PRACTICAL CONSEQUENCES OF THE MINE HEALTH AND SAFETY AMENDMENT ACT 2008 (ACT NO. 74 OF 2008) – THE IMPACT ON SOUTH AFRICA'S MINING INDUSTRY

While two of the most controversial amendments to the Mine Health and Safety Act 1996 (Act 29 of 1996) ("MHSA") did not come into force and effect on 30 May 2009, when the Mine Health and Safety Act Amendment Act 2008 (Act No. 74 of 2008) came into operation, the amendments to the MHSA are nevertheless fundamental, and have far reaching practical and legal consequences.

It is essential that Chief Executive Officers, Directors, and Senior Management have a full appreciation of the practical and legal consequences of the amendments, and of course, what is required in order to ensure compliance with the amendments.

In this memorandum we explore some of the more important amendments, which have significant practical and legal consequences.

Section 2 of the MHSA has been amended and requires the Employer of a Mine that is not being worked, but in respect of which a Closure Certificate has not been issued in terms of the Mineral and Petroleum Resources Development Act ("MPRDA"), to take reasonable steps to continuously prevent injuries, ill health, loss of life or damage of any kind from occurring at or because of the Mine. In order to obtain a Closure Certificate in terms of the MPRDA, the Employer of the Mine that is not being worked, must comply with extensive requirements in terms of the MPRDA and the MPRDA Regulations. Practically, the process of closure and the obtaining of the Closure Certificate will be a lengthy process. Attention must be given to ensuring that Health and Safety is still managed, during the closure period, up until the Closure Certificate is issued. The responsibilities in terms of the MHSA with regard to Employees and non Employees must be considered, and taken into account, when implementing the health and safety management system in respect of operations which are not being worked.

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Section 2A of the MHSA is amended by the inclusion of Sub-Section 6(a) which requires the Employer to inform the Chief Inspector of Mines in writing within 7 (seven) days of the appointment of the Chief Executive Officer. The notification must include the name of the Chief Executive Officer, the nature of such person's functions, and the name of persons who are Managers under the supervision of the Chief Executive Officer. The term "Chief Executive Officer" is defined to be the person who is responsible for the overall management and control of the business of the Employer. Section 2A(3) of the MHSA provides that if the Employer is a Body Corporate, the functions of the Chief Executive Officer may be performed by a member of the Board of the Body Corporate designated by the Board. The person appointed in terms of Section 2A (3) MHSA therefore "steps into the shoes" of the Chief Executive Officer. The amendment to Section 2A MHSA does not make a distinction between the Chief Executive Officer contemplated in Section 2A(1), and the person who may be designated to step into the shoes of the Chief Executive Officer in terms of Section 2A(3). In our view, the notification required in terms of Section 2A (6) (a) MHSA, would refer to the person designated in terms of Section 2A (3) MHSA, where such person has been designated. Further, while it is not provided for, as a matter of practice, Employers should notify the Chief Inspector, when a new Chief Executive Officer is appointed (or person is designated in terms of Section 2A(3) MHSA).

Section 10 of the MHSA requires Employers to provide Employees with any information, instruction, training or supervision that is necessary to enable them to perform their work safely and without risk to health, and ensure that every Employee becomes familiar with work related hazards and risks and the measures that must be taken to eliminate, control, and minimize those hazards and risks. Section 10(2) requires the Employer to ensure that every Employee is properly trained to deal with every risk to that Employee's health or safety that is associated with any work that the Employee has to perform and has been recorded in terms of Section 11 of the MHSA (the provisions requiring hazard identification and risk assessments to be carried out), in the procedures to be followed to perform that Employee's work, and in relevant emergency procedures. Section 10 of the MHSA has been amended, by the inclusion of Sub-Sections 4 & 5. Sub-Section 4 now requires the Employer to keep a record of all formal training provided in respect of each Employee in terms of Sub-Section 2. This amendments requires a holistic approach to be adopted to

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determine (a) what constitutes formal training (this is not defined in Section 10(4)) (b) how the records are going to be kept , (c) for how long the records are going to be kept (no time period is specified, and as a result, it appears that the records must be kept indefinitely) and (d) how the records of Contract Employees, who are regarded as Employees for the purpose of the MHSA, are going to be addressed. It is important to note that it is only the health and safety training records contemplated in Section 10(2), that are required to be kept. Because there is no definition of "formal", each Employer will be required to determine what constitutes part of the formal training given to Employees. Formal training will in most circumstances include induction training, job specific training, underground training and specialist training. It may however also include training provided during planned task observations, the communications during workplace meeting, "talk topics" etc. As a result of the level of practicality required, it is proposed that the various relevant Departments adopt an integrated approach. It would be inappropriate, to attempt to address this, without the Human Resources Development Department consulting the various operational and related Departments.

