IN-DEPTH

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EDITION 11

Contributing editor
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Preface

Michael Burns

The convergence of politics, law, business and environmental concerns makes international oil and gas law a fascinating and ever-shifting field. The outbreak of the conflict in Ukraine threw the role of gas in bridging this intersection into particular prominence in 2022, when prices soared and gas supplies were threatened. Maintaining energy security continues to be a priority in 2023 and has given further impetus to the commitments of national governments to accelerate the energy transition. Meanwhile, the scale of the task of achieving net zero has led to questions over the nature and extent of the future role of the oil and gas industry.

Regulating an industry that involves balancing these differing concerns is inherently complex. Against this background, oil and gas practitioners are required to negotiate diverse national law and regulation in the context of a truly international industry. *The Oil and Gas Law Review* aims to assist practitioners in this challenging area by providing an introduction to the fundamental local legal requirements that they must understand when advising clients in a number of jurisdictions.

The Oil and Gas Law Review is made possible by the efforts of its contributing experts, editors and publishers. I would like to thank all those who have been involved in producing this volume, which will serve as a vital resource to many practitioners.

Michael Burns
Ashurst
London
October 2023

Chapter 13

South Africa

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Summary

I INTRODUCTION

The South African upstream oil and gas regulatory landscape is on the cusp of a legislative transition as the country awaits enactment of the Upstream Petroleum Resources Development Bill (UPRDB). The UPRDB was introduced into the national assembly on 1 July 2021 and once passed, the UPRDB will separate upstream oil and gas activities from the mining sector. As of January 2022, South Africa's estimated crude oil reserves are 15 million barrels, all of which are located offshore,[2] and the natural gas reserves were estimated at only 25.1 billion cubic meters (bcm) as at 2021. There is significant opportunity for gas production in South Africa, with TotalEnergies' announcement in 2021 of two significant gas discoveries, namely the Bulpradda and Luipard prospects. The Block 11B12B joint venture has since applied for a production right. Production of the domestic oil and gas reserves has the potential to spark a much-needed energy transition in the country. Currently South Africa's offshore oil and gas acreage is occupied by a mix of junior, major and supermajor oil companies, as well as the national oil company, and we stand at the precipice of an exciting period in the development and production of gas and condensates, both onshore and offshore, all of which could positively impact the South African economy.

II LEGAL AND REGULATORY FRAMEWORK

i Domestic oil and gas legislation

The Mineral and Petroleum Resources Development Act No 28 of 2002 (MPRDA) and the Mineral and Petroleum Development Regulations issued thereunder (Petroleum Regulations) is the national legislation that regulates both the mining sector and the upstream petroleum exploration and production sector. The MPRDA states that the petroleum resources of the nation are the common heritage of the people of South Africa, and the state, duly represented by the Minister, is the custodian thereof for the benefit of all South Africans.[3] Chapter 6 of the MPRDA contains the legislative framework for petroleum exploration and production activities in South Africa.

Section 2 of the MPRDA sets out the objects of the MPRDA, which include:

- recognising the right of the state to exercise sovereignty over the mineral and petroleum resources in South Africa;[4]
- promoting equitable access to mineral and petroleum resources to all South Africans;[5] and
- expanding opportunities for historically disadvantaged persons by facilitating participation entry into the petroleum sector.[6]

These, along with the other objects, ultimately colour the provisions of the MPRDA with a noble purpose of furthering the interests of all people in South Africa.

In addition to the MPRDA, the Mining Titles Registration Act No 16 of 1967 (MTRA) seeks to ensure that permits and rights granted under the MPRDA are properly registered and enforceable against third-party claims. Upon such registration, the exploration and production rights become a real right to property; property in this context being the natural resource.

As in the ordinary course, domestic legislation must be read and interpreted to further the objects of the Constitution of the Republic of South Africa, 1996 (Constitution). On 6 December 2014, the Department of Mineral Resources and Energy (DMRE) the Department of Environmental Affairs as it was known then (DEA) and the Department of Water and Sanitation (DWS) issued a joint statement announcing that environmental regulation would be removed from the scope of the MPRDA and would be regulated under the National Environmental Management Act 107 of 1988 (NEMA), which would give rise to the 'One Environmental System'. The implementation of the One Environmental System was given effect by the National Environmental Management Amendment Act and the Mineral and Petroleum Resources Development Amendment Act 49 of 2008. Accordingly, NEMA is the overarching regulatory framework for environmental matters related to exploration

and production activities and the Minister is the responsible authority for implementing the environmental provisions under NEMA, insofar as it relates to exploration and production activities.[7]

Other important legislation includes the Income Tax Act 21 of 1996 (ITA), the Value Added Tax Act 89 of 1991, the Mineral and Petroleum Resources Royalty Act, 2008 and the Transfer Duty Act 40 of 1949.

ii Regulation

The main regulatory bodies responsible for overseeing upstream oil and gas operations are the Department of Mineral Resources and Energy (DMRE), the Petroleum Agency of South Africa (SOC) Limited (Petroleum Agency) and the Mineral and Petroleum Titles Registration Office (MPTRO).

