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IN THIS ISSUE

CASE LAW UPDATE

LEGISLATION UPDATE

STATUS OF EMPLOYMENT LEGISLATION UPDATES

ENVIRONMENTAL LAW - RECENT AMENDMENTS REGARDING MINERAL ACTIVITIES

LEGAL DEVELOPMENTS ACROSS A RANGE OF PRACTICE AREAS AND SECTORS

INTRODUCTION

LEGAL PRACTICE

The final version of the long awaited Legal Practice Act, No 28 of 2014 (the Act), has recently been published. This will have serious implications for the legal profession in South Africa.

The Act recognises that:

- the legal profession is regulated by different laws which apply in different parts of the Republic and, as a result thereof, is fragmented and divided;
- access to legal services is not a reality for most South Africans;
- the legal profession is not broadly representative of the demographics of South Africa; and
- opportunities for entry into the legal profession are restricted in terms of the current legislative framework.

In addressing these issues, the Act aims to:

- provide a legislative framework for the transformation and restructuring of the legal profession into a profession which is broadly representative of the Republic's demographics under a single regulatory body;
- ensure that the values underpinning the Constitution are embraced and that the rule of law is upheld;
- ensure that legal services are accessible;
- regulate the legal profession, in the public interest, by means of a single statute;
- remove any unnecessary or artificial barriers for entry into the legal profession;
- strengthen the independence of the legal profession; and
- ensure the accountability of the legal profession to the public.

The Act will have a significant impact on the governance, structure and regulation of the legal profession in South Africa.

It introduces a single South African Legal Practice Council to exercise jurisdiction over all 'legal practitioners and candidate legal practitioners.' The Legal Practice Council will in due course replace the existing provincial

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This KM Alert offers a high level overview of *selected* recent developments with regard to case law and legislation and reflects the position as at date of publication.

Look out for the next KM Alert for more information on recent developments in regard to:

- Employment law
- Specific sectors and industries

Law Societies and the Bar Council. In addition, the Act deals with, for example:

- the admission and enrolment of legal practitioners;
- the right of appearance of legal practitioners;
- minimum legal qualifications and practical vocational training;
- community service for law graduates;
- professional conduct and establishment of disciplinary bodies;
- the legal practitioners' Fidelity Fund; and
- the handling of trust monies.

This legislation has been criticised as posing a serious threat to the independence of the profession.

Once implemented, it will repeal, for example, the whole of the Attorneys Act, No 53 of 1979; the Admission of Advocates Act, No 74 of 1964; the Recognition of Foreign Legal Qualifications and Practice Act, No 114 of 1993; the Admission of Legal Practitioners Act, No 33 of 1995 and the Right of Appearance in Courts Act, No 62 of 1995.

1. CASE LAW UPDATE

1.1 A selection of recent cases

***Firstrand Bank Ltd v The Land and Agricultural Development Bank of South Africa (436/13)* [2014] ZASCA 115 (18 September 2014)]**

This case highlights the importance of properly perfecting a general notarial bond prior to the liquidation of a company, so as to maximise the amount that can be recovered from an insolvent estate.

In this case the Supreme Court of Appeal (SCA) had occasion to clarify the extent of security provided by a general notarial bond in light of s102 of the Insolvency Act, No 24 of 1936 (Act). Firstrand Bank Ltd (Firstrand) had obtained an order perfecting its security up to an amount of R5,500,000 against Rubaco Boerdery (EDMS) Bpk (Rubaco), which company was subsequently liquidated. It is unclear why Firstrand did not perfect the bond in respect of all moveable assets, but the net result was that the R5,500,000 was approximately R3,800,000 short of the entire indebtedness of Rubaco to Firstrand.

This left Firstrand with a secured claim of R5,500,000 (the perfected portion) - but holding only a preferent claim for the remainder (in terms of a general notarial bond over movables). Firstrand alleged that it was entitled to the entire balance of the free residue of the insolvent estate on the basis of a reading of s102 of the Act, and by virtue of its general notarial bond over the movables of Rubaco. The Land and Agricultural Development Bank of South Africa argued that Firstrand was a preferent creditor only to the extent of that portion of the free residue derived from the movable assets over which Firstrand had the bond, and was merely a concurrent creditor for any remaining shortfall.

The parties therefore formulated the question before the SCA as follows: "[w]hether the preference afforded to the holder of a general notarial bond in terms of s102 of the Insolvency Act, No 24 of 1936 extends only to such portion of the free residue as may consist of the proceeds of movable property?" [at par 2].

Section 102 of the act reads "**Preference under a general bond** - Thereafter any balance of the free residue shall be applied in the payment of any claims proved against the estate in question which were secured by a general mortgage bond, in the order of preference with interest thereon calculated in the manner provided in subsection (2) of section one hundred and three."

