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Oil and gas regulation in South Africa: overview

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DOMESTIC SECTOR

1. What is the role of the domestic oil sector in your jurisdiction?

Domestic production

South Africa's proven oil reserves are currently relatively insignificant, totalling approximately 15 million barrels. The US Energy Information Administration reports that, in October 2015, oil production in South Africa totalled 3,000 barrels per day. However, there has been renewed interest in oil and gas exploration following the Brulpadda gas condensate discovery made by Total in early 2019.

There has been a small amount of commercial production of both oil and gas in the Bredasdorp basin and discoveries of oil and gas in the Pletmos basin and the Orange basin, off South Africa's west coast.

South Africa's total refining capacity amounts to 704 megabarrels per day (Mbpd), of which 72% is allocated to crude oil refining (mostly of imported crude oil) with the balance allocated to synthetic fuel refining.

South Africa produces petrol, diesel, residual fuel oil, paraffin, jet fuel, aviation gas, LPG and refinery gas from domestic refineries. South Africa's synthetic fuel refining sector is based around coal-to-liquid conversion.

South Africa is the world leader in coal-to-liquid fuel production, and the Secunda Synfuels operation (owned by Sasol) is the world's only commercially operating coal-based synthetic fuels manufacturing facility.

The state-owned Petroleum Oil and Gas Corporation of South Africa (PetroSA) also operates a gas-to-liquid refinery at Mossel Bay, which uses the Fischer Tropsch process to convert natural methane-rich gas into ultra-clean synthetic fuels.

Oil imports/exports market

South Africa relies on imports of crude oil and refined fuels to meet its liquid fuels needs, importing almost 90% of the crude oil consumed domestically.

There has been little to no growth in the domestic supply of raw petroleum products in the last decade while demand has steadily increased. The result, spurred on by an expansion in the economy over this period, has been a significant increase in imports of both crude oil and refined products.

As of 2015, South Africa imported 83% of its crude oil requirements. South Africa imported crude oil as follows:

- 57% came from other African nations, mainly from Nigeria (32%) and Angola (17%).
- 42% came from the Middle East, mainly from Saudi Arabia (25%) and the UAE (7%).
- The remaining 1% came from Colombia.

Although South Africa is currently not an exporter of crude oil products, under the International Trade Administration Act 2002, an exporter of petroleum products must obtain an export permit from the International Trade Administration Commission (ITAC). A prerequisite for the issuing of an export permit by ITAC is that the exporter has obtained a "recommendation" from the Department of Energy. The Department of Energy cannot refuse to issue a "recommendation" to an applicant unless the proposed export would result in a shortage of that product or is not in the public interest. There are currently no domestic market obligations in place.

Domestic market structure

Any entity, public or private, can gain access to South Africa's petroleum resources by applying to the Minister of Mineral Resources for an exploration or production right. These rights have in the past reserved a carried interest in production rights for the national oil company, PetroSA, as the designated state-owned company. However, following the current uncertainty surrounding the regulatory regime applicable to the oil and gas sector, it is unclear whether the state-reserved interest will continue to be a requirement, and (if so) how large such reserved interest will be (*see Question 29, Participation by historically disadvantaged South Africans (HDSAs)*). PetroSA is currently involved in the production of several small oil and gas fields in co-operation with various private partners, as well as various exploration ventures. Most of these resources are used in its gas-to-liquids refinery, where petrol, diesel, kerosene and several other products are manufactured.

There are many private and public sector groups now seriously considering establishing a market for imported LNG, and it is predicted by many in the industry that this will be realised within the next decade. South Africa's issues with energy supply stability make LNG fuelled gas-to-power an attractive option for large-scale industry, and the development of this element of the domestic market should be watched closely.

Government policy objectives

South Africa held general elections in 2019, which were won by the incumbent African National Congress (albeit by a steadily diminishing margin). The newly elected administration has attempted to strongly dissociate itself from the previous administration, and has promised increased efficiency, transparency and better governance in an attempt to attract foreign investment.

However, this objective is balanced against the need to address racial inequality stemming from the nation's troubled history, and the need to generate additional tax income to support beleaguered public institutions (such as Eskom, South African Airways and arms manufacturer Denel).

In September 2018, it was announced that the much delayed Mineral and Petroleum Resources Development Amendment Bill 2013 was to be withdrawn from further consideration in Parliament. The Bill was set to introduce significant changes to the regulation of the oil and gas sector, and its slow progress had significantly hampered the development of the industry in South Africa.

The newly expanded Department of Minerals and Energy has announced that it is working on a new Bill to be introduced to regulate oil and gas separately from mining. The separation from mining is hoped to address several longstanding regulatory issues faced by the industry, and should allow for significantly faster passage through Parliament and into law.

It is hoped that the new Petroleum Resources Development Bill will be passed later this year. The Bill is expected to address key issues for investors, such as local content policy, environmental compliance requirements and regulatory stability.

Current market trends

Market trends in South African are similar to those in global markets. The market for oil has improved following a recent period of year-on-year decreases in price, but remains relatively low (at approximately USD65 per barrel). Dramatic cost-cutting measures in the industry have led to a reduction in the breakeven price for developments, and may see an increase in new projects.

2. What is the role of the natural gas sector in your jurisdiction?

Domestic production

Despite proven reserves of approximately 27 million cubic metres of natural gas, the Petroleum Oil and Gas Corporation of South Africa (PetroSA) is the only primary producer of indigenous natural gas in South Africa. Its offshore producing gas field is located in the Bredasdorp basin and is used as feedstock for its gas-to-liquids refiner. This field is approaching depletion, and further development of the basin is underway to ensure future resources. Renergen Limited, a local company listed on the Johannesburg and Australian Alternative Stock Exchanges, has also been begun to produce natural gas from wells located onshore in the Free State province of South Africa.

While it is too early to determine whether the Brulpadda gas condensate discovery will lead to commercial production, it is likely that South Africa will continue to grow its domestic production of natural gas as a means of supporting its energy grid.

