



the federation for a sustainable environment

(Reg. No. 2007/003002/08)
NPO NUMBER 062986-NPO
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FOR ATTENTION:

The Minister of Mineral Resources and Energy
The Honourable Mr S.G. Mantashe

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DILOKONG CHROME MINE

REQUEST FOR THE ENFORCEMENT OF THE POLLUTER PAYS PRINCIPLE

1. The matter pertains to the Dilokong Chrome Mine (Pty) Ltd (DCM). The DCM in 2008 sunk a 6m by 2m dual decline shaft (TMT Shaft), developed the underground decline shafts over a distance of approximately 700 metres and in the process established a waste rock dump of between 250 000 and 275 000 tons as well as ancillary surface infrastructure on Portion 2 of the farm Mooihoek, 255.
2. On the **30th of September 2019**, the FSE in terms of the provisions of Section 31 of the National Environmental Management Act (NEMA), 107 of 1998, notified the Department of Mineral Resources and Energy, the Department of Human Settlements, Water and Sanitation and the Department of Environment, Forestry and Fisheries (DEFF) (Organs of State), as the Organs of State responsible for protecting any aspect of the environment of a perceived environmental risk and unlawful and/or illegal conduct as it pertains to DCM's TMT Shaft and Waste Dump on Portion 2 of the farm Mooihoek, 255 and requested the above-mentioned Organs of State to investigate this alleged risk and threat to the environment, water resources and communities adjacent to the DCM.

(ANNEXURE "A")

3. On the **2nd of November 2019**, the Minister of Environmental Affairs, Forestry and Fisheries, Ms Creecy responded and advised that this matter falls within the jurisdiction of the Department of Mineral Resources, and that in terms of Section 31BB of the NEMA, the duty to respond to the FSE's complaint rests with the Environmental Mineral Resource Inspectors (EMRI) and that Environmental Management Inspectors of the Department of Environmental Affairs may only become involved in the investigation once the procedure of Section 31D (4) – (9) have been followed.

(ANNEXURE "B")

4. On the **2nd of December, 2019** the Regional Manager: Limpopo Region, Mr Azwihangwisi Mulaudzi responded as follows:

4.1 DCM *"has an approved Environmental Management Programme that permits them to conduct all the activities which are of serious concern as raised by the FSE"*;

4.2 The DMR is in possession of the financial provision of the DCM for the rehabilitation of negative environmental impacts caused by its mining related activities.

4.3 DCM has an issued mining right.

4.4 Any third party *"who is taking the mining right for Dilokong mine will also be taking all the supporting documents to the annexure to the mining right."*

(ANNEXURE "C")

5. On the **26th of January, 2020**, the FSE submitted a request to you, honourable Minister and to Mr Azwihangwisi Mulaudzi requesting whether the response by Mr Mulaudzi, the Regional Manager: Limpopo Region, was on your behalf.

(ANNEXURE “D” & “D” (i))

6. The FSE received no response notwithstanding the fact that the documents were delivered both electronically and to the DMR’s physical address. (Reference: PNA 24098650334 & PNA 24069456981.)
7. In order to ripen the FSE’s judgement regarding the response by the Regional Manager: Limpopo Region, the FSE on the **26th of January 2020**, in terms of the provisions of the Promotion of Access to Information Act, 2 of 2000 requested the following documents from the DMR’s Information Officer, namely Advocate Thabo Mokoena:
 - 7.1 A copy of the DCM’s Mining Right
 - 7.2 A copy of the DCM’s Environmental Management Programme Report
 - 7.3 A copy of the DCM’s Rehabilitation Plan and Closure Plan pertaining to Portion 2 of the farm Mooihoek, 225
 - 7.4 A copy of the DCM’s Environmental Authorisation in respect of the sinking of the TMT Shaft and the establishment of the Waste Dump in terms of the MPRDA and the NEMA
 - 7.5 A copy of the DCM’s Waste Management Licence in terms of the NEM: Waste Act, 59 of 2008
 - 7.6 A copy of the DCM’s Financial Provisions for rehabilitation in terms of the National Environmental Management Act (107/1998): Regulations pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations.

(ANNEXURE “E”)

8. At the time of writing, the FSE’s request for information in terms of the provisions of PAIA has neither been acknowledged nor responded to.
9. In the absence of the above-mentioned responses to the FSE’s requests, the FSE solicited legal opinion on this matter and was advised that the DCM was required, in terms of sections 5(4) and 5A of the MPRDA, to be in possession of a mining right (and environmental management programme) for Portion 2 of the farm Mooihoek¹ in order to have sunk the TMT Shaft, establish the waste rock dump and related infrastructure during 2008 – 2010.

¹ Section 5(4) of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) prescribed inter alia that “no person may...mine...or commence with any work incidental thereto or any area without – (a) an approved environmental management programme ... (b) a mining right...; and (c) notifying and consulting with the landowner or lawful occupier of the land in question.”