Other key regulatory agencies in South Africa include:

- Department of Forestry Fisheries and the Environment (DFFE), which is responsible for protecting, conserving and improving the South African environment and natural resources;
- Department of Water and Sanitation (DWS), which has overall responsibility for and authority over South Africa's water resources and their use;
- National Energy Regulator of South Africa (NERSA), with the mandate to regulate and determine tariffs and pricing for the electricity, piped gas and petroleum pipelines industry;
- International Trade Administration Commission, responsible for the issuing of import and export permits for inter alia the import and export of petroleum in accordance with the ITA Act; and
- the South African Maritime Safety Authority, with powers to approve Oil Spill Contingency plans required to be developed in connection with exploratory and production drilling.

Section 3(2)(a) of the MPRDA specifies that the state acting through the Minister may grant, issue, refuse, control, administer and manage, inter alia, any petroleum permit or petroleum right. Section 103 of the MPRDA grants the Minister the power to delegate any power or assign any duty conferred on him in the MPRDA (except for the powers to make regulations or deal with any appeal) to the Director-General, the Regional Manager or any officer.[8]

On 14 December 2006, the Minister delegated the powers conferred under Section 3(2)(a) of the MPRDA to the Director-General, the delegation of which remains in full force and effect as at the time of writing.[9] Subsequently, on 3 May 2012, the Minister amended the aforesaid delegation so as to extend a delegation of the Section 3(2)(a) powers to issue, refuse and notify an applicant of refusal of a petroleum permit to the Deputy Director-General: Mineral Regulation of the Department of Mineral Resources (DDG), the delegation of which remains at full force and effect as at the time of writing.

The net effect and intent of the aforementioned delegations being that the Director-General is authorised to grant, refuse, control, administer and manage any petroleum right and the DDG is authorised to grant, refuse and notify an applicant of refusal of a petroleum permit.

The Minister is authorised in Section 70 of the MPRDA to designate an organ of state or wholly owned and controlled agency or company belonging to the state to perform the Chapter 6 functions. The Petroleum Agency has been designated as such and is thus required to perform all the functions listed in Section 71 of the MPRDA.[10]

The DMRE is responsible for the regulation, transformation and promotion of the mineral and energy sector. The DMRE also oversees compliance with the provisions of the MPRDA and NEMA in relation to the mining sector as well as the oil and gas sector in South Africa. The DMRE, duly represented by the Minister and his or her delegates, is responsible for the granting, issuing or refusal of the rights and permits under the MPRDA and serves as the competent authority for the granting of environmental authorisations in terms of NEMA in accordance with Section 38A of the MPRDA.

In addition to the granting or refusal of rights under the MRDA, the Minister and his or her delegates are empowered to cancel or suspend permits and rights should the holder thereof, inter alia, conduct its operations in contravention of the MPRDA, breach the terms and conditions of its right or permit or contravene a condition in the environmental authorisation.[11]

The Petroleum Agency promotes exploration and production activities within the Republic. Notable functions of the Petroleum Agency, as listed in Section 71 of the MPRDA, include the promotion of onshore and offshore exploration and production activities. The Petroleum Agency is also responsible for receiving applications in connection with various rights and permits and making recommendations to the Minister. In sum, the Petroleum Agency acts in an advisory role with a remit to promote exploration and production activities in South Africa.

The MPTRO is responsible for the registration of exploration and production rights and the recording of reconnaissance and technical cooperation permits (TCPs).

iii Treaties

South Africa is a party to the New York Convention, which has been enacted into domestic legislation by way of the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. South African courts are generally willing to enforce any valid arbitration award on the same basis as a judgment of the High Court of South Africa, unless the court finds exceptional reasons for not doing so. South Africa is not a party to the International Centre for Settlement of Investment Disputes (ICSID).

Domestically, the Institute of Legal Proceedings Against Certain Organs of State Act 40 of 2002 seeks to make provision for notice requirements in connection with any legal proceedings instituted against an organ of state. In terms of this act, a notice of intention to institute legal proceedings must be served on an organ of state within six months from the date on which a cause of action arose.[12] In this regard, court processes may not be served on the organ of state before the expiry of 30 days after the notice of intention to institute legal proceedings was served on the relevant organ of the state.[13]

In practice, dispute resolution clauses in upstream-related permits and rights often provide for disputes to be settled by way of arbitration in accordance with the rules of the Arbitration Foundation of Southern Africa.

Bilateral investment

South Africa is signatory to a number of bilateral investment treaties (BITs) with countries such as the United Kingdom, the Netherlands, Switzerland and France.

However, South Africa has begun terminating its BITs with the intention of replacing them with South African domestic legislation in the form of the Promotion and Protection of Investment Act 22 of 2015, which came into effect on 13 July 2018. The aim of this Act is to protect foreign investors in South Africa.

Accordingly, South Africa has opted to replace the treaty protections with those stipulated in the Promotion and Protection of Investment Act 22 of 2015.

III LICENSING

The MPRDA provides for four types of granting instruments in the context of petroleum:

- a reconnaissance permit;
- a technical cooperation permit (TCP);
- an exploration right; and
- a production right.

The MPRDA makes provision for the submission of six types of applications:

- an application for issuing a reconnaissance permit;
- an application for issuing a TCP;
- an application for granting an exploration right;
- an application for granting a production right; and
- an application for granting a renewal to exploration rights or production rights.

