

**COMMENTARY ON THE DRAFT GUIDELINE FOR THE COMPILATION OF A MANDATORY
CODE OF PRACTICE FOR THE MITIGATION AND MANAGEMENT OF COVID-19 OUTBREAK
(GN 262 of Government Gazette, No. 43304 of 11 May 2020)**

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1 About the SARChI Chair for Mineral Law in Africa

The SARChI Chair for Mineral Law in Africa (MLiA) was launched in 2016 as part of the South African Research Chairs Initiative (SARChI) established by the Department of Science and Technology (DST) and the National Research Foundation (NRF). The DST and NRF are jointly our main funders. We are hosted by the University of Cape Town within the Faculty of Law, Department of Private Law. Further information about MLiA, its objectives, projects and activities can be accessed from its official website.¹ Our research focus is generally on mineral law and policy development in South Africa and the rest of the African continent. Among the projects currently undertaken by MLiA is several doctoral and masters research studies that features various aspects relating to mining and land use. These include mining law and policy development, abandonment of landownership, intersections of land and mineral resource reforms and other related topics. It is in this context that we would like to make a submission on the Draft Guideline for the Compilation of a Mandatory Code of Practice for the Mitigation and Management of Covid-19 Outbreak [GN 262 of GG 43304 of 11 May 2020].

2 Context

On 11 May 2020, the Chief Inspector of Mines (CIOM) published the Draft Guideline for the Compilation of a Mandatory Code of Practice for the Mitigation and Management of Covid-19 Outbreak [GN 262 of GG 43304 of 11 May 2020] (the 'Guideline').² The Guideline seeks to facilitate the management and mitigation of the effect of the outbreak of Covid-19 on the health and safety of employees in the mining industry.³ The CIOM further invited interested persons to submit written comments on the Draft Guideline by 14 May 2020. This commentary is submitted in response to that invitation and it is hoped that our views will be given adequate and fair consideration by the honourable Inspectorate.

We can only bemoan a very short notice for the submission of public comments, i.e. 11-14 May 2020. While we understand the source of this urgency to be an order of the Labour Court that was delivered on 1 May 2020,⁴ we are at the same time of the view that three days is insufficient for adequate and rigorous interrogation of the proposed measures in the Draft Guideline. This carries a major risk of defeating the whole purpose of public participation which has to be meaningful and extensive.

¹ This can be accessed at (accessed 24 February 2020).

² GN 262 of GG 43304 of 11 May 2020.

³ And as defined in the Mine Health and Safety Act 29 of 1996.

⁴ *Association of Mineworkers and Construction Union v Minister of Mineral Resources and Energy and Others* (2020) Labour Court: Case number: J427/2020.



The commentary is organised into two sections, one outlining a detailed background to the current developments with an understanding that something can be learnt from the past experience; and the other section reviewing the fitness for purpose of the actual Draft Guideline.

3 Background

Having first been reported in Wuhan, China in December 2019, the Covid-19 outbreak has since developed into a global pandemic.⁵ The Department of Health announced the first reported case in South Africa on 5 March 2020.⁶ South Africa entered a nationwide lockdown on 27 March 2020,⁷ which required mines, besides those producing coal for Eskom, to be put under care and maintenance for the initial period of the lockdown.⁸ Lockdown restrictions were eased from 1 May 2020 under the Government's tiered lockdown approach, beginning at level 4.⁹ Level 4 permitted the resumption of mining activities to a limited extent, i.e. with 50 per cent reduced capacity or production.¹⁰

Further Historical Context

When dealing with an uncharted terrain such as Covid-19, it is necessary to reflect on the history of the South African mining industry and the past experiences that are closely related to the current pandemic. We encourage this with the understanding that history can lend us one or two lessons on how to approach the current pandemic, particularly when engaging with mine health and safety. The history of the South African mining industry, characterised by an exploitative migrant labour system, is inseparably bound up with the nation's history of disease, most notably with HIV/AIDS.¹¹ However,

⁵ World Health Organisation "Rolling Updates on Coronavirus Disease (COVID-19)" (11-05-2020) *World Health Organisation* <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>> (accessed 13-05-2020).

⁶ S Shoba & D Erasmus "As First Coronavirus Case Confirmed, South Africa Told to Keep Calm" (06-03-2020) *Daily Maverick* <<https://www.dailymaverick.co.za/article/2020-03-06-as-first-coronavirus-case-confirmed-south-africa-told-to-keep-calm/>> (accessed 13-05-2020).

⁷ G Quintal "SA Going into National Lockdown to Combat Covid-19" (23-03-2020) *Business Day* <<https://www.businesslive.co.za/bd/national/2020-03-23-sa-going-into-national-lockdown-to-combat-covid-19/>> (accessed 23-03-2020).

