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INTRODUCTION

Once again the mining feature includes issues that are sometimes looked at in isolation but are integral to all that encompasses mining – infrastructure, energy, conservation and human rights, among others.

2019 will be remembered as a year of economic decline and ongoing incompetence in the public sector. The ramifications were dire. A number of construction companies, some of them household names, found themselves in financial difficulty. For some, business rescue has been a possible solution; for others the doors closed, for all it meant job losses.

It is estimated that mineral deposits with any commercial value lie under a mere 1% of the earth surface. As the world population grows, so its dependence on transport, computers, phones, industrial machinery – and the list goes on – increases, and they all require minerals. It is said that world consumption of minerals used in the 20th century exceeded that used since the beginning of history; a sobering thought in a digital age.

There are several articles in this feature that consider the impact on the environment. Short-term (relatively speaking) riches and advancement for local communities and the country may be a draw card, but must be weighed up against long-term degradation. The balancing act that is required will take intelligent and sensitive handling; lunar landscapes over thousands of kilometres of once incredible beauty are considered and that fauna and flora are disturbed as little as possible, and relocated where it is impossible to avoid. There are many local communities who, rightly, have considerable concerns about the environment in which they live and the possible destruction of a way of life they enjoy.

Frequently underestimated, perhaps not even considered by many, is the time it takes to complete the formal agreements and to consider and ensure that the basic essentials of power and water and haul roads will be available to get projects off the ground. The disciplines involved in the initial phases include architecture and engineering, environmental and financial; the costs involved are, in a word, huge. The infrastructure required for a new mine is vast – roads, storm-water drainage systems, mine water dams. And the facilities needed for those who will be living there - access to housing, sanitation, clinics, schools, telecommunications, shops and potable water.

South Africa lags behind other mining countries when it comes to the processes used. Labour intensive methods of extraction are outdated and mines will have to consider technology as an alternative; the resulting need for fewer people is likely to be met with strikes; unsurprising in an industry that currently provides direct employment to 456,000 people. But perhaps that is a doom and gloom expectation. Should the economy improve and local and foreign investors consider it worthwhile investing once again, exploration may discover new areas for development. The Minerals Council South Africa’s most recent stats (2017) show that global exploration in that year in Canada accounted for 14%, Australia also 14% and South Africa – a miserable 1%.

Eskom’s complete mismanagement has badly impacted the bottom line for mining companies. The unexpected load-shedding at the end of 2019 was considerable, both in impact and in battering confidence levels. With an unreliable power provider and the hefty price hikes – particularly for the mines which have to pay winter costs - miners are seriously considering the viability of their operations, with many small-scale operators closing their doors. Already mines (Sibanye) have shed jobs or have warned of impending job losses (Glencore and Samancor). This in a country where it is said that one in three adults is unemployed. AngloGold Ashanti’s sale of the last of its assets in South Africa will see the end of its historical association with the country. In each case, the major reason cited has been Eskom; along with rising levels of debt in SoEs, corruption, labour unrest and for construction companies, the inability of government to do anything about Mafia style intimidation.

A rather gloomy picture. •

Myrle Vanderstraeten
THE POLICIES KEY TO SUCCESS OF AFCFTA

WILDU DU PLESSIS

The African Continental Free Trade Area (AfCFTA) has the potential to deliver significant benefits for the continent. According to our latest research, compiled in conjunction with Oxford Economics, AfCFTA’s US$ 3 trillion Opportunity: Weighing Existing Barriers against Potential Economic Gains, AfCFTA will increase the competitiveness of the continent’s producers and exporters, incentivise new business, improve prospects for increased local value, establish new intraregional value chains, and serve to lower inflation in the long term. It will also help to address Africa’s industrial deficit and reduce the continent’s overreliance on primary goods exports. Yet the tangible benefits, with a wider reach across the continent, will likely only be realised from 2030 onwards due to a number of obstacles, including among other things, a lack of cohesive and reliable infrastructure, unreliable sources for water and electricity, political instability and policy concerns.

South Africa stands to maximise the benefits of AfCFTA due to its existing strong connections across the continent, and a well-established manufacturing base. Smaller economies, such those of Ghana and Côte d’Ivoire, also stand to benefit from the agreement, due to existing favourable conditions – open economies, good infrastructure and supportive business environments.

Investment in Africa has always been a story of infrastructure and that has not changed in 50 years. Among African leaders there has been a strong consensus that the infrastructure impediment must be addressed so as not to restrict increased trade integration. This includes reducing barriers to trade by boosting transport and utilities infrastructure. As such, AfCFTA offers the opportunity to shape Africa’s future in a different way, providing a structure for various trading partners to interact with all 54 nations, to create infrastructure and unlock growth.

Over the past decade, Africa has made progress in overcoming the infrastructure financing shortfalls. In November 2019, the AfDB announced at the Africa Investment Forum in Johannesburg that infrastructure investment in Africa was over US$100 billion in 2018, and around US$25 billion came from China. Of the overall amount, 40% went to energy infrastructure, China, through its Belt and Road Initiative (BRI), is Africa’s largest trading and investment partner but the opportunities for investment and collaboration extend beyond China to other Asian nations such as Japan, and to the US.

Africa’s transport infrastructure is currently behind the global average. With an area of 30.4 million km², Africa’s size makes it challenging to build reliable transport networks. The continent’s major rivers (Congo, Niger and Nile) are unsuited as transport channels due to cataracts and deltas. South Africa, and countries in North Africa such as Morocco, Egypt, Tunisia and Algeria, generally boast more sophisticated transport infrastructure but landlocked nations lack easy access to ports, making their markets less accessible.

Despite these challenges, large-scale projects are in the pipeline to mitigate the situation. These include the North-South Multimodal Corridor of roads and railways on the multi-modal African Regional Transport Infrastructure Network corridor that runs through South Africa, Botswana, Zimbabwe, Zambia, Malawi and the DRC. Also currently under development is the Central Corridor that will modernise the ARTIN corridor in Eastern Africa, connecting Burundi, the DRC, Rwanda, Tanzania and Uganda. The Abidjan-Lagos Corridor Highway Project, a six-lane dual motorway is being built from Lagos to Abidjan to align with potential new economic zones. The Trans-Maghreb Highway aims to improve the movement of services and goods across North Africa.

Most African countries are behind the global average in terms of their current utility infrastructure, according to the WEF CGI scores. Some countries, like Egypt, Morocco, Tunisia and Algeria, are just reaching the world average. However, in terms of the available supply of water and electricity, the rest of the continent, including South Africa, Ghana, Côte d’Ivoire and Kenya, are under the global average. Within the AfCFTA context, reliable utility infrastructure is vital for businesses to scale up production for regional export or to develop manufacturing bases and the continent needs to redouble efforts to ensure that an adequate supply of water and electricity is available. Additional investments in utility infrastructure will also incentivise foreign companies to set up production facilities on the continent.

Potentially, the best bets will be made by companies that invest in countries where it is easy to do business, where wages are low, and from which the transport of goods to other African markets is easy. African governments know this and are accelerating their initiatives to improve the ease of doing business.
The report lists Ethiopia as standing out as an especially promising investment destination. The Ethiopian government is aggressively boosting power generation capacity and transport links to neighbouring countries (and, via, Djibouti, to the world) while undertaking an ambitious policy reform project to make the country an attractive investment destination.

Rwanda is also an inviting operating base for companies, thanks to regulations that make it easy and quick to set up a company. In addition, it neighbours the massive, and massively underserved, market of the DRC. Further, South Africa and Morocco will continue to attract FDI as they have long been competitive exporters of goods.

Three factors are crucial to the successful implementation of AfCFTA:

- Aligning and ensuring rule of law among the 54 African signatories, getting collaboration right, and solving the problem of reliable infrastructure and energy. However, finding effective solutions will likely take many years, given limited financial capacity in many countries, high risks to private financing of infrastructure, political hurdles, administration shortfalls and lack of resources. Despite this, we are confident that African nations can address the challenges successfully and that the next decade will see the formation of one of the world’s most exciting new global trading zones.

Du Plessis is a Partner and Head of Africa, Baker McKenzie (South Africa).

HOW IS SOUTH AFRICA’S REGULATORY FRAMEWORK SUPPORTIVE OF ITS JUNIOR MINING INDUSTRY?

DIMITRI CAVVADAS, CONOR MCFADDEN AND THANDIWE NHLAPHO

In jurisdictions with depleting reserves, mining exploration can be the catalyst for future economic growth, employment creation and business opportunity. Yet, whenever the mining industry experiences a downturn, exploration spending usually plummets. A jurisdiction which best illustrates this is South Africa, whose exploration budget, according to data from S&P Global Market Intelligence, decreased from US$404 million in 2007 to US$87 million in 2017.

From a global perspective, there are signs that the financial performance of the mining industry is improving and a comparative analysis by S&P Global Market Intelligence of exploration expenditure for 2018, 2017 and 2016 yields a similar upward trend. If this trend continues, how is South Africa, as a jurisdiction best known for its large-scale mining operations, supporting junior mining through an enabling regulatory framework?

Tax concessions for investors

In 2009 South Africa introduced concessions on its tax legislation aimed at venture capital companies (VCCs), financing early stage businesses, including junior mining companies. These concessions are encapsulated in s12J of the South African Income Tax Act (ITA). This section is akin to the UK’s venture capital trust regime. It allows investors to benefit from tax concessions, namely a 100% deduction of the amount invested, arising from their investment in a mining company in the period before it generates sufficient taxable income from production.

In order to qualify for this tax benefit, VCCs must invest in companies with a book value not exceeding R50 million, or R500 million in the case of a “junior mining company” (being an unlisted mining company or mining company listed on AIX). Although this initiative was intended to encourage exploration funding, it is unfortunate that, from a mining perspective, it has rarely been used; there is only one VCC operating in the mining space. Reasons for this may be the inability to trade the shares in a VCC (investors are required to hold the shares for five years, failing which the tax benefit is lost), the limit on the investment amount and restrictions on the amount of shareholding. In any event, the VCC regime is a temporary measure that, unless extended, ends in June 2021.

