Guidelines for Miners, Lawyers and Pirates

Those with their eyes peeled on developments in mining law during the past year or so will agree that keeping up is a bit like chasing your shadow. On the commercial front, the bill before parliament keep making headlines and the jury is out on how the state will eventually share in the riches of gas and petroleum resources and whether the proceeds will ultimately benefit the few or the many. On the environmental front, many who claim to be quite abreast of what is in fact going may be fibbing just a little. It is not since the state assumed custodianship of mineral resources during 2004 that we have seen so many and such complex changes, if not already implemented, then in draft or awaiting commencement by this and that date.

The wheels have been turning since 2008 on the envisaged transfer of all matters environmental in the mining sector to the Department of Environmental Affairs (DEA), though it appears now that this process is being redirected to rather secure the Minister of Mineral Resources in that position. There is clearly a lot going on behind the scenes. In the process however, the Department of Mineral Resources (DMR) had by oversight deleted just about every environmental related section in the Mineral and Petroleum Resources Development Act (MPRDA) during 2013. Yes, that includes most provisions on financial provisions aimed at rehabilitation. The initial flurry of exasperated online and print editorials quickly died down as it became increasingly evident that we will have to traverse that legal vacuum with our eyes fixed on 7 December 2014, when a modicum of environmental regulation returns to the mining legislation. This arrangement, which one can at best describe as a time-share deal with the National Environmental Management Act, is however hopelessly flawed. Having put together all the amendments, one cannot help but wonder whether the regulatory portfolio members of the DEA and the DMR had in fact read each other's legislation, before redrafting both.

If it were not disconcerting enough that mining legislation appears to tear at itself like an auto-immune disease, we saw the launch of yet another spectacular, if inconspicuous, mining related adjustment to the National Environmental Management: Waste Act (the Waste Act) on 2 June 2014. That tweak will soon render all mine tailings and other mine process related wastes subject to the regulatory regime of the Waste Act. The potential implications are significant. The Waste Act, and its predecessors, regulated all non-mining related wastes. These wastes are subject to regulatory requirements which are significantly more stringent than that applied in respect of mining. During 2013, the requirements of the Waste Act were made even more rigorous by rather shoddily drafted, yet onerous, disposal Norms and Standards. The Norms and Standards require classification of wastes in Type categories, each requiring a particular Class of lined disposal facility. For instance, *Type 1* tailings must be disposed of at a facility with a *Class A* liner design, Type 2 to Class B and so forth. Most of these designs are not in use in the mining industry, predominantly because the costs of such facilities are prohibitive in the mining context. Voices of reason appear to have been ignored and the DEA (and DMR) is now left with but three months to find a solution to an ill-executed plan that took significantly longer to be hatched.

A friend once said, "*rather the certainty of misery, than the misery of uncertainty"*. That reminds me of a scene from one of the *Pirates of the Caribbean* movies where the distressed damsel finds herself at the mercy of a horde of swashbuckling pirates. She attempts to declare "*parlay*", a rule that may see her life spared. As I recall, the captain retorts with two counter arguments, but wraps up "*... and thirdly, the code is more like a guideline than actual rules"*. A rather miserable state of affairs, but worse, it is uncertain. Uncertainty serves neither state, nor private interests, though I am not sure that the penny drops. I recall my astonishment some time ago when a colleague told me how an official of the DMR, refusing to capitulate on a point of law, quipped "*but the law is only a guide*". Like the captain, he understood that if all else fails, it is easiest to disavow the rules. He's wrong of course, but that hardly matters if you do not intend to litigate, which few clients do in a game where relationships often trump being right.

Ironically, those of us serving the mining industry may also be hard pressed to turn, what seems like hard law, into something more akin to a guideline. Lawyers too start to flourish on the uncertainties and absurdities in wording when circumstances so dictate. Or perhaps, we find ourselves once more in a position where the actual implication of the law as it stands is essentially to be ignored by the fiscus itself, because the true implications are too abhorrent to be acknowledged or perhaps, believed. Either way, when our delicate mining and environmental laws are, time and again, amended with the finesse of a lumberjack, we can but do what lawyers in this field do – risk management. Place all the pieces on the chessboard such that when the powers that be decide that the law is in fact just that, and no longer a "guideline", the king remains protected. It is going to be interesting to see how these matters unfold, but sail cautiously because as always, here be dragons.

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