Section 24G NEMA Fines and the Importance of Timeous Appeals

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Before conducting certain environmentally-damaging activities, an environmental authorisation in terms of the National Environmental Management Act 107 of 1998 ("**NEMA**") must be obtained. Section 24G of NEMA however provides for somewhat of an exception to this: an *ex post facto* authorisation process where a listed activity was unlawfully conducted without the requisite approval, provided an administrative fine of anywhere up to R5 million is paid.

The section 24G process has been criticised for providing a loophole to the environmental authorisation process, which is aimed at ensuring that developments' impacts are properly assessed, and if necessary mitigated, before a project is given the go-ahead. In this respect, there are four critical aspects to note. Firstly, the competent authority has a discretion to accept the section 24G application for processing, and may very well refuse the application altogether. It is only if this first 'discretionary' hurdle is overcome and the fine is thereafter paid, will the 'late' environmental authorisation application be processed. Secondly, the payment of the fine does not guarantee a positive environmental authorisation decision – only that the application will be considered. Thirdly, on receipt of the section 24G application, the competent authority is empowered to direct the applicant to *inter alia* cease all activities, compile impact assessment reports as well as undertake remediation. Lastly, the submission of the section 24G application does not shield the applicant from environmental management inspectors (also known as the Green Scorpions) and/or the police undertaking their own investigations into non-compliances, or a possible subsequent criminal prosecution by the National Prosecuting Authority. In this way, while the section 24G process may appear to be a get-out-of-jail-free card, these mechanisms, if properly utilised by the authorities, provide for effective checks and balances.

Section 24G Regulations, which took effect on 20 July 2017, set out the section 24G application process as well as how the quantum of the fine is to be determined. In the application, the applicant must disclose the impacts of the activity, including socio-economic, biodiversity and heritage impacts as well as whether the activity resulted in any pollution, all of which must be supported by specialist studies. Notably, the company's environmental compliance history, such as previous compliance notices, convictions or section 24G applications, as well as the company's directors' environmental compliance history, must also be disclosed in the application. In

determining the fine quantum, the regulatory authority uses a so-called 'fine calculator' which accords a rating to each of the various environmental impacts and on this basis, arrives at a fine amount. The fine calculator has not been formally gazetted, but can be accessed on the Department's website at: https://www.environment.gov.za/24g_calculator_appropriatefees_determination.
Notwithstanding the fine calculation, the maximum fine of R5 million may be imposed where the company, or its directors, have had historical environmental compliance issues.

As with all authorisation processes under NEMA, there is a strong focus on public participation. In the case of a section 24G application, the applicant must advertise in a newspaper and on its website that it "*commenced a listed activity without the necessary environmental authorisation and is now applying for ex post facto approval*" and must open an interested and affected party register so as to keep all stakeholders informed of the process. It is noteworthy that the section 24G application itself, which includes the company's and its directors' environmental compliance history, may become public "*unless protected by law*". Significant criminal sanctions may be imposed where these public participation requirements are not adhered to, or where the applicant provides incorrect, false or misleading information, or omits material information, in their section 24G application. These include fines and/or imprisonment ranging from R5 million to R10 million and 5 years to 10 years, respectively.

Once the section 24G application has been processed and the fine determined, the applicant has a right to appeal the fine quantum. In this respect, the NEMA Appeal Regulations of 2014 provide for an 'internal' appeal to the Minister of Environmental Affairs or the relevant MEC and set out the timeframes in which an appeal must be launched, responded to, and a decision thereon reached. The timeframes are tight: an appeal must be submitted within 20 days, a responding statement must be lodged within 20 days, and an appeal decision must be reached within 50 days thereafter, totaling a 90-day appeal process. Depending on the facts, a section 24G fine can be reduced on appeal provided there is proper substantiation as to why the fine calculation was inappropriate in the circumstances, and the processes set out in the Appeal Regulations have been followed.

If the appeal decision is unfavourable, then a judicial review is the next step. This entails an application to the High Court in terms of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**"), where the internal appeal decision is challenged on the basis that it was not lawful or reasonable or procedurally fair administrative action. A judicial review application must be

launched within 180 days of the internal appeal decision. It is critical to bear in mind that a PAJA judicial review is only possible after all internal remedies have been exhausted, namely that the internal appeal process provided in NEMA has been duly followed.

In the recent Supreme Court of Appeal ("**SCA**") decision of *Member of the Executive Council for Local Government, Environmental Affairs and Development Planning, Western Cape and Another v Plotz NO and Another* (495/2017) [2017] ZASCA 175 (1 December 2017), the court reiterated the importance of exhausting all internal remedies, failing which an applicant is not entitled to pursue a judicial review. In this matter, Mr Plotz, in his representative capacity as a trustee of the McGregor Trust, the owner of the Ocean View Guesthouse in Cape Town, unlawfully conducted listed activities without first obtaining an environmental authorisation to do so, namely he constructed a weir on the Kasteelspoort River and removed more than five cubic metres of rock from this river. Mr Plotz applied for a section 24G *ex post facto* environmental authorisation and was issued with a fine of R475 000. He appealed the fine in terms of NEMA, but critically did not do so within the prescribed statutory timeframe. (Note that the 2010 NEMA Environmental Impact Assessment Regulations, the predecessor regulations to the 2014 NEMA Appeal Regulations, were applicable to this appeal, which had a 20-day notice of intention to oppose period and 30-day window thereafter to appeal, as opposed to the all-in current 20-day timeframe). The appeal authority (the MEC) refused to consider Mr Plotz's appeal on the basis that his appeal was out of time. Then, a year later, Mr Plotz instituted judicial review proceedings, this too out of the 180 days imposed by PAJA for a judicial review.

In the High Court, Mr Plotz was initially fortunate: the court condoned his failure to timeously submit his internal NEMA appeal, *mero muto* found that he had exhausted his internal remedies, condoned his late judicial review, and then went on to set aside the R475 000 fine and substitute it for R75 000.

However, when the matter was taken on appeal to the SCA, the court, solely on the finding that Mr Plotz had exhausted his internal remedies, overturned the High Court's judgment and reinstated the original R475 000 fine plus costs. In this respect, the SCA succinctly held that "*a meaningful internal appeal …in terms of … NEMA was well within the reach of [Mr Plotz], but [he] failed, without justification, to submit … an appeal timeously. [He] failed to place any facts before the court a quo [regarding exceptional circumstances] that warranted a finding that [he] was entitled to be exempted from the obligation to have exhausted the internal remedy of an appeal*

available to [him]. This conclusion is dispositive of the appeal rendering it unnecessary to deal with the other grounds of appeal."

The SCA was clear: only where there are exceptional circumstances, such as where the internal remedy would be ineffective or is unavailable, and it is in the interests of justice, will a court condone an applicant's failure to comply with the "strict duty" of exhausting one's internal remedies. As Mr Plotz asserted neither, he was not entitled to have his section 24G fine reviewed by the High Court. Notably, in this context, the SCA also awarded costs against Mr Plotz as the litigation was found to not be an assertion of his constitutional rights, but rather his commercial interests.

In our view, the NEMA 90-day internal appeal is a relatively quick, effective and inexpensive process, and in the case of section 24G fines, can save companies a substantial amount of money, provided there are good reasons for a fine reduction. Section 24G applicants are to take note of the SCA's findings in the *Plotz* case and ensure that these fines are appealed within the prescribed 20 days, failing which there may not also be a further right of recourse in the courts.