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Mining Charter 2018 and the potential impact on health and safety of the "cannabis judgement"

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September 2018 was an eventful month for the Mining and Natural Resources Sector in South Africa, with the announcement, by President Ramaphosa, of the Stimulus Package aimed at reviving South Africa's ailing economy through various infrastructure and rural economy development programmes, the publication of the long-awaited "Broad-Based Socio Economic Empowerment Charter for the Mining and Minerals Industry, 2018" (Mining Charter 2018) on 27 September 2018, and the judgment of the Constitutional Court of South Africa handed down on 18 September 2018, decriminalising cultivation, possession and use of cannabis in certain circumstances.

Here we comment on Mining Charter 2018, and on the Constitutional Court Judgment decriminalising cultivation, possession, and use of cannabis for private personal purposes.

Mining charter 2018

Investment in the Mining and Natural Resources Sector in South Africa has been plagued by, amongst others, regulatory and policy uncertainty. Previous attempts to implement the third version of the Mining Charter contributed to this policy uncertainty, with regulatory uncertainty being underpinned by various failed attempts to amend the Mineral and Petroleum Resources Development Act, No. 28 of 2002 (**MPRDA**).

The publication of Mining Charter 2018 on 27 September 2018 and the announcement of the withdrawal of the MPRDA Amendment Bill, has gone some way in providing certainty and stability.

The Minister of Mineral Resources, Mr Gwede Mantashe, was at pains to point out that Mining Charter 2018 is a "*consensus*" document, and while there have been significant improvements from the position in previous versions of the Mining Charter, the voices of dissent have already started, from communities that are dissatisfied, through to other stakeholders that have expressed concerns regarding the achievability of some of the provisions of Mining Charter 2018.

This is of course to be expected. It would simply not have been possible to create a document which was 100 percent acceptable to the myriad of stakeholders in the Mining and Natural Resources Sector. In addition, it is clear that there are a number of aspects that will require extensive debate regarding the interpretation and application of some of the provisions of Mining Charter 2018, such as the "*carried interest*" provisions. Perhaps the Implementation Guidelines which are to be published within two months from 27 September 2018 will provide the clarity needed. If, after this, some stakeholders are still dissatisfied, there are various mechanisms available including access to the South African courts. South Africa is widely praised for its progressive judicial system, and hopefully, if there are any remaining concerns, and if these concerns cannot be addressed through dialogue, these concerns can be addressed within the judicial structures.

For now, the focus is on analysing Mining Charter 2018 with a view to implementation and compliance.

The South African Mining and Natural Resources Sector has been widely recognised as a significant contributor and potential further contributor to growth and transformation in South Africa for the benefit of all South Africans. Commentators also seemed to suggest that the Mining and Natural Resources Sector was the reason why South Africa was not regarded as being in a recession, in the second quarter of 2018. The Mining and Natural Resources Sector can continue to play this critical role, if certainty and stability can be achieved.

It is not our intention to address each and every aspect of Mining Charter 2018 – we will do so in subsequent alerts – but rather to address some of those aspects that resulted in robust debate prior to the publication of Mining Charter 2018, namely the ownership and procurement elements.

- **The Ownership Element**
  - "*Once empowered always empowered*"
    - The "*once empowered always empowered*" principle has been the subject of extensive debate, with holders of mining rights that entered into empowerment transactions, historically, contending that these transactions should be recognised indefinitely, even where the empowerment partner has exited. The ownership element of Mining Charter 2018 provides for the recognition of historical transactions. An existing mining right holder i.e. a holder of the mining right granted prior to 27 September 2018, that achieved a minimum of 26 percent Black Economic Empowerment ("**BEE**") shareholding, is recognised as compliant for the duration of the mining right. If a minimum of 26 percent BEE shareholding was achieved and the BEE shareholders / partners exited prior to 27 September 2018, the historical transaction is also recognised, and the holder of the mining right is

regarded as compliant for the duration of the mining right.

    - There are likely to be two concerns for existing mining right holders. Firstly recognition of historical transactions does not apply when the relevant mining right is renewed. This will be of particular concern to holders of mining rights, which are expiring soon. While Section 24(5) of the MPRDA provides that a mining right in respect of which an application for renewal has been lodged, will despite its expiry date, remain in force until such time as the renewal application has been granted or refused (which may extent the period of the recognition of the historical transactions), on renewal, the historical transactions no longer enjoy recognition. In addition, there are likely to be concerns on how the provisions of Section 25(1) of the MPRDA are going to be interpreted. Section 25(1) of the MPRDA provides that the holder of a mining right has the exclusive right to apply for and be granted a renewal of the mining right. While it does not state that the mining right must be renewed on exactly the same terms and conditions, this has certainly become an expectation, which may no longer apply.
    - The second concern is that the recognition of continuing consequences in respect of an existing mining right, is not transferrable, and the historical recognition lapses upon transfer of the mining right or part thereof, which seems to suggest that even if a part of a mining right is transferred, then the historical recognition in respect of the entire right, may lapse.
    - On a positive note, the recognition of continuing consequences include historical transactions concluded at holding company level, mining right level, on units of production, shares or assets including all historical BEE transactions which form the basis upon which the new order mining rights were granted.

