MINING | ENERGY | INFRASTRUCTURE
FEATURE

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INTRODUCTION

January 2008 is etched forever on my mind – Eskom blackouts, roads full of potholes and pouring rain, generally welcome but not along with the former two issues. For me, January 2008 provided a salutary lesson not to take things for granted.

The three activities that form our first feature for 2019 – mining, energy and infrastructure – and their end products were largely considered by many of us as a given until that point. Ten years on we know nothing should be assumed; the potholes increase in number and size; the electricity issue has not been resolved and mining in Q1 declined by 1.8% – although the SA economy in general grew by 2.2%, quarter-on-quarter, bringing the country out of the recession. However, it should not be forgotten that mining continues to play an important role in the South African economy and, according to the Minerals Council South Africa (previously The Chamber of Mines), the industry contributed R335 billion to GDP, R159 billion in taxes and R90 billion in employee tax collected. R72.5 billion in royalties, provided employment for 464 667 people and employee earnings of some R126 billion, R7 billion was spent on skills development and R2 billion was spent on community development. What is sometimes forgotten is the role played by mine employees in the lives of others. It is estimated that 4.5 million people are supported by the 464 667 mine employees. This certainly underscores how devastating the impact is when there are retributions.

Georgius Agricola wrote, “If we remove metals from the service of man, all methods of protecting and sustaining health and more carefully preserving the course of life are done away with, if there were no metals, man would pass a hopeless and wretched existence in the midst of wild beasts….” Georg Bauer (1494 – 1555), known by the Latin version of his name, Georgius Agricola, is considered the founder of geology as a discipline. A man of immense intellect, his work De Re Metallica (“On the Nature of Metals,”) was regarded as the standard on mining for two centuries. Infrastructure has been called “the framework of modern life”. We take for granted the roads, the bridges and all the other structures without which society, as we know it, would not function. Our dependence on the efficient functioning of our infrastructure for our wellbeing is extended to the wellbeing of our economies. And then energy. Energy is synonymous with power and life, in the minds of most of us who live in South Africa, it is synonymous with Eskom. The state utility’s inability to maintain plants and its “capture” have been a rude awakening to realties of the essential role energy plays in our everyday lives, and its overall impact on the economy.

The discipline of engineering is essential to all these sectors. And while engineers today are not held in the high esteem extended to doctors, lawyers and accountants, without them, their expertise and innovation there would be no infrastructure for our wellbeing or the wellbeing of our economies. And then energy. Energy is synonymous with power and life, in the minds of practically every South African, it is synonymous with Eskom. The state utility’s inability to maintain plants and its “capture” have been a rude awakening to realties of the essential role energy plays in our everyday lives, and its overall impact on the economy.

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Politics frequently appears to be a game played by those in power with the rest of us as pawns. The law should, but doesn’t always, keep the game fair. This brings us to the role and impact of politics and the law. Politics frequently appears to be a game played by those in power with the rest of us as pawns. The law should, but doesn’t always, keep the game fair.

Never has this been more apparent than in the first four articles on mining and energy, as well as the three articles on infrastructure. For me, January 2008 provided a salutary lesson not to take things for granted.

Myrle Vanderstraeten

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PROTECTING ANCESTRAL LAND FROM THE PURSUIT OF PROFIT

CLINTON PAVLOVIC

In November 2018 the community of uMgungundlovu, which has called the Xolobeni area of the Eastern Cape in South Africa home since the early 1800s, secured a critical legal victory to stop planned mining activities on its ancestral land.

Previously it had been accepted that the landowners and communities only had to be consulted before a mining right is granted. The purpose was to inform them of the planned activities and the potential impacts. It wasn’t necessary to get their consent – the landowner and communities could object, but ultimately they couldn’t prevent the granting of a mining licence. Their only recourse was a claim for damages if no agreement could be reached with the mining company.

Faced with the loss of access to their land and their way of life, the uMgungundlovu traditional community approached the court for an order declaring that without their consent a mining right cannot be granted over their ancestral land. They argued that the Interim Protection of Informal Land Rights Act (31 of 1996) (IPILRA) required the free and informed consent of traditional communities before they could be deprived of their land.

The mining company (Transworld Energy and Mineral Resources) disagreed. It relied on the Mineral and Petroleum Resources Development Act (28 of 2002) (MPRDA), which does not require "consent", only "consultation". The company argued that the MPRDA trumps the IPILRA, and that no-one has a right to refuse consent to mine.

The South African High Court disagreed with the mining company and held that a mining right could not be granted over a community’s land unless the community had first granted their free and informed consent.

The court said that the question at the heart of the case was:

"Who gets to decide whether mining activities take place on this area – the community which has lived there for centuries, or the [mining company]?"

It was not disputed that the uMgungundlovu community was indeed a "community" and held informal rights to the land in terms of the IPILRA. What was in dispute was whether the requirements of both the IPILRA and the MPRDA must be complied with in circumstances where land falls under the IPILRA.

The court accepted that the IPILRA and MPRDA had different thresholds when it came to engaging with communities and landowners. The IPILRA needs "consent", which equates to an agreement between the parties. In terms of international law, consent needs to be "free, prior and informed". The MPRDA, however, only needs "consultation", which is merely a process of consensus seeking. The aim of consultation isn’t to reach an agreement but only to involve the landowner and inform them of possible interference with their property rights.
The court rejected the mining company's argument that there was a conflict between the two Acts. The IPILRA specifically regulates South African customary law, while the MPRDA regulates mining activities while being silent on customary law. The court applied the recent decision of the South African Constitutional Court in the Maledu case (Maledu and others v Itereleng Bakgatla Mineral Resources and Another [2018] SACC 41), where it was held that the MPRDA and the IPILRA were not conflicting and must be interpreted and read harmoniously.

The purpose of the IPILRA is to protect traditional communities' informal rights to land, which were not previously protected under racially discriminatory laws. It gives traditional communities greater protection than the protection enjoyed by common law landowners. This is justified because a traditional community's way of life is intrinsically linked to their ancestral land:

"... the communal land and the residential plots (umzi) of each imzi [household] forms an inextricable and integral part of this community's way of life. ... a residential plot represents far more than merely a place to live: it is a symbol of social maturity and social dignity. Each residential plot further serves as a critical conduit for the preservation of relations of inter-linkage and mutual dependence between the living and the dead and is critically important for the wellbeing of each imzi.

... the proposed mining activities ... will not only bring about a physical displacement from their homes, but will lead to an economic displacement of the community and bring about a complete destruction of their cultural way of life."

The court accordingly held that without the community's prior consent, the Minister of Mineral Resources did not have the legal power to grant a mining right over a community's land that is protected by the IPILRA.

This judgment was hailed by Amnesty International as "a clear message that multinational mining companies cannot trample over people's rights in the pursuit of profit". However, it was quickly condemned by the Minister of Mineral Resources for impeding government’s ability to grant mining rights to companies.

The Minister has indicated the intention to appeal the decision, so this will not be the end of the uMgungundlovu community's legal battle.

Pavlovic is a Senior Associate at Hogan Lovells (South Africa).

Citations:
Baleni and Others v the Minister of Mineral Resources and Others, Case No 73768/2016
Maledu and others v Itereleng Bakgatla Mineral Resources and Another (2018) SACC 41
Interim Protection of Informal Land Rights Act, No 31 of 1996 (IPILRA)
Mineral and Petroleum Resources Development Act, No 28 of 2002 (MPRDA)
INFORMAL LAND RIGHTS: WHAT DOES THIS MEAN FOR HOLDERS OF MINING RIGHTS?

ITUMELENG MUKHOVHA

The current clamour for redistribution of land in South Africa has heightened an interest in land reform and placed raging socio-political discourse centre stage. Although mining is one of the major contributors to the South African economy, it goes without saying that the granting and execution of a mining right represents an invasion of a landowner's right of use and enjoyment of the surface. The provisions of s5(3) of the Minerals and Petroleum Resources Development Act (MPRDA) echo two fundamental common law principles that foster the co-existence of the mining right holder to access the land to which the mining right relates and the right holder's obligation to cause the least possible inconvenience to the landowner. Although our law tries to reconcile, as far as possible, these competing rights, a situation may arise where the conflict of the rights is insoluble. For instance, when the landowner and the mining right holder are unable to enjoy their respective rights without clashing interests, there is no room for the simultaneous exercise of the rights of both parties.

Accordingly, the purpose of the different requirements relating to notification and consultation, as underscored by the MPRDA, is to determine whether the holder of the mining right can be accommodated if the mining activities interfere with the landowner's right to use the property concerned. In Makedu and Others v Itelelekg Raikgatla Mineral Resources Proprietary Limited and Another (Makedu), the members of the Lesetlheng village community and holders of informal land rights under the Interim Protection of Informal Land Rights Act (31 of 1996) (IPILRA), cited as the Applicants, contended that they are true owners of the Farm Wilgespruit 2 J.Q. in the North West Province (farm), and that in terms of the law Itelelekg Raikgatla Mineral Resources Proprietary Limited and Pilansberg Platinum Mines Proprietary Limited, cited as the Respondents, were required not only to notify them of their application for a mining right but also to adhere to the consultation process in relation to such an application. In contrast, the Respondents argued that upon the award of the mining right, the Applicants' informal land rights were terminated in accordance with s2 of the IPILRA. Accordingly, the Applicants' occupation of the farm was unlawful. The Respondents argued that s54, which is aimed at striking a balance between the surface rights of the landowner and the rights of the mining right holder, only applies where the occupation is lawful but as the applicants were occupying the farm unlawfully, they were under no obligation to comply with the provisions of s54 of the MPRDA before approaching a court.

Mindful of a past characterised by a legacy of land dispossession, insecure land tenure, historically contested customary ownership of land and racially discriminatory laws and practices, the Constitutional Court emphasised that the Constitution places a premium on the absolute need to redress the social injustices of the past and entitles any person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws, to a tenure which is legally secure or to comparable redress. The purpose of the IPILRA (as is evident from its preamble) is to provide secure tenure to historically disadvantaged communities and to protect people from being deprived of an informal right to land, and to ensure that communities have a right to decide what should happen to the land in which such communities have an interest.

The implication of the Makedu judgment is that the MPRDA cannot be read in dissonance with the applicability or requirements of other statutes such as the IPILRA that have an impact on mining activities. It follows that the granting of a mining right does not nullify the occupational rights of informal rights holders under the IPILRA and resultantly, absolve the mining right holders from taking all reasonable steps to exhaust the s54 process before approaching a court. In fact, holders of informal rights under the IPILRA cannot be deprived of their rights without either consent or expropriation. Accordingly, the holder of a mining right will not be entitled to commence mining activities on the land in question before exhausting the process set out in s54, which includes paying compensation to the lawful occupier - such as the holder of informal rights to land.

Mukhovha is an Associate, Corporate/M&A Practice, Baker McKenzie (South Africa).
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COMMUNITIES TO HAVE FINAL SAY ON MINING?

PIETER SMIT

Land remains one of the most important, and emotional, political and economic issues in South Africa. In a country where mining constitutes one of the largest contributors to the economy, it is unavoidable that the mining sector will be a key participant in the larger debate regarding land. Unfortunately, the mining sector was also historically associated with some of the worst effects of racially discriminatory practices, including the creation of homelands which deprived black South Africans of economically productive land, and migrant labour that destabilised traditional social structures. In addition, some of the most valuable mineral resources occur in areas constituting communal land. In many cases, this communal land is ecologically sensitive and its inhabitants rely heavily on the capacity of the land to sustain human life, agriculture and livestock farming. Unsurprisingly, the inherent tensions between communities, whose land rights were historically precarious at best, and those who seek to use the land for financial gain, will therefore play out directly in the mining sector.

The recent judgment of the Pretoria High Court in Baleni and Others v Minister of Mineral Resources and Others [2018] ZAGPPHC 829, is a potential game-changer in the contest between indigenous communities and mining houses seeking to mine their land. It could also have profound implications for the validity of a large number of rights granted over communal land since the inception of the Mineral and Petroleum Resources Development Act (28 of 2002) (MPRDA) in May 2004.

In Baleni, the court considered whether the Minister of Mineral Resources has the power to grant a mining right over communal land without the prior consent of the community. The question arose in the context of the vociferous opposition of the Xolobeni Community against the mining of sand dunes in their communal lands on the Wild Coast.

The court considered the interplay between the MPRDA, which does not ordinarily require consent of a landowner or occupier before a mining right may be granted, and s2 of the Interim Protection of Informal Land Rights Act (31 of 1996) (IPILRA). Section 2(1) provides:

“Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.”

The applicants (members of the Xolobeni Community) are the holders of informal rights to land as defined in IPILRA, and are entitled to the protection afforded under s2(1) of IPILRA.

