Facilitating dereliction? How the South African legal regulatory framework enables mining companies to circumvent closure duties

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Abstract

This paper outlines the legal provisions that constitute the regulated model for mine closure in South Africa. This model, which is largely focused on the management of environmental impacts, incorporates the standard that the land should be returned to its natural or a predetermined state, or to a use that conforms to the generally accepted principle of sustainable development. It is further constituted by the regulatory techniques of forward planning for mine closure, financial provision for rehabilitation, flexible operational monitoring and oversight, state-approved final closure, and transfer of environmental risks and liabilities. Despite the apparent rigour of these provisions, the rules on the transfer of mining rights and the winding up of companies, and the failure to accommodate disruptive social issues upon closure seriously undermine the regulated closure model. These deficiencies are outlined with reference to current law and to the situation that recently unfolded regarding the winding up of the Blyvooruitzicht Gold Mining Company.

1 Introduction

The attempt to establish and enforce standards to order and ameliorate the enduring effects of a mine presence in a particular locality has for long been a concern of the South African state. A trajectory of gradual elaboration and strengthening of the regulatory frame is evident, from the sparse provision for closure issues in the Mines and Works Act No. 12 of 1911, to the far more rigorous obligations imposed by the Mineral and Petroleum Resources Development Act No. 28 of 2002 (MPRDA) as amended.

Despite these regulatory advances, there are still a number of legal design flaws that enable mining companies to evade costly closure obligations. These are flaws in the powers, duties, liabilities and rights of key agents in the regulated closure model and the manner in which these intersect with (i) the transfer of mining rights, and (ii) the winding up of mining companies. The paper elucidates these flaws with reference to the regulated model for mine closure in South Africa, and illustrates how these flaws have contributed to the recent chaotic situation that emerged around the winding up of the Blyvooruitzicht Gold Mining Company (BGMC), one of the oldest gold mines in Carletonville, South Africa. Although there are also massive flaws in mine closure arising from problems in enforcement such as lack of state responsiveness, political interference and weak state institutional capacity these are not considered further for purposes of this paper.

The paper argues that while the current regulated model for mine closure in the MPRDA creates an impression of orderly closure, the right to transfer mining rights allows for the obfuscation of ownership and liability, and facilitates the mad scramble for ever more precarious mining proponents willing to take on an increasingly wasted resource. The winding up of a mining company, as presently governed by chapter 14 of the Companies Act 61 of 1972, seemingly exists in another regulatory universe, with no articulation to the regulated closure model and as a result inadequate protection of the financial provision for environmental rehabilitation. The winding up process also generates a liminal regulatory space in which all manner of nebulous social practices appear to abound, including asset stripping of the mine. Most importantly, however, the current exclusion of social issues in the regulated model for mine closure is highly problematic as it is not capable of holding the complex social issues arising at the end of the life of the mine.

The research reported in this paper is based on documentary research incorporating legislation, court judgments, court papers, company financial statements and reports, and media reports.

2 The current regulated model for mine closure in South Africa

The earliest laws dealing with "mines and works" in South Africa regulated the protection and preservation of the surface of mines, the treatment of mine wastewater, and the combustion of coal waste heaps. Over time the state's regulatory power was extended to issues such as the making safe of undermined ground and dangerous tailings facilities, the abandonment of activities in or at mines or works, and the restoration of land on which activities connected with mines or works had been performed. Rehabilitation, however, only featured as a central policy objective of the mining legal framework by the time of the Minerals Act 50 of 1991. Later amendments to this particular legislation included provisions on the issuing of closure certificates, and the rehabilitation of the surface of the land. This had to be done in accordance with an approved environmental management programme (EMP) and as an integral part of the operations.

