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Memorandum

To : Mr Dylan Slater, *Engineering News & Mining Weekly*

From : Dr. Ernst Basson & Ms Peggy Schoeman

Re : Salient developments in environmental law

Date : 22 April 2014

Ref : GM/13895-0001/550519V2/SCHOEPE/11042014

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1 Introduction

1.1 There are a plethora of environmental related challenges to miners and industrialists such as reducing water and energy use and finding of alternative sources, waste disposal and reduction, improvement of atmospheric impacts and reduction of carbon footprints, remediation of legacy soil and water pollution (e.g. contaminated land and groundwater, acid mine drainage), mine closure and rehabilitation obligations, stricter environmental regulation and cumbersome authorising processes. Recent legislative and administrative developments strive to address some of these challenges.

1.2 Notably are the recent changes to the Minerals and Petroleum Resources Development Act No. 28 of 2002 ("**MPRDA**") and the National Environmental Management Act No. 107 of 1998 ("**NEMA**"). Both amendments, namely the Minerals and Petroleum Resources Development Amendment Bill No. 15 of 2013 ("**MPRDA Bill**") and the National Environmental Management Laws Third Amendment Bill No. 26 of 2013 ("**NEML Bill**") were passed by Parliament in March this year and require only the President's signature before becoming law.

1.3 The MPRDA and NEML Bills ("**Amendment Bills**") endeavour to unify the current disjointed system which involves separate environmental applications to different government departments. These are the Department of Mineral Resources ("**DMR**"), for a mining right/prospecting licence and environmental approval, the Department of Environmental Affairs ("**DEA**") or the relevant provincial environmental department for an environmental authorisation ("**EA**") and waste management license ("**WML"**), where relevant, as well as the Department of Water Affairs ("**DWA**") for a water use licence ("**WUL**"). The result of this tiered process has often been long and expensive waiting times, miscommunication between departments and a generally disorientating process. The dysfunction of the Water Tribunal which adjudicates appeals against unrealistic conditions in WULs, and the delay with the enactment of the contaminated land legislation (see discussion below) have further exacerbated this legal uncertainty.

2 Mining law changes

2.1 The Amendment Bills intend to create a streamlined mining and environmental process. Prior to the Amendment Bills, there was much uncertainty created by previous amendments to both NEMA and the MPRDA (some which were clearly contradictory) but this is no longer a concern of clarity as the Amendment Bills provide for a co-ordinated approach going forward.

2.2 The Amendment Bills provide that mining EAs are to be dealt with under NEMA and further that the DMR will be the competent authority to implement mine environmental management (including the issuing of EAs) whereas the DEA will be the competent appeal authority and responsible for setting the regulatory framework and norms and standards. The DMR will also employ environmental mineral resource inspectors ("**EMRI**") who will police environmental compliance of mines along with the Green Scorpions (environmental management inspectors (EMIs)). These changes to environmental decision-making will also ensure greater integration with the regulation of water use at mines by the DWA in terms of the National Water Act No. 36 of 1998 ("**NWA**").

2.3 The intention of the Amendment Bills is to create a one-stop decision-making mechanism at the DMR for mining and prospecting applications. In this regard, the President remarked in his State of the Nation on 13 February 2014 that the streamlining of mining licensing approvals, EAs and WULs under one DMR roof will facilitate doing business in South Africa, namely under this new system, it should only take 300 days to obtain the necessary mining and environmental approvals in order to commence operations. The Amendment Bills do not refer to a statutory time frame of 300 days, but advise that this will be addressed in regulations, still to be promulgated. It is however, worrying that some of the prescribed timeframes in the MPRDA have been deleted from the Act and will only be prescribed by subordinate legislation which can be changed by government departments instead of being protected by Parliament. Also, given their present capacity constraints, it is near impossible for competent authorities such as the DEA, provincial departments, DWA and DMR to all comply with this time frame. In this regard the NEML Bill provides that the Ministers of the DMR, DEA and DWA will implement measures to secure a co-ordinated and streamlined approach.