Ruling in favour of the community, the court reasoned (broadly speaking):

- The grant of a mining right over communal land constitutes a deprivation of informal land rights within the meaning of IPILRA and the Constitution, 1996;
- The MPRDA does not provide for expropriation of rights in land within the meaning of s2(a) of IPILRA, (based on the reasoning of the Constitutional Court in Agri SA v Minister for Minerals and Energy 2013 (4) SA 1 (CC)). As such, the MPRDA does not constitute an exception to the requirement that holders of informal land rights must consent to the deprivation of their rights;
- The provision of the MPRDA that landowners and lawful occupiers must be “consulted” prior to the grant of a mining right, as opposed to requiring their consent, does not detract from the requirements under IPILRA and the two statutes should be read in harmony with each other;
- If IPILRA thereby creates a special category of land rights which enjoy heightened protection against an adverse grant of mining rights (as op-
posed to the formal land rights of common law owners), the departure from formal land rights is reasonable and justifiable in the context of the constitutional imperative to undo the racially discriminatory laws of the past and to afford holders of informal rights to land the fullest possible protection;

- It follows that, prior to the grant of a mining right by the Minister of Mineral Resources, the consent of the community members must be obtained in terms of s2(1) of IPILRA, over and above the consultation requirements under the MPRDA; and

- Based on international law principles, the community’s prior consent must be free and informed.

In short, therefore, the Pretoria High Court found that a community’s prior, free and informed consent is required before the Minister of Mineral Resources may grant a mining right over the community’s land.

The judgment in Baleni builds on the Constitutional Court’s judgment in Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another [2018] ZACC 41, which was delivered on 25 October 2018. This judgment was the first in South Africa to recognise the full force and applicability of IPILRA in the context of mining rights granted under the MPRDA. In Maledu, the crisp legal issue was whether a mining right holder was entitled to evict community members who refused to vacate the land to make way for mining activities. In that case, the court found that IPILRA served to protect their land tenure in those circumstances, and that the mining right holder was obliged first to exhaust its remedies under s54 of the MPRDA before it could legally evict community members in order to enforce its mining right.

Section 54 of the MPRDA envisages a negotiation process, as directed by the Regional Manager of the Department of Mineral Resources, failing which compensation payable to the landowner or lawful occupier must be determined by arbitration or by a competent court. In appropriate circumstances, this process might also require expropriation of the land in question in terms of s55, read with s54(5) of the MPRDA.

Whereas Maledu recognised IPILRA as a “shield” which community members might invoke to protect themselves against eviction by a mining right holder proposing to operate without their consent, Baleni goes one step further and elevates this consent to a jurisdictional fact for the grant of a mining right under the MPRDA. The implication of this finding is that any mining right granted in terms of s23 of the MPRDA over communal land, without the prior free and informed consent of the community, could be unlawful and liable to judicial review.

There are a number of issues that the court did not fully consider in Baleni. These include, among others:

- The procedures that the Minister of Mineral Resources, and/or an applicant for a mining right, would need to follow to seek community consent;

- The extent to which each individual community member must consent, or whether they can be bound by the conduct of community representatives and traditional leaders;

- The impacts of sub-sections (2), (3) and (4) of s2 of IPILRA, which provides for majority-sanctioned deprivation of land rights held on a communal basis;

- When informal land rights can be said to be held on a communal basis;

- Under what circumstances a majority of community members could deprive individual community members of communal land; and

- The differences, if any, between holders of mining rights granted afresh under the dispensation introduced by the MPRDA, and the position of holders who derived their mining rights from old order prospecting rights and mineral rights created prior to the enactment of IPILRA.

The ruling in Baleni is far-reaching, especially insofar as it might have implications for the validity of hundreds of mining rights granted over communal land in the past 15 years. Some of the issues which were considered conclusive in Baleni, such as the contention that the grant of a mining right under the MPRDA does not constitute expropriation of rights in land, and/or the justification for the creation of a special class of land rights, are not necessarily unassailable.

Although the Constitutional Court has already displayed a great degree of sympathy for the situation of informal land right holders (for example in Maledu), it remains possible to distinguish between these two cases. Before the Constitutional Court finally rules on the specific issues on which the Baleni judgment is based, there remains some uncertainty as to the status of mining rights granted without community consent. One can only hope that, whatever the ultimate outcome of these issues will be, it will strike an appropriate balance between the rights of informal land right holders and the need for investment and economic growth.

In the meantime, existing mining right holders and applicants for rights should consider very carefully how to mitigate their risks and to ensure that they have the free, prior and informed consent of the informal land right holders who are impacted by their mining project.

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HOLDERS OF INFORMAL LAND RIGHTS HAVE THE RIGHT TO SAY NO TO MINING

On 22 November 2018 the North Gauteng High Court, Pretoria, in the matter of Baleni and Others v Minister of Mineral Resources and Others (73768/2016) [2018] ZAGPHC 829 (22 November 2018) (Baleni judgment) delivered a judgment which has far-reaching ramifications for the mining industry, including policies of the South African government. For many years, the practice has been that the mining laws of the country require mining companies to “consult” affected communities – but do not require explicit consent from landowners or communities to mine.

The high court found that in terms of the provisions of the Interim Protection of Informal Land Rights Act (31 of 1996) (IPILRA), the Minister of Mineral Resources was obliged to obtain the full and informed consent of the applicants and the uMgungundlovu Community, as holders of informal rights in land, prior to granting any mining right in terms of s23, read with s22 of the Mineral and Petroleum Resources Development Act (28 of 2002) (MPRDA).

For all practical purposes, the Baleni judgment means that the consent of communities with informal rights to land must be obtained before mining can occur.

This judgment set a precedent that customary rights to land are afforded greater protection than common law rights to land and that consent (not consultation) is required from communities with informal rights to land – the MPRDA does not trump customary rights, only common law rights.

The incumbent Minister, Gwede Mantashe, has expressed concern over the Baleni judgment and has confirmed that he will appeal some of its aspects, particularly those elements concerning the authority to issue mining licences and the status of the MPRDA.

The purpose of this article is to provide a brief outline of the range of issues raised in the Baleni judgment and to evaluate the significance of the precedent set and the impact that it is likely to have on the South African mining industry.

Context
South Africa is rich in minerals and the MPRDA is designed to ensure that all South Africans benefit from the mineral wealth of the country. The MPRDA came into effect on 1 May 2004 and was enacted to facilitate equitable access to and sustainable development of the nation’s mineral and petroleum resources. It presented a fundamental departure from South Africa’s past mining policy and legislation. It placed the state as custodian of the nation’s mineral resources for the benefit of all South Africans and, acting through the Minister, it may grant rights to applicants to mine.

The majority of mining operations in South Africa are undertaken on communal land occupied by communities located within the former Bantustans. These communities’ tenure rights are insecure.

Recently, numerous communities have been resisting mining operations on their land. In June 2016, representatives of mining affected communities from seven provinces, together with community organisations, signed and adopted the first ever Peoples Mining Charter (Mining Weekly, 2016). The adoption of the Peoples Mining Charter follows the Berea Declaration, adopted in March 2015, by various mining affected communities and civil society organisations.

The Berea Declaration and the Peoples Mining Charter call for the international principle of Free Prior and Informed Consent (FPIC) to be adopted into South African mining legislation. The Peoples Mining Charter serves as a political programme around which mining affected communities will self-mobilise and engage mining companies and the state.

The Peoples Mining Charter further affirms:
(i) communities will refuse to give consent to any company that does not have a transparent community driven process of negotiation which has, at its core, the principles of FPIC; and
(ii) that it must be the directly impacted
affected local communities, who have the greatest weight in determining whether extractives happen on their land, not only outside interests - “communities must have a right to say no to mining.”

Mining affected communities and civil society organisations have called on government to consider the set of minimum requirements for mining legislation in South Africa, laid down in the Berea Declaration and the Peoples Mining Charter.

Government and mining companies, on the other hand, have for years argued that the MPRDA, as it stands, supersedes the limited protection afforded by IPILRA to communities and allows the state to authorise mining - with minimal recognition of customary rights of communities. The Baleni judgment is accordingly seen by some (particularly communities and civil society organisations) as providing welcome clarity on the issue of whether the MPRDA prevails over IPILRA and whether the consent (and not just consultation) of communities is required prior to the grant of a mining right. The judgment is seen by others as a decision which may cripple the mining industry by making it difficult for South Africa to compete for investment in new mining projects.

The Baleni Judgment

Facts

On the Wild Coast there is an area called uMgungundlovu. It is an area of immense natural beauty. The sands of uMgungundlovu are rich in titanium. Several hundred people (the Applicants) and their ancestors have lived there according to their customs and traditions for centuries.

The uMgungundlovu community holds informal rights to land as defined in the Interim Protection of Informal Land Rights Act, 31 of 1996 (IPILRA) and occupy the land in terms of their customs and customary law.

On 3 March 2015, Transworld Energy and Mineral Resources (SA) (Pty) Ltd (TEM), an Australian mining company, applied for a right to conduct open cast mining activities over a coastal stretch of land some 22 kilometres long and 1.5 kilometres wide.

The uMgungundlovu community holds informal rights to land as defined in the Interim Protection of Informal Land Rights Act, 31 of 1996 (IPILRA) and occupy the land in terms of their customs and customary law.

In terms of s49(1) of the MPRDA, there is presently a moratorium imposed by the Minister on TEM’s application and the lodging of any further prospecting or mining applications in the area. The moratorium remains in place for 18 months or until the Minister is satisfied that the community conflict and unrest have been resolved.

The Applicants do not want TEM to mine on their ancestral land. Apart from the fact that several hundred people live within or near the proposed mining area, the land is an important resource and central to the livelihoods and subsistence of the Applicants. They use it for grazing, for cultivating their crops, depending on it for water, and for building materials, firewood, edible and medicinal fruits and plants, fish and shellfish. Members of the community also rely on tourism and tourist-related activities. However, the prospect of mining on the land has sterilised all alternative development and investment in the community since the mid-2000s.

The community of uMgungundlovu opposes the proposed mining on the basis that they fear the disastrous social, economic, and ecological consequences of mining. Consequently, the Applicants brought the application seeking amongst others, the following declaratory relief:

- an order that their consent is required in terms of IPILRA before the Minister grants a mining right in terms of s23, read with s22 of the MPRDA, over land anywhere in the Republic of South Africa owned or occupied under a right to land in terms of any tribal, customary or indigenous law or practice of a tribe, as defined by the IPILRA, unless the provisions of IPILRA have been complied with;
- an order that any decision to grant a mining right would constitute a deprivation of rights (including informal rights) in land as provided for in s2 of the IPILRA;
- an order that the Minister cannot deprive the Applicants of any of their rights in land without complying with the living customary law of the uMgungundlovu Community and the amaMpondo People, which is protected by s211 and s212 of the Constitution.

Issues

The central issue that concerned the high court was whether the Applicants’ consent is required in terms of IPILRA before the Minister grants a mining right in terms of s23, read with s22 of the MPRDA.

The Applicants argued that no-one should be able to take their land without their and the community’s consent, which must be obtained in accordance with the provisions of IPILRA. They argued further that in terms of the provisions of the IPILRA, the Minister must seek their consent before granting a mining right over their land - that they have the right to say no to mining.

What is more, they argued that international law recognises that indigenous people have the right to free, prior and informed consent over their land.

The Minister opposed this argument and argued that the MPRDA only requires that a land owner be consulted about the impact of the mining prior to the granting of a mining right. Consultation does not give the land owner the right to say no. It merely entitles the land owner to be notified of the planned mining and to raise objections. The Minister further argued that IPILRA cannot be used to stop mining because the MPRDA does not give land owners the right to refuse mining.

Ruling

The high court noted that it is accepted that mining activities form a crucial cornerstone of our national economy and that the MPRDA is a radical departure from the past dispensation in terms of which the common law owner of land owned everything above and below the land - including minerals.

It further noted that the Applicants’ tenure, like many other communities across the country, was made insecure by apartheid laws and exclusionary treatment of customary land rights and failure to recognise customary title, and that with the advent of the new constitutional order, the IPILRA was
adopted to protect those who previously held insecure tenure.

Section 1 of IPILRA defines a “community” as “any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group”. The high court held that the uMgungundlovu Community is such a community and that it is also regarded as such in terms of the MPRDA.

Section 2 of the IPILRA provides that:

“(1) subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.

(2) Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community.”

Section 2(4) of IPILRA provides that the custom and usage of a community is deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering the disposal, of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.