The current legal authorities governing the mine closure process are the MPRDA as amended by Act 49 of 2008 and the MPRDA regulations (GNR 527 *Government Gazette* 26275 of 23 April 2004). A second amendment Act (B 15B–2013) incorporating some changes to the closure model was passed by both houses of Parliament in early 2014, but the President has not yet signed it into law. From 8 December 2014 the legal authority for a number of the substantive powers, duties, liabilities and rights pertaining to mine closure will shift to the National Environmental Management Act 107 of 1998 (NEMA), and where relevant the discussion below will accordingly reference the incoming NEMA provisions as well. A number of provisions in other environmental statutes, particularly the NEMA and the National Water Act 36 of 1998 (NWA), may also be applied to ground civil and criminal liability post-closure but for purposes of this paper it is not necessary to consider them further.

The MPRDA aims to govern the variety of situations in which mining operations cease in a manner that ensures orderly closure and minimization of state liability for abandoned and derelict mines. Its provisions cover both so-called "new" and "old order" mining rights (i.e. mines authorised prior to the MRPDA coming into effect) as well as a process for conversion of the latter to the former. For both kinds of right, the MPRDA constitutes a regulatory model for mine closure based on action undertaken by a prospecting or mining rights applicant, and later "holder", under the regulatory watch of the state. State approval marks the start and end of the process: In legal technical terms, the mine closure process commences with the applicant's preparation of an EMP prior to authorization, continues through the operational phase, and concludes with the issuing of a closure certificate by the minister of mineral resources. The model is framed by standards describing the quality of mine rehabilitation and is constituted by five key regulatory techniques, namely (i) forward planning for mine closure; (ii) financial provision for rehabilitation; (iii) flexible monitoring and oversight during the operational phase; (iv) state-approved final closure; and (v) transfer of environmental risks and liabilities. These framing standards and regulatory techniques are elaborated upon below.

2.1 Mine closure standard

In any regulatory model, specification of the standard to which mine rehabilitation initiatives must aspire is a critical determinant of the cost of the work and thereby the amount of financial provision for closure that will be required (Miller 2005). Standards that require land to be returned to its pre-mining condition, or to a state that supports a pre-mining use, are frequently viewed as unrealistic and unachievable, and there is a preference for generally applicable standards hedged in with qualifications of practicability such as returning mine sites and affected areas "to viable and, wherever practicable, self-sustaining ecosystems compatible with a healthy environment and with human activities" (Miller, 2005: 10). Even in such a generally applicable standard, the emphasis falls more on the state of the non-human environment – on land, land uses and ecosystems – than on dealing with social issues that may arise upon closure.

In South Africa, the statutory standard for mine closure is focused on the non-human environment: The holder of a prospecting or mining right "must as far as it is reasonably practicable, rehabilitate the environment affected by the prospecting or mining operations to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development" (s 38(1)(d) MPRDA, to be replaced by s 24N7(e) of the NEMA on 8 December 2014). The use of the conjunction "or" in this provision further allows for considerable latitude: Either the environment must be rehabilitated to a "natural or predetermined state" *or* to a land use conforming to the "generally accepted principle of sustainable development". Given that the predetermined state (as determined by baseline studies undertaken for the preparation of the EMP) could be an environmentally degraded one, the recourse to an alternative standard invoking sustainable development theoretically allows for land use post-closure to be improved. The sustainable development discourse, with its emphasis on the interlinked pillars of economy, society and the environment may also allow for the more detailed articulation of standards to govern "social closure". On the other hand, this discourse is so amorphous and wide ranging, that it could be used to justify virtually any post-closure land use having a marginal economic or social benefit but not offsetting environmental loss or dealing with the most critical social issues.

The closest the MPRDA legal framework comes to establishing a frame for closure on social issues is through the processes governing the social and labour plan. An applicant must submit a social and labour plan together with his or her application for a mining right (regulation 42(1)). In addition to other information, the social and labour plan must detail the manner in which the applicant intends to manage downscaling and retrenchment when closure of the mine is certain (regulation 46(d)). The focus of this aspect of the social and labour plan is predominantly on job security and it does not otherwise link up with the regulatory techniques for closure on environmental issues detailed below.

