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OIL & GAS ALERT



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Draft Upstream Petroleum Resources Development Bill, 2019: transitional provisions pertaining to existing permit and right holders and existing applications

In part two in our series of articles on the draft Upstream Petroleum Resources Development Bill, 2019 (the Petroleum Bill) we focus on the transitional provisions relating to existing permit and right holders as well as the status of existing applications submitted under the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA).

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PART 2

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The transitional provisions of the Petroleum Bill are contained in section 24, with subsections (1) to (6) addressing matters related to the transfer of employees, assets and liabilities to the Petroleum Agency established in terms of the Petroleum Bill as well as matters ancillary thereto.

In part two in our series of articles on the draft Upstream Petroleum Resources Development Bill, 2019 (the Petroleum Bill) we focus on the transitional provisions relating to existing permit and right holders as well as the status of existing applications submitted under the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA).

The transitional provisions of the Petroleum Bill are contained in section 24, with subsections (1) to (6) addressing matters related to the transfer of employees, assets and liabilities to the Petroleum Agency established in terms of the Petroleum Bill as well as matters ancillary thereto. For a detailed analysis on the designation of the Petroleum Agency, refer to the previous article in this series. This article will consider sections 24(7) to 24(11) of the Petroleum Bill, which *inter alia* sets out the transitional arrangements in relation to the status of existing applications and the status of permits, rights or exemptions granted under the MPRDA.

Section 24(7) of the Petroleum Bill provides that any application, whether for a technical co-operation permit, reconnaissance permit, retention permit, exploration right or production right, lodged under the MPRDA, but which has not been granted by the effective date of the Upstream Petroleum Resources Development Act will be regarded as having been lodged in terms of the Upstream Petroleum Resources Development Act, when promulgated (the Petroleum Act). The fundamental challenge posed by this provision is that the MPRDA and the Petroleum Bill naturally set out different requirements for the various applications. As such, an application which may have been fully compliant in terms of the provisions of the MPRDA, may not meet the requirements of the Petroleum Bill.

By way of example, under the MPRDA, the initial period of an exploration right is three years, therefore in the application, an applicant would have prepared a three-year work programme. However, under the Petroleum Bill, the initial period

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In its current form, there is no provision in the Petroleum Bill for an applicant to align or amend their application, submitted under the MPRDA, with the legislative requirements of the Petroleum Bill.

of an exploration right is five years. A three-year work programme under the MPRDA would be insufficient to cover the five-year initial period contemplated under the Petroleum Bill. Additionally, the Petroleum Bill, unlike the MPRDA, requires mandatory participation of black persons at 10% in every exploration right or production right. We do not propose to consider the merits of this requirement for the purposes of this article, save to point out that an application which complies fully with the provisions of the MPRDA, but which does not have a black person (as defined in the Petroleum Bill) as a 10% holder, would be regarded as non-compliant under the Petroleum Bill.

Section 27(4) of the Petroleum Bill provides that the Petroleum Agency must reject an application if it does not meet the requirements of subsection (3), which includes the requirement for mandatory participation of black persons at 10% and State participation at 20%. In its current form, there is no provision in the Petroleum Bill for an applicant to align or amend their application, submitted under the MPRDA, with the legislative requirements of the Petroleum Bill. Consequently, the cumulative impact of section 24(7), read with the remainder of the Petroleum Bill, contains a lacunae insofar as it relates to compliant applications under the MPRDA, and for which there is no panacea. Section 24(7) would benefit from further clarification

from the drafter as to the practicalities of how the holder would transition to having the mandatory 10% black persons participation and the 20% State participation and the Petroleum Bill would need to specify a deadline for compliance.

Section 24(8) of the Petroleum Bill provides that any right or permit lodged for registration with the Mineral and Petroleum Titles Registration Office in terms of the Mining Titles Registration Act (Act No. 16 of 1967) but not finalised on the date on which the Petroleum Act comes into effect must be regarded as having been lodged after that date. As it is not anticipated that the Mining Titles Registration Act will require amendments following the promulgation of the Petroleum Bill, it is not anticipated that the registration of a right or permit will be affected.

The crux of the transitional arrangements contained in the Petroleum Bill are in section 24(9), which provides that any right, permit, exemption or any other form of authorisation granted before the date on which the Petroleum Act comes into effect will continue in force under the terms and conditions subject to which such right, permit or exemption was granted, until such time as it is due for renewal. As such, existing holders (both of permits and/or rights) will only be required to comply with the provisions of the Petroleum Act at the renewal of the permit or right, as the case may be.

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Section 24(11) of the Petroleum Bill prescribes that anything done before the commencement of the Petroleum Act, under or in terms of a provision repealed by Petroleum Act, must be regarded, unless clearly inappropriate, to have been done under or in terms of the corresponding provision of Petroleum Act.

This requirement to comply with the provisions of the new Petroleum Act at the time of renewal may pose some complexities for current holders in the jurisdiction. It is not inconceivable that a circumstance may arise where an exploration right holder may have yet to decide whether to renew the right or not, but is simultaneously required to acquire a farm-in partner, in order to comply with the mandatory black person participation requirement, if they eventually proceed to enter the applicable renewal period in question. When considering the lifecycle of an exploration project, how work programmes are typically structured, and that investment decisions are often inextricably linked to the results of the seismic data acquired during the work programme, this may present some challenges for existing right holders. It is also worth noting that, since the duration of a production right is 30 years the trigger for the holder of a production right (albeit only a limited number in the jurisdiction as at date hereof), to comply with the Petroleum Act will arise at a much later stage. One of the stated objects of the Petroleum Bill is *to substantially and meaningfully expand opportunities for black persons to enter into and actively participate in the upstream petroleum sector and to benefit from the exploitation*

of the nation's petroleum resources. With this in mind, the practical effect of section 24(9) of the Petroleum Bill, insofar as it relates to production rights, is incongruous with this stated object.

Similar to the way that a right or permit for which an application for renewal has been lodged remains in force notwithstanding its expiry date until such time as such application has been granted or refused under the MPRDA, section 24(10) of the Petroleum Bill provides that in the event that an application for renewal of a right or permit or form of authorisation has been lodged but not finalised before the date on which the Petroleum Act comes into effect, the right or permit or authorisation remains valid until the application is decided.

Finally, section 24(11) of the Petroleum Bill prescribes that anything done before the commencement of the Petroleum Act, under or in terms of a provision repealed by Petroleum Act, must be regarded, unless clearly inappropriate, to have been done under or in terms of the corresponding provision of Petroleum Act. This section creates a presumption that the holders of permits and rights have acted in compliance with the Petroleum Act before it is promulgated, unless it is clear that any activity does not align with the Petroleum Act.

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In our next article in the series, we will be considering the application for permits or rights, the processing of those applications and consultation with interested and affected parties under the Petroleum Bill.

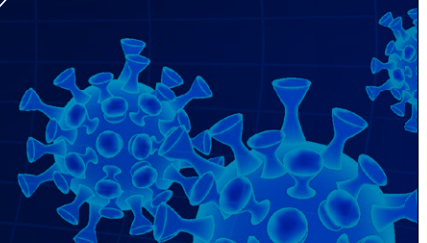
The above reforms to petroleum regulation seek to address some of the bureaucratic challenges presented by the provisions of the MPRDA. South Africa has had an increase in exploration interest during the last few years, which has tested the provisions of the MPRDA and necessitated some of the amendments referred to above. As such, enabling an efficient legislative environment will prove to be all the more necessary.

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Megan Rodgers, Sthembile Shamase and Shameegh Allen

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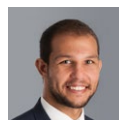
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