Natural gas imports/exports

South African natural gas production amounts to approximately 26% (as of 2015) of domestic use, with the remaining 74% being imported via a transmission pipeline owned by the Republic of Mozambique Pipeline Investing Company, which has been set up as a joint venture comprised of the South African Gas Development Company (Pty) Ltd, Companhia Mocambicana de Gasoduto S.A.R.L and Sasol. The 240 million GJ per annum pipeline conveys gas from Sasol's Pande and Temane gas fields in Mozambique. South Africa does not export natural gas.

Domestic market structures

As a primary fuel, gas makes up only 3% of the total energy mix. The two major players in the domestic gas market are Sasol and PetroSA. However, there are also several smaller private-sector companies involved in the transmission and reticulation of the gas imported through the pipeline operated by the Republic of Mozambique Pipeline Investing Company.

Opportunities for domestic expansion

Offshore exploration currently underway by international oil companies (such as Total, ENI ExxonMobil, Anadarko and Statoil) has increased interest in South Africa's onshore and offshore oil and gas reserves. The Brulpadda gas condensate discovery is the first major oil and gas discovery made offshore of South Africa in deep water conditions, and proves in concept that there may be untapped reserves available for development.

Additionally, the Petroleum Agency of South Africa believes that the onshore Karoo basin may contain significant quantities of shale gas. Recent estimates suggest volumes of approximately 40 trillion cubic feet, although this is considerably less than the figure of 480 trillion cubic feet arrived at by the Energy Information Administration. Applications for rights to explore these opportunities have been submitted to the regulator. Following objections raised by community and environmental groups, a moratorium was imposed on the granting of these applications (and on the submission of any new applications) pending the finalisation of suitable technical regulations to govern shale gas exploration (in particular, by way of hydraulic fracturing).

These regulations were published by the Minister of Mineral Resources in June 2015. In November 2015, two separate High Court applications were brought before each of the Eastern Cape and Gauteng – Pretoria High Courts challenging the Minister's authority to regulate environmental requirements pertaining to oil and gas exploration. Following a period of uncertainty after the Eastern Cape High Court ruled in favour of the applicants and the Pretoria High Court against them, the South African Supreme Court of Appeal has confirmed that the Minister did indeed lack the requisite authority, and has ordered the regulations set aside on grounds of invalidity. It is expected that a new drafting process will commence to address the issues identified in the court's judgement. However, for the time being, shale gas exploration remains in stasis. It is expected that no shale gas licences will be issued until new regulations that regulate hydraulic fracturing have been published.

Current market trends

Following significant gas discoveries on the east coast of Africa, the South African Government has initiated various policies and programmes aimed at increasing the penetration of gas in South Africa's energy economy. A Gas Utilisation Master Plan is expected to be published by the Department of Minerals and Energy to serve as a framework for establishing the infrastructure and incentives necessary to realise this objective, following the finalisation of the 2030 Integrated Resources Plan (also expected in 2019).

A Liquefied Natural Gas to Power Programme is under consideration by the Department, and interest has grown in the private sector for an import based LNG-to-power alternative to reliance on the national utility company, Eskom. It is hoped that the development of a national procurement programme or a large private project will create an anchor for demand that will stimulate the growth of a viable gas sector, which may ultimately be met with indigenous gas resources.

3. Are domestic energy requirements met by oil and gas production?

Oil requirements

South African liquid fuel demand sits at approximately 25 million cubic metres per year, about 60% of which is met by imported crude oil.

Natural gas requirements

Apart from a small amount of natural gas made available by the Petroleum Oil and Gas Corporation of South Africa from its offshore production, South Africa's natural gas requirements are met by natural gas imported from Mozambique.

4. Are there specific government policies to encourage the exploration and production of unconventional gas or oil?

While the government offers a distinct and favourable tax regime for oil and gas companies engaged in upstream exploration (*see Question 11*), there are no specific policies which target unconventional gas or oil exploration or production.

REGULATION

Regulatory bodies

5. Who regulates the extraction of oil and gas?

The principal regulatory bodies overseeing oil and gas extraction are the national Department of Minerals and Energy (formerly known as the Department of Mineral Resources) (DME) and the Petroleum Agency of South Africa (Soc) Limited (Petroleum Agency).

The DME administers the Mineral and Petroleum Resources Development Act 2002 (MPRDA), which at present is the principal statute governing the exploration and production of petroleum resources. The Petroleum Agency has been delegated various first-tier functions under the MPRDA relating to the acceptance and consideration of applications for petroleum rights and permits. Generally, the Petroleum Agency performs an advisory and administrative role that includes receiving, evaluating and making recommendations to the minister on applications for petroleum rights and permits, and monitoring compliance with such permits and rights. It also acts as the custodian of the national petroleum exploration and production database.

While the new "Petroleum Resources Development Bill" is expected to be published (at least in draft format) this year, it is not expected that this change in legislation will alter responsibility for the regulation of the upstream oil and gas industry.

The regulatory regime

6. What is the regulatory regime for onshore and offshore oil and gas exploration and production?

South Africa operates a licensing regime under which access to petroleum resources is obtained through an application to the Minister of Mineral Resources for a petroleum right in the form of a reconnaissance permit, technical co-operation permit, exploration right or production right. These applications are processed on a first-come, first-served basis. Exploration and production rights confer a limited real right in respect of the acreage over which they are granted.

A reconnaissance permit entitles the holder to carry out geological, geophysical and photo geological surveys.

A technical co-operation permit entitles the holder to conduct a technical co-operation study, based on an analysis of data held by the Petroleum Agency. The holder of a technical co-operation permit has the exclusive right to apply for, and be granted, an exploration right in respect of the area covered by the permit.

Exploration rights entitle the holder to conduct exploration operations and all incidental activities on the acreage. Exploration rights can be renewed.

Relinquishment of a portion of the exploration area is usually required on renewal. Although the extent of the area to be relinquished is not prescribed by legislation, it has become common practice for the relinquishment requirement to take the following form:

- 20% relinquishment of the exploration area on completion of the initial exploration period.
- Not less than a 15% relinquishment of the exploration area on completion of the first renewal period.
- Not less than 15% relinquishment of the exploration area on completion of the second renewal period.

The holder of an exploration right enjoys an exclusive right to apply for, and be granted, a production right over the exploration area.

While the new Petroleum Resources Development Bill is expected to be published (at least in draft format) this year, it is not expected that the new Bill will vary the licencing regime for offshore oil and gas.

