



# MINING & MINERALS ALERT

## IN THIS ISSUE

**“CRIPPLING” 2015 MINING FINANCIAL PROVISION REGULATIONS – Possible deadline extensions for likely rehabilitation liability increases and income tax penalties due to legislative riddles**

The Financial Provision Regulations (2015 Regulations) publication under the National Environmental Management Act 107 of 1998 (NEMA) in November 2015 was widely criticised in the media. The Chamber of Mines has stated that it could have a crippling effect on the mining industry.

# “CRIPPLING” 2015 MINING FINANCIAL PROVISION REGULATIONS – Possible deadline extensions for likely rehabilitation liability increases and income tax penalties due to legislative riddles

*The Financial Provision Regulations (2015 Regulations) publication under the National Environmental Management Act 107 of 1998 (NEMA) in November 2015 was widely criticised in the media.*

*Under the 2015 Regulations, a rehabilitation trust fund may be used as a financial provision vehicle, if it is established through a trust deed in the format set out in an Appendix to the 2015 Regulations.*

**The Financial Provision Regulations (2015 Regulations) publication under the National Environmental Management Act 107 of 1998 (NEMA) in November 2015 was widely criticised in the media. The Chamber of Mines has stated that it could have a crippling effect on the mining industry.**

The criticisms particularly relate to the:

- restrictions on using rehabilitation trust funds for only final rehabilitation liability. This includes ongoing liability for latent and residual environmental impacts that may arise in the future, which was not previously required under the Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA); and
- consequences of income tax penalties that may be payable by mines under the Income Tax Act 58 of 1962 (ITA) due to significant misalignment of the 2015 Regulations and ITA.

The Department of Mineral Resources (DMR) has sought to elucidate some of the issues raised by releasing a clarification note to stakeholders. However, as discussed below, this has merely resulted in more confusion and regulatory uncertainty.

#### **Possible Extensions for Alignment Assessments**

Mineral right holders (Holders) are required to compile an onerous, extensive and expensive assessment to review and align their existing financial provision provided through financial instruments under the MPRDA with the 2015 Regulations before 20 February 2017 (Alignment Assessment). Due to the significant

issues arising from the 2015 Regulations and legislative amendments required to rectify this, the DMR has conveyed that this deadline will be amended to extend the period to 20 November 2017. When such amendment will occur has however not been confirmed, so Holders are still presently, due to timing constraints, required to prepare the Alignment Assessment in accordance with the 20 February 2017 deadline.

#### **Onerous ongoing final rehabilitation liability and requirements for use of Trust Funds to protect the State or the environment?**

Under the 2015 Regulations, a rehabilitation trust fund may be used as a financial provision vehicle, if it is established through a trust deed in the format set out in an Appendix to the 2015 Regulations. This is provided that trust funds are not used for financial provision required for annual rehabilitation and mine closure costs. In practice, trust funds will need to be used for financial provision required for final rehabilitation liability. This liability will now be ongoing, despite the issue of a closure certificate, under amendments to NEMA. Contributions into trust funds must now also be ceded to the DMR on mine closure. Financial guarantees would not be suitable financial provision instruments for final rehabilitation liability, as the 2015 Regulations require all new

# “CRIPPLING” 2015 MINING FINANCIAL PROVISION REGULATIONS – Possible deadline extensions for likely rehabilitation liability increases and income tax penalties due to legislative riddles

CONTINUED

*Trusts funds established under s37A of the ITA (s37A Trust Funds) have been utilised by Holders as a vehicle to house their financial provision because of the tax benefit provided.*



guarantees to expire when a closure certificate is issued, making it an unsuitable financial instrument for ongoing final rehabilitation liability.

Legislature’s rationale for including the requirements for final rehabilitation liability and ceding trust funds to the DMR was that only sixty percent of operational mines presently have adequate financial provision. This does not include underground or surface water liabilities, which amounts to a large percentage of historical unaccounted for liability; and has resulted in massive State liability and potentially will lead to significant indirect liability for the mining industry. The DMR has therefore been reluctant to issue closure certificates to mines, as liability is then transferred to State, despite the DMR not being known in practice to commonly undertake rehabilitation. Mines have therefore been unable to obtain financial provision refunds. The last known statistics on closure certificate are from 2014: of the 575 closure certificates under review only 159 were issued. Closure certificates still remain a rare sight in practice.