Canadian comparison

In Canada, a jurisdiction in which exploration expenditure has significantly increased since 2015, “flow-through shares” are an established source of financing, targeted specifically at exploration activities. The holders of flow-through shares are entitled to certain tax benefits and, therefore, such shares are typically issued at a premium to ordinary shares. They become ordinary tradable shares of the issuer once bought by an investor and the tax benefits are conferred. In contrast to the VCC regime, the flow-through share regime allows a mining company to obtain funding for expenditures on exploration and pre-mining development. The company is able to renounce or flow-through certain expenses to the holder of the shares. Therefore, the expenses are deemed to be incurred by the investor and not the company and accordingly reduce the investor’s taxable income. Furthermore, the Canadian flow-through regime is complemented by the additional 15% mineral exploration tax credit available to individual investors for grassroots exploration.

The flow-through share regime is specifically tailored for junior mining companies and ensures that they have a consistent flow of capital during their initial phase of exploration, when there is no taxable income accrued. The Prospectors & Developers Association of Canada (PDAC) believes that the “flow-through shares” concession has propelled Canada to be a global
leader in mineral exploration and mining. PDAC bases this assertion on information provided by the TMX Group and S&P Global Market Intelligence which shows that between 2011 and 2017, on average, 68% of the funds raised on the TSX and the TSX-V were raised through flow-through shares. This percentage is even higher for smaller transactions.

**Stock exchange participation**

The JSE has supported the growth of small and medium-sized businesses and junior mining exploration entities by relaxing its requirements relating to the appointment of a designated adviser for VCCs. A VCC applicant issuer listed on the AltX of the JSE may either appoint a designated adviser or VCC adviser. However, in the event of a VCC seeking a listing on the Main Board of the JSE, it will be required to appoint a sponsor and not a VCC adviser. The JSE recently indicated its willingness to engage with the junior mining industry to unpack its listing requirements and consider other barriers to entry into the market. Capital markets activity could also potentially be enhanced through suitable tax incentive structures for junior miners.

**2018 Mining Charter**

An argument could be made that the Department of Mineral Resources and Energy (DMR), under its new leadership, has recognised the plight of the junior mining sector in South Africa by dispensing with the empowerment requirements entrenched in the earlier 2017 “Zwane Charter”. This Charter required the holder of a new prospecting right to have a minimum of 50% + 1 black person shareholding. Notwithstanding this milestone, the 2018 Mining Charter has received criticism for failing to engage with the junior miners and deal with the more specific challenges of exploration in order to create an enabling legal framework for this sector.

**Additional supportive measures**

Other encouraging developments to emerge in South Africa in support of exploration funding are initiatives by the DMR and Minerals Council, namely the DMR’s junior miners’ programme and Junior and Emerging Miners’ Desk to assist new entrants in the junior mining sector.

Minister Gwede Mantashe also dedicated a national investment of R20 billion to an integrated and multi-disciplinary mapping programme to boost global investment in local exploration. The R20 billion dedicated by the Minister is expected to be made available over the next 10 years. It is envisaged that the programme will assist South Africa in securing new resources for development, employment creation, economic growth and accelerating transformation. In the past, the mining industry has fulfilled a significant role for employment creation on a large scale. If the junior mining industry can attract investment as it does in Canada and Australia, it may play a significant role in addressing President Cyril Ramaphosa’s recent call for two million jobs in the next 10 years.

According to a survey conducted with members of the Junior and Emerging Miner’s Desk of the Minerals Council during April and May 2019, 64% of participants identified the South African regulatory environment as a key challenge to doing business. Despite the measures contemplated in this article, it would appear that further work needs to be done to create an enabling regulatory framework for junior miners in South Africa and that some lessons can be learnt from jurisdictions with a thriving junior mining sector, such as Canada, in achieving this objective.

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MINING IN A CIRCULAR ECONOMY MEETS STUMBLING BLOCKS

GARYN RAPSON AND PAULA-ANN NOVOTNY

Companies that take the circular economy seriously by finding creative ways to re-use the same materials will stand the test of time.

Minimising waste is already a legal requirement in South Africa. The National Waste Management Strategy advocates for the waste management hierarchy as a necessary approach towards achieving effective waste management and contributing to sustainable development. This principle has been carried into law under the National Environmental Management: Waste Act (59 of 2008), placing a duty on all holders of waste (i.e. those who import, generate, store, accumulate, transport, process, treat or export waste) to ensure that the generation of waste is avoided, or where it cannot be avoided, that it is reduced, re-used, recycled or recovered and only as a last resort treated and safely disposed of. As support for “green industrialisation”, the circular economy promotes the elimination of waste by creating a continuous value chain for resources.

The circular economy is a risk for mining companies as it reduces the demand for raw materials. But it is also an opportunity. For example, last year Nespresso announced that it would use responsibly-sourced aluminium produced by Rio Tinto in its coffee capsules, which it recycles. Responsibly-sourced aluminium means that certain standards were met during production, including minimising carbon emissions.

The benefits for mining companies which are active in the circular economy are twofold. They create customer loyalty (as in the Nespresso example), and generate economic benefits, since sustainable projects can reap profits. Unfortunately, however, while government seeks to encourage recycling, it also impedes its realisation with regulatory obstacles such as the requirement for new and amended permitting for mining companies trying to find creative solutions for waste rock or industrial off-gases.

Two examples illustrate this stumbling block.

The first is a mining company which has designed a project to reduce waste rock material by crushing it and supplying it to local communities and businesses for housing or road construction. From a legal perspective, waste management licences are potentially required for the dump reclamation process, for the crushing and screening of the waste rock and potentially for the use of this waste rock in construction activities (not to mention other environmental permits).

The project could further require the amendment of existing environmental approvals, as well as mine closure plans where waste rock is used in various rehabilitation activities, such as backfilling.

If the dump was stockpiled before 1 May 2004, it is regarded as an industrial asset, which would require environmental and water permits for processing, but not a mining right. If it was deposited after 1 May 2004, when the Mineral and Petroleum Resources Development Act (MPRDA) came into effect, it is and will be classified as a mining asset, which requires a mining right. This is because the MPRDA broadened the definition of mining to include processing and not merely extraction.

Legitimately re-treating waste material has been identified as an opportunity to bring illegal artisanal miners, such as those operating on the diamondiferous rock dumps around Kimberley, into the legal system. The Minerals Council SA has been actively examining this opportunity and is in ongoing discussions with the Department of Mineral Resources and Energy.

The fourth industrial revolution’s intent is to bring industries, particularly the mining industry, towards a low-carbon future; this will require vast volumes of new minerals and metals and, given SA’s extensive natural reserves of the materials required, mining will remain a powerhouse of our economy.
The problem with trying to legalise illegal mining even re-treating dump material is that it brings additional significant costs relating to permitting and compliance, which are likely to meet resistance.

A second example of a circular economy project is that of an entrepreneur who is currently testing technology to treat waste gases from a furnace on a mine. The technology produces bicarbonate of soda as a by-product. This is an ideal project for the circular economy.

However, in this case, there is an onerous legal requirement to potentially amend the company's air emissions licence, which would have imposed abatement requirements for the furnace. The project could also be required to obtain other environmental approvals, for example in respect of water uses and the clearing of indigenous vegetation for site expansions.

Each scenario must nevertheless be considered on its own from a regulatory and permitting perspective.

The fourth industrial revolution’s intent is to bring industries, particularly the mining industry, towards a low-carbon future; this will require vast volumes of new minerals and metals and, given SA's extensive natural reserves of the materials required, mining will remain a powerhouse of our economy.

Those mining companies that stick their heads above the parapet will participate successfully in the future of the circular economy but their plans could be frustrated if the right approvals are not in place.

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AS CLEAR AS MUD: UNCERTAINTY CREATED BY THE ONE ENVIRONMENTAL SYSTEM

LILI NUPEN, NICOLE LIMBERIS-RITCHIE AND EMLYN PILLAY

On 8 December 2014, the so-called one environmental system (OES) made its debut with the intention of streamlining the licensing of mining operations. However, the OES is no model of clarity, and confusion persists.

In this article we discuss the uncertainty of the OES insofar as the provisions seek, in certain circumstances, to deem an environmental management programme (EMP) issued under the Mineral and Petroleum Resources Development Act (MPRDA) to be an environmental authorisation (EA) issued under the National Environmental Management Act (NEMA).

Prior to the enactment of NEMA, and as early as 1998, activities that could have a substantial and detrimental impact on the environment were listed under the Environment Conservation Act (ECA) and required environmental approval before they could lawfully commence. In 2006, the ECA listed activities were replaced by the NEMA listing notices, of which there have since been three sets.

Until the advent of the OES, mining itself was not listed under either ECA or NEMA. However, various activities ancillary to mining were listed; for example, the construction of roads or clearance of indigenous vegetation. These associated activities required approval under either ECA or NEMA, depending on the date of commencement. Indeed, there was no provision in ECA, NEMA or the MPRDA to exclude the need to obtain environmental authorisation in circumstances where a mining right and EMP had been obtained under the MPRDA. Despite this, it is apparent that, in practice, many mining companies operated in the absence of environmental authorisation, with the ancillary activities being considered as part of the EMP process contemplated in the MPRDA.

Enter the OES. Mining itself is now specifically listed as an activity under
NEMA. Companies wishing to mine need to apply for environmental authorisation, and to include in that application all listed activities that will be triggered. Environmental impacts are no longer considered as part of the mining right application. Instead, a mining right may only be issued where an environmental authorisation has been granted in terms of NEMA.

According to the National Environmental Management Amendment Act 2008 (NEMLAA), an EMPr approved under the MPRDA, must be regarded as being approved under NEMA. Many interpreted this to mean that where a mine had obtained its mining right and associated EMPr inclusive of such activities, it automatically meant that the EMPr would be deemed to be a blanket EA for all activities being conducted by the mine, regardless of whether these activities were approved under NEMA or ECA - as the case may be.

This wide interpretation would, in effect, legalise activities that were not properly approved prior to the OES. The legislature recognised this uncertainty and proposed an amendment in the National Environmental Laws Amendment Bill 2014 (NEMLAB 4) which is currently with the NCOP for deliberation.

NEMPLA 4 provides that only once a mine has obtained its mining EMPR for all associated listed activities, will the EMPR be deemed to be an EA. This seems to solve the problem and make it clear that prior to the OES a mine required an EA for ancillary activities, regardless of whether they were included in the mining EMPR. Unfortunately, NEMLAB 4’s memorandum of objects, which explains this proposed amendment, is fraught with inconsistency removing the clarity the clause itself seeks to achieve.

