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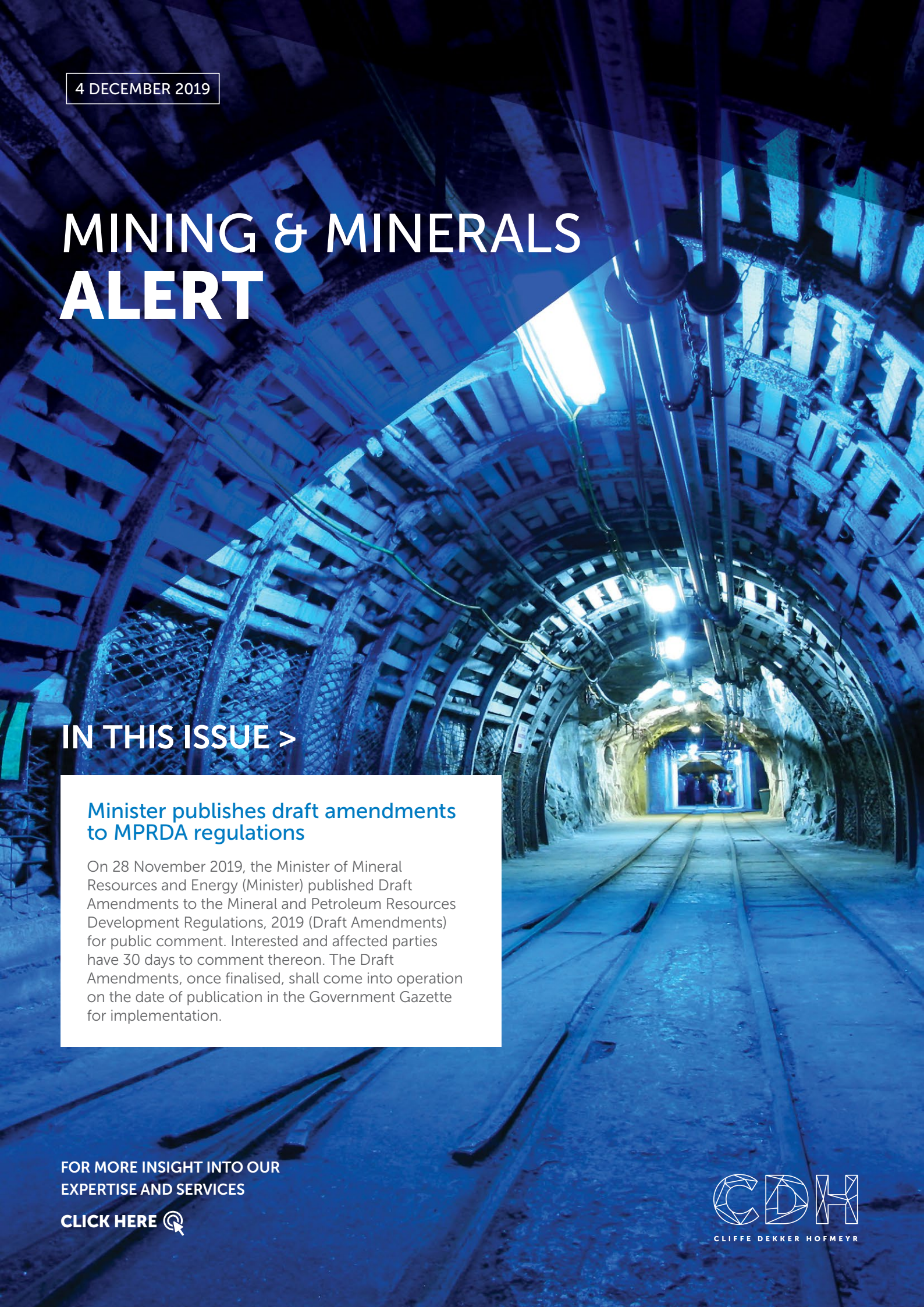
MINING & MINERALS ALERT



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Minister publishes draft amendments to MPRDA regulations

On 28 November 2019, the Minister of Mineral Resources and Energy (Minister) published Draft Amendments to the Mineral and Petroleum Resources Development Regulations, 2019 (Draft Amendments) for public comment. Interested and affected parties have 30 days to comment thereon. The Draft Amendments, once finalised, shall come into operation on the date of publication in the Government Gazette for implementation.