The SCA noted that the critical words "claims…which were secured by a general mortgage bond" may refer either to the whole of the bondholder's claim or to the portion of the claim that is actually secured by the bond (that is, the amount stemming from the sale of the movables subject to the bond.)

The SCA ultimately favoured the latter interpretation stating that "[t]he effect of the interpretation of s102 contended for by Firstrand would be that the holder of a general notarial bond would acquire on liquidation greater rights than it enjoyed at the date of liquidation and its security would be enhanced" [at par 31]. Consequently, the SCA found that the holder of a general notarial bond has a claim that is preferent only to the extent of the proceeds derived from property covered in the bond, and then only has a concurrent claim against the free residue for any remaining shortfall.

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***Africast (Pty) Ltd v Pangbourne Properties Ltd (359/13) [2014] ZASCA* 33 (28 March 2014)**

It is a commercial reality that parties often enter into contracts subject to suspensive conditions. This case re-affirms the nature of a suspensive condition; the importance of ensuring that a suspensive condition is properly and timeously fulfilled; and highlights the important distinction that must be drawn between the authority of signatories to sign a contract and their ultimate ability to bind a contracting party.

The facts of this case are the following: on 5 March 2007, Pangbourne Properties Ltd's (Pangbourne) company secretary, and one of its directors, entered into a property agreement in terms of which a property was sold to Pangbourne. An addendum to this written agreement was signed by them on 11 April 2007, and was signed on the same day by a representative of Africast (Pty) Ltd (Africast).

The agreement was subject to the following suspensive condition:

> "16.1 This agreement is subject to the suspensive condition (stipulated for the benefit of PANGBOURNE COMPANY and which may be waived by written notice given by PANGBOURNE COMPANY to SELLER COMPANY on or before the date for fulfilment of this condition) that within seven days (excluding Saturdays, Sundays and public holidays) after the date on which this agreement is **concluded**… PANGBOURNE COMPANY gives SELLER COMPANY written notice that its board of directors has approved the purchase of the property by PANGBOURNE COMPANY in terms of this agreement… (Emphasis added).
>
> 16.2 If this condition is not fulfilled or waived, then this agreement will terminate and neither party will have a claim against the other as a result thereof."

The question before the Supreme Court of Appeal (SCA) was whether, in fact, this suspensive condition had been fulfilled. The answer turned on an analysis of when the agreement was *concluded*, and whether notice in writing was given to Africast within the time stipulated in clause 16.1. As it turns out, the board of Pangbourne approved the acquisition of the property, and on 25 April 2007 Pangbourne gave Africast written notice of the board's approval. After that time it is common cause that both parties acted on the basis that the agreement was indeed binding.

Subsequently, and in 2008, almost all of Pangbourne's management was replaced. The new board of directors decided not to continue with the agreement and, on an interpretation of clause 16.1, was of the view that there was no contractual obligation to do so. This view was formed on the basis that the company secretary and director of Pangbourne signed the addendum to the agreement on 11 April 2007, but the written notice of the board's approval was only given to Africast on 25 April 2007. If the agreement indeed had been *concluded* on 11 April 2007, the suspensive condition would have needed to be properly fulfilled by 20 April 2007, which it was not.

Africast argued that the contract was in fact only *concluded* on 20 April 2007, once Pangbourne's board had approved the acquisition of the property (that is, Africast argued that the company secretary and director were not authorised to enter into the agreement prior to the board resolving to approve the transaction).

The majority of SCA found that, on the evidence, the company secretary and the director of Pangbourne had had the authority to conclude the agreement on 11 April 2007, despite the fact that only an inchoate agreement came into being. That is, they had the authority to sign the agreement and agree on its terms and provisions (the court interpreted this as *conclusion*), but the agreement's effectiveness was suspended until fulfilment of the suspensive condition. This is in line with the court a quo's finding that one cannot suspend something that does not yet exist.

Lewis JA, writing in the minority, favoured Africast's argument. However, the majority of the SCA held that "[a] distinction must be drawn between the authority of the signatories to sign the agreement and the authority to bind Pangbourne to the agreement. Upon signature of the agreement an inchoate agreement came into being, pending the fulfilment of the suspensive condition. In the event that the suspensive condition was not fulfilled, neither party would be bound by the agreement" [at par 39]. The suspensive condition was accordingly held not to have been properly fulfilled and consequently, Pangbourne's decision not to continue with the agreement was not a repudiation.

***Liviero Wilge Joint Venture and Another v Eskom Holdings SOC Limited* (17321/14) [2014] ZAGPJHC 150 (12 June 2014)**

The crux of this case is the test for the application of s18 of the Superior Courts Act, No 10 of 2013 (Act).

