

## **PENALTY FOR FAILING TO OBTAIN WATER-USE LICENCE CAN BE SEVERE**

Failure to obtain a water-use licence where one is required can give rise to severe penalties.

The granting of mineral rights does not include water rights and is regulated by the Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”). The National Water Act 36 of 1998 (“NWA”) regulates the use of South Africa's water resources and authorises specific water uses as defined in the Act.

Generally, a water-use must be licensed by the Department of Water and Environmental affairs (“the Department”) in the form of an integrated water-use licence, unless otherwise authorised by the NWA. There are several mines currently using water without the required water use licences owing to departmental delays in processing licence applications occasioned by a lack of capacity.

The Department recently announced an agreement with the Department of Mineral Resources (“DMR”) to implement parallel water use licensing and mineral authorisations in a parliamentary question and answer session. This is a welcome move from an environmental perspective, as it will ensure that all mining operations which require water use licences are licensed and under the control of the Department.

The move is aimed at ensuring that mining does not commence before a water-use licence has been issued. As such, the DMR will only issue mineral rights where an operation has already been granted a water-use licence. This is in line with Section 5(3)(d) of the MPRDA which provides that the right to use water on mining property is subject to the NWA.

However, it is unclear how or when the two departments intend to implement parallel licensing. It is also unclear whether the agreement between the two departments includes a mechanism to fast-track the two licensing processes. The move may cause further delays in the granting of mineral rights, as both the water-use licensing and the mineral authorisation processes are known to cause significant delays.

Mines and other business operations that use water without a water-use licence where one is required risk enforcement action by the authorities. Using water without the required water use licence is an offence under

section 151(1)(a) of the NWA. Any person convicted of this offence is liable on first conviction for a fine or imprisonment for up to five years, or both. Upon second conviction, the offender is liable for a fine or imprisonment for up to 10 years, or both.

The most significant risk for a business that uses water without a water-use licence is that in terms of section 155 of the NWA, the Minister of the Department may approach the High Court for an interdict (or other appropriate order) against the business for contravention of the provisions of the NWA. The court may order the business to discontinue any activity that is held to be in contravention of the NWA.

The likelihood of such enforcement action is difficult to predict as the law is not enforced in every case. However, recent cases suggest that the courts will prosecute non-compliance with the NWA Act where this is brought to their attention. In *Gerber v Gerber*, the High Court ordered the respondents to remedy the effects of their contravention by removing upstream weirs and pipes that diverted the course of a riverbed and prevented the flow of water to downstream farms. Furthermore, in the recent case of *Mostert Snr v State* the Supreme Court of Appeal upheld a criminal conviction for non-compliance with the NWA.

The consequences of operating a mine or business without the requisite water-use licence are far-reaching and include stop-orders, which would interrupt mining and other operations. In order to mitigate the risks of operating a business without a water-use licence, all mining operations and other businesses must ensure that they submit applications for such licences as a matter of urgency.

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This article was written by Claire Tucker and Twaambo Muleza of Bowman Gilfillan. For further information, please visit [www.bowman.co.za](http://www.bowman.co.za).

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