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Minister publishes draft amendments to MPRDA regulations

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The Draft Amendments envisage various amendments to the Mineral and Petroleum Resources Development Regulations (MPRDA Regulations) published in terms of the Mineral and Petroleum Resources Development Act, No 28 of 2002 (MPRDA) – the most notable of which are discussed below.

Consultation Obligations

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. Previously, this definition only related to natural or juristic persons or an association of persons with a direct interest in the proposed or existing operations or who may be affected by the proposed or existing operation.

A definition of "*meaningful consultation*" has been included in the Draft Amendments. The definition contemplates an applicant, in good faith, engaging 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 to his right of use of the land by availing all the information pertaining to the proposed activities enabling these parties to make an informed decision regarding the impact of the proposed activities. However, we note that the definition of "meaningful consultation" has not been used in the Draft Amendments and does not appear anywhere in the current Regulations.

New regulations are proposed regarding the obligations of:

- an applicant for a prospecting right, mining right or mining permit to consult, which provides that the consultation with landowners, lawful occupiers and interested and affected persons contemplated in sections 16(4)(b), 22(4)(b) and 27(5)(a) of the MPRDA, shall be conducted in terms of the public participation process prescribed in Chapter 6 of the Environmental Impact Assessment Regulations, 2014 (EIA Regulations); and

Minister publishes draft amendments to MPRDA regulations...*continued*

The objectives of social and labour plans have been expanded to include mining right holders contributing towards the socio-economic development of labour sending areas as well as areas in which they operate.

- a holder of a reconnaissance permission, reconnaissance permit, mining permit, prospecting permit, and mining right to give at least 21 days written notice of his/her intention to commence with operations to the landowner or lawful occupier of the land, as well as the Regional Manager.

Social and Labour Plans

The objectives of social and labour plans (SLP/s) have been expanded to include mining right holders contributing towards the socio-economic development of labour sending areas as well as areas in which they operate. Labour sending areas mean areas from which a majority of mineworkers, both historical and current, are or have been sourced. On this definition, a mining right holder who historically procured the majority of its workforce from, say, the Eastern Cape, but no longer does so, would be obliged to contribute to the socio-economic development of that area even though there are no longer ties to that area.

If a Regional Manager refers a SLP back to an applicant with proposals for amendments, the revised SLP must then be re-lodged within a period specified by the Regional Manager, which period may not exceed 30 days.

An applicant for a mining right must also, within 180 days from receiving notification of the acceptance of the application from the Department of Mineral Resources and Energy (DMR), consult with communities and the relevant structures of the local, district and metropolitan municipalities as defined by the Local Government: Municipal Structure Act, No 117 of 1998 (defined in the Draft Amendments as "Relevant Structures") on the content of the SLP to ensure that it addresses the relevant needs of such communities and is aligned with the updated integrated development plans of such Relevant Structures. Such consultation process regarding the contents of the SLPs should also take place in accordance with the public participation process prescribed in the EIA Regulations.

The Draft Amendments clarify that SLPs need to be approved. We note that neither the MPRDA nor the current MPRDA Regulations are explicit regarding the requirement of the approval of SLPs or the process to be followed in relation thereto. Section 23(1)(e) of the MPRDA does, however, provide that the Minister must grant a mining right if, *inter alia*, the applicant has provided for the prescribed SLP. The Draft Amendments are specific in that they provide that SLPs which have been *approved* will remain valid until a closure certificate has been issued.

The Draft Amendments also clarify that amendments to approved SLPs will require the consent of the Minister in terms of section 102 of the MPRDA. Although section 102 of the MPRDA does not specifically provide for the amendment of a SLP, a SLP is attached to an approved mining right as an annexure, and forms part of the terms and conditions of such right through the definition of "*Mining Right*" in the right itself and is likely thereby covered by section 102 of the MPRDA.

Minister publishes draft amendments to MPRDA regulations...*continued*

The Draft Amendments also propose repealing all regulations in the MPRDA Regulations relating to environmental matters, save for regulations 56, 57, 61 and 62

New regulations are proposed regarding:

- the obligation of mining right holders to publish approved and consulted SLPs within 30 days of receiving approval thereof. The publications must be in English and one other dominant official language commonly used within the mine community, and must be published using the avenues set out in the Draft Amendments. The requirement to publish the approved SLP in "*local newspapers*" appears to be an error. SLPs are simply far too voluminous to publish in this manner;
- the review of a SLP every five years, the first of which will be five years after the date on which the SLP was approved. The review process may begin from the fourth year in which a SLP has been valid, and during this process affected mine communities, adjacent communities, labour sending area, as well as local or district municipalities must also be consulted. When reviewing a SLP, the Minister must take a number of factors into account, including past compliance with the approved SLP, an assessment of annual compliance reports, input and comments from affected communities and Relevant Structures, as well as the changing nature of the relevant needs of the affected communities as per the integrated development plans of the Relevant Structures;
- the need to consult with all stakeholders in a transparent and inclusive manner when making amendments to approved SLPs; and
- collaboration on any approved SLP projects taking place in a transparent and inclusive manner and based on consultation with all stakeholders.