Section 11(5) of the MHSA requires an Employer to conduct an investigation into every accident that must be reported in terms of the MHSA, serious illness, and health threatening occurrence. It also requires the Employer to prepare a Report. Section 11(5) of the MHSA is amended by the insertion of a requirement to commence the investigation within 10(ten) days from the date of the accident, serious illness or health threatening occurrence. It further provides that the investigation must be completed within 30 (thirty) days, or such longer period as the Principal Inspector of Mines may permit. A time period is now specified for the commencement and completion of the investigation. Further changes require the Report to be delivered within 30 (thirty) days from the date of the accident, serious illness or health threatening occurrence, to the Principal Inspector of Mines, and the Health and Safety Committee, or to the Health and Safety Representative for the working place, if there is not a Health and Safety Committee. While, in principle, there should be no difficulties with the time periods, there is a significant concern regarding the obligation to provide a copy of the Report to the Principal Inspector. It is generally accepted that, in order to prevent accidents from occurring, it is essential to understand the mechanisms of the accident, and there is significant reliance on openness and honesty, by all persons involved. It is probable that persons

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involved in an accident, will take steps to protect themselves from any adverse consequences. In our view, the requirement to provide the Principal Inspector with a copy of the Report, will undermine health and safety, and will result in "generic" style Reports being prepared, a far cry from the often extensive Investigation Reports which are prepared, following intensive investigation which addresses all possible contributory factors. This is, in our view, exacerbated by the further change to Section 11, namely the inclusion of Section 11(6), which requires the Employer to notify the Principal Inspector of Mines of any accident or occurrence at a Mine that results in a serious injury, illness or death of any person, in order to allow the Principal Inspector of Mines to instruct an Inspector to conduct an investigation simultaneously with the Employer as required in terms of Section 11(5) (a). Section 11(6) effectively provides that the Internal Investigation which the Employer must carry out in terms of Section 11(5) may be held jointly with an investigation conducted by an Inspector. While reference is not specifically made to investigations in terms of Section 60 of the MHSA, our view is that this is the investigation which is in fact referred to. It also appears to us that the Employer cannot refuse to have such a joint investigation. In the event that an Inspector is involved in the Internal Investigation, this will once again, undermine the attempts to get to the bottom of an accident. Employers, Employees and other Stakeholders are likely to take all steps, to ensure that blame cannot be attributed to them. A further change to Section 11 is the addition of Section 11(8), which is aimed at preserving evidence. It confirms that no person may without the consent of the Principal Inspector of Mines disturb the site at which the incident occurred, or remove any article or substance involved in the incident. It does however retain the general exclusion that the article or substance may be removed if it is necessary to prevent any incident, remove the injured or dead person, or rescue any person from danger.

Section 13 of the MHSA is amended to prohibit the use of other Practitioners holding a qualification in occupational medicine to assist the Occupational Medical Practitioner. In addition, only an Occupational Medical Practitioner can be used, i.e. a Medical Practitioner cannot be used to perform the functions of an Occupational Medical Practitioner. A new Sub-Section is inserted (Section 13(4), which requires the Employer to inform the Principal Inspector of Mines in writing, within 7 (seven) days of the appointment of Occupational Medical Practitioner.

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Section 17 of the MHSA is amended, to require the exit medical examination to be conducted within 30 (thirty) days after termination of the employment. There are often practical difficulties associated with the exit medical, particularly where persons abscond, or, after resignation, simply do not report for duty or for any other reason do not present themselves for the exit medical. To the extent that attempts are made to secure the attendance of persons to conduct an exit medical, a full record should be kept of such attempts. It is also proposed that a procedure be drafted and implemented, which addresses the steps to be taken, and the records to be kept.

