

Environmental and legal Issues relating to Borrow pits.

or

Pitfalls and other considerations associated with Borrow Pits.

Alan Cluett



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Background

In November 2005:

“Legal implications when using borrow pits and mobile crushers for the production of road materials”

ROAD PAVEMENTS FORUM

Legal implications when using borrow pits and mobile crushers for the production of road material.

22 November 2005

Alan Cluett
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The 2005 presentation focused on-

- *“Legal trends in South Africa”*
- *“Extracts from South African Law”* and,
- *“Contractor and Authority responsibility”*



Background

In November 2005

Conclusions included -

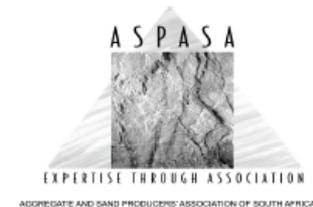
-  *“Contractors have a legal and moral responsibility to uphold the law..”*
-  *“Failure to check the ‘credentials’ of the supplier (to your contract) could result in a claim against the (you or your) company in terms of NEMA, the NWA and MPRDA”...*

ROAD PAVEMENTS FORUM

Legal implications when using borrow pits and mobile crushers for the production of road material.

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Background

Essentially, I could have made the same presentation today,...
however....

- there are now more legal requirements;
- we have an energised Competition Commission and an ‘in the spotlight’ industry; and,
- we have authorities who are clamping down on the application of mining and environmental law more stringently.



Content

- Objective of presentation
- Definitions
- The big question – “Is a Borrow Pit a Mine?”
- Applicable legislation
- Supply Options
- Conclusions



Objectives of presentation

Objectives include –

-  to create awareness of the legal framework in which surface mines operate;
-  to consider some requirements for the opening of a mine;
-  to suggest the need for an industry “Code of Practice” relating to aggregate supply (cooperative governance);
-  to encourage maintenance of a fair and competitive industry.

Definitions

Aggregate - different sized 'stone' used in construction;

Sand - finer aggregate components, usually < 6mm;

Quarry - A surface mine from which rock is mined and processed into aggregate;

Borrow Pit - an excavation dug to provide fill to make up ground elsewhere;

Sustainability – meeting current needs without compromising the ability to meet future needs;

Derelict ownerless mine – Owner/s not traceable;



Definitions (MPRDA)

-  **“Mine”**, when used as a verb, means any operation or activity for the purposes of winning any mineral on, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto;
-  **“Mineral”** means any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits, but excludes...
-  **“Mining operation”** means any operation relating to the act of mining and matters directly incidental thereto.



Definitions (MPRDA)

- **“Mine”**: any operation ... for the purposes of winning any mineral on, in or under the earth, or any residue deposit, whether by ... open working or otherwise ...;
- **“Mineral”**: any substance, ..., occurring naturally in or on the earth ... formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits,...
- **“Mining operation”**: any operation relating to the act of mining and matters directly incidental thereto.



The big question

Is a Borrow Pit a mine?

Quite clearly as per these definitions -

a “Borrow Pit” is a mine,

and as such subject to the requirements of the

MPRDA

(Mineral and Petroleum Development Act, 2002)

and

other legislation



Applicable legislation

- **Constitution** — Constitution of the Republic of South Africa (1996)
- **MPRDA** — Mineral and Petroleum Development Act (Act 28 of 2002);
- **MHSAct** — Mine Health and Safety Act (Act 29 of 1996);
- **NEMA** — National Environmental Management Act (Act 107 of 1998);
- **NWA** — National Water Act (Act 36 of 1998);
- **NEM:WMA** — NEM: Waste Management Act (Act 59 of 2008);
- **NEM:AQA** — NEM: Air Quality Act (39 of 2004);
- **NFA** — National Forests Act (Act 84 of 1998);
- **NVFFA** — National Veld and Forest Fire Act (Act 101 of 1998);
- **NRTA** — National Road Traffic Act (Act 93 of 1996);
- **OHSAct** — Occupational Health and Safety Act (Act 85 of 1993)



Applicable Legislation

also includes –

Advertising on Road and Ribbon Development Act; Agricultural Pests Act; Basic Conditions of Employment Act; Companies Act; Compensation for Occupational Injuries and Diseases Act; **Conservation of Agricultural Resources Act**; **Environmental Conservation Act**; Explosives Act; Fencing Act; Fertilizers, Farm Feeds and Stock Remedies Act; Game Theft Act; Hazardous Substances Act; Labour Relations Act; Mountain Catchment Management Act; NEM; Biodiversity Act; NEM: Protected Areas Act; **National Heritage Resources Act**; Nuclear Energy Act; Physical Planning Act; Road Transportation Act; Skills Development Act; Unemployment Insurance Act....

and any applicable **Provincial and Local Authority** legislation or Permit or License Conditions.