The courts have had occasion to consider this issue. In a 2017 decision of the Western Cape High Court in Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroust No and Others (18701/16) [2017] ZAWCHC 25; [2017] 2 All SA 599 (WCC) (20 March 2017), the court clearly said that prior to the OES, both a NEMA EA and an EMPR under the MPRDA were required. However, last year in the matter of Global Environmental Trust and Others v Tendele Coal Mining (Pty) Limited (11488/17P) [2018] ZAKZPHC 62; [2019] 1 All SA 176 (KZP) (20 November 2018), the Pietermaritzburg High Court said something different. It said that prior to the OES, the environmental impacts of mining were regulated exclusively though the MPRDA and further, that through the operation of s12(4) of NEMLAA, a mining EMPR was deemed a NEMA EA. This judgment is currently on appeal in the Supreme Court of Appeal (SCA), and an attack on this interpretation was brought into the spotlight by the Centre for Environmental Rights which intervened as amicus on the application for leave. It is also important to note that the court of first instance was not alerted to the amendment proposed in NEMLAB 4, nor to the decision of the Western Cape High Court as already discussed.

If the Pietermaritzburg High Court’s decision is overturned on appeal this may leave many mines that did not obtain environmental authorisation prior to the OES in a position where they will be required to apply - through s24G of NEMA - to have ancillary activities authorised ex post facto subject to the payment of a fine of up to R5 million per listed activity.

The mining industry awaits the SCA decision with clenched jaws.

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The Mineral and Petroleum Resources Development Act (28 of 1991) (MPRDA) recognises the need for sustainable development of mineral and petroleum resources while simultaneously promoting economic and social development, local and rural development and the social upliftment of communities affected by mining. It contains, however, no stated objective to maintain tenure and, at best, recognises the need for redress in instances where the inherent objectives of the MPRDA clash with the unavoidable consequences of mining.

In the context of informal land ownership, two other legislative imperatives accompany mining right applications. Those are, firstly, the impact assessment processes set out in the National Environmental Management Act (107 of 1998) (NEMA). It is trite that aspects such as “need and desirability” and socio-economic impacts are, by law, required to form part and parcel of impact assessments under the NEMA. Secondly, the Interim Protection of Informal Land Rights Act (31 of 1996) (IPILRA) serves to ensure that communal land rights by customary law also assumes its rightful place at the constitutional table of protection. The decision in Baleni and others v Minister of Mineral Resources and others [2018] JOL 40654 (GP), which seeks to interpret the application of the IPILRA in a mining context, may, however, be a bridge too far.

The judgment held, amongst others, that the Department of Mineral Resources (DMR) cannot approve a mining right over communal land unless it had obtained consent from the community. The finding is premised predominantly on s2(1) of the IPILRA, which states that “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”. This stands, on face value, in contrast to the MPRDA, which merely requires that a landowner (or community) must be consulted before, in the words of the court, “the Minister awards a mining right to an applicant”. The fact that there is an entirely separate body of law regulating the assessment and consideration of socio-economic impacts, to inform any such decision, is not noted.

The judgment elucidates the rich history of the Umgun-gundlovu community, their spiritual connection to the land and various aspects of communal customs that evidently supersede a mere affinity for property or transient sentiment. It is evident that mining as envisaged would lead to reduction of grazing areas and areas harvested for building material and the like. Evidently, the prospect of mining dampened tourism potential in the area, which the community apparently pursues as a vessel of possible future income. Other aspects include the community’s fear of adverse impacts on their way of life due to an influx of outsiders. The court concludes that a “complete destruction” of the community’s cultural way of life is in the ofing. The veracity of these deductions is not the subject of this article, but rather the statutory process in terms of which such evaluations are performed, how these assessments feed into the consideration of mining right applications and the implication thereof for purposes of an alternative approach to the IPILRA.

The IPILRA clearly gives informal landowners a voice, which enhances rights to consultation, objection, appeal and other administrative or judicial remedies. If mining impacts are such that it cannot be appositely ameliorated either by management or compensation, the right may not be granted. Hence also the appeal procedures under the MPRDA, supported by the basic tenets of administrative law and subsequent review options to court.

The court rejected a proposition by the respondents that the IPILRA was not enacted with a view to elevate communal rights above that of common law ownership but rather to ensure that communal and traditional rights to land received their proper place in the South African context with all other land rights. However, the court’s references to other case law in this respect do not convincingly make the point in contradistinction to common law ownership rights. The court appropriately highlights the importance of pursuing
an interpretation that is cognisant of the social and historical context of a statute. In so doing, the court refers to concepts of redress. However, the community is evidently not seeking redress, but rather preservation of the status quo. While these aspects may be debatable, the court’s reference to s23(2A) of the MPRDA to support a consent approach is misplaced. That provision merely empowers the Minister to insert conditions into an already granted mining right, which promotes the interest of an occupying community. Since the section relates to the advancement of communities consequential to the awarding of a mining right, it can have no bearing on the question as to whether any community is, under the IPILRA, at liberty to refuse a mining right to be processed in the first instance.

Importantly, in partial support of the notion that, in effect, the IPILRA confers a veto right to informal landowners vis mining, the court argues that the reference in s2(1) to “any other law” does not include a reference to the MPRDA. This inference, however, hinges on an apparent misreading of the judgment in Agri South Africa v Minister for Minerals and Energy 2013 (4) SA 1 (CC). In coming to the critical conclusion that the MPRDA does not envisage expropriation for purposes of s2(1) of the IPILRA, the court conflates two distinct concepts. That is, the inherent dispossession of mineral rights occasioned by the promulgation of the MPRDA as such on the one hand, and expropriation of property consequential to the granting of a mining right, on the other. While the Constitutional Court had ruled that the former does not constitute expropriation, the latter concept clearly remains expropriation, which is also the trajectory on which the Umgungundlovu community finds itself. If there is any reason why s2(1) of the IPILRA requires community consent for purposes of mining rights, it cannot be for the reasons proffered by the court in this respect.

Moreover, the judgment cites an extract from the same judgment in Agri South Africa v Minister for Minerals and Energy, endorsing the court’s view that “Many people have an attachment to land for its own sake and would prefer not to see the surface of their land disturbed through the exploitation of minerals ...”. However, if the court rendered its decision, in part, on the basis that the connection of a community of informal landowners to land is unique and therefore requires an equally unique treatment under the law, this notion is eroded by a reference to the general aversion of all landowners against invasive mining.

Much was also made of various, and admittedly important, concepts of international law and the concept of informed consent where mining significantly affects communities. However, the “significance” of socio-economic impacts is a function of statutory assessments under the NEMA that had, by the time the community approached the court, not been completed. Further, it is not convincing to argue that merely because the concept of informed consent exists in international law, it automatically trumps an assessment and decision-making process entrenched in South African law, which is (at least on paper) cognisant of the historical, cultural and socio-political setting of a particular community. Many of the community-specific considerations ventilated before the court are the very matters that stand to be administratively evaluated in the course of the mining right application itself. In any event, even if it is to be concluded that s2(1) of the IPILRA does indeed trump the MPRDA by requiring informed consent, the argument should arguably not be rooted in an overreliance on facts and factors which are unique to a specific community.

Assessments on social impact, a project’s “need and desirability”, as well as the subsequent evaluation of these assessments by a competent regulatory authority within the bounds of administrative law, remain the fulcrum of any mining rights application. The particular vulnerability of a community from a consultative, historical and cultural point of view is the subject matter that colours these assessments and evaluations. If it is so that the granting of rights will lead to unacceptable socio-economic and cultural impacts or if such assessments are lacking in depth or inclusion, then the application should fail, either out of hand or on appeal, with the courts at the ready thereafter.

The court reveals a doubtful premise in stating: “Who gets to decide whether mining activities can take place on this area – the community which has lived there for centuries or the [mine]?”. The exclusion of the regulator in this question arguably points to the answer. If the writer’s position on s2(1) of the IPILRA is correct, the answer is, neither. It may be so that certain minerals should remain untouched, and some for pure socio-economic reasons. These abatements should, however, be gleaned from the MPRDA and the NEMA, and not s2 of the IPILRA.

The court correctly points out that both the IPILRA and MPRDA “seek to restore land and resources to Black people who were the victims of historical discrimination” and consequently must be read together. The irony is that an overbroad application of s2(1) of the IPILRA may well act to the detriment of these very objectives. Even unjustified community objections against empowered mining will win the day. Beneficial mining, which would otherwise have
optimised mineral exploitation and facilitated the empowerment objectives set out in the mining charter, as well as compulsory social and labour initiatives, will stand or fall at the whim of communal consent. This outcome does not bode well for an industry that is critical to the circular flow of the economy and one of the major vessels for socio-economic transformation.

The question remains whether the criticisms mentioned, and proposed interpretation, would aid to alleviate the plight of vulnerable communities of informal landowners. It is true that the mandated assessments under the NEMA, administrative appeals and subsequent review options could save the day, but perhaps the DMR, as both wolf and herder under the MPRDA, might not be the appropriate initial arbiter in these matters. This points to the need for improved policy and jurisdictional adjustments, rather than a complete abandonment of administrative discretion in similar mining right applications.

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**CAN THE SOUTH AFRICAN MINING AND NATURAL RESOURCES SECTOR SURVIVE?**

**WARREN BEECH**

In the lead-up to the Cape Town Mining Indaba 2020, stakeholders in the South African Mining and Natural Resources Sector have been trying to put a positive spin on the outlook for 2020. There are various reasons, including that it is necessary to create optimism so that investors will consider investing in South Africa, and because to do otherwise is often seen as not supporting the “Africa Rising” narrative. By the time this article has been published, the Cape Town Mining Indaba 2020 will be in full swing, or possibly over, and stakeholders will be considering how to optimise the outcomes.

Mining Indaba 2019 was filled with hope and promise as stakeholders in the Mining and Natural Resources Sector rode the wave of optimism following the election of President Cyril Ramaphosa, and as the sector responded positively to his charisma during his keynote address.

