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Financial Provisioning Regulations, 2017

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On 20 November 2015, the National Environmental Management Act No. 107 of 1998 ("**NEMA**") "Financial Provisioning Regulations, 2015" GNR1147 GG 39425 ("**2015 Regulations**") were promulgated, resulting in a significant shift of thinking from the longstanding 'simple' Regulation 53 and 54 process, contained in the Mineral and Petroleum Resources Development Act ("**MPRDA**") Regulations, 2004.

The 2015 Regulations were immediately applicable to applicants for a prospecting right, mining permit, mining right, exploration right or production right (i.e new applicants). Holders and holders of a right and permit were allowed to choose the transitional period, being either within 3 months of their financial year end or 15 months from promulgation of the 2015 Regulations. Due to an outcry from the minerals industry around the practical implications of complying within such a limited time frame, holders and holders of a right and permit were granted an extended transitional period of 39 months from date of promulgation and now have until 19 February 2019, to comply.

Separate from the complaints on the timeline restrictions, the Chamber of Mines expressed some serious misgivings regarding the content and implications of the 2015 Regulations. The top five concerns highlighted by the Chamber of Mines included –

- the cost to the industry of retaining funds for 10 years;
- the possible "ultra vires" nature of the provision related to care and maintenance and closure/partial closure;
- the restriction of the trust fund mechanism for financial provision on latent defects;
- the inclusion of the annual rehabilitation requirement in the financial provision to be set aside – double accounting; and
- public access to the EMPR and the calculation of the financial provision.

In a process which took place after the promulgation of the 2015 Regulations, the Department of Mineral Resources ("**DMR**") met with various stakeholders, amongst others, the Chamber of Mines, in an attempt to address the mining industry's concerns. The aforementioned consultation has now culminated in the publication, on 10 November 2017, of the new "Proposed Regulations Pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations" GNR 1228 GG 41236 of 10 November 2017 ("**Draft Regulations**"), which seek to repeal the 2015 Regulations. Comments on the Draft Regulations must be submitted to the DMR before 10 December 2017.

A perusal of the Draft Regulations has revealed a concerted attempt to address some of the uncertainties, whilst it is also patently obvious that on some of the scores, the DMR is not prepared to compromise. Here are the top 10 highlights from the Draft Regulations –

1. the definition of "applicant" has been amended to, *inter alia*, include the transferring party in a Section 11 transaction. As such, it is proposed that the transferring party will, amongst other obligations in the MPRDA, in order to obtain approval of the Section 11 transaction, be required to conduct its own financial provision assessment as described by these Regulations. In addition, the Draft Regulations propose that the transferring party will not be granted Section 11 approval until it provides proof of payment of the financial provision;
2. the regulations do not propose a financial vehicle for the costs associated with annual rehabilitation. As such it would seem that this cost may be funded from OPEX. This fine-tuning of the Draft Regulations has the potential to expose the DMR to liability in the event that the rights holder absconds in the early stages of operation of the right. This risk, the 'premature closure risk', may however be covered by final rehabilitation costing if one considers the methodology detailed in Appendix 2 of the Draft Regulations;
3. the restrictions on financial vehicles available to applicants, holders of rights and holders of rights and permits for annual rehabilitation and final rehabilitation provisions have been removed. It is proposed that financial guarantees, deposits to the Minister and contributions to a Trust may once again be utilised for the purpose of securing these funds. In addition, contributions to rehabilitation companies have been recognised as an acceptable financial vehicle into which financial provisions may be paid;

4. internal determination, review and assessment of financial provision under the Draft Regulations is now expressly permitted as long as an independent specialist is appointed to do an external review thereof;
5. the granting of an Environmental Authorisation where the listed or specified activity is directly related to prospecting, exploration or extraction, including primary processing of a mineral and petroleum resource will, in addition to the obligations contained in regulation 19 and 23 of the NEMA Environmental Impact Regulations GN982, be subject to the Minister first ensuring that the applicant has complied with regulation 10 of the Draft Regulations, which describes the determination obligations for financial provisions for applicants. The regulation 10 obligations require applicants to ensure that their financial provision is made in line with the plans and reports set out in the Draft Regulations, and that this determination is submitted as part of the considerations in the environmental impact assessment report submitted by the applicant. The obligations, in addition, propose that the applicant must provide proof of payment of the financial provision prior to commencing with any prospecting, exploration, mining or production operations. The implications of this proposed suspensive condition in the Draft Regulations, is that applicants will not receive a 'granted' Environmental Authorisation, until they have provided proof of payment;
6. the care and maintenance provisions in the 2015 Regulations are proposed to be removed in their entirety. Care and maintenance refers to the state of a mine's operations, where there is a deviation from the normal mining activities, potentially affecting the financial feasibility of the mine;
7. detailed methodologies are now proposed to calculate the amount of financial provisioning to be made available for both new developments in terms of Appendix 1 as well as existing developments in terms of Appendix 2. This is a positive adjustment in that it will, along with the report formats, standardise the way in which provisions are calculated;
8. the obligations of a liquidator insofar as review, assessment and adjustments of financial provisions and the responsibility for implementing the plans and reports, has been expressly provided for in the Draft Regulations;
9. in the event that a holder, a section 11 transferring party, a holder or a holder of a right or permit is not able to increase the assessed and audited financial provision to cover an identified shortfall, the Draft Regulations have proposed a mechanism whereby these parties may enter into a payment agreement with the Minister for a period not exceeding three years. This mechanism is possibly unlawful if one considers the peremptory provisions contained in regulation 7, which states that a holder or a holder of a right or permit **must** ensure that the available financial provision calculated is at any given time equal to the sum of the costs of implementing activities;
10. the transitional arrangements propose that holders of offshore oil and gas production rights have until 2024 to comply. Applicants are however required to comply on application.

This is a basic overview of the Draft Regulations, and we have not in any detail considered the technical or legal implications hereof, such as the compatibility with NEMA or the MPRDA. However, overall it does look as if the DMR has taken due note of certain priority difficulties with the implementation of the 2015 Regulations and proposed amendments to deal with these. As a result, the Draft Regulations certainly represent a more balanced attempt at addressing the financial provision environment and the challenges experienced in practice, by mining companies.



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