South African mining industry digging itself deeper into a hole

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Without Prejudice

It is estimated that, in the past three years, more than

80 000 jobs have been lost in the mining industry. It is generally accepted that there is a high multiplier effect applicable in the mining industry and that, on average, each person directly employed at a mine, provides income to or sustains at least six to eight other people, if not more.

The announcements by AngloGold Ashanti and Bokoni Platinum that they propose to retrench in excess of a combined 10 000 employees may just be the start of further, significant job losses in the mining industry. The reasons for job losses in the mining industry often lead to extensive debate among the mining industry stakeholders, but there is some common ground, namely fluctuating and unsustainable commodity prices and decreased demand. Some reasons are more controversial, and there are of course, diverse views in relation to these reasons, which include regulatory uncertainty, high costs of labour, community demands, compromised infrastructure (electricity, road, rail and water), and the loss of investor confidence.

The most recent controversy, surrounding the publication of the reviewed Broad Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry (Mining Charter 3) on 15 June, has had a significant, dramatic, negative impact on the mining industry. This was, unfortunately, worsened by the subsequent publication of the Notice of Intention, by Minister Zwane, to stop new prospecting and mining right applications, and applications in terms of section 11 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), which is being described by several commentators as a "sterilisation notice". While Minister Zwane suspended the operation of Mining Charter 3, the "sterilisation notice" created a furore, generally, but more specifically, in relation to the impact on those commercial transactions which require Ministerial Consent in terms of section 11 for implementation and prospecting, which is the lifeblood of future mining operators.

The view is widely held that the "sterilisation notice" by Minister Zwane is unconstitutional, and that he would be acting *ultra vires* in issuing it, despite purporting to do so under the provisions of section 49.

But what does this mean for the mining industry? To the extent that there is a perception that mines can simply "be switched off", downscaled, placed on care and maintenance, or employees retrenched, this is incorrect. One of the most intensely debated aspects in relation to downscaling

operations is the inter-relationship between the provisions of section 52 of the MPRDA and the provisions of sections 189 and 189A of the Labour Relations Act 66 of 1995 (LRA). This is particularly where the holder of the mining right is not the employer as contemplated in those sections - in most instances, because the mining operations have been contracted out to a third party.

Mining companies have often taken a holistic view and considered compliance with the provisions of section 52 of the MPRDA, the contents of the Social and Labour Plan and the provisions of sections 189 and 189A of the LRA together. More recently, mining companies have also had to consider compliance with the Regulations Pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations, 2015.

The inter-relationship, and compliance requirements, in relation to section 52 of the MPRDA, the Social and Labour Plan, and sections 189 and 189A of the LRA was considered and addressed in *National Union of Mineworkers v Anglo American Platinum and Others* (2014) 35 ILJ 1024 (LC) (the *Anglo American Platinum* judgment), and provided guidance on the interpretation and application of the provisions of the MPRDA and the LRA. The Labour Appeal Court (LAC) judgment in the matter between *Association of Mineworkers and Construction Union and Others v Buffalo Coal Dundee Proprietary Limited and Zinoju Coal Proprietary Limited*, Case number JA42/2015 (the Buffalo Coal judgment) distinguishes the *Anglo American Platinum* judgment and essentially finds that the holder of a mining right ultimately remains responsible for the implementation of the process provided for under sections189 and 189A of the LRA, even where the holder of the mining right has contracted out its mining operations to a third party, and the holder of the mining right is not the employer as contemplated in those.

Putting aside for the moment the debate whether or not the requirements of section 52 of the MPRDA are binding and must be complied with (due to the fact that the method of notification is not determined by regulation, as required, under section 52), section 52(1) requires the holder of a mining right to notify the Minister of Mineral Resources in the prescribed manner where prevailing economic conditions cause the profit to revenue ratio of the relevant mine to be less than 6% on average for a continuous period of twelve months or if any mining operation is to be scaled down or to cease with the possible effect that 10% or more of the labour force or more than five-hundred employees, whichever is the lesser, are likely to be retrenched in any twelve month period. Sections 52(2) and 52(3) then specify what must take place, once the Minister of Mineral Resources has been notified. Section 52(4) provides that the holder of a mining right remains responsible for the implementation of the processes pertaining to the management, downscaling and retrenchment, as provided for in the LRA, until the Minister of Mineral Resources has issued a closure certificate (in terms of the MPRDA) to the holder of the mining right.

In relation to every mining right, there must be an approved Social and Labour Plan. MPRDA Regulation 46 sets out the required contents of the Social and Labour Plan, which includes processes pertaining to management, downscaling and retrenchment. These processes must include the downscaling and retrenchment. These processes must include the establishment of a future forum; mechanisms to save jobs and avoid job losses and a decline in employment;

mechanisms to provide alternative solutions and procedures for creating job security where job losses cannot be avoided; and mechanisms to ameliorate the social and economic impact on individuals, regions and economies where retrenchment or closure of the mine is certain.

Sections 189 and 189A of the LRA makes provision for an employer who contemplates dismissing one or more employees for reasons based on the employer's operational requirements, to consult with any registered trade union whose members are likely to be affected by the proposed dismissals. In terms of section 189(3), the employer is required to issue a written notice inviting the other consulting parties to consult with it and disclose in writing all relevant information. In terms of section 189(2), the employer and other consulting parties must, in consultation, engage in a meaningful consensus seeking process.

In the matter under discussion, the holder of the mining right, namely Zinoju Coal Proprietary Limited (Zinoju), had contracted out its mining operations to Buffalo Coal Dundee Proprietary Limited (Buffalo Coal). Due to its financial position, Buffalo Coal gave notice in terms of s189, in its capacity as the employer of the affected employees.

The key question addressed by the LAC was whether Zinoju, in its capacity as the holder of the mining right, was entitled to or required to be part of the consultation process contemplated in section 189. The LAC answered this in the affirmative.

This judgment of the LAC is clear: there is an obligation on a third party contractor to involve the holder of the mining rights in the processes contemplated in section 189, and there is an obligation on the holder of the mining rights to become involved in the retrenchment processes. The holder of the mining right remains responsible for management of the implementation of the retrenchment processes, because of its obligations in terms of section 52 of the MPRDA, read together with MPRDA Regulation 46.

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