The high court held that in keeping with the purpose of IPILRA to protect the informal rights of customary communities previously not protected by the law, the Applicants have the right to decide what happens with their land. As such, they may not be deprived of their land without their consent. Where the land is held on a communal basis - as in this matter - the community must be placed in a position to consider the proposed deprivation and, in terms of their custom and community, be allowed to take a communal decision on whether or not they consent to a proposal to dispose of their rights to their land.

Moreover, having accepted that granting a mineral right constitutes a deprivation, the high court found that the consent requirement provided for in s2(1) of IPILRA for such deprivation appears to have been triggered.

The high court considered the provisions of s4 of the MPRDA. Section 4(1) of the MPRDA provides that when interpreting a provision of the MPRDA, any reasonable interpretation which is consistent with the objects of the MPRDA must be preferred over any other interpretation which is inconsistent.

The court pointed out that s4(2) specifically provides that where the common law is inconsistent with the MPRDA, the MPRDA prevails and, accordingly, that the MPRDA does not purport to prevail over other statutes nor over customary law. It further pointed out that customary law enjoys equal constitutional status to common law, but the MPRDA does not contain a similar provision in respect of customary law. Therefore, the MPRDA does not specifically subject customary law to its provisions in the event of inconsistency (or conflict) with the MPRDA.

In deciding the matter, the high court emphasised that customary law has a special place under the Constitution because of the historical discrimination against indigenous forms of law in South Africa.

In the circumstances, the high court:

- rejected the argument of the Minister and TEM that the MPRDA trumps IPILRA;
- held that the MPRDA and IPILRA must be read together, which means that the Minister must seek the consent of the affected informal land rights holders before granting a mining right; and
- found that granting special protection to communities by requiring consent as opposed to mere consultation is in accordance with international law.

Implications of the Baleni judgment

Minister lacks authority to grant mineral rights

The implications of the Baleni judgment are profound for South Africa’s mining industry. In terms of the judgment, the Minister lacks the authority to grant a mining right in terms of the MPRDA in relation to land where a person/community holds an informal right to that land, unless the provisions of the IPILRA have been complied with.

The Baleni judgment does not deal with the requirements of how the “full and informed consent” of the holders of informal right to land is to be obtained. IPILRA stipulates that where land is held on a communal basis, a person (community) may be deprived of such land or right in land in accordance with the custom and usage of that community - the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by the requisite majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate. For some communities, the requisite majority may be a higher threshold than the ordinary simple majority, depending on the practice of the relevant community in respect of deprivation of land.

The MPRDA requires consultation at both the stage of applying for a prospecting right and when applying for a mining right. What the judgment has not clarified is whether holders of informal rights to land have the right to say no to prospecting on their land. Further, if consent is granted at the prospecting stage, can it be refused at the mining stage?

Moreover, can the consent be withdrawn if the holder of an informal right is of the view that the mining company has broken any laws or if the prospecting or mining is substantially interfering with the use of the land? If consent is granted, do holders of informal rights to land have the right to put reasonable conditions on the entry and use of the land?

It must be emphasised that with the advent of democracy, the structure of mineral rights in South Africa was designed to prevent private landowners from blocking mining development that has the potential to benefit the country as a whole. The MPRDA accordingly eliminated private ownership of mineral rights and vested ownership of minerals and petroleum in the people of South Africa under the custodianship of the state.

Section 3 of the MPRDA makes it clear that mineral and petroleum resources are the common heritage of all the people of South Africa and the state is the custodian. The state thus gains control over rights to minerals in an effort to redress past discrimination. The MPRDA achieves its transformation objectives by extinguishing private mineral rights, establishing the state as custodian of all mineral and petroleum resources and creating a system where the state receives public law powers to grant prospecting and mining rights.

In view of the Baleni judgment, the high court has, to an extent, effectively...
created a veto that can be used by communities with informal rights in respect of mining or prospecting right applications.

Taking into account that the majority of new and expanding mining projects in the country are located on land occupied by communities with informal rights to land, it must be considered whether the precedent set by the Baleni judgment will lead to the potential reinstating of the right to stabilise the extraction of the national mineral resources. To a certain extent the judgment does resurrect the old mineral regime by reviving the extinguished right of consent by landowners (albeit in this case consent of the holders of informal rights to land) and giving them the ability to say no to mining on their land.

Incorporation of the free, prior, informed consent model

As already highlighted, the high court found the requirement of consent as opposed to mere consultation is in accordance with international law - multiple international instruments require that communities such as the Applicants have the right to grant or refuse their free, prior and informed consent to any mining development that will significantly affect them. Consequently, the Baleni judgment has imported the international concept of free, prior and informed consent into South African mining law.

According to Greenspan, 2014, FPIC is embedded within the universal right to self-determination, which is a fundamental principle of international law. The basic principle of FPIC is to allow communities to give or withhold consent to a development that may affect them or their land.

In the context of mining, FPIC can be defined as consent from mining affected communities obtained in a manner that is free from coercion; that is obtained prior to granting of the mineral right and through the affected community’s customary laws; and that such consent is informed through a process of participation and consultation based on full disclosure of all aspects of the proposed mining project (Laughlin et al, 2013).

FPIC is enshrined in a number of international instruments. The most significant instruments are the Convention concerning Indigenous and Tribal Peoples in Independent Countries, 169/1989 (the ILO Convention) and the United Nations Declarations on the Rights of Indigenous Peoples (UNDRIP). FPIC is also recognised in progressive international jurisprudence. The ILO Convention is an international treaty legally binding on states that have ratified it. The ILO Convention prohibits the removal and/or relocation of indigenous and tribal populations from their territories without their free and informed consent. Where their consent cannot be obtained, relocation will take place only following appropriate procedures established by national laws and regulations, including public inquiries where necessary, which provide
the opportunity for effective representation of the peoples concerned.

South Africa has never ratified the ILO Convention. Only one African country, the Central African Republic, has done so.

The UNDRIP is a declaration adopted by the General Assembly of the United Nations. Declarations are not subject to ratification and do not have legally binding status. UNDRIP reflects the collective views of the United Nations which, in good faith, must be taken into account by all members. It reaffirms the importance of the principles provided for under the ILO Convention. South Africa is one of 144 states that voted in favour of the adoption of the UNDRIP.

International best practice increasingly points to the notion of FPIC, where communities affected by mining projects have the right to say “yes” or “no” to proposed development projects. It is within the context of FPIC that communities across the world have successfully campaigned for legal mechanisms to protect their lands from resource extraction projects.

FPIC is emerging more broadly as a principle of best practice for sustainable development, used to reduce social conflict and increase the legitimacy of the project in the eyes of all stakeholders and rights holders.

The Baleni judgment has signaled a change in South Africa’s mining legal regime and has given full recognition to customary law land ownership and customary rights.

One argument against the right to FPIC is that it undermines state sovereignty over mineral resources.

The validity of existing mining rights

The Baleni judgment is likely to also have major implications where mining is already taking place on land occupied by holders of informal rights to land, and in circumstances where the mining rights were granted without the “full and informed” consent of such holders. This may result is such mining rights being legally precarious and subject to legal review proceedings.

However, it must be kept in mind that the decision to grant mineral rights remains valid and lawful until set aside by a court.

Who is a holder of informal rights to land under IPILRA?

It must be emphasised that to benefit from the consent requirement under IPILRA one must be a holder of an informal right to land under the IPILRA.

In terms of s1 of IPILRA the term “informal right to land” means –

(a) the use of, occupation of, or access to land in terms of –

(i) any tribal, customary or indigenous law or practice of a tribe;

(ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in –

(aa) the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936);

(bb) the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution Act, 1971 (Act No. 21 of 1971); or

(cc) the governments of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei;

(b) the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or ap-

pointed by or under an Act of Parliament or the holder of a public office;

(c) beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997;

(d) the use or occupation by any person of an erf as if he or she is, in respect of that erf, the holder of a right mentioned in Schedule 1 or 2 of the Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991), although he or she is not formally recorded in a register of land rights as the holder of the right in question, but does not include -

(e) any right or interest of a tenant, labour tenant, sharecropper or employee if such right or interest is purely of a contractual nature; and

(f) any right or interest based purely on temporary permission granted by the owner or lawful occupier of the land in question, on the basis that such permission may at any time be withdrawn by such owner or lawful occupier.”

Section 1(2)(a) provides that IPILRA shall not confer on the holder of a real right to land, any additional rights to those which he or she holds in that land.

The concept of informal right to land means, inter alia, the use of, occupation of, or access to land in terms of any tribal, customary or indigenous law or practice.

Does IPILRA provide an absolute right to prevent mining?

It should be noted that IPILRA does not grant communities with informal right to land an absolute right to prevent mining or any other development from occurring on their land. The right to consent to a development on their land is subject to the Expropriation Act (63 of 1975) or any law relating to expropriation of land or rights in land.

In this regard s55 of the MPRDA, in accordance with s25(2) and (3) of the Constitution, empowers the Minister to expropriate any land or any right therein and to pay compensation in respect thereof, if it is necessary for the achievement of certain objects of the MPRDA.

Thus, even if a community with informal right to land refuses to grant consent in terms of IPILRA, it can still be expropriated by the Minister, if this will advance certain objects of the MPRDA.

Since the Minister confirmed that he will appeal certain aspects of the Baleni judgment – uncertainty remains whether the state is truly the custodian of the nation’s mineral resources for the benefit of all South Africans.

It is encouraging to note that government has committed itself to bringing about policy and legal certainty in the mining sector to strengthen and enhance the country’s competitiveness, to create a climate conducive to investment and thereby attract local and foreign investment.

It is clear that whatever the outcome of the appeal, policy and regulatory certainty in South Africa’s mining industry is required. The right of communities to consent to mining has become an increasingly contentious issue. Regardless of the outcome of the appeal, it may be necessary to effect legislative amendments to bring about legal certainty around this contentious issue.

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“BLACK GOLD” REMAINS CRITICAL TO SOUTH AFRICA’S ENERGY MIX

WARREN BEECH

Mineral Resources Minister, Gwede Mantashe, has, once again, publicly defended the role of coal in South Africa’s energy mix. He has also brought into stark reality the costs of producing electricity from nuclear, coal, and renewable energy. Minister Mantashe has highlighted that Eskom generates electricity at its Koeberg Nuclear Plant for approximately R0.40 per unit, for approximately R0.80 a unit at the coal-fired power plants but that it was purchasing renewable energy from independent power producers at approximately R2.20 a unit.

While renewable energy is critical to a sustainable future, coal-fired power stations are here for the foreseeable future.

One of the things that struck me on a recent business trip to Europe was the significant increase in the number of electric vehicles on the roads since my last trip. In one of the cities, almost every taxi was an electric vehicle, and I took the opportunity to engage with the drivers on their views in relation to electric vehicles. There seemed to be a strong sense of pride that electric vehicles were being used and, almost exclusively. The reasons given for the use of electric vehicles were environmental considerations and changing regulations in Europe.

The dynamic of the conversation did, however, change when I posed the question regarding the source of the electricity for charging the electric vehicles, and while I should not generalise, for the purposes of this article, it certainly seemed that there is a disconnect between perceptions of the benefits associated with the use of electric vehicles, and what it takes to charge those vehicles. This disconnect is probably even more significant in South Africa with its strong dependence on coal-fired generation of electricity. While South Africa’s renewable energy programmes are limping along, South Africans will, in my view, continue to rely on electricity generated from coal-fired power stations for the foreseeable future.

Both thermal coal and coking coal have played a significant role in the first, second and third industrial revolutions. In the first industrial revolution, water and steam power replaced human and animal power, while in the second industrial revolution, electricity, the internal combustion engine, aeroplanes, telephony, vehicles, radio and mass production featured. In the third industrial revolution, automation was the key defining feature based on electronics, the establishment of the internet, and the use of IT solutions to further enhance mass production through automation.

South Africa’s mining industry, including the coal mining industry, has often been at the forefront of innovation, with numerous domestic inventions providing global solutions. More recently, the South African mining industry has focused on automation, with digitisation playing a key role in automation of several exploration and extractive systems.
There have been a number of drivers which have forced the South African mining industry to focus on mechanisation in the interim, and ultimately, on automation. These drivers include the high costs associated with mining operations. While there have been significant increases in the costs of employment, which has been on an expected trajectory, relatively recent costing of the risk associated with policy and regulatory uncertainty is playing a more substantial role in high mining costs. These factors are making inevitable the shift from digitisation, the primary feature of the third industrial revolution, to systems based on a combination of connected technologies. This shift to the connectivity and combination of technologies is the key feature of the fourth industrial revolution, and it is essential for the South African coal mining industry to fully appreciate the changing environment, and to innovate, as part of the cycle of continuous improvement.

