



Ursula Brown

Our Legal Department provides legal advisory services required by the Chamber in support of executing our role in lobbying government and stakeholders for an acceptable and predictable policy and regulatory environment.

These services include but are not limited to drafting and making submissions, both written and oral, on behalf of the Chamber. The Legal Department also provides in-house legal service to the Chamber and where necessary and required, seeks specialist external legal advice from external law firms and/or legal counsel.

### ONCE EMPOWERED PRINCIPLE

We sought clarity through our 2015 High Court application for a declaratory order on the 'once empowered always empowered' principle, applicable to the assessment of the ownership element of the Mining Charter, in respect of the continuing consequences of previous black economic empowerment deals carried out by the industry between 2004 and 2014. The application for a declaratory order was finally heard on 9 and 10 November 2017 before a full bench of the High Court. Judgement was granted on 4 April 2018 in favour of the Chamber endorsing the principle of once empowered, always empowered, which technically

means that mining companies would not be compelled to permanently 'top up' the black shareholding of mines if existing black shareholders for any reason exit or sell out. The Department of Mineral Resources has however submitted an application for leave to appeal the 4 April 2018 judgement. The matter is ongoing.

### MPRDA AMENDMENT BILL

The National Assembly passed the MPRDA Amendment Bill in May 2014 and submitted it to the President for assenting. In January 2015, the President referred the Bill back to Parliament for reconsideration, citing the Bill would not pass constitutional muster in that, amongst others, it elevated the Mining Charter to the status of legislation, by-passing Parliament as the legislature in the process. Section 26 of the Bill was probably also unconstitutional in that it was inconsistent with South Africa's obligations under the General Agreement on Tariffs and Trade (GATT) and the Trade, Development and Cooperation Agreement (TDCA). The section constituted a quantitative restriction on exports and this rendered the state vulnerable to challenges in international fora.

The State Law Advisors and the Parliamentary Legal Advisors have consistently disagreed with the President's Legal Advisors and maintained that the substantive issues were constitutional. The Chamber has always held the view that the two substantive issues were unconstitutional.

The Provincial Legislatures held public hearings on the Bill between December 2016 and March 2017. Parliament's National Council of Provinces' (NCOP's) Select Committee on Land and Mineral Resources also conducted its own public hearing in June 2017 and the Chamber made written submissions and representations before some of the Legislatures and the Select Committee. Numerous additional amendments were introduced by the DMR following the public participation processes. The Chamber is of the view that the introduction of these additional amendments exposes the Bill to further legal challenges as it is understood that the National Assembly in reconsidering the Bill should, in terms of the Joint Rules of Parliament, only confine itself to the reservations raised by the President and has no authority to introduce new amendments.

The NCOP is currently deliberating on the negotiating mandates from the Provincial Legislatures. It is anticipated that the NCOP's Select Committee will conclude its processes by the end of May 2018, after they have considered and adopted the final list of amendments on the Bill.

## LEGISLATION continued

**TAXATION**

We made a submission to the Davis Tax Commission (DTC) on the First Interim Report on the Proposed Carbon Tax for South Africa in January 2016, highlighting our concern about the negative impact of a carbon tax on the mining industry, given the deteriorating economic circumstances in South Africa and the fact that South Africa is reliant on coal as its primary energy source. The National Treasury published the second draft of the Carbon Tax Bill for public comment on 14 December 2017. We are currently considering the Bill and its implications for the mining industry.

On 13 November 2017 the DTC released a number of final reports, including but not limited to the following, to the National Treasury:

- **Report on Base Erosion and Profit Sharing (BEPS):** The DTC provided recommendations on how South Africa could incorporate the fifteen OECD's BEPS minimum standards and best practice into its international tax framework. In summary, the DTC recommended South Africa consider a balanced approach in the adoption of the 15 Actions in its international tax policy, citing that South Africa is an emerging economy that attracts large amounts of foreign direct investment (FDI), therefore, it must consider its legislative capacity, socio-geopolitical issues and its trade treaties. The implementation of the guidelines will assist in the best location of economic activities for tax purposes and in addition, enhance transparency and improve information access to tax authorities.
- **Report on Hard-Rock Mining:** The report mainly covers income tax and mineral royalty charges imposed in terms of the Mineral and Petroleum Resources Royalty Act.
- **Report on Tax Administration:** This report deals with specific issues relating to the administration of tax in South Africa and its implications for the structure, operation and practice of the South African Revenue Services (SARS). The report recognised the need to examine all relevant information affecting the running of SARS and recommends that a separate inquiry be considered to examine the relationship between the various legislative tax instruments.
- On 18 March 2018, the DTC published the following four additional final reports in conclusion of its work based on its Terms of Reference: VAT report (replaces the first VAT report), Corporate Income Tax (CIT) report, Public Benefit Organisations (PBOs) report and the Wealth Tax report.

There is likely to be legislative reforms to comply with the various recommendations of the DTC to the National Treasury.

**SOCIAL SECURITY**

The Taxation Laws Amendment Act, which was scheduled to become effective on 1 March 2016 has been delayed until 1 March 2018 due to the labour unions' rebuttal of the proposed amendment relating to provident fund annuitisation. The implementation of annuitisation of retirement benefits in provident funds is the subject of ongoing discussions.