Repeal of Environmental Regulations

The Draft Amendments also propose repealing all regulations in the MPRDA Regulations relating to environmental matters, save for regulations 56 (Principles of mine closure), 57 (Application for mine closure), 61 (Closure objectives), and 62 (Contents of closure plan).

New Regulations Relating to section 52 of the MPRDA

New regulations have been proposed in relation to the notices to be sent to the Minister in terms of section 52(1) of the MPRDA. Under the MPRDA, such notices must be sent by mining right holders where (a) prevailing economic conditions cause the profit to revenue ratio of a mine to be less than 6% on average for a continuous period of 12 months, or (b) if any mining operation is to be scaled down or to cease with the possible effect that 10% or more of the workforce or more than 500 employees, whichever is the lesser, are likely to be retrenched in any 12 month period.

In terms of the Draft Amendments, a mining right holder must submit a notice pursuant to section 52(1) of the MPRDA to the Minister "*within seven days from the date after consultations with registered trade union/s, affected employees or their nominated beneficiaries, are concluded*" (own emphasis added). Furthermore, the Draft Amendments require that mining right holders must submit records of the

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Minister publishes draft amendments to MPRDA regulations...*continued*

In terms of section 53 of the MPRDA, any person who intends to use the surface of any land in a manner which may be contrary to the objects of the MPRDA or is likely to impede such objects, must apply to the Minister for approval in the prescribed manner.

consultations which have taken place in terms of section 189 of the Labour Relations Act, No 66 of 1995 (LRA) as well as the status of such consultations as supporting documents to the notice. In our opinion, these proposed regulations do not align with how section 52 of the MPRDA has been interpreted up to this point and will be highly problematic from a practical perspective. By requiring right holders to only send the section 52 notice to the Minister (and thus initiate negotiations with the DMR) after consultations with trade unions and affected employees have been concluded in terms of section 189 of the LRA, seems to be irrational and may result in additional time delays and costs.

The Draft Amendments also provide that a notice sent to the Minister in terms of section 52(1) of the MPRDA must also be accompanied by, *inter alia*, a competent persons report and a due diligence report as supporting documents. In our opinion, the requirement to prepare and submit the said reports (whatever they are meant to entail) as part of this process is unreasonable and will be troublesome, particularly where mining right holders are not listed companies. The need for such reports is not material within this context, and the additional costs and time required to prepare the said reports may create unintended consequences and potentially further job losses.

In addition to the above, the template form for section 52(1) notices provided in the Draft Amendments contains a provision which states "*the company acknowledges that the Minister may invoke the provisions of sections 52(3)(c), 93, 47, 99 and related provisions of the MPRDA to ensure compliance with its requirements.*" We note that the inclusion of this provision is highly irregular. Companies should not have to agree or acknowledge the application of the mentioned sections as part of this process. The applicability of the mentioned sections of the MPRDA should only be determined as a matter of law.

New Regulations relating to Applications for the Use of the Surface of Land Contrary to the Objects of the MPRDA

In terms of section 53 of the MPRDA, any person who intends to use the surface of any land in a manner which may be contrary to the objects of the MPRDA or is likely to impede such objects, must apply to the Minister for approval in the prescribed manner.

New regulations have been proposed in the Draft Amendments which set out the specific information that applicants will need to provide as part of a section 53 application. Until now, there has been no prescribed format for a section 53 application. However, the DMR published a template for such applications, which is aligned with what is now set out in the Draft Amendments. The difficulty which applicants under section 53 face in practice is that certain information required under these regulations is not readily available. For example, applicants will be required to confirm, *inter alia*, whether holders of prospecting, mining, exploration or production rights within a two-kilometre radius of the application area have been identified, and if so, whether they have been consulted and/or objected to the proposed

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Minister publishes draft amendments to MPRDA regulations...*continued*

New regulations have been proposed in the Draft Amendments regarding how disputes envisaged in section 54 of the MPRDA will be resolved and the process set out therein is inconsistent with what is set out in section 54.

land development. In our experience, applicants are only made aware of whether any parties hold mineral rights in relation to the application area (and possibly the surrounding area) once the section 53 application is processed by the DMR, and the applicants have been directed by the DMR to consult with any such parties who hold or have applied for rights under the MPRDA. Applications for information under the Promotion of Access to Information Act, No 2 of 2000 can be lengthy processes and are not therefore particularly helpful.