- Pending applications
    - Where an application was lodged and accepted prior to 27 September 2018, the application will be processed in terms of Mining Charter 2010, with a requirement of a minimum of 26 percent BEE shareholding. The holder of the mining right must however, within a period of five years from the effective date of the mining right, increase the BEE shareholding to a minimum of 30 percent.

- New mining rights
    - A new mining right must have a minimum of 30 percent BEE shareholding which must include economic interest plus corresponding percentage of voting right per mining right or in the mining company which holds a mining right. The 30 percent BEE shareholding must be distributed as prescribed i.e. (a) a minimum of 5 percent non-transferable carried interest to qualifying employees from the effective date of the mining right, (b) a minimum of 5 percent non-transferrable carried interest or a minimum of 5 percent equity equivalent benefit to host communities from the effective date of a mining right, and (c) a minimum of 20 percent effective ownership in the form of shares to a BEE Entrepreneur, 5 percent of which must preferably be for women.

    - The carried interest has been retained in relation to communities and employees but there has been a change in wording from "*free carried interest*" to a "*carried interest*". This is one of the key aspects that will require careful consideration and interpretation. Importantly, in the case of communities, the shareholding can be held by a trust or similar vehicle.
    - The shareholding to be held by BEE Entrepreneurs may not be diluted below 51 percent ownership and control by BEE Entrepreneurs.
    - BEE shareholding may be concluded at holding company level, mining right level, on units of production, shares or assets. Where the BEE shareholding is concluded at any level other than mining right level, the Flow Through Principle will apply.
- <u>Vesting of BEE shareholding for new rights</u>
    - A minimum of 50 percent BEE shareholding shall vest within two thirds of the duration of the relevant mining right, and the prescribed minimum 30 percent target applies for the duration of the mining right.
- <u>Disposal of BEE shareholding in respect of existing and new mining rights</u>
    - A mining right holder's empowerment credentials are recognised for the duration of the mining right, where a BEE shareholding or part thereof is disposed of below the prescribed minimum shareholding (30 percent) provided that (a) the mining right holder is compliant with the requirements of the Mining Charter 2018 at the time of disposal, (b) the BEE shareholder has held the shares for a minimum period equivalent to a third of the duration of the mining right, and an unencumbered net value must have been realised, (c) the recognition of empowerment credentials only applies to the measured effective ownership which has vested to BEE shareholding, and (d) an agreement detailing exit mechanisms and the BEE shareholders' remaining financial obligations constituting a contract between the mining right holder and the BEE shareholders has been submitted to the Department of Mineral Resources. The recognition of consequences of previous deals cannot be claimed against future mining rights or mining right renewal applications, in these circumstances.
- <u>Beneficiation equity equivalence against the ownership target</u>
    - A mining right holder may claim the equity equivalent up to a maximum of five percentage points of BEE Entrepreneur shareholding i.e. where a mining right holder is carrying out beneficiation as contemplated in the parameters of Mining Charter 2018; a mining right holder may claim a 5 percent equity equivalent in relation to the BEE Entrepreneur shareholding, for beneficiation.
    - Where, before 27 September 2018, a mining right holder claimed the beneficiation offset (up to eleven percentage points), the historical mining right holder, retains the offset for the duration of that mining right.