The DTC requested our comments on the proposed funding models for the National Health Insurance (NHI) contained in the White Paper issued on 11 December 2015. We submitted detailed comments and recommended that a comprehensive discussion on all social security reforms needs to take place before legislation in respect of such matters is finalised. The ad hoc proposals to increase taxes or levies in a low growth scenario and where the mining industry is in dire economic straits is, in our view, inappropriate. The recent DTC Report on NHI also observed that there is currently substantial uncertainty about both the costs and funding shortfall of the NHI given the level of detail on institutional reforms and the lack of specifics on health financing system reforms. Detailed implementation plans and financing plans still need to be developed.

The Comprehensive Social Security Policy Paper was issued for comment in November 2016. We are currently participating in the ongoing NEDLAC meetings on this matter.

**TRUSTEES APPOINTED TO INDUSTRY RETIREMENT FUNDS**

In terms of the rules of the industry funds dealt with here, provision is made for the appointment of employer trustees, mainly because employers are co-contributors to these funds on behalf of their employees.

**Sentinel Retirement Fund (Sentinel):** The Sentinel Fund is one of the largest self-administered, defined-contribution, umbrella funds in South Africa, and actively manages assets of approximately R82 billion (as at 30 June 2017). The Fund has 40,640 active and deferred members and monthly pensions are paid to 34,420 former members and beneficiaries. We appoint seven employer representatives to act as trustees of this Fund.

**Mineworkers Provident Fund (MPF):** The MPF is one of South Africa's largest self-administered provident funds with assets exceeding R28 billion. As at 31 December 2016, the portion of unclaimed benefits stood at 76,512. The MPF has also established an office in Maputo to assist potential claimants with their claims. The MPF has amended its rules which are currently awaiting approval by the Financial Services Board. The number of employer trustees will be reduced from nine to five, taking into account the number of members employed by each employer. The MPF was the recipient of a number of Best Practice Awards in 2017.



## CASE STUDY

### THE REVIEWED MINING CHARTER 2017

A prominent feature of the Legal Department's work during the year under review related to the submission of its application for the judicial review and setting aside of the Reviewed Broad Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry, 2017 (Reviewed Mining Charter), published by the Minister of Mineral Resources on 15 June 2017. We are fully supportive of and committed to meaningful transformation in the mining industry and this is not the basis on which the Review Application is premised. The Chamber believes that, as the primary instrument for driving transformation in the mining sector, the Reviewed Mining Charter should be designed and agreed upon by all affected stakeholders with an outcome that all stakeholders support and which they can defend. The DMR failed in this regard. It has not shown a commitment to engage genuinely. In its current form, the Reviewed Mining Charter will jeopardise the viability of the industry that is already under significant economic pressure. The key features of our Review Application focus on the review of the substantive issues of the Reviewed Mining Charter which include, but are not limited to the issue of regulatory overreach.

We also submitted an urgent interdict application to prevent the implementation of the Reviewed Mining Charter, pending the outcome of a decision on the judicial Review Application. The urgent interdict application was never adjudicated as the Chamber reached an agreement with the Minister in terms of which the Minister undertook in writing not to implement the Reviewed Mining Charter until judgment had been handed down in respect of the Chamber's judicial Review Application. This undertaking, which we accepted, rendered the granting of an interdict by the court unnecessary at that stage.

The parties initially agreed that the application for the judicial review of the Reviewed Mining Charter be heard on 13 and 14 December 2017 before a full bench of High Court Judges and that was the position until 24 November 2017.

On 14 November 2017, the Centre for Applied Legal Studies (CALs) and Lawyers for Human Rights (LHR) on behalf of three mining community organisations – Mining Affected Communities United in Action, Women Affected by Mining United in Action, and the Mining and Environmental Justice Network of SA – successfully instituted an urgent application seeking leave to intervene as co-applicants in our application for a review of the Reviewed Mining Charter. Our decision to oppose the intervention applications was premised on the fact that the co-applicants' grounds for review were materially different from those of the Chamber, and that the allotted two days which were initially set aside for the hearing would be inadequate to complete the arguments on a wide range of highly complex issues. The Court granted judgement in favour of the co-applicants. In addition to the admission of NUM and Solidarity as friends of the Court, there were then nine parties whose arguments would be heard before the court.

On 24 November 2017, the hearing of the Chamber's application for the review of the Reviewed Mining Charter was consequently postponed to 19 to 21 February 2018 as the judges were not comfortable that the initial two days which were set down for the hearing would be adequate to accommodate the arguments of all 11 parties involved in the matter.

Following the State of the Nation Address on 16 February, and subsequent engagement with the Presidency, the Chamber, on behalf of our members, agreed, jointly with the DMR to postpone our court application in respect of the Reviewed Mining Charter, that was due to be heard in the High Court on 19 to 21 February.

The order was handed down by presiding judges on 19 February in the High Court regarding the postponement of the application for the review of the Minister's Reviewed Mining Charter 2017. In terms of the order, the application has been postponed sine die. In addition, the court recorded that applicants two to eight as recognised by the Minister of Mineral Resources are interested and relevant stakeholders.