Section 20 of the MHSA is amended to provide that an Employee lodging an Appeal against a finding that they are unfit to carry on work, may not be dismissed on any grounds relating to unfitness to perform work, pending the outcome of the Appeal. This provision cuts across the provisions of the Labour Relations Act and the ability of Employers to dismiss persons, on the basis of medical incapacity, pending the outcome of an Appeal, to the Medical Inspector. It is anticipated that, as a result of the inclusion of this provision, Employees will, in almost every instance, appeal against the finding, to secure continued employment for an additional period. Practically, it will require Employers to formulate procedures to address the situation where Employees, who have been found unfit to carry out work, remain in the employ of the Employer. The amendment contemplates the protection of persons, who face dismissal, i.e. who have been found unfit to perform work at the relevant Mine (and not necessarily only in the particular job category). The relevant Human Resources Policies Practices and Procedures will require a review, in order to ensure that persons can be accommodated, pending the outcome of the Appeal. This cannot however be done in isolation, i.e. it should be done in consultation with the relevant operational, engineering and related departments, to determine whether persons can be accommodated, on a temporary basis, in an alternative position. This unfortunately pre-empts several of the aspects which would under normal circumstances, be addressed in terms of the Medical Incapacity Procedure. It could be argued that the only prohibition, is a prohibition against dismissal, and that the Employer could process the individual Employee, through the Medical Incapacity Process as contemplated in the Labour Relations Act, and in the various Policies, Practices and Procedures. If this interpretation is adopted (which is proposed), the process could assist Employers, in accommodating Employees.

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Section 23 of the MHSA is amended, by providing that the Minister, must, by notice in the Gazette, determine minimum requirements for the procedure to withdraw from a dangerous working place. This will mean that the freedom of the Employer to determine the procedure will be curtailed.

Section 54 of the MHSA is amended by the deletion of Sub-Sections 7, 8, 9 and 10. Section 54 sets out the powers of Inspectors to address any occurrence, practice or condition at a Mine, which in the view of the Inspector, endangers or may endanger the health and safety of any person at the Mine. Sub-Section 7, 8, 9 and 10 require the Inspector to allow the Employer and the representatives of Employees an opportunity to make representations before giving any instruction in terms of Section 54 MHSA. While these requirements are built in, as a result of the Promotion of Administrative Justice Act, in our view, it is preferable that these provisions should have remained in the MHSA, itself. These provisions provided a guideline to the Inspectors, and assisted, in our view, in circumscribing the requirements placed on Inspectors, before issuing a Directive in terms of Section 54. The provisions of Sub-Section 7, 8, 9 and 10 guided the Inspectorate, with regard to fair procedures to be followed.

The administrative fine system has been significantly amended. Prior to the amendments, an Inspector could recommend the imposition of an administrative fine, whereafter the Employer and other Parties would be invited to make representation. Thereafter, the Principal Inspector would either impose the fine, or not impose the administrative fine. In the event that the Employer was dissatisfied with the decision of the Principal Inspector, the Employer could appeal to the Chief Inspector, and if the Employer was dissatisfied with the decision of the Chief Inspector, it could appeal to the Labour Court. Section 55A previously required an Inspector to have reason to believe that an Employer had contravened the MHSA, before a fine was recommended. The requirement that the Inspector "has reason to believe" has now been deleted. This, in our view, requires the Inspector to have information available to him/her, on an objective basis, demonstrated that there has been a failure to comply with provisions of the MHSA. The standard would be "beyond all reasonable doubt". This, in our view, has introduced a significant onus and burden on the Inspectorate, and an opportunity, for Employers, to challenge the recommendation to impose the administrative fine. The further amendments provide the Employer with an opportunity to make written representations to the Principal Inspector of Mines within 30 (thirty) days of the

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recommendation. Importantly, the amendments provide that a representation made in terms of Section 55 may not be used against the Employer in any criminal or civil proceedings in respect of the same set of facts. The concern remains however, that in practice, the provision that the representations may not be used in any criminal or civil proceedings, will in fact not encourage the Employer to be open and honest. The protection is not wide enough, i.e. it does not cover investigations in terms of Section 60 of the MHSA, Inquiries in terms of Section 65 of the MHSA, Disciplinary Inquiries, or any other form of administrative proceedings. There are therefore still consequences.

Section 55B has been amended to provide that the Principal Inspector of Mines, after considering the recommendation and any representation made in accordance with Section 55A may (a) disregard the recommendation (b) impose a fine not exceeding the maximum amount mentioned in Table 2 of Schedule 8 or (c) refer the matter to the Prosecuting Authority for a decision as to whether the Employer should be charged with an offence. While it is not clear, it would appear that the principle of "double jeopardy" will apply, i.e. the Employer cannot face an administrative fine, and a prosecution, when looking at the wording of Sub-Sections b and c. In addition, it is not clear whether, if the Prosecuting Authority decides not to prosecute, whether the Inspectorate can revert to an administrative fine. Once a fine is imposed, the Employer is required to pay the fine, within 30 (thirty) days of the imposition of the fine. If the Employer fails to pay the fine within the specified period, the Chief Inspector of Mines may apply to the Labour Court for the fine to be made an Order of Court. The Order of Court can be implemented, by the attachment of goods, to the value of the fine. Due to the repeal of Sections 55C to 55H, there is a question mark over the status of the guidelines previously issued under Section 55G, which guided the Inspectorate and Employers, on how a decision would be made on whether or not to impose an administrative fine. What is however important, with the deletion of Section 55E, is that the Employer's guilt will now have to be proved beyond all reasonable doubt.

