

The Impacts of Regulation on Business on the Waste Sector: Evidence from the Western Cape

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ABSTRACT

The waste sector has been identified as a sector which can contribute towards South Africa's economic growth and the creation of green jobs. Policies and regulations are often identified as a potential limiting factor for growth in the waste sector. In this regard, the Western Cape Department of Economic Development and Tourism commissioned a project to do a regulatory impact assessment for the waste economy in the Western Cape. The findings of this research suggest that a number of the legislative barriers identified by businesses entering the waste economy are perceived rather than actual barriers. It is not the law or regulation that is causing the barrier, but the interpretation and application of the law by the different players. Nevertheless, from the perspective of small businesses in particular, there are very real challenges that need to be addressed. Growing the waste economy requires navigating a host of environmental and financial laws and regulations, and compliance with the various requirements is hampering the sustainability and growth of small businesses, especially, in the waste sector.

1. INTRODUCTION

All waste management activities (beyond only the disposal of waste as was the case under the Environment Conservation Act, 1989) are now regulated by law under the National Environmental Management: Waste Act, 2008 (NEM:WA). The promulgation of NEM:WA was followed by the publication of a number of norms, standards and regulations that all came into effect within the past three years. The new regulatory framework has resulted in significant changes in the requirements that a business in the waste sector has to adhere to in order to operate legally. This dramatic change in regulations impacts upon both government and industry. This requires a change in mind-set of business and regulators, at all three spheres of government.

The Department of Environmental Affairs (DEA) confirmed that no regulatory impact assessment was conducted prior to the promulgation of NEM:WA or publication of the subsequent regulations (Pers. Comm. DEA, 2014b). An assessment of the cost implications associated with implementation of the Waste Act, National Waste Management Strategy (NWMS) and the Domestic Waste Collection Standards was conducted prior to its approval (Pers. Comm. DEA, 2014b).

Initially, as with all new laws coming into effect, there were a number of implementation challenges. The definition of waste and the list of waste management activities that was published in 2009 is a case in point. In an attempt to address some of the implementation challenges, the National Waste Management: Waste Amendment Bill [32-2013] was published for public comment in July 2013 (RSA, 2013). The proposed changes to NEM:WA fall into three broad categories –

- definitions and their context;
- Members of the Executive Council (MECs) powers; and
- the Waste Management Agency (now called the Waste Management Bureau)

A revised list of waste management activities (RSA 2013a) was published in November 2013 and the Waste Act Amendment Bill is currently before parliament for consideration. DEA is expecting that the Bill will be finalised and approved during the current parliamentary session (Pers. Comm. DEA, 2014a).

The purpose of the research reported here is to determine the impacts of legislation and regulations on growth and development of the waste sector in the Western Cape as experienced by stakeholders in the sector.

2. RESEARCH METHOD

Qualitative research methods were employed to collect data during January and February of 2014. Due to the limited project time frame, the assessment of intended and unintended consequences of legislation was initiated with a regional workshop. The aim of the workshop was to allow the project team to:

- Rapidly collect information on examples where rules and regulations in the waste sector have impacted on businesses;
- Identify relevant stakeholders with whom more in-depth interviews could be held; and
- Allow input from more stakeholders than could be reached through the interviews

The Project Steering Committee assisted with the identification of relevant stakeholders to be invited to the workshop. A total of 52 people (excluding the project team), mostly from industry and industry associations, were invited to the workshop.

Following the workshop, semi-structured interviews were conducted with representatives from industry and industry associations in the paper, plastics, glass, tyre, e-waste and waste-to-energy sectors. Interviews were also conducted with municipalities, provincial and national government departments. In instances where a number of people from one organisation could provide input, a focus group discussion - rather than one-on-one interviews - was conducted. Specific organisations active in enterprise development and consulting services to clients in the waste sector in the Western Cape were also interviewed as they are, in most instances, acutely aware of the obstacles facing their clients. Telephonic interviews were conducted where it was not possible to meet in person.

