



Sustainability Regulation as Applicable to Business

Nedbank Sustainability Media Seminar

25 October 2011

Presentation prepared & presented by Andrew Gilder
IMBEWU Sustainability Legal Specialists (Pty) Ltd

www.imbewu.co.za; www.imbewuregisters.co.za

This presentation does not constitute legal advice.
No part of this presentation may be reproduced without the written consent of IMBEWU .

IMBEWU Sustainability Legal Specialists (Pty) Ltd

- A Johannesburg (South Africa) based legal specialist sustainability legal consultancy.
- Provides services to the South African and international markets.
- Employs seven lawyers all specialising in an aspect of environmental, climate change or health & safety law.
- Climate Change and CDM Specialist Legal Consultancy Unit.
- Collaboration with Warburton Attorneys (www.warburtons.co.za).
- Most of the professional services offered by IMBEWU can also be provided in French. IMBEWU provides technical French/English translation services in its field of expertise.

Sustainability Law?

- “Sustainability law“:
 - encompasses a variety of inter-related legal disciplines;
 - common theme: the constitutional imperative of securing "ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".
- Taking its direction from the Constitution Act (106 of 1996):
 - South African law is evolving to meet the country’s contemporary needs.
 - Paramount among these:
 - provide for legitimate social and economic development,
 - while considering the sensitivity of the natural environment to the effects of such development; and,
 - including the consideration and protection of employee health and safety.

South African law - background

- Dutch and British colonial influences:
 - Overtones of common and civil law elements.
 - Common law rules subject to the Constitution and statute law.
- Constitution Act No. 106 of 1996.
- Bill of Rights:
 - Environmental Right.
 - *Locus Standi* (echoed in section 32 of NEMA)
 - Administrative Justice (echoed in section 31 of NEMA)

Environmental Right

- Section 24 of the Constitution:
 - ‘Everyone has the right-
 - (a) to an **environment that is not harmful to their health or well-being**; and
 - (b) to have the environment protected, for the **benefit of present and future generations**, through **reasonable legislative and other measures** that-
 - (i) **prevent pollution and ecological degradation**;
 - (ii) promote **conservation**; and
 - (iii) secure **ecologically sustainable development** and use of natural resources while **promoting justifiable economic and social development**.’

Environmental Legislation

- National Environmental Management Act 107 of 1998 (NEMA).
- NEM (prefix) and raft of legislation operating under NEMA's auspices.
- Evolving perception:
 - Sophisticated statutes lacking in enforcement.
 - Sophisticated statutes with increasingly active enforcement:
 - Compliance and Enforcement Directive.

NEMA

- National Environmental Management Principles.
- International environmental law principles – accepted into SA law:
 - Sustainable Development.
 - Precaution.
 - Polluter Pays.
 - Cradle to Grave Responsibility.
 - Public Trust.

National Environmental Management Principles (1)

- NEMA Section 2(3): Development must be socially, environmentally and economically sustainable.
- NEMA Section 2(4)(a) Sustainable development requires the consideration of all relevant factors including the following:
 - that the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
 - that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
 - that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;

National Environmental Management Principles (2)

- that waste is avoided, or where it cannot be altogether avoided, minimised and reused or recycled where possible and otherwise disposed of in a responsible manner;
- that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;
- that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;
- that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and
- that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.

National Environmental Management: Air Quality Act (No. 39 of 2004)

A new air quality regime?

- To achieve one of government's priorities of a healthy nation, we will give careful attention to the quality of the air we breathe.
- The year 2009 is a watershed year in air quality governance in South Africa and 9/11 will assume a new meaning to air quality management stakeholders in South Africa.
- The 11th of September 2009 will see the complete repeal of the Atmospheric Pollution Prevention Act (APPA) of 1965 and the coming into full force of the National Environmental Management: Air Quality Act of 2004.
- This final 'Change of Guard' from APPA to AQA is a product of a long transition which has been carefully steered by the Department with a number of transition projects to ensure a smooth passing of the baton.

(Speech on the Environment Budget Vote 2009/10 delivered by Minister B. P. Sonjica: National Assembly, Parliament, 8 June 2009)

AQA: Preamble

- “Whereas:
 - the quality of **ambient air** in many areas of the Republic is not conducive to a **healthy environment** for the people living in those areas let alone promoting their social and economic development;
 - the burden of **health impacts** associated with polluted ambient air falls most heavily on the poor;
 - air pollution carries a high social, economic and environmental **cost that is seldom borne by the polluter**;
 - atmospheric emissions of ozone-depleting substances, greenhouse gases and other substances have deleterious effects on the environment both locally and globally...”

AQA: Objects

- Objects of the AQA:
 - to protect the environment by providing reasonable measures for-
 - the **protection** and **enhancement** of the quality of air in the Republic;
 - the **prevention** of air pollution and ecological degradation; and
 - **securing ecologically sustainable development** while promoting justifiable economic and social development; and
 - generally to give effect to section 24(b) of the Constitution in order to enhance the quality of ambient air for the sake of securing an environment that is not harmful to the health and well-being of people.