While there is still extensive debate on what the fourth industrial revolution means, and the consequences of block chain payment platforms, innovation is likely to be substantially based on the Internet of Things (IoT). With the historical focus (third industrial revolution) on information technology and digitisation around people and IT processes communicating, the IoT focuses on equipment and machines communicating with one another on a continuous, real-time basis. This concept is unlikely to be new to South African's mining industry, including the coal mining industry, which has focused on real-time monitoring of machines and equipment for production purposes for some time. However, what will be a major disruptor, in future, is the scale of the connectivity and levels of communication between equipment and machines. There is also likely to be a shift, particularly in relation to original equipment manufacturers, from only providing machines, to providing a fully managed solution to the mining industry. Equipment and machines that are supplied by original equipment manufacturers as products will form part of a network, allowing not only real-time monitoring but also management and adjustment to optimise production levels.

The IoT is also likely to have a significant impact on one of the most important elements, namely healthy and safe production. The ability to monitor, manage, and identify what has gone wrong is likely to improve health and safety at South African mines.

While there is likely to be robust debate on the fourth industrial revolution and the IoT, including fears that society will be roboticised, IoT will, in my view, be the single most significant disruptor of the South African coal mining industry in the foreseeable future, and the reality is that several of the supporting platforms are already in place. These include cloud-based storage and analytics, low-energy wide area networks, and 5-G cellular.

With the advantages of IoT, there are, of course, a number of challenges including the vast amount of data that will be produced, which will need careful management, not only in relation to its efficient use but also in terms of compliance with legal requirements on privacy and data storage protection. Perhaps, however, one of the most significant impacts and challenges could be on employees. The South African mining industry is again facing large scale dismissals and perhaps fears of the IoT and its consequences may be justified. Importantly, the opportunities created by the IoT are widespread, with a strong emphasis on a strong skills base. In this context, the mining industry would need to review its training programmes and its skills investment carefully.

It certainly seems that the coal mining industry, at least in South Africa, is here to stay, and that it will be significantly disrupted by the fourth industrial revolution and the IoT.

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LOAD SHEDDING OVER 10 YEARS: ESKOM, THE ECONOMY AND THE FISCAL CRISIS

HAPPY MASONDO

Economy out of recession but still in the dark

On Tuesday, 4 December 2018, Statistics South Africa released data indicating that "farms and factories dragged South Africa out of its first recession in almost a decade ... as the economy grew by more than expected in the third quarter of 2018." The data would have given South Africans reason to celebrate under any other circumstances but a few days before its release, Eskom Holdings, the electricity utility, had released its own salvo of data about Stage 2 load shedding. In this author’s view, "load shedding" is a euphemism used by Eskom to force the public to keep the lights off and for the public and private sectors to refrain from using Eskom’s only product - electricity.

According to Eskom, load shedding is a measure of last resort to prevent a country-wide collapse of the power system. When there is insufficient power station capacity to supply the demand or load from all the customers, the electricity system becomes unbalanced, which can cause it to trip out country-wide. The result? A complete blackout which could take days to restore.

Eskom would like the public to believe that it "normally takes a sequence of steps to keep the system stable and to avoid load shedding, the steps include first asking large customers to reduce load voluntarily" (www.loadscheduling.co.za). However, since 29 November 2018 the experience of the South African public, including the large users of electricity, businesses and individual households has been that Eskom tends to skip those steps and goes straight to load shedding.

On the fifth consecutive day of Stage 2 load shedding during December 2018, Business Unity South Africa (Busa) issued a warning that Eskom’s de-
cision to reinstate load shedding would have a negative knock-on effect on the industry. Busa's Martin Kingston said:

“The industry at this stage is in a very difficult economic environment and needs to rely on predictable and reliable power supply, so curtailing that, was going to have a major negative impact on our ability to ensure that business can thrive and prosper.” (Mortlock Monique, “Business Unity SA: Load Shedding will negatively affect Industry, EWN Online, 4 December 2018”).

December 2018 was littered with sentiments along a similar vein as the country battled to understand the new spectre of load shedding, reminiscent of over a decade ago when South Africans were first introduced to rolling blackouts. During the period of load shedding in December 2007 and January 2008, South Africans came to understand that the rolling blackouts were as a result of a lack of capacity of the then aging power stations infrastructure. Over a decade later, it is load shedding déjà vu. This time around, however, it is Eskom’s failure and/or neglect of the upkeep of the aging power stations which plunged us into darkness.

**Crucial maintenance repeatedly put off**

At the end of November 2018 and every day at the beginning of December 2018, Eskom’s public announcements were that there would be continued power outages due to inadequate energy availability, arising from an aging fleet of coal fired power stations with limited maintenance. It would appear that at this time, every single one of South Africa’s 12 largest and most important power stations broke down. This resulted in 17 371MW or 38% of Eskom’s total generating capacity being offline.

The breakdown of all the largest power stations was a result of Eskom’s maintenance backlogs. From Eskom’s public announcements, we are given to understand that it has failed to invest adequately in the maintenance of its plants resulting in unpredictable breakdowns of these power stations.

Throughout the rolling blackouts in the latter part of 2018, the pronouncements by Eskom to the effect that the Utility expected to launch its turnaround strategy in 2019, were intended to assuage the South African public. These platitudes, however, were and are of no solace at all to the public - the daily rolling blackouts are predicted to persist unabated for several months given the continued use of and reliance on decrepit coal-fired power stations. The ultimate effect of these utterances was to dim the nascent optimism brought about by the announcement that the South African economy had exited the recession in the third quarter of 2018.

**Eskom’s new build programme**

The South African public was lulled into a false sense of security - believing that the aging infrastructure and limited capacity would be ameliorated by Eskom’s new build programme, in particular, the 4764MW Medupi and 4800MW Kusile coal-fired power stations. But, over a decade later, South Africans are informed by the Minister of Public Enterprises, Pravin Gordhan, that “original equipment manufacturers …, had done shoddy work on both the Kusile and Medupi power stations.” (Skiti Sabelo, “Gupta Looters Leave SA in the Dark,” Mail and Guardian, 7 to 13 December 2018, p4)
The “shoddy workmanship” at Kusile and Medupi power stations is said to have contributed to the sudden onset of load shedding in December 2018. As a consequence, senior engineers at Eskom informed City Press (Schoeman, Aldi and van Rensburg, Dewald – “Inside the Eskom Crisis Why the lights keep on going out”, city press.news24.com - 10 December 2018) that Eskom was in the process of instituting a major court battle against the original equipment manufacturers arising from design flaws that affected the full capacity output of the newly built Medupi and Kusile.

It has since transpired that at the onset of load-shedding in December 2018, and contrary to expectations that the newly built power stations would bridge the gap of the ailing old power stations, Medupi’s three operational units either shut down entirely or lost part of their output. And, far from the Medupi and Kusile new build coal -fired power stations being a panacea for all load shedding ills, it is reported that:

“Eskom has begun to admit that both Medupi and Kusile are riddled with fundamental problems that will deny the country the full benefit of their stated capacity of (approximately) 4800MW each when completed.” (Schoeman, Aldi and van Rensburg, Dewald – “Inside the Eskom Crisis Why the lights keep on going out”, city press.news24.com - 10 December 2018)

While Eskom lays the blame at the door of its original equipment manufacturers, the South African public simply wants to know whether and if the lights will be kept on for the foreseeable future.

**Eskom’s financial constraints**

Eskom faces significant financial constraints. Its total debt is estimated at R419 billion, which it has found difficult to service. Given that it does not have the capacity to produce the power, Eskom is not in a position to sell enough electricity to cover its costs.

In the editorial of the Financial Mail of the week of 6–12 December 2018, Eskom was described as follows:

“Eskom, as usual remains an albatross around SA’s neck. The resumption of load shedding is, not to put too fine a point on it, an absolute disaster, and will surely constrain growth.” (Rose Rob, “Growth: Is this the Turning Point?” Financial Mail 6-12 December 2018).

During December 2018 Eskom anticipated “a loss of more than R11.2 billion in the 12 months through March.” (Cohen Michael and Burkhardt Pauls, “How Power Utility Eskom is Hobbling South Africa’s Economy”, Bloomberg L.P, 5 December 2018).

There were further reports that Eskom was intent on proposing that government absorb R100 billion of the R419 billion Eskom debt as part of the rescue plan for the state-owned utility, although Eskom would not “comment further on the turnaround plan” (Bowker John and Vecchiatta Paul, “Eskom reportedly wants state to absorb R100bn debt,” www.moneyweb.co.za - 5 December 2018) until all “stakeholders” had been consulted.

In terms of s2 of the Local Government: Municipal Systems Act (32 of 2000), electricity is supposed to be distributed in large measure by munici-

**The five year turn-around plan**

Eskom, as the only holder of a licence for the generation and transmission of electricity, exercises a licensed monopoly over the supply of electricity in South Africa, and currently generates and transmits electricity in South Africa. However, if remarks made during December 2018 by the Minister are anything to go by, the status of Eskom as we know it is about to change. It would appear that the Eskom turn-around plan contemplates, amongst others:

- “a restructuring of the organisation, whereby there would be an initial functional separation of the generation, transmission and distribution components of the business, ahead of a possible legal separation at a later stage.” (Creamer Terence, “Treasonous tweets won’t help Eskom out of current crisis,” Creamer Media’s Engineering News, 6 December 2018).

The prospect of some form of restructuring of Eskom, including the establishment of a single buyer office, was first mooted almost a decade ago, at the time of the publication of the Independent System and Market Operator Establishment Bill, General Notice (290 of 2011), Government Gazette No. 34289, 13 May 2011. Could it be that this is the turn-around plan which will take South Africans out of the load-shedding misery? Hope springs eternal.

**Masondo is a Partner with Werksmans.**

In his State of the Nation address in February, President Ramaphosa is expected to announce measures to prevent Eskom from failing – Ed.

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1 Reuters; "South Africa emerges from recession as farming, manufacturing jump"; Creamer Media’s Engineering News, 4 December 2018.
RESOLVING SOUTH AFRICA’S ELECTRICITY CRISIS

HUGH LANE

The recurrence of “rolling blackouts” towards the end of last year coupled with Eskom’s warning that this is likely to continue for a considerable time, its present precarious financial position and continued quest for significantly increased electricity charges, has highlighted the electricity crisis we are in. Alarmed South Africans are wondering what can be done and what is being done (and not being done) to alleviate this calamity.

Government is presently deciding South Africa’s long-term electricity policy. This will be one of the most important decisions as abundant, reliable and low-cost electricity is a precondition to our growth and prosperity.

Recent media briefing

The Free Market Foundation convened a media briefing during December 2018 which broadly considered the various options available as sources of electrical energy, and their respective pros and cons. It was conducted by a well-known and qualified expert in this field, Dr Anthonie Cilliers (Pr. Eng, PhD in nuclear engineering, 16 years experience in nuclear technology and honorary research fellow at Wits). It centred on government’s latest Draft Integrated Resource Plan 2018 (Draft IRP 2018). The briefing and the lively discussions among prominent figures in the energy generation field and economists present at the briefing were riveting.

What is “load shedding”?

At the outset we should understand that what we’ve been experiencing is not, strictly speaking, “load shedding” but rather “rolling blackouts”. “Load shedding” is a systematic process to reduce load.

Causes of current “rolling blackouts”

Several of Eskom’s power stations are old and their maintenance needs have become greater with time. Necessary plant maintenance has not been done, and is still not being done, because of our need for energy today. In addition to shortages in the supply of coal, these rolling blackouts result from maintenance that can no longer be deferred.

De-industrialisation

South Africa’s industrial capacity has been limited for the past 10 years because of insufficient electricity supply. To achieve the necessary economic growth and prosperity, we need more electricity. Those who are unemployed need jobs, primarily in industry, for which their skills are most suitable.

Socio-economic upliftment of people

The crucial role played worldwide by the availability of electricity in people’s homes for their socio-economic upliftment is well known.

Climate change

Whether climate change is caused by human activities or nature, or both, we need additional energy to adapt to a changing natural environment.

Wind and solar electricity generation

Wind and solar (that is, solar photo-voltaic panels) have become darlings of renewable energy resources. The Draft IRP 2018 suggests that South Africa’s missing capacity might be provided by a solar-wind-gas mix. In striving for political correctness in this regard, have we taken insufficient cognisance that solar and wind are intermittent sources, with no solar generation at night or under heavy cloud during the day, and when the wind is not blowing. Eskom would have to fill the gaps by burning expensive diesel and gas, and using expensive storage batteries and hydro electricity from storage dams. No country in the world has achieved more than a total of 30% of its energy needs from grids with large energy installations. As wind turbines are susceptible to vast homogenous air masses, which by their nature can cover all or a major part of a country, it’s questionable whether installing more of them in the hope of catching wind elsewhere will be of value – although generally they work well in coastal areas.

