

## SOUTH AFRICAN EXPLORATION DRILLING FORUM

*Some observations regarding the proposed amendments to the Mine Health and Safety Act 29 of 1996, as amended ("MHSA") and certain practical consequences thereof*

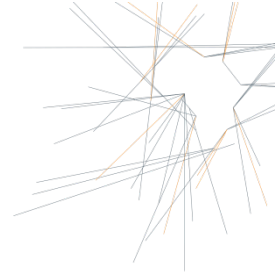
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Glen Hove Conference Center

24 July 2014

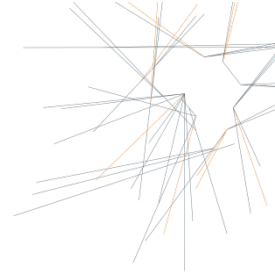


# INTRODUCTION



- On 15 November 2013, the erstwhile Minister of Mineral Resources (the "**Minister**"), Ms Susan Shabangu gave notice that she intended introducing the draft Mine Health and Safety Bill, 2013 ("**the Bill**") in Parliament
- The Minister invited the mining and minerals industry and interested and affected parties to submit written representations on the Bill
  - Webber Wentzel submitted written representations on the Bill
- The purpose of this presentation is to make some observations in respect of some of the proposed amendments contained in the Bill and to discuss the practical consequences thereof
- Development of legislation must be a continuous and thorough process actively seeking the input from all relevant stakeholders – it should not just be a once-off engagement

# INTRODUCTION CONTD



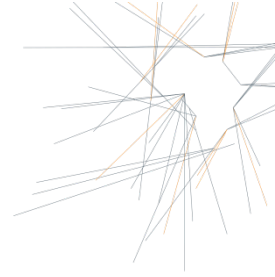
- The Department of Mineral Resources ("DMR") and the specifically established Mine Health and Safety Inspectorate ("MHSI") must steer this process in an inclusive manner to make it as far as possible **a joint and meaningful consensus seeking exercise**
- The stated preamble to the Bill is *"to streamline administrative processes; to strengthen enforcement provisions; to reinforce offences and penalties; to amend certain definitions; and to provide for matters connected therewith"*
- Let every stakeholder not forget that the purpose of the MHSA is to provide for the protection of the health and safety of employees and others at mines which should include **seeking certainty for employers** in the manner in which they are to discharge their duties

# THE BILL – MANY OF THE PROPOSED AMENDMENTS ARE POSITIVE



- The Bill proposes to amend the reference to the term "**body corporate**" in sections 2(d) and 2A(3) of the MHSA and to replace it with the term "**company**"
  - This proposed amendment must be seen in a positive light since it creates certainty in respect of understanding the definition of "*employer/owner*" under the MHSA
    - Whereas the term "body corporate" is not defined in the MHSA, the Bill does define a company to be "*a company as defined in the Companies Act*" – there is often unnecessary confusion as to understanding that in most cases it is a company (and not an individual) that is the employer
    - Also greater clarity in understanding who may be appointed as the "**chief executive officer**" in terms of section 2A(3)

# THE BILL – BUT THERE ARE PROBLEM AREAS



- The Bill envisages a new section 2B to the MHSA

*"2B(1) The employer of every mine that is being worked, **must appoint a chief executive officer**, if such employer is a company.*

***(2) The chief executive officer must perform all the functions of the employer, including making any appointments in terms of this Act.***

*(3) The chief executive officer must be –*

*(a) a member of a board of a company, designated by the board; and*

*(b) responsible for the health and safety of employees and persons who are not employees but who may be directly affected by the activities at the mines.*

*(4) Where the employer is not a company, the owner of a mine must be responsible for the health and safety of employees and persons who are not employees but who may be directly affected by the activities at the mine.*

*(5) The employer must inform the Chief Inspector of Mines, in writing, within        seven days of the appointment of the chief executive officer, of such appointment,        and such information must include –*

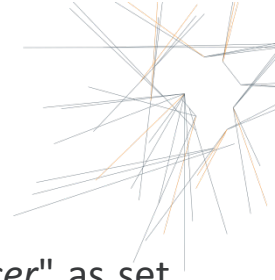
*(a) the name of the chief executive officer;*

*(b) the nature of the chief executive officer's functions;*

*(c) the area of responsibility of the chief executive officer; and*

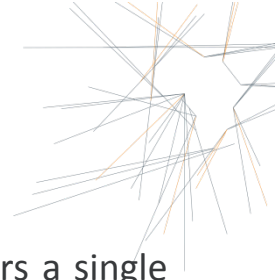
*(d) the names of the mine managers over whom the chief executive officer has control."*