However, 2019 was another tumultuous year for the sector, as it was battered by continued policy and regulatory uncertainty, the rising costs of electricity, deteriorating infrastructure (particularly roads and rail), unfulfilled expectations of many stakeholders - particularly communities in and around mining operations, uncertain commodity cycles and prices, costs of employment, rising unemployment generally and specifically in the Mining and Natural Resources Sector, crime (including illegal mining), and corruption.

Despite the publication of Mining Charter III on 27 September 2018, and the subsequent publication of the Implementation Guideline, not all stakeholders are satisfied and there is ongoing debate (and potential court action) regarding several key provisions, including the “once empowered, always empowered” principle, and compliance with the procurement requirements, which several stakeholders regard as extremely onerous. For as long as there are disputes and unhappiness surrounding these key aspects, there will be uncertainty, and potential investor caution, at a time when South Africa can least afford overly cautious investors.

It is, however, not only the usual factors that are impacting the Mining and Natural Resources Sector, but also the global “environmental revolution” which has focused significant attention on environmental compliance with a range of requirements, including South Africa’s extremely complex legal framework which governs the Mining and Natural Resources Sector. This attention is focused, specifically, on aspects such as greenhouse gas emissions, carbon tax, post-closure liabilities, and the disastrous consequences that may flow from a loss of integrity of tailings storage facility impoundment walls. This focus has resulted in several institutional and private investors reconsidering their investment and threatening to divest. These threats are particularly in relation to mines which operate large tailings storage facilities and follow Vale’s Brumadinho tailings storage facility failure (one of six major tailings storage facility failures in 2019) and the so-called “dirty minerals”, with thermal coal receiving the most attention.

Despite the current status of South Africa’s Mining and Natural Resources Sector, it remains a critical and substantial contributor to South Africa’s economy.
It is not only coal that is regarded as “dirty”. There has been significant attention on conflict diamonds following the Kimberley Process plenary meeting, held in India in November 2019. An opportunity was lost to strengthen the scope of the Kimberley Process, with governments failing to reach consensus during this plenary meeting. While the Kimberley Process, the Multi-Lateral Trade Regime established in 2003, has gone a long way to prevent the flow of conflict diamonds, it was hoped that the process would be strengthened to make it more efficient and encourage positive governance by affected countries.

It was not, however, all bad news in 2019. Wage negotiations were concluded in the sector without protracted strikes and there have been significant developments relating to fluor spar with Sepfluor’s Nokeng Mine ramping up to commercial production, and approvals granted for the construction and development of what many regard as one of the highest grade rare earths mine in South Africa (Steenkampskraal). Fluorspar and rare earths are critical in the development of lithium and other storage cells (batteries), which are important not only in relation to the efficient use of renewable energy but also for electric vehicles, which will play a vital role in the sustainable mines of the future.

Despite the current status of South Africa’s Mining and Natural Resources Sector, it remains a critical and substantial contributor to South Africa’s economy. This is recognised by the South African government, which frequently publicly confirms its status. It is, however, becoming more challenging for South Africa’s Mining and Natural Resources Sector to do business. Balancing key characteristics of the Mining and Natural Resources Sector, such as the finite nature of mineral resources, the potential damage to the environment and the focus on environmental compliance, requires a careful balancing act between the benefits that are derived from South Africa’s minerals (including growth, transformation and development) and the constitutional right to an environment which is not harmful.

The recent judgment of the Constitutional Court, which dismissed Atha-Africa’s appeal against a high court decision that set aside ministerial approvals for the proposed coal mine in a protected area near Wakkerstroom, Mpumalanga, in November 2019, sent a very clear message – despite the potential significant benefits that can be derived from mining, mining cannot and will not be prioritised over protection of sensitive environmental areas.

In November 2018, a year before the Constitutional Court’s judgment, the High Court, Pretoria set aside the 2016 decisions by the Minister of Mineral Resources (as he was then known) to grant approval for the establishment of a coal mine inside of the Mabola Protected Environment. Not only did Atha-Africa obtain a mining right, all environmental approvals were granted. This caused outrage, particularly among environmental activists, led predominantly by the Centre for Environmental rights.

Importantly, Atha-Africa’s loss in the Constitutional Court is not necessarily the end of the matter and Atha-Africa can re-apply. But it would have to comply fully with the provisions of the National Environmental Management: Protected Areas Act (57 of 2003), which will no doubt lead to renewed objections and fierce debate regarding the benefits of mining versus the protection of the environment.

South Africa’s Mining and Natural Resources Sector is likely to continue to face significant challenges in 2020 as it grapples with increasing environmental compliance obligations, mechanisation, automation, Internet of Things, what the Fourth Industrial Revolution means for the industry, and how these developments can contribute to a more efficient, cost-effective, safe and sustainable sector.

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ONE STEP AT A TIME: IRP 2019 AND THE TRANSITION TO A LOW-CARBON ECONOMY

GILLIAN NIVEN AND PAULA-ANN NOVOTNY

The Integrated Resource Plan 2019 (IRP 2019) is the latest addition to the array of legal instruments South Africa has adopted to transition to a low carbon economy and as part of its commitment to adapt to and mitigate against climate change under the international climate change framework.

We have seen a marked increase in climate change-related legislation and regulations in recent years, including the mandatory greenhouse gas reporting framework promulgated under the National Environmental Management: Air Quality Act, 2004 (NEMQA); the long-awaited Carbon Tax Act, 2019 which imposes taxes on fossil fuel inputs by large industry emitters (subject to a host of allowances aiding the transitional implementation of this levy), and the draft Climate Change Bill seeking to serve as a framework to build SA’s effective climate change response in the long term, along a national greenhouse gas emissions trajectory.

These frameworks do not come without problems of their own, however, and the piecemeal fashion in which these laws are taking shape is problematic.

IRP 2019, published on 18 October 2019, makes it clear that SA will pursue a diversified energy mix to reduce reliance on a single energy source (coal) in line with the country’s Paris Agreement commitment. IRP 2019 acknowledges that the transition to a low-carbon economy must be timed in a manner that is “socially just and sensitive to the potential impacts on jobs and local economies”. SA’s energy sector has been plagued by issues relating to infrastructure and service delivery for years. The diverse energy mix in IRP 2019 seeks to
remedy this. Plans to decommission old Eskom power stations, coupled with the uptake of renewables, as well as technology such as battery storage and corridors for renewable projects, will assist in reducing red tape and facilitating renewable energy projects.

While new coal projects are not excluded, under IRP 2019, all new coal power projects must be based on high efficiency, low emission technologies and other cleaner coal technologies. IRP 2019 also sets out the rate and schedule of decommissioning of Eskom’s existing 16 coal-fired power plants until 2050. This appears to align with the tender published by Eskom in August 2019, for the review of the decommissioning and rehabilitation cost associated with coal, peaking and renewable power stations after life of plant. We have also recently seen the disposal of thermal coal assets by both South32 and Anglo American as international stakeholders continue to reduce exposure to coal assets.

While IRP 2019 acknowledges the regulatory constraints under which Eskom’s power plants must operate, namely the minimum emission standards prescribed under NEMQA, which many of the older plants are unable to achieve, it does remark that in addressing this statutory non-compliance, a balance should be struck between energy security, poor air quality and the economic cost associated with shutting these down. Statements such as this do not appear to point clearly in the direction of “Just Transition” but rather contribute further to the muddled waters regarding policy direction in relation to air quality and GHG emissions.

Government has, however, attempted to alleviate the regulatory strain on renewable energy companies by revising the procedure for applying for environmental authorisations for large-scale wind and solar photovoltaic (PV) energy developments. Applications for environmental authorisations for certain large scale wind or solar PV facilities must follow the basic assessment procedure of the Environmental Impact Assessment Regulations, 2014, and the timeframe for decision-making purposes is 57 days. However, this process is only available for projects where the entire proposed facility will be situated in declared Renewable Energy Development Zones (REDZ).

Actions such as the changes to the listed activities requiring an environmental authorisation for certain renewable energy projects and the gazetting of eight REDZ in 2018, with three more proposed in early November 2019, are promising and may be the key to ensuring a smooth transition to a low-carbon economy. We have seen a noticeable change in the Department of Environment, Forestry and Fisheries under Minister Barbara Creecy. It appears to be significantly more energetic and proactive and is addressing the correct environmental concerns.

While government’s policy is unquestionably supportive of renewable energy, the high level of environmental regulation in these areas poses financial challenges to new entrants and is slowing down the development of new clean energy projects significantly.

We have seen this in the battery technology space. Due to the substances used in certain battery technologies, some of these projects may constitute a “listed activity” under the National Environmental Management Act, 1998 (thus requiring an environmental authorisation). The reuse and/or recycling of many battery storage technologies may require a waste licence under the National Environmental Management: Waste Act, 2008 and, depending on the technology in question and the location of these projects, permits may also be required under other environmental legislation such as the National Water Act, 1998; the Hazardous Substances Act, 1973; NEMQA; and/or the National Environmental Management: Protected Areas Act, 2003.

Obtaining such permits is a costly and lengthy exercise and may obstruct or delay development and production in these industries, which in turn may hamper SA attaining its goal of transitioning to a low-carbon economy. While SA’s policymakers are committed to attaining a low-carbon economy, the piecemeal approach towards legislation poses significant challenges to industry, increases the risk of misalignment between the different instruments, and may foster legal uncertainty. Most important, these further hurdles are likely to slow the transition to a low-carbon economy. A more holistic approach to regulatory reform to ensure better cohesion between the different instruments and speed up the transition to a low-carbon economy would be preferable.

SA’s lawmakers must watch both global trends in climate change-related legislation and investor sentiment towards green energy for future direction and to ensure the country remains competitive.

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All it takes is the right partner
CONSULTATION OBLIGATIONS WHEN APPLYING FOR MINERAL RIGHTS

GIADA MASINA

Recent case law has seen a shift in approach regarding the obligation that parties applying for mining rights in terms of the Mineral and Petroleum Resources Development Act (28 of 2002) have to consult with mine communities. In the matters of Grace Masele (Mpane) Malengu and Others v Itereleng Bakgatla Mineral Resources (Proprietary) Limited and Another (2018) and Baleni and Others v Minister of Mineral Resources and Others Case No 73768/2016, the courts held that mere consultation with communities who have informal rights in land on which mining is to take place is not sufficient. Applicants for a mining right have an obligation to obtain the full and informed consent of the community if its rights will be negatively impacted by mining operations.