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Section 57 of the MHSA has been amended, to exclude an Appeal against the imposition of an administrative fine, to the Chief Inspector, i.e. there is no longer an internal repeal, in respect of administrative fines. This is specifically endorsed by the appeal of Section 57A, which provided for the right to appeal to the Chief Inspector against the decision of the Principal Inspector to impose an administrative fine.

In future, should an Employer wish to challenge the decision of the Principal Inspector to impose an administrative fine, it would be required to review the decision, in terms of the Promotion of Administrative Justice Act. The repeal of the provisions of the MHSA, which automatically suspended the obligation to pay the administrative fine, in the event that the Employer appealed (internal appeal), also means that, in order to suspend the obligation to pay the fine, the Employer would be required to approach the High Court, for an Interim Order, pending the review in terms of the Promotion of Administrative Justice Act. It is likely that Employers will continue to challenge administrative fines, particularly in view of the increase of the maximum administrative fine that can be imposed. Previously, the maximum administrative fine, was R200 000.00. This limit has now been lifted to R1 million.

In our view, rather than simplifying the administrative fine system, the administrative fine system has been complicated by what we view to be a "lifting" of the onus of proof placed on the Inspectorate, and the removal of the internal appeal process.

Section 91 of the MHSA has been amended to specifically provide that an Employer commits an offence if the Employer contravenes or fails to comply with any provisions of the MHSA, and is liable to a fine or imprisonment as prescribed. Previously, Section 91(1) excluded the commission of an offence, under the listed circumstances, by an Employer. The effect of the amendments to Section 91 is that the Employer may be subject to both a criminal sanction, and an administrative fine. Prior to the amendment, most breaches by the Employer were subject to a possible administrative fine. There has, in effect, been a "re-criminalization" in respect of the Employer, an aspect which was specifically addressed prior to the coming into force and effect of the MHSA, in 1997. The prescribed fines have been increased, and the maximum term of imprisonment, has been increased. The new maximum fine and period of imprisonment for criminal convictions are R1

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million or 5 (five) years, respectively. Where no fine is indicated, a fine of R20 000.00 can be imposed for every 12 (twelve) months imprisonment, in terms of the Adjustment of Fines Act, unless there is no option of a fine. Depending on the Section under which the person may be convicted, the fines range from a maximum R200 000.00 or 2 (two) years imprisonment, to R1 million or 5 (five) years imprisonment.

The MHSA has also been amended to establish an independent juristic body, known as the **Mine Health and Safety Inspectorate** ("MHSI"), and related amendments have been incorporated, to provide relevant authorities, and financing.

Two controversial Sections have not come into force and effect. The first is in respect of the amendment to **Section 50(7A).** This provides that the Inspector may impose a prohibition on the further functioning of the site where a person's death, serious injury or illness to a person, or a health threatening occurrence has occurred, by blocking, barring or barricading the site in such a manner as the Inspector may deem necessary. The primary concerns relate to (a) what is meant by the "site", i.e. is it where, for example, the incident occurred, or the entire working place, shaft, complex of shafts etc, (b) what is meant by "blocking barring or barricading" and (c) how is the prohibition to be lifted. There is no mechanism for the lifting of the prohibition.

The second amendment, is the introduction of **Section 86A** which provides for statutory criminal liability on a vicarious liability basis, in circumstances where a Chief Executive Officer, Manager, Agent or Employee, commits an offence, and provided that it would also be an offence, if the Employer committed the offence, then the Employer is equally liable, with the Chief Executive Officer, Manager, Agent or Employee. The vicarious liability provision only applies where the contravention results in a person's death, serious injury or illness. Section 86A, as currently drafted, does contain certain qualifications. However, these qualifications are, for practical purposes, in our view, of such a nature, that it would be extremely difficult, if not impossible, to defend the Employer in the circumstances.

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It is anticipated that these two Sections will be amended, by a further Amendment Bill.

The amendments, as can be seen above, introduce extensive levels of complexity, areas of concern, and potential adverse consequences. The amendments should be carefully considered, and Employers should establish multi-disciplinary task teams, to identify compliance requirements, for action. The multi-disciplinary task teams should include representative from the various disciplines at the Operations, and representatives of the Employees, either formally, through the Health and Safety Committee's, the Health and Safety Representatives, and the relevant Trade Unions.

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