



the federation for a sustainable environment

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FOR URGENT ATTENTION

The Minister of Mineral Resources and Energy
The Honourable Mr S. G. Mantashe
Care of:
Ms Princess Duma
princess.duma@energy.gov.za

The Director General for Mineral Resources
The Honourable Adv T. Mokoena
Care of:
Mamabefu Modipa
Ministry
Email : Mamabefu.Modipa@dmr.gov.za

The Regional Manager
Limpopo Region
Department of Mineral Resources
Email: Tebogo.mangaba@dmr.gov.za

Copied to:
The Minister of Environment, Forestry and Fisheries
The Honourable Ms Barbara Creecy
Care of:
Mr F. Shaik
fshaik@environment.gov.za

And copied to:
Mr Ishaam Abader
Mr Grant Walters

The Minister of Human Settlements, Water and Sanitation
The Honourable Ms L. N. Sisulu

Care of:
Mr Francois Hugo
Francois.hugo@dhs.gov.za

And copied to:
Adv Anil Singh
Mr Marius Keet
Mr Bashan Govender

Dear Honourable Minister Mantashe, Adv Mokoena and the Regional Manager (Limpopo Region),

DILOKONG CHROME MINE (PTY) LTD: REQUEST FOR INVESTIGATION

The following request is submitted on behalf of the Federation for Sustainable Environment (“FSE”). The FSE is a federation of community based civil society organisations committed to the realisation of the constitutional right to an environment that is not harmful to health or well-being, and to having the environment sustainably managed and protected for future generations. Their mission is specifically focussed on addressing the adverse impacts of mining and industrial activities on the lives and livelihoods of vulnerable and disadvantaged communities who live and work near South Africa’s mines and industries.

We hereby, in terms of the provisions of Section 31 of the NEMA¹, wish to notify 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 environment² **of a perceived 1) environmental risk and 2) unlawful and/or illegal conduct as it pertains to Dilokong Chrome Mine (Pty) Ltd’s (“DCM”) TMT Shaft and Waste Dump on Portion 2 of the farm Mooihoek, 255 and hereby respectfully, albeit urgently request the above-mentioned Organs of State to investigate this alleged risk³ and threat to the environment, water resources and communities adjacent to DCM.**

In notifying the above-mentioned Organs of State and requesting an investigation, the FSE is acting not in the pursuance of narrow self-interest but out of a concern for the public interest and in the interest of protecting the environment⁴.

According to our understanding DCM is/was neither the holder of the mining right of Portion 2 of the farm Mooihoek nor the owner of the land. **Notwithstanding these facts, DCM sunk the TMT Shaft in 2008 and established a Waste Dump on Portion 2 of the farm Mooihoek, 255. DCM furthermore established its Waste Dump on a water course.**

In substantiation, please see the subjoined Google image.

¹ Section 31 of the NEMA, subsection (4); 5(b)(i) and (ii).

² Section 31 of the NEMA, subsection (5)(a)(ii).

³ Section 31 of the NEMA, subsection 5(b)(i).

⁴ Section 32 of the NEMA, subsection (1)(d) and (e).



Image 1

Arrow on top indicates the Waste Dump while the bottom arrow indicates the water course

It is public knowledge that DCM applied for business rescue in 2016⁵ and that, in pursuance of the recommendations of the Business Rescue Plan, Cheetah Chrome South Africa (Pty) Ltd (“**Cheetah**”) submitted a bid to acquire the business of DCM⁶. It is furthermore public knowledge that the bid was successful and that DCM and Cheetah submitted an application in terms of section 11 of the MPRDA to the Minister of the Minister of Mineral Resources for the transferring of the mining right⁷.

While we recognise the fact that parties may contractually decide to transfer environmental liabilities and that the Minister may agree to the "transfer" such environmental liabilities and responsibilities (i.e. environmental liabilities caused lawfully and/or legally subsequent to an approved MP) in deciding the section 11 application, the provision relating to the transfer of

⁵ <https://www.asametals.co.za/business-rescue/dcm-business-rescue.html> (accessed on 22 September 2019)

⁷ <https://www.engineeringnews.co.za/article/commission-approves-cheetah-chromes-acquisition-of-dcm-2019-07-25> (accessed on 22 September 2019).

liability under the MPRDA does not however, imply that environmental liabilities caused illegally and/or unlawfully or otherwise can be transferred by a party contract out of its statutory responsibilities. In any event, the transfer of the mining right will have no effect in terms of transferring environmental liabilities associated with the TMT Shaft and Waste Dump (statutory or contractual) given this infrastructure is not contemplated in the mining right. DCM will remain the responsible company who can be held solely liable if no or ineffective measures are undertaken by the Cheetah. It is therefore clear that the duty to take reasonable measures cannot be contractually or statutorily assigned and DCM remains responsible and thus liable, even if they are not the owner of the land, in control of the land or have a right to use the land since DCM is the juristic person who causes, has caused or is likely to cause pollution and degradation⁸.