⁸ T Heiberg "South Africa to Allow Mines to Operate at 50% Capacity" (16-04-2020) *Reuters* <<https://www.reuters.com/article/us-health-coronavirus-safrica-mining/south-africa-to-allow-mines-to-operate-at-50-capacity-during-lockdown-idUSKBN21Y2LI>> (accessed 16-04-2020).

⁹ Business Insider SA "Lockdown Level 4: What Will Now be Allowed" (30-04-2020) *Business Insider South Africa* <<https://www.businessinsider.co.za/lockdown-level-4-what-is-now-allowed-2020-4/>> (accessed 30-04-2020).

¹⁰ GN 480 in GG 43258 of 29-04-2020.

¹¹ H Phillips *Plague, Pox and Pandemics* (2012) 117ff.



Covid-19 poses a unique threat experienced for the first time in the industry since the Spanish flu pandemic of 1918.¹²

One characteristic setting Covid-19 apart from other diseases in the contemporary mining industry is the rapid rate at which it can spread.¹³ Of particular concern from a historical point of view in the midst of the raging Covid-19 pandemic is the manner in which mineworkers have been treated as expendable in the past in pursuit of profits. The lack of regard for the safety and wellbeing of mineworkers stems to the very beginnings of mining practice in South Africa, when there was an outbreak of smallpox in Kimberly in 1883-4.¹⁴ This outbreak was characterised by a deliberate attempt by 'powerful players' in the mining industry to cover up the outbreak, with a view to avoiding the closure of Kimberly's diamond fields.¹⁵ As a result of this cover-up, around 700 people in a town accounting for 20 000 of the overall population died.¹⁶

While it is not contended that any such conspiracy may be perpetuated by mining companies today, it does underline the need for absolute transparency in the context of a pandemic in the mining industry. This is of particular urgency in the South African context. Among the most vulnerable to the wrath of Covid-19 are the immunocompromised, not just the elderly as per the medical experts' advice.¹⁷ Due to HIV and tuberculosis, it is an unfortunate reality that the immunocompromised are a significant proportion of the nation's population.¹⁸ Furthermore, mineworkers in South Africa are a high-risk group for contracting immunocompromising conditions such as HIV due to the nature of the migrant-labour system and congested working spaces where communicable diseases such as Covid-19 can easily spread.¹⁹

¹² H Phillips *'Black October': The Impact of the Spanish Influenza Epidemic of 1918 on South Africa* PhD thesis University of Cape Town (1984) Chapters 1 and 3.

¹³ M Mendelson "South Africa's COVID-19 Testing Strategy Needs Urgent Fixing: Here's How to Do It" (08-05-2020) *The Conversation* <<https://theconversation.com/south-africas-covid-19-testing-strategy-needs-urgent-fixing-heres-how-to-do-it-138225>> (accessed 13-05-2020).

¹⁴ H Phillips *Plague, Pox and Pandemics* (2012) 32-33.

¹⁵ R Viljoen "The 'Smallpox War' on the Kimberley Diamonds Fields in the mid-1880s" (2003) 35 *Kleio* 5 9.

¹⁶ Phillips *Plague* 33; Viljoen (2003) *Kleio* 17.

¹⁷ G Aviles "As Coronavirus Spreads, Immunocompromised Young People Ask Peers to Keep Them in Mind" (16-03-2020) *NBC News* <<https://www.nbcnews.com/news/us-news/coronavirus-spreads-immunocompromised-young-people-ask-peers-keep-them-mind-n1160381>> (accessed 13-05-2020).

¹⁸ Bloomberg "South Africa's High AIDS and Tuberculosis Numbers under the Spotlight as Coronavirus Spreads" (23-03-2020) *BusinessTech* < <https://businesstech.co.za/news/technology/383929/south-africas-high-aids-and-tuberculosis-numbers-under-the-spotlight-as-coronavirus-spreads/>> (accessed 13-05-2020).

¹⁹ D Stuckler, S Steele, M Lurie & S Basu "Dying for Gold': The Effects of Mineral Mining on HIV, Tuberculosis, Silicosis and Occupational Diseases in Southern Africa" (2013) 43 *Int J Health Serv* 639.



With the historical context in mind, the proactive steps taken by the Chief Inspector of Mines to publish guidelines for the drafting and implementation of codes of practice to protect the health of mine employees and related groups are commended. In particular, in view of the context set out above, the provision is made for adequate and rigorous reporting and monitoring, a policy aspect of critical importance. Further commentary on the guidelines follows below.

4 Comments on the Draft Guideline, 2020

For an ease of reference, the comments on the Draft Guideline will follow the chronological order as presented.

