

NOTES / AANTEKENINGE

LESSONS TO BE LEARNT FROM THE EXTINCTION OF THE “NATIONAL FLOWER” OF SOUTH AFRICA

1 Introduction

The increasing waste problem experienced with plastic bags in South Africa led to the banning of the manufacturing and distribution of thin plastic bags on 9 May 2003 (GN 625 in GG 24839 of 2003-05-09). The promulgation of these regulations was the result of three years of regulatory activity from the side of the Department of Environmental Affairs and Tourism (DEAT) as well as lengthy negotiations between the government, business and labour sectors. The result of these negotiations was the drafting of a Memorandum of Agreement (MOA) between organised business, government and labour, which included areas of agreement in relation to issues such as the minimum thickness of plastic bags. It is interesting to note that the consensus between the parties was not embodied in an Environmental Management Co-operation Agreement (EMCA) as provided for in section 35 of the National Environmental Management Act 107 of 1998 (NEMA).

It is the intent of this note to reflect on the manner in which the problem of plastic bags was addressed through the regulatory authority of the Minister of Environmental Affairs and Tourism (the Minister). This note furthermore ascertains whether an EMCA could have been a worthwhile instrument to regulate the issue of plastic bags in South Africa. Some proposals are made in conclusion with regard to the usage of an EMCA as a mechanism to address environmental issues.

This *ex post facto* investigation is of value since lessons for government, business and labour may be distilled from the plastic bags experience. It may in addition be of assistance in the application of solutions for future environmental problems. This note does not undertake an extensive examination of the content of the plastic bag regulations, but rather focuses on the manner in which this issue is regulated as well as the process that was embarked upon prior to the promulgation of the regulations.

2 The regulatory quest of DEAT

2.1 The promulgation of plastic bag regulations

The first set of plastic bag draft regulations that was promulgated in terms of section 24(d) of the Environmental Conservation Act 73 of 1979 (GN 1994 in GG 21203 of 2000-05-19), was met with fierce resistance by certain sectors of business. Interested and affected parties were not consulted prior to the promulgation of the draft regulations. The content of these regulations was also criticised due to the fact that it lacked a substantive framework that could facilitate the aim of the regulations as indicated in the explanatory memorandum, which is *inter alia* to promote re-use and recycling. The regulations furthermore included rigorous provisions prohibiting the supply of carry bags of less than 30 microns with effect from 1 January 2001 and a thickness of less than 80 microns with effect from 1 June 2001. It was clear that these regulations would have resulted in major job losses as the plastic industry would not have been able to meet these requirements.

The issue was subsequently submitted to the National Economic and Development and Labour Council (NEDLAC) for formal discussion in November 2000 (www.nedlac.org.za/). A socio-economic impact study found that the two-step approach of the draft regulations was not feasible (*Fridge Socio-economic Impact Assessment of the Proposed Plastic Bag Regulations* at <http://www.nedlac.org.za/research/fridge/plastics/abbrev.pdf>). The 80 microns bag requires different manufacturing technology than what is used to manufacture the 30 microns bag. The existing technology also did not cater for the 30 microns bag, which implied that significant capital investment implied would have to be made to convert technology to adhere to the proposed requirements. The updated technology would then have to be replaced after six months to produce the 80 microns bags.

An amended version of the regulations was published in 2001 in reaction to public comments that were received on the first draft regulations. In terms of the amended version the manufacturing, trade and commercial distribution of plastic bags thinner than 80 micrometres were prohibited. This prohibition was qualified by the provision that, in the enforcement of the regulations, a tolerance of 10% microns variation in the measurement of the minimum thickness may be permitted at the discretion of the authorized person. These regulations were also met with scepticism and resistance from the business sector, which was of the view that existing technology would not be able to adhere to the requirements and that a conversion to other technology was needed. Business indicated that this would eventually have a negative impact on the economy.