Applications for the issue of a TCP, exploration rights and production rights are processed on a first-come, first-served basis if there are competing applications (namely, applications over the same area) received on different dates. If applications are received on the same day, they are regarded as received at the same time and in this particular scenario the MPRDA expressly states that a competing application that has been submitted by an HDSA company must be given preference over all other applications submitted on the same day.[14]

i Reconnaissance permits

A reconnaissance permit may be applied for under Section 74 of the MPRDA. Under this permit, the holder is permitted to undertake only geological, geophysical or photographical surveys and any remote sensing techniques. This permit is valid for 1 year and cannot be renewed. An application for the grant or issue of a reconnaissance permit, and the application documents to be submitted in support of such application, are expressly set out and listed in Section 74 of the MPRDA read with regulation 18 and Form K, Annexure I of the Petroleum Regulations. Holders of a reconnaissance permit do not enjoy exclusive rights, and the permit holders are obliged, in terms of Regulation 22 of the Petroleum Regulations, to supply the Petroleum Agency with all data, reports and interpretation generated as soon as possible after completion of the operations.

ii TCPs

A TCP can be acquired under Section 77(1) of the MPRDA and enables the holder thereof to carry out desktop studies, acquire seismic data and data from other sources, including from the Petroleum Agency. This permit is valid for one year and cannot be renewed. In addition, one cannot conduct exploration activities under this permit. An application for the grant or issue of a TCP, and the application documents to be submitted in support of such application, are expressly set out and listed in Section 76 of the MPRDA read with Regulation 23 and Form L, Annexure I of the Petroleum Regulations. In the event that an application for a TCP does not comply with the acceptance requirements contained in Section 76(1) and Section 76(2) of the MPRDA, the Petroleum Agency must notify the applicant in writing of that fact within 14 days of receipt of the application and return the application to the applicant.[15] If an application for a TCP meets the acceptance criteria, then the merits of the application are assessed by the Petroleum Agency; such merits relate to the applicant's demonstration of its access to financial resources, technical ability and whether or not the applicant is in contravention of the MPRDA.[16] TCPs are granted for a period not exceeding one year and are not transferable and not renewable.[17] Holders of TCPs have an exclusive right to apply for an exploration right over the area covered by a TCP, and a TCP in respect of which an application for an exploration right has been lodged will remain in force until such time as the application for an exploration right has either been accepted or rejected.[18]

iii Exploration rights

An application to grant an exploration right and the application documents to be submitted in support of such application are expressly set out and listed in Section 79 of the MPRDA read with Regulation 28 and Form M, Annexure I of the Petroleum Regulations. In terms of Section 79(1), the application once prepared and compiled by the applicant must be lodged at the office of the Petroleum Agency, in the prescribed manner, together with a prescribed non-refundable application fee.[19] The Petroleum Agency must, in terms of Section 79(2) of the MPRDA, accept an application for a exploration right if such application has met the requirements of Section 79(1) and no other person holds a technical cooperation permit,

exploration right or production right for petroleum over any part of the same area. The Petroleum Agency must, in terms of Section 79(2) of the MPRDA, accept an application for an exploration right if the application has met the requirements of Section 79(1) and no other person holds a TCP, exploration right or production right for petroleum over any part of the same area. In the event that an application for an exploration right does not comply with the acceptance requirements contained in Section 79(1) and Section 79(2) of the MPRDA, then the Petroleum Agency must notify the applicant in writing of that fact within 14 days of receipt of the application and return the application to the applicant.[20]

If an application for an exploration right meets the acceptance criteria, then the Petroleum Agency must, within 14 days from the date of such acceptance, require the applicant to:

- notify and consult with any landowner, lawful occupier and any interested and affected party; and
- prepare and submit the relevant environmental reports required in terms of Chapter 5 of NEMA.

The MPRDA states that an exploration right must be granted by the Minister if the criteria set out in Section 80 of the MPRDA has been demonstrated by the applicant and met.[21] Exploration rights are granted for an initial period of three years and on application can be renewed for up to three further periods not exceeding two years each.[22] An application for renewal of an exploration right must be granted if the holder of the exploration right has complied with the terms and conditions of the exploration right, the approved exploration work programme and the provisions of the Act.[23] An application for renewal of an exploration right, and the application documents to be submitted in support of such application are expressly set out and listed in Section 81(1) and (2) of the MPRDA read with Regulation 33 and Form M, Annexure I of the Petroleum Regulations. Neither the MPRDA nor the Petroleum Regulations as stated above require an applicant for renewal to relinquish an exploration area in order for the application to be accepted by the Petroleum Agency. An exploration right that is the subject of a renewal application will remain in force until such time as the application has either been accepted or rejected.[24] The holder on an exploration right has the exclusive right to apply for a production right over the exploration area.

iv Production rights

An application for the grant of a production right and the application documents to be submitted in support of such application are expressly set out and listed in Section 83 of the MPRDA read with regulation 34 and Form N, Annexure I of the Petroleum Regulations. In terms of Section 83(1), the application once prepared and compiled by the applicant must be lodged at the office of the Petroleum Agency, in the prescribed manner, together with a prescribed non-refundable application fee.[25] The Petroleum Agency must, in terms of Section 83(2) of the MPRDA, accept an application for a production right if such application has met the requirements of Section 83(1) and no other person holds a technical cooperation permit, exploration right or production right for petroleum over any part of the same area. In the event that an application for a production right does not comply with the acceptance requirements contained in Section 83(1) and (2) of the MPRDA, then the Petroleum Agency must notify the applicant in writing of that fact within 14 days of receipt of the application and return the application to the applicant.[26] A production right is valid for 30 years and is renewable for further periods each of which cannot extend beyond 10 years.