New Regulations Relating to Section 54 of the MPRDA

In terms of section 54 of the MPRDA, a right holder should notify the relevant Regional Manager where a landowner or the lawful occupier of the land prevents the holder from commencing or conducting any reconnaissance, prospecting or mining operations by (a) refusing entrance to the land; (b) placing unreasonable demands in return for access to the land; or (c) if the landowner cannot be found in order to apply for access to the land. The Regional Manager is obliged to follow certain processes as set out in section 54, and in terms of section 54(4) of the MPRDA, in the event that parties then fail to reach agreement on the amount of compensation payable due to the loss or damage suffered, the parties are entitled to refer the matter either to arbitration or a competent court for determination.

New regulations have been proposed in the Draft Amendments regarding how disputes envisaged in section 54 of the MPRDA will be resolved and the process set out therein is inconsistent with what is set out in section 54.

In terms of the Draft Amendments, once notice has been sent to a Regional Manager in terms of section 54 of the MPRDA and provided the dispute cannot be resolved by the Regional Manager, the parties will be required to refer the matter to either an arbitration or conciliation process. Only in circumstances where the arbitration or conciliation process fails, will an aggrieved party be entitled to refer the dispute to a competent court for determination.

Furthermore, a non-refundable fee of R1,500 per notice will be payable by the right holder, which is not contemplated in the MPRDA. It is unclear whether a landowner who submits a notice in terms of section 54(7) will also be liable for the payment of such fee. Frequently, it is impoverished communities who file such notices, and the additional fee would be burdensome.

Appeals

Under the Draft Amendments, substantial amendments to the MPRDA Regulations relating to appeals against administrative decisions have been proposed. A number of the proposed amendments seem to be problematic and may create uncertainty in practice if accepted. It should be noted that the reference in section 74(10)(b) of the Draft Amendments to *"answering affidavit"* is clearly wrong and should be read as *"answering statement"*.

Within this context, it is important to highlight the distinction between appeals against administrative decisions submitted in terms of sections 96(1)(a) and 96(1)(b) of the MPRDA. An appeal in terms of section 96(1)(a) of the MPRDA will be submitted to the Director-General where

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The Draft Amendments do not appear to recognise the distinction between appeals submitted under these two sub-sections and seem to only apply to appeals submitted pursuant to section 96(1)(a) of the MPRDA.

a party wishes to appeal an administrative decision made by a Regional Manager (or a designated person to whom power has been delegated or authority has been assigned). An appeal in terms of section 96(1)(b) of the MPRDA will be submitted to the Minister where a party wishes to appeal an administrative decision made by a Director-General (or the designated agency). The Draft Amendments do not appear to recognise the distinction between appeals submitted under these two sub-sections and seem to only apply to appeals submitted pursuant to section 96(1)(a) of the MPRDA. The manner in which appeals submitted in terms of section 96(1)(b) of the MPRDA will be processed and the time periods applicable thereto appears to have been left open, which will create uncertainty going forward. Furthermore, the proposed amendments appear to remove the responsibility of the Director-General to adjudicate appeals submitted pursuant to section 96(1)(a) of the MPRDA and place this obligation on the Minister instead. It appears as though the intention behind the Draft Amendments in this regard is to make the Minister the sole authority responsible for adjudicating appeals against administrative decisions. In practice, although the Draft Amendments do set out specific time periods within which each step of the appeal process must take place, the ability of the Minister to take on the additional work contemplated by this proposed amendment and whether this will result in timing delays has to be questioned.

A further issue created by the Draft Amendments relates to the time period within which a party may submit a written notice of its intention to appeal an administrative decision. Currently, under the MPRDA Regulations, any person who intends to appeal an administrative decision in terms of section 96 of the MPRDA must submit written notice of its intention to appeal to the Director-General or the Minister (as the case may be) within 30 days of becoming aware of the administrative decision. In terms of the Draft Amendments, the notice of intention to appeal a decision in terms of section 96(1)(a) of the MPRDA has to be submitted in writing within 30 days of the administrative decision being made. This proposed amendment has the potential to be problematic, as in practice, it is common for parties to whom these provisions may apply to only become aware that an administrative decision has been made later than 30 days after the date of the decision. The consequence of the proposed amendments will therefore be that persons who had a right to appeal an administrative decision being potentially prevented from doing so, due to no fault of their own.