The Gauteng Local Division of the High Court examined the provisions of s18 of the Act as well as the position under Uniform Rule 49(11) in this case. The default position under the Rule is that the effect of noting an appeal against a judgment suspends the effect of the judgment pending the determination of the appeal – the purpose being to 'prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or by execution of a judgment in any other manner…' (the court citing the decision of *South Cape Corporation (Pty) Ltd v Engineering Management Services*

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(Pty) Ltd 1977 (3) SA 534 (AD)). The position under s18 of the Act has not changed this default position in principle, but has changed the requirements to succeed with an application to have an order made immediately effective pending an appeal.

In terms of s18(3) specific provision is made for a court to order otherwise than for the suspension (that is, for immediate effectiveness) of the order provided that three specific conditions are met:

- that there are exceptional circumstances to order that the judgment be immediately effective – a fact-specific enquiry, with a strict interpretation to be given to the concept of 'exceptional circumstances';
- secondly, that the applicant for *non-suspension* must prove on a balance of probabilities that he or she will suffer irreparable harm if the court does not order immediate effectiveness of the judgment appealed against; and
- finally, that on a balance of probabilities the other party will not suffer irreparable harm if the court so orders.

This the court said was a novel approach, created in the Act, which moved away from the 'just and equitable standard' in the jurisprudence around Rule 49(11) towards a hierarchy of entitlements that must be established on a balance of probabilities. The test, so the court said, is cumulative and the applicant for *non-suspension* must establish all three elements. This the court said is "far more prescriptive than the earlier approach" [at par 25].

While matters concerning whether an order should be made immediately effective pending an appeal will always be factual in nature, the court must now have regard to facts proven on a balance of probabilities, rather than to so-called 'potentialities' of harm. The discretion of the court has accordingly become constrained.

The court in this case proceeded to consider whether there were any exceptional circumstances. These the court said, were not proven, nor were either of the other requirements of s18(3) met. It is apparent that these allegations will have to be made carefully and convincingly if one hopes to sway a court into a finding of non-suspension.

1.2 Comment on another interesting decision

***Ex Parte George Nel N.O. and Others* (45279/14) [2014] ZAGPPHC 620 (29 July 2014)**

Business rescue proceedings have become known to serve as a delaying tactic. More often than not, companies apply for business rescue to gain nothing more than a stay on a creditor's claim. It is therefore often expected that creditors will apply to court to set aside resolutions to commence business rescue proceedings and for the company to be placed under liquidation.

The general perception among clients is that once a company has been placed under business rescue, the control of the company is placed in the hands of the business rescue practitioner.

A business rescue practitioner is defined in the Companies Act, No 71 of 2008 as the 'person appointed, or two or more persons appointed jointly, in terms of [Chapter 6 of the Act] to oversee a company during business rescue proceedings.'

In this *ex parte* application, the court had the opportunity to deal with the question of control where a resolution commencing business rescue proceedings has been set aside, a final liquidation order has been granted, and an appeal has been launched in respect of the court's decision relating to the setting aside of the resolution.

In this case, a liquidation application was launched on an urgent basis by two Filapro creditors who were of the view that there was no reasonable prospect of rescuing the business of Filapro - this following the adoption of a resolution by the board of Filapro to place the company under business rescue.

The business rescue practitioner did two things: firstly, he brought an application to court requesting that he be granted an extension of time to publish a business rescue plan; and secondly, he opposed the liquidation application brought by the two Filapro creditors.

In the present circumstances the court set aside the resolution commencing business rescue proceedings, dismissed the practitioner's application, and placed Filapro under final liquidation.

The practitioner appealed against the court's decision but an application was brought for a declaratory order prior to the court having the opportunity to hear the application for leave to appeal. In the application for the declaratory order, the court was requested to make a determination as to who - the business rescue practitioner or the liquidators - should remain in control of Filapro's business.

In the process of making such determination, the court held that it is 'safer' to vest control in the hands of the liquidators as (more often than not) it is unlikely that the liquidators would dispose of company property and conceal evidence. This is due to the fact that liquidators act on the instructions of the creditors and act independently of the company's board. Furthermore the court held that vesting control in the liquidators would be consistent with long standing practice as refined by the courts. As such the court held that the liquidators should remain in control of Filapro's assets.

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2. LEGISLATION UPDATE

2.1 Acts published

Employment

- **Labour Relations Amendment Act, No 6 of 2014 (GN 629; GG 37921; 18 August 2014)**

Commencement date:

This Act comes into operation on a date fixed by the President by proclamation in the Government Gazette. However, the coming into operation of s198(4F) is suspended until the date when the applicable legislation contemplated in s198(4F) enters into force.

Section 198(4F) reads as follows:

- "No person must perform the functions of a temporary employment service unless it is registered in terms of any applicable legislation, and the fact that a temporary employment service is not registered will not constitute a defence to any claim instituted in terms of this section or 198A".