2.2 Forward planning for mine closure

The law requires applicants for prospecting and mining rights and various other forms of mining authorisation, to undertake rigorous forward planning for closure. This essentially means that the mine must be planned with closure in mind and planning relating to closure must continue throughout the life of the operation (regulation 56).

The key statutory provisions institutionalising forward planning for mine closure are currently s 38(1)(b) and s 39 of the MPRDA (to be replaced by s 38A of the MPRDA and s 24(1) read with s 24N(1A) and 24N(7)(b) of the NEMA from 8 December 2014), which require an applicant to consider, investigate, assess and communicate the impact of the planned prospecting or mining on the environment, and to submit the prescribed EMP. The legal obligations relating to the EMP coalesce around the standard requirements of an environmental impact assessment procedure; i.e. undertaking a public participation process, establishing baseline information on the affected environment; investigating and assessing the impact of proposed prospecting and mining operations on the environment, socio-economic conditions and cultural heritage; and identifying the manner in which processes causing pollution or ecological degradation can be avoided or mitigated. Again, while the regulations reference the need to investigate the impacts of the operation on socio-economic conditions, the focus falls predominantly on environmental impacts.

The MRPDA regulations require that objectives and plans relating to mine closure must be included in the EMP. The EMP must explicitly identify mine closure objectives and proposed closure costs (regulation 61). Regulation 62 goes on to state that a "closure plan", detailing environmental risks, decommissioning of each prospecting and mining component, and details of expected long-term management and maintenance of high risk environmental impacts forms part of the EMP. The closure plan essentially serves as a living document, both shaping and responding to the ongoing flexible monitoring and oversight of mine closure during the operational phase. Because the closure plan is a part of the EMP, it is also subject to the ministerial power to amend the EMP from time to time, and non-compliance with its provisions may be visited with criminal liability. It is currently a criminal offence for the holder of a prospecting or mining right to fail to manage all environmental impacts in accordance with the EMP and as an integral part of the prospecting or mining operation (s 38(1)(c) MPRDA).

Although the MPRDA regulations will shortly be repealed, new regulations giving effect to the obligation to obtain an environmental authorisation in terms of the NEMA will almost certainly incorporate the regulatory technique of forward planning for mine closure (see s 24N(2)(iv) and (v) NEMA).

The EMP, including its closure components, is the principle document upon which the director-general of the department of mineral resources, acting under delegated authority, decides whether the prospecting or mining will result in "unacceptable" pollution, degradation or damage to the environment (s 17(1)(c) and 23(1)(d) MPRDA). From the start, therefore, the state is complicit in whatever has, or has not been proposed as part of mine closure.

In the case of old order rights, any EMP approved in terms of the previously applicable Minerals Act 50 of 1991 remains in force, subject to the minister's power to direct that the EMP be amended to bring it into line with the requirements of the MPRDA (item 10, Schedule II, MPRDA). Old order prospecting and mining rights may only be converted to new order rights under the MPRDA if the holders have an approved EMP (item 6(3)(d) and 7(3)(d), Schedule II, MPRDA).

2.3 Financial provision for mine closure

Requiring some form of financial provision for management of environmental impacts upon mine closure is a common regulatory technique. Internationally, forms of financial provision range from soft measures such as balance sheet checks and corporate guarantees to hard measures such as a letter of credit, cash bonds or trust funds (Miller, 2005). South African law requires hard forms of financial assurance, being trust funds specifically established for rehabilitation purposes, a financial guarantee from a South African registered bank, a cash deposit into an account specified by the director-general, or any other method the director-general may determine (s 41(1) of the MPRDA read together with regulation 53(1), to be replaced by s 24P of the NEMA from 8 December 2014). There are departmental guidelines for some of these forms of financial provision. For example, in the case of trust funds the department of mineral resources has a Standard Trust Deed that is tweaked for application to different trust funds (Van Zyl et al. 2012). There is currently no official guide on the quantification of social closure costs, although some large mining houses have done work in this area (De Beers 2008–2012, Anglo American 2013) along with the Centre for Sustainability of Mining and Industry.