The terms and conditions of the reconnaissance permits, TCPs, exploration and production rights are open to negotiation but must comply with the provisions of the MPRDA and must be approved by the Minister.[27]

Although not expressly provided for under the MPRDA, a standard condition contained in exploration and production rights is an option, afforded to the state, to participate via a 10 per cent carried interest in all exploration and production rights granted by the Minister. A further standard term to exploration and production rights under the MPRDA includes the participation of historically disadvantaged persons (HDPs). In this regard, the granting of production rights must give effect to the transformative objectives of the MPRDA, including the

objects of the Charter For the South African Petroleum and Liquid Fuels Industry (Charter).[28] The Charter enjoins all signatories to aid in the redistribution of ownership in the petroleum industry to HDPs. This usually translates into a condition under production rights whereby holders are required to onboard an HDP partner with a 10 per cent participating interest.

Exploration rights (including any subsequent notarial deed of renewal or assignment) and production rights must be lodged for registration at the MPTRO within 60 days from the date of execution thereof. The Regulations to the Mining Titles Act provide that the MPTRO must register an exploration right within 10 working days from the date days this is lodged with the MPTRO.[29] Once an exploration right or production right has been registered by the MPTRO, it creates a real right which is enforceable against third-party claims.[30]

The effective dates for the rights and permits mentioned above are not prescribed by law. However, the Supreme Court of Appeal, in the case of *Minister of Mineral Resources v. Mawetse (SA) Mining Corporation (Pty) Ltd* [31] held that the effective date of an exploration right or the renewal of such right, as the case may be, is the date on which the granting of such right or renewal is communicated to the holder by the Petroleum Agency. Accordingly, the period of the applicable permit or right commences on the day the Petroleum Agency issues a letter to the holder thereof that such permit or right has been granted.

IV PRODUCTION RESTRICTIONS

The National Energy Regulator of South Africa (NERSA) is mandated in terms of the Gas Act 2001 (Gas Act) to determine the maximum prices to be charged by individual gas distributors and traders. To exercise this power, NERSA must determine that there is inadequate competition in the gas industry. NERSA is the authority regulating and determining tariffs and pricing for the electricity, piped gas and petroleum pipelines industry in terms of the Electricity Regulation Act 4 of 2006, the Gas Act and the Petroleum Pipelines Act 60 of 2003. The construction of new upstream pipelines currently requires an application to NERSA. Oil prices are not regulated by legislation in South Africa.

The International Trade Administration Act 71 of 2002 (ITA Act) provides that an exporter of petroleum products must obtain an export permit from International Trade Administration Commission (ITAC).[32] A requirement for the issuing of an export permit is that the exporter has obtained a recommendation from the DMRE. On 3 November 2006, DMRE published the Petroleum Export Guidelines. In terms of the Petroleum Export Guidelines, DMRE must issue a recommendation to an applicant seeking to export, inter alia, crude oil, unless it is the opinion of DMRE that such export may:

- result in a shortage of crude oil; or
- not be in the public interest to issue such recommendation.[33]

Applications for export recommendations must be made in writing to DMRE by completion of the relevant form supplied by ITAC. DMRE must within 24 hours of receipt of an application issue a recommendation to ITAC and issue a copy thereof to the applicant. If DMRE declines to do so, reasons must be provided.[34] South Africa is currently not an exporter of crude oil; it is a net importer of both crude oil and gas.

V ASSIGNMENTS OF INTERESTS

The holder of an exploration right is able to cede or assign the exploration right or an interest therein, subject to the approval of the Minister.[35] A cessionary or assignee will be required to prove, among other things, their technical and financial ability to conduct the proposed exploration operation optimally in accordance with the exploration work programme.[36]

Once the cession or assignment has been approved by the Minister, the cedent, cessionary (or assignor, assignee) and the Petroleum Agency of South Africa (PASA), acting on behalf of the Minister must execute a notarial deed of assignment at the office of PASA before a notary public (a Notarial Deed of Assignment). The cessionary or assignee is thereafter required to submit the Notarial Deed of Assignment for registration at the MPTRO within

60 days in accordance with the Mining Titles Registration Act, No. 16 of 1967. Once the Notarial Deed of Assignment has been registered with the MPTRO, it creates a real right that is enforceable against third-party claims.

Section 102 of the MPRDA permits the holder of an exploration right to amend the terms and conditions of the exploration right and the exploration work programme but subject to obtaining prior Ministerial consent.[37]

VI TAX

i Applicable tax regime

The South African Revenue Service (SARS) is responsible for collecting revenue and ensuring compliance with tax laws.

