

COVID-19: South Africa | The Big Section 54

01 April 2020

As the nation comes to grips with the unprecedented nationwide lockdown of 21 days (and perhaps even longer if needed), businesses are making such adjustments as they can to preserve their commercial viability. Those (lucky ones) that can continue operations from home, have been able to mitigate the adverse economic impact and those who are performing essential services operate under strict guidelines as per the regulations.

The mining and related beneficiation industry is one that cannot send its workforce home with laptops and an internet connection and continue with "business as usual". Mines are labour-intensive operations subject to many vagaries, such as the volatility of commodity prices and the exchange rate of the Rand, which both impact drastically on their profitability. One way in which mines try to dilute their heavy overhead costs is by increased productivity through continuous operations. A lockdown of three or more weeks can be catastrophic for mines and their workers.

On 25 March 2020, the Government issued the lockdown regulations that will remain in force and effect, initially until 16 April 2020. The regulations were drafted urgently (as the circumstances demanded) and anyone who needs to interpret them must heed the Supreme Court of Appeal's judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality* that calls for an interpretation thereof that regards the ordinary meaning of the words, the context, the document as a whole and the circumstances in which it was prepared, to avoid an insensible and unbusinesslike interpretation that undermines the purpose of the regulations.

The regulations were implemented to lessen the infection rate of the coronavirus (COVID-19) so that our healthcare system can cope with the inevitable increased demand for treatment. As much as we hope and trust that the nation will be spared the apocalyptic impact other nations have suffered, we would be playing with fire if we, as individuals as well as a nation, were to disregard or circumvent the regulations. To this end, the regulations provide that every person is confined to their place of residence and to achieve this, all businesses (save for those performing essential services and those which can operate remotely from their residence) are to cease operations.

What about the mines? Well, they too are to shut down, save where their operations are expressly permitted, such as gold and gold refinery and coal (as an essential service). Coal as a fuel is declared an essential good and the electricity supply is an essential service. In our view, only coal mines that supply coal to Eskom may continue to operate, but they are to scale down

their operations in accordance with the reduced demand for electricity, as remarked by the Minister of Mineral Resources and Energy on 25 March 2020. The Minister, however, appreciated that mines and smelting operations in certain circumstances cannot shut down completely and he said that the department would adopt a risk-based approach.

In the urgent cut and thrust of issuing of the regulations, many public statements and comments may cause confusion as to the terms and extent of the regulations. A word to the wise is to read and interpret the regulations and not to latch on to comments by officials. We have already had instances where comments made by various officials appear to contradict each other, and even the regulations themselves. At most, such comments are helpful to interpret the context and intent behind the regulations, but ultimately the promulgated regulations prevail. Mines are not *per se* essential services and the minerals they mine are not necessarily essential goods during the national state of disaster. A careful, sober and reasonable interpretation of the regulations will demonstrate whether mines can continue to operate. The respite is that critical maintenance services that cannot be delayed for more than 21 days and which are essential for the resumption of normal operations after the lockdown may be undertaken as it mitigates the impact.

Over and above this, mines are also subject to the strict provisions of the Mine Health and Safety Act (MHSA) which continue to apply during the lockdown. This requires them to ensure that all employees work in an environment that is safe and not detrimental to their health. The coronavirus outbreak is precisely such a threat to the health and safety of mine employees. In terms of section 54 of the MHSA, Inspectors of Mines have the right to stop mining operations if any occurrence, practice or condition poses a danger to the health and safety of anyone at the mine. It seems that the regulations are the metaphoric "big Section 54 instruction" to all mines that are not essential, to shut down in the interest of the safety of their employees (and by extension, the safety of the nation).

Although many of the major mining companies have taken the appropriate action to halt operations or to scale down where permitted, some may not have. On 31 March 2020, the Department of Trade and Industry issued a media release indicating that businesses which are not eligible to continue operations, but nonetheless obtained an essential service certificate, shall have their certificates cancelled and will be handed over to the South African Police Services for investigation and potential prosecution. To the extent that mines think that they are immune to the nationwide lockdown, they do so not only at the risk of prosecution, but also at the risk of their employees. And this risk may also render mines and mine managers liable to fines and prosecution under the MHSA.

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