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MINING & MINERALS ALERT

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During the past few years there has been a slump in the global demand for coal, similar to other commodities. This has largely been caused by structural changes in the economy – with a reduced demand for coal, coupled with increased investment in the renewable energy sector by China and other countries. The past few months have, however, seen a rejuvenation of confidence in the demand for coal.

Coal has played and continues to play a major role in the South Africa economy, with its impact spanning the entire value chain – from production to beneficiation – with approximately 90% of South Africa's electricity derived from thermal coal. Of the total coal produced in South Africa as at December 2017, 76.47 million tons of coal were exported – a record-breaking year for the Richards Bay Coal Terminal. Compared to all other commodities, coal was the largest revenue generator for the South African economy during 2017 – contributing approximately R131,4 billion. Coal thus plays a very important role in South Africa's growth and development.

Despite coal's importance, the industry's role in the economy is being disrupted by a number of policy and regulatory changes in the market, such as South Africa's climate change commitments to reduce greenhouse gas emissions under the Paris Agreement, an uncertain mining regulatory framework which has been causing jitters in the mining sector, and the policy shifts to reduce the contribution of coal in South Africa's energy mix.

The gradual move to more reliable renewable energy sources is the biggest disrupter for coal to continue as South Africa's baseload energy source. The new draft Integrated Resource Plan of November 2016 (draft IRP) - which went through a public participation process during 2017 – made this shift even clearer with the intention of reducing coal's contribution to the South African energy mix to less than 40%. This implies a dramatic reduction in the production of coal in South Africa for the utilisation in the domestic market, and probably also for the export market. This move away from coal comes despite some other markets, such as India, still investing heavily in coal fired-power stations to ensure at least 200 million people have basic access to electricity.

How will coal remain a relevant energy commodity in a future where it will be plagued by carbon taxes, export restrictions and policies requiring the use of "clean coal" for energy production? Both producers (miners) and users of coal (utilities) need to invest in the advancement of clean coal technologies (such as carbon capture and storage, underground coal gasification, and so on). These investments (which to an extent are already happening) will ensure that in the long-run coal could continue to sustainably contribute to the economic development of coal-rich regions such as South Africa, Botswana and Mozambique. The investment in "clean coal" will further be a catalyst for the enhancement of other cross-sectors, as "clean coal" implies becoming more innovative and market leading – thereby growing and developing service sectors that support a "clean coal" revolution.

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THE GLOBAL WAR AGAINST COAL: WHAT DOES THE FUTURE HOLD FOR COAL?

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It is imperative that government has a serious dialogue with all stakeholders in the mining and energy sectors to root-out the evil called "uncertainty".

Producers of coal are also plagued with regulatory uncertainties in the mining sector. The vague and ambiguous requirements of the Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 (new Charter) are currently the subject of a lengthy court battle, including concerns relating to certain of the provisions of the Mineral and Petroleum Resources Development Amendment Bill, 2013 (MPRDA Amendment Bill). The regulatory uncertainties are having a detrimental effect on future investments in the mining sector, as investors are reluctant to invest in a sector where the 'rules of the game' are unclear and constantly in flux. The new Charter has good intentions to ensure meaningful transformation of the mining sector, however, a number of its provisions appear to violate the rule of law. The most evident of these: the proposed retroactive application of ownership requirements, the potential violation of international law commitments in respect of the local content requirement for the procurement of goods and services, and certain provisions conflicting with other laws and legal principles under South Africa law.

For the coal miners, an added concern is the provision of the MPRDA Amendment Bill which empowers the Minister of Mineral Resources (Minister) to declare certain minerals such as coal as so called "strategic minerals". The Minister's right implies that once a mineral such as coal is declared as a strategic mineral, the export thereof could be restricted in order to meet the domestic requirements at a set price. The initial thinking behind this ministerial power was to ensure the security of supply of minerals such as coal for the domestic thermal coal market. It is not clear whether such a need has dissipated with the policy change on coal's contribution to the energy mix, but this remains a factor investors will take into account when contemplating investments. The authority of the Minster to declare certain minerals as "strategic minerals" must be clearly defined and set out in either the principle act or regulations, similar to what is found under the Diamonds Act for the exportation of diamonds. Without clarity on the Minister's authority - specifically the objective grounds to be relied on in declaring a mineral as a "strategic minerals" – producers' export of coal may be restricted despite buyers placing forward orders for the delivery of seaborne coal. It is thus imperative for the industry to lobby for the "rules of the game" to be made clear at the onset – to avoid future costly disputes with the Minister on the scope of his powers.