### **Income tax penalties for mines due to misalignment to ITA**

Trusts funds established under s37A of the ITA (s37A Trust Funds) have been utilised by Holders as a vehicle to house their financial provision because of the tax benefit provided. Under ITA a s37A Trust’s sole object must be to apply all funds to mine closure rehabilitation and final rehabilitation. It does not envisage financial provision for annual

rehabilitation, which is a new requirement under the 2015 Regulations. However the 2015 Regulations now prescribe that contributions to s37A Trust Funds may only be used for final rehabilitation. The 2015 Regulations’ restriction on using s37A Trust Funds for final rehabilitation has two significant consequences for Holders:

- withdrawals from a s37A Trust to secure an alternative financial vehicle for annual rehabilitation and mine closure rehabilitation would contravene ITA, which only allows such withdrawals for direct expenses related to rehabilitation, decommissioning or closure. Any such withdrawal may therefore have significant punitive tax consequences; and
- the 2015 Regulations’ prescribed format for s37A Trust Funds does not conform to the 2015 Regulations and s37A as it, *inter alia*, erroneously allows funds in the trust to be allocated to annual rehabilitation, mine closure rehabilitation and final rehabilitation, which goes beyond the limitations of the 2015 Regulations and ITA. Tax benefits for s37A Trust Funds will therefore no longer apply to trust funds established in the prescribed format.

This will likely have significant economic implications for mining companies. Non-compliance with the 2015 Regulations is also a criminal offence and both the Holder and its directors may be held criminally liable.

# “CRIPPLING” 2015 MINING FINANCIAL PROVISION REGULATIONS – Possible deadline extensions for likely rehabilitation liability increases and income tax penalties due to legislative riddles

CONTINUED

*The DMR has clarified that the limitations on using trust funds applies to Holders.*



Given the significant misalignment of ITA and the 2015 Regulations, further legislative amendments will be required. A National Treasury and Department of Environmental Affairs meeting has been promised for a while to expedite a solution. When this meeting will be forthcoming is uncertain and any amendments will require a relatively lengthy regulatory process, particularly if parliamentary approval is required to amend ITA. This is unlikely to occur before the 20 February 2017 deadline.

#### DMR Clarification provides little clarification

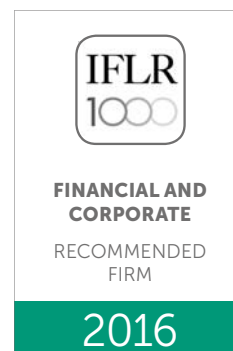
The DMR has clarified that the limitations on using trust funds applies to Holders. Holders will therefore need to change their financial instruments for rehabilitation liability shortly after the DMR has approved their Alignment Assessments that are due by 20 February 2017.

It has however confusingly also conveyed that “existing trusts can be managed as before”. This implies that trust funds can be used for closure rehabilitation, which contradicts the 2015 Regulations. If this is the position, there is no clarity on:

- a) whether contributions for closure costs can still be made after the Alignment Assessment; and
- b) how the resultant consequences of the income tax penalties Holders may incur will be remedied if they need to draw from a trust fund for annual rehabilitation.

The 2015 Regulations therefore remains yet another riddle produced under the environmental legislative framework for regulating mines.

*Sandra Gore*



## OUR TEAM

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



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



**Julian Jones**  
Sector Head  
Business Rescue and Insolvency  
T +27 (0)11 562 1198  
E julian.jones@cdhlegal.com



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



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



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



**Banzi Malinga**  
Director  
Corporate and Commercial  
T +27 (0)11 562 1100  
E banzi.malinga@cdhlegal.com



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



**Deepa Vallabh**  
Head: Cross-border M&A, Africa and Asia  
Director  
Corporate and Commercial  
T +27 (0)11 562 1188  
E deepa.vallabh@cdhlegal.com



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



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



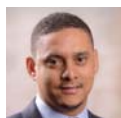
**Ian Burger**  
Director  
Corporate and Commercial  
T +27 (0)11 562 1177  
E ian.burger@cdhlegal.com



**Nonhla Mchunu**  
Director  
Corporate and Commercial  
T +27 (0)11 562 1228  
E nonhla.mchunu@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



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



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



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



**Sibongile Solombela**  
Director  
Corporate and Commercial  
T +27 (0)11 562 1534  
E sibongile.solombela@cdhlegal.com



**Terry Winstanley**  
National Practice Head  
Director  
Environmental  
T +27 (0)21 562 6332  
E terry.winstanley@cdhlegal.com



**Sandra Gore**  
Director  
Environmental  
T +27 (0)11 562 1433  
E sandra.gore@cdhlegal.com



**Luntu Sebatane**  
Director  
Corporate and Commercial  
T +27 (0)11 562 1087  
E luntu.sebatane@cdhlegal.com

### BBBEE STATUS: LEVEL THREE CONTRIBUTOR

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.

### 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

©2016 1256/AUG