In answer to the criticism of the 2001 regulations, new amended regulations were promulgated on 9 May 2002 (GN 543 in *GG* 23393 of 2002-05-09). Regulation 2(1) contains a prohibition on the manufacture, trade and commercial distribution of plastic bags, made of plastic film, with a wall thickness of less than 80 micrometres. The exceptions to this prohibition are included in regulations 2(2)-2(4). Plastic bags that do not have any printing, painting or marks of any kind, unless required by law, may have a wall thickness of between 30 and 80 micrometres. Bread bags made of plastic may have a wall thickness of between 25 and 80 micrometres provided that they also do not have any printing, painting or marks of any kind. The prohibition does not apply to shrinklene and flimsy bread bags made of plastic film. These regulations were repealed on 9 April 2003 (Notice No. 518 Government Gazette No. 24739 of 9 April 2003).

Compulsory specifications for plastic carrier and flat bags were promulgated in 2003 (GN 867 in *GG* 25082 of 2003-06-20). Regulations 4 and 5 contain the thickness, construction and printing requirements in this regard. The new plastic bag regulations (GN 625 in *GG* 24839 of 2003-05-09) prohibit the manufacture, trade and commercial distribution of domestically produced and imported plastic carrier bags and plastic flat bags for use within the Republic of South Africa if they do not comply with regulations 4 and 5 of the compulsory specifications. In terms of the specifications the film thickness of a carrier bag or flat bag shall not be less than 24 microns. Regulation 6 prescribes the test method to determine the thickness of plastic film used.

Recently Parliament's Finance Portfolio Committee was briefed on a draft Revenue Laws Amendment Bill, which proposes a levy on certain plastic bags (<http://business.iafrica.com/news>). The proposal entails that the Customs and Excise Act 91 of 1964 will be amended to provide for a levy of R10 per kilogram on the bags. The manner in which the levy was determined is unclear and it seems that it was generated in an arbitrary manner. The Congress of South African Trade Unions (Cosatu) reacted with fierce protest to the amount of the levy and branded it as excessive (<http://allafrica.com/stories>). It will be interesting to see if this amount will be amended to a more realistic level.

2.2 *The conclusion of a MOA*

The MOA of September 2002 contains important agreements between organized labour, business and DEAT. The purpose of the agreement is to address the negative impacts associated with the generation, use, collection, transportation and disposal of plastic bags whilst minimizing the negative socio-economic impacts of the regulatory efforts of DEAT in this regard (par 1.3 of MOA). The parties agreed in paragraph 2.4.3 that the maximum

tolerance that will be allowed on the thickness of 30 microns is 20 % for a period of five years, after which an appropriate standard to achieve 30 microns will be developed. In terms of paragraph 2.4.4 business will strive to attain a tolerance on the thickness of 30 microns of 10%. This implies that a tolerance of 24 microns will be allowed for during the first five years of the agreement, whereafter business must attain 27 microns. The MOA further envisages the establishment of a section 21 company which shall *inter alia* promote efficiency in the use, re-use, collection, recycling and disposal of plastic bags (par 2.9). Paragraph 2.10 makes provision for a mandatory levy that will be imposed on the plastic bag manufacturers. The parties furthermore agreed that the consumer would carry the costs of the plastic bags (par 2.5.2.1).

3 Evaluation of the plastic bags regulatory regime

3.1 Positive contributions of the regulatory regime

At present the manufacture, trade and commercial distribution of plastic bags are legislated by way of regulations, which refer to compulsory specifications. In addition to the current regulations, a MOA contains important agreements in relation to plastic bags. The MOA informed the existing regulations and further legislation is envisaged in accordance with the agreement in the MOA (Annexure A of MOA). The current regime is a great improvement on the first regulatory efforts of DEAT that seem to have been promulgated in isolation of knowledgeable input and socio-economic realism. The latest regulations address the problem of plastic bags without plastic retailers and manufacturers having to close down due to unrealistic and stringent requirements. The MOA supports a long-term vision, which was omitted in the first promulgated regulations. DEAT involves important interested and affected parties to ensure that these parties can provide assistance to address the problem of plastic bags. This participatory approach can be favoured as it adheres to the principles in NEMA. Public participation is acknowledged as an important principle of NEMA (Preamble of the Act and aa 2(f) and 2(g)). The promulgation of compulsory specifications in terms of section 22(3) of the Standards Act 29 of 1993 furthermore provides certainty regarding the thickness, construction, printing and testing methods that must be used. These specifications can be welcomed since the first regulations lacked this scientific base.