During this year's World Economic Forum meeting in Davos, the Deputy President of South Africa made various commitments to ensure that all the inhibiters to growth and development – such as policy and regulatory uncertainties – will be addressed. In order to ensure sustainable growth and development for South Africa, which will be the catalyst for meaningful economic transformation, it is imperative that government has a serious dialogue with all stakeholders in the mining and energy sectors to root-out the evil called "uncertainty". Uncertainty is the biggest cause for investment decline in the mining and energy sector. If the "rules of the game" are clear – the economy will see more investment flow to critical sectors.

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OVERHAUL OF FINANCIAL PROVISION REGIME TAKES A STEP IN THE DIRECTION OF LEGAL CERTAINTY

Some of the criticism levelled against the financial provision framework has been considered.

An overhaul of the financial provision regime for the mineral and petroleum sectors has finally been proposed.

The publication of the Financial Provision Regulations for Prospecting, Exploration, Mining or Production Operations by the Minister of Environmental Affairs on 20 November 2015 (2015 Regulations) was met with significant resistance, with the Chamber of Mines noting that it would have a "crippling effect" on the mining sector.

The mining sector had to grapple with the near insurmountable task of having to, within a relatively short transitional period, comply with unnecessarily onerous regulations riddled with legislative uncertainties and a myriad of contradictions.

Amidst a fragile mining industry, the 2015 Regulations (not surprisingly) became the subject of judicial challenge. Two mining companies instituted an application in the High Court for an order determining the legality, constitutionality and/or meaning of the 2015 Regulations. However, on 9 September 2016, before the application was heard, the Environmental Minister published Proposed Amendments to the 2015 Regulations and, on 26 October 2016, extended the transitional period of two years in the 2015 Regulations - giving mining companies until 19 February 2019 to comply.

Despite the additional breathing space and attempts by the Department of Mineral Resources to offer some clarification, be it by engaging directly with the industry or through publication of "explanatory" notes, the 2015 Regulations continued to be widely critiqued for their regulatory uncertainties and absurdities.

Inevitably, following two years of regulatory uncertainty, an overhaul of the financial provision regime for the mineral and petroleum sectors has finally been proposed with the publication of a new set of Proposed Regulations pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations by the Environmental Minister on 10 November 2017 (2017 Proposed Regulations).

Some of the criticism levelled against the financial provision framework has been considered, as various nuances seem to have been addressed in the 2017 Proposed Regulations, particularly:

- The 10-year requirement for financial provision availability
  Under the 2015 Regulations a holder must ensure that the financial provision required was, at any given time, equal to the sum of the actual costs of implementing the annual rehabilitation plan, closure plan and environmental risk report in relation to annual rehabilitation (Annual Rehabilitation); final rehabilitation, decommissioning and closure at the end of the life of operations (Closure Rehabilitation); and the remediation of latent or residual environmental impacts which may become known in the future, including the pumping and treatment of polluted or extraneous water (Future Rehabilitation) respectively. This has now been significantly reduced to three years for holders of mineral rights obtained prior to the commencement of the 2015 Regulations and one year for applicants or holders of rights applied for or issued after the promulgation of the 2015 Regulations or 2017 Proposed Regulations;

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Financial provision is only required to be made available for Closure and Future Rehabilitation, and not for Annual Rehabilitation.