AQA: features at a glance (1)

- Includes **ambient air quality standards** as opposed to exclusively point-source control of emissions.
- **More stringent** standards including focus on particular emissions >> **industrial focus**.
- Possibility for declaration of *priority areas* within which particular *priority area management plans* will be implemented.
- A greater variety of considerations to be taken into account in the granting of *atmospheric emission licences*, including
 - considerations of public participation; and,
 - the requirements of the environmental impact assessment regime.

AQA: features at a glance (2)

- Increased **enforcement**.
- **Monitoring** responsibilities for industry.
- Complex **transitional arrangements** with respect to licensing.
- Offences and penalty provisions (fine / imprisonment not exceeding ten years, or both a fine and such imprisonment).
- Provides for requirements to:
 - appoint *air emission officers*,
 - prepare *pollution prevention plans*,
 - produce *atmospheric impact reports*.

Governance, Planning & Responsibilities

- Affirmation of the provincial and municipal governance levels as main actors in day-to-day air quality management.
- Co-operative governance.
- A National Air Quality Officer is responsible for national air quality management.
- Provincial Air Quality Officers co-ordinates these matters at a provincial level.
- Each municipality must also designate an air quality officer.
- An air quality management plan must be included in:
 - environmental implementation or environmental management plans (EIPs & EMPs); and,
 - integrated development plans (IDPs) prepared by municipalities.
 - (Manual for Air Quality Management Planning)

Implications of the new regime

- Emitting industries are likely to be more carefully monitored:
 - for compliance with emissions standards; and,
 - for compliance with the formal requirements of AQA.
- Cost implications of compliance and the potential for forum shopping.
- Potential liability for non-compliance.
- A higher standard of behaviour to which emitting industries will be held >> civil society context.

Carbon Tax Discussion Document

- Released in mid-December 2010 by National Treasury.
- Within the context of South Africa's country pledge under the Copenhagen Accord.
- The Long Term Mitigation Strategy scenarios (LTMS) and the Climate Change Response Green Paper recognise the need for the use of market mechanisms to price carbon so that greenhouse gas emissions can be reflected in the price of goods and services.
- Carbon tax seen as a contributor to the achievement of a low carbon growth path and is anticipated to:
 - result in competitive advantages in low carbon technologies; and,
 - create incentives for research, development and increased levels of innovation.

Carbon Tax (2)

- Three options for imposing a carbon tax are explored:
 - 1. An emissions tax applied directly on measured carbon dioxide emissions;
 - 2. An upstream tax on fossil fuel inputs based on the carbon content of the fuel (for example , coal); or
 - 3. A downstream tax imposed on the outputs or products generated from fossil fuels (for example, electricity or liquid fuels).

Carbon Tax (2)

- A carbon tax imposed directly on all measured emissions of carbon dioxide appears to be the most appropriate.
- The second best option is to tax fossil fuel inputs such as coal, crude oil and natural gas, based on the carbon content of these fuels.
- Both options create adequate incentives to encourage behavioural changes. A tax on actual measured emissions would require appropriate institutional capacity to measure, monitor and verify actual emissions.

National Climate Change Response White Paper

- Appeared in second week of October 2011.
- Strategically prior to the Climate Change Convention (COP17), Durban, November and December 2011 (“moral advantage”).
- Green Paper - appeared mid-November 2010, although expected at various times since September 2009.
- President Jacob Zuma’s statement of the country’s greenhouse emissions mitigation ambition – just prior to COP 15, Copenhagen, Denmark, December 2009 >> strategic.
- SA’s pledge to the UNFCCC (29 January 2010):
 - 34% reduction against BAU by 2020 (“business as usual emissions growth trajectory”).
 - 42% reduction against BAU by 2020 (“business as usual emissions growth trajectory”).

Climate change policy development – some milestones

- September 2004 – National Climate Change Response Strategy.
- November 2005 – SA National Climate Change Conference.
- 2006 and beyond - Long Term Mitigation Strategy Scenarios.
- December 2007 - ANC Polokwane Summit.
- March 2009 – SA Climate Change Policy Summit.
- May 2010 – Green Economy Summit.
- November 2010 – Green Paper.
- October 2011 – White Paper.

National Climate Change Response White Paper

- Determinant of a legislative, policy and fiscal package ready for implementation by end 2012.
- Measure and Reporting obligations on big emitters:
 - > 0.1 Mt of greenhouse gas annually
 - Consumers of electricity the generation of which results in > 0.1 Mt of greenhouse gas annually
- Data to form part of the National Atmospheric Emissions Inventory (www.saaqis.org.za).
- Use of section 29(1) of AQA – declaration of carbon dioxide as a priority pollutant.

Contact Details

Thank You

ANDREW GILDER

IMBEWU Sustainability Legal Specialists (Pty) Ltd

53 Dudley Road, Cnr Bolton Avenue

Parkwood, Johannesburg.

Eastern Cape satellite office at:

62 Westbourne Road, Kenton On Sea

Tel: 011 214 0660

Fax: 011 880 6577

Mobile: 082 962 2520

<http://www.imbewu.co.za> & www.imbewuregisters.co.za