On 28 November 2019, the Minister of Mineral Resources and Energy published Draft Amendments to the Mineral and Petroleum Resources Development Regulations, 2019 for public comment. Certain of the proposed amendments seem to follow a similar theme to the recent judgments. However, they do not go as far as requiring the consent of interested and affected parties for mining.

A definition of ‘meaningful consultation’ has been included in the Draft Amendment Regulations. It contemplates an applicant engaging in good faith with the landowner, lawful occupier and interested and affected parties in respect of the land subject to the application about the impact the prospecting or mining activities would have on their right of use of the land. The applicant should avail all the information pertaining to the proposed activities, enabling the concerned parties to make an informed decision regarding the impact of the proposed activities.

However, the definition of "meaningful consultation" is then not used in the Draft Amendment Regulations. Rather, a new regulation is proposed regarding the obligation of an applicant to consult with landowners, lawful occupiers and interested and affected persons, which specifies that the consultation must be conducted in terms of the public participation process prescribed in the Environmental Impact Assessment Regulations, 2014 (EIA Regulations). This is a helpful amendment in that it clarifies that, practically, an applicant will follow the same process as it does for environmental matters. However, additional information regarding the mining operations may need to be shared with interested and affected parties.

The EIA Regulations require, inter alia, that the applicant open and maintain a register of interested and affected parties and that the comments of the parties, including the responses thereto, are recorded in reports and plans that are to be submitted to the relevant authorities.

The definition of "interested and affected persons" has been expanded to refer specifically to host communities, landowners (both traditional and title deed owners), traditional authorities, land claimants, lawful land occupiers, holders of informal rights, the Department of Agriculture, Land Reform and Rural Development, any person (including on adjacent and non-adjacent properties) whose socio-economic conditions may be directly affected by the proposed prospecting or mining operation, the Local Municipality and the relevant Government Departments, agencies and institutions responsible for the various aspects of the environment and for infrastructure which may be affected by the proposed project. This list is significantly broad. However, it is aligned with the categories of parties that are normally already consulted.

The most material change in the Draft Amendment Regulations, in respect of the obligation to consult, relates to social and labour plans, as the objectives of social and labour plans are proposed to be expanded to include mining right holders contributing towards the socio-economic development of not only the areas in which they operate but also of “Labour Sending Areas”.


The term "Labour Sending Areas" is defined as areas from which a majority of mineworkers, both historical and current, are or have been sourced. This is a significant change and one which may be difficult to implement.

The Draft Amendment Regulations propose several other changes relating to social and labour plans, many of which clarify processes which are generally already followed.

An applicant for a mining right must, within 180 days from receiving notification of the acceptance of the application from the Department of Mineral Resources and Energy (DMRE), consult with communities and "Relevant
Structures” (comprising the local, district and metropolitan municipalities) on the content of the social and labour plan, to ensure that it addresses the relevant needs of the communities and is aligned with the updated Integrated Development Plans of such Relevant Structures. This consultation process is also to take place in accordance with the public participation process prescribed in the EIA Regulations.

Where the DMRE proposes amendments to a draft social and labour plan submitted, the revised social and labour plan must be re-lodged within a period specified by the Regional Manager and the Draft Amendment Regulations now specify that this period may not exceed 30 days. The mining right holder must publish, within 30 days and in one of the prescribed manners, the approved social and labour plan in English and one other dominant official language commonly used within the mine community.

An approved social and labour plan must be reviewed every five years from the date of approval and, when reviewing a social and labour plan, the Minister must take into account various factors, including the extent of the mining right holder’s compliance with the plan; an assessment of annual reports submitted in respect thereof; input, comments and reports from affected communities and Relevant Structures; and the changing nature of the relevant needs of the affected communities, as per the Integrated Development Plans of the Relevant Structures. Such a review process may be initiated from the fourth year of the social and labour plan and must be done in consultation with affected mine communities, adjacent communities, Labour Sending Areas and the local or district municipality.

Any collaboration in respect of approved social and labour plan projects must be transparent and must also be based on consultation with all stakeholders.

Interested and affected parties had 30 days from the date of publication to submit written representations on the Draft Amendment Regulations.

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CORRUPTION IN THE MINING SECTOR AND THE APPLICABLE SANCTIONS

BRANDON IRSIGLER AND HEATHER DUBE

The mining sector has become a focus of international investigation into corruption and bribery, despite being the most heavily regulated sector in the world. Characteristics such as the need for large sums of capital, social responsibility, the possibility of operating in high-risk countries and heavy reliance on government and government agencies responsible for issuing permits and authorisations have contributed to making the sector vulnerable to corrupt activities (Ian E Marshall ‘A Survey of Corruption Issues in the Mining and Mineral Sector’ World Business Council For Sustainable Development vol 15 2001).

Corruption in the mining sector and applicable legislation

Section 3 of the Prevention and Combating of Corrupt Activities Act (4 of 2004), defines corruption as directly or indirectly giving, or offering to give (or accepting or offering to accept), any gratification, whether for the benefit of oneself or of another person, amounting to an unauthorised or improper inducement to act, or not to act, in a particular manner.

South Africa has ratified a number of international and regional conventions and protocols against corruption, including the United Nations Convention against Corruption (UNCAC), the African Union Convention on Preventing and Combating Corruption (AUCPCC), and the Organisation for Economic Co-operation and Development – Anti-bribery convention (OECD Anti-bribery Convention). South Africa has also enacted legislation to give effect to these conventions and to prevent and combat corruption and corruption-related activities. The Prevention of Organised Crime Act (POCA) (121 of 1998), the Financial Intelligence Centre Act (FICA) (38 of 2001) and The Prevention and Combating of Corrupt Activities Act (PACCA) (4 of 2004) are domestic anti-corruption laws. These statutory provisions set out punishable acts of corruption, reporting
obligations and the penalties applicable. In addition, PACCA provides for extra-territorial jurisdiction by empowering South African courts to hear matters in respect of an act of corruption committed outside the country if the person (natural or juristic) is a South African citizen who is ordinarily resident in the country and was arrested in the territory, territorial waters or onboard a ship or aircraft registered in South Africa (Nicolas Bourdin ‘The International Investigations Review’ Law Business Research Ltd 2011).

Despite having a strong legislative backbone, the South African mining sector is flagged in the 2014 ‘Phase 3 report on implementing the OECD’s Anti-bribery convention in South Africa’ for the lack of enforcement despite being a signatory for more than 10 years.

Bribery in the mining sector often takes place through government agencies as they have the power to grant, delay or prevent the issue of licences and approvals required for the exploration, development, construction and operation of mines. Some countries permit the making of facilitation payments to encourage public officials to perform their duties expeditiously. Facilitation payments (as opposed to bribes) are lawful in jurisdictions such as the US, but remain illegal in South Africa and punishable in terms of PACCA.

**Penalties**

The penalty for corruption in terms of s26 of PACCA is imprisonment or the payment of fines. A person found guilty of corruption could be subject to a maximum sentence of life imprisonment or an unlimited fine. In addition, the court is empowered to impose an additional fine of five times the value of gratification involved in the offence.

Under POCA, a person found guilty of money laundering or associated offences is subject to a fine not exceeding R100 million. Additionally, the Act allows for the confiscation of the proceeds of unlawful activity and the property used to commit the offence.

**The Foreign Corrupt Practices Act, 1977 (United States)**

The Foreign Corrupt Practices Act (FCPA) is the US’s primary legislation against corrupt activities. The Act has a near-universal jurisdiction and its main aim is to deter corruption and abuses of power. The scope of the Act extends to any person who is linked to the US and is involved in corrupt or related activities. This includes corporations in the US, foreign corporations trading in the US, as well as US nationals who are operating in other countries and not physically in the US. Foreign natural and legal persons will be subject to the provisions of the Act if the corrupt activity took place when they were in the US.

The scope of the FCPA includes anti-bribery legislation. In terms of the Act, it is unlawful to make payment to an official with an intention to obtain an improper advantage. The Securities and Exchange Commission and the Department of Justice are both tasked with the enforcement of the Act.

There are three requirements that must be satisfied in order to establish a violation in terms of the Act:

1. “The defendant must have used a means of interstate commerce;”
2. “The defendant offered to pay anything of value to a foreign official, political part, or candidate; and”
3. “The defendant knowingly, corruptly, or willfully sought to influence an official act or to secure an improper advantage.” (§ 78dd-2)

The Act is not concerned about the value of the bribe involved, it is the intention to bribe that is punishable. Notably, receiving a bribe is not punish-
able in terms of the Act. Other statutes, such as the anti-money laundering
statutory provisions, would ordinarily be invoked in order to convict a public
official for receiving a bribe.

The FCPA does, however, distinguish between bribery and facilitation pay-
ments (grease payments). Because facilitation payments are made with the
intention to incentivise public officials to complete their official duties expedi-
tiously, they are exempt from the application of the Act. Therefore, in terms of
§ 78dd (b) facilitation payments are legal in the US.

The FCPA holds corporations accountable for their internal and external
relationships. A company is held accountable for the unlawful actions of its
directors, shareholders, agents, employees and third parties such as consult-
ants. US corporations are further susceptible to successor liability in the case
of acquiring an entity on a going-concern basis. Consequently many corpora-
tions conduct due diligences before merging with other corporations, acquir-
ing assets or engaging with intermediaries.

**Bribery Act 2010 (United Kingdom)**

The UK Bribery Act has been described as “the toughest anti-corruption leg-
islation in the world”. This comprehensive Bribery Act prohibits the act of
bribing, receiving a bribe and bribing a foreign public official. Notably, the Act
also punishes the failure by corporate entities to implement anti-bribery
measures.

Section 1 of the Act provides that bribery occurs when “a person offers,
gives or promises to give a financial or other advantage to another individual
in exchange for improperly performing a relevant function or activity”. Like the
FCPA, the UK Bribery Act has near-universal jurisdiction, subjecting natural
and legal persons who have a certain degree of connection to the UK to the
provisions of the Bribery Act, despite not physically being in the UK. In terms
of s1 of the Bribery Act and similar to the FCPA, the punishment of an official
who receives a bribe is not expressly provided for.