The quantum of the financial provision must include a detailed itemization of all actual costs required for premature closure (incorporating rehabilitation of the surface area; prevention and management of pollution of the atmosphere, soil and water; and the prevention of acid mine drainage); decommissioning and final closure; and the post-closure management of residual and latent environmental impacts (regulation 54). The Department of Minerals and Energy's *Guideline Document for the Evaluation of the Quantum of Closure-Related Financial Provision Provided by a Mine* (2005) provides further guidance on how various closure components should be identified and quantified having regard to both the risk class of the mineral and the sensitivity of the area in which mining takes place. These guidelines, which deal only with environmental aspects, have been critiqued on the basis that they do not even provide adequately for this limited form of rehabilitation. For example, in the case of water management, they require quantification of only two to three years post-closure management (see Van Zyl et al. 2012).

The prescribed financial provision must be "made"; i.e. actually paid over into a trust fund or an account or confirmed through the submission of a financial guarantee, *before* the EMP can be approved (s 41(1) MPRDA). If the minister is not satisfied with the assessment of the financial provision he may appoint an independent assessor to review the applicant's submissions (s 41(4) MPRDA).

The holder of the right must assess his or her environmental liability on an annual basis and increase the financial provision to the satisfaction of the minister (s 41(3) MPRDA). The obligation to "maintain and retain" the financial provision remains in force until the minister issues a closure certificate (s 41(5) MPRDA). The language used in these legislative provisions, however, does not make it clear that where the annual assessment of environmental liability indicates an increase in the level of financial provision, this must be "made" in the sense of topping up the trust fund, case deposit or financial guarantee. As a result of

this ambiguity, increases in the financial provision exist as an accounting entry. This state of affairs may have been intended on the part of the legislature, as these hard forms of financial provision tie up capital. However, this manner of "setting aside" funds for rehabilitation offers little protection when winding-up procedures of a mining company are initiated, as detailed further in section 3.2. Section 24P of the NEMA, which will replace s 41 on 7 December 2014, states that the Insolvency Act 24 of 1936 does not apply to any form of financial provision for rehabilitation. However, this overlooks the fact that the primary statutory authority bearing upon the allocation of funds upon a company's demise is not the Insolvency Act (which applies in a supplementary capacity), but still Chapter 14 of the Companies Act, 1973.

2.4 Flexible monitoring and oversight

After the forward planning for mine closure has been completed, and the financial provision made, a long period of flexible monitoring and oversight ensues during the operational phase. The holder of the right has a duty to manage all impacts in accordance with the EMP and as an integral part of the prospecting or mining operation (s 38(1)(c) MPRDA). The holder is under a legal obligation to conduct monitoring on a continuous basis, undertake performance assessments of the EMP, and compile and submit performance assessment reports to the minister (regulation 55). These reports inform the annual assessment of environmental liability and the holder's ongoing assessment of the adequacy of the financial provision.

During this period, the state assumes an oversight role, checking the performance assessments and annual reviews of the financial provision. The state has a range of powers at its disposal to deal with situations where impacts and associated preventive and mitigatory actions depart too extensively from the EMP, or where the holder fails to comply with the EMP or effectively manage environmental damage, pollution or ecological degradation. At any time after he has approved the EMP for example, the minister may amend this document, including the closure plan. In contrast to the public participation and consultation processes that apply during the initial formulation of the EMP, the minister need only consult with the holder of the right concerned (s 39(6) MPRDA, to be replaced by s 24N(6) NEMA). The minister may also use part or all of the financial provision if the holder fails to manage or rehabilitate any negative impact on the environment (s 41(2) MPRDA as well as s 24P(2) NEMA) and is empowered to direct and if necessary undertake urgent remedial measures, recovering the costs thereof from the holder concerned (s 45 MPRDA).

