Unprecedented consequences of the protracted mining strike

In the last week of June, the South African mining industry ended an unprecedented five-month strike that has had crippling consequences. The compromise achieved between organised labour and their employers demonstrates neither a capitulation nor a spectacular victory by either party. Some say that it will take striking workers years to recoup their loss of income sustained during the strike. It is now up to the employees, their extended families and the employers to undertake the painstaking task of picking out the shrapnel from their wounds.

It is not too difficult to predict that the strike will eventually take its toll on the macro economy. We have already seen the dramatic effect on the micro economy of surrounding settlements and on the economic heart of the North West Province, Rustenburg. The loss of approximately R24bn in revenue by platinum producers over the past five months represents just about 6% of the country's gross domestic product (GDP) and, singlehandedly, could have wiped out this year's annual growth in the economy so desperately needed to meet the growing demands of a better life for all.

Nor is it too difficult to predict that platinum producers will have to rethink their business models if they are to meet the demands of shareholders and returns on investment in a depressed world economy. Dare I say it: we will most likely soon hear the rumblings of intentions to close less profitable shafts with the inevitable depressing consequence of job losses.

However, the mining industry is unlike any other. It is highly regulated and the decision to scale down operations may not be taken only in the interest of profit. In this industry, the Department of Mineral Resources (DMR) takes a keen statutory and regulatory interest in the comings and goings of mining companies.

Section 52 of the Mineral and Petroleum Resources Development Act (28 of 2002) (MPRDA) provides that where a mining right holder intends to downscale its operations by 10%, or to the extent that 500 employees would lose their jobs, the mining company is obliged to inform the board of the DMR before any such decision is taken. Upon such notification, the DMR may appoint a judicial manager to make recommendations as to measures to prevent downscaling and job losses. This reporting obligation stands separate and distinct from the obligation to consult recognised trade unions under the Labour Relations Act (66 of 1995) (LRA) to avoid and minimise job losses.

Over and above this, mining companies are obliged, under the MPRDA, to continue mining their mineral resources under their existing and finite mining rights. Each mining right holder is required to present to the DMR for approval a mine works programme (MWP), which dictates and stipulates the mining pace.

Together with this, mining right holders must also adopt and implement a social and labour plan (SLP) intended to uplift the local mine community by providing education, employment and economic upliftment.

Any mining right awarded by the DMR is subject to its terms and conditions. Both the MWP and the SLP are conditions of the mining right and, as such, their terms must be complied with for the duration of the mining right. Where mining operations are to be scaled down, or temporarily suspended, mining companies are obliged to apply to the DMR for the amendment to these conditions. Failure to do so will not only invoke the wrath of local communities unable to derive a benefit from scaled down or suspended mining operations but will also attract the attention of the DMR. Within this context, mining companies will also be alive to the increased strength and solidarity of the trade unions (as we have come to learn over the past year) who may do everything in their power to prevent job losses, including knocking on the door of the local DMR office for help.

Section 47 of the MPRDA affords the Minister of Mineral Resources the power to revoke a mining right where the holder fails to meet any of its conditions. The obligation to continue mining operations and not to "stockpile" mining reserves is central to the new mineral dispensation of custodianship ushered in by the MPRDA. To employ a rugby metaphor, mining companies must "use-it-or-lose-it".

It remains to be seen what attitude the new Minister of Mineral Resources and his administration will adopt in the aftermath of the strike. Will the Minister adopt a sympathetic stance to mining companies that mothball shafts in an effort to regain profitability or will he insist on maximum extraction, under pain of threat to revoke mining rights and award them to other eager candidates? It is unclear how the custodianship of the nation's minerals will be exercised in such unprecedented circumstances.

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However, smaller mining companies may even consider the provisions of Chapter 6 of the new Companies Act (71 of 2008), which provides for a method of preserving ailing companies. The so-called business rescue provisions of this chapter allow companies that are in financial distress to invoke business rescue proceedings. Financial distress includes where a company will be unable to meet its financial obligations as and when they fall due during the following six months.

Under business rescue, the ailing company is given breathing space to adopt a business rescue plan in an effort to avoid liquidation and to preserve the business. Business rescue practitioners appointed in these circumstances have an obligation to develop and implement a business rescue plan.

Although payment obligations to creditors are suspended during these proceedings, the statutory and regulatory conditions attached to mining rights are not. It is very important that business rescue practitioners properly and timeously engage the local communities and the DMR in the development of business rescue plans; failure to engage the DMR appropriately and to obtain the amendment of mining right conditions timeously, may derail this process.

South Africa, unlike territories in the northern hemisphere, does not generally experience particularly harsh winters. Although the fields may be covered in frost in the early morning hours, the African sun soon thaws the land into mild sunny days. However, for the most part, winter is a dry white season, parched and dusty.

I think the mining industry has entered such a dry white season, one to be endured before we may smell and sense the invigorating aromas and crisp morning air of spring, which it is to be hoped will soon come.