# THE BILL – BUT THERE ARE PROBLEM AREAS



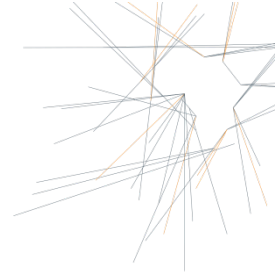
- The Bill does not envisage an amendment to the definition of "*chief executive officer*" as set out in section 102 of the MHSa. Section 102 of the MHSa defines a "***chief executive officer***" as "***the person who is responsible for the overall management and control of the business of an employer***"
  - The definition of "*chief executive officer*" in section 102 of the MHSa does not accord with this proposed amendment
    - De facto CEO or appointed CEO?
- Problem with this portion of the proposed new section 2B is that it creates uncertainty surrounding the clear identity of the CEO – our proposal would be to amend the definition of "*chief executive officer*" to refer to the person appointed in terms of section 2B of the Bill
- Most troubling however is the proposed new section 2B(2)
  - Section 2A(1) of the MHSa provides that a "***chief executive officer must take reasonable steps to ensure that the functions of the employer as contemplated in this Act are properly performed***"
    - ***Already section 2B(2) creates uncertainty as to the real role of the CEO***

# THE BILL – BUT THERE ARE PROBLEM AREAS CONTD



- Furthermore, section 2B(2):
  - removes responsibility from the holder of the prospecting or mining right and renders a single person entirely responsible for the functions of the employer, which functions should be aimed in the legislative framework at the company and not the individual
  - renders it **factually** impossible for a CEO to comply with this proposed amendment in its current form. On an ordinary interpretation of this proposed amendment it may lead to the absurdity that a CEO, himself or herself, must perform the training required by section 10 of the MHSA – **this is unreasonable, impossible and incapable of being enforced and accordingly of no use**
    - we would propose that section 2B(2) be brought into line with the wording contained in section 2A(1) of the MHSA
  - means that a CEO must make all appointments in respect of an operation in terms of which the MHSA envisages he/she may delegate the day to day operation thereof to a competent mine manager – this puts paid to many of the sections of the MHSA and Minerals Act Regulations requiring appointments to be made. Such a state of affairs cannot practically be implemented
    - we propose that section 2B(2) of the MHSA rather read "*... and must make all appointments required to be made by the employer in terms of the Act*"
- These comments also apply to the proposed section 2B(3)(b) contained in the Bill
- The apparent omission of the phrase "*reasonably practicable*" in the proposed section 2B is also of concern and unduly onerous

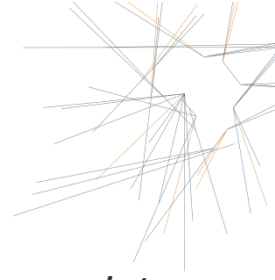
# THE BILL – PERSONAL PROTECTIVE EQUIPMENT



- The proposed amendments to section 6 of the MHSA relating to the **suitability** of personal protective equipment and the **consideration of size, fit, type of workplace hazards and the purpose and nature of work** to be undertaken does not from a legal perspective raise any alarm bells



# THE BILL – SOMETIMES STATES THE OBVIOUS!



- The Bill envisages a new section 7(6) to the MHSA which reads *"If the employer appoints or employs a contractor to perform any work within the boundaries of the mining area, mine or works, as the case may be, such employer remains responsible for compliance with this Act by such contractor, its employees, any of its sub-contractors, and their employees"*
  - It is well-known that the MHSA is distinct in its definitions of **"employer" and "employee" to the Occupational Health and Safety Act 85 of 1993, as amended ("OHSA")**
- We propose that the word **"employs"** is deleted from the proposed new section 7(6) of the MHSA
- Can you imagine if it were possible to include a similar section to section 37(2) of the OHSA?
  - The omission of being able to hold a contractor liable creates a significant loophole for the health and safety of employees under the direct supervision of a contractor possibly to be exploited

# THE BILL – THE PROPOSED AMENDMENT TO SECTION 10 OF THE MHSA



- The Bill seeks to remove the term "**reasonably practicable**" from an employer's obligation to provide training to its employees .
  - This proposed amendment is highly problematic
    - The removal of the term "**reasonably practicable**", which term is defined in the MHSA renders this section impossible to comply with and equally impossible to enforce
    - It is also akin to strict liability in respect of already onerous training requirements placed on employees
- We propose to bring back the term "**reasonably practicable**"
- Furthermore the proposed amendments to section 10 of the MHSA require every employee to ensure that employees are formally trained
  - The term "**formal training** " is defined in the Bill and means "*any relevant training contemplated in section 10(2), which must be properly structured and assessable*"

# THE BILL – THE PROPOSED AMENDMENT TO SECTION 10 OF THE MHSA CONTD



- This is problematic because:
  - it is not applicable nor appropriate for all operations of varying sizes, work forces and does not take into account the importance of practical, on the job involvement and learning;
  - the requirement that training be structured or assessable is vague and unhelpful.