RIGHTS TO OIL AND GAS

Ownership

7. How are rights to oil and gas held?

An exploration or production right takes the form of a grant on stated terms and conditions imposed by the state following negotiation with the holder. An exploration or production right must be executed before a notary public. Once executed, the right must be registered with the Mineral and Petroleum Titles Office. On registration, a petroleum right confers a limited real right on the holder which is enforceable against third parties. It is an instrument unique to South Africa, and (while comparable to a licence) offers greater security to the holder, such as superseding the rights of any owner of the land to which the mineral rights relate.

It is not expected that the new Petroleum Resources Development Bill will change how rights are held in South Africa.

Nature of oil and gas rights

8. What are the key features of the leases, licences or concessions which are issued under the regulatory regime?

Lease/licence/concession term

South Africa operates a licensing regime and access to petroleum resources is obtained by applying to the Minister of Mineral Resources for a petroleum right in the form of a reconnaissance permit, technical co-operation permit, exploration right or production right (*see Question 6*).

A reconnaissance permit is valid for a period not exceeding one year, and it is not renewable or extendable and it does not provide any exclusivity.

A technical co-operation permit is valid for a period not exceeding one year and is not renewable. The holder of a technical co-operation permit has an exclusive right to apply for an exploration right over the area covered by the technical co-operation permit.

Exploration rights are tenable for a period not exceeding three years and can be renewed for three periods of two years each. The holder of an exploration right has the exclusive right to apply for renewal.

Production rights are granted for an initial period not exceeding 30 years. The holder of a production right also has an exclusive right to apply for, and be granted, a renewal of the right. A production right period can be renewed for further periods not exceeding 30 years. The maximum number of renewals permitted in relation to a Production Right is not prescribed by the Mineral and Petroleum Resources Development Act 2002 (MPRDA).

A decision by the Supreme Court of Appeal of South Africa in *Minister of Mineral Resources and Others v Mawetse (SA) Mining Corporation* confirmed that a general principle in South African law is that the duration of a right granted under the MPRDA is calculated with reference to the date when the approval of the application is communicated to the applicant.

This implies that usually the period of validity of an exploration or production right starts from the date when its granting is communicated to the holder (that is, the date of the granting letter). This is true even though the rights and obligations attached to an exploration or production right only come into effect on the date when the deed of Exploration or Production is executed.

While the key features of oil and gas rights are not expected to be varied after the implementation of the new Petroleum Resources Development Bill, it is hoped that the effect of the *Mawetse* Decision will be addressed in order to align the period of validity of a right with the period in which the holders rights and obligations apply.

Fees

Under the current regime, exploration right holders must pay the exploration fees prescribed under the MPRDA. These fees are currently set at:

- ZAR1 per hectare for onshore exploration rights.
- ZAR100 per square kilometre for offshore exploration rights (escalating at a rate of ZAR10 per square kilometre per annum).

No licence fees are payable at production stage.

Liability

The holder of either an exploration or a production right commits to a minimum work programme incorporated into the right. The holder is bound to discharge the work programme. In certain instances, the Petroleum Agency will require that the holder makes financial provision acceptable to the Petroleum Agency guaranteeing the availability of sufficient funds for the due fulfilment of all work programmes prior to the commencement of operations.

Under the Financial Provisioning Regulations published under the National Environmental Management Act 1998 (NEMA), an exploration or production right holder must also make financial provision for the rehabilitation, closure and ongoing post decommissioning management of negative environmental impacts. The quantum to be set aside must be determined through a detailed itemisation of all activities and costs required to implement final rehabilitation and decommissioning and remediation of any latent residual environmental impacts, in accordance with plans and studies submitted to the Petroleum Agency as part of the application for an environmental authorisation. At present, a holder is required to ensure that the financial provision is sufficient to cover the actual costs of implementing these measures for a period of ten years.

However, the Financial Provisioning Regulations are in the process of being overhauled, and a new iteration of the Regulations is expected to be promulgated towards the end of 2019. A draft version of the proposed Financial Provisioning Regulations was presented for public comment in May 2019.

Significant changes to the Regulations include a requirement that financial provision is made for environmental rehabilitation and decommissioning of activities scheduled to be performed over the next 12 months (from the date of assessment), and a requirement that holders reassess and update their financial provision annually. The draft regulations also included changes to the financial vehicles available for the setting aside of funds, although these may continue to be developed before the final promulgation of the regulations.

Any right holder who has applied for exploration or production rights before 20 November 2015 (when the existing Financial Provisioning Regulations were promulgated) will be regarded as having complied with the existing Financial Provisioning Regulations if they comply with the previous legislative requirements under the MPRDA on financial provisioning measures (which would have been approved by the DMR as part of the issue of each respective right).

From 19 February 2024, all operators must comply with the updated Financial Provisioning Regulations in force at that time.

In addition, the standard form exploration and production right provides that the holder undertakes to "defend, hold harmless and indemnify the state from and against any and all claims, costs, charges, liabilities and expenses, including reasonable legal costs that may be instituted against or suffered by any member of the state as a result of injury to or death of any person or damage or destruction to any property or the environment arising from the negligent or unlawful acts or omissions of the holder".

Restrictions

The primary restriction on exploration and production rights relates to the transfer of interest. The MPRDA prohibits the transfer of a right, an interest in a right, or a controlling interest in an entity holding a right without the permission of the Minister of Mineral Resources (except in the case of a change of controlling interest in a listed company).

Additionally, the standard form exploration right provides, at present, that a 10% (undivided interest of the participating interest in the right must be sold (on market related terms) to a company owned or controlled by historically disadvantaged South Africans.

9. How are such leases, licences or concessions awarded?

Although the Mineral and Petroleum Resources Development Act 2002 (MPRDA) is administered by the national Department of Minerals and Energy (DME), the Petroleum Agency has been delegated various first-tier functions relating to the acceptance and consideration of applications for petroleum rights and permits. An applicant for an exploration or production right must submit an application in accordance with the requirements of the MPRDA to the Petroleum Agency, together with the prescribed fee. The Petroleum Agency must, among other things, accept, evaluate and make recommendations to the Minister of Minerals and Energy regarding applications for reconnaissance permits, technical co-operation permits, exploration rights and production rights.

