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New directions, regulations and a Labour Court judgment bring clarity to the mining industry

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1. Following the announcement of the phased and regulated relaxation of the National Lockdown on 23 April 2020, the mining industry remained in need of further clarification in terms of the procedures that employers would be expected to follow in order to embark on this "start-up" process under the newly relaxed regulations.
2. In regulations made in terms of section 27(2) of the Disaster Management Act, 2002 ("the DMA") dated 29 April 2020 ("DMA Regulations 29 April 2020"), the guidelines of what would be permitted under 'Alert Level 4' were put forward. The DMA Regulations 29 April 2020 are said to repeal the regulations published by Government Notice No 318 of 18 March 2020, as amended. Despite the repeal of the aforementioned regulations, it is said, *inter alia*, that all directions issued in terms of those regulations shall continue to apply unless varied, amended or withdrawn by the Cabinet member responsible for such directions.
   2.1 In addition to the general measures to contain the spread of Covid-19, in terms of the DMA Regulations 29 April 2020, Regulation 30 is of particular importance to the mining industry, dealing with the 'start up processes' relevant to mining operations under Alert Level 4. Regulation 30 states the following:

   2.1.1 Open-cast mining scaling up to a baseline of 50% and thereafter scaling up to full employment;
   2.1.2 All other mining starting in batches, scaling up towards 50% employment;
   2.1.3 Mining operations, must be conducted at a reduced capacity of not more than 50% and thereafter at increasing capacity as determined by direction issued by the Cabinet member responsible for mineral resources and energy;
   2.1.4 The following conditions apply to the starting and increasing capacity:

   2.1.4.1 Appropriate measures to protect the health and safety of workers must be implemented by mining companies in accordance with the directions issued from time to time by the Cabinet member responsible for mineral resources and energy, in consultation with the Cabinet member responsible for health;
   2.1.4.2 A rigorous screening and testing programme must be implemented as employees return to work;
   2.1.4.3 The mining industry must provide quarantine facilities for employees who have tested positive for the Covid-19;
   2.1.4.4 Data collected during the screening and testing programme must be submitted to the authority referred in regulation 8;
   2.1.4.5 Mining companies must make arrangements to transport their South African employees from their respective areas of operation;

   2.1.5 The monitoring and impact assessment of seismicity through the Council for Geoscience must be intensified with immediate effect

3. According to the DMA Regulations 29 April 2020, the list of industries and activities that are permitted to operate under Alert Level 4, includes under Part K, coal production for Eskom scaling up to full employment, open-cast scaling up to a

baseline of 50% and thereafter scaling up to full employment and all other mining starting in batches scaling up towards 50% employment.

4. In conjunction with the DMA Regulations 29 April 2020, directions released by the DMRE dated 29 April 2020, ("DMRE Directions 29 April 2020") further stipulate that:
   4.1 every employer conducting mining operations and activities in connection therewith at a mine, must implement appropriate measures to protect the health and safety of workers in respect of Covid-19. It states that these measures are to be contained in a standard operating procedure which must be developed in consultation with organised labour or worker representatives at the mine.

   4.2 in the development of a standard operating procedure required in terms of the DMRE Directions 29 April 2020, it is advisable that one prepares the procedure in line with the Standard Operating Procedure for South African Mines, previously circulated to members of the mining operations industry and which is further referenced in the Labour Court order discussed in 8.3.2 below. Further one is to apply the relevant guidelines issued by the World Health Organisation, directions and guidelines issued by the National Department of Health, guidelines issued by the National Institute of Communicable Deceases and the risk based approach as embedded in the Guiding Principles of Prevention and Management of Covid-19 in the South African Mining Industry issued by the Chief Inspector of Mines of the DMRE on 26 March 2020.

5. On 1 May 2020, an order handed down by the Labour Court ("the Order") has provided further, much needed practical legal certainty in relation to Mine health and safety and as such has been praised by the DMRE. According to the order, employers in the mining industry have been ordered to prepare and implement a code of practice in terms of section 9(2) of the Mine Health and Safety Act 29 of 1996 ("MHSA"), in accordance with guidelines to be published by the Chief Inspector of Mines in the Government Gazette, by 18 May 2020.

