

JANUARY 2015

“All good things which exist are the fruits of originality.”
- John Stuart Mill

Regulatory regime for gas exploration in South Africa

“You are your choices”- Jean Paul Sartre

The production of commercial shale gas is regarded as a major breakthrough in the oil and gas industry. Shale gas is an unconventional gas trapped in shale sediments deep in the earth. The extraction process, known as “fracking” has been the subject of heated debates in South Africa. To date gas exploration in South Africa has only been regulated by the *Mineral and Petroleum Resources Development Act 28 of 2002* (MPRDA), which focuses on off shore gas exploration.

The MPRDA read with the slant of environmental protection legislation, provides for various mechanisms and government tools to regulate gas exploration processes that may be detrimental to the environment, mainly offshore extraction. However, the gas extraction processes currently regulated by the environmental legislative regime is different from the extraction process brought about by fracking. The universal interpretation by stakeholders is that the current regulatory regime is not adapted to sufficiently provide for the onshore gas extraction processes such as fracking.

The procedures regarding the extraction of gas both onshore and offshore are complex and the detrimental impacts on the environment differ. The current gas exploration legislative regime needs to be tailored to address each of these respective onshore and offshore exploration processes. A successful oil and gas regulatory regime requires certainty and predictability in a high cost, high risk and capital intensive industry. The Government states that it is geared to regulate and monitor companies that have expressed an interest in exploring shale gas in the country and developed a draft set of technical regulations for onshore gas extraction activities.

Thibedi Ramontja, the Director-General of the Mineral Resources Department, said the draft regulations will be sufficient to deal with the risks that gas exploration might pose to the environment and environmental protection and ground water sources will take a centre stage when processing permits for technical co-operation, exploration and gas production rights. The extraction of onshore shale gas will not only create a new industry, but provide for growth in the South African economy and draw new international investments.

Law & Laughter

Q: What do you get when you cross a librarian with a lawyer?
A: All the information you need, but your can't understand a word of it.

Visit us online for the latest news and info on upcoming events!
www.vanhuyssteens.co.za

GOOD INTENTIONS ARE NOT ENOUGH, TRANSFORMATION POLICY MUST BE CONSTITUTIONAL

On Tuesday the 13th of January the Western Cape High Court delivered judgment in the matter of *SARIPA v Minister of Justice and SIPA and Others v Minister of Justice*. The applicants in the matters were voluntary associations and other concerned bodies in the insolvency industry. The subject of the applications is a policy adopted by the Minister in early 2014, which determines the appointment of insolvency practitioners in insolvent estates, based on race and sex.

The policy, amongst other things, classifies citizens along the following lines:

- A. African, Coloured, Indian and Chinese **females** who became citizens before 27 April 1994;
- B. African, Coloured, Indian and Chinese **males** who became citizens before 27 April 1994;
- C. White **females** who became citizens before April 1994; and
- D. African, Coloured, Indian and Chinese **males** and **females** and White **females** who became citizens after April 1994, and white **males**.

According to the policy, the Master of the High Court has to make appointments in estates in the following ratio: A4:B3:C2:D1 and in alphabetical order. The Master must have an alphabetical list of candidates segregated into categories, and must make appointments without deviating from the list.

In an expansive judgment, covering 42 pages, the court deals with various arguments in favour of and against the policy. The full judgment can be read here : www.saffli.org/za/cases/ZAWCHC2015/1.html.

The Court applies the following test: If the policy unlawfully fetters the discretion of the Master, is not rationally connected to its purpose, falls foul of the equality clause of the Constitution or is not procedurally fair, it must be struck down as unconstitutional. (This test was formulated in *S v Jordan*).

The Court acknowledges the need for transformation and the inherent discrimination, real or perceived, associated with policies designed to address past inequality. However, the Court finds that the good intentions underlying a transformation policy cannot save it from unconstitutionality resulting from the application of the above test. The Court finds that the policy fails the test on two grounds:

- 1) that it renders the Master a “rubber stamp” official who cannot exercise his discretion in making appointments in insolvent estates and;
- 2) that the inflexibility of the system will not cure the mischief which it aims to address, in that it will not lead to transformation or the eradication of fronting or corruption.

The implications of the judgment are far wider reaching than the insolvency industry. The principals applied by the Court will find application in procurement, labour and other areas.

Contact Van Huyssteens

T +27 12 349 2306
F +086 6151 183

Address:

De Haviland Crescent Nr. 5,
III Villaggio Nr.12, Torino Suite
Persequor Park
Pretoria, South Africa

Van Huyssteens appreciates your feedback:

For information or editorial contributions, please e-mail: commercial@vanhuyssteens.co.za.

If you would like to subscribe to this service, please send a blank e-Mail to: commercial@vanhuyssteens.co.za with the word 'Subscribe' in the subject line. To unsubscribe send a blank e-Mail to: commercial@vanhuyssteens.co.za with the word 'un-Subscribe' in the subject line. As a subscriber, your name will not be released to any third party, but you may receive research surveys and similar communications about activities relating to Van Huyssteens and your fields of interest.

Van Huyssteens Commercial Attorneys disclaims all liability for any loss, damage, injury or expense however caused, arising from the use of, or reliance upon, in any manner or form, the information provided through this newsletter. It does no, in any form or manner, warrant, or purport to warrant, the truth, accuracy and/or completeness of the information provided. Should any of the information provided herein be applicable to (or interest) you, please consult with a legal professional for comprehensive advice and guidance thereon. The publisher's prior written permission is required to reproduce, publish, use and/or display the contents hereof in any form or manner and/or for any reason whatsoever.