- **Procurement and Supplier Development**
  - Mining Charter 2018 retains the distinction between mining goods and mining services.
  - In the case of mining goods, a minimum of 70 percent of total mining goods procurement spend (including non-discretionary expenditure) must be on South African manufactured goods. "*South African manufactured goods*" is defined to mean goods with a minimum of 60 percent local content during the assembly or manufacturing of the product in South Africa. The calculation of local content excludes profit mark up, intangible value such as brand value and overheads.
  - The 70 percent of total mining goods procurement spend must be allocated as follows: (a) 21 percent to be spent on South African manufactured goods produced by a Historical Disadvantaged Persons owned and controlled company, (b) 5 percent to be spent on South Africa manufactured goods produced by a woman or youth owned and controlled company, and (c) 44 percent to be spent on South African manufactured goods produced by a BEE compliant company (which is defined to mean a company with a minimum B-BBEE Level 4 status in terms of the Department of Trade and Industries Broad-Based Black Economic Empowerment Codes of Good Practice, and minimum 25 percent plus 1 vote ownership by historically disadvantaged persons).
  - In relation to services, a minimum of 80 percent of the total spend on services (including non-discretionary expenditure) must be sourced from South African based companies. "*South African companies*" are defined to mean companies incorporated and registered in terms of the Companies Act, No. 71 of 2008, with operations in South Africa and subject to South African Laws.
  - The 80 percent total spend on services must be allocated as follows: (a) 50 percent must be spent on services supplied by Historically Disadvantaged Persons owned and controlled companies, (b) 15 percent must be spent on services supplied by women owned and controlled companies, (c) 5 percent must be spent on services supplied by youth, and (d) 10 percent must be spent on services supplied by BEE compliant companies.
  - The procurement targets must be complied with progressively within a period of five years as outlined in the transitional arrangements. Within six months from 27 September 2018, a mining right holder must submit a five year plan indicating progressive implementation of inclusive procurement targets.
  - Compliance with procurement targets within the transitional period must be as follows: (a) Mining Goods – the first year target is set at 10 percent, second year at 20 percent, third year at 35 percent, fourth year at 50 percent, and fifth year at 70 percent, (b) Services – first year target is set at 70 percent and second year at 80 percent.
  - Setoff provisions are however included, for enterprise and supplier development. In the case of mining goods, up to 30 percent of the total procurement budget on mining goods (excluding non-discretionary expenditure) may be offset against supplier development. A mining right holder may develop suppliers through original equipment

manufacturers as prescribed in the Implementation Guidelines. In the case of services, up to 10 percent of the total procurement budget on services (including nondiscretionary expenditure) may be offset against supplier and enterprise development. Various criteria must be met for the offset to be claimed within the parameters of Mining Charter 2018.

  - A mining right holder is required to spend a minimum of 70 percent of its total research and development budget on South African based research and development entities, which can be either public or private.
  - The mining right holder must use South African based facilities or companies for the analysis of 100 percent of all mineral samples across the mining value chain.
  - A mining right holder may not conduct sample analysis using foreign based facilities or companies without the written consent of the Minister.

- **Some Additional Observations – Other Elements of Mining Charter 2018**
  - Element 2.5 recognises mine community development and that mine communities form an integral part of mining development, which requires a balance between mining and mine communities' socio-economic development needs. A mining right holder is required to meaningfully contribute towards mine community development with a bias towards mining communities and in keeping with the principles of the social licence to operate.
  - While several communities championed for consent to be required from the community, before mining commences, Mining Charter 2018 has retained the obligation to consult, and recognises that mining right holders in the same area may collaborate on identified projects to maximise the socio-economic developmental impact.
  - Element 3 sets out a regime for junior miners, and applies to mining rights granted after 27 September 2018.
  - An additional aspect that was hotly debated was the "*trickle dividend*", that holders of mining rights were meant to pay. This aspect has been completely removed from Mining Charter 2018.
  - The previous version of the Charter contained various "*lock in*" provisions for BEE partners. Under Mining Charter 2018, BEE partners are permitted to sell their shares and are not required to re-invest a portion of the proceeds in mining, as required in the previous version.
  - The change to "*carried interest*" will require careful consideration. Previous versions of the Charter referred specifically to "*free carried interest*" and the change to "*carried interest*" is unclear. Mining Charter 2018 provides that the cost of the "*carried interest*" can be recovered from development of the asset, but at the same time, specifies that the "*carried interest*" has to be free of any encumbrance i.e. they may not be debt funded.

- **Conclusion**
    - Stakeholders in the Mining and Natural Resources Sector will no doubt, over the next few weeks, be debating the interpretation and application of Mining Charter 2018, but it is hoped that the publication of Mining Charter 2018 will bring about much needed certainty and investor stability.

Health and safety in the workplace - up in smoke or going to pot?

The judgement of the Constitutional Court in the matter between *Minister of Justice and Constitutional Development et al case CCT 108/17* (**the Cannabis Judgment**), which decriminalised the cultivation, possession and use of cannabis for personal private purposes, understandably, evoked a wide range of responses, from jubilation, to predictions of dire consequences.

In this Alert, we touch on two important aspects, namely how health and safety could be affected, and what it means for employers in relation to their policies and procedures on substances, and the disciplinary code and procedure which applies at a particular workplace.