The information gathered during the interviews was geared towards answering the following questions:

- How does the legislation/regulation impact on the business/entity?
- What are the unintended consequences of rules and regulations on business?
- How practical and feasible is the legislation, rules or regulations?
- The transparency of the rules and legislation (is the regulation clear and easy to understand and comply with?)
- The relevance of the legislation, rules and regulations.
- The impact on businesses in terms of costs (financial costs and time – human resources - costs) and investment decisions.
- Do the benefits justify the costs?

3. RESULTS AND DISCUSSION

The findings presented in this paper are based on research that was conducted during January and February of 2014. It is therefore too early to judge if the government amended list of waste management activities has brought about significant change to the waste sector in the Western Cape. The proposed amendments to the Waste Act are also noted, but since the Amendment Bill has not yet been signed by the President at the time of conducting this research, the impacts of the changes are still to be realised.

The reported issues are based on the actual experiences and perceptions of respondents in the waste sector in the Western Cape. A number of the respondents also have experience in other provinces and have indicated that the majority of the issues noted for the Western Cape are not unique to the province, but relevant to their overall experience of doing business in the waste sector in South Africa.

The impact of regulation in the waste sector is of particular concern to small businesses who have raised the following issues, amongst other:

- They rely on timeous responses to business opportunities and time delays in getting environmental authorisations approved by government have resulted in lost business opportunities.
- Entrepreneurs often choose to do business under the thresholds in order to avoid triggering the licencing processes and the associated cost implications, but capping of operations is not conducive to growth of the waste sector.
- Short-term contracts offered by municipalities also reduce the ability of small contractors to amortise their assets thereby negatively impacting on the sustainability of these small businesses, especially waste collectors.

3.1 Impacts of legislation, rules and regulations on business

The reported impacts of legislation and regulations on business relate mostly to time and/or cost associated with:

- Subjectivity in the interpretation of legislation
- Time delays in environmental authorisation approvals
- Procurement processes required in terms of the MFMA (RSA, 2005)
- Section 78 assessments (MSA) for outsourcing of municipal services
- Differing requirements for service provider registrations between municipalities
- Site specific waste management licences
- Enforcement of Section 24 G (NEMA) on businesses 'doing the right thing'
- Classification of e-waste as hazardous
- Time delays in waste classification
- Environmental impact assessment processes required in terms of NEM:WA and NWA
- Time delays in approval of IndWMPs
- Record keeping in terms of the Second Hand Goods Act, 2009 (RSA, 2009)

3.2 Unintended consequences of legislation, rules and regulations on business

The reported unintended consequences of legislation on businesses are both positive and negative and include:

- Demand for higher skills in the waste sector
- Risk aversion with respect to:
 - Decisions to authorise waste activities
 - Avoiding putting out tenders for waste activities
 - Investment in waste management activities
- Capping of business activities to below threshold values
- Delays in issuing of licences
- Increased administrative burden on business
- Collection of recyclables is subject to procurement processes
- 'Value for money' is not a consideration in tender evaluations
- Fragmentation of municipal waste services
- Difficulty in recovering capital investment costs by small businesses
- Informal sector integration into the formal waste sector is not catered for
- Slow uptake of identified business opportunities
- Stockpiling of waste to avoid analytical cost
- Waste previously disposed at hazardous waste sites may now legally be disposed at general waste landfills
- Planning for new landfills may be under greater pressure
- Delay in realisation of real opportunities in the waste sector
- Conflicting clauses between regulations

3.3 Practicality and feasibility of legislation, rules or regulations

The reported practical issues hampering growth in the waste sector include:

- Supply chain regulations (MSA)
- Lack of upfront regulatory impact and cost assessment in consultation with industry and municipalities
- Standardised interpretation and enforcement of law through communication, awareness and training
- Conflicting clauses in regulations under NEM:WA
- Lack of government support to municipalities to achieve NWMS targets
- Lack of cooperative governance to support waste-to-energy projects
- Organic waste composting strategy creates a biased approach towards composting
- The use of SANAS accredited laboratories for waste classification must be ensured
- Compliance audits focus only on licence conditions
- Confusion about information systems to be reported into
- Legislation favouring businesses operating below thresholds
- Zoning and rezoning of land
- Public participation process abuse by stakeholders and cost implications
- Securing of funding for assessments