2.5 State-approved final closure

The next phase of the regulated mine closure model is initiated by the materialisation of any one of the following four scenarios: (i) the lapsing, abandonment or cancellation of the right; (ii) cessation of the prospecting or mining operation; (iii) relinquishment of any portion of the prospecting of the land to which a right relates; or (iv) completion of the prescribed closure plan (s 43(3) MPRDA). These closure-initiating scenarios, all of which may present interpretive difficulties (what, for example, constitutes "cessation" of operations, what constitutes "abandonment"; etc), trigger the need for the holder of a right to apply for a closure certificate.

Within 180 days of any of these scenarios materialising, the rights holder must apply for a closure certificate (s 43(4) MPRDA read with regulation 57), submitting the closure plan as developed throughout the lifecycle of the mine; the final performance assessment of the EMP (regulation 55(8)); and the environmental risk report outlined in regulation 60. This documentation must essentially prove that the requirements of relevant legislation have been complied with, that the closure objectives have been met, and that all residual environmental impacts arising from the operation have been identified, and their severity and probability assessed. The holder must also outline what management measures will be implemented to manage risks regarded as significant. The duty to apply for a closure certificate also applies to the holders of old order prospecting or mining rights but only in the situation of cessation of operations (item 10(4), Schedule II, MPRDA).

The closure certificate is issued by the minister of minerals after the chief inspector of mines and each government department charged with the administration of any law relating to the environment have confirmed in writing that legal provisions pertaining to health and safety, management of pollution to water resources, the pumping and treatment of extraneous water and (in future) compliance with the conditions of the environmental authorisation, have been addressed (s 43(5) MPRDA). The primary legal significance of the closure certificate is that it absolves the rights holder from further liability for environmental damage, pollution, ecological degradation, and (since 7 June 2013), the pumping and treatment of extraneous water (s 43(1) MPRDA). However, the second MPRDA amendment Act incorporates a new s 43(1A), which states that *despite* the issue of a closure certificate, the holder of a right or previous owner of works "remains liable for any latent or residual environmental liability, pollution, ecological degradation, [and] the pumping and treatment of extraneous water which may become known in the future". This amendment, together with statutory duties of care in s 28 of the NEMA and s 19 of the NWA, imply that closure and rehabilitation are continuing rather than once-off activities. The minister may return the holder's financial provision but may also retain any portion thereof for latent and residual safety, health or environmental impacts that may only become known in the future (s 43(6) MPRDA).

One of the weaknesses that the first MPRDA amendment Act attempted to address, was that the initial formulation of s 43(1) applied only to "[t]he holder of a prospecting right, mining right, retention permit or mining permit". On 7 June 2013 this was changed to include "the previous holder of an old order right or previous owner of works that has ceased to exist". By effecting this amendment, the state clearly aimed to apply closure obligations to the holders of unconverted old order rights as well as any "previous owner of works that has ceased to exist". It if not clear from the latter formulation, however, whether the lack of existence applies to the works, or to the previous owner. It also assumes the continued existence of a corporate entity as a juristic person.

2.6 Transfer of environmental risks and liabilities

The final regulatory technique that stitches the mine closure model together is the notion of transferring environmental risks and liabilities to a competent third party. This is a matter that lies in the discretion of the holder of the right (including previous owners of old order rights) and the minister of minerals: The holder of the right must first apply for the transfer, and the minister may then approve it subject to the third party meeting prescribed standards of qualification (s 43(2) MPRDA). The transfer relates to environmental responsibilities and liabilities as specified in the EMP, including the closure plan (regulation 58(2)). The regulations further specify the range of expertise, resources and experience a person to whom environmental risks and liabilities are transferred must possess. These include, for instance, expertise in the fields of integrated risk assessment, management and financing; financial resources sufficient to meet the obligations transferred; and direct access to insurance products and alternative risk financing, amongst others (regulation 59).