The taxes that are applicable to the oil and gas industry may include:

- income tax and capital gains tax (CGT) in terms of the ITA;
- value added tax (VAT), levied under the Value Added Tax Act No 89 of 1991 (VAT Act);
- royalties, which are imposed by the Mineral and Petroleum Resources Royalty Act No. 28 of 2008 read with the Mineral and Petroleum Resources Royalty No 29 of 2008 (Administration) Act; and
- carbon tax, imposed in terms of the Carbon Tax Act No 15 of 2019.

ii Income tax and CGT

South Africa applies a residence-based income tax system, meaning that South African residents are subject to income tax on their worldwide income, while non-residents are taxed on their income from South African sources. Residents are further subject to CGT on their worldwide capital gains, while non-residents are subject to CGT only in respect of capital gains arising from the disposal of immovable property (or rights therein) situated in South Africa, or movable property attributable to a permanent establishment in South Africa, unless a double taxation agreement (DTA) provides otherwise.

A resident, in relation to juristic or legal entities, means any person who is incorporated, established or formed in South Africa or who has a place of effective management in South Africa. Branches of offshore companies will not fall within the definition of resident, but they may still be subject to South African income tax and CGT on the basis that they derive income or capital gains from a South African source, unless they can rely on a DTA for protection.

Resident and non-resident companies currently are subject to income tax at a rate of 27 per cent and to CGT at an effective rate of 21.6 per cent.

The Tenth Schedule to the ITA contains a number of favourable provisions for oil and gas companies, including a special dispensation in respect of deductions from oil and gas income. In respect of an oil and gas right, oil and gas companies currently can claim up to 200 per cent in deductions for capital expenditure incurred during exploration. The Tenth Schedule also currently authorises the Minister of Finance to conclude binding fiscal stability agreements with an oil and gas company. These agreements have the effect of guaranteeing that the provisions of the Tenth Schedule (as per the date of concluding the agreement) continue to apply in respect of that right as long as the right is held by the oil and gas company.

iii VAT

Persons who make taxable supplies in the course of an enterprise conducted wholly or partly in South Africa, irrespective of whether they are a resident or non-resident, must register as VAT vendors, provided that the minimum threshold is reached. VAT vendors collect output VAT from their customers and claim credits for input VAT paid by them. The difference is paid to SARS.

VAT is generally levied at a rate of 15 per cent at each stage of the distribution chain, although certain supplies are subject to VAT at a rate of zero per cent (referred to as zero-rated supplies), while other supplies, such as financial services, are treated as exempt.

A person must register as a VAT vendor if it carries on an enterprise and the total value of taxable supplies during the previous 12 months exceeds 1 million South African rands, or will exceed 1 million South African rands within the next 12 months.

A special voluntary registration regime applies to companies engaged in the mining of minerals, metal, oil, gas or natural gas resources (for example, both exploration and extraction).

iv Mineral and petroleum resource royalty

The royalty applies to any entity that holds a prospecting right, retention permit, exploration right, mining right, mining permit or production right or a lease or sublease in respect of such a right, or any entity who wins or recovers a mineral resource extracted from within South Africa. The royalty is triggered on the transfer of a mineral extracted from within South Africa.

The rate for the royalty is determined according to a formula and it differs between the refined and unrefined conditions of the mineral resource. Currently it is a minimum of 0.5 per cent to a maximum of 5 per cent for refined minerals and a minimum of 0.5 per cent to a maximum of 7 per cent for refined minerals.

v Carbon tax

The Carbon Tax Act imposes a levy on any person who conducts any number of listed carbon dioxide-producing activities, including several attributable to the extraction and processing of petroleum products.

In the 2022 national budget, the government announced its intention to ramp up the carbon price and strengthen the price signals to promote behaviour changes over the short, medium and long term. It proposed increases in the carbon tax rate for the 2023 to 2025 tax periods by a minimum of US$1 and increasing gradually to US$20 in 2026 and at least US$30/tCO2e in 2030.

The following rate increases were ultimately legislated for the relevant calendar years:

- 2023 – 159 rands;
- 2024 – 190 rands;
- 2025 – 236 rands;
- 2026 to 2030 – 308, 347, 385 and 424 rands; and
- 2031 – to be announced by the relevant minister.

In addition, the energy efficiency tax incentive and electricity price neutrality commitment is extended until the end of 2025.

vi Other

In addition, oil and gas companies may be liable for transfer duties on the transfer of immovable property and securities transfer taxes on the transfer of securities. South Africa further imposes withholding taxes on dividends, royalties and interest.

The dividends tax is a tax on the shareholder receiving the dividend, which is collected by the company declaring the dividend. Dividends tax is imposed currently at a rate of 20 per cent but may be reduced to zero per cent under the Tenth Schedule to the ITA or under a DTA.

VII ENVIRONMENTAL IMPACT AND DECOMMISSIONING

i Authorisations and competent authorities

Applicants for exploration and production rights under the MPRDA must obtain an environmental authorisation (EA) issued in terms of Section 24 of NEMA and the NEMA Environmental Impact Assessment Regulation (EIA Regulations), which require that an environmental assessment is undertaken for certain activities that are listed in the regulations (Listed Activities). The Listed Activities were amended in June 2021 to also include and make provision for hydraulic fracturing operations and expansions.