The above section of the MPRDA has since been repealed and replaced by section 5A of the MPRDA which now similarly provides that “no person may...mine...or commence with any work incidental thereto or any area without – (a) an environmental authorisation (b) a mining right...; and (c) giving the landowner or lawful occupier of the land in question at least 21 days written notice.”

The requirements in subparagraphs (a) to (c) of the repealed section 5(4) of the MPRDA (and now of section 5A) are cumulative.

10. The FSE was furthermore advised that the DCM was/is not in possession of a mining right of Portion 2 of the farm Mooihoek contrary to the information we received from the Regional Manager of the DMR (Limpopo Region). The FSE was informed that Umnotho weSizwe Resources (Pty) has since 2009 held the mining right of Portion 2 of the farm Mooihoek (MPT 36/2009 MR) and prior to that, it held a prospecting right of Portion 2 of the farm Mooihoek. Umnotho weSizwe has never ceded, transferred, let or sublet the mining right to DCM.

(ANNEXURE “F”)

11. Since the DCM was never the holder of the mining right for Portion 2 of the farm Mooihoek, it cannot cede, transfer, let or sublet the mining right for the above area to its successor-in-title, Cheetah Chrome South Africa (Pty) Ltd (Cheetah), and transfer its environmental liabilities to Cheetah.

12. It follows hence that the DCM remains responsible and liable for its illegal activities and the environmental degradation in terms of section 28 of the National Environmental Management Act (107 of 1998) (NEMA), namely that *“every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring.”*

13. Section 34 of NEMA makes provision for both ‘firms’ (including companies and partnerships) and their ‘directors’ (including board members, executive committees or other managing bodies or companies or members of close corporations or of partnerships) to be held liable, in their personal capacities, for environmental crimes. This personal liability also applies to managers, agents or employees who have done or omitted to do an allocated task, while acting on behalf of their employer.

14. Of relevance in this regard are the recommendations² of the Parliamentary Portfolio Committee on Mineral Resources to the DMR pertaining to companies, such as DCM that are in business rescue.

14.1 *“Changes to the mining law were made by Parliament after 2002 to ensure that in mining, as elsewhere, the polluter must pay”.*

14.2 *“There is a lack of clarity on the rules for the Department of Mineral Resources when it comes to Business Rescue Practitioners. It seems there is non-application of the law resulting in a free for all.”*

14.3 *“There is a huge regulatory gap regarding the financial provision of environmental rehabilitation of a mine during the process of business rescue”.*

² 22 November 2018: ANNOUNCEMENTS, TABLINGS AND COMMITTEE REPORTS NO 174–2018. No 174–2018, FIFTH SESSION, PARLIAMENT. Pages 39 – 52.

14.4 “The DMR should further explore the regulatory gaps resulting from the business rescue process and come up with regulations that will ensure full environmental compliance during the period when a mine is experiencing financial distress”.

15. Of relevance too are the “Proposed Regulations pertaining to Financial Provisioning for the Rehabilitation and Remediation of Environmental Damage caused by Reconnaissance, Prospecting, Exploration, Mining or Production Operations” dated 17 May 2019 of the NEMA, namely:

“6(7) *The Chief Executive Officer of the applicant, holder, or person appointed in a similar position, or, where liquidation or business rescue proceedings have been initiated, the liquidator or **business rescue administrator of the company, is responsible for implementing the plans and report contemplated in subregulation (2) and signing off all documentation submitted to the Minister.***

Subregulation (2) reads:

“6(2) *An applicant or holder must determine the financial provision through a detailed itemisation of all activities and costs, based on actual market related rates for **implementing the activities for-***

(a) *Annual rehabilitation, determined in the annual rehabilitation plan conforming to the content requirements of Appendix 1;*

(b) *Final rehabilitation, decommissioning and mine closure, determined in the final rehabilitation, decommissioning and mine closure plan, apportioned per year and conforming to the content requirements of Appendix 2; and*

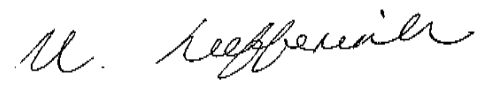
(c) ***Remediation and management of residual and latent environmental impacts, including the ongoing pumping and treatment of polluted or extraneous water, determined in an environmental risk assessment report conforming to the content requirements of Appendix 3.***

(Emphasis added.)

16. In view of the aforesaid, we hereby call upon you, the honourable Minister of Mineral Resources and the Regional Manager of the DMR (Limpopo Region) to direct the DCM to rehabilitate the environmental degradation it caused as a result of its illegal activities and to make the area safe. The rehabilitation objectives must include *inter alia* the backfilling of the dual inclined shaft, the removal of the waste rock dump and the rehabilitation of the footprint to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development.

17. We respectfully, albeit urgently, request a response within 14 (fourteen) days. In the absence of which we shall be compelled to initiate the procedure provided for in section 31D(4) – (9) of the NEMA.

Yours respectfully,

A handwritten signature in black ink, appearing to read 'M. Liefferink', written in a cursive style.

Mariette Liefferink.

CEO: FEDERATION FOR A SUSTAINABLE ENVIRONMENT.

16 APRIL 2020.