COMMENT 1: Clause 2 - Legal Status of the Guideline and Codes of Practice (COP)

First, clause 2.1. of the Draft Guideline states that “*this COP must comply with any relevant guidelines and instructions issued by the CIOM [Section 9(3) MHSA], including regulations and guidelines from Disaster Management Act (Act no 57 of 2002) and any other relevant guidance with regards to COVID-19.*” With the understanding that this Guideline will not operate in silos despite being tailored specifically for Covid-19, and instead will become part of the bigger regulatory framework of the mining industry, we suggest the inclusion of the words “**and any other applicable legislation**” after the “Disaster Management Act (Act no 57 of 2002)”. This other legislation may include, for example, the Labour Relations Act (Act 66 of 1995) which will become relevant and applicable in the event that the mine wants to effect mass retrenchments due to the impact of Covid-19. The suggestion made cannot be said to be covered by the subsequent words, i.e. “*any other relevant guidance with regards to COVID-19*” since the mining regulatory framework is not entirely focused on Covid-19 alone but on other important aspects that cannot be ruled out.

Secondly, clause 2.1. of the Draft Guideline provides further that the “*failure by the employer to prepare or implement a COP in compliance with this guideline will be a contravention, a criminal offence and a breach of the MHSA.*” There is tautology in the phrasing of the clause, i.e. failure to comply means contravention and thus it is unnecessary to have two in one command/provision. Therefore, we suggest rephrasing of the clause to read as follows: “**Failure by the employer to prepare and (not or) implement a COP in compliance with this guideline constitutes a criminal offence punishable in terms of the relevant legislation.**” The relevant legislation here may mean the Criminal Procedure Act (Act 51 of 1977) and any other law prescribing penalties in the mining industry.

COMMENT 2: Clause 3 – Objectives of the Guideline



Clause 3 of the Draft Guideline provides that “*the objective of this guideline is to assist employers to establish and maintain a COVID-19 mitigation and management programme at mines, which if properly implemented and complied with, would assist the health and safety of the mine’s employees.*” In our view, the current stipulation of the objective (which “is to [merely] assist”) is an understatement and lacks a peremptory voice. This may give the employers an inapt impression and sort of a leeway to disregard the Guideline. Therefore, we suggest the objective to be restated as follows: “**The objective of this guideline is to provide for compulsory and non-negotiable measures to guide employers in establishing and maintaining a COVID-19 mitigation and management programme in the mining industry. The guideline, if properly implemented and complied with, would safeguard and ensure the health and safety of the mine’s employees.**”

COMMENT 3: Clause 4 – Definitions

The Guideline defines the word “**Exposure**” to mean “the subjection of a person to an **airborne pollutant** in the course of employment through any route of entry (e.g. inhalation, ingestion, skin contact or absorption). First, we suggest this to be termed “**Risk Exposure**” as opposed to just ‘exposure’. Second, we are of the view that the scope of the definition is problematically constrained and generalised, not tailored specifically to fit the context of Covid-19 impact management which is the core of the Guideline. Therefore, we suggest that the scope of subjecting a person to risk exposure be expanded to include subjecting the employee to any condition or space where the contraction of Covid-19 is inevitable. The CloM, in conjunction with the MHSC, must possess the discretion in this regard i.e. whether a particular condition exposes the employees to the risk of contracting Covid-19.

COMMENT 4: Clause 5 – Scope of the Guideline

First, clause 5.1 of the Draft Guideline provides that the “guideline applies to all mines or part/s thereof, mine employees, irrespective of employment category, and contract employees in the SAMI that might be exposed to COVID-19 in the performance of their duties.” We suggest the inclusion of another category, namely “**any other person coming into contact with the mine employees**”, for example, an (essential) service provider to the mine.

Second, clause 5.3 of the Draft Guideline stipulates the other laws, policies and/or guidelines which must be read in conjunction with it where applicable. This list is, however, closed. We therefore suggest an inclusion of clause 5.3.5 to provide for an open-ended phrase. This should read as: “**any other relevant and applicable law, policy and/or regulation**”.



COMMENT 5: Clause 6 – The Task Team

Clause 6 of the Draft Guideline provides for the composition and/or members of the Task Team. While there might be good and compelling reasons for the establishment of this Team, we are of the view that the Terms of Reference (if any) guiding its operations should be made available to the public and interested parties for scrutiny. In fact, it must have been attached to this Guideline as one of the annexures. The Terms of Reference here we mean and should include, but not limited to:

- The mention of the authority or legal status and enabling provisions for the establishment of the Task Team;
- The key mandate of the Task Team and the clearly defined interests it seeks to advocate for and advance;
- The guiding criteria used in the selection of the Task Team members (we should not be under any illusion that the mining sector authority is not susceptible/prone to bureaucratic tendencies of imposing ‘leadership’ on those they claim to be protecting, in this case the employees and rightly, the mining communities);
- Organised responsibility division among members of the Task Team;
- The rationale behind further specification of three categories on the Task Team composition, i.e. State; Organised Labour and Employers. Whilst here, an immediate question is: what about the relevant trade unions; representatives of affected mining communities; experts in the mining industry policy development and practice and occupational health experts, to mention a few?