Applications are currently processed on a "first-come, first-served" basis and the Minister of Minerals and Energy does not have discretion to refuse to grant a right where the application meets the requirements of the MPRDA. This is subject to the proviso that, in the case of contemporaneous applications, an application by a historically disadvantaged South African (as defined in the MPRDA) will be given preference.

A petroleum right or permit is embodied in a deed granted by the government to the right holder. This deed sets out the rights and obligations of the parties.

While the new Petroleum Resources Development Act will replace the MPRDA as the governing legislation under which licences are awarded, it is not expected to vary the state institutions which are responsible for administration of the application and permitting

system, nor is it expected to significantly change how licences and rights are awarded.

Transfer of rights

10. How are oil and gas rights transferred?

The MPRDA prohibits the transfer of a right, an interest in a right, or a controlling interest in an entity holding a right without the permission of the Minister of Mineral Resources (except in the case of a change of controlling interest in a listed company) (*see Question 8, Restrictions*).

The Minister of Mineral Resources must grant his or her permission if, among other things, the prospective transferee can comply with the terms and conditions of the right and demonstrates compliance with the requirements that an applicant for an exploration or production right must meet. Permits granted under the MPRDA are not transferrable.

TAX

11. What payments are payable by oil and gas interest holders to the government?

Oil and gas companies are liable for:

- Income tax and capital gains tax (CGT), under the Income Tax Act 1962 (ITA).
- Value added tax (VAT), levied under the Value Added Tax Act 1991 (VAT Act).
- Royalties, imposed by the Mineral and Petroleum Resources Royalty Act read with the Mineral and Petroleum Resources Royalty (Administration) Act.

Other potential liabilities include:

- Transfer duty on the transfer of immovable property.
- Securities transfer tax on the transfer of securities (for example, shares).

The South African Revenue Service (SARS) is tasked with collecting revenue and ensuring compliance with tax laws.

South Africa applies a residence-based income tax system, meaning that South African residents are subject to income tax on their worldwide income while non-residents are taxed on their income from South African sources. Residents are further subject to CGT on their worldwide capital gains, while non-residents are subject to CGT only in respect of capital gains arising from the disposal of immovable property (including an interest in, or right to, immovable property) situated in South Africa, or movable property attributable to a permanent establishment in South Africa, unless a double taxation agreement (DTA) provides otherwise.

Resident and non-resident companies are subject to income tax at a rate of 28% and to CGT at an effective rate of 22.4%.

The Tenth Schedule to the ITA deals specifically with the taxation of oil and gas companies and contains a number of favourable provisions. The Tenth Schedule establishes a special dispensation in respect of deductions from oil and gas income. At present, the Tenth Schedule also authorises the Minister of Finance to conclude binding fiscal stability agreements with an oil and gas company (however the authors understand that this inclusion is currently under review by the National Treasury).

A resident, in relation to juristic or legal entities, means any person that is incorporated, established or formed in South Africa or that has a place of effective management in South Africa. Branches of offshore companies will not fall within the definition of resident, but they may still be subject to South African income tax and CGT on the basis that they derive income or capital gains from a South African source, unless they can rely on a DTA for protection.

South Africa imposes withholding taxes on dividends, royalties and interest.

Until 31 March 2012, a resident company was subject to secondary tax on companies, a second tier of corporate tax on distributions of profits, at a rate of 10% (STC). The STC was replaced with a dividends tax with effect from 1 April 2012. In contrast to STC, dividends tax is a tax on the shareholder receiving the dividend, although it will be collected by the company declaring the dividend. Dividends tax is imposed at a rate of 15%, but may be reduced to 0% under the Tenth Schedule to the ITA or under a DTA (in the latter case, generally to not lower than 5%).

VAT is levied on both the:

- Supply of goods and services.
- Importation of goods and services.

Persons (regardless of whether they are resident or non-resident) who make taxable supplies in the course of an enterprise conducted wholly or partly in South Africa must register as VAT vendors, provided that the minimum threshold is reached. VAT vendors collect output VAT from their customers and claim credits for input VAT paid by them. The difference is paid to SARS.

VAT is generally levied at a rate of 15% at each stage of the distribution chain, although certain supplies are subject to VAT at a rate of 0% (referred to as zero-rated supplies), while other supplies, such as financial services, are treated as exempt.

A person must register as a VAT vendor if it carries on an enterprise and the total value of taxable supplies during the previous 12 months exceeds ZAR1 million, or will exceed ZAR1 million within the next 12 months.

In May 2019, the South African National Treasury announced the implementation of the new Carbon Tax Act 2019, with effect from 1 June 2019. The Carbon Tax Act imposes a levy on any person who conducts any number of listed Carbon Dioxide producing activities (including several attributable to the extraction an and processing of petroleum products). The implementation of carbon taxation will be done in two phases. The first phase will commence with effect form 1 June 2019 until 31 December 2022, and will provide significant tax-free emission allowances to allow for adjustment to the new regime. The second phase will commence from 1 January 2023 and will last until 2030.

12. Does the government derive any other economic benefits from oil and gas exploration and production?

At present, government participation in exploration and production operations is not legislated, but may be provided for in the granting instrument (that is, an exploration or production right), which can include a provision conferring a right to the state, exercised by the national oil company, to acquire a participating interest in the right. At present, the authors have only seen this being required at production phase. On exercise of this right, the government is not liable for past expenditure but must contribute, in proportion to its participating interest, to production costs incurred after the acquisition of the interest.

The new Petroleum Resources Development Bill may formalise state participation in petroleum rights (*see Question 29, State participation in exploration and production*).

13. What taxes and duties apply on import and export of oil and gas?

Customs duties are payable on imported goods at varying rates.

Value added tax (VAT) is payable on the import of goods and certain services into South Africa.

As a general rule, VAT is imposed at a rate of 15% on the supply of goods and/or provision of services by a registered VAT vendor, or on goods and certain services imported into South Africa. There are certain exemptions from VAT. Some supplies (such as goods and services exported from South Africa) are subject to VAT at 0% (referred to as zero-rated supplies).