The independent power producers get paid if their plant is available to dispatch electricity - not as and when and to the extent that it is actually dispatched. They have first access to the grid. Apparently this is an internationally
Dr Cilliers proposed a rational and balanced mix of energy sources to provide South Africa with a low cost and reliable source of electrical energy. All options need to be used rationally.

accepted phenomenon which enables them to obtain finance to fund their capital outlay. Their power purchase agreements are also fully indexed for inflation.

Thus, although the independent power producers are projected to contribute only a relatively small portion of South Africa’s electricity requirements, the unit cost of this to consumers will be significantly higher than that derived from coal and nuclear. It was contended that we can no longer afford expensive energy to be politically correct.

It’s also well-known that the windmills impact negatively on birds (which simply cannot see the blades - with fatal consequences) butterflies, moths and other constituents of the natural environment.

Gas
Apart from the present uncertain possibility of shale gas from the Karoo, South Africa has no viable reserves of natural gas within its borders from which to generate electricity. This would have to be imported - unnecessary as we have sufficient natural coal and nuclear reserves for centuries to come.

Hydro electricity
The potential for hydro electricity generation within South Africa’s borders is very small.

The possibility of obtaining hydro electricity from the river systems of the Democratic Republic of the Congo is fraught with difficulties. Apart from the inherent political instability of that region, the cost of constructing and maintaining vast transmission lines and the significant loss of electricity from those lines in the normal course of transmitting electricity over huge distances, how would the safety of those lines through politically unstable regions be secured?

Recommended plan
Dr Cilliers proposed a rational and balanced mix of energy sources to provide South Africa with a low cost and reliable source of electrical energy. All options need to be used rationally.

He proposed the further use of nuclear generated electricity, pointing to Eskom’s Koeberg power station as the lowest cost electricity plant and its excellent safety record and environmental impact over the past 30 years. Importantly these power stations don’t discharge greenhouse gases. He also showed why the unit cost of electricity generated by new nuclear power stations would reduce over time and so incentivise consumers to buy it, as opposed to that obtained from solar and wind. Nuclear power stations would not become “stranded assets” as may be the case with other generating facilities whose generating costs become prohibitively expensive. Furthermore, a new nuclear programme doesn’t have to be carried out in one costly “big bang” and can be implemented in phases.

In a nutshell, as Leon Louw, the Executive Director of the Free Market Foundation, put it, for our prosperity we require large coal and nuclear power investments, supplemented by renewables at competitive prices, on a level playing field.

Pebble bed
A pebble bed modular reactor is an intrinsically safe, efficient, graphite-moderned, gas-cooled nuclear reactor deployable in any part of the country. It could be cost-effectively installed close to its load centre, and inland as it isn’t cooled by water. It is fuelled and moderated by spherical tennis-ball-sized graphite fuel spheres containing micro-fuel particles of fissionable material. Being gas-cooled, there is no need for traditional very large and costly water-cooling plants. Being modular, the initial installation could comprise a single small to mid-sized unit with additional units added as demand increases. Fuel replacement is continuous, so there’s no need to shut down for weeks to replace traditional fuel rods. Designed to handle high temperatures, it can cool by natural circulation and still survive an accident scenario as it would passively reduce to a designed safe power-level and stay there. In addition to its other inherent safety features (requiring fewer safety systems), the disposal of its waste would be safer as the waste pebbles are already encased. It is, perhaps, a potential panacea for South Africa’s electricity needs.

It was explained at the briefing that research in South Africa on pebble bed modular reactors was halted in 2010, not because of technical difficulties but apparently because of the long delay in bringing it to a state of commercialisation. Encouragingly, it was reported that Eskom is now funding further research into “pebble bed”. Some believe that if this is successful, South Africa could become a world leader in this technology and that it would have huge export potential.

Procurement of new generating facilities
Whatever the resultant mix of new electricity generating facilities is decided upon, if they are to be procured by organs of state this would have to be done in compliance with s217 of the Constitution which provides that when contracting for goods or services, organs of state must do so “in accordance with a system which is fair, equitable, transparent, competitive and cost-effective”, and other legislation governing procurement by them.

If procurement is to be from Russia or China, careful thought ought also to be given to what effective recourse should be put in place for defects and deficiencies in that supplied, and other breaches of contract. Without implying that this is likely to occur, the amounts of money involved and the other consequences are huge. I’m unaware of any major successful precedent in this regard.

Ideally these facilities should operate within an overall structure designed to harness the well-established benefits of competition between the generators, distributors and suppliers of electricity.

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ANY CLARITY FROM THE MINING CHARTER IMPLEMENTATION GUIDELINES?

GEORG KAHLE AND GEORGA BALLARD

The “Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018” (Charter) was published on 27 September 2018. “The Implementation Guidelines” (Guidelines) for the Charter were published and became effective on 19 December 2018. The Charter itself was amended on 19 December in terms of the “Amendment of the Mining Charter, 2018” (Charter Amendments).

The Guidelines set out the processes, procedures, forms and templates to be used by mining right, licence and permit holders (Holders) in order to comply with the Charter’s requirements. The Guidelines must be read together with the Charter.

Amendments to the Charter
The Charter Amendments provide mining companies and other stakeholders with much needed certainty on compliance timeframes: the list reporting on the Charter must be submitted to the DMR on or before 31 March 2020. Existing Holders must implement the Charter from 1 March. Before this date, Holders must continue to comply with the requirements of the Mining Charter, 2010.

Ambiguities
The Guidelines are intended to provide certainty to Holders and, together with the Charter, have provided certainty. However, ambiguities remain. The following are some of most relevant issues to mining companies:

Procurement
While the Charter sets out progressive compliance targets to be met over the transitional five-year period for procurement of mining goods and services, it contemplates that Holders must submit a five-year plan for progressive implementation of the compliance targets by 26 March. However, the Guidelines do not mention or incorporate the transitional progressive targets in any way and are silent on the procedure for achieving these targets. It is therefore unclear how Holders will be measured for purposes of compliance with the Charter during the transitional period and consequently whether they will be able to achieve the requisite level of compliance.

Youth-owned suppliers
In order to facilitate the development and growth of youth-owned suppliers (18 – 35 years), the Guidelines allow Holders to claim points for procuring from youth-owned entities for the duration of any procurement contract. The Guidelines are silent on what points can be claimed and the category of mining goods or services towards which they would count.

Research and development
The Holder must report annually on its research and development expenditure to ensure that it is complying with its obligation under the Charter to allocate a minimum of 70% of its total research and development budget to South African based entities. There is no guidance as to what is contemplated by research and development.

Processing of mineral samples
The Charter provides that mineral samples cannot be processed by foreign-based facilities unless the Holder has obtained the prior written consent of the Minister.

The Guidelines have been much anticipated by the South African mining industry. Unfortunately they fall short in providing the required clarity. It is probable that Holders will only discover the answers to these questions when attempting to comply with the Guidelines’ requirements after the first annual reporting date of 31 March 2020.
The Minister has a discretion whether or not to grant the consent but he must make a decision within 30 days of submission of the request. The Guidelines (5.11.3) state that the Minister “shall…grant such consent if the mining right holder has (as in the Guideline)”. The criteria for their grant of the consent appears to have been accidentally omitted, which may have the effect that the exception provision is void. This limitation may also (once amended) inadvertently result in the South African mining market becoming less competitive in comparison with other markets which do not have these restrictions in place.

**Mineral beneficiation**

Holders must submit beneficiation equity equivalence plans to the DMR to allow Holders to claim a beneficiation equity equivalence benefit – for new Holders, the maximum offset allowance has been decreased from 11% to 5% of a BEE Entrepreneur shareholding.

The Guidelines provide further detail regarding the procedure for approval of these plans, including the introduction of qualification criteria. The Guidelines’ so-called qualification criteria (they are more akin to statements than criteria) do not align with the Charter’s qualification criteria. It would seem that the Guidelines are attempting to amend the Charter’s provisions by introducing additional qualification criteria, as opposed to providing clarity or procedures regarding the Charter’s equity equivalent provisions.

**Trusts or other appropriate vehicles for host communities**

The Guidelines require Holders to submit certain information in respect of carried interest for Host Communities (communities within a local or metropolitan municipality adjacent to the mining area) or the equity equivalent benefit with their annual reports.

The Charter’s stipulated requirements are only applicable to the equity equivalent benefit for Host Communities (the identification of Host Community development needs and the development and approval of a Host Community Development Programme) and not to the carried interest for Host Communities.

It appears that, through the Guidelines, the DMR is amending the Charter by extending the application of the Host Community requirements for equity equivalent benefits to Host Communities introduced through carried interest. Therefore, in respect of a Host Community introduced through carried interest, the Holder must comply with the Host Community equity equivalent requirements:
- It must consult with the Host Community;
- it must develop a Host Community Development Programme approved by the DMR; and
- report on its progress against these programmes and consultations.

**Enterprise and supplier development**

It appears that the Guidelines allow Holders to use the enterprise and supplier development provisions to score additional points under the procurement scorecard for mining goods and services. However, enterprise and supplier development does not form part of the procurement scorecard against which the Holder is measured. Furthermore, the Guidelines provide insufficient detail regarding the nature of enterprise and supplier development initiatives and do not outline the procedures that a Holder would need to follow or comply with to obtain these points.

The Guidelines provide further details on the manner in which a Holder can undertake supplier development through its OEM (original equipment manufacturer) suppliers. The OEM supplier and the Holder must identify imported components that can be locally manufactured, but which have either already been used, or will be used within five years, in mining goods supplied by the OEM to the right holder (5.9.3.2). The Holder can then claim offset points for quantifiable investments in OEMs in the supplier development programme, but not as part of its equity equivalent programme.

**Social and Labour Plan (SLP)**

Consulted and approved SLPs must be published through one of the publication options set out in the Guidelines within 30 days of their approval. Collaboration on identified projects between mining right holders operating in the same area must be “transparent, inclusive and based on consultation with all stakeholders”. Any amendment of an approved SLP required for collaboration must be done in terms of Regulation 44 of the MPRDA.

**Unanswered questions remain**

The DMR has attempted to align the Charter and Guidelines with the format of BEE regulatory measurements. However, it is still uncertain:
1. which entity is responsible for the verification of Holder’s initiatives and the award of the level. The DMR would most likely be the responsible entity but it may not have adequate resources to fulfil these roles;
2. what the consequence of any misrepresentations in respect of the initiatives are (that is whether this would result in immediate non-compliance with the Charter or have any alternative consequence); and
3. how targets are treated where they are not 100% met.

The Guidelines have been much anticipated by the South African mining industry. Unfortunately they fail short in providing the required clarity. It is probable that Holders will only discover the answers to these questions when attempting to comply with the Guidelines’ requirements after the first annual reporting date of 31 March 2020. In the interim, dialogue between mining companies and the DMR on these issues should be initiated to ensure that further clarity can be obtained, and appropriate amendments made.

The publication of the Guidelines is an important first step. Regulatory certainty is desperately required and is a key ingredient in ensuring the long-term survival of the mining sector in South Africa.

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REGULATORY UNCERTAINTY AND AIR QUALITY ARE LIKELY TO DOMINATE IN 2019

MATTHEW BURNELL

Last year I published a series of articles focusing on the expected regulatory developments in 2018. President Ramaphosa had been elected as the ANC president and soon thereafter he was handed the keys to the jalopy that is the South African economy. Since then, there has been a small up-tick in investor confidence and interest in South Africa. However, as President Ramaphosa has had to manage matters of state capture, expropriation of land without compensation and the Mining Charter, one feels that little headway has been made in the environmental regulatory sphere. Modest progress has been made on the Carbon Tax Bill, the discussions regarding the Financial Provision Regulations for mining rehabilitation have regressed and the Climate Change Bill has not taken us any closer to minimising greenhouse gas (GHG) emissions and the impacts of climate change. Unfortunately, given that 2019 is likely to focus on the national election, I fear that regulatory uncertainty in some fields is set to continue.

While there may be some delays in finalising regulations, I anticipate administrative and litigious activity in the air quality sphere as companies seek to postpone their obligations to comply with the Minimum Emission Standards Regulations and non-governmental organisations pursue litigious options regarding poor air quality management and the impacts of climate change.

Climate Change Regulation

The South African government has committed to reducing GHG emissions to meet its nationally-determined contributions in accordance with the Paris Agreement. To achieve these objectives, government needs to implement regulatory and other measures to encourage producers and consumers to undertake activities or purchase products that are more environmentally responsible. One such regulatory measure is the imposition of carbon taxes.