2.7 Strengths of the regulated closure model

The regulatory model for mine closure in South Africa appears to be comprehensive and fairly rigorous. At least insofar as environmental impacts are concerned it presents a veneer of order. Notwithstanding certain interpretive difficulties, the law sets a standard; entrenches forward planning for mine closure based on the scientifically defensible process of environmental impact assessment; requires hard forms of financial provision that must actually be provided before the right is effective; requires closure planning to continue during the operational phase; establishes a closure process sealed with the imprimatur of the state; and specifies that environmental risks and responsibilities may only be transferred to persons having the requisite level of competence.

The rigor of the closure model is a façade, however, and in practice there are a variety of loopholes to exploit. In the following section the paper outlines how the holder of a mining right may avoid the closure

process through the transfer of rights, and how closure requirements may be ignored in the winding up of mining companies.

3 Legal loopholes in the regulated closure model

3.1 Transfer of mining rights

In South Africa it is customary for as many as three mining companies to operate, consecutively, on the same site. Whilst very large companies mine the most high value ores, smaller companies take over as the production value of the ore drops (Godrey et al. 2007). How is this succession of operations structured legally? Does each company have to apply for a right anew, or can rights be transferred? If so, how does this affect closure obligations?

While previous mining legislation prohibited the transfer or encumbrance of a prospecting permit or mining authorization (s 13 Minerals Act 1991), the MPRDA allows for this, subject to the written consent of the minister of minerals. A prospecting right, mining right, interest in any such right, or a controlling interest in a company or close corporation may be ceded, transferred, let, sublet, assigned or alienated provided the requisite consent is obtained (s 11(1) MPRDA). As the law currently stands, a change in the controlling interest of a listed company is exempt from the requirement of ministerial consent, but this will change if an amendment introduced by Act 49 of 2008 comes into effect. The MPRDA states that the minister must grant consent for the transfer of a right or controlling interest if the cessionary, transferee, lessee; etc "is capable of carrying out and complying with the obligations and the terms and conditions of the right in question" and if the requirements for the granting of the prospecting or mining right in the first instance are satisfied; i.e. that the prospecting or mining will not result in "unacceptable pollution, ecological degradation or damage to the environment" (s 11(2) MPRDA).

This provision in effect creates a market for prospecting and mining rights, allowing mining companies to legally structure operational arrangements between themselves in different ways. Clearly this may allow for efficiency gains. It also, however, allows the bigger and more well-resourced mining companies to circumvent the need to obtain a closure certificate or to apply for the transfer of environmental risks and liabilities. There is no indication in s 11 of the MPRDA that s 43 obligations are triggered when a transfer takes place. Further, the obligations outlined in s 43, which trigger the need to apply for a closure certificate, do not apply mainly because there is no cessation of the prospecting or mining operation.

One may argue that the criteria governing the granting of ministerial consent are sufficient to ensure that the person taking up the right, or assuming the controlling interest in an unlisted company or closed corporation has the requisite expertise, resources and experience to comply with the closure obligations set out in the EMP. In exercising this discretion, however, the only quality fettering the minister's decision is that the person should be "capable" and there is no explicit requirement that the more detailed qualifications in regulation 59 would apply. Everything therefore rests on the integrity of the minister's decision (or of the official to which the task is delegated). The ambiguous meaning of "capable" would make this decision difficult to set aside on judicial review.

More importantly, however, *liability* for pollution, ecological degradation, the pumping and treatment of extraneous water, and latent and residual impacts, as well as the obligation to apply for a closure certificate, vests in the *last* holder of the right, in all likelihood the least well-resourced and most precarious corporate entity. This "pass-the-parcel" approach to the custodianship of the closure plan, where the "gift" ends up in the hands of the weakest, seriously undermines the value and integrity of the forward planning approach to mine closure. Where the last link in the chain of mining companies operating a site then fails to apply for a closure certificate, it also undermines the rule of law.