All stakeholders in the Mining and Natural Resources Sector have acknowledged that the fatal accidents in 2018 are unacceptable, and have recommitted themselves to the target of zero harm. It is not the purpose of this Alert to elaborate on the various reasons that have been suggested for the various incidents and accidents that have occurred at South Africa's mines, but rather to make some observations regarding the responsibilities for health and safety placed on the "*employer*" for the purposes of the Mine Health and Safety Act, No. 29 of 1996 (**MHSA**) i.e. the entity which holds the right to prospect or mine, and employees (this term is extremely widely defined under the MHSA to mean any person who is employed at or working at a mine. For the purpose of the MHSA, employees therefore include contractors, their employees, service providers, etc.), within the context of the Cannabis Judgment.

The MHSA places the primary responsibility for the health and safety of employees on the "*employer*" which, for the purposes of this Alert, we refer to as the mining company. The health and safety responsibilities contained in Sections 2 and 5 of the MHSA are broad-ranging, and the consequences of a failure to comply, can be dire. The consequences potentially include not only injuries and death, but also potential prosecution of the mining company, its directors, officers, managers, supervisors, and the imposition of an administrative fine on the mining company.

Section 22 of the MHSA also places responsibilities for health and safety on the employees themselves. Employees must take reasonable steps to ensure their own health and safety and that of fellow employees.

Within the context of the health and safety responsibilities placed on the employer and employees, substance use or being under the influence of an intoxicating substance is taken extremely seriously. This is understandable, given the inherently dangerous nature of the mining environment, and, for example, the sheer scale and magnitude of machinery and equipment often used on mines.

Mining companies typically therefore implement comprehensive substance use policies, and disciplinary codes and procedures, which may be regarded as draconian, by the non-mining sector, but which is perfectly justifiable, within the mining context.

It seems that cannabis can remain in a person's system for variable amounts of time, depending on how often the person uses cannabis. "*Casual use*" can result in positive tests for short periods (three to five days), but persons who make more frequent use, can produce a positive test for up to a month. It is not only the amount that is used, that can impact on this. The way that cannabis is used apparently changes the way that it is metabolised (for example smoking versus ingesting), and there are a number of views on how long a person is "*under the influence*" of cannabis, after the person has used or ingested the cannabis.

The workplace would certainly not be regarded as "*private*", and there seems to be a common understanding that persons cannot cultivate, be in possession of, or use cannabis in the workplace (although employers will need to review their policies and procedures, and make this absolutely clear). However, there is likely to be extensive debate regarding whether or not a person is "*under the influence*", if the person has used cannabis, outside of the workplace, and then comes to work, and cannabis is detected during random and other testing.

Persons who chair disciplinary enquiries, and, Commissioners at the Commission for Conciliation, Mediation and Arbitration (**CCMA**) and Judges at the Labour Court will have to grapple with this, in the coming months. Employees who are dismissed after testing positive for cannabis, without displaying symptoms of being "*under the influence*" will no doubt challenge their dismissal. However, they are unlikely to successfully challenge a dismissal if they are caught cultivating cannabis or being in possession or using cannabis in the workplace (unless the employer's codes and procedures are extremely poorly drafted).

Persons employed by contractors are, for the purposes of the MHSA, regarded as employees of the client (the mining company), and the responsibilities which are placed on the mining company extend to the employees of contractors. These persons are also required to comply with, amongst others, Section 22 of the MHSA. A distinction must however be made between the employment status of persons who are employed by contracting companies, and who are deployed at the mine and health and safety responsibilities in terms of the MHSA. For

employment purposes, these persons remain the employee of the contracting company, and the contracting company will be the entity which needs to take appropriate disciplinary action against those persons in accordance with the disciplinary codes and procedures that have been implemented by the contracting companies in respect of their own employees. Mining companies will of course insist on that person being removed from the site, but the mining company has no authority, itself, to take disciplinary action against such a person. Mining companies are likely to tighten up the contractual provisions with contracting companies to address, amongst others cultivation, possessions and use of cannabis by the contracting company's employees.

A further distinction must be made in relation to persons who are engaged through the services of a temporary employment service (more commonly referred to as a "*labour broker*"). Again, persons provided to a mining company through the services of a labour broker, are regarded as employees of the mining company, for the purposes of the MHSA. However, for Employment Law purposes, these persons are deemed to be the employee of the labour broker and the labour broker will be responsible for taking appropriate disciplinary action.

While cultivation, possession and use of cannabis for personal private purposes has been decriminalised, there is going to be extensive debate, from all quarters, and stakeholders such as the mining companies, contracting companies and the employees themselves, will need to grapple with the practical interpretation and application of the decriminalisation, including in respect of health and safety in the workplace, substance policies and procedures, and disciplinary codes and procedures.

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