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LEGAL UPDATE

You Can Run, But You Can’t Hide

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A recent judgment in the North Gauteng High Court, Pretoria has caused more than ripples amongst the mining community. The ruling has the effect of imposing liabilities in terms of directives issued by agencies, such as the Department of Environmental and Water Affairs, with no prospects of later excusing oneself from that liability. Basically, you can run, but you can't hide.

In light of the decision of *Harmony Gold Mining Company Limited v The Regional Director: Free State, Department of Water Affairs and six others*, dated 29 June 2012, it is currently good law that the liability for environmental degradation cannot be sold. As such a party continues to be liable for remediation in terms of a directive issued to it by a relevant authority until such person has fully discharged the obligations in terms of that directive.

History of the matter

In the course of September 2003, Harmony Gold Mining Company Limited (Harmony) acquired all the shares in African Rainbow Minerals Gold Limited (ARMGOLD) and as a result managed the mining operations and exercised control over the property on which the mining operations were being conducted ("the property"). ARMGOLD, however, remained the owner of the property until January 2009 when ownership in the property was transferred to Pamodzi Gold Orkney (Pamodzi). Harmony then ceased to exercise control over the property, which control was assumed by Pamodzi together with all the mining obligations of Harmony.

A directive was issued by the Regional Director: Free State, Department of Water Affairs (regional director) on 1 November 2005 (the directive) and was according to the judgment by Majgoka J "required to operate until Harmony and other mining houses had reached agreement on the long term management of water arising from mining activities in the KOSH area", comprising Klerksdorp, Orkney, Stilfontein and Hartbeesfontein.

Pending the implementation of the agreement, Harmony was directed, together with the other mining houses to undertake certain activities including the management, collection, treatment, usage or disposal of subterranean water that might affect the current and future operations of

mines in the area and share the costs of taking those measures equally. The agreement, which was to be submitted to the Regional Director of the Free State Department of Water Affairs, was, in fact, never concluded.

Harmony contacted the Department of Water and Environmental Affairs during May 2009 and advised the Department that "as of February 2008 (the date when the sale of the property became unconditional), the directive was no longer valid against it, but against Pamodzi" and "it gave further notice of its intention to cease its contribution to the costs of water pumping and treatment with effect from 30 June 2009" (at paragraph 7 of the judgment). On 28 August 2009, Harmony requested that the Department withdraws the directive against it, as Harmony was of the view that it no longer fell within the ambit of section 19(1) of the National Water Act No. 36 of 1998, as amended (the NWA), as it was no longer the owner of the property. The request was denied by the Department and as a result Harmony approached the North Gauteng High Court, Pretoria for relief.

Applicable legislation

Section 19(1) of the NWA provides that an owner of land, a person in control of land or a person who occupies or uses the land on which:

1. any activity or process is or was performed or undertaken; or
2. any other situation exists, which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.

The measures referred to in section 19(1), include the following measures –

1. cease, modify or control any act or process causing the pollution;
2. comply with any prescribed waste standard or management practice;
3. contain or prevent the movement of pollutants;
4. eliminate any source of the pollution;
5. remedy the effects of the pollution; and
6. remedy the effects of any disturbance to the bed and banks of a watercourse.

Section 19(3) of the NWA relates to the ability of a "catchment management agency [to] direct any person who fails to take the measures required section 19(1) to –

1. commence taking specific measures before a given date;
2. diligently continue with those measures; and
3. complete those measures before a given date".

The Judgment

Harmony, in its application to the North Gauteng High Court, Pretoria, sought an order reviewing and setting aside the directive, alternatively, Harmony sought to review and set aside the decision of the Department not to withdraw the decision against it and a declaratory order that the directive became invalid when Harmony ceased to operate any mining activity on the affected land.

Majgoka J held that the primary issue for consideration was whether or not a directive issued in terms of section 19(3) of the NWA becomes invalid once a person ceases to be a landowner in respect of the property to which the directive applies.

Majgoka J agreed that the power conferred on the Minister of Water and Environmental Affairs ("the Minister") in terms of section 19(3) of the NWA is limited to a landholder. However, Majgoka J disagreed that the Minister may only direct the current landholder to undertake remediation for so long as it is the landowner. After considering the provisions of the NWA, the National Environmental Management Act No. 107 of 1998, as amended, and analysing the provisions of section 19 of the NWA, Majgoka J ruled that:

- the directive did not, in fact, impose liability for remediation in perpetuity, as argued by Harmony, but was issued as a result of the failure to comply with previous directives. The directive was issued pending the implementation of an agreement and joint proposal towards long term sustainable management of water from mining activities, which agreement Harmony failed to reach with the other mining houses involved in the matter – see paragraphs 25 to 27 of the judgment;
- the Minister is empowered to direct a landholder to take preventative measures for as long as it takes to address the risk of pollution. As a result, the purpose of section 19(3) and the directive do not fall away when the landholder, who had been validly directed to take certain measure, dissolves links with the property;

- "where the directive was issued while a person was in control to take the preventative measures, his unfulfilled obligations do not become discharged or nullified once he ceases to be in control. If he severs ties with the land, fully knowing that his validly imposed obligations remained unfulfilled, he can hardly complain if it is insisted that he should comply with those before he is discharged from them" – see paragraph 32 of the judgment;
- there was a clear causal and moral link between the directive and Harmony's pollution activities as the measures that Harmony was directed to take were as a result of pollution that occurred while Harmony was the landholder;
- the interpretation that the Minister may only issue a directive to someone who "fails" to take the preventative measures in section 19(1), that is, to someone who has "a current connection with the land in question", was incorrect and that "the severance of ties with the affected land does not affect the obligations validly imposed when the landholder still belonged to the class of persons obliged to take measures and "the obligations remain unfulfilled" – see paragraph 39 of the judgment;

Majgoka J went on to record that section 19 provides no limitation that a directive may only bind the owner, occupier or user of the affected land to take measures for as long as such person remains the owner, occupier or user of the affected land. Therefore, it does not follow that the unfulfilled obligations in terms of a directive cease to be applicable as soon as an owner or occupier or user of land ceases to be such.

The court concluded by agreeing with the defence proposed by the Department that "until Harmony fully complies with the directive, the directive remains valid" and that the directive remains in force despite the sale of shares agreement, the disposal of interest by the applicant could never bring an end to unfulfilled obligations imposed in terms of a directive. As a result, the directive would only be withdrawn once there was full compliance with the directive.

Consequences of the judgment

As a result of the judgment, Harmony is required to continue paying for remediation measures as prescribed in the directive, for a mine that it sold during 2008. Accordingly, where a directive from the Department to undertake certain measures to prevent pollution is issued to one person, that person's unfulfilled obligations do not come to an end once that person ceases to be in control of the land in question.

It appears that Harmony will, in all likelihood, appeal the decision. The jurisprudence emanating from the appeal will be of significance to landowners and persons bound by directives as it clarifies both the obligations of landowners and the duration that a directive continues to be operative despite the transfer of land by a landowner who may have been party to a polluting activity.

However, it remains to be seen whether or not an erstwhile landowner will be allowed to run away from its obligations to, inter alia, pump and treat mine water or undertake remediation generally to land that was previously owned or under the control of that person. Currently, under this judgment, running away is just not an option for polluters.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.



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