

Evolving Financial Provision Requirements for Mines in South Africa

By Catherine Warburton and Alistair Young

Managing Partner and Senior Associate, Warburton Attorneys

19 December 2016

With the advent of the 2016 financial year, mining companies had more questions than answers as to how the more onerous legal regime imposed on mining companies in respect of financial provision for mine closure and environmental rehabilitation in the Financial Provisioning Regulations under the National Environmental Management Act 107 of 1998 ("**NEMA**"), promulgated on 20 November 2015 in Government Notice R1147, would be implemented. Compliance with the requirements of these Regulations was required by the end of February 2017 at the latest. On 26 October 2016 these Regulations were amended by GN R1314 which essentially repealed regulation 17(5) and inserted the 'Extension of the Transitional Period', seemingly allowing holders of rights to comply with GN R1147 by February 2019.

The definition of a 'holder' in terms of regulation 1 of GN R1147, as amended, is problematic in so far as it provides little guidance and makes reference to a section (section 41) in the Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA**") that was repealed as far back as June 2013. The actual meaning of a "holder" therefore has to be established by determining the context within which it is used in the Regulations, which context has led to the interpretation that a "holder" is an existing holder of a right at the time the regulations came into effect.

It is regrettable that, in so far as existing holders of rights issued in terms of the MPRDA are concerned, or currently operating mines, the 'Transitional Arrangements' in regulation 17 do not provide sufficient clarity on the applicable regime applicable after the effective date of the Regulations and prior to February 2019 for the assessment and submission of financial provision for mine closure and rehabilitation. GN R1147 does not expressly repeal and replace regulations 53 and 54 of the MPRD Regulations although regulation 17(1), (2) and (3) of GN R1147 provides for the applicability of regulations 53 and 54 and GN R1147 in specified circumstances, "despite their repeal". Furthermore, the legislation provides for the following in terms of regulation 17(4) of GN R1147:

*"A financial provision **approved** in terms of the Mineral and Petroleum Resources Development Regulations, 2004 **must be regarded to be the financial provision approved in terms of these Regulations**, on condition that a holder that operates in terms of a*

*financial provision approved in terms of the Mineral and Petroleum Resources Development Act, 2002 at the time of the coming into operation of these Regulations, **must review and align such approved financial provision with the provisions of these Regulations, after the coming into operation of these Regulations, as set out in sub-regulations (5) to (10), and annually thereafter as set out in regulations 9 and 11, read with the necessary changes.*** (Own emphasis).

With the repeal of regulation 17(5) and the failure to amend the above regulation to exclude any reference thereto and make any reference to the newly added "Extension of the Transitional Period" provision, regulation 17(4) now appears to suggest that existing holders must approve and align their current approved financial provision immediately after the coming into effect of the Regulations and annually thereafter. However, contrary to the above provision, the content of the newly added 'Extension of the Transitional Period' provision, suggests that existing holders would be excluded from the requirement to comply with the Regulations until February 2019. Consequently, it is arguable that it is not clear from the Financial Provisioning Regulations whether existing holders are required to, as per regulation 17(4), immediately comply with GN R1147, or whether they must, in terms of the "Extension of the Transitional Period" provision, submit annual returns until February 2019 as per the requirements of the supposedly repealed regulations 53 and 54 of the MPRD Regulations.

There are numerous other uncertainties and concerns which have arisen from the Regulations, which were not addressed in the amendments of October 2016. The uncertainty and complexity of the Financial Provisioning Regulations will accordingly still prevail at the advent of the 2017 financial year.