No provision is made in the MPRDA for public participation in the event of an application for the transfer of a mining right or the transfer of environmental liabilities. Notwithstanding, Sections 28(4) and (12) of the NEMA allows “*any person*” to request the Director-General or the provincial head of department, after consultation with any other organ of state to direct any person who fails to take the measures required under subsection (1) of Section 28 (duty of care and remediation of environmental damage) to investigate, evaluate and assess the impact of specific activities and report thereon; commence taking specific reasonable measures before a given date; diligently continue with those measures; and complete them before a specified reasonable date. In terms of the above-mentioned provisions, **the FSE hereby respectfully, albeit urgently requests the Organs of State to investigate whether the DCM:**

- 1. Is/was in possession of a Mining Right, which entitled it to sink a shaft and establish a Waste Dump on Portion 2 of the farm Mooihoek, 225?**
- 2. Is/was in possession of an Environmental Management Programme Report, a Rehabilitation Plan and a Closure Plan pertaining to Portion 2 of the farm Mooihoek, 225?**
- 3. Was granted an 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?**
- 4. Is/was in possession of a Waste Management Licence in terms of the NEM: Waste Act, 59 of 2008?⁹**
- 5. Is/was in possession of a Water Use Licence, which allowed it to dispose of waste in a manner which may detrimentally impact on a water resource¹⁰?**
- 6. Has made sufficient financial provision for the rehabilitation and remediation of the TMT Shaft and Waste Dump?**
- 7. Is in the position to transfer the TWT Shaft and Waste Dump to Cheetah or any other prospective purchaser if it is not the lawful owner of the mining right?**

Our request is motivated by the recent findings and recommendations of the Parliamentary Portfolio Committee on Mineral Resources, dated the 22nd of November 2018 and titled

⁸ NEMA Section 28(1) and (2); NEMA Section 34(7)

⁹ “Waste” in terms of the NEM: Waste Act includes waste generated by the mining sector.

¹⁰ Section 21(h) of the NWA.

“ANNOUNCEMENTS, TABLINGS AND COMMITTEE REPORTS NO 174—2018. No 174—2018, FIFTH SESSION, PARLIAMENT” (Pages 39 – 52). (ANNEXURE “A”) and in particular the following findings and recommendations:

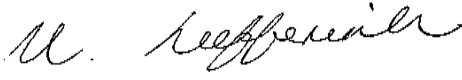
- *“The DMR has failed to implement effectively and carry out the intentions of Parliament to ensure that all mines rehabilitate the damage they cause.*
- *“Changes to the mining law were made by Parliament after 2002 to ensure that in mining, as elsewhere, the polluter must pay.*
- *“The new laws have not proven effective in avoiding this situation where the state and the taxpayer still ends up paying for the environmental harm caused by mining.*
- *“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.*
- *“There is a huge regulatory gap regarding the financial provision of environmental rehabilitation of a mine during the process of business rescue.*
- *“There is a lack of standardization by the DMR on how to relax environmental obligations of a mine during the business rescue stage.*
- *“The DMR must actively ensure that the licensing of mines goes with responsibility and accountability.*
- *“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.*
- *“The DMR should design and implement standardized approaches when dealing with the relaxation of environmental financial provisions for mines that are undergoing business rescue process.”*

And, since the FSE is a member of the Section 11 Advisory Committee of the South African Human Rights Commission (SAHRC) pertaining to the SAHRC’s National Hearing on the Underlying Socio-Economic Challenges facing Mining-Affected Communities in South Africa (ANNEXURE “B”), our concerns are actuated by the findings and directives of the SAHRC namely:

- The SAHRC found that the DMR has not taken adequate steps to secure financial provision for rehabilitating damage to the environment and water resources.
- Licences should not be granted where long term sustainable land use cannot be guaranteed.
- Overall the mining sector is riddled with challenges related to land, housing, water, the environment and the absence of sufficient participation mechanisms and access to information.
- Non-compliance, the failure to monitor compliance, poor enforcement, and a severe lack of coordination amongst especially government stakeholders exacerbate the socio-economic challenges faced by mining-affected communities.

We express the sincere hope that our request for an investigation and subsequent enforcement, if necessary, will not be abortive.

Respectfully yours,

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

Mariette Liefferink.

CEO: FEDERATION FOR A SUSTAINABLE ENVIROMENT.

30 September 2019.