On 30 June 2023, certain provisions in the National Environmental Management Laws Amendment Act 2 of 2022 (NEMLA IV) came into effect, thereby amending the NEMA. NEMLA IV has introduced the following amendments that are applicable to the oil and gas sectors:

- the new definition of 'environmental mineral and petroleum inspector', which means a person designated as an environmental mineral and petroleum inspector in terms of Section 31BB of NEMA;
- a new definition for 'financial provision', which now means the amount that is to be provided in terms of NEMA by a holder of an old order right or applicant, guaranteeing the availability of funds to fulfil the obligation to undertake progressive rehabilitation, decommissioning, closure and post-closure activities, including the pumping and treatment of polluted or extraneous water to ensure that the state does not become liable for those costs that should be covered by a holder of an old order right or applicant;
- applications for an EA for (1) a reconnaissance permit; (2) a TCP; (3) an exploration right; and (4) a production right must be made simultaneously with applications for these rights with the associated application for an EA;
- activities undertaken unlawfully where there has been commencement of a listed activity, an EA will be directed by the competent authority to immediately cease the activity pending a decision on the application submitted in terms of Section 24G of NEMA;
- the compete overhaul of Section 24P on financial provision for remediation of environmental damage, which now requires the holder of an EA pertaining to mining activities (including hydraulic fracturing) to maintain its financial provision until it is issued with a closure certificate by the Minister of Mineral Resources and Energy. The holder must also subject the financial provision to an independent audit that must be submitted to the Minister of Mineral Resources and Energy. The holder must also annually undertake the mitigation, remediation and rehabilitation measures; and
- the increase in the penalties for certain offences has increased to a fine not exceeding 10 million rand or imprisonment not exceeding 10 years, or to both a fine and imprisonment.

On 4 August 2023, a notice was published inviting comments of DFFE's intention to amend the EIA Regulations and Listed Activities. The amendments currently proposed and that may have a bearing on exploration and production activities include:

- the new definition of 'offshore activities', which means activities as identified in the EIA Regulations Listing Notice 1 of 2014, Listing Notice 2 of 2014 or Listing Notice 3 of 2014, published in terms of the NEMA, the activities of which are proposed within the exclusive economic zone and continental shelf of the Republic referred to in Sections 3,4,7 and 8 of the Maritime Zones Act, 1994 (Act No.15 of 1994); and
- the amendment of Regulation 39 of the EIA Regulations to exempt applicants for an EA to carry out hydraulic fracturing and offshore activities from having to obtain landowner consent prior to applying for an EA and the inclusion of the requirement to notify the relevant organ of state in instances where activities will be undertaken on coastal public properties.

The timelines, processes and costs associated with applying for an EA will depend on whether a basic assessment or an Environmental Impact Assessment (EIA) is appropriate for the project. This would be determined by a qualified environmental consultant referred to as an Environmental Assessment Practitioner (EAP) in terms of the NEMA EIA Regulations. Although the EAP undertakes the assessment on behalf of the applicant, it is required to be independent. The applicant is responsible for the cost of the environmental assessment.

The Minister of Mineral Resources and Energy is the competent authority for the granting of EAs for activities related to exploration and production, while the Minister of Forestry, Fisheries and the Environment would act as the appeal authority.

In June 2015, the Minister of Mineral Resources (now the Minister of Mineral Resources and Energy) published Technical Regulations for Petroleum Exploration and Exploitation (the Technical Regulations) under the MPRDA, which apply to onshore exploration and production operations. These attempted to establish technical and environmental standards for the conduct of hydraulic fracturing in South Africa. However, in July 2019, the Supreme Court of Appeal of South Africa ruled that the Technical Regulations had been improperly promulgated and were therefore invalid. The court ordered that the Technical Regulations be set aside. The Minister of Forestry, Fisheries and the Environment published the proposed Regulations Pertaining to the Exploration and Production of Onshore Oil and Gas Requiring Hydraulic Fracturing, which set out the monitoring and environmental impact assessments requirements for hydraulic fracturing, the prohibition of certain activities associated with hydraulic fracturing, the identified geographical areas where hydraulic fracturing is prohibited and set out the monitoring requirements before and during operations.

Another material environmental authorisation that will likely be triggered by onshore oil and gas exploration and production is the need for certain authorisations in the National Water Act 36 of 1998 (NWA). On 7 May 2021, the Minister of Human Settlements, Water and Sanitation (DHSWS) (as the DWS was known then) published the 'Regulations for the use of water for exploration and production of onshore naturally occurring hydrocarbons that require stimulation, including hydraulic fracturing and underground coal gasification, to extract and any activity incidental thereto that may impact detrimentally on the water resource' (Draft Regulations), in terms of Section 28(1)(g) of the NWA, which focus exclusively on water use licences (WUL) required for onshore exploration and production operations for unconventional oil or gas development and regulate the exploration for shale gas through the use of hydraulic fracturing. However, these Draft Regulations have not yet been finalised and enacted into law.

Depending on the nature of the petroleum operations, other environmental licences and permits may be required. Such licences may include a waste management licence issued in terms of the National Environmental Management: Waste Act 2008, or an atmospheric emissions licence issued in terms of the National Environmental Management: Air Quality Act, 2004.

ii Environmental enforcement

NEMA provides for the appointment of environmental management inspectors (EMIs) within the DMRE to control compliance with environmental obligations. The appointment process, functions, powers and standards that apply to EMIs are governed by Section 31 of NEMA.

