A Reconsideration of the Ambit and Adequacy of Sanctions in the 2015 Financial Provision Regulations

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August 2017

The controversy regarding premature withdrawals of contributions from an environmental rehabilitation trust fund is currently the subject of concern and debate, especially in light of recent media reports indicating that companies have gained access to these funds without first obtaining a closure certificate.

In terms of section 24R of the *National Environmental Management Act* 107 of 1998, the Minister must return a portion of the financial provision to the relevant permit or right holder, crucially after a closure certificate has been issued. Conversely, in terms of latent, residual and other environmental impacts, the Minister may retain a portion of the financial provision. In this latter respect, the financial vehicle used to address these impacts is a trust fund which must be ceded to the Minister upon the issuing of a closure certificate. Accordingly, and in terms of Regulation 7 of the *Regulations pertaining to the financial provisions for prospecting, exploration, mining or production operations*, 2015 (Financial provisioning regulations GN R 1147 of 20 November 2015), the applicant, permit or right holder must ensure that "*at any given time*" there are sufficient amounts available in the financial provision, which amounts should be "*equal to the sum of the actual costs of implementing*" the rehabilitation.

Regulations 18(1) and (2) of the financial provisioning regulations provide that, "*an applicant or holder of a right or permit commits an offence if that person contravenes or fails to comply with regulation 4, 5, 6, 7, 9(1), 10, 11, 12(5), 13 or 16(6)*" or "*…regulation 17(5), 17(11), 17(12), 17(16), 17(17) or 17(19).*" Therefore, in terms of regulation 18, an offence is committed where the financial provision is less than what is required for rehabilitation "*at any given time*". The commission of such an offence carries a fine of up to R10 million or 10 years' imprisonment.

At first glance, the stipulated fine may seem excessive. However, in light of the fact that many rehabilitation trust funds run into hundreds of millions, a R10 million fine may not be appropriate in all cases. It may in some cases, where funds are unlawfully withdrawn, be too low to deter non-compliance with the regulations. To counter the lack of an appropriate sanction, it might be prudent to consider alternative approaches thereto. One such alternative could be that fines be a percentage-based penalty in accordance with the amount withdrawn from the financial provision, contrary to the regulations.

Furthermore, it is noteworthy that, in terms of regulation 8, a guarantee for environmental rehabilitation can only be withdrawn after the financial institution, where such a guarantee is held, has communicated its intention to withdraw to the Minister. However, non-compliance with regulation 8 by a financial institution does not constitute an offence in terms of regulation 18. In this instance, it might be crucial to consider widening the ambit of the offences provided for in the financial provisioning regulations to include "the breach of" regulation 8 as an offence, in order to also attract criminal liability. More accountability is needed in this arena, particularly where funds are unlawfully withdrawn and companies abscond from environmental rehabilitation obligations.