In addition to legally transferring a prospecting or mining right with written ministerial consent, listed mining companies currently have the option of exiting a liability escalating venture by changing the controlling interest of the corporate entity holding the right. There is no state oversight of this process at present.

3.2 Winding up of mining companies

The second major loophole in the regulated closure model arises from the lack of articulation between the closure requirements in the MPRDA and the process for winding up companies as set out in chapter 14 of the Companies Act, 1973.

Essentially, chapter 14 establishes a process whereby insolvent companies are placed under the custodianship of a liquidator who manages the fair and equitable allocation of the company's property amongst its various creditors. Various safeguards are built into this process to ensure that interested parties are made aware of an application to initiate the winding-up of a company; that reasons justifying the postponement or dismissal of the application for winding-up are considered; and that creditors are allowed to consider the company's statement of affairs and prove their claims against the company. The winding-up process commences with a court granting a provisional liquidation order and appointing one or more liquidators who assume custody of the company's affairs. The process culminates in the liquidator lodging a liquidation and distribution account with the Master of the High Court specifying how the company's remaining assets must be applied in (i) payment of costs, charges, and expenses incurred in the winding-up process; and (ii) payment of the claims of creditors in a manner that approximates as far as possible the allocation of assets in terms of the law of insolvency. After the winding up is complete the liquidator sends a certificate to the Companies Commission which allows for the company to be dissolved and deregistered, thus ending its existence as a juristic person and it capacity to bear legal rights and obligations.

From the perspective of compliance with closure obligations, the winding up procedure as it is currently configured is highly problematic for a number of reasons. Having preceded both the Minerals Act 1991 and the MPRDA, chapter 14 places no specific obligation on the court to determine whether a company applying for a provisional liquidation order has applied for a closure certificate, ensured the transfer of environmental liabilities, or actually topped up any shortfall of funds in the chosen vehicle for financial provision. This lack of specificity is exacerbated by the narrow notice requirements, as chapter 14 requires only that employees, trade unions and SARS should be notified of a company's intention to initiate winding up proceedings (s 346A Companies Act, 1971). Government departments charged with the custodianship of mineral resources or the protection of the environment are not required to be notified and in practice are frequently caught on the back foot, becoming aware of a company's pending liquidation after a winding-up order has already been granted by a court. Although notice of a provisional winding-up order is required to be published in the *Government Gazette*, capacity constraints are such that it is unlikely such departments will become aware of the application in time to participate in the court proceedings or later in the creditors' meetings. Whether they would even be able to "represent" the financial provision for environmental rehabilitation at the creditors' meetings is open to debate.

Secondly, the duties and potential liability of the liquidator during the liminal phase between the granting of the provisional and final winding-up orders are unclear, as Stander (2012) has observed. It is uncertain, for instance, whether the liquidator is obliged to apply for a closure certificate where the company itself has failed to do so, or whether the liquidator(s) would be responsible for environmental damage occurring during the liquidation phase.

Thirdly, it is not clear whether the financial provision for rehabilitation already "made" would be regarded as an asset of the company available for distribution to the creditors. In practice, the protection afforded to the financial provision would probably depend on its form. In the case of trust property, for example, s 12 of the Trust Property Control Act provides that trust property shall not form part of the personal estate of the trustee, except insofar as the trust *beneficiary* is entitled to the trust property. However in terms of the Standard Trust Deed used by the DMR for financial provision for rehabilitation, the trust *is* established for the benefit of the beneficiary, which when read with other clauses, clearly means the mining company responsible for carrying out rehabilitation and preventing and controlling pollution at its operations. Given

this it would be possible to argue that protections afforded by trust legislation do not apply. Similarly, cash deposited into an account designated by the director-general could be regarded as an "asset" in the liquidation process.