This legislation aims 'to amend the Labour Relations Act, 1995, so as to facilitate the granting of organisational rights to trade unions that are sufficiently representative; to strengthen the status of picketing rules and agreements; to amend the operation, functions and composition of the essential services committee and to provide for minimum service determinations; to provide for the Labour Court to order that a suitable person be appointed to administer a trade union or employers' organisation; to enable judges of the Labour Court to serve as a judge of the Labour Appeal Court; to further regulate enquiries by arbitrators; to provide greater protection for workers placed in temporary employment services; to regulate the employment of fixed term contracts and part-time employees earning below the earnings threshold determined by the Minister; to further specify the liability for employer's obligations; and to substitute certain definitions; and to provide for matters connected therewith'.

Legal Practice

- **Legal Practice Act, No 28 of 2014 (GN 740; GG 38022; 22 September 2014)**

Commencement date:

Chapter 10 (dealing with the National Forum on the Legal Profession and transitional provisions) comes into operation on a date fixed by the President by proclamation in the Gazette. Chapter 2 (dealing with the South African Legal Practice Council) comes into operation three years after the date of commencement of Chapter 10 or on any earlier date fixed by the President by proclamation in the Gazette. The remaining provisions of this Act come into operation on a date, after the commencement of Chapter 2, fixed by the President by proclamation in the Gazette.

This legislation aims 'to provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic; to provide for the establishment, powers and functions of a single South African Legal Practice Council and Provincial Councils in order to regulate the affairs of legal practitioners and to set norms and standards; to provide for the admission and enrolment of legal practitioners; to regulate the professional conduct of legal practitioners so as to ensure accountable conduct; to provide for the establishment of an Office of a Legal Services Ombud and for the appointment, powers and functions of a Legal Services Ombud; to provide for a Legal Practitioners' Fidelity Fund and a Board of Control for the Fidelity Fund; to provide for the establishment, powers and functions of a National Forum on the Legal Profession; and to provide for matters connected therewith'.

Local Government

- **Local Government Municipal Property Rates Amendment Act, No 29 of 2014 (GN 630; GG 37922; 18 August 2014)**

Commencement date:

The Act comes into operation on a date to be proclaimed by the President in the Government Gazette.

This legislation aims 'to amend the Local Government: Municipal Property Rates Act, 2004, so as to provide for the amendment and insertion of certain definitions; to delete the provisions dealing with district management areas; to provide that a rates policy must determine criteria for not only the increase but also for the decrease of rates; to delete the provisions of section 3(4) and to provide for a rates policy to give effect to the regulations promulgated in terms of section 19(1)(b); to provide that by-laws giving effect to the rates policy must be adopted and published in terms of the Municipal Systems Act; to provide for the determination of categories of property in respect of which rates may be levied and to provide for a municipality to apply

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to the Minister for authorisation to sub-categorise property categories where it can show good cause to do so; to regulate the timeframe of publication of the resolutions levying rates and what must be contained in the promulgated resolution; to provide for the Minister to make a decision in terms of section 16(2) with the concurrence of the Minister of Finance; to provide for the exclusion from rates of certain categories of public service infrastructure as well as mining rights or mining permits, to provide that infrastructure above the surface in respect of mining property is rateable and the rates are payable by the holder of the mining right or mining permit; to provide that the exclusion from rates in respect of land belonging to a land reform beneficiary is extended to the spouse and dependants; to provide that an exclusion from rates in respect of the seashore lapses if any part thereof is alienated; to provide that a municipality may levy different rates on vacant residential property; to provide that a municipality may not recover rates in respect of a right of exclusive use registered against a sectional title unit from the body corporate; to provide that a person liable for a rate must furnish the municipality with his or her postal address; to provide that municipalities are not required to value properties fully excluded from rates; to provide for the period of validity of a valuation roll to be four years in respect of a metropolitan municipality and five years in respect of local municipalities; to provide for the MEC for local government to extend the period of validity of valuation rolls by two additional years where the provincial executive has intervened in terms of section 139 of the Constitution and by one financial year and two financial years for metropolitan and local municipalities respectively on request by a municipality in any exceptional circumstances; to provide that a body corporate, share block company or managing association is required to provide information to a valuer; to delete the requirement for the payment of interest in specific instances; to delete the requirement for the establishment of a valuation appeal board in every district municipality; to provide that a professional associated valuer may be appointed to the valuation appeal board if a professional valuer cannot be appointed; to amend the quorum of an appeal board to include the valuer member of the valuation appeal board; to amend the dates on which a supplementary valuation takes effect; to provide for the notification of owners of property affected by a supplementary valuation; to limit condonation by the MEC for local government through the framework to municipalities only; to provide for more effective monitoring and reporting by municipalities and provinces on critical areas of the implementation of the Act; to extend the Minister's regulatory powers; to provide for the phasing in of certain regulations; to provide for the phasing in of the prohibition on the levying of rates on certain types of public service infrastructure; to provide for transitional arrangements in respect of municipalities that have been affected by a redetermination of municipal boundaries; to provide for transitional arrangements for the implementation of section 8 and to provide for matters connected therewith'.