Carbon Taxes

A revised version of the Carbon Tax Bill was published in December 2018. The Finance Minister promised that carbon taxes will be implemented in June 2019. However, every recent budget speech has included an assurance that carbon taxes will be implemented in the next 12 month cycle; with elections looming, it remains to be seen whether the tax will be implemented in the first half of this year.

The most recent iteration of the Bill has not significantly revised the principles that were included in its predecessor. That is to say, the tax is calculated based on the sum of carbon dioxide equivalent of greenhouse gases arising from the combustion of fuels, industrial processes and fugitive emissions (determined with reference to specified emission factors), subject to the various tax free allowances. This sum will be multiplied by the carbon tax rate of R120 per ton of carbon dioxide equivalent. The carbon tax rate can be increased by CPI+2% until 31 December 2022 and thereafter by CPI.

Some of the significant differences between the previous and current version of the Bill are:

- The carbon dioxide equivalent calculations for combustion emissions, process emissions and fugitive emissions has been refined by requiring taxpayers to calculate carbon dioxide emissions, methane emissions, nitrous oxide emissions etc arising from each fuel, process or activity;
- Previously it was stated that although the tax free allowances could be as high as 95% of the tax due, these allowances would decrease over time. The current version of the Bill does not include a similar statement. However, this does not prevent future amendments to the Bill to reduce the thresholds. Any amendments, however, would require further public participation processes.

The main criticisms of the Bill are:
- The imposition of taxes on local manufacturers increases their production/operation costs. Imported products are not subject to the same cost restrictions and, as a result, importers will have a profitability advantage over local entities;
• It is unclear whether the tax free allowances will be reduced over time and at what rate. This makes it difficult for companies to make financial projections; and
• The taxes are paid into the national fiscus and are not ring-fenced for projects that reduce GHG emissions and/or promote or support local businesses/persons that may be affected by the effects of climate change.

Climate Change Bill
On 8 June 2018 the Minister of Environmental Affairs published the Climate Change Bill (the CC Bill) for public comment. The CC Bill provides a framework for climate change regulation in South Africa aimed at governing the country’s sustainable transition to a climate-resilient, low carbon economy and society. The Bill provides a bare procedural outline that will be developed through the creation of frameworks and plans that have not yet been compiled; the precise impact that this proposed legislation will have on business is not certain.

Air Quality Litigation and Postponement Applications

Air quality litigation and liability
Closely linked to the climate change regulation already set out is the potential for litigation arising from companies’ failure to implement measures to mitigate the effects of climate change which results in harm. It may be difficult for litigants to establish a causal link between a company’s GHG emissions and the damage caused by an extreme weather event. However, liability may be imputed where a company fails to take reasonable measures to prevent pollution or environmental degradation from occurring, continuing or recurring. This would include failure to take reasonable measures to reduce/limit their GHG emissions.

Failing to take such measures may result in potential liability - not only for the company but also for directors and management in terms of s49A of the National Environmental Management Act (NEMA), read with Schedule 3 of NEMA and the Companies Act.

In October 2018 Greenpeace published an article indicating that “the world’s largest air pollution hotspot” is based in Mpumalanga. The article notes that the biggest contributors of Nitrogen Dioxide into the atmosphere are from the coal and transport sectors and due to the 12 coal power plants in Mpumalanga. While government has questioned the veracity of these allegations, the fact remains that air quality in the region is poor. For companies (and management) to avoid liability, particularly in areas where there is poor air quality, they will need to demonstrate that they have implemented reasonable measures to reduce their environmental impacts.

Postponement applications
Another important consideration for 2019 is that companies are required to comply with the minimum emission standards for new plants by 1 April 2020. Companies unable to meet the new plant standards by 1 April 2020 must submit a postponement application to the National Air Quality Officer by 31 March 2019.

There have been some recent amendments to the Minimum Emission Standards Regulations:
• An existing plant may apply for a once-off postponement of the compliance timeframes for the minimum emission standards for new plants. However, this once-off postponement may not exceed five years and will not be valid beyond 31 March 2025. The only exception is for plants that will be commissioned before 31 March 2030.
• No postponement compliance timeframes or a suspension of compliance timeframes will be granted for minimum emission standards for existing plants. If companies cannot comply with these standards by 1 April 2020 they may attempt to seek exemption from the provisions of the Minimum Emission Standards.
• In addition to the postponement application, an existing plant may submit an application for a specific emission limit regarding a particular pollutant/pollutants. These applications must demonstrate the measures that the plant has taken to reduce emissions and its attempts to comply with the Minimum Emission Standards for new plants. Provided the plant complies materially with the new plant standards, and the continued non-compliance in respect of the particular pollutant will not have a material increased health risk, the National Air Quality Officer may set an alternative emission limit.
Depending on the outcome of these postponement/exemption applications, it may be necessary for review proceedings to be launched on an urgent basis.

Financial provision for rehabilitation
Financial provision has been the subject of debate since the Department of Minerals and Energy (as it was then) published the Guidelines Document for the Evaluation of the Quantum of Closure-related Financial Provision (the Guidelines). The Guidelines were criticised because they failed to calculate rehabilitation costs precisely, resulting in financial provision which did not cover the environmental liability. As a result, following the implementation of the One Environmental System, the Department of Environmental Affairs (DEA) sought to rectify the Guidelines’ shortcomings and burden that under-provided mines placed on the state and communities by publishing the Financial Provision Regulations, 2015 (the 2015 Regulations) in accordance with s24P of NEMA (Financial Provision for the Remediation of Environmental Damage). Section 24P replaced s41 of the Minerals and Petroleum Resources Development Act (28 of 2002) (MPRDA).

The 2015 Regulations contain a number of material issues that were raised with the DEA. As a result, a revised draft of the Financial Provision Regulations was published in 2017 (the 2017 Financial Provision Regulations*). These 2017 Regulations were never finalised and it appears that they have been abandoned as the DEA unofficially published a revised draft version of the financial provision regulations for comment in September 2018 (the 2018 Financial Provision Regulations). A final version of the regulations was intended to be officially published in November 2018 but so far nothing has been forthcoming.

Unfortunately the 2018 Financial Provision Regulations contain more problems than its predecessor, including:
- The terminology used is inconsistent. The word “rehabilitation” is prefixed with the word “final”, “concurrent”, “progressive” and “annual”. These qualifications indicate that rehabilitation occurs in phases, however, it is unclear if these terms have their own meaning or if they are expected to be synonyms of one another;
- Section 4(1) of the 2018 Financial Provision Regulations states that financial provision must guarantee the availability of sufficient funds for “progressive rehabilitation and remediation” and “rehabilitation, decommissioning and closure activities”. If we assume that “rehabilitation” refers to progressive, concurrent, annual and final rehabilitation, there is an overlap and double funding requirement in s4(1). It is therefore assumed that s4(1)(b) refers to “final rehabilitation”. This, however, does not resolve the matter. For example, it is unclear at what point concurrent/progressive/annual rehabilitation ends and final rehabilitation begins. This is important to understand as funds only need to be set aside for purposes of “final rehabilitation” and not concurrent/progressive/annual rehabilitation.
- Section 4(1) also conflicts with s6(1) which states that a holder must “provide funds for the costs required to implement the activities for annual rehabilitation from the operational budget of the company”. Funding financial provision and paying for rehabilitation from operational expenditure is unviable unless the holder has access to the financial provision. Access to these funds appears to be permissible in terms of s4(2). However, the rules governing such withdrawals need to be developed. For example, will draw downs be permitted on a Rand amount spent by the holder or the Rand value by which that amount decreased the environmental liability? Similarly, would the same principles apply in situations where the financial provision exceeds the environmental liability?
- The Minister must “claim” against the guarantee or insurance on the issuing of a closure certificate and use these funds for latent and residual liabilities. This section does not work as the Minister can only call on the guarantee if the holder fails to comply with the final rehabilitation, decommissioning and mine closure plan or is placed into sequestration, liquidation or bankruptcy. Also the guarantee lapses on the granting of a closure certificate in terms of the MPRDA. Therefore as soon as the closure certificate is issued, the guarantee lapses and no claims can be entertained.
- The Financial Provision Regulations include provisional and general costs, contingencies, VAT and CPI+2% which significantly increases the overall financial provision that must be provided. Including provisional and general costs, VAT and CPI + 2% requires holders to increase their current financial provision by more than 50%. This is economically unsustainable.

Questions around the authority of the Regional Manager and Director General of the DMR
Another factor to take into account is that, based on a preliminary investigation, it appears that in terms of s24P of NEMA the Minister of Mineral Resources may not delegate his powers to the Director-General or the Regional Manager in terms of s42B. This means any decisions made by persons in either of these capacities are unlawful. Submissions regarding the adequacy of financial provision, it appears, may only be decided by the Minister in terms of s24P(3).

Regulatory certainty in these sectors needs to be addressed as soon as possible if the investor confidence in the mining sector is expected to increase in the future. Even if legal certainty increases, companies should expect that a bigger portion of their budgets is going to be used to implement mitigation and rehabilitation measures to prevent pollution from occurring, continuing or recurring.

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The Constitution enshrines the right to an environment that is protected for the benefit of present and future generations and that is not harmful to one’s health or well-being. Flowing from this, the state has passed a myriad of environmental legislation. The National Environmental Management: Air Quality Act (39 of 2004) is one of our primary pieces of environmental legislation and aims to give effect to the environmental right in the Constitution.

The Act regulates air pollution from various industrial and mining-related activities, whether electricity generation, fuel storage, waste incineration or cement production, and sets the permitted amount of pollution that may be emitted in each case. In October 2018, the Department of Environmental Affairs brought into effect certain amendments in this regard. This article spells out two of these amendments, namely an increase in sulphur dioxide emission limits for electricity generators and cement producers and the prohibition of “rolling” postponements of compliance with prescribed emission limits. These postponements have been sought by many of Eskom’s power plants.

Activities which cause air pollution and their associated pollutant limits (referred to as “Minimum Emission Standards” (MES)) are listed under a Schedule to the Act. (Listed activities under the Act must obtain an atmospheric emission licence, which this article does not deal with). The Schedule of Listed Activities and Associated MES under the Act was first promulgated in 2010 (and then again in 2013) and provides for two sets of emission standards – a less stringent set of limits for businesses which were operational before 2010 (Old Plant MES) and a more stringent set of limits for businesses operational after 2010 (New Plant MES). Post-2010 operations had to comply immediately, or on commissioning, with the more stringent New Plant MES, whereas the timeframes for older plants are staggered: first to comply with the less onerous Old Plant MES by 2015 (with a five-year lead time) and then to comply with the more onerous New Plant MES by 2020 (with a ten-year lead time). The rationale for this phased compliance was that generally many operations built before 2010 were not designed in a way to comply with the current air emission limits, and the installation of air pollution abatement technology is incredibly costly.

The two key amendments brought into effect in October 2018 apply to pre-2010 operations and reflect an apparent inability of these older operations to either meet the pollutant limits by 2020, or at all.

The first critical amendment of October 2018 is an increase in the sulphur dioxide limits for solid fuel burning installations used for steam raising or electricity generation. All such pre-2010 installations are now entitled to emit double the previous 2020 sulphur dioxide limits (an increase from 500 mg/Nm$^3$ to 1000 mg/Nm$^3$). This particular amendment is currently being challenged by various civil society organisations as it was not gazetted for public comment before being promulgated into law (although other amendments were gazetted for comment), and we wait to see the court’s decision in this regard. A further sulphur dioxide increase was brought into effect for cement producers using conventional fuels and raw materials (in particular pyritic limestone), namely all pre-2010 operations may now emit, from 2020, 60% more than previously allowed (an increase from 250 mg/Nm$^3$ to 400 mg/Nm$^3$). This amendment was gazetted for public comment before becoming law, and so does not face the same procedural challenges as do electricity generators. The outcome for cement producers is that there is significantly more leeway in terms of their sulphur dioxide emissions. However
it should be noted that the conditions of individual atmospheric emission li-
cences may override this.

The second key amendment brought into effect in October 2018 deals
with so-called “rolling” postponements. Prior to the 2018 amendments, an
operation (in any industry) could apply to continually “postpone” compliance
with their 2015 and/or 2020 emission limits as there was no express legisla-
tive cap on how many times an operation could apply for such a postpone-
ment. Many of Eskom’s power plants, for example, applied for a post-
ponement of their 2020 limits, largely due to the time and cost implications
of retrofitting their aging infrastructure. These rolling postponements have
been criticised for the obvious reason that an unlimited number of postpone-
ments could effectively result in an ongoing permission to pollute. The recent
amendments prohibit these rolling, or unlimited, postponements and rather
provide that pre-2010 operations may now only apply for a once-off post-
ponement of compliance with their 2020 targets which may not go beyond
2025, and there may not be any (further) postponements of compliance with
2015 targets. This prohibition of rolling postponements is welcome.