In terms of regulation 15 of the Draft Amendments, in circumstances where the Minister receives an appeal which covers matters to be adjudicated on in terms of both sections 96(1)(a) and 96(1)(b) of the MPRDA, a copy of the appeal must be submitted to the Minister of Environmental Affairs "*for processing in relation to environmental matters in accordance with the procedure set out in section 96(1)(b)*", and the Minister (of Mineral Resources

Minister publishes draft amendments to MPRDA regulations...*continued*

We recommend that this proposed regulation be amended to provide certainty in relation to the instances when the Minister of Environmental Affairs must be involved in adjudicating appeals submitted in terms of section 96(1) of the MPRDA.

and Energy) and the Minister of Environmental Affairs *"shall co-ordinate the finalisation of simultaneous appeals in terms of section 96(1)(a) and (b) of the MPRDA respectively affecting the same administrative decision."* We note that this proposed regulation is unclear and appears to be incorrect for a number of reasons. Firstly, as mentioned previously, there is a distinction between the types of appeals submitted under sections 96(1)(a) and (b) of the MPRDA – and as such, there should never be a scenario where as part of one appeal, an administrative decision of a Regional Manager as well as an administrative decision of a Director-General are submitted together at the same time. Secondly, based on the manner in which this proposed regulation is drafted, copies of all appeals submitted in terms of section 96(1) of the MPRDA will also have to be submitted to the Minister of Environmental Affairs, regardless of whether an appeal relates to an environmental matter or not. We recommend that this proposed regulation be amended to provide certainty in relation to the instances when the Minister of Environmental Affairs must be involved in adjudicating appeals submitted in terms of section 96(1) of the MPRDA.

Giada Masina, Allan Reid and Ben Cripps

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CDH CLIFFE DEKKER HOFMEYR

OUR TEAM

For more information about our Mining & Minerals sector and services, please contact:

Allan Reid
Sector Head
Director
Corporate & Commercial
T +27 (0)11 562 1222
E allan.reid@cdhlegal.com

Nonhla Mchunu
Director
Corporate & Commercial
T +27 (0)11 562 1228
E nonhla.mchunu@cdhlegal.com

Julian Jones
Sector Head
Business Rescue & Insolvency
Director: Dispute Resolution
T +27 (0)11 562 1198
E julian.jones@cdhlegal.com

Giada Masina
Director
Corporate & Commercial
T +27 (0)11 562 1221
E giada.masina@cdhlegal.com

Fiona Leppan
Director
Employment
T +27 (0)11 562 1153
E fiona.leppan@cdhlegal.com

Rishaban Moodley
Director
Dispute Resolution
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Lilia Franca
Director
Corporate & Commercial
T +27 (0)11 562 1148
E lilia.franca@cdhlegal.com

Emil Brincker
National Practice Head
Director
Tax & Exchange Control
T +27 (0)11 562 1063
E emil.brincker@cdhlegal.com

Ben Cripps
Senior Associate
Corporate & Commercial
T +27 (0)11 562 1242
E ben.cripps@cdhlegal.com

Mmatiki Aphiri
Director
Corporate & Commercial
T +27 (0)11 562 1087
E mmatiki.aphiri@cdhlegal.com

Willem Jacobs
National Practice Head
Director
Corporate & Commercial
T +27 (0)11 562 1555
E willem.jacobs@cdhlegal.com

Alecia Pienaar
Associate
Corporate & Commercial
T +27 (0)11 562 1017
E alecia.pienaar@cdhlegal.com

Sandra Gore
Director
Corporate & Commercial
T +27 (0)11 562 1433
E sandra.gore@cdhlegal.com

Aadil Patel
National Practice Head
Director
Employment
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

Jackwell Feris
Director
Dispute Resolution
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Mark Linington
Sector Head
Private Equity
Director: Tax & Exchange Control
T +27 (0)11 562 1667
E mark.linington@cdhlegal.com

Verushca Pillay
Director
Corporate & Commercial
T +27 (0)11 562 1800
E verushca.pillay@cdhlegal.com

Deon Wilken
National Practice Head
Director
Finance & Banking
T +27 (0)11 562 1096E
E deon.wilken@cdhlegal.com

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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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