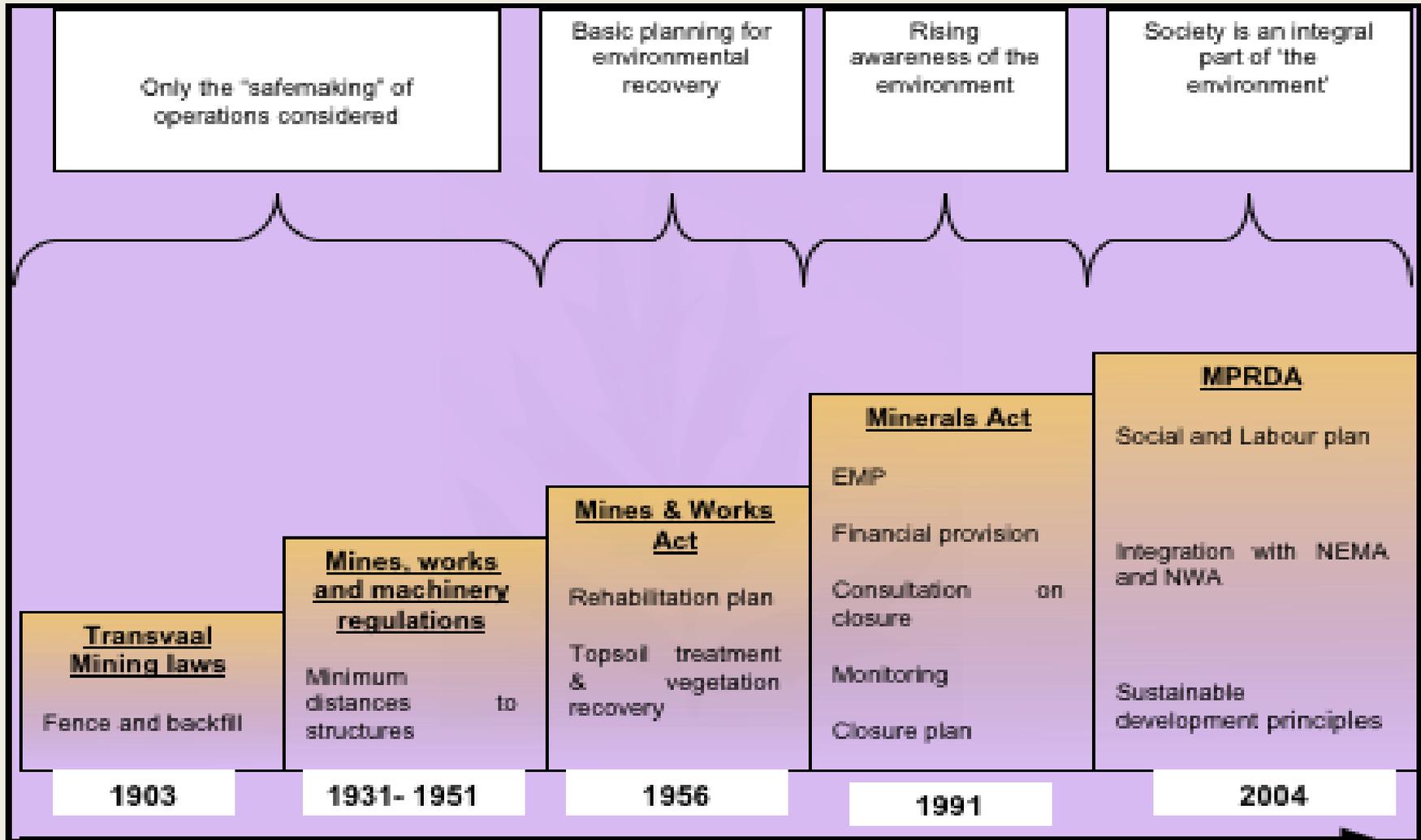
The Constitution

Section 24 of the **Constitution of the Republic** of South Africa, guarantees everyone the following environmental rights:

- “an environment that is **not harmful to their health or well-being**; and,
- 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”.



Progressive mining related legislation



Source: Department of Mineral Resources, 2009. The National Strategy for the Management of Derelict and Ownerless Mines in South Africa.