There is, however, a worrying new provision - 12A - which effectively allows
yet another postponement: an older operation (in any industry) may apply for an
“alternative emission limit” (undefined) with respect to a 2020 pollutant
limit or limits, provided the operation complies with all other emission stan-
dards. Notably there is no cap on how many times an operation may apply in
this regard, and there is an express provision for one or more pollutants. The
net effect is that rolling postponements of compliance with air pollution limits
may still be allowed, simply under a different provision. No doubt the same
concerns raised with the now-prohibited rolling postponements will resurface
with this new provision 12A. Moreover, this provision was not gazetted for
public comment, and so will in all likelihood face the same procedural chal-
lenges as the sulphur dioxide amendments.

There are, therefore, three aspects to the recent amendments which may
require revisiting. Firstly, the extent of the sulphur dioxide increases is signifi-
cant – increases of 60% and 100%. This is of particular concern in the case
of large-scale electricity generation, namely Eskom’s power plants. It is sug-
gested that any increase to emission limits be more gradual, alternatively
form part of a site-specific exemption. Secondly, the back-door provision of
12A which provides for a rolling postponement of compliance by another
name is problematic as it has the potential to render the MES meaningless in
cases where a 12A application is granted. It is suggested that an “alternative
emission limit” be restrictively defined and this application process be made
more stringent. Lastly, the promulgation of the amendments without public
participation contravenes the Act which mandates a consultative process be-
fore amending the Listed Activities and Associated MES. It is suggested that
the Department of Environmental Affairs which, unfortunately, has repeatedly
made this mistake, complies with the law-making consultation requirements
as set out in the various environmental Acts and the Constitution. ●

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WANDISILE MANDLANA

Collectively and individually, Sub-Saharan African (SSA) countries have made en-
couraging headway in ensuring that their mining and minerals industries make a
positive contribution to sustainable development. That said, there are some chal-
lenges, not least climate change, community-level development and divergent
approaches to the laws and regulations underpinning sustainable development.

Collectively, one notable contribution SSA countries have made in the
area of sustainable development in mining was to endorse a shared policy
framework, the African Mining Vision (AMV), in 2009.

All African Union (AU) member states, the majority of which are SSA coun-
ties, have adopted the AMV to ensure “transparent, equitable and optimal
exploitation of mineral resources to underpin broad-based sustainable
growth and socio-economic development”.

The AMV is quite visionary when it comes to the contribution of Africa’s
minerals industry to sustainable development. It directly addresses the need
to foster environmentally and socially responsible mining that includes com-
munities and other stakeholders, and that is accountable and transparent in
applying and optimising resources for broad economic and social develop-
ment. Local value creation through local processing and supply of inputs is
emphasised, as are technical and skills upgrading and investments in educa-
tion, research and development.

From vision to action

The AMV will be supported by country mining visions (CMVs), among other
things. Various SSA countries are in different phases of developing their
CMVs, which are intended to be a collective agenda, broadly shared by the
government, labour, business, communities and civil society.

In 2011, the AU Ministers responsible for mineral resources development
approved the implementation of their CMVs. This resulted in the establish-
ment in 2013 of the African Mineral Development Centre (AMDC), which has
published the Country Mining Vision Guidebook, developed the African Min-
eral Governance Framework (AMGF) and launched the AMV compact with the
private sector (AMV Compact).
The need for the Guidebook stemmed from the realisation that the AMV programmes may not be suitable to the circumstances of all of the countries. Its purpose was therefore to “provide decision makers and stakeholders with clear and simple guidelines and options for aligning their mining policies” to the AMV.

The AMGF was developed by the AMDC in collaboration with civil society between 2014 and 2016, and endorsed by AU mineral resources Ministers in May 2016. It is a monitoring framework for the governance of the mineral sector and encourages peer learning and multi-stakeholder dialogue.

As for the AMV Compact, it was launched in 2016 to support the most cost-effective mode of co-operation in rolling out the AMV. In respect to environmental and social issues, the private sector has committed to the “polluter pays” principle, and adherence to environmental sustainability, best practices, national policy and legislation and regional agreements and protocols. Parties to the AMV Compact also embrace corporate social responsibility.

Statutory and regulatory measures in SSA countries

Since the 1980s, a number of SSA countries have put statutory and regulatory measures in place to address the impact of mining operations on the environment, human health and safety. Generally speaking, the focus of this has been on four main sustainable development issues:

- Requirements for addressing environmental and social impacts before undertaking the mining operation or for conducting operations in accordance with good mining industry practices. Two examples are:
  - Section 18 of Ghana’s Minerals and Mining Act. Section 18(1) provides that “before undertaking an activity or operation under a mineral right, the holder of the mineral right shall obtain the necessary approvals and permits required from the Forestry Commission and the Environmental Protection Agency for the protection of natural resources, public health and the environment”; and
  - Section 45(1)(b) of Botswana’s Mines and Minerals Act which provides that the holder of a mining licence shall develop and mine the mineral covered by his mining licence in accordance with the programme of mining operations as adjusted from time to time in accordance with good mining and environmental practice.

- The obligation to rehabilitate mining areas. One of many examples is s96 of the Malawi Mines and Minerals Act, 1981, which empowers the relevant authority to impose conditions for the reinstatement, levelling, re-dressing, reforesting and contouring of any part of a mining area damaged or deleteriously affected by mining operations.

- Various obligations, including local content requirements. For example, s12 of the Botswana Mines and Minerals Act provides that when procuring mining goods and services, the holder of a mineral concession should give preference, to the maximum extent possible consistent with safety, efficiency and economy, to service agencies located in Botswana and owned by Botswana citizens or bodies corporate.

- Authority to sanction violation of any requirement, including environmental protection requirements. For example, s47(1)(c) of the South African Mineral and Petroleum Resources Act empowers the relevant authority to cancel or suspend a mining licence if the holder contravenes the law - including any environmental obligation.

These developments demonstrate the general acceptance among SSA countries that mining operations must be conducive to sustainable development. At the same time, countries face a range of challenges. Three common ones are socio-economic development challenges, responding to climate change and the implementation of social development initiatives.

Community-level development requires attention

Although there is evidence of progress, socio-economic development remains one of the biggest challenges for minerals and sustainable development in SSA countries, especially community-level development. Protests among communities surrounding mines appear to be on the increase, along with worsening community relations in some parts of the continent and the phenomenon of “ghost towns” upon cessation of mining activities.

SSA countries have initiated a number of ongoing initiatives in response. One of the most recent is the African Mining Sustainability meeting concluded in Geneva in October as a collaboration between the Mining Indaba and the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF). This brought together major industry organisations to discuss the role of communities in shaping the development of the African mining sector, and will be a focus at the Investing in Africa Mining Indaba in 2019.

Countries should be working to develop their CMVs to cater for effective and transparent measures that encourage socio-economic development.
through mining. As a bare minimum, they should assess their mineral laws and policies properly to determine whether these promote socio-economic development meaningfully. Such assessments and any resultant reforms should include clear provisions for ensuring that social issues are properly addressed as part of the permitting process, as well as clear community grievance/dispute resolution procedures.

Similarly, it is important to clearly define the roles of the community, government and companies. For example, in South Africa there is a statutory obligation on holders of mining rights to contribute towards socio-economic development. Lack of clarity on roles and co-operation sometimes frustrates or undermines this contribution.

Responding to climate change

Most mining companies report climate change as one of the major risks they are facing. However, the response of SSA countries is inadequate. As Oxfam observed in a March 2017 briefing paper entitled “From Aspiration to Reality: Unpacking the Africa Mining Vision,” “Africa is faced with a dilemma – it has the right development, but the heavy carbon footprint of mineral extraction and reliance on fossil fuel energy undermine environmental sustainability, although the continent has contributed the least to global warming. [Africa] is also the most vulnerable continent and least prepared for climate change due to inequality, poverty and low adaptive capacity”.

The challenge for SSA countries is to find ways to balance the competing demands of mineral-based transformation and long-term sustainable development. Practically, this requires an ongoing integration of climate change issues into national mineral laws and policies. This is all the more important given Oxfam’s observation that the AMV primarily focuses on mainstreaming environmental and socio impact management tools such as strategic environmental assessments but gives less attention to tools to address ongoing social environmental disruption.

In addition to ongoing integration of climate change issues into mineral laws and policies, the SSA countries and the mining industry should deepen their collaboration on adaptation in order to respond adequately to climate change disruptions.

Variable implementation of sustainable development initiatives

There are differences in how SSA countries are implementing sustainable development initiatives. For example, some do not have clear community development obligations in their mineral laws and do not provide for environmental protection in a uniform way. The “compare” function of the African Mining Legislation Atlas is a useful resource for understanding some of the gaps and differences in African mining laws and policies.

These differences pose a problem for companies with a presence in a number of SSA countries because they have to comply with different legal requirements. This is an opportunity for SSA countries to align their mineral laws and policies as much as possible. The Country Mining Vision Guidebook could play a useful role here.

In practice, the implementation or domestication of the AMV has been relatively slow across SSA countries, underlining the need to prioritise it. One area where they could gain the necessary momentum is in using their CMVs to identify and address gaps in their mining legislation and policies. Failure to do so will prevent the laudable aspirations of the AMV being achieved.

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WINE, ROSES AND RENEWABLES

MARYANN MIDDLETON

Clare Valley in South Australia is not as well known as the Barossa Valley nor the McLaren Vale Wine Region. It is a two hour drive from Adelaide, the closest city. Vines were first planted in 1830, and today Clare Valley boasts that it is the heart of Australian Riesling. Shiraz and Cabernet vines also flourish in the area.

In spring, the roses are beautiful and add a touch of elegance to the well maintained vineyards.

It all might not have happened or flourished if it wasn’t for the discovery of copper ore at Kapunda, a small town midway between the Barossa Valley and Clare Valley. Miners from Cornwall and Wales in the UK sailed to Australia in their droves to make their fortunes in the copper boom. The Kapunda Mine was the first successful metal mine in Australia and contributed greatly to the economic development in South Australia.

Fast forward to the twenty-first century, South Australia’s mining industry is dominated by the Olympic Dam Mine based on rich seams of copper, uranium, gold and silver mineralisation.

On 23 November a 200-metre chimney stack at what was South Australia’s last remaining coal-fired power station was felled in a controlled explosion. The closing of the power plant is a direct consequence of the state adopting an ideological anti-coal agenda which caused the closure of the Leigh Creek coal mine that fueled the power station. The state adopted an aggressive Renewable Energy Target. After the coal-fired power stations were closed the state was, and continues to be, powered by a mix of wind, solar and gas. Significant spikes in power prices and a lack of energy security were experienced. In September 2016, during some wild weather, South Australia’s entire power network failed for the better part of 24 hours. The interconnector between the states of Victoria and South Australia which was supposed to provide backup power failed. The greatest paradox was that the wind turbines could not work because the wind was blowing too hard.

Renewable energy is the favored child of the Inter-governmental Panel on Climate Change (IPCC). IPCC is the UN body for assessing the science related
MINING | ENERGY | INFRASTRUCTURE FEATURE

28 without prejudice

The demand for copper, iron ore, lithium, limestone, bauxite, silica, kaolin, fluorspar, titanium (to name just a few) will continue to rise with each new wind and solar photovoltaic power installation.

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soon. There is a general misconception on the part of the public that global warming is linked to changing weather patterns. There is also a general misconception that a carbon emissions reduction target will result in a slowdown in industry and mining. South Australia showed its move to close coal-fired power stations had an adverse effect on the coal mining industry in that region but as long as China and India continue to build new coal-fired power stations at a greater rate than previously estimated (as reported by CoalSwarm, a network of researchers seeking to develop collaborative informational resources on coal impacts and alternatives) coal mining is not in danger of disappearing.

The demand for copper, iron ore, lithium, limestone, bauxite, silica, kaolin, fluorspar, titanium (to name just a few) will continue to rise with each new wind and solar photovoltaic power installation.

Consider that a typical wind turbine contains 89% steel, 6% fiberglass, 1.6% copper, 1.3% concrete, 1.1% adhesives and 1% aluminium. On average the material needed for each megawatt capacity of a wind turbine is 103 000 kilograms of stainless steel, 402 000 kilograms of concrete, 6 800 kilograms of fiberglass, a total of 9 300 kilograms of aluminium, plastic, epoxy resins, polymer foam and wood, 3 000 kilograms of copper, 43 kilograms of Neodymium, and 20 000 kilograms of cast iron. (Wilburn, D.R., 2011, Wind energy in the United States and materials required for the land-based wind turbine industry from 2010 through 2030: U.S. Geological Survey Scientific Investigations Report 2011–5036, p22).