In terms of s7 of the Act, the failure by a corporation to put in place, and
effectively implement, anti-bribery mechanisms is an offence. No proof of in-
tention is required to establish this offence and the principle of vicarious lia-
ability is applicable.

Penalties for bribery in terms of the Act include a maximum of 10 years’
imprisonment, fines, confiscation of proceeds of a crime and the declaration
do delinquency for directors.

**US sanctions regime**

As a superpower, sanctions have been and remain the US’s most instrumen-
tal foreign policy tool. The legal framework providing for sanctions in the US is
always developing to meet the country’s evolving national security interests.
For this reason, it is imperative for countries and corporations engaged in
dealings with the US to always be aware of the US sanctions regime.

The Office of Foreign Assets Control (OFAC) is part of the Treasury Department.
This office is primarily tasked with the administration and enforcement of economic
and trade sanctions. Frequently the objective of these sanctions is to “prevent pro-
hibited transactions” which are not aligned with the US national security and foreign
policy objectives. The OFAC is empowered by The International Emergency Economic
Powers Act (IEEPA), 1977 and the Trading With The Enemy Act (TWEA), 1917.

In terms of IEEPA, when the US is faced with an extraordinary threat, the
president is empowered to declare a national emergency and, if needs be, trade
restrictions will be imposed against the threatening party, and assets within the
borders of the US will be frozen and/or confiscated to deal with the threat.

The TWEA empowers the US president to impose economic sanctions on
its opponents during a war.

The latest piece of legislation introduced to deter and punish countries for
acting in contravention of the US national security and foreign policy objec-
tives is the Countering America’s Adversaries Through Sanctions Act (CAATSA),
June 2017. CAATSA came into effect in June 2017 with the objective to provide
for the imposition of sanctions on Iran, Russia and North Korea.

Due to the nature of the industry, mining companies are exposed to both
the reality of on-the-ground operational corruption and the various global
regimes that penalise such activities. By way of example, a company domici-
led in South Africa, with a listing in the UK, with US listed debt, or employing
US citizens, could trigger three separate offences for an act of corruption that
occurs in its operations in, for example, the DRC – excluding any offence
under the laws of the DRC. Trading with entities subject to US sanctions (how-
ever remotely) results in the freezing of any dollar-based payment flowing
through the US banking system – essentially any dollar payment whatsoever.

Stakeholders in the South African mining sector must play their role in combat-
ing corruption by self-reporting, conducting internal investigations, co-operating in
external investigations and refraining from trade with sanctioned entities.

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THE PRIVILEGED TAX TREATMENT OF MINING OPERATIONS

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When is a company carrying out mining operations? While this may seem an innocuous question, it was one that the Supreme Court of Appeal (SCA) had to answer in Benhaus Mining v Commissioner for the South African Revenue Service 81 SATC 241. It is an important question because taxpayers who conduct mining operations are entitled to claim deductions of capital expenditure in terms of s15, read with s36(7C) of the Income Tax Act (58 of 1968).

The SCA pointed out that, for a long time, miners have been treated differently from other businesses when it comes to taxation. Miners are given privileged treatment and there are sound reasons for this. It is expensive to establish a mine. A start-up mining operation requires a huge amount of capital investment before it becomes profitable. For this high-investment, high-risk industry to flourish, it needs to be treated differently from other taxpayers.

The legislature came to the assistance of the mining industry with special provisions in s15, read with s36(7C):

“There shall be allowed to be deducted from the income derived by the taxpayer from mining operations-
(a) an amount to be ascertained under the provisions of Section 36, in lieu of the allowances in sections...”
Section 36(7C) states:

“Subject to the provisions of subsections (7E), (7F) and (7G), the amounts to be deducted under Section 15(a) from income derived from the working of any producing mine shall be the amount of the capital expenditure incurred.”

Lewis ADP explains in the Benhaus judgment that the reason for affording miners the right to claim the amount of capital expenditure actually incurred, instead of the asset being depreciated over time – as would apply to other industries – is to lessen the impact of deriving little or no income when a mine is being established, in some cases, for years.

For a taxpayer to qualify for the capital expenditure deduction, it must first be conducting mining operations. SARS had assessed Benhaus for income tax on the basis that it did not fall within the ambit of s15 because, in SARS’ view, it was not a mining company. The Act defines “mining operations” and “mining” as including:

“every method or process by which any mineral is won from the soil or from any substance or constituent thereof”.

Benhaus evolved from being a construction company to what is now referred to in the industry as a contract miner. This means the company enters into contracts with third parties which hold mining rights to render various services to them, for a fee. Benhaus did not, itself, trade in the extracted minerals but entered into contracts to extract the minerals in return for a fee.

More specifically, they extracted chrome-bearing ore which was delivered to its client’s processing plant. It was then paid a fee, calculated at a rate per ton of the ore that was delivered.

When filing its income tax return, Benhaus claimed that it was mining the ore. It further claimed deductions in each year for the capital expenditure on the machinery used to extract the mineral-bearing ore. Benhaus never contended that it was responsible for the entire mining process but rather that it was responsible for extracting the mineral-bearing ore from the ground and this qualified it as being a mining operation.

Benhaus explained that there are three stages in open cast chrome mining. The first stage is the removal of topsoil and overburden, blasting the rocks to expose the mineral reef, extracting the ore, crushing and screening it, and delivering it to the processing plant. Benhaus attended to this whole first stage of the process. The second stage involves milling run-of-mine chromite ore and subjecting it to a washing process. The third stage entails melting the higher concentrate ore in a furnace to separate waste from metal to produce ferrochrome. Benhaus was not involved in the second and third stages of the mining process.

When the matter came before the Tax Court, it was found that Benhaus was not engaged in mining within the meaning of the definition and s15(a) of the Act. It was not, therefore, entitled to deduct the capital expenditure in respect of the equipment it used for extracting mineral-bearing ore from the ground. The Tax Court followed the reasoning of Sutherland J in Classic Challenge Trading v CSARS, ITC 1907 (2017), 80 SATC 271 which dealt with the same question concerning contract mining. Here, the court held that the contractor miner was not in the trade of mining but rather in the trade of servicing a miner’s requirement by the extraction of material. The essence of this argument is that a contract miner is effectively an outsourced service remunerated by the actual risk-taker. Benhaus contended, and the SCA agreed with them, that the requirement of risk should not be a factor when deciding whether an entity is conducting mining operations. In any event, it was pointed out that Benhaus did bear commercial risk. It had bought mining equipment at a considerable cost of R391 million over the relevant years, had incurred labour costs and losses due to strikes, costs for equipment breakages, and was to be paid a lesser fee if the quality of the chrome-bearing ore was below that of the sample agreed.

In the Classic Challenge case, the court concluded that for there to be mining operations, there had to be a direct connection between the activity that is the mining source and the income earned as a result. In this case, Sutherland J held:

“Accordingly, the critical enquiry is into the “connection” between “income” and “source” and whether the connection between mining operations and the income is broken by an intervening happening. This is the
reason why it is not appropriate to try to disaggregate bits and pieces of overall mining operations, as if they could constitute self-standing trades or businesses of “mining operations”.

The court in *Classic Challenge* was of the view that a contract miner was not involved in mining operations. Benhaus disagreed with the approach of Sutherland J, and referred the SCA to *ITC 1455*, a case in which Harms J, referring to a case in the High Court of Australia, *Federal Commission of Taxation vs Broken Hill Proprietary Co Ltd 1 ATR 40*. In this case, the court held that:

‘This expression [mining operations] is wider than the working of a mining property... Thus it comprehends more than mining in the narrow sense which imports the detaching of lumps of material from the position in which in a state of nature they form part of the soil. It extends to any work done on a mineral-bearing property in preparation for or as ancillary to the actual winning of the mineral (as distinguished from work for the purpose of ascertaining whether it is worthwhile to undertake mining at all):... Likewise, it extends to any work done on the property subsequently to the winning of the mineral (e.g. transporting, crushing, sluicing and screening) for the purpose of completing the recovery of the desired end product of the whole activity. We agree entirely with [the] view that “mining operations” covers “work done on a mineral-bearing property in preparation for, or as ancillary to, the actual winning of the mineral”...’

In *Benhaus*, SARS argued that the income derived by the taxpayer was from fees for services provided and not from the sale of minerals. Therefore the income was not from mining operations at a producing mine. SARS further contended that Benhaus incurred expenditure on activities such as establishing the site and road construction before there was a producing mine. Benhaus pointed out that, in the *Broken Hill* case, the work done on mineral bearing property in preparation for winning the mineral is covered by the expression “mining operations”. The SCA agreed with this interpretation, otherwise mines would not be able to recover expenditure on capital assets laid out before a mine started producing.

The SCA concluded that Benhaus did do mining work in that it extracted the mineral-bearing ore from the ground. It was, therefore, entitled to deduct capital expenditure on mining machinery from income earned from doing so. The mining operations commenced when Benhaus moved onto site and started the preparation for digging the mineral-bearing ore out of the earth. The SCA was of the view that it did not matter that Benhaus was paid a fee for delivery of the chrome-bearing ore to its client, as that is the work from which it earns its income. Furthermore, it was of no relevance that the contract miner immediately begins to earn an income from mining and does not have to wait for the mine to produce over many years. Benhaus’s appeal was therefore upheld and the uncertainty around contract miners qualifying for the deduction of capital expenditure has now, unless the legislature intervenes, been finally settled.

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**THE TRANSMISSIBILITY OF A RIGHT, AFTER DEATH, IN TERMS OF THE MPRDA**

**SHANI JORDAAN**

On 9 October 2019, the Constitutional Court delivered judgment in *Magnificent Mile Trading 30 (Pty) Ltd v Charmaine Celliers N.O. and Others* (CCT157/18) [2019] ZACC 36 on the transmissibility of a right after death as contemplated in the Mineral and Petroleum Resources Development Act (28 of 2002) (MPRDA). A prospecting right was awarded to Magnificent Mile Trading 30 Proprietary Limited (Magnificent Mile) in conflict with the rights enjoyed by the holder of an “unused old order right” as provided for in the MPRDA.

The Constitutional Court found that the unused old order right was still valid and was therefore transmissible. It further found that with the facts specific to this case, the rule in *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48, which provides that an administrative decision stands until
set aside, was not applicable to the conflicting prospecting right granted to Magnificent Mile.