# THE BILL – PROPOSED AMENDMENTS TO SECTIONS 75, 76, 78, 80 AND 97 OF THE MHSA



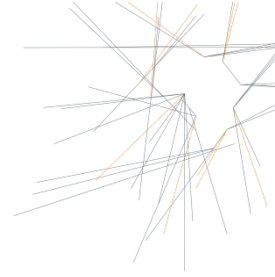
- The apparent proposed increase in the discretionary powers of the Minister of Mineral Resources and the removal of the input and consultation with the Mine Health and Safety Council is a cause for serious concern
- It is no longer clear on what basis the various decisions of the Minister of Mineral Resources will be made and/or affected where there is no longer a requirement to consult, where the Minister is no longer required to believe decisions necessary in the public interest or where there is a removal of the obligation of the Minister to consult with interested parties, which may in it itself be challengeable

# THE BILL – PROPOSED AMENDMENTS TO SECTION 92 OF THE MHSA



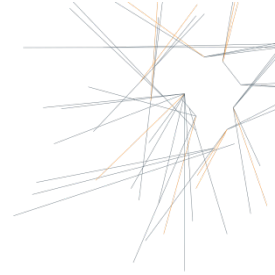
- While the intention of the Bill is to "reinforce offences and penalties" with respect it seeks to do so in a radical fashion
  - **The Bill proposes that an employer that is a company may be liable to a fine not exceeding 10% of the company's annual turnover for the period during which the company has failed to comply with the relevant provision or to imprisonment not exceeding 10 years**
- Wow!
- We propose the penalty section under the MHSA remains unchanged

# THE BILL – SECTION 103

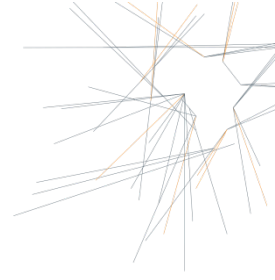


- Section 103 of the MHSA reads "*The Occupational Health and Safety Act, 1993 (Act 85 of 1993) is not applicable to any matter in respect of which any provision of this Act is applicable*"
  - The Bill does not seek to clarify what is meant by the term "*any matter*" which has a very wide interpretation and this clarification is conspicuous by its absence

# THE BILL – WHAT PRACTICALLY CAN EMPLOYERS DO?



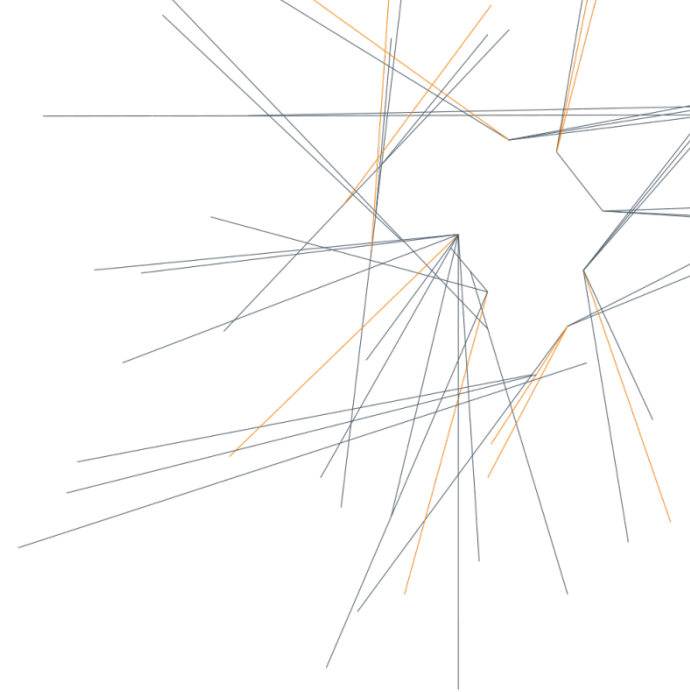
- We are yet to see whether the Bill will be passed into law
- Whilst there are positive aspects of the Bill there are also a number of proposed amendments aimed at stringent and strict liability
- Employers should continue to engage with the Minister of Mineral Resources in respect of the proposed amendments contained in the Bill and to make its voice heard – it did so in the 2008 amendments of the MHSA
- Continue to comply with the MHSA in a philosophy replete with the mantra "*out of an abundance of caution*"
- Continue to engage with the MHSI on a daily basis in relation to your specific operations and build meaningful and strong relationships in which there is a reciprocal respect and acknowledgement by the MHSI of their powers as circumscribed by the MHSA



# THANK YOU

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