These EMIs have the power to investigate, issue compliance notices and admission of guilt fines, and in more extreme cases hand over cases involving criminal liability to the National Prosecuting Authority for prosecution. Failure to comply with a compliance notice may also result in the revocation of the EA or licence in respect of which contravention occurred.

iii Decommissioning and financial provisioning

Holders of an exploration or production right must obtain a closure certificate in the event that:

- the right lapses, is abandoned or cancelled;
- the relevant operations are ceased; or
- any portion of the right is relinquished.

Closure certificate applications must be submitted to the Petroleum Agency within 180 days of the lapse, expiry or cancellation of the right in question.

In addition, an EA must be obtained to decommission the operations, with decommissioning now referred to as 'closure' in terms of the EIA Regulations and Listed Activities. The EIA

process in support of the EA application must be initiated before the submission of an application for a closure certificate. Finally, on closure, an exploration or production right holder will be required to execute approved rehabilitation and closure plans. The Financial Provisioning Regulations, 2015 published under NEMA require that exploration or production right applicants and holders must make financial provision for the rehabilitation, closure and ongoing post-decommissioning management of negative environmental impacts. On 27 August 2021, the Minister of Forestry, Fisheries and the Environment published proposed amended regulations in respect of financial provisioning (2021 Proposed NEMA Regulations). The Minister subsequently published proposed amended regulations in respect of financial provisioning on 11 July 2022 (2022 Proposed NEMA Regulations), which are intended to repeal and replace the FP Regulations and supersede the 2021 Proposed NEMA Regulations. The 2022 Proposed NEMA Regulations do not apply to an applicant or holder of an offshore operation, where the activity involves a seismic survey but no drilling of stratigraphic wells. The 2022 Proposed NEMA Regulations are also no longer applicable to applicants for a Section 11 Deed of Assignment. The 2022 Proposed NEMA regulations are currently undergoing public consultation. As it currently stands, the Financial Provisioning Regulations, 2015 are still applicable. In terms of the transition period, the Financial Provisioning Regulations, 2015 state that a holder of an offshore oil or gas exploration or production right, who applied this right prior to 20 November 2015, regardless of when the right was obtained, must by no later than 19 February 2024 comply with the financial provisioning requirements (see above for the overhaul of Section 24P of NEMA concerning new financial provision requirements).

VIII FOREIGN INVESTMENT CONSIDERATIONS

i Establishment

For the purpose of a holder of an interest in an exploration right, the MPRDA itself does not require such holder to register a foreign company branch in South Africa or to acquire or incorporate a subsidiary company in South Africa; however, this obligation is imposed by the Companies Act 71 of 2008 (Companies Act). A foreign company that carries on business activities in South Africa must either:

- register a branch with the Companies and Intellectual Property Commission (CIPC) within 20 business days after it first begins to 'conduct business activities' in South Africa; or
- acquire or incorporate a subsidiary company in South Africa.

A holder qualifies as continually engaging in business in South Africa by virtue of its interest held in the exploration right. Accordingly, a holder must within 20 business days after acquiring an interest in the exploration right either register a foreign company branch in South Africa, or acquire or incorporate a subsidiary company in South Africa.

The registration of a foreign company branch will require the foreign entity to appoint a legal representative, resident within South Africa, who will accept service of documents on behalf of a foreign company branch. Additionally, SARS requires that all companies – including foreign companies with branches registered in South Africa – appoint a public officer with whom SARS will communicate in respect of the taxation affairs of the company. The public officer must be resident within South Africa. The role of a public officer, while separate from that of legal representative, is in practice fulfilled by the same person.

The registration of a foreign company branch does not create a legal entity separate from the foreign parent company that registers the branch (whereas acquiring or incorporating a subsidiary in South Africa involves creating an entity with separate legal personality from the foreign parent company). Accordingly, if foreign investors wish to protect the foreign parent company within its group from local liability or litigation, acquiring or incorporating a subsidiary to hold its interest in the exploration right is preferable to registering a foreign company branch. Moreover, in its current form the UPRDB contains a requirement that a holder be incorporated in South Africa. This will mean that those holders who elected to register a foreign company branch to hold their interest in an exploration right, and any new holders acquiring interests in exploration rights after enactment of the UPRDB (in its current

form) will be required to acquire or incorporate a subsidiary company in South Africa to hold their interests under exploration rights. Generally, it takes between three and six weeks to register a foreign company branch.

A foreign company wishing to incorporate a subsidiary company in South Africa may do so in one of two ways:

- acquire a shelf company that has already been formed; or
- incorporate a new private company afresh.

For the purpose of holding an interest in an exploration right, only a limited liability private company must be used. In practice, purchasing a shelf company can be more efficient in terms of time and cost as the company is already in existence, having been formed for the specific purpose of being sold to a third party. The shares in the shelf company can be transferred to the shareholders within a day or two and the company may then proceed with business. The other details of the shelf company such as the details of the directors and company name can be amended within a few weeks. Generally, it takes between two to four weeks to register the amendments to a shelf company. Alternatively, incorporating a new company in South Africa affords a foreign investor the opportunity to create a new corporate entity without the need to amend prior details. The company is therefore built *de novo* and customised to suit the needs of the shareholders. The incorporation of a new company in South Africa takes longer than a shelf company because the registration of amendments to a shelf company may be quicker than the registration of a new company. A new company may not commence business until a certificate to commence business has been issued by CIPC, which usually takes between six and eight weeks from the date of lodgement with the CIPC.