TRANSPORTATION BY PIPELINE

14. What regulatory requirements apply to the construction and operation of oil and gas pipelines?

Oil pipelines

The Petroleum Pipelines Act 2003 (PPA) establishes the regulatory framework for petroleum pipelines. The PPA applies to crude oil, any liquid petroleum fuel and any lubricant. Under the PPA, no person can construct or operate a petroleum pipeline, loading facility or storage facility without a licence issued by the National Energy Regulator of South Africa (NERSA).

Gas pipelines

The Gas Act 2001 (Gas Act) establishes the regulatory framework for the piped gas industry. The Act applies to all hydrocarbon gases transported by pipeline and expressly to liquefied petroleum gas (LPG). Under the Gas Act, no person can construct or operate gas transmission, storage, distribution, liquefaction and re-gasification facilities, or convert infrastructure into such facilities, or trade in gas without a licence issued by NERSA.

The draft Gas Amendment Bill 2013 seeks to partially clarify the apparent overlap between the regulation of LPG by excluding from the ambit of the Gas Act LPG that is stored or used within the scope of the Petroleum Products Act 1977 or the Petroleum Pipelines Act 2003 (PPA). It would therefore appear that the legislature intends for LPG to be regulated by the Gas Act only in circumstances where the Petroleum Products Act and PPA do not apply. The draft Gas Amendment Bill was expected to be considered in cabinet before the end of the 2018/19 financial year. However this appears to have been delayed and to date no further progress has been made.

Environmental and land use authorisations and approvals may also be required for the construction and/or operation of a gas pipeline and additional requirements may apply to pipelines associated with upstream operations.

15. Is there a system of third party access to pipelines and other infrastructure?

Under both the Gas Act 2001 (Gas Act) and the Petroleum Pipelines Act 2003 (PPA), the National Energy Regulator of South Africa can impose licence conditions that include that third parties must be given access to pipelines.

Under the PPA, pipeline and loading facility capacity must be shared in proportion to the needs of users and prospective users and within the constraints of the pipeline and loading facility, while uncommitted storage facility capacity must be made available to third parties. Under the Gas Act, third parties must be given access to uncommitted capacity in transmission (bulk) pipelines and storage facilities.

HEALTH, SAFETY AND THE ENVIRONMENT

Health and safety

16. What is the health and safety regime for oil and gas exploration and extraction, and transportation by pipeline?

Exploration

Health and safety at upstream oil facilities is regulated primarily by the Mines Health and Safety Act 1996 (MHSA). This statute is administered by the Chief Inspector of Mines. For offshore installations, the Maritime Occupational Safety Regulations, the Marine Traffic Act 1981 and the Maritime Zones Act 1994 may also be relevant.

The MHSA prescribes general duties in relation to:

- Health and safety.
- Reporting, recording and investigation of incidents.
- Medical surveillance in certain circumstances.
- Fire precautions.
- Operating procedures and qualification requirements to operate certain equipment.

Further, a number of South African National Standards (SANS) codes are incorporated by reference into this legislation. Full compliance with the standards set out in these SANS is required.

Transportation

Health and safety at facilities related to the transportation of petroleum products is regulated primarily by the Occupational Health and Safety Act 1993 (OHSA). The Department of Labour administers the OHSA and its regulations.

The Major Hazard Installation Regulations promulgated under the OHSA apply where the nature of a facility is such that it may pose a risk that could affect the health and safety of employees and the public. The regulations require, among other things, that a risk assessment is undertaken to identify the emergency measures and planning that need to be in place in respect of the relevant installation.

Environmental impact assessments (EIAs)

17. Is an EIA required before extracting or processing onshore or offshore oil and gas?

Until recently, the environmental regulation of petroleum exploitation was addressed in the Mineral and Petroleum Resources Development Act 2002 (MPRDA) and the regulations promulgated under it. For various historical reasons, minerals and petroleum exploitation was subject to a special environmental regime. However, recent amendments to both the National Environmental Management Act 1998 (NEMA) and the MPRDA have brought petroleum within the scope of NEMA.

Exploration and production right applicants must now secure an environmental authorisation as a condition for the grant of the exploration or production right.

The Minister of Environmental Affairs can list activities that cannot commence without an environmental authorisation (*section 24, NEMA*). An environmental authorisation is granted on the basis of an assessment conducted in accordance with the Environmental Impact Assessment Regulations. In December 2014, the Minister of Environmental Affairs published an updated version of the Environmental Impact Assessment Regulations together with updated listing notices, referring to various exploration and production-related activities.

The required EIA encompasses studies and reports evaluating the socio-economic and environmental impacts of the proposed operations. The reports must be subject to at least one round of public participation, with a final report incorporating the comments and concerns of interested and affected parties.

Under this new regime, the Minister of Mineral Resources remains the competent authority to grant environmental authorisations for activities related to exploration and production, while the Minister of Environmental Affairs will serve as the appeal authority.

In June 2015, the Minister of Mineral Resources (as he then was) published Technical Regulations for Petroleum Exploration and Exploitation (Technical Regulations) under the MPRDA, which apply to onshore exploration and production operations (discussed at *Question 2, Opportunities for domestic expansion*). The Technical Regulations attempted to establish comprehensive technical and environmental standards for the conduct of hydraulic fracturing in South Africa. They governed, among other things:

- Well design and construction.
- Well abandonment.
- Drilling fluid management of waste.
- Management of water.
- In July 2019, the Supreme Court of Appeal of South Africa ruled the Technical Regulations had been improperly promulgated as the Minister of Environmental Affairs was solely responsible for publishing regulations intended to regulate environmental concerns, and the publication by the Minister of Mineral Resources was therefore invalid. The Court ordered that the Technical Regulations be set aside, and it is expected that they will be redrafted.

Depending on the nature of the facility, other environmental licences and permits may be required, for example:

- A waste management licence, under National Environmental Management: Waste Act 2008.
- An air quality licence, under the National Environmental Management: Air Quality Act 2004.

Although these are separate statutory permits, the application process has been harmonised with that required for an environmental authorisation under NEMA. Accordingly, these applications will be supported by common studies and reports.