MPRDA requirements

- Section 10 - Consultation with I&APs;
- Section 16 - Application for prospecting right;
- Section 22 - Application for mining right (License or Permit);
- Section 27 - Application for, issuing and duration of mining permit;
- Section 39 – Environmental Management Programme and Environmental Management Plan;
- Section 41 - Financial provision for remediation of environmental damage;
- Section 43 - Closure certificate;
- Section 51 - Optimal mining of mineral resources



MPRDA

99. Penalties

Fines range from R10 000 to R500 000 and imprisonment for various contravention's, with -

- (g) in the case of any conviction of an offence in terms of this Act for which no penalty is expressly determined, to a fine or to **imprisonment** for a period not exceeding six months or to both a fine and such imprisonment; and

101. Appointment of contractor

If the holder of a right or permission appoints any person or employs a contractor to perform any work within the boundaries of the reconnaissance, mining, prospecting, exploration, production or retention area, as the case may be, such holder remains responsible for compliance with this Act.

 Penalties ranging from R10 000 to R500 000, 6 months in prison or both + restoration costs!



24. Environmental authorisations

24E. Minimum conditions attached to environmental authorisations..

24F. Offences relating to commencement or continuation of listed activity

(1) Notwithstanding the provisions of any other Act, **no person may commence an activity** listed in terms of section 24(2)(a) or (b) unless the competent authority has granted an environmental authorisation

....

24G. Rectification of unlawful commencement or continuation of listed activity

28. Duty of care and remediation of environmental damage

- (1) **Every person** who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, ...
- (7) Should a person fail to comply, or inadequately comply, with a directive, the Director-General or provincial head of department **may take reasonable measures to remedy** the situation.
- (8) **may recover all costs incurred** ... from any or all of the following persons -
 - (a) any person who is or was **responsible for**, or **who directly or indirectly contributed** to, the pollution or degradation or the potential pollution or degradation;



28. Duty of care and remediation of environmental damage

- (9) The (Authority) may, **claim proportionally from any other person who benefited**; and ,
- (11) If more than one person is liable, the liability must be **apportioned among the persons concerned** according to the degree to which each was responsible...

29. Protection of workers refusing to do environmentally hazardous work

- (1) Notwithstanding the provisions of any other law, no person is civilly or criminally liable or may be dismissed, disciplined, prejudiced or harassed on account of having refused to perform any work if the person in good faith and reasonably believed at the time of the refusal that the performance of the work would result in an imminent and serious threat to the environment.



34D. Forfeiture of items

- (1) The court convicting a person of an offence in terms of this Act may declare any item, including but not limited to **any specimen, container, vehicle, vessel, aircraft or document** that was used for the purpose of, or in connection with the commission of the offence and was seized under the provisions of this Part, to be forfeited to the State.
- (2) The provisions of section 35 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), apply to the forfeiture of any item in terms of subsection (1), subject to such modifications as the context may require

R.765 - 25 June 2004: Activities that may not commence without Environmental Authorisation from the competent authority

Schedules

Definitions

The following definitions apply to these schedules -

- "industrial mineral" means aggregate,....., manufactured sand from hardrock, manufactured sand from waste dump, stone aggregate from waste dump, gravel stone aggregate,.....
- "silica" means building sand, concrete sand, crusher sand, filling sand, ..., silcrete or silica sand;

R.765 - 25 June 2004: Activities that may not commence without Environmental Authorisation from the competent authority

Schedule 3: Activities that require Initial Assessment

The activities listed in this schedule **may not be undertaken** prior to the issuing of an environmental authorisation by the competent authority..

4. The mining, quarrying, prospecting, extraction or production, including associated structures and the extension of existing operations, of -
- (a) industrial minerals;...
 - (d) silica;...

R.1182 - 5 September 1997

21. Identification of activities which will probably have detrimental effect on environment including

(a) Land use and transformation;

(c) resource removal, including natural living resources;

22. Prohibition on undertaking of identified activities

(1) No person shall undertake an activity identified in terms of section 21 (1) or cause such an activity to be undertaken except by virtue of a written authorisation ...



Failure to comply ... shall be guilty of an offence and liable on conviction to a fine not exceeding R100 000 or to imprisonment for a period not exceeding 10 years.



Court may order that any damage to the environment... be repaired by the person convicted.



Other Acts

National Water –

Pollution of the Resource

Water User Licenses

National Heritage Resources

Monuments/graves/artifacts

Nat. Veld and Forest Fire

Fire breaks & damage

liability

Nat. Forest Act

Protected Trees

Cons. of Agric Resources

Erosion, Alien/Invasive Veg.