- **The limitation on using trust funds for Future Rehabilitation and misalignment with the Income Tax Act, No 58 of 1962 (ITA)**
  The current provisions under the 2015 Regulations are severely problematic. Funds currently held in existing trusts established under s37A of the ITA (s37A Trust) could not be withdrawn from a s37A Trust to secure an alternative financial vehicle for Annual or Closure Rehabilitation, as this would have constituted a contravention of s37A(1)(a) of the ITA. This is because the ITA only allows such withdrawal for purposes of direct expenses relating to rehabilitation upon premature closure, decommissioning or closure (that is, actual rehabilitation). Contravention of this section could result in SARS including an amount equal to twice the market value of funds held in the s37A Trust as a taxable income penalty. This was aggravated by subsequent draft amendments to the ITA proposing an even more stringent penalty for withdrawal of funds for purposes other than actual rehabilitation. The limitation also precluded mineral rights holders from the tax benefits of using a s37A Trust for Closure Rehabilitation. Thankfully, no restrictions on the use of rehabilitation trust funds have been included in the 2017 Proposed Regulations.
- **Financial provision for rehabilitation**
  Financial provision is only required to be made available for Closure and Future Rehabilitation, and not for Annual Rehabilitation. It is understood that OPEX will likely be used to fund Annual Rehabilitation costs; and
- **The care and maintenance provisions have been removed**
  This is, to some extent, unfortunate. The provisions were ultra vires insofar as it was not within the Environmental Minister's competence to regulate: (i) when a mine is operationally considered to be in care and maintenance; or (ii) the submission and approval of care and maintenance applications, which is within the Minister of Mineral Resources' competency. This is particularly so as there is already a procedure in the Minerals and Petroleum Resources Development Act, No 28 of 2002 (MPRDA). Furthermore, the environmental management of a mine under care and maintenance differs from what is required when it is operational. The 2015 Proposed Regulations included the requirement for the submission of a care and maintenance plan. With the deletion of these provisions, the environmental management of mines under care and maintenance is again not thoroughly regulated.

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Finalisation of the 2017 Proposed Regulations must be prioritised, as existing holders are presently still required to comply with the 2015 Regulations by February 2019.

Although the above changes do add a much-needed level of certainty to the financial provision regime, the 2017 Proposed Regulation still place an administrative and financial burden on the mining industry. When the 2015 Regulations were promulgated, they were critiqued for putting too much strain on the sector due to stringent requirements relating to the costs of post-closure pumping, and treatment of polluted and extraneous water during Future Rehabilitation – something that was not required under the MPRDA. Despite this being estimated to double rehabilitation liability, these provisions do not appear to have been relaxed.

The 2017 Proposed Regulations also introduced various new noteworthy changes, some of which include:

- distinguishing between new and existing mining operations in the methodologies for the determination of rehabilitation and cost closure liability;
- introducing "rehabilitation companies" as a financial provision mechanism. This, however, goes beyond what constitutes "financial provision" in terms of the 2017 Proposed Regulations' empowering statute: the National Environmental Management Act, No 107 of 1998. As such, its definition of "financial provision" will have to be amended to cater for rehabilitation companies;
- prohibiting the use of financial guarantees for Future Rehabilitation;
- financial provision must be apportioned to each right and permit where a mineral rights holder is in possession of multiple rights or permits;
- the determination, review and assessment of rehabilitation and cost closure liability need not necessarily be undertaken only by a specialist but may be done internally by an applicant or holder, subject to external review by an independent specialist. The cost of appointing specialists was one of the criticisms of the 2015 Regulations;
- applicants for consents under s11 and s102 of the MPRDA are now also required to determine and provide financial provision prior to these consents being granted. Understandably, the introduction of this requirement has been met with criticism, as such a requirement unduly forces a mineral rights acquirer to provide financial provision prior to taking transfer of the right; and
- separate report templates and an extended transitional period are provided for holders of offshore, oil and gas exploration and production rights, who will only be required to comply by 19 February 2024.

The above provisions are by no means final but the complete proposed overhaul does provide some comfort to an industry fraught with regulatory challenges and uncertainties.

Finalisation of the 2017 Proposed Regulations must be prioritised, as existing holders are presently still required to comply with the 2015 Regulations by February 2019.

The mining sector needs to be able to ensure the legality of their operations, as compliance is essential to successfully apply for and retain mineral rights. Although technical and practical difficulties are bound to creep in, the 2017 Proposed Regulations are a definite step away from the disarray of the 2015 Regulations. It is likely that the burden of the costs for Future Rehabilitation will, however, remain contentious.

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