18. What are the different stages of the EIA?

No extraction or processing of oil or gas can commence without an environmental authorisation. The environmental approval process is set out in the:

- National Environmental Management Act 1998.
- Environmental Impact Assessment Regulations 2014 (EIA Regulations).
- Various accompanying listing notices.

Activities listed in Listing Notice 2 of the EIA Regulations include any activity that requires an exploration right as contemplated in section 79 of the Mineral and Petroleum Resources Development Act 2002 (MPRDA) and any activity including the operation of that activity which requires a production right as contemplated in section 83 of the MPRDA. Therefore, the investigation, assessment and communication of the potential impact of these activities must follow the procedure prescribed in regulations 21 to 24 of the EIA Regulations.

Regulations 21 to 24 of the EIA Regulations provide as follows:

- An applicant for an environmental authorisation must submit, within 44 days of receipt of the application by the minister responsible for mineral resources, a scoping report that has been subjected to a public participation process of at least 30 days to that minister.
- The minister must, within 43 days of receipt of a scoping report accept the scoping report, with or without conditions, and advise the applicant to proceed or continue with the tasks contemplated in the plan of study for EIA, or refuse the environmental authorisation.
- The applicant must, within 106 days of the acceptance of the scoping report, submit to the minister an EIA report inclusive of any specialist reports, and an Environmental Management Programme (EMPr), which must have been subjected to a public participation process of at least 30 days. Alternatively, the applicant can submit a notification in writing advising that an EMPr will be submitted within 156 days of such a notice, where significant changes have been made or significant information has been added to the EIA report or EMPr.
- The minister must, within 107 days of receipt of the EIA report and EMPr, grant an environmental authorisation in writing in respect of all or part of the activity applied for, or refuse to grant the authorisation.

Environmental permits

19. Is there a permit regime for environmental damage or emissions produced during the extraction or processing of oil and gas?

The extraction or processing of oil or gas cannot commence without an environmental authorisation (*see Question 17 and Question 18*). As part of the environmental authorisation process, an applicant must submit an Environmental Management Programme that must:

- Provide a description of the impact management outcomes, including management statements, identifying the impacts and risks that need to be avoided, managed and mitigated as identified through the environmental impact assessment process for all phases of the development.
- Provide a description of proposed impact management actions, identifying the manner in which the impact management outcomes will be achieved.

An applicant must also make financial provision for negative environmental impacts (*Environmental Impact Assessment Regulations 2014*).

Finally, the newly implemented Carbon Tax Act 2019, imposes a new levy on any person who conducts any number of listed carbon dioxide producing activities (including several attributable to the extraction and processing of petroleum products). (*See Question 11.*)

Environmental concerns

20. Are there any specific government policies and/or incentives aimed at meeting the environmental concerns associated with the exploration and production of oil and gas?

Wide-scale petroleum exploration has only recently been initiated in South Africa. Accordingly, policy initiatives directed at addressing the special concerns that arise in this area are in the relatively early stages. However, various policy programmes are moving forward.

With regard to offshore petroleum activities, the various interested government departments and the upstream industry are currently co-operating to formulate a plan for joint industry/government emergency response drills (National Oil Spill Contingency Plan), and a Bill has been tabled to govern response measures to oil spills within South African waters (Oil Spill Response Bill).

In addition, a strategic environmental assessment has been undertaken in anticipation of wide-scale shale gas exploration activities in the Karoo basin. The assessment aims, among other things, to "determine sensitivities, vulnerabilities and risks across the study area considering key sustainability objectives" and to "develop policy options and guidelines for site specific assessments in environmental authorisation applications". The assessment was published in November 2016.

It will be increasingly important for government to take an active role in addressing environmental concerns raised in relation to exploration and production as the pace of development in South Africa increases.

Waste

21. What are the regulations on the disposal of waste products resulting from oil or gas extraction or processing?

The National Environmental Management: Waste Act 2008 provides the statutory framework for waste management in South Africa. The Act empowers the Minister of Environmental Affairs to identify "waste management activities" in respect of which a waste management licence must be obtained. The currently applicable list was published in November 2013 and includes activities relating to the storage, treatment and disposal of waste above certain industrial-scale thresholds. The storage of general and hazardous waste in facilities with a capacity to hold in excess of 100 and 80 cubic metres respectively does not require a waste management licence, but is subject to registration and compliance with the national norms and standards for the storage of waste published by the Minister of Environmental Affairs.

If a waste management licence is required, the application must be supported by an environmental impact assessment (EIA) process (or a truncated assessment process referred to as a "basic assessment"). This process is streamlined with any EIA that may be required in respect of a general environmental authorisation or an atmospheric emissions licence.

The Minister of Environmental Affairs has also published the:

- Waste Classification and Management Regulations, which prescribe various measures related to management and record keeping.
- National Waste Information Regulations, which establish reporting requirements in respect of waste.

Flares and vents

22. Are flare and vent regulations in place?

Venting and flaring are not currently subject to regulations. The Technical Regulations for Petroleum Exploration and Exploitation (Technical Regulations) contained several provisions relevant to these processes (some of which were criticised as being overly onerous for producers). These included the requirement that:

- Fluids and natural gas that are recovered during hydraulic fracturing must be routed into prescribed receptacles, unless some acceptable method other than venting could be used for dealing with these substances.
- Flaring can only be used if it can be established that it is not feasible to recover fluid and natural gas in the prescribed manner.
- In such case, a site-specific analysis must be submitted to the Petroleum Agency of South Africa establishing the necessity of flaring.

As the Technical Regulations have been set aside, such provisions are no longer relevant. It remains to be seen whether the regulations drafted to replace the Technical Regulations include similar provisions (*see Question 2, Opportunities for domestic expansion*).

Decommissioning

23. What are the decommissioning obligations and liabilities that arise?

The holder of an exploration or production right must obtain a closure certificate on the lapsing, abandonment or cancellation of the right, the cessation of the operation or in respect of any portion relinquished (*section 43, MPRDA*). An application for a closure certificate must be submitted to the Petroleum Agency of South Africa within 180 days of the lapse, expiry or cancellation of the exploration right.

Decommissioning of an exploration or production operation is also an activity subject to environmental authorisation under the National Environmental Management Act 1998. The environmental assessment process in support of this application must be initiated before the submission of an application for a closure certificate, as there is a streamlined process for consideration of these two applications.