COMMENT 6: Part C Clause 3: Status of the Mandatory Code of Practice

There is quite a number of improvisations and leeways provided to the employer under Clause 3 of Part C. We are of the view that this should not be left unchecked. We suggest an inclusion of qualifying provision stating that the Code of Practice shall only take effect after being approved by the Chief Inspector of Mines in conjunction with the Task Team or so as may be delegated.

COMMENT 7: Clause 8.1: Risk Assessment

We commend an extensive and detailed nature of clause 8.1 of the Draft Guideline. However, we are of the view that few additional aspects need to be included for more clarity and specificity. These include details as to:

- How to assess a Covid-19 risk exposure in a mining environment and surroundings (including in the mining communities)?
- When and how often should a Covid-19 risk assessment be carried out?
- How to control and mitigate Covid-19 risk exposure?
- How to develop and coordinate the implementation of Covid-19 response and control measures as an employer?
- How to ensure that the controls put in place remain effective?

COMMENT 8: Clause 8.3.2: Covid-19 Mitigation and Management Programme

Clause 8.3.2 of the Draft Guideline provides for a number of considerations in the development of the COVID-19 Code of Practice. While the list seem generous, particularly in clause 8.3.2.2, however, one missing point is that the employer must also take into account the interests and safety of the affected mining community, as order by the Labour Court of South Africa on 1 May 2020.²⁰

COMMENT 9: Clause 8.4: Monitoring and Reporting

Clause 8.4 of the Draft Guideline spells out the obligations of the employer. However, we note with discontent and dissatisfaction that throughout the Guideline, what fails to come out clearly is the co-ordinated role (if any) of the Task Team envisaged in clause 6. This failure, even under monitoring and reporting section, where we believe its role would be befitting, is problematic and needs to be revised. It takes us back to our earlier comment 5 as to what key mandate this Task Team seeks to serve and how.

Clause 8.4.5 of the Draft Guideline goes further to provide for the appointment of a Covid-19 Compliance Officer with the necessary powers to provide oversight on the implementation of this Guideline. The good about this provision is that it is mindful of the need to maintain check insofar as compliance is concerned. However, the latter good is outweighed by the bad in that the Guideline fails to provide guidance on the oversight over the work of the Compliance Officer. We therefore suggest that the Guideline create a collaborative relationship between the Task Team and this Compliance Officer.

²⁰ See court order number 3, 3.3.

COMMENT 10: Part D Clause 1: Implementation Plan

Clause 1 of Part D imposes a duty on the employer to develop an implementation plan for its Code of Practice. The Clause has two sub-clauses, i.e. 1.1 and 1.2. We suggest the inclusion of additional sub-clause 1.3 with a qualifying provision stating that the implementation plan is subject to the scrutiny and approval by the Chief Inspector of Mines in conjunction with the Task Team or so as may be delegated.

COMMENT 11: Part D Clause 3: Access to the Code of Practice and Related Documents

Clause 3 of Part D of the Draft Guideline makes provision for access to the Code of Practice and related documents by affected parties. Sub-clause 3.2 states that “a registered trade union with members at the mine or where there is no such union, a health and safety representative on the mine, or, if there is no health and safety representative, an employee representing the employees on the mine, must be provided with a copy on written request to the manager.” It is not clear which manager is being referred to here and there is neither a definition of this ‘manager’ in the definitional clause. There are lot of ‘managers’ at mines. Therefore, a revision of this provision is absolutely necessary to enhance clarity and precision.

5 Concluding Remarks

Whilst we have outlined several aspects which we believe requires further revision, we are of the view that this version of the Draft Guideline reflects a substantive improvement and proactive response to curb further impact of Covid-19 in the sector.

We welcome any initiative aimed at improving aspects of South Africa’s mining practice, policy and legal framework. For that reason, we remain committed to continue participating in this process. We do not serve any client, nor have any private interests or hidden agenda that we seek to advance through this submission. We avail our research capacity at the disposal of the Department of Mineral Resources & Energy in general and the Chief Inspector of Mine in particular for further consultation in all the remaining stages towards the final consolidation of the Draft Guideline.