The purpose of this article is to provide an outline on the issues raised in the judgment, to evaluate whether the judgment will have far-reaching ramifications and the potential impact on the mining industry in South Africa.

Background

Item 8 of Schedule II to the MPRDA is applicable to unused old order rights (as defined in item 1(x) of Schedule II) and provides that an unused old order right, which was in force immediately before the MPRDA took effect, continues to be in force for a period not exceeding one year from the date on which the Act took effect.

It further provides that the holder of such a right has the exclusive right to apply for a prospecting right or a mining right within the one year period.

The MPRDA took effect on 1 May 2004. The exclusive right to apply for a mining right or a prospecting right therefore had to be exercised by 30 April 2005.

In the event that an application has been lodged within the exclusive one year period, an unused old order right remains valid until such time as the application for a mining or prospecting right has been granted and dealt with or refused.

The judgment provides some clarity about the nature of unused old order rights. It is noteworthy that the court ordered the DMR to pay all the appellant’s litigation costs because of the clumsy manner in which it had dealt with the applications.

The case

Facts

Mr Gouw was the holder of an unused old order right at the time the MPRDA came into effect. On 29 April 2005 he, as the holder of an unused old order right, applied for a prospecting right in terms of s16(1) of the MPRDA. On 3 May 2005, Magnificent Mile also applied for a prospecting right for coal on Mr Gouw’s farm.

Both applications were accepted by the then Department of Mineral Resources (DMR). Mr Gouw’s application was accepted on 20 May 2005 and Magnificent Mile’s application was accepted on 31 May 2005. Mr Gouw died on 7 November 2005 – before the DMR had made a decision about his application.

On 13 December 2005, the DMR granted Mr Gouw a prospecting right in respect of a farm for which he had not applied instead of the farm he owned before his death. On 16 January 2006, the DMR granted Magnificent Mile a prospecting right in respect of Mr Gouw’s farm. Little prospecting was conducted by Magnificent Mile as all their efforts were curtailed by the Gouws family. Magnificent Mile applied for a mining right in terms of s22 of the MPRDA on 18 November 2009.

In 2010, the DMR attempted to undo the mess that it made when it granted Mr Gouws a prospecting right for another farm, by amending the prospecting right granted to Mr Gouws in respect of only one of the properties described in the two deeds of transfer under which Mr Gouws owned the farm. After Mr Gouws’ death, Mrs Gouws’ applied for the cession of the prospecting right in terms of s11 of the MPRDA. The DMR registered the prospecting right in her name. Magnificent Mile appealed the award of the prospecting right to the Gouws family. This appeal is yet to be decided.

On 10 April 2013, the DMR refused Magnificent Mile’s application for a mining right based on the application having been granted to Mr Gouws for the same land and minerals. Magnificent Mile brought a review application in the high court. This review application prayed for the setting aside of the award of rights that had been made in favour of the Gouws family, the refusal of the application for a prospecting right by Mr Gouws in respect of his farm, the setting aside of the decision to refuse Magnificent Mile’s application for a mining right and the substitution of this refusal decision with a decision to grant the mining right.

Magnificent Mile’s argument was that the right that Mr Gouws enjoyed (a right that his application for a prospecting right be decided) terminated upon his death.

Mrs Gouws opposed the relief sought by Magnificent Mile and furthermore sought a declarator by way of counter-application to the effect that Magnificent Mile’s application for a prospecting right was void and that Mr Gouws’ application for a prospecting right was valid and had either been granted or was still pending. Magnificent Mile considered this counter-application as a review of an administrative action which should, in terms of s7 of the Promotion of Administrative Justice Act (3 of 2000) (PAJA), have been brought within 180 days after Mrs Gouws became aware of this decision. This was not done.

The high court found in Magnificent Mile’s favour, but the decision was overturned by the Supreme Court of Appeal.

Ruling

It is a general rule that legal rights of a proprietary nature - rights which have a value - are normally transmissible on death to heirs and legatees.

The court found that the rights Mr Gouws had enjoyed, as the holder of an unused old order right, did have value. There are two different rights at play in this instance, the exclusive right to apply for a ‘new-order title’, together with the old order right itself. The old order right was a limited real right, coupled with a statutory personal right to acquire a new limited real right under the MPRDA.

Mineral rights held before the MPRDA took effect were treated as assets that could be sold, leased or used as security. They formed part of the
holder’s estate and could be bequeathed to an heir.

Mr Gouws’ old order right did not evaporate once he lodged an application for a prospecting right. Such a right remains valid until the application is granted and dealt with or refused. The court found that Mr Gouws’ right became an asset in his estate and was transmissible.

The court further found that Mrs Gouws’ counter-application was not a review of an administrative action in terms of PAPA but simply an assertion of a pre-existing right. It dismissed Magnificent Mile’s appeal and declared the unused old order right valid. It further declared that the application for a prospecting right lodged by Mr Gouws was yet to be decided and consequently the award of a prospecting right to Magnificent Mile was found invalid.

Potential impact on the mining industry

Had the court found that Mr Gouws’ right was of a personal nature, that is only the right to have his application decided, and that this right was transmissible on death, the ramifications would have been felt far and wide. The effect would have been that any application for a licence say, for example, a firearm licence, would be transmissible, even where an application is of an extremely personal nature.

In this instance, the court found that the limited real right, the unused old order right, is transmissible upon death and together with that comes the statutory personal right to have the application decided for the granting of a prospecting right (a new limited real right under the MPRDA). It is this limited real right that has value and becomes an asset in an estate; not the corresponding statutory personal right.

The application of this case is, therefore, limited and would only be applicable in an instance where there is an existing limited real right. For example, if a holder of a mining right (the limited real right) lodged an application for its renewal but dies before the application can be decided, the principle established in the judgment would apply. The existing mining right, together with the statutory personal right to have the application decided, would be transmissible and would constitute an asset in the estate of such a deceased holder. This cannot be said to be applicable in the case of companies as no ‘successors in title’ exist when a company is liquidated and the right lapses in terms of s56 of the MPRDA.

The judgment provides some clarity about the nature of unused old order rights. It is noteworthy that the court ordered the DMR to pay all the appellant’s litigation costs because of the clumsy manner in which it had dealt with the applications.

Jordaan is a Candidate Attorney with Malan Scholes. The supervising Director was Hulme Scholes.

PERFORMANCE GUARANTEES

ROB MORSON AND THEMBELA NDWANDWE

A contractor can rely on the underlying construction contract to prevent an employer from making a demand on the performance guarantee until such time as the underlying construction contract is complied with.

The Gauteng Divisions of the High Court in South Africa have recently been faced with applications by contractors seeking to prevent employers, who have threatened to make demands under performance guarantees, from making those demands relying on the provisions of the underlying construction contract. Traditionally, the manner in which a guarantee interdict unfolds is that the employer makes its demand under the guarantee, and the contractor then seeks to prevent the guarantor from paying in accordance with that demand. Success in this course of action, however, is a lot more difficult for the contractor who will carry a heavier burden once a call is made. The grounds on which the guarantor may be prevented from making payment against a demand are quite narrow, particularly depending on the nature and wording of the guarantee provided (i.e. whether it is an unconditional demand guarantee or a conditional guarantee).

In 2019 there were two unreported judgments in the Gauteng Provincial Division, Pretoria where, under FIDIC Red Book (1999 edition) contracts, the contractors have made applications to prevent the employer from making a demand under the performance guarantee (and the retention money guarantee in one case, but this will not be the focus here). These cases were:

- Joint Venture Between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Roads Agency SOC Ltd [2019] 3 All SA 186 (GF) (case number 8331/2019), judgment and order handed down on 22 March; and
- Fountain Civil Engineering (Pty) Ltd v South African National Roads Agency SOC Ltd (case number 36597/2019), judgment was handed on 1 August, although the court order was given on 13 June.

The central legal point in both cases was essentially the same and the facts had similarities. One similarity was that the respective contractors had terminated the contracts (both citing sub-clauses 19.6 and 19.7 and making allegations of force majeure) and the employer disputed the termination rights and sought to terminate the respective contracts due to asserted repudiation. The employer had also then made a threat to claim under the “Performance Security” (i.e. the performance guarantee).

In each case, the respective contractors sought to prevent the employer from making a demand under the performance guarantee because they had threatened to make such a demand at a time when it had not complied with, as the respective contractors alleged, sub-clause 4.2 (meaning the demand
would be in breach of the provision). The Particular Conditions did not materially alter the General Conditions in respect of sub-clause 4.2 in either case and the clause was materially the same in both cases.

The uniqueness of sub-clause 4.2 must be highlighted. While most other standard form construction contracts do not do this, sub-clause 4.2 of the FIDIC forms constrains the employer’s ability to have recourse to the performance guarantee. It provides that the employer may not make a claim under the performance guarantee (i) “except for amounts to which the Employer is entitled under the Contract” and (ii) in the event of the four circumstances listed in it.

As the respective contractors’ arguments went, in light of the wording of sub-clause 4.2, the employer’s entitlement to amounts must be established in accordance with sub-clauses 2.5 and 3.5. The former provision regulates the procedure for employer’s claims and establishing an entitlement under the contract, which requires the Engineer to proceed in accordance with sub-clause 3.5 to agree or determine the amount. Sub-clauses 2.5 and 3.5 in

These matters are significant in that they raised a novel point in South African law. Essentially, this was that the autonomy principle for performance guarantees was not applicable in circumstances where the demand on the performance guarantee had not been made and the underlying contract prevented a demand on it until certain preconditions were complied with. These are the preconditions in sub-clause 4.2, read with sub-clauses 2.5 and 3.5. While the Supreme Court of Appeal (SCA), in [Kwikspace Modular Buildings v Sabodala Mining Company 2010 (3) All SA 467 (SCA)], had previously made some findings in this regard, this was based on Australian law. Consequently, there was a lacuna on this point in South African law. In making their arguments, the contractors also relied on English law, particularly [Simon Carves Ltd v Ensus UK Ltd [2011] EWHC 657 (TCC)].

