

Revised Construction Sector Code

By Erika Holmes

The following legal opinion regarding the scope of the Revised Construction Sector Code was obtained by Aspasa on behalf of its members.

On 26 August 2016, Shepstone & Wylie Attorneys sent written submissions to the dti on behalf of Aspasa and Sarma, requesting that members of those associations whose annual revenue is more than 50% derived from quarrying and crushing stone aggregate/gravel as well as building sand be exempted from the scope of the draft aligned Construction Sector Code ('CSC'), as those entities were already being measured in terms of the Mining Charter.

The Mining Charter applies to all entities that require mining rights to conduct their businesses. A mining right is required to 'mine' as defined in the Minerals and Petroleum Resources Development Act (MPRDA), which essentially

means any excavation of the earth, whether underground or open working or otherwise, or any extraction of minerals from the earth.

The draft of the CSC dated June 2017 has a definition of 'construction sector' that includes all enterprises that derive more than 50% of their annual revenue from 'construction-related activities', which in turn is defined as the activities conducted by contractors, built environment professionals, and 'construction material suppliers' (enterprises that conduct the following activities: manufacturing, creation, or supply of building material and equipment used in construction, for example cement, concrete, bricks, electrical equipment, and steel).

The definition of 'construction sector' goes on to state that 'being registered with any of the following bodies does not automatically render the enterprise to be part of the construction sector: CIDB, NHBRC, CETA. The key consideration is whether or not the majority of its annual revenue is derived from construction-related activities.'

Paragraph 3 states that the CSC is applicable to the B-BBEE compliance measurement of all entities that fall within the construction sector. 'Where a Measured Entity operates in more than one sector or subsector (for example Contractor or BEP), whether it requires a single entity verification or a consolidated verification for it as a group; it will be required to report in terms of: a) The scorecard for the sector or subsector in which the majority of its core activities (measured in terms of annual revenue) are located; and b) Should the majority of its core activities be in the construction field, the measured entity may be evaluated in terms of the Amended CSC should these activities conform to those described in the definitions of

a Contractor or BEP in these codes.'

The paragraph goes on to state: 'For the avoidance of doubt, Construction Material Suppliers are measurable against the thresholds, targets, weightings, and methodology applicable to Contractors as per the Construction Sector Code scorecards, except where the Measured Entity can prove compulsory legislative compliance and licensing in another sector.'

In my view, this means that where an entity is obliged by a statute to become compliant with the requirements of another sector or to obtain a compulsory licence in another sector, then that other sector's Code will prevail.

As set out above, the Minerals and Petroleum Resources Development Act requires any entity that is engaged in any mining (that is, excavation of the earth, whether underground or open working or otherwise, or any extraction of minerals from the earth) to acquire a mining right to do so.

In my view, that would place entities that are engaged in quarrying outside the scope of the CSC and within the scope of the Mining Charter. ■



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ABOUT THE AUTHOR

Erika Holmes is a partner in the Commercial & Corporate Law Department at Shepstone & Wylie Attorneys (Durban), and has a BCom and an LLB (cum laude) degree from the University of KwaZulu-Natal. Erika specialises in commercial law and has a wide range of experience in corporate transactions and structures, including extensive expertise in broad-based black economic empowerment transactions and structures.