- Municipalities having to accept higher bids
- Using municipal land to set up a business is onerous and favour PPPs
- Lack of cost/benefit sharing between industry and municipality for waste separation
- Ownership of municipal waste
- Lack of action plans to support meeting the NWMS targets
- Import of waste not being listed as a waste management
- Lack of flexibility in application of norms and standards

3.4 Transparency of the legislation, rules and regulations

The reported transparency issues identified include:

- Rules and regulations are not easy to understand and follow
- Inconsistent interpretation of definitions and regulations causes confusion and frustration
- General lack of awareness in the private sector
- Mechanisms for awareness creation that were put in place by government need to be strengthened
- Frequency of updating SAWIC website needs to be improved

3.5 Relevance of the legislation, rules and regulations

The reported issues relating to relevance of rules and regulations include:

- Legal opinions are being sought to determine relevance to specific activities
- Relevance of having to go through the same process for licencing when moving a business to a different site is questioned
- Norms and standards to replace the need for licences is supported, provided that these are practical
- Relevance of conflicting regulations is questioned

3.6 Impact on business in terms of cost and time and investment decisions

The issues of increased costs and time delays and lengthy processes, as an impact on business operations and on investment decisions, have been alluded to in the previous sections. The following section provides actual information, from stakeholders, on how cost and time are negatively influencing business operations. The cost and time impacts of the different laws and regulations on business are summarised in Table 1.

3.7 Do the benefits justify the cost?

The introduction of the internationally accepted waste management hierarchy into South African legislation, made little progress towards moving waste up the hierarchy. The national Waste Sector Survey of 2012 (DST, 2013) highlighted landfilling as the preferred waste management technology option in both the private and public waste sectors in South Africa. Growing the waste economy in South Africa requires a diversion of waste away from landfill to create jobs and to realise the economic value of waste as a resource. The increased costs of landfilling, both in terms of landfill design and classification of waste, are recognised as potential drivers for growth of the waste economy in the Western Cape.

The benefits of environmental protection are perceived to be increased. As such the costs may be justified from an environmental perspective but not necessarily from a business perspective. In addition, costs and benefits accrue to different parties, while environmental benefits in particular are often difficult to internalise by any one particular party. Furthermore, the way compliance audits are conducted limits the ability to realise the environmental benefits associated with the regulation.

There is a need to quantify the environmental benefits in economic (monetary) terms; and to compare those benefits with the increased cost of doing business in the waste sector; in order to fully assess whether the benefits justify the costs. In addition, the misalignment in the accrual of benefits and costs must be addressed, for example, through some form of compensation mechanism such as requiring industries to pay municipalities for recyclable waste collected.

Table 1: Cost and Time impacts of legislation and regulations on the waste sector

Activity	Law/regulation	Cost	Timeframe
Outsourcing a municipal service	Section 78 assessment (MSA)	R 180 000 (Sec 78(1)) typically for evaluation of a single facility or service Up to R10 million for full Sec 78	14 months on average for full Sec 78
Outsourcing a municipal service	RFP if job <R200 000	Insignificant	11 weeks based on the prescribed tender process to follow
Establish a PPP	Section 120 (MFMA) read with the PPP regulations	R2 million (typically for one facility/property) Per PPP established	9 months minimum depending on complexity and size of PPP (this excludes tender process time described, which will be longer due to the complexity of the tender specification that increases when asking for transaction advisor services needed to complete the PPP process in terms of regulations)
Contracts beyond 3 years	Section 33 of (MFMA) requirements		2-3 years (12 months is more realistic, as discussed)
Investigation to determine if municipal land is available for use by PPP or business	Section 120 of MFMA	R 4 000 – R 5 000 upfront admin fee only for zoning application	6 months minimum (if rezoning is required, this involves a process and decision by province, with public participation that could stretch the timeline to approx. 3 years)
Listed Activity Category A	Basic Assessment in terms of 2013 listed Activity	R 45 000 – R 180 000 excluding specialist studies	7-9 months (will depend on public participation and what effect comments will have on the process to do more studies or supply more information)
Listed Activity Category B	Full EIA in terms of 2013 listed Activity	>R150 000 Up to R6 million per site	11-24 months (will depend on public participation and what effect comments will have on the process to do more studies or supply more information)
Closure of landfill sites	NEW:WA	R10 million/hectare	Non specified
Water use licence	DWA water use licence	>R45 000	No time frame specified 2.5 year backlog in licence processing (mostly related to WWTW's)
Rectification of unlawful commencement or continuation of listed waste management activity	Section 24 G NEMA	R 50 000-R 5 million Administrative fine	Fine must be paid before the EIA process may start
Analysis, Classification and compilation of SDS for waste	Waste Classification and management regulations	R 20 000 - R70 000 per sample	30 working days Depending on the capacity of the lab to process the samples