3.2 Critical questions concerning the regulatory regime

The epic relating to the regulation of plastic bags is not only positive. A period of three years passed before the current regulations were promulgated. This period entailed time-consuming negotiations and the

promulgation of various draft regulations. The way in which the plastic bag regulations were developed leads to various questions.

A question that comes to mind is why DEAT promulgated the 2000 regulations which lacked any substantive content and which were clearly not plausible? Why were organized business and labour not consulted prior to embarking on the regulatory quest? Could this not have saved time and money? It is impossible to speculate about the intentions of the Minister in this regard. The reason for the promulgation of the first series of regulations may have been of a purely political nature. Another possibility may be that the Minister wanted to frighten organized business into action and send them a message that DEAT was serious about the effective regulation of plastic bags. The regulations may have served as a “stick” to induce business to find solutions to the problem of plastic bags. If this is the case, it clearly worked. If one were to criticize DEAT for initially acting in an arbitrary and unrealistic manner, one must also chide organized business for not being pro-active. The increasing waste problem experienced with plastic bags has been known to industry and they could have acted to address this problem instead of waiting for draft regulations that resulted in great effort and cost to ensure a realistic final outcome. Both business and government have lessons to learn from the plastic bags epic.

However, the process is flawed in that one of the major retailers in South Africa, Mr Price, was excluded from the MOA. Mr Price does not charge its customers for plastic bags and DEAT responded with a letter that insisted that the retailer should charge for plastic bags (<http://www.news24.com>). Mr Price, correctly, pointed out that it complies with the regulations that came into effect on 9 May and 20 June. The regulations do not compel retailers to charge for plastic bags, but prescribe the compulsory specifications relating to *inter alia* the thickness of the bags. Mr Price did not sign the MOA and is accordingly under no obligation to charge for plastic bags. This incident indicates a flaw in the regulatory approach of DEAT in this regard. Important parties are left out of the MOA and do not need to comply with this agreement. Free-riders exist which could impair the effective and uniform regulation of plastic bags. Moreover, the MOA has a dubious legal status.

3.3 *The possible regulation of plastic bags on the basis of section 35 of NEMA*

A vital question surfaces in this regard: why did DEAT not make use of section 35 of NEMA to embody the agreement of the parties in an EMCA? Section 35 of NEMA provides DEAT with an instrument to regulate the waste problem associated with the manufacturing and distribution of plastic bags. Section 35 of NEMA provides for the Minister and every MEC or

municipality to enter into an EMCA with any person. According to section 1 of NEMA the definition of “person” in section 1 includes a juristic person. The fact that “any” is used in this section means that person can be read in the singular or plural (s 6 of the Interpretation Act 33 of 1957). This interpretation implies that an EMCA may be concluded between government and various other parties. This interpretation opens up the possibility for multilateral EMCA’s. The Minister could therefore conclude an EMCA with organized business and labour to address the issue of plastic bags.

What would be the advantage of using section 35 to facilitate the agreement instead of making use of a more informal MOA? One of the main points of critique against the usage of a MOA is the fact that it is not binding on all of the important role players and that it has a dubious legal status. An enforceable EMCA can embody the agreement between DEAT and other parties. The parties can clearly stipulate that they are of the intent to be bound by an EMCA. The content of the EMCA could also reflect this intent. This option still presents the problem of free-riders as an EMCA could also only be enforced against signatories to the agreement. It would be optimal if one could extend the application of an EMCA to free-riders that impair the effective implementation thereof.

3 4 Extension of application of EMCA to non-parties

The question arises as to how an EMCA could be made applicable to free-riders in order to ensure that all relevant actors adhere to the important obligations of this agreement? South African labour law makes provision for the extension of an agreement to non-parties. Section 32 of the Labour Relations Act 66 of 1995 regulates the situation where an application can be lodged with the Minister with the objective of the extension of a collective agreement to non-parties to the agreement. The Minister must grant the extension if the conditions in subsection (1)(a) and (b) are met. According to section 32(2) the Minister will then extend the collective agreement by publishing a notice in the Government Gazette that declares the agreement binding to non-parties as specified in the notice from a specified date and for a specified period. Subsection 3 reads that the Minister must be satisfied that certain requirements are met, before the extension is allowed. Could an analogous application of the extension of a collective agreement ensure that free-riders do not impair the implementation of an EMCA?

