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Update on the Department of Mineral Resources and Energy Regulation & Directions for the Mining and Energy Sector

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COVID-19, Electricity Regulations, REIPPPP, GAS Regulations and the Nuclear New Build Programme

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It goes without saying that from the period commencing on 27 March 2020 to date, our country has experienced, among many other things, firstly an increase in the public's reliance on and tentative assessment of the Gazetted information being released almost daily and secondly that the various government departments have released directions, regulations and amendments thereof more frequently in the past three months than it has done in a 'normal' year.

The Department of Mineral Resources and Energy ("**DMRE**") is no exception to the above. This article therefore serves as an attempt to aid those who may be either confused or have fallen behind on what has been released since the 8th of May 2020 to date, in relation to the DMRE.

Mining sector

On 18 May 2020, the DMRE published in Government Gazette 43335, 'Guidelines for a Mandatory Code of Practice ("**COP**") on the Mitigation and Management of Covid-19 in the Mining Sector' ("**Guidelines**"), which we note was an anticipated document as discussed in a Werksmans Attorneys article dated 8 May 2020 entitled *'New directions, regulations and a Labour Court judgment bring clarity to the mining industry'*. These Guidelines were drafted in terms of section 9(2) of the Mining Health and Safety Act 29 of 1996 ("**MHSA**") and came about as a result of the Labour Court Order granted on 1 May 2020, instructing employers in the mining industry to prepare and implement a COP on Covid-19. The Guidelines were released to assist employers as far as reasonably possible and practicable in order to establish and maintain a Covid-19 prevention, management and mitigation plan at mines. The Guidelines also provide minimum requirements and best practices for the implementation of the Covid-19 specific COP. Also included in the Guidelines is the status of mandatory COPs, risk assessment, start-up procedure for mines, compliance with the COP and access to the COP and related documents. It was noted by the Chief Inspector of Mines that the Guidelines are to be seen as being 'a living document' and may be subject to change should new developments relating to Covid-19 arise.

The Guidelines therefore seem to answer many of the questions that previously faced the mining sector during the start-up process but of importance, among other things, would be to be advised that the legal status of the Guidelines and the COP are such that an employer must prepare and implement a Code of Practice (COP) on the COVID-19 pandemic present and spreading in South Africa. This COP must comply with any relevant guidelines and instructions issued by the CIoM in terms of Section 9(3) MHSA, including regulations and guidelines released in terms of the Disaster Management Act no 57 of 2002 ("**DMA**") and all other applicable statutory obligations related to COVID-19.

Failure by the employer to prepare and implement the mine's COP in line with this guideline constitutes a criminal offence and a breach of the MHSA. The employer must ensure that a complete COP and the related documents are kept readily available at the mine for examination by any affected person, a registered trade union with members at the mine or where there is no such union, a health and safety representative on the mine, or, if there is no health and safety representative, an employee representing the employees on the mine, must be provided with a copy. A register must be kept of such persons or institutions with copies to facilitate updating of such copies. The employer must ensure that all employees are fully conversant with the sections of the COP relevant to their respective areas of responsibilities.

As at 29 May 2020, and in terms of the relevant updates to mining under Alert Level 3, all deep mining operations are now expected to ramp-up to their full capacity and therefore place the mining industry back into full production capacity. In a briefing, the minister of mineral resources and energy, Gwede Mantashe, noted that prior to ramping up, all mining operations are required to prepare and implement a mandatory COP for the mitigation and management of Covid-19, as discussed above. In the Mantashe Economic Cluster Media Briefing on Coronavirus Covid-19 Alert Level 3, the chairperson of the portfolio committee on mineral resources and energy, Sahlulele Luzipo, also called on the department to consider having a "dedicated health specialist, over and above the regular mine health and safety inspectors, who will specifically take lead in the inspection of compliance with Covid-19 plans"

Energy sector

On 5 May 2020, the minister of the DMRE published for comment in Government Notice No 500, in Gazette No 43277, 'Draft Regulations amending the electricity regulations on new generation capacity, 2011' ("**Draft Regulation Amendments**"). One key aspect to take note of in the Draft Regulation Amendments, relates to the proposal to allow Municipalities to apply to the minister to establish new generation capacity in accordance with the integrated resource plan.

The intention behind the Draft Regulation Amendments is said to amend the Electricity Regulations on New Generation Capacity as published by Government Notice R. 399 in Government Gazette 34262 of 4 May 2011 and amended by Government Notice R. 1366 in Government Gazette 40401 of 4 November 2016.

The Draft Regulation Amendments were published for public comment in terms of section 35(5) of the Electricity Regulation Act 4 of 2006 ("**ERA**"), and invited interested parties to submit written comments on the Draft Regulation Amendments within 30 days of 5 May 2020. As a brief overview, the Draft Regulation Amendments have proposed, among other things, that:

Regulation 3 of the ERA be amended by the insertion after paragraph (a) of, "(aA) to permit a municipality to apply to the Minister to establish new generation capacity";

Regulation 5 of the ERA be amended by the addition of the following sub-regulations, "(3) Notwithstanding sub-regulation (1), a Municipality may apply to the Minister to establish new generation capacity in accordance with the integrated resource plan, and such application must:

(a) be accompanied by a detailed feasibility study as contemplated in sub-regulation (2);

(b) demonstrate sound financial standing of the Municipality; and

(c) be aligned to the Integrated Development Plan of that Municipality.