ii Capital, labour and content restrictions

There are no specific legislative requirements that relate to the employment of local personnel in the upstream oil and gas industry. Similarly, there are no legislative restrictions on the ability of oil and gas companies to hire foreign workers. However, regard must be shown to the objects of the MPRDA, in particular, the object to meaningfully expand opportunities for historically disadvantaged persons[38] and to promote employment and advance the social and economic welfare of all South Africans.[39] It is for this reason that the standard form exploration right and production right used by PASA require that the holder of the right employ South Africans with appropriate qualifications and experience, giving preference to historically disadvantaged persons and taking into account the operational requirements of the right holder. The standard form exploration right and production right often require holders to implement a programme for future recruitment, and to propose a training programme for South African graduates in various disciplines of oil and gas production.

The standard form exploration right and production right also require the holder to make an annual contribution to the Upstream Training Trust. The Upstream Training Trust administers the contributions and provides bursaries to South Africans to study at universities in South Africa to gain the skills required for the oil and gas industry.

iii Anti-corruption

The key legislation aimed at combating corruption in South Africa is the Prevention and Combating of Corrupt Activities Act, 2004. In South Africa, the concept of bribery is referred to as 'corruption', and the Prevention and Combating of Corrupt Activities Act broadly defines corruption as directly and indirectly receiving or giving gratification from or to another person to act or influence the other person to act in a manner that:

- is illegal, dishonest, unauthorised or biased, among other things;
- amounts to breach of a position of authority, breach of trust or violation of a legal duty or set of rules;
- is designed to achieve an unjustified result; or
- amounts to any other unauthorised or improper inducement to do or not do anything.

Gratification is also broadly defined as including money, loans, donations, employment and benefit of any kind.

The Prevention and Combating of Corrupt Activities Act applies in both the private and public sectors, and persons convicted of offences under the act are liable to a fine or imprisonment, including life imprisonment.

The penalty provisions of the Prevention and Combating of Corrupt Activities Act differentiate between categories of offences. The majority of offences are penalised by a fine or imprisonment for a period of up to 18 years. Other categories, such as the concealment of the offence of corruption or being an accessory after the offence, carry a lesser penalty, namely a fine or imprisonment of up to 10 years. The court has discretion to impose the fine equal to five times the value of the gratification involved in the offence.

IX CURRENT DEVELOPMENTS

As hinted to above, the most anticipated development in the South African upstream oil and gas sector is the enactment of the UPRDB.

In its simplest form, the UPRDB introduces a separation of the regulatory frameworks governing mining and upstream petroleum exploration and production that were previously dealt with together under the MPRDA. This separation allows the emerging and nuanced upstream oil and gas sector to be regulated entirely separately from the more established mining sector. On 1 July 2021, the UPRDB was introduced to the National Assembly, and on 17 May 2022, DMRE briefed the Portfolio Committee on the salient provisions of the UPRDB.

During this briefing, the DMRE reiterated the importance of the UPRDB, its contribution to the development and growth of the upstream petroleum industry, and the need to promote investor certainty by passing the UPRDB. These provisions include:

- the introduction of the petroleum right that will cover both an exploration phase and a production phase; accordingly, separate exploration rights and production rights will no longer be granted upon enactment of the UPRDB;
- two types of licensing rounds that will be triggered by ministerial notices in the Government Gazette:
  - a notice defining the application criteria that includes a minimum work commitment; and
  - the open-door system where the criteria for award of the right is not predetermined;
- the provision for a 20 per cent carried state interest in all petroleum rights remains; holders will be entitled to recover a maximum of 50 per cent and 100 per cent of the state's share of exploration and production rights, respectively; and
- a requirement that all petroleum rights must have a minimum of 10 per cent Black participation on commercial terms.

From the salient provisions presented to the Portfolio Committee, it is clear that no new amendments to the UPRDB have been made or are being proposed by the DMRE since the iteration introduced to the National Assembly on 1 July 2021. In its concluding remarks, the DMRE stated that the passing of the UPRDB remains a critical step towards ensuring the energy security of the country. This echoes the recent address by President Cyril Ramaphosa at the 2022 Investing in African Mining Indaba that in order for South Africa to achieve energy security, foster social and economic development, eradicate energy poverty and enable its transition to a low or zero-carbon future, exploration and development of its oil and gas resources must continue.

The Portfolio Committee agreed on 24 May 2022 that there will be two phases for public participation associated with the UPRDB, namely written submissions and public hearings. On 28 June 2022, the first phase commenced, as the Portfolio Committee invited the public to submit written comments and indicate any interests in making oral submissions on the UPRDB. Written submissions were due by 29 July 2022.

Public hearings in South Africa's nine provinces commenced on 17 February 2023 and ended on 28 May 2023. Having now completed the public participation process, the UPRDB will be

reconsidered by the National Assembly, which will debate and vote on the passing of the UPRDB with or without amendments. If the National Assembly approves the UPRDB, it will move to the National Council of Provinces. Once the UPRDB has passed through both the National Assembly and the National Council of Provinces, it will be translated into one other official language and submitted to the President's office for signature. The President also has the option to refer the UPRDB to the Constitutional Court for a decision on its constitutionality.

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