

Fourth Amendment to the Disaster Management Regulations, insofar as they impact upon the energy and mining sector during COVID-19 lockdown

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1. On 16 April 2020, the Minister of Cooperative Governance and Traditional Affairs amended (for the fourth time) the Regulations issued on 15 March 2020, in terms of section 27(2) of the Disaster Management Act, 2002 (the “Fourth Amendment”).
2. The amendment deals *inter alia* with the definition of ‘lockdown’ (indicating the extension thereof to Thursday 30 April 2020) expanding on what may be transported, authorising the sale of hardware products and vehicle components (as long as this is within the perimeters of ‘essential goods’) and introducing the “phased reopening” of the whole mining and energy sector as an ‘essential service’.
3. The department of mineral resources and energy (“the DMRE”) indicated that issues directly affecting mining and energy are being proactively managed to ensure employee health and safety and “that these sectors we regulate are able to meet their obligations during this period, and are better positioned to ramp up production systematically once the lockdown has been lifted”.
4. Specifically, the Fourth Amendment, stated the following with respect to the energy and mining sectors:
 1. Collieries that supply Eskom shall continue to run at full capacity;
 2. Refineries involved in the supply of energy and petroleum products to society (this includes smelters, plants and furnaces involved in the supply chain) shall run at full capacity to avoid fuel shortages;
 3. Mining operations must be conducted at a reduced capacity of not more than 50% during the period of lockdown, and thereafter at increasing capacity as determined by directions issued by the Cabinet member responsible for mineral resources and energy; and
 4. All mining operations are subject to operating in terms of specific conditions which *inter alia* include:
 1. implementing a rigorous screening and testing programme for employees;
 2. the collection of data during the screening and testing programme to be submitted to the relevant authority;
 3. provision of quarantine facilities for employees who test positive for COVID-19; and
 4. mining companies must make arrangements to transport their South African employees from their homes to their respective areas of operations.
5. Given that mining activities conducted during the lockdown are no longer limited to gold and coal mining, the Fourth Amendment has afforded some much needed relief to the mining and energy sectors (and the economy as a whole) however, there are certain concerns around practical implementation thereof. By way of example:
 1. whilst all mining now constitutes an ‘essential service’, not all mining products (coal being the obvious exception) are ‘essential goods’. This in turn creates a concern around the legality of the businesses involved in the supply chain transporting these mining products;
 2. the list of ‘essential goods’ has been expanded to include ‘hardware’ (which is further subcategorised in Annexure B) and for purposes of this note means “*Hardware, components and supplies required by any entity engaged in the provision of essential services for any project related to the provision of water, electricity or other essential services*”. It is unclear whether or not this means that businesses producing ‘hardware’ are entitled to resume business. For instance there is no clarity as to whether a manufacturer of bearings and rubber railings for a mines cableway transportation system would be entitled to resume business at 100% capacity, to meet the operational needs of its customer that is now considered an “essential service” and required to operate; and
 3. there is no certainty as to where this leaves associated service providers that support the mining sector such as land management services, catering services and fuel supply services, some of which are instrumental in the proper functioning of the mining sector.
6. What is clear from the Fourth Amendment is that with little under two weeks of the national lockdown remaining, there is a definite movement towards phased reopening of businesses and that this has commenced with the mining and energy sector. The DMRE has however emphasised that a risk-based approach must be maintained and that various conditions apply to the starting and increasing of capacity.
7. Accordingly whilst this development is encouraging, it is key that when mines (and other businesses) make decisions as to when and how they will be able to re-join the economy, they must ensure that they are able to implement whatever measures are necessary, to ensure maximum protection of employees and to limit the spread of Covid-19. This will no doubt vary from sector to sector, and indeed as between different mining operations.
8. Please contact the Werksmans mining team should you have any questions around the implementation of the Disaster Management Act, 2002 and associated Regulations.



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