Section 35 does not make provision for the extension of a declaration of an EMCA to non-parties. Section 45 of NEMA provides the Minister with broad regulatory power pertaining to procedural and substantial aspects of the EMCA’s. Section 45(1)(d) states that the Minister may promulgate regulations regarding *inter alia* general conditions and prohibitions. It is

proposed that section 45(1)(d) may be used as the basis to promulgate conditions that will regulate the extension of an EMCA to non-parties.

Section 44 of NEMA provides the Minister with broad regulatory authority and section 44(1)(b) specifically states that the Minister may make regulations in general to carry out the purposes of this Act. It is clear that the overarching objective of NEMA is to further sustainable development (Principles 3 and 4). NEMA was furthermore promulgated in the overarching framework of the Constitution of the Republic of South Africa Act 108 of 1996 (hereafter the 1996 Constitution). Article 24(b)(iii) of the 1996 Constitution underwrites the promotion of sustainable development through legislative and other means. The extension of an EMCA that is aimed at sustainable development, could accordingly promote the objective of sustainable development in the Act. The regulations may form the basis for a declaration of the extension of an EMCA to non-parties. Another option would be to revise section 35 in order to establish the regulatory framework for the declaration of an extension in NEMA.

4 Proposed contents of the regulations regarding the extension of an EMCA

The relevant parties to an EMCA may request a declaration of extension, or the Minister may initiate this after consultation with the parties. The intent of the Minister will be published in the Government Gazette and interested parties may provide input according to the usual time frames. Parties to the agreement will be notified of the intent of the Minister and they will have an opportunity to respond. The time frame for the duration of the declaration will be stated in accordance with the provision in the EMCA. Provision must be made in the regulations for instances where the Minister may withdraw his declaration. These instances may for example be where unforeseen circumstances occur which make compliance with the EMCA impossible; where international law mandates the action or where the EMCA is terminated or has expired in terms of the provisions in the EMCA. In the instance where a declaration is withdrawn, the Minister will publish his or her intent in the Government Gazette and request input from the public. The parties will be notified of the intent of the Minister and will have the opportunity to respond in writing. The regulations must also prescribe the requirements and conditions that need to be fulfilled before a declaration can be published.

5 Way forward

Various lessons can be distilled from the regulatory quest of DEAT pertaining to the regulation of plastic bags. DEAT should have chosen a more participatory approach when it decided to regulate plastic bags. This

may arguably have contributed to legal certainty, realistic regulations and reasonable administrative costs. Government must realize that they need the assistance of the regulated as well as other members of civil society to address environmental problems. This approach may lighten the cumbersome burden that government carries in relation to problematic issues such as the environment.

Organized business was also at fault since it did not act in a pro-active manner in order to ensure that it solves the problems associated with plastic bags. This would have avoided a great deal of effort and problems for business. The participatory approach may be most advantageous to address environmental problems and this was also finally chosen by DEAT, organized business and labour as a MOA was signed. This MOA contains very important agreements for the regulation of plastic bags in South Africa. However, it is not clear why an EMCA was not utilised to facilitate the agreement between the relevant parties. This instrument is well suited to assist in the regulation of plastic bags. The legal status of the EMCA is also not as dubious as that of the MOA.

The EMCA could further curtail free-riding where the application of the agreement is extended to non-parties *via* a declaration of the Minister of DEAT to this effect. At present NEMA does not explicitly make provision for the extension of the application of an EMCA to non-parties. NEMA does, however, provide the Minister with broad regulatory powers. Section 45(d) might accordingly be used to promulgate conditions for the extension of the EMCA. This implies that a different set of regulations must form the basis for the declaration of the Minister. Section 44(1)(b) might form the basis for the promulgation of the declaration of the Minister on an *ad hoc* basis. A more viable alternative may be to revise section 35 to make provision for a regulatory framework for the extension of EMCA's to non-parties in a similar manner as the Labour Relations Act. The lessons learned from the regulation of plastic bags must serve as an incentive for DEAT to make use of EMCA's in order to address environmental problems.

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