2.4 A further aspect which deserves mention is the Regional Mining Development and Environmental Committee ("**RMDEC**"). The MPRDA provides that where there is an objection against the granting of a prospecting licence/mining right, the Regional Manager (an official designated by the Director-General of the DMR) must refer this to the RMDEC to consider the objections and to advise the Minister of Mineral Resources. Although the MPRDA Bill provides important aspects for the RMDEC to function properly, some gaps occur namely that while the Regional Manager must refer an objection to RMDEC, the Regional Manager has a discretion as to whether or not there should be consultation with interested and affected parties. The wide discretionary powers by a line function official can be criticised as it may lead to the exclusion of interested and affected parties and prevent a proper consultative process with civil society groups, environmental watchdog organisations and affected communities. In any event though, the Regional Manager's discretion is bound by section 33(1) of the Constitution read with the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which guarantees the right that government officials must follow a fair decision-making procedure and the courts have consistently emphasised the importance of ensuring proper public consultation by government officials which affect them.

3 Environmental Remediation Liability

3.1 A further issue which arises is the issue of a near open-ended environmental remediation liability in respect of both water and soil contamination. This has its roots in three sources – the MPRDA Bill, a recent court decision regarding the NWA and certain provisions in the the National Environmental Management: Waste Act No. 59 of 2008 ("**NEMWA**"). The MPRDA currently provides that the holder of a prospecting licence or a mining right remains liable for environmental damage until the Minister of Mineral Resources has issued a closure certificate. The Amendment Bills however provide that the holder remains liable notwithstanding the issuing of a closure certificate. This introduces the possibility of an open-ended legal liability for mining impacts and effectively undermines the purpose of closure certificates. This is important because of the restatement of the joint and several liability of directors of companies for the negative environmental impacts, damages, degradation or pollution caused by its operations.

3.2 The broad liability of companies to address water pollution was confirmed by a decision in 2013 by the Supreme Court of Appeal in the case of *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs* ("**Harmony**"). This case was confirmed by the Constitutional Court in 2014. The case involved a directive issued by the DWA in 2005 in terms of the NWA to Harmony and other mining companies to treat contaminated water in the Klerksdorp, Orkney, Stilfontein and Hartbeesfontein area in the North-West Province. Harmony challenged the directive on the basis that some of its operations, to which this directive applied, had been sold to Pamodzi Gold Orkney in 2009, and therefore it should not be required to take such remediation measures as it no longer owns, controls or occupies the mine. The court held that the mining company remained liable despite the sale of the land. This decision is significant as it extends environmental liability of a mining company beyond the use or ownership of the mining area in question.

3.3 The so-called Contaminated Land Provisions in NEMWA take the matter even further. These Provisions retrospectively provide for onerous remediation obligations on land owners and/or users where land is contaminated. The retrospective nature of the Provisions means that current owners and/or users may be held liable for remediation purposes for previous owners and/or users' pollution, and mirrors the findings in the *Harmony* case. There are a number of further mechanisms provided in the Provisions including the compilation of specialist reports, an obligation to notify a prospective purchaser as well as the authorities of land contamination, the possibility that title deeds may be endorsed accordingly, and the introduction of a national contaminated land register.

3.4 The Contaminated Land Provisions have not yet commenced, and are suspended in NEMWA, which already came into force in July 2009. Regulations for Site Assessments and Reports and the Draft Norms and Standards for the Remediation of Contaminated Land and Soil Quality have been published. It is noteworthy that these Draft Norms and Standards are already being applied by the authorities in instances of soil pollution as if they are in effect. The Contaminated Land Provisions are expected to commence in 2014.

3.5 The net effect of the abovementioned legal developments is a lack of certainty on what a company's remediation responsibilities entail at the end of operations; there is effectively the possibility of limitless statutory environmental liability for companies, irrespective of having obtained a closure certificate or no longer being the owner or user of the land. Companies will have to resort to contractual mechanisms to spread their environmental risk but ultimately retain statutory liability.