On closure, an exploration or production right holder will be required to execute approved rehabilitation and closure plans.

SALE AND TRADE

24. How is trade in oil and gas usually completed?

There are separate wholesale and consumer markets for producers and suppliers. Manufacturers and wholesalers cannot hold a retail licence except for training purposes, but this does not apply to wholesalers and retailers of liquefied petroleum gas and paraffin (*section 2A(5), PPA*).

In terms of the International Trade and Administration Act 2002, the Minister of Trade and Industry can require the permits to be obtained before the import or export of certain classes of goods. The Minister has identified petroleum products and blending components as a class of goods requiring a permit.

A permit is obtained by making application to the International Trade Administration Commission on the prescribed form. A special requirement in the case of applications relating to the import or export of petroleum products is that the application is accompanied by a recommendation obtained from the Department of Energy. This recommendation is obtained by making an application to the Department of Energy in accordance with the Guidelines governing the recommendations by the Department of Minerals and Energy to the International Trade Administration Commission in respect of the importation and exportation of crude oil, petroleum products and blending components.

In addition, the application must be accompanied by:

- A tax clearance certificate from the South African Revenue Service.
- A copy of the applicant's identity document.
- The full customs tariff heading for the imported goods (this is an eight-digit number).

25. Are oil and gas prices regulated?

In terms of the Gas Act 2001 (Gas Act), the National Energy Regulator of South Africa (NERSA), which is the mandated regulator of the electricity, piped-gas and petroleum pipelines industries, can determine the maximum prices to be charged by individual gas distributors, reticulators and traders. To exercise this power, NERSA must determine that there is inadequate competition in the gas industry.

Piped Gas Regulations have been promulgated by the Minister of Energy to govern the determination of maximum prices. The criterion for maximum price determination is that it must enable the licensee to both:

- Recover all efficient and prudently incurred investment and operational costs.
- Generate a profit commensurate with risk.

The Piped Gas Regulations also require the maximum price to differentiate between classes of customers based on volumes purchased.

The Gas Act prohibits discrimination between customers or classes of customers in relation to access, tariffs, prices, conditions or service, except for objectively justifiable and identifiable differences relating to matters including:

- Quantity.
- Transmission distance.
- Length of contract.
- Load profile.
- Interruptible supply.
- Other distinguishing features approved by NERSA.

The price of petroleum products is similarly regulated by the Minister of Minerals and Energy (as the successor of the powers and functions of the previous Minister of Energy). The Minister of Minerals and Energy can prescribe the price, or a maximum or minimum price, or a maximum and minimum price, at which any petroleum product can be sold or bought (*section 2(1)(c), PPA*).

The retail price of various crude oil products is set by notice in the *Government Gazette*. The price of fuel in particular is set according to a system referred to as the Regulatory Accounting System. It is adjusted on the first Wednesday of every month in accordance with a calculation carried out by the Central Energy Fund on behalf of the Minister of Minerals and Energy. The price reflects both international and domestic elements, specifically the dollar price of the product on world markets and the retail and marketing margins, transport costs and taxes and levies denominated in local currency.

A Draft National Energy Regulator Amendment Bill is due to be considered before the cabinet later in 2019 (although no date has been set for consideration yet). We cannot yet comment on the amendments which may ultimately be promulgated.

ENFORCEMENT OF REGULATION

26. What are the regulator's enforcement powers?

Under the Mineral and Petroleum Resources Development Act 2002 (MPRDA), officials appointed by the Minister of Mineral Resources (now the Minister of Minerals and Energy) can enter and inspect exploration and production operations, on the authority of a warrant issued by a magistrate in circumstances where it is reasonably believed that material (including documents, records, substances and electronic information) may relate to a contravention of the MPRDA, and can confiscate such material.

The Minister of Minerals and Energy can also suspend or cancel a petroleum right or permit in circumstances where the holder has committed a material breach of the provisions of the MPRDA or of the right or permit (*section 47, MPRDA*). The Minister can only exercise this power if he or she has given the holder an opportunity to correct the breach. A fine of up to ZAR500,000 and imprisonment can also be imposed for certain offences under the MPRDA.

With respect to enforcement of environmental compliance, the National Environmental Management Act 1998 (NEMA) provides for the appointment of environmental management inspectors within the Department of Mineral Resources to control compliance with environmental obligations. Environmental management inspectors have particularly wide powers. They can, without a warrant:

- Interrogate persons suspected of contravention of the NEMA or other environmental statutes.
- Collect evidence by copying documents and extracting samples from the site.
- Issue a compliance notice directing specific measures.

Failure to comply with a compliance notice may result in the revocation of the environmental permit or authorisation in respect of which the infraction occurred, and prosecution.

The NEMA also imposes a duty of care in relation to the environment and empowers the Director-General of the Department of Minerals and Energy to direct any person responsible for significant pollution or environmental degradation to take remedial measures within a specified period, failing which the state can execute remediation and recover the costs from the responsible person or entity.

A fine of up to ZAR10 million may be imposed on conviction of an offence under NEMA.

The Mines Health and Safety Act 1996 (MHSA) establishes the office of the Chief Inspector of Mines. Inspectors are empowered to:

- Enter the area of any exploration or production operation.
- Interrogate persons and inspect documents associated with the operations.
- Issue compliance notices where an employer is contravening the provisions of the MHSA.

A fine of up to ZAR3 million may be imposed on conviction of an offence under the MHSA.

In the midstream sector, the National Energy Regulator of South Africa (NERSA) can enforce compliance with applicable laws by service of a compliance notice. Additionally, where a licensee fails to comply with a compliance notice, NERSA can sit as a tribunal to decide the matter, and can impose a penalty or a fine not exceeding ZAR2 million per day for each day on which the contravention or failure to comply continues (*Petroleum Pipelines Act 2003 and Gas Act 2001*).

While the new Petroleum Resources Development Act will replace the MPRDA as the governing legislation under which exploration and production licences are regulated, it is not expected to change the enforcement powers of the relevant authorities.