2.2 Important commencement dates

- **Basic Conditions of Employment Amendment Act, No 20 of 2013, (GN R60; GG 37955; 29 August 2014) comes into operation on 1 September 2014.**

This aims 'to amend the Basic Conditions of Employment Act, 1997, so as to substitute certain definitions; to prohibit employers from requiring employees to make payments to secure employment and from requiring employees to purchase goods, services or products; to prohibit anyone from requiring or permitting a child under the age of 15 years to work; to make it an offence for anyone to require or permit a child to perform any work or provide any services that place at risk the child's well-being; to provide for the Minister to publish a sectoral determination for employees and employers who are not covered by any other sectoral determination; to provide for the Director-General to apply to the Labour Court for an employer to comply with a written undertaking by the employer; to provide for a compliance order; to delete certain obsolete provisions; to provide the Labour Court with exclusive jurisdiction in respect of certain matters; to provide for certain offences and penalties; to increase the penalties for certain offences and to provide for matters connected therewith'.

- **South African Human Rights Commission Act, Act No 40 of 2013, (GN 63; GG 37977; 5 September 2014) came into operation on 5 September 2014.**

This aims 'to provide for the composition, powers, functions and functioning of the South African Human Rights Commission; to provide for the repeal of the Human Rights Commission Act, 1994; and to provide for matters connected therewith.'

2.3 Bills

Bills before the National Assembly for consideration

- **Defence A/B [PMB 8-13]**

This aims 'to amend the Defence Act, 2002, so as to ensure that the procurement of armaments is subject to parliamentary oversight'

continued

- **Development Bank of Southern Africa A/B [B 2–14]**

This aims 'to amend the Development Bank of Southern Africa Act, 1997, so as to define certain expressions and to amend a definition; to delete an obsolete provision; to provide afresh for the regions in which the Bank may operate; to increase the authorised share capital of the Bank; to align a provision with the terminology in the Companies Act, 2008; to amend the provisions regarding the issuing of certificates for issued shares; to enable the Minister to increase the authorised share capital; to require the shareholders' approval for subscription by the shareholders to any portion of the balance of the authorised share capital on request of the board; to amend the power of the Minister to make regulations by amending the introductory provision, empowering the Minister to regulate the use of callable capital of the Bank to calculate the leverage ratio of the Bank, omitting the provision empowering the Minister to determine the region in which the Bank may operate and limiting the general regulation-making power to ensure constitutionality; to adjust the provision enabling the application to the Bank of any provision of the Companies Act, 2008, the Banks Act, 1990, and any other appropriate legislation; to amend the Preamble and to provide for matters connected therewith'.

- **Rental Housing A/B [B 56D-13]**

This aims 'to amend the Rental Housing Act, 1999, so as to substitute and insert certain definitions; to set out the rights and obligations of tenants and landlords in a coherent manner; to require leases to be in writing; to extend the application of Chapter 4 to all provinces; to require MEC's to establish Rental Housing Tribunals; to extend the powers of the Rental Housing Tribunals; to provide for an appeal process; to require all local municipalities to have Rental Housing Information Offices; to provide for norms and standards related to rental housing; to extend offences and to provide for matters connected therewith'.

Bills tabled in Parliament

- **Medical Innovation Bill [PMB 1-14]**

This aims 'to make provision for innovation in medical treatment and to legalise the use of cannabinoids for medical purposes and beneficial commercial and industrial uses.'

- **Medicines & Related Substances [B 6-14]**

This aims 'to amend the Medicines and Related Substances Act, 1965, so as to define certain expressions and to delete or amend certain definitions; to provide for the objects and functions of the Authority; to provide for the composition, appointment of chairperson, vice-chairperson and members, disqualification of members, meetings and committees of the Board of the Authority; to replace the word 'products' with the word 'medicines' and expression 'Scheduled substances' in order to correctly reflect the subject matter of the said Act; to effect certain technical corrections and to provide for matters connected therewith.

2.4 OTHER IMPORTANT LEGISLATIVE DEVELOPMENTS

- **Banks Act, No 94 of 1990**
  - Designation of an activity not falling within the meaning of 'The Business of a Bank' (a group of persons between the members of which exists a common bond) – Stokvels (GN 620; GG 37903; 15 August 2014).

- **Draft Call Termination Regulations**
  - Published for comment in (GG 37986; GN 795; 9 September 2014)
  - The purpose of these regulations is 'to modify the pro-competitive conditions imposed by the Authority (ICASA) to remedy market failure in the wholesale call termination markets following a review of the market determinations contained in regulation 6 of the Call Termination Regulations, 2010/11.'

