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SOUTH AFRICAN MINING OUTLOOK FOR 2018: ENVIRONMENTAL AND CLIMATE CHANGE RESILIENCE

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Legal Briefings – By **Matthew Burnell)**

The South African government has committed to reducing greenhouse gas (**GHG**) emissions to meet its nationally-determined contribution commitments in accordance with the Paris Agreement. In order to achieve these objectives, the South African government needs to implement regulatory and other measures that encourage producers and consumers to undertake activities or purchase products that are more environmentally responsible.

One would assume that the transition to a low-carbon economy puts GHG-intense industries such as mining on unsteady ground. While this may be the case for certain kinds of mining (such as coal), the demand for other non-renewable resources has spiked in respect of those resources required in renewable energy generation and storage. These resources include 'aluminium (including its key constituent, bauxite), cobalt, copper, iron ore, lead, lithium nickel, manganese, the platinum group metals, rare earth metals including cadmium, molybdenum, neodymium and imdium – silver, steel, titanium and zinc'.[1] As South Africa is known to have significant reserves of platinum group metals, manganese, titanium and other resources it is well place to contribute to (and benefit from) this increased demand. Whether companies can survive or flourish during this time depends on how efficiently and effectively they can mobilise to take advantage of these resources and (simultaneously) transition to this low carbon economy.

A CHANGING REGULATORY ENVIRONMENT

The South African government is developing measures to curb the effects of climate change including the imposition of carbon taxes and climate change legislation. At the time of writing this article, the most recent iteration of the Carbon Tax Bill[2] has been published for comment. In its current format, the carbon tax seeks to incorporate the negative impact of GHG emissions into the final price of products and services.

To ensure a sustainable transition to a low carbon economy, the tax will be imposed incrementally with various allowances so as to ensure that South Africa's competitiveness is not compromised during this transition.

The tax rate is R120 per ton of carbon dioxide equivalent. However, the tax free allowances contemplated in the Bill can (in certain circumstances) reduce the tax rate to between R6 and R48 per ton of carbon dioxide.[3] These allowances include a basic tax-free allowance of 60%; additional tax free allowances for process and fugitive emissions of up to 10% each; a variable tax-free allowance for trade-exposed sectors; a 5% tax free allowance for those entities that out-perform other companies within the sector; a 5% tax free allowance for companies with a carbon budget (or who participate in building the information database for the carbon budgeting) and a carbon offset allowance of between 5 and 10%.

The manner in which some of these allowances will be calculated remains to be seen. For example, the GHG emission industry and sector benchmarks to assess a companies' performance within its industry or sectors will only be determined by regulation.[4] Similarly, the carbon offset regulation also still need to be published. The Bill is only expected to be tabled in Parliament in mid-2018 but it is anticipated that carbon taxes will be payable from 1 January 2019.[5]

In addition, draft legislation governing the management of climate change impacts is anticipated during 2018. The nature and extent of any additional obligations (over and above the development of GHG pollution prevention plans and reporting required in terms of the National Environmental Management: Air Quality Act 39 of 2004) are presently unknown but based on the Paris Agreement, it is anticipated that companies will be required to implement measures to reduce GHG emissions and develop adaptation plans aimed at assisting entities in developing resilience to the effects of climate change.

CLIMATE CHANGE RELATED RISKS

Much of the existing narrative around climate change is concerned with reducing greenhouse gas emissions in an attempt to curb the effects of climate change. The reality, however, is that the effects of climate change are already being felt – the recent droughts and extreme weather events experienced across the country (and globally) have made the old adage of 'adapt or die' more relevant today than ever before.

The World Economic Forum's Global Risk Report for 2018 identifies water scarcity and the failure to adapt to climate change as two of the highest risks to the global economy. Extreme weather events such as droughts and severe storms may:

- Impact on the availability of resources or raw materials such as foods, cotton, paper or rubber;
- Result in damage to key infrastructure such as roads, rail, ports, pipelines, communication networks, roads or electricity supply which may affect the supply of key resources, manufacturing processes or transporting products to customers or for export;
- Have significant impacts on the health and safety of employees and communities. For example, miners in mines during flooding events or communities living in close proximity to a slimes dams that ruptures or damage to water supply my result in unsanitary conditions and impacts on human health.

These impacts will also have an exponential effect as the failure to or delay in providing a resource due to its availability or due to infrastructure damage may have a knock-on effect for a number of businesses.

Businesses must anticipate these impacts and implement adaptation measures to minimize the risks of climate change and to remain competitive. Two key factors that businesses must consider are knowing and understanding:

- their weaknesses and how weather events, resource supply or damaged infrastructure will impact production or operations; and
- how climate change may affect other stakeholders in the supply chain and thus their business. That is, how extreme weather events may affect resource supply, the labour force or the supply of the product to customers. This requires that businesses engage and collaborate with out stakeholders in the value chain.

With this information in mind, business can allocate better allocate resources towards minimizing climate change impacts that are within their individual control as well as collaborating with suppliers, customers and competitors around investment planning to minimize existing and future climate change risks.

BARRIERS TO ADAPTATION

The National Business Initiative published: *A New Climate of Risk: How South African Businesses are Adapting to Climate Change*[6] indicated that one of the key barriers to implementing adaption measures is a lack of 'buy-in' by senior management as climate change is viewed as an environmental risk rather than a risk to the survival and longevity of the business itself.

If the potential impacts on the operational-side of the business are not enough to spark senior management into implementing adaption measures, then perhaps their potential liability in terms of the National Environmental Management Act (NEMA) may trigger a response.

Section 28 of the NEMA places a duty of care on 'every person' to take reasonable measures to prevent pollution from occurring, continuing or recurring. If they fail to do so, they may personally be held for the costs incurred in remedying the effects of any resultant pollution. Given the recent effects of extreme weather events experienced in South Africa, it would be considered reasonable for senior management to audit their operations, identify any potential pollution risks that may arise from a failure of infrastructure and to take appropriate measures to strengthen infrastructure against these events. In light of the above, the expression should perhaps be "adapt or die and / or pay the consequences".

Another barrier to implementing reasonable adaptation measures is establishing a business case for investing money in future potential risks. Understandably, businesses may be reluctant to fund activities that will not result in a return on the investment, particularly since these costs may be significant. It is anticipated, however, that if businesses are unable to fund new projects or expansions of projects off of their balance sheet, they will need to ensure that they have adopted an adaption plan as lenders will want comfort that the borrower will be able to service its debt notwithstanding climate change impacts.

Furthermore, in light of the recent High Court application challenging the environmental authorisation awarded to the Thabametsi coal-fired power station, any new projects or expansion projects which do not take into consideration the impacts that the activity will have on climate change and / or the effects that the activity may have as a result of climate change are likely to be rejected by the authorities or challenged in court.

CONCLUSION

Climate change regulation in South Africa is expected to be significantly revised in 2018 to nudge business and consumers into a low carbon economy and to encourage them to incorporate climate change into their decision-making processes. The reduction of greenhouse gas emissions, however, is only half of the story. The effects of climate change are already having a negative effect on the economy and if businesses are to survive, they need to take reasonable measures to ensure that the effects of climate change and extreme weather events on the business are minimal from an operational as well as an environmental perspective.

ENDNOTES

1. World Bank Group 'The Growing Role of Minerals and Metals for a Low Carbon Future' June 2017 at xii.
2. Draft Carbon Tax Bill.
3. Explanatory Memorandum for the Carbon Tax Bill, 2017.
4. Ibid.
5. 2018 Budget Speech.
6. A New Climate of Risk: How South African Businesses are Adapting to Climate Change Report.

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