Fencing Act

Fencing

Advertising on Road and

Access points and signage

Ribbon development Act

on Public Roads



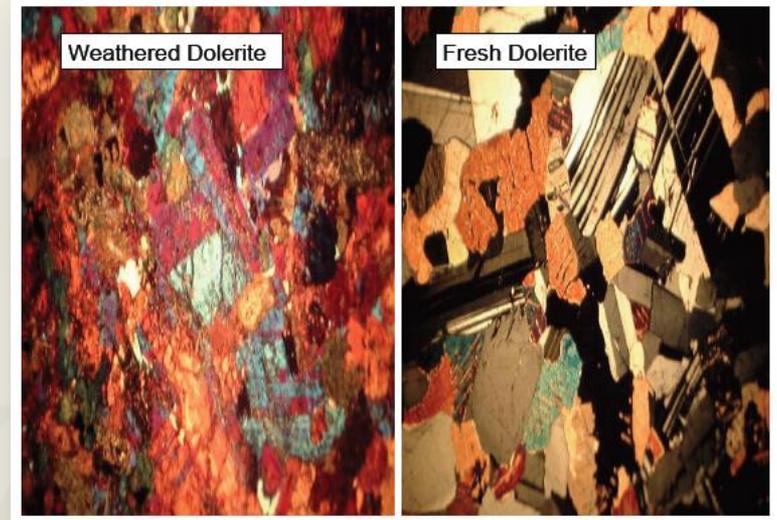
Summary

- A 'Borrow Pit' is a mine!
- Mining requires authorisation/s;
- Authorisations require processes to be followed and permissions in terms of the MPRDA, NEMA, ECA, NWA, HMA, Provincial and Local Authority requirements;
- Penalties range from
 - R10 000 to R10 000 000;
 - imprisonment up to 10 years;
 - combinations of prison and fines;
 - clean-up costs, restoration costs,
 - suspension to loss of mining right;
 - forfeiture of items, and,
 - costs associated with breach of contract.



Supply option 1 – Open own mine

- Management time
- Costs of exploration
- Consultation with landowners and I&APs
- Negotiations with landowner or purchase of surface right
- Mining Authorisation and Mining Charter requirements
- Labour issues – contracts, training, insurance, leave, housing...
- Legislation – MPRDA, ECA, NEMA, NWA, MHSAct, OHSAct, COIDA, LRA, BCEA, NVFFA, NFA, NHR ...
- Explosives Act, Magazines, Blasters, oversize....
- Quality, delivery schedules, fill material....
- Rehabilitation and Closure costs and management time



Supply option 2 – Use a contractor

MPRDA

101. Appointment of contractor

If the holder of a right or permission appoints any person or employs a contractor to perform any work within the boundaries of the reconnaissance, mining, prospecting, exploration, production or retention area, as the case may be, such holder remains responsible for compliance with this Act.

NEMA

28. Duty of care and remediation of environmental damage

(8) ... may recover all costs incurred ... from any or all of the following persons

- (a) any person who is or was responsible for, or who directly or indirectly contributed to, the pollution or degradation or the potential pollution or degradation;

(9) The (Authority) may, claim proportionally from any other person who benefited; and ,

(11) If more than one person is liable, the liability must be apportioned among the persons concerned according to the degree to which each was responsible/



Supply option 3 – Use established quarry

Purchase from an established quarry

- Avoid all costs and management time associated with “Go it Alone” option;
- Contractual costs known upfront;
- Aggregate quality known upfront;
- No mine related labour issues;
- No audits, no Mining Charter no associated fines or penalties;
- No rehabilitation and closure related issues;
- Reduced liability risk – NEMA, ECA, NWA, MPRDA, NVFFA, HMA;
- Focus on what you are good at.



Opportunities - Go it alone

Open own contract specific quarry / borrow pit legally

- Management time
- Costs of exploration
- Consultation with landowners and other I&APs
- Negotiations with landowner or purchase of surface right
- Mining Authorisation and Mining Charter requirements
- Labour related issues – contracts, training, insurance, leave, housing...
- MHSAct, OHSAct, COID, Labour Relations, Basic Conditions of Employment...
- Explosives
- Quality, delivery schedules
- Rehabilitation and Closure costs and management

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Conclusion

1. Business and environmental “Stewardship” is a must;
2. This includes Legal Compliance;
3. Ethical business practices are required by -
 - Shareholders
 - Employees
 - I&APs
 - Authorities
4. A need for an industry “Code of Practice” for aggregate procurement –
 - “own” quarry
 - “contractor” quarry
 - “established” quarry, and
5. Through following the above **a fair, competitive industry can be maintained for all contracts.**





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