In the Joint Venture case, it was successfully argued that it was competent for a contractor to prevent the employer from making a demand on the performance guarantee until it had complied with the preconditions in the underlying construction contract for making such a demand. The court in that matter also went on its own initiative and found further case law which supported the contractor’s case (these were high court, not SCA, decisions). However, the interdict was not granted because the court found that the Joint Venture would have difficulty establishing that a force majeure event had arisen. It is noteworthy that this is unusual, because the evidence did not deal with that issue. The court found that the employer was entitled to regard the contractor’s actions as a repudiation of the contract, thus entitling the employer to make demand on the Performance Security. The termination dispute was to be the subject of dispute resolution proceedings between the parties as prescribed by the underlying construction contract.

Leave to appeal the decision to the SCA in the Joint Venture case has been granted to the contractor. A further update will be given once the SCA has issued its decision, which will provide certainty on the issues.

In the Fountain case, however, the result was different – the interdict was granted in favour of the contractor. The arguments advanced in the Fountain case were essentially similar to those advanced in the Joint Venture case.

What becomes clear is that the Gauteng Divisions of the High Court in South Africa have taken the stance that to preserve the status quo and prevent a breach of the underlying construction contract, it is competent for a contractor to prevent an employer from making a demand under a performance guarantee, when such a demand has not yet been made.
Among other things, the court in the Fountain case found that the contractor demonstrated a *prima facie* right to terminate the Contract and the court reiterated the test for establishing a *prima facie* right. The court found that the relief sought was interim in nature and not final in effect because it sought to preserve the status quo pending confirmation through dispute resolution proceedings to be instituted. Further, if, in the dispute resolution proceedings, the employer demonstrated that it met the prerequisites of sub-clause 4.2, read with sub-clauses 2.5 and 3.5, and showed it was entitled to make the demand under the performance guarantee, then it would be at liberty to make such a demand.

The employer submitted an application for leave to appeal the judgment in the Fountain case and sought the appeal to be to the SCA.

An interesting question to consider in both cases is whether or not either court even focused on the correct *prima facie* right. Should the courts have focused on the *prima facie* right of the contractor to terminate the contract or the fact that the *prima facie* right which the contractors sought to protect was the proper implementation of the terms of the underlying construction contract, with the termination issue being only one aspect?

A further case that is worth a mention on this topic is Liviero Civils (Pty) Ltd v Road Agency Limpopo SOC Ltd and Another (case number 24906/18) which was heard in the Gauteng Local Division, Johannesburg. Unfortunately, there was no written judgment handed down in this case. However, the court order given on 10 July 2018 and the court papers filed by the parties respectively give an understanding of the relief sought and the relief ultimately granted.

In this case, Liviero Civils (Pty) Ltd was the contractor and Roads Agency Limpopo SOC Ltd was the employer. The underlying construction contract was in the form of the General Conditions of Contract for Construction Works (GCC) (second edition, 2010) published by SAICE. There was also a service level agreement between the parties. The GCC and the service level agreement did not contain provisions similar to sub-clause 4.2 of the FIDIC Red Book (1999 edition). Rather, the contractor sought to prevent the employer from making a demand on the performance guarantee (in circumstances where no demand had been made at the time) on the ground that no demand would be in accordance with the terms of the performance guarantee.

The contractor had terminated the contract and the employer disputed the termination. The employer then sought to terminate the contract (although it had not done so at the time of the application) and threatened to make a demand under the performance guarantee. If the employer had validly terminated the contract, it would have been entitled to make a demand on the performance guarantee, under the terms of the performance guarantee. However, the contractor argued that it was not possible for the employer to terminate the contract since the contractor had done so earlier, and, therefore, the employer could not obtain a right to make a demand under the performance guarantee.

Accordingly, the contractor sought an interim interdict preventing the employer from making a demand under the performance guarantee pending the resolution of the termination dispute. The interim interdict was granted.

What becomes clear is that the Gauteng Divisions of the High Court in South Africa have taken the stance that to preserve the status quo and prevent a breach of the underlying construction contract, it is competent for a contractor to prevent an employer from making a demand under a performance guarantee, when such a demand has not yet been made. The decision in Liviero goes further and shows that an interdict may also be obtained prospectively where a demand may be in breach of the performance guarantee itself. ●

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## MINES MAY RUN OUT OF ROAD ON DIESEL USAGE REFUNDS

**A D É L E D E J A G E R**

Mining companies hoping to continue receiving rebates for diesel usage in their operations may have to work harder to benefit from these tax incentives in future. In two recent disputes that reached the high court, the South African Revenue Service (SARS) took a narrow interpretation of the law, possibly signalling a more aggressive approach on the part of the revenue collector towards allowing these incentives.

The ruling went against SARS in one of the cases and in its favour in the other, but both matters indicate a hardening of its approach to allowing mining companies to claim refunds on the fuel levy and Road Accident Fund levy.

Refunds on these levies are permitted in certain circumstances under the provisions of the Customs and Excise Act (91 of 1964) and the Schedules to the Act.

Schedule 6 specifies that purchases of diesel become eligible for refunds when the fuel is used for ‘own primary production activities’ listed. These activities include exploration or prospecting for minerals, the removal of overburden, operations for the recovery of minerals being mined and the construction or maintenance of tailings and dams, among other things.

The rationale behind the diesel fuel concession for primary production, which was introduced in the 2000 Budget, is twofold. One, the bulk of diesel fuel purchased by the mining industry is used off-road and so should not be taxed on the same basis as usage of public roads. Two, the concession is intended to make the price of commodities in South Africa more market-related, compared with other countries.

Considering the intention of the legislature in introducing the fuel rebates,
While SARS was not successful in this case, it indicates the narrowing of its interpretation on the allowance of fuel refunds – refunds that are of substantial value to the hard-pressed mining industry.

SARS’ approach in the two recent high court cases involving Canyon Resources and Glencore Operations respectively, is cause for concern.

Record keeping stymies company’s claim
The Canyon Resources case, which went in SARS’ favour, is important for taxpayers to note because it was more about the mechanics of claiming the fuel rebates than about the eligibility of the activities for which the diesel was used. In particular, the case was about Canyon Resources’ diesel usage records.

In disallowing the company’s claim for a diesel rebate, SARS contended that proper records had not been kept and they did not demonstrate the use of diesel for eligible purposes. SARS said it was necessary to demonstrate ‘the journey the distillate fuel has travelled from purchase to supply’ and then also to indicate the ultimate use of every litre of such fuel in eligible purposes. This is generally done by keeping logbooks, which should contain the necessary evidence of diesel usage to satisfy SARS. If the eventual use of diesel has not been stated or sufficiently indicated, the claim for the refunds may then be disallowed.

Meanwhile, in examining SARS’ tougher stance on fuel rebates, there is the Glencore Operations case to consider.

Tougher stance revealed in second dispute
Although this dispute with SARS was on very different grounds, and the ruling went for, not against, Glencore, this matter similarly underlines the hardening of the tax authority’s stance on diesel usage rebates.

In the case against Glencore, the Commissioner for SARS held that certain refunds claimed did not qualify for a rebate, which were then disallowed. The essence of the dispute was whether or not the taxpayer had used the fuel relating to the claim for ‘primary production activities in mining’. The Commissioner argued that a narrow interpretation should be given to the word ‘include’ as referred to in Schedule 6 and said that the activities concerned constituted ‘post-mining processing’. In the Commissioner’s view, this did not amount to primary mining activities, and so the taxpayer was not eligible for a rebate on the diesel used.

The taxpayer, on the other hand, submitted that although not specifically listed in Schedule 6, the activities it had conducted were an integral part of the operations that the legislature intended to include in the concept of primary mining activities.

In its ruling, issued in October 2018, the Gauteng Division of the High Court ruled in favour of Glencore Operations. It held that the activities in Schedule 6 were ‘non-exhaustive activities’ and that the activities in dispute all formed part of the operations which the legislature had intended should qualify for the rebate.

While SARS was not successful in this case, it indicates the narrowing of its interpretation on the allowance of fuel refunds – refunds that are of substantial value to the hard-pressed mining industry.

Given the shortfall in tax collections, the more aggressive approach we have seen SARS adopt in these two recent cases could be a sign of things to come.

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WOMEN CAN CONTRIBUTE MORE TO MINING

MMATIKI APHIRI

Gender bias in mining is still a reality – one that excludes the vital talent that the industry needs.

The last few years have seen a significant increase in the number of women working in the South African mining industry, both at executive level and underground. However, the industry remains heavily male-dominated and more needs to be done to eliminate the challenges faced by women who participate in one of the country’s most important economic sectors.

Figures released in 2019 by non-profit organisation, Women in Mining South Africa, show that women are under-represented in the sector. While they make up more than 51% of the country’s total population, women hold a mere 12%, or 53,179 - jobs of a total of 464,667 in the mining industry at the time of writing.

The statistics look even bleaker at the top end of the sector, with just 241 women in top management and some 800 in senior management positions. Mine ownership figures among women are negligible.

At executive level, women face discrimination in decision making and are often excluded and when it comes to management issues, they are not kept in the know. They also face huge earning disparities compared with their male colleagues. These salary disparities need to be addressed urgently - beyond companies merely complying with legislation.

Furthermore, women who work as underground miners face a unique set of challenges, often having to deal with inadequate toilet facilities, ill-fitting safety equipment and constant harassment by their male co-workers.

What must also be kept in mind is that while women have physical limitations, these can be overcome by assigning appropriate tasks for women to perform. Machinery is often specifically made for men to operate, with parts, such as the handles, made specifically for bigger hands. This can create safety issues for women.

Some initiatives have been introduced to facilitate women’s participation in the mining industry. For instance, legislation has been introduced that makes it obligatory for mining companies to supply female workers with protective gear designed specifically for women. In the past, women had to wear protective equipment, such as boiler suits or safety shoes designed for men, or which were supposedly unisex, making them virtually impossible for women to wear. The unique female shape meant that the gear was frequently ill-fitting and uncomfortable and, importantly, could affect safety and productivity levels. In addition, the long-term use of ill-fitting safety clothing can have dire health consequences for the wearer.

If mining is a driving force in the economy, it should include more than a mere 12% female representation.

As mining becomes more mechanised, the physical limitations of female miners will become less relevant. And at executive level, women must be given a greater opportunity to participate - the glass ceiling must be removed to encourage more women to join this vital sector.

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