(4) In considering an application by the Municipality in terms of sub-regulation (3), the Minister may request additional information required to make a determination in terms of regulation 6."; and

Regulation 9 of the ERA be amended by the substitution in sub-regulation (2) for the words preceding paragraph (a) of the following words, "(2) Before the buyer concludes a power purchase agreement, the buyer or the procurer must, subject to any approvals required in terms of the PFMA, Municipal Finance Management Act and Municipal Systems Act".

On 14 May 2020, the DMRE released directions for the Continuous Supply of Energy and Petroleum Products to Society, in terms of the DMA regulations published on 29 April 2020. The directions not only deal with the continuous supply of energy and petroleum products but further aim to allow maintenance and construction work for energy projects to recommence, subject to strict hygiene, safety, sanitation and social distancing protocols. The permitted activities under these directions include, among others, projects procured under the Renewable Energy Independent Power Producers Procurement Programme that are currently in construction, Eskom new build programme which includes Medupi and Kusile, the mineral resources and energy department's national social solar water heater programme and projects, nuclear projects under maintenance and construction in power stations and other nuclear facilities and energy construction work for already priced and awarded government tenders.

Of interest, in a non-governmental organisation notice 287 of 2020 dated 22 May 2020, the National Nuclear Regulator announced that Eskom had applied for a nuclear vessel licence in terms of section 21(3) of the National Nuclear Regulator Act No 47 of 1999. This licence will enable a non-nuclear powered vessel to dock in the Cape Town harbour for two days in December 2020 in order to transport fresh nuclear fuel assemblies to the Koeberg Nuclear Power Station. Representations regarding this notice have been invited within 30 days of the date of publication of this notice.

On or about 26 May 2020, the DMRE released a '2020-2025 Strategic Plan and 2020-2021 Annual Performance Plan' ("**Plan**") in an attempt to provide a roadmap to achieve the 2500 MW Nuclear New Build Programme that is soon to commence. This was announced during a briefing with parliament and it was added that a plan for providing oversight monitoring for the Koeberg Life Extension Programme is also being developed. Among other things, the Plan aims to deal with the inadequate energy supply in South Africa by accelerating the

updating and processing of the DMRE's regulatory frameworks in order to enable interventions relating to the various IRP2019 technologies. The DMRE further plans to commence immediately with procurement processes to ensure the security of energy supply.

Some of the planned interventions include, enhancing the stability of the energy distribution industry by reviewing the regulatory framework and industry structure, as well as introducing regulations to improve the National Energy Regulator's regulatory oversight on infrastructure maintenance, addressing licensing turnaround times by reviewing and strengthening relevant legislation. It is further proposed that section 50 of the Minerals and Petroleum Resources Development Act be revisited to help increase domestic beneficiation.

On 29 May 2020, regulations were released in Government Gazette 43367, in respect of the Maximum Refinery Gate Price of Liquefied Petroleum Gas ("**RGP**"). The DMRE drafted these regulations in terms of the Petroleum Products Act No 120 of 1977. Among other things, the regulation states that the RGP has to be based on the import parity pricing and comprise the Saudi Contract Price, freight, insurance, storage, cargo dues, demurrage and stock financing and be expressed in Rands per metric ton. The regulations further state that this RGP needs to be revised every month and will be effective from the first Wednesday of each month and must be calculated by the CEF (SOC) Limited using the RGP in the preceding month in accordance with regulation 2. These regulations have since the date of publication come into effect.

General

On 5 June 2020 and in relation to all industries, it has recently been announced and published in Government Gazette 43408, that the national state of disaster that was declared on 15 March 2020 by Government Gazette 43096 has been extended to 15 July 2020 in terms of section 27(5)(c) of the DMA ("**5 June 2020 DMA Extension**"). This is said to be subject to the need to continue augmenting the existing mitigation measures undertaken by the state to address the impact of the disaster.

Although the impacts on the 5 June 2020 DMA Extension have not been fully elucidated in respect of the different governmental departments, at this time, one must be cautious in assuming that this extension can be interpreted as being an extension of the timeframe relaxations as provided for in, for instance the directions issued in terms of regulation 10(8) of the regulations made under section 27(2) of the DMA, which dealt with the extension of certain timeframes, released by the DMRE dated 11 April 2020 under Government Gazette No R 462 No 43227 ("**DMRE 11 April 2020 Directions**").

The DMRE 11 April 2020 Directions had provided for the extension of timeframes in relation to various processes including, but not limited to, permissions, rights and permits as contemplated in the MPRDA, directives, notices, orders and instructions and the submission of various reports. The DMRE 11 April 2020 Directions had stated that the extensions of these timeframes would in most cases be extended or deemed to have been extended by the number of days of the duration of the lockdown period. If one looks at the definition of "lockdown" in the Regulations issued in terms of section 27(2) of the DMA on 29 April 2020, Government Notice No. R. 462 Gazette No. 43227 ("**29 April 2020 DMA Regulations**"), it is clear that the lockdown was defined as being the period between the 23h59 on 26 March 2020 and 23h59 on 30 April 2020. As the 29 April 2020 DMA Regulations have not since been repealed, this would mean that the extensions as provided for in the DMRE 11 April 2020 Directions, remain to have only been extended up until 30 April 2020.



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