- **Draft EIA Guideline for Renewable Energy Projects**
  - Published for comment (GG 37984; GN 777; 8 September 2014)
  - The Introduction to these Guidelines states that:

    "The Department of Energy (DoE) gazetted its White Paper on Renewable Energy in 2003, and introduced it as a "policy that envisages a range of measures to bring about integration of renewable energies into the mainstream energy economy." At that time the national target was fixed at 10 000GWh (0.8Mtoe) renewable energy contribution to final energy consumption by 2013. The White Paper proposed that this would be produced mainly from biomass, wind, solar and small-scale hydropower. It went on to recommend that this renewable energy should be utilised for power generation and non-electric technologies such as solar water heating and bio-fuels. Since the White Paper was gazetted, South Africa's primary

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and secondary energy requirements have remained heavily fossil-fuel dependant, both in terms of indigenous coal production and use, as well as the use of imported oil resources. Alongside this the projected electricity demand of the country has led the National utility, Eskom, to embark upon an intensive build programme to secure South Africa's longer-term energy needs, together with an adequate reserve margin. Whilst the medium-term power generation mix will continue to lean heavily on the use of fossil fuels, the Revised Balanced Scenario (RBS) of the 2010 Integrated Resource Plan (IRP) includes for a total additional supply capacity of 17.8GWe from renewable sources by 2030. In pursuit of promoting the country's Renewable Energy development imperatives, the Government has been actively encouraging the role of Independent Power Producers (IPP) to feed into the national grid. Through its Renewable Energy IPP Procurement Programme the DoE has been engaging with the sector in order to strengthen the role of IPPs in renewable energy development. Launched during 2011, the IPP Procurement Programme is designed so as to contribute towards a target of 3 725MW and towards socio-economic and environmentally sustainable growth, as well as to further stimulate the renewable industry in South Africa. In order to facilitate the development of IPPs in South Africa, these guidelines have been written to assist project planning, financing, permitting, and implementation for both developers and regulators. The purpose of these guidelines is not to provide an exhaustive checklist of requirements, but to promote efficient, effective, and expedited authorisation processes".

- **Immigration**
  - Statement by the Minister of Home Affairs on postponement of 2 sections of the Immigration Regulations (16 September 2014)
  - The requirement that all children entering or exiting South Africa be in possession of an Unabridged Birth Certificate, and written permission from both parents or guardians of the child, authorizing that child's travel have been postponed to 1 June 2015.

- **Promotion of Diversity and Competition on Digital Terrestrial Television Regulations**
  - These Regulations will come into effect upon publication in the Gazette (GN 682; GG 37929; 22 August 2014).

- **Public Hearings**
  - Inquiry into the state of competition in the Information and Communications Technology Sector (GN 797; GG 37990; 10 September 2014).

- **White Paper on Families**
  - An integrated plan has been developed to implement the white paper on families. The Social Development Department announced this during an update briefing on the policy to the national assembly's social development committee in September 2014. A monitoring mechanism will be developed by both social development and planning, monitoring and evaluation departments to gauge progress on implementation. The department also reported that a number of programmes have been developed such as mediation, family reunification services, integrated parenting framework, fatherhood strategy and active parenting of teenagers to help with implementation. The intention is to implement the policy in all provinces.

The legislative process surrounding Employment legislation is almost complete.

Employers should note that the amendments to the Employment Equity Act, No 55 of 1998 (EEA) and the Basic Conditions of Employment Act, No 75 of 1997, have already come into effect, on 1 August 2014 and 1 September 2014 respectively.

The effective dates of the amendments to the Labour Relations Act, 66 of 1995 (LRA), and the Employment Services Act, No 4 of 2014 remain unknown, but other than publication of such effective dates, the legislative process is complete.

Speculation remains rife that further amendments to the LRA may well be in the offing, to address the problem of violent strikes, and strikes that endure far beyond what most would consider to be reasonable. It would however require a completely new draft amendment Act, and the resultant lengthy Parliamentary process, for such amendments to become law. To date, such further legislative process has not commenced.

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4. ENVIRONMENTAL LAW

Recent amendments regarding mineral activities

4.1 Attempts to streamline authorisation requirements

4.1.1 From 2 September 2014, the environmental regulation of prospecting, mining, exploration or production activities (mineral activities) was transferred from the Minerals and Petroleum Resources Development Act, No 28 of 2002 (MPRDA) to the National Environmental Management Act, No 107 of 1998 (NEMA).

4.1.2 This follows the enactment of inter alia the National Environmental Management Laws Amendment Act, No 25 of 2014 (NEMLAA). For the last six years, it was envisaged that the competency for the environmental regulation of mineral activities would be transferred from the Minister of Mineral Resources under the MPRDA to the Minister of Environmental Affairs under NEMA (Initial Transitional Arrangements). The Minister of Mineral Resources will now retain his competency, but under NEMA.