4. CONCLUSIONS

Little to no upfront assessment of the impact of new regulation on business is done by national government before new laws and regulations are promulgated and implemented. In the few instances where costing was done, it was done without consulting the affected parties in the waste sector (industry and municipalities in particular).

Growing the waste economy requires navigating a host of environmental and financial laws in order to ensure the establishment of businesses operating legally in the waste sector. Ensuring legal operations is, however, hampering the sustainability and growth of small businesses, especially, in the waste sector.

A number of the legislative barriers identified by people entering the waste economy have proven to be perceived rather than actual barriers. It is not the law or regulation that is the barrier, as the need for regulation is acknowledged by the respondents. The interpretation and application of the law by the different players is the real barrier. There is, in fact, much uncertainty about the legal requirements due to the fast and continuous changes experienced by the regulation of waste management activities in the past few years. Risk aversion by all parties is therefore a greater barrier than the law itself.

A need for better communication about what is required and what has changed has been expressed by a number of respondents in this study.

The main issues hampering growth in the waste economy in the Western Cape that have been identified are:

- Interpretation of the law by officials at all three spheres of government;
- Cost and time of the bureaucratic processes associated with –
 - Environment authorisations,
 - Municipal financial management;
- Ownership of waste - as this impacts on feedstock agreements between business and municipalities;
- Zoning and rezoning of land is a barrier, especially where an activity is not listed in the regulations; and
- Inconsistencies between differing regulations

Although a number of the legal barriers, such as the threshold limits and the definition of waste, are addressed through the revision of the list of waste activities (RSA, 2013a) and potentially through the Waste Act Amendment Bill, the issue of fairness and of Just Administrative Action remains. A number of small businesses were fined for conducting illegal activities when they applied for licences after moving to larger facilities to accommodate growth in their operations. The 2013 revised list of waste management activities relaxed the thresholds for licencing. The result of this situation is that some businesses commissioned studies and incurred costs towards meeting requirements for licencing which are now relaxed and in many instances no longer applicable. Others also paid fines or started legal processes (also at a cost) to avoid having to pay these fines.

5. RECOMMENDATIONS

- Sustainable economic growth in the waste sector can only be achieved if the value of waste as a resource is realised; and/or if the cost of landfilling becomes more expensive, either through more appropriate pricing based on full cost recovery, or through the implementation of market-based instruments to 'internalise' the externalities (social and environmental costs) associated with landfilling.
- There is a need to quantify the environmental benefits of the new legislation in economic (monetary) terms; and to compare those benefits with the increased cost of doing business in the waste sector, in order to fully assess whether the benefits justify the costs. Such a study could be commissioned by the Department of Economic Development in conjunction with the Department of Trade and Industry. In addition, the misalignment in the accrual of benefits and costs (e.g. municipalities using public funds to collect recyclable waste for the benefit of industries) must be addressed, for example, through some form of compensation mechanism, such as requiring industries to pay municipalities for recyclable waste collected.
- Clear communication regarding requirements and changes in regulations and requirements is needed.
- A strategy outlining envisaged growth in jobs in the waste sector is required in order to achieve the targets set in the NWMS.

Other recommendations from this study to the Western Cape Government include:

- Streamlining of the regulatory environment in consultation with all spheres of government
- Scope for development of norms and standards at provincial and national level
- Mechanisms to reduce the burden of new legislation both at provincial and national level.

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