Mineral and rare earth element mining will only benefit from the increased construction of renewable energy plants. Mining companies will continue to prospect for these substances, governments will continue to earn revenue from the grant of mining rights, and mining lawyers will continue to be in demand.

Raise a glass and smell the roses, light a candle and comfort yourself that you are not adding to the carbon emission levels.

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INFRASTRUCTURE PROJECTS IN KENYA: A CASE FOR PUBLIC PRIVATE PARTNERSHIPS

ESTHER NJIRU-OMULELE

Africa has an approximate $170 billion infrastructural development gap. The private sector has been urged to contribute towards closing this gap in Africa. In this respect, African governments are moving towards not only involving the private sector but also creating an enabling environment to attract the participation of the private sector in delivering infrastructural development. As a result, the Kenyan Government has been shifting towards private sector initiated infrastructural development. It is these initiatives that have resulted in rapid growth in public private partnership projects in Kenya in recent years. According to the PPP Unit, Kenya has a pipeline of about 72 PPP projects.

It is worth noting that PPP projects are large projects that are, more often than not, long term in nature and thereby attract more risks. The issue of risk allocation is one of the most critical in PPP projects. It is a guiding principle...
that risks in PPP projects are allocated to the party best placed to manage them.

The private sector in Kenya has demonstrated its willingness to invest in PPPs and deliver public functions efficiently, but on condition that such investments be more secure and bankable. The question that then arises is, how does the government create an enabling environment that would attract private sector participation in delivering public functions without bearing more risks than it can manage?

The Government of Kenya acknowledges that deeper private sector participation in public investment programmes is key to sustainable development in the country. Government efforts to create a balance between an enabling environment and risk came up with a support policy on Government Support Measures (GSMs) for PPP projects, issued by the National Treasury and Planning in September 2018. The following are the support tools making up the GSMs under the policy:

a) Sovereign guarantees;
b) Letters of Support and Comfort;
c) Project-based Guarantees;
d) Partial Risk Guarantees;
e) General undertakings;
f) Government Notes and Letters of Exchange;
g) Promissory Notes; and
h) Co-investments in public investment projects and programmes.

Private investors have relied on these support tools to secure funding because they act as insurance for lenders in the event of unseen eventualities that make it impossible for the borrower to repay. Each of the tools is applicable to particular circumstances, with Letters of Support (LoS) being the most commonly used in PPP projects in Kenya. This article focuses on the following questions:

a) Why is the Government opting for LoS?
b) Is there any law governing letters of support, Government guarantees and letters of comfort?
c) Are letters of support binding?
d) Use in Road Annuity Projects?

Why is government opting for Letters of Support?
LoS is a type of GSM used by government to provide different forms of undertakings, commitments and assurances that it will do certain things, and refrain from doing others in support of a project. It frequently also includes statements of recognition of both the investment and the financing parties behind such investments, with associated assurance.

Letters of Support, Letters of Comfort and Letters of Intent have been used to provide comfort to both public and private foreign counterparties in public investment undertakings. However, the difference between these instruments per se would be the fact that the latter two documents frequently carry no financial obligation on the part of government.

A Government of Kenya Letter of Support may take varying forms over time. It may either take a contingent liability instrument approach where it commits to provide various undertakings for a project failure for which it incurs a financial liability or it may adopt a non-contract, non-binding form providing a level of comfort to project participants, thereby making goodwill the intent on the part of Government.

Is there any law governing letters of support, Government guarantees and letters of comfort?

Kenyan government policy on GSMs
As already mentioned, Kenya has a policy on GSMs which is aimed at establishing practice principles that minimise and manage the risks created by the GSMs.

It is important to note that, under the Policy, not all projects may be supported by a GSM. The GSM will be issued in very exceptional circumstances for projects approved by Cabinet that are considered strategic, and that are of public interest.

The current legal framework for GSMs is grounded in the Constitution of Kenya, the Public Finance Management Act, 2012, and the Public Private Partnerships (PPP) Act. It is expressly stated in the Policy that the provision of GSMs has to be aligned with the constitutional principles of fiscal responsibility in public finance and the overall philosophy of the Public Finance Management Act, 2012 that public finance should remain sustainable, equitable and stable.

The Constitution of Kenya
The Constitution, under Articles 201 and 202, provides the core principles that guide every aspect of public finance in Kenya. The principles are that public finance shall be open and accountable and allow for public participation. It is also a key principle that public finance systems promote an equitable society by ensuring the burden of taxation is shared equally, and that expenditure promotes equitable development in the country.
The principle of equitable development is particularly important because LoS are used to promote public infrastructure development. It is, therefore, key that any LoS issued is tied to the guiding principles of PPP of affordability, value for money, optimal risk allocation and public service delivery.

The Public Finance Management Act, 2012 (PFMA)
Sections 58 and 65 of the PFMA 2012 establish the following principles as far as issuance of GSMS is concerned:

a) The National Treasury has capacity and legal authority to guarantee loans by county governments and national government agencies or entities, where the borrowing is for the development of capital projects, and where the borrower is capable of repaying the loan and paying interest and other charges associated with the loan;

b) Any borrowing must be within approved ceilings for national debt stock;

c) A private borrower may be guaranteed, where that private borrower is borrowing to develop a public capital project, and the private party has capacity to provide adequate security for such borrowings;

d) Any borrowing must adhere to the principles governing public finance under the Constitution, including, particularly, compliance with the fiscal responsibility principles and financial objectives of the national government;

e) Borrowing needs to take into account equity between the national and the county government’s interests so as to ensure fairness; and

f) The borrowing must be affordable, and the recommendation of the Public Debt Management Office is made a key requirement for both borrowings and issuance of guarantees.

From this it is clear that a framework for the grant of a GSM for borrowing by government exists in law.

The Public Private Partnerships Act, 2013 (PPP Act)
Section 27 of the PPP Act gives power to the Cabinet Secretary of the National Treasury to issue non-sovereign guarantees, binding undertakings and Letters of Comfort where these are deemed necessary to support projects in order to reduce premiums factored for political risks.

Under this Act, guarantees may include demand or revenue guarantees where Government retains demand or market risk in public infrastructure projects structured to rely on user fees as the revenue base. Under this law, the GSMS mentioned are aimed at supporting public private partnership projects.

The administrative process for the grant of a GSM under the PPP Act 2013 requires a recommendation by the PPP Committee to be made to the Cabinet Secretary. In practice, the PPP Committee makes such a recommendation at the time of approving negotiated contract terms for PPP projects. Thereafter, the PPI Unit, working in close collaboration with the Public Debt Management Office, processes actual requests by project developers, negotiates the terms of the GSM instrument, and submits, through the Principal Secretary of the National Treasury, the negotiated GSM to the Cabinet Secretary for approval and issuance.

Are Letters of Support binding?
LoS are commonly used in the world of banking and finance, either to give comfort in relation to the performance of agreed commercial obligations, or for one party to “support” the financial obligations of another.

With regard to PPPs in Kenya, they are to provide different forms of government undertakings, commitments and assurances in support of a project. But what value do they really have? Are they binding? If not, what is the point of having them?

Comfort Letters can either be legally binding or non-legally binding, depending on the wording; specific terminology used in the letter determines whether the assurance given constitutes a binding contract or only a moral obligation.

LoS in most cases, operate as credit-enhancement tools, thereby enabling financial institutions to accept the financing risk profiles of public transactions. Attracting local and international capital has historically been founded on an implicit assurance that the Government will protect private sector interests and that the investor will receive a reasonable return on its investment. Ultimately, this level of fiscal comfort to third parties to a transaction has significant reputational benefits to the issuing government, especially if the framework for its grant is structured, predictable and unambiguous.

Application of a Letter of Support in Road Annuity Projects
The Roads Annuity Programme was introduced in Kenya in 2015. It is enabled through the Annuity financing programme which is in essence a financing model for road construction. The Kenyan Government dubbed this model, Roads 10,000 Programme and it was approved by Cabinet in 2015.

The programme, which was introduced in a bid to mitigate the strain in financing of road projects, ensures an expeditious turnaround in execution of road construction. Under this model, contractors design, finance and construct the roads within a stipulated time not exceeding three years, and guarantee construction quality. The contractors also carry out post-construction maintenance for a maximum period of eight years.

The contractors under this model have to raise at least 70% of the total cost of a project before they are awarded the contract. In this respect, Government issues a Letter of Support to the relevant financial institution. Unlike in the past where contractors under the Build, Operate and Transfer-Toll model recovered their monies by collecting toll proceeds, here the government pays for road projects through fixed, periodical payments.

Government then raises the balance of the 30% and upon completion of a road, repays the loan in equal instalments (annuity) over a set period of time.

In conclusion, GSMS have not been fully embraced by financial institutions in Kenya. It is hoped that these institutions will continue to gain understanding of GSM instruments to enable support of infrastructure projects and thus spur economic development in Kenya.

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WELCOME PLEDGES TO INVEST

DEEPA VALLABH

South Africa’s newly-minted Head of State, President Cyril Ramaphosa, has won wide acclaim for securing billions of dollars in foreign direct investment in the aftermath of a resoundingly successful international road show that he and his team embarked upon.

This is welcome news for the 26.7% of the labour force that is unemployed, or to put it more grimly, for six million people who are actively seeking employment without success, according to the latest figures from Statistics South Africa quarterly labour survey.

No one can argue against the benefits of the inflow of foreign direct investment, particularly for an emerging economy such as South Africa, which is hobbled by the triple challenges of spiralling unemployment, abject poverty and widening inequalities.

While we should be delighted by the positive investor sentiments that are manifesting in pledges of massive investments in South Africa, it is imperative that the country attracts the kind of investment that will stimulate job creation, invigorate efficiency and put the country on a positive growth trajectory.

The country is investing substantially in its infrastructure build programme which, according to Economic Development Minister Ebrahim Patel, averages about R300 billion a year. This investment has resulted in the country moving off a precipice of chronic energy shortage, which threatened to eclipse large parts of the economy, to an energy surplus.

However, more investment is needed in other areas too. This will lower the costs of doing business, give impetus to enterprise growth and further enhance the country’s attractiveness as an investment destination.

The stubbornly high unemployment rate, coupled with a workforce that is generally unskilled and semi-skilled, calls upon considerable investment in sectors that have the potential to generate large scale employment such as mining, rail and water infrastructure.

Correspondingly, we also need to upskill the youth by developing tailored programmes that will equip them with core skills required in an economy that is increasing digitisation. Some of this investment could be channelled towards training and education, particularly in new skill sets that define the industrial internet of things (IoT) ecosystem in the Fourth Industrial Revolution.

Mining remains one of the low hanging fruits that we can harness to stimulate growth and create much-needed employment. The commodities market is bucking the trend of a global slowdown and is growing steadily. South Africa is a mineral-rich country with an abundance of ore and minerals that need to be extracted. It is critical that we should nurture this sector that has the potential to create sustainable jobs throughout the value chain. Equally important, government needs to offer decisive leadership and articulate a clear and unambiguous policy framework that outlines its plans for the sector in the medium to long term.

Due to its very nature, and the vast amounts of capital required, mining investors take a long term view and demand policy certainty about the future of their investment. Policy certainty and clarity in this industry is the name of the game. I believe there is a huge appetite in the investor community, both local and international, to plough money into South Africa. The election of a new president has imbued the business and investor community with a new sense of optimism about the future direction of the country.

Economists argue that investment inflows would go a long way towards creating much-needed job opportunities, which will have a ripple effect of generating additional tax revenue and create a class of new consumers with disposable income that will stimulate further growth and expenditure.

Infrastructure is also a critical factor in the health and wealth of a country. It enables private businesses and individuals to produce goods and services more efficiently. With respect to overall economic output, increased infrastructure spending by government is generally expected to result in higher economic output in the short-term by stimulating demand and, in the long term, by increasing overall productivity.

The impact on economic output depends on the type of infrastructure investment. Investments in core infrastructure, defined as roads, railways, airports and utilities, are expected to produce larger gains in economic output than investments in some broader types of infrastructure, such as hospitals, schools and other public buildings.

The investor community is cautiously optimistic, and waits with bated breath to ascertain whether the positive sentiments emanating from Pretoria match the policies that are promulgated by the legislature in Cape Town.

The investor community is cautiously optimistic, and waits with bated breath to ascertain whether the positive sentiments emanating from Pretoria match the policies that are promulgated by the legislature in Cape Town.

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