4.1.3 Changes were also introduced to the National Environmental Management: Waste Act, No 59 of 2008 (Waste Act) regarding mineral activities.

4.1.4 Environmental Authorisation (EAs) and Environmental Management Programmes (EMPs)

4.1.4.1 The majority of the MPRDA's environmental regulation requirements were deleted by the MPRDA Amendment Act, No 49 of 2008 (which commenced in June 2013) (MPRDA 2013), including the EMP provisions. This was intended to give effect to the Initial Transitional Arrangements, whereby EAs would be required for mineral activities as from December 2014, under the NEMA Amendment Act, No 62 of 2008 (NEMA 2008).

4.1.4.2 The NEMLAA however deletes the NEMA 2008's transitional provisions and the December 2014 date is now irrelevant. NEMLAA however has no provisions regarding the date from which EAs will be required. Mineral activities are however listed under NEMA as requiring EAs but a commencement date has not yet been proclaimed. Commencement dates for certain provisions under the MPRDA Amendment Act, required for the transition of environmental regulation from the MPRDA also need to be proclaimed.

4.1.4.3 Until this takes place, it appears that the EMP requirements must be regulated by the MPRDA's deleted provisions. Unless the MPRDA Bill is enacted, gaps will still remain subsequent to the commencement of NEMLAA and the MPRDA 2013 as to pending applications for approvals for EMPs.

Residue stockpiles and deposits

4.1.4.4 Waste management licences are now required from the Department of Mineral Resources (DMR) for residue stockpiles and deposits relating to mineral activities under the National Environmental Management: Waste Act, No 59 of 2008.

Rehabilitation and closure costs

4.1.4.5 A mineral right holder previously remained liable for rehabilitation and cost closure liability until the DMR issued a closure certificate. From 2 September 2014, notwithstanding the issue of such certificate, a holder now remains responsible for any residual environmental liability and closure costs.

4.2 Recent amendments to NEMA

4.2.1 Appeals to suspend EAs

Under NEMLAA an EA will be suspended if an appeal against that EA is submitted.

The holder of an EA would be prevented from commencing with construction of a development until the authorities make a decision on the appeal, which can be time consuming. A separate alert is on our website regarding this.

4.2.2 Increased scope for director liability

The fundamental principle of company law that the directors of a company are not personally liable for the entity's debts and liabilities is curtailed by South African environmental law. NEMLAA has made further inroads into this principle by providing that notwithstanding, the Companies Act, No 71 of 2008 or the Close Corporations Act, No 69 of 1984, the

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directors of a company or members of a close corporation are '...jointly and severally liable for any negative impact on the environment, whether advertently or inadvertently caused by the company or close corporation which they represent, including damage, degradation or pollution.'

There is also an increased willingness on the part of the South African courts to hold company directors or members of close corporations personally liable, exemplified by the recent sentencing of a director to imprisonment for environmental crimes in the case of *S v Blue Platinum (Pty) and Matome Samuel Maponya (2014)* Case no: PR 126/13.

This arguably results in the net of potential liability being cast even wider.

For more information, please refer to the following Alert on our website: **http://www.cliffedekkerhofmeyr.com/en/news/publications/2014/environmental/environmental-alert-1-september-directors-beware.html**

5. RECENT DEVELOPMENTS ACROSS PRACTICE AREAS

Competition

Recent publications covered:

- New appointments at the Competition Commission
- Are merger related employment conditions stifling the realisation of efficiencies?
- High Court decides on Netcare's concerns regarding healthcare inquiry
- Final statement of issues and guidelines for participation in healthcare inquiry published
- The Competition Commission retracts and corrects terms of reference for LPG market inquiry
- Competition Commission concluded consent agreement with British Airways plc
- B&E and Cycad Pipeline settlements
- New clarity in merger control
- Commission concludes collaboration agreements with regulators

For more information, please refer to the following Alerts on our website: **http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Competition**

Dispute Resolution

Recent publications covered:

- The general principles in construing a contract silent as to its duration is to look at the express provisions of the contract and the intention of the parties
- Understanding the powers conferred upon an organ of state in blacklisting persons or companies as suppliers or service providers
- Security for costs: A new dispensation?
- Section 14 of the Prescription Act, No 56 of 1972 – A life line
- The sale of a rental enterprise
- Liquidation: The effect on leases
- The prohibition or restriction of prospecting or mining within the buffer zone of the Mapungubwe World Heritage Site

For more information, please refer to the following Alerts on our website: **http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Dispute Resolution**

Employment

Recent publications covered:

- The Basic Conditions of Employment Amendment Act, No 20 of 2013, comes into operation on 1 September 2014
- Equal pay provisions and the impact on collective agreements
- The last leg: Constitutional Court finds that SAPS decision to not promote Barnard was not unlawful
- Amendments to the Employment Equity Act require increased reporting
- Other amendments to the Employment Equity Act
- What is unfair discrimination on an 'arbitrary ground'?
- Stricter enforcement of the EEA under the amendments
- Compensation and Damages: What is the difference?
- Be smart and comply – Employment Equity Plans
- Assessment of compliance with employer's Employment Equity requirements

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For more information, please refer to the following Alerts/publications on our website:**http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Employment**

Environmental

Recent publications covered:

- Potential delays to mining operations due to the requirements for waste management licenses
- Appeals to suspend environmental authorisations: a barrier to development or proper protection of the environment?
- The Environmental Law Rubicon regulating mineral operations – latest developments

For more information, please refer to the following Alerts on our website: **http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Environmental**

Tax

Recent publications covered:

- Sale of shares by special purpose vehicle
- Electronic communication with SARS
- Search and seizure: the extent of SARS's powers
- Expenditure relating to deferred accruals
- Proposed changes to secondary transfer pricing adjustment
- Keeping the lid on Pandora's Box
  - If only all judgments were formulated with the elegant reasoning and perspicacity of the judgment delivered by Rogers J in the Western Cape Division of the High Court in Kluh Investments (Pty) Ltd v Commissioner for the South African Revenue Service (case number A48/2014, as yet unreported) on 9 September 2014.
- An update on the streamlining of the VAT registration process
  - The Taxation Laws Amendment Act, No 31 of 2013 introduced legislative amendments aimed at streamlining the Value-Added Tax registration process as contained in the Value-Added Tax Act, No 89 of 1991.
- Concerns raised on interest deduction limitation rules
  - Interest deduction limitation provisions have been enacted in terms of s23N of the Income Tax Act, No 58 of 1962, which apply to so called 'reorganisation and acquisition transactions'. These provisions have been in effect since 1 April 2014. The purpose of these provisions (as the heading suggests) is to limit interest deductions in respect of certain debt arrangements that National Treasury consider as being susceptible to excessive gearing.
- Salary Sacrifices
  - In the recent case of ABC Limited v The Commissioner for the South African Revenue Service (case number 12984, as yet unreported), the Tax Court had to determine whether the Appellant had entered into an effective salary sacrifice scheme with its employees in respect of motor vehicle benefits. If there truly was a salary sacrifice, only the taxable value of such benefit in accordance with the provisions of the Seventh Schedule to the Income Tax Act, No 58 of 1962 will have accrued to the employee, otherwise the amount expended by the Appellant to provide the benefit will have accrued.

For more information, please refer to the following Alerts on our website: **http://www.cliffedekkerhofmeyr.com/en/news/?type=/en/news/publications/&practice-area=Tax**

Technology, Media and Telecommunications

Recent publications covered:

- Facial recognition…a necessary evil?
  - An investigative report was recently released by DigBoston (a free, alternative newsweekly published in Boston, Massachusetts) in respect of a new event-monitoring facial recognition surveillance system used by the City of Boston as part of a pilot project during two public music events held in May and September 2013.
- ICT Policy White Paper on its way…
  - The Draft IMT Roadmap may be beneficial to some but costly to current licensees. At a media release held on 1 September 2014, the Independent Communications Authority of South Africa (ICASA) called for comments just days after it had published the Draft International Mobile Telephony Roadmap (Draft IMT Roadmap) on 27 August 2014. Stakeholders have until 7 October 2014 to submit their input, comments and representations to ICASA on the Draft IMT Roadmap. The Draft IMT Roadmap builds on the Frequency Migration Plan published in April 2013, which identified the frequency bands employed in South Africa.

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TRAINING, LEARNING AND SKILLS DEVELOPMENT

We value training and skills development as an important part of our corporate culture.

We offer various training sessions, presentations, updates and workshops on a range of topics.

We recently hosted seminars on developments in the areas of:

- Competition law
- Dispute resolution – business rescue proceedings
- Employment law
- Immigration law
- Tax law

Please visit our website for more information about upcoming events.

THE NEXT TRAINING INITIATIVE WILL FOCUS ON:

- Term Sheets
- The Companies Act, 2008
  - Corporate governance & committees
  - Director liability and personal financial interests
  - The memorandum of incorporation and shareholders agreement
  - Winding up, deregistration and reregistration of companies
  - Financial assistance under s44 and s45 of the Act
  - Distributions and share buy-backs
  - Share capital and corporate finance aspects
  - Mergers and selected practical issues regarding takeover law

These sessions are aimed at providing companies with insights and solutions in respect of a number of practical questions and issues that have arisen under the Act since its commencement some three and half years ago.

The sessions should benefit corporate legal counsel, transaction advisors and company secretaries.

For more information, please contact: **www.valueadd4clients@dlacdh.com**

The KM Team

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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