6. The Order is said to resolve the uncertainty as to whether the DMRE and the Chief Inspector of Mines are empowered under the MHSA to introduce enforceable measures to deal with the outbreak of Covid-19 at mines. In an article released by Werksmans Attorneys dated 30 April 2020 entitled *'DMRE issues directives on mining sector, in line with requirements of Section 5(1) of the Mine Health And Safety Act, 29 of 1996'*, the steps that the DMRE believed were necessary to ensure safe start-up processes and procedures were discussed as stated in the directive issued by the DMRE to all mining operations ("the 23 April 2020 Directive"). It was noted that the 23 April 2020 Directive did not seem to amend the regulations released in terms of section 27(2) of the DMA and that its exact legal status remained unclear. It was further stated that mining companies must, in consultation with labour unions in the respective operations, develop the start-up procedure, and provide a copy of such procedure to the Department, **prior to** ramp-up of operations.

7. The application before the Labour Court was brought by AMCU and as its main relief sought an order directing the Minister to declare Covid-19 an occupational health risk and to issue mandatory directions to mines under section 76(2) of the MHSA or alternatively requiring the Chief Inspector to act under section 9 of the MHSA. The Order requires that it be read with the DMRE Directions 29 April 2020

8. The Order directs the following in terms of clarity moving forward for the mining industry:
   8.1 The Second Respondent, namely the Chief Inspector of Mining, is directed by no later than 18 May 2020 to publish a notice ("the Notice") in the Government Gazette:

   8.1.1 containing guidelines in terms of section 9(3) and 49(6) of the MHSA; and
   8.1.2 in terms of section 9(2) thereof requiring employers (as defined in the MHSA) to prepare and implement a code or codes of practice to mitigate the effect of the outbreak of Covid-19 on the health and safety of employees (as defined in the MHSA) and persons who may be directly affected by the disease at the mine.

   8.2 Before publishing the Notice in terms of paragraph 2, the Second Respondent shall:

   8.2.1 consult with the Mine Health and Safety Council, if constituted at the date of this court order;
   8.2.2 elicit and consider all available expert advice, including but not limited to the expert opinions of Professors Ehrlich, Murray, Naidoo, Sonnenberg, and Rees contained in the Applicant's papers;
   8.2.3 meaningfully engage with the relevant trade unions, including but not limited to the Applicant, relevant employer organisations, including but not limited to the Minerals Council, Mining Affected Communities United in Action, and such other interested persons as the Second Respondent may determine regarding the content of the guidelines;

8.2.4 consider the DMRE Directions 29 April 2020; and
8.2.5 after having completed the steps in the above paragraphs but no later than 11 May 2020, publish the draft guidelines for public comment.

8.3 Pending the publication of the Notice and the lodging of codes of practice with the Chief Inspector in terms of section 9(5) of the HSA, and in addition to complying with any regulations and directions issued under section 27(2) of the Disaster Management Act ("the Regulations"):

8.3.1 **all employers as defined in the MHSA shall, at a minimum**, comply with the Standard Operating Procedures for South African Mines, previously circulated to members of the mining operations industry, a copy of which can be made available upon request, to the extent that it is not inconsistent with the Regulations, and as read with, but not limited by:

8.3.1.1 the Directives (Guiding Principles on Prevention and Management of Covid-19 in SAMI) issued by the Second Respondent to employers on 26 March 2020, a copy of which can be made available upon request; and
8.3.1.2 paragraphs 1 and 3(a) to (d) of the DMRE Directions 29 April 2020.

8.3.2 compliance with paragraph 8.3.1 of this article, will be deemed to constitute compliance with paragraph 2 of the DMRE Directions 29 April 2020.

9. In addition to the guidance provided by the Labour Court by means of the Order, and in anticipation of the Notice to be published by the Chief Inspector of Mining by no later than 18 May 2020, it would seem to remain in the best interest for mining operations to continue to comply in terms of the 23 April 2020 Directive issued by the DMRE to all mining operations and to provide a copy of such procedures to the Department, **prior to** ramp-up of operations.
10. 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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