27. Is there a right of appeal against the regulator's decisions?

The Mineral and Petroleum Resources Development Act 2002 (MPRDA) and the National Environmental Management Act 1998 provide an administrative appeal to the Minister of Mineral Resources (now the Minister of Minerals and Energy) and the Minister of Environmental Affairs (now the Minister of Environment, Forestry and Fisheries) respectively against any decision taken under those statutes, provided that the decision was not taken by the relevant Minister.

An administrative appeal can also be brought before the Chief Inspector of Mines against the decision of an inspector (*Mines Health and Safety Act 1996*).

No appeals are available under the Petroleum Pipelines Act 2003 or the Gas Act 2001.

In addition, an application can be lodged in the high court for the judicial review of an administrative decision taken under any statute under South African common law and in terms of the South African Constitution.

While the new Petroleum Resources Development Act will replace the MPRDA as the governing legislation under which exploration and production licences are regulated, it is not expected to change the applicable appeal process (as currently set out in the MPRDA).

INSURANCE

28. Are there any insurance requirements that must be met?

There are currently no set insurance requirements. However, oil and gas companies must make financial provision for the negative environmental impacts of exploration and production operations. Insurance is a common vehicle used by these companies as part of their mix of products to make adequate financial provision. Significant changes to the Financial Provisioning Regulations published under the National Environmental Management Act 1998 have been included in the forthcoming revised Financial Provisioning Regulations, which will amend the financial vehicles which oil and gas operating companies are permitted to set aside funds in South Africa (*see Question 8, Liability*).

REFORM

29. Are there plans for changes to the legal and regulatory framework?

The Mineral and Petroleum Resources Development Amendment Bill B15 of 2013 (Bill) was tabled in the National Assembly (South Africa's lower house of Parliament) on 21 June 2013. The Bill proposes various amendments to the Mineral and Petroleum Resources Development Act 2002 (MPRDA), which is the primary law governing upstream petroleum activities in South Africa. Following a lengthy and controversial passage through the legislature, the Bill was eventually adopted by both houses of Parliament in March 2014 and thereafter referred to the President for signature.

The major changes to the petroleum regime (as distinct from mining, which is also governed by the MPRDA) relate to state participation in exploration and production.

Former President Jacob Zuma referred the Bill back to the National Assembly in January 2015 on the basis of several constitutional reservations. Under the South African Constitution, the National Assembly was obliged to re-consider the Bill in light of the President's reservations. Following lengthy public consultation, and significant resistance being voiced in respect of certain controversial inclusions in the Bill affecting the mining industry, the decision was taken in later 2018 to remove the Bill from future consideration.

The Department of Minerals and Energy have stated that the oil and gas industry will be better regulated in a new, standalone Act which will separate the regulation of oil and gas from the regulation of mining activities entirely. The new Petroleum Resources Development Act will be administered by the Department of Minerals and Energy, and will retain much of the current regulatory structure contained in the MPRDA, in addition to those amendments in the Bill which had been agreed between stakeholders through the expensive public consultation process held previously.

The Department of Minerals and Energy have set a goal for publication of the new Petroleum Resources Development Act by the end of the 2020 financial year (May 2020). It is hoped that the draft wording will be published for public comment by the end of 2019.

State participation in exploration and production

Under the current regime, the terms of an exploration or production right are negotiated on an individual basis (albeit based on a standard form template) and recorded in a registerable deed (referred to as an exploration or production right).

The standard form template exploration right (and therefore most exploration rights which are granted) include wording which provides the State with a right to receive a carried interest (usually 10%) in the project if it transition from exploration to production phase through the acquisition of a 10% participating interest in the production right. This right is assignable so that it may be exercised by the South African national oil company on behalf of the State.

This convention had been intended to be formalised through the introduction of a provision in the Minerals and Petroleum Resources Development Amendment Bill, which (if passed) will:

- Guarantee a fixed state participation right in new exploration and production rights.
- Provide an entitlement to the State to take up additional participation on commercial terms or through a production sharing agreement.

The withdrawal of the Bill from consideration means that this formalisation has fallen away for now. It remains to be seen whether similar provisions will be included in the new "Petroleum Resources Development Act" providing for fixed state participation.

Participation by historically disadvantaged South Africans (HDSAs)

The proposed amended to the MPRDA contemplated in the Bill also elevates the broad-based socio-economic empowerment Charter (commonly referred to as the Mining Charter) to the status of law by incorporating it into the definition of the MPRDA itself.

The Mining Charter is a transformation framework developed by the Minister of Mineral Resources under section 100 of the MPRDA. It is intended to set the targets and timetable for effecting the entry and active participation of HDSAs (Historically Disadvantaged South Africans, meaning a person disadvantaged by unfair discrimination before 1994 or a company controlled by such a person or persons) into the mining industry, and allow them to benefit from the exploitation of the mining and mineral resources and the beneficiation of these mineral resources. This has taken the form of a target of 26% ownership of mining assets by HDSAs before the year 2014.

Under the current MPRDA, production rights and exploration rights are notionally subject to the Mining Charter, but as the Mining Charter does not include any provision which applies to oil or gas exploration or production, it is not functionally relevant. However, the Minister imposes a separate target of 10% HDSA participation in petroleum assets by means of a term included in the right granted to the holder (*see Question 8, Restrictions*).

Proposed amendments in the Bill had also sought to introduce a new charter to be drafted specifically for the upstream petroleum industry. Now that the Bill has been withdrawn, it remains to be seen whether or to what extent the new Petroleum Resources Development Act provides for mandatory HDSA participation in the oil and gas sector.

Liquid Fuels Charter

Additionally, the Charter for the South African Petroleum and Liquid Fuels Industry on Empowering Historically Disadvantaged South Africans in the petroleum and Liquid Fuels Industry (Liquid Fuels Charter) is in the process of being updated and aligned with the Broad-Based Black Economic Empowerment Act 2003. Once updated, the aligned charter will apply to holders of licences granted under the PPA and the Gas Act, and will therefore apply to parties involved in the construction and operation of oil and gas pipelines.

At this stage, the updated Liquid Fuels Charter has not been published even in draft form, and the authors cannot comment on its provisions other than to note that it is likely that the Charter will impose some mandatory black economic empowerment/participation requirement on holders of applicable licences or permits.

Practical Law Contributor profile

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