

## 2016 AREAS OF FOCUS continued



### Legislation

The Chamber of Mines' Legal Department is tasked with providing and co-ordinating the legal advisory services required by the Chamber in order to act in the best interests of its members. These services may include drafting and making submissions, both written and oral, on behalf of the Chamber. In certain cases, legal content takes up the major part of the submission, while in others it is a necessary, but not predominant part. The Legal Department also offers an in-house legal service to the Chamber. The Chamber seeks expert legal advice as and when required from law firms and/or legal counsel.

#### **MINING CHARTER**

The Chamber sought clarity through its 2015 High Court application for a declaratory order on the interpretation of BEE ownership transactions carried out by the industry between 2004 and 2014. However, on the hearing dates in March 2016, attorneys Malan Scholes asked the Court to be joined in the Chamber's application. The Court heard Malan Scholes' application and on 3 May 2016 handed down a judgment dismissing this application. Malan Scholes thereafter applied for a separate application for a declaratory order on the ownership element of the Charter to be set down for hearing. In the interim, the Chamber and the DMR agreed that the Chamber's application for a declaratory order would be held in abeyance while the parties endeavoured to reach agreement on the matter.

The parties engaged on a number of occasions during 2016 but by the end of December had not managed to reach a mutually satisfactory outcome.

#### **MPRDA AMENDMENT BILL**

The President refused to sign the MPRDA Amendment Bill into law upon receiving legal advice that the definition of "this Act" in section 1 of the Bill was probably unconstitutional, in that it elevated the Mining Charter (and some other documents) 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.

In February 2015, the Parliamentary Law Adviser advised the Parliamentary Portfolio Committee on Mineral Resources that, in her view, these provisions were not unconstitutional. In late 2016, the MPRDA Amendment Bill was referred to Parliament's National Council of Provinces (NCOP) for public hearings.

The Chamber was instructed by its Council in November 2016 to ask the two Senior Counsel who gave legal opinions in 2015 on the two constitutional issues mentioned above to update their legal opinions. Depending on the updated legal opinions, the Chamber will decide whether or not to participate in the NCOP public hearings.



**Dr Elize Strydom**

Senior Executive: Employment Relations  
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## TAXATION

The Chamber made a submission to the DTC on the First Interim Report on the Proposed Carbon Tax for South Africa in January 2016, highlighting its 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 Chamber also participated in a workshop on Mineral Royalties, hosted by the DTC on 13 May 2016. It dealt with the technical aspects and interpretational issues of mineral royalty payments in respect of diamonds, iron ore, coal and platinum. The Chamber regarded the Draft Tax Administration Laws Amendment Bill, 2016, published by Treasury on 8 July 2016, dealing with proposed amendments relating to the payment of mineral and petroleum royalties under the Mineral and Petroleum Resources Royalty (Administration) Act, 2000, as inappropriate because they pre-empted the report of the DTC. This proposed amendment did not provide legislative clarity which is precisely what the DTC was tasked with.

## 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 the Chamber's comments on the proposed funding models for the NHI contained in the White Paper issued on 11 December 2015. The Chamber 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 the Chamber's view, inappropriate.

The Comprehensive Social Security Policy Paper was issued for comment in November 2016. The Chamber will participate in the NEDLAC meetings on this matter which are scheduled to commence in March 2017.

## TRUSTEES APPOINTED TO INDUSTRY RETIREMENT FUNDS

In terms of the rules of the industry funds dealt with below, 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 Retirement Fund is one of the largest self-administered, defined-contribution, umbrella funds in South Africa, actively managing assets of approximately R85 billion (as at 30 June 2016). The Fund has 41,113 active and deferred members and monthly pensions are paid to 34,644 former members and beneficiaries. In 2016, the Fund celebrated its 70th anniversary and was awarded The European Pension Fund of the Year – Africa. The Chamber appoints seven employer representatives to act as trustees of the Fund.
- **Mineworkers Provident Fund (MPF):** The MPF is one of South Africa's largest self-administered provident funds with assets exceeding R28 billion. It is disappointing that the proportion of unclaimed benefits has increased and, as at December 2016, stood at 70,147. A large number of these are more than 16 years old. The MPF plans to embark on

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an aggressive tracing strategy involving roadshows in 2017, both within and outside South Africa. 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.

- **Mines 1970 Unclaimed Benefits Preservation Pension and Provident Funds:** These are unclaimed benefit funds with assets in the region of R700 million. Over the past two years, the funds improved their combined tracing rate to identify 62% of the total number of missing beneficiaries. More than R60 million in previously unclaimed benefits has been paid to beneficiaries over the same period.

Much of the success in improving payments comes from expanded tracing initiatives, including semi-physical tracing where tracing agents make in-person visits to the homes of beneficiaries to help them complete application forms and obtain other supporting documentation. This process has helped speed up the return of claim forms and the subsequent processing and payment of claims. The funds continue to collaborate with other funds including the MPF, Sentinel and Amplats in order to identify additional potential claimants.



In FY2016 Northam's Zondereinde Platinum mine had over 6,000 full-time employees

## CASE STUDY

### DECLARATORY ORDER ON THE PRINCIPLE OF "ONCE EMPOWERED, ALWAYS EMPOWERED"

A prominent feature of the Chamber's Legal Department's work during the year under review has been the application to the North Gauteng High Court for a declaratory order on the interpretation of the BEE ownership provisions of the Mining Charter – the "once empowered, always empowered" question.

The issue revolves around whether a company remains compliant once a previous BEE shareholder has sold its shares or interests in the company and where BEE ownership thus falls below the 26% target set by the Charter. The industry holds that it does, otherwise it would either be necessary to repeatedly carry out transactions (which would have severe impacts on the value of other shareholders' holdings) or to structure transactions so that BEE shareholders may not sell their interests other than to other BEE entities. This latter approach would, we contend, put BEE shareholders at a severe disadvantage.

The decision that we should lodge the application was initially taken by agreement with then Mineral Resources Minister Ngoako Ramatlhodi. This was done in March 2015. However, government later apparently became uncomfortable with having agreed to hand adjudication on this matter over to the courts and withdrew its support for our application.

The application remains in place. However, the Chamber has not yet made progress on the matter as it has held back on applying for a court date pending discussions on the matter with the DMR. Some discussions have taken place, but consensus has not yet been reached. The Chamber will continue these negotiations and will take further court action only if the DMR seeks to implement the ownership provisions on a basis unsatisfactory to the industry.