Next, in the (likely) event of a shortfall in funds (i.e where environmental liabilities have been accounted for but funds have not actually been transferred to the vehicle for financial provision), there is no guidance on how such claim could be proved at creditors meetings. It is doubtful whether the financial provision for rehabilitation would rank as either a "secured" or a "preferent" creditor, as these terms are currently defined in the Insolvency Act (Van Zyl et al. 2012) The department of mineral resources (or other state department or civil society actor) would thus have to fight with other concurrent creditors for the spoils of assets remaining after these two creditor categories have been satisfied.

The public interest in rehabilitation, specifically to ensure that the state and communities do not assume a disproportionate share of the environmental risks, should however be enough to justify the pre-liquidation settlement of the financial provision for environmental rehabilitation; i.e. it should be part of the court order granting provisional liquidation. However there is no clear obligation in law vesting in mining companies to do this. The Standard Trust Deed used by the department of mineral resources states that should a beneficiary go into liquidation prior to fulfilling its statutory environmental obligations it must not earlier than three months, and not later than one month *prior* to taking any steps terminating mining operations or initiating winding up proceedings, have final estimates prepared of the probable costs of compliance with outstanding environmental statutory obligations, to be certified by the regional manager (clause 17.1, Standard Trust Deed). If, on or after the date of termination of mining activities, the total amount estimated for outstanding environmental obligations exceeds the amount standing to the credit of the beneficiary in the trust's account, the beneficiary "shall forthwith pay to the Trust the shortfall" (clause 17.2, Standard Trust Deed). However, the only consequence of non-compliance with this clause (and other clauses) of the trust deed is that it allows the Commissioner of SARS to apply certain tax penalties.

Finally, one of the most serious consequences of the winding up procedure is that the company ceases to exist as a legal person. The environmental obligations specified in the MPRDA are linked to the "holder" of a prospecting or mining right, and this in turn is defined with reference to a "person". If no "person" legally exists these obligations by extension cannot be enforced. Amendment Act 49 of 2008 attempted to circumvent this by specifying in its amendment of s 43 that the obligation to apply for a closure certificate extends to "the previous holder of an old order right or previous owner of works that has ceased to exist". However, the formulation "previous owner of works that has ceased to exist", while laudable in its intention, cannot on its own resuscitate a dissolved company. How can obligations be enforced against an "owner" that is distinguished from other holders by non-existence? The amendment would have done better to refer to the "previous shareholder or shareholders of a juristic person that has ceased to exist".

The following section illustrates how these design flaws in the MPRDA closure model featured in the closure of the Blyvooruitzicht mine, Carletonville.

4 Case study: Closure of the Blyvooruitzicht mine, Carletonville

The Blyvooruitzicht Gold Mining Company (BGMC) was floated in 1937 as a subsidiary of West Witwatersrand Areas Limited (WWAL), which had been incorporated in 1932 to prove and develop a mining field on the Far West Rand (Walker, 1950). A listed company, the BGMC was the product of an agreement between WWAL and The Central Mining and Investment Corporation and of the five subsidaries initiated by WWAL to exploit the riches of the West Wits line, it was one of the first to be brought into production, in 1942 (Walker, 1950). Some seven years later the Carbon Leader reef underlying the mining area of the company was described as "phenomenally rich" and "practically one hundred per cent payable" (Walker, 1950). Blyvooruitzicht was thus undoutedly an "outstanding mine" that "more than justified the optimism of the pioneers of the Far West Rand" (Walker, 1950). This opinion stood the test of time with the Blyvooruitzicht operations eventually yielding 1, 102 238 kg of gold, silver, uranium and other mineral commodities (Council of Geosciences, n.d.).

In 1997, DRD Gold Limited (DRD) acquired the majority share-holding in the BGMC and took over the Blyvooruitzicht operations (which had since the mid-1990s included operations on the adjacent Doornfontein mine). In order to comply with the provisions of the Minerals Act, 1991 the BGMC obtained a financial guarantee from Standard Corporate and Merchant Bank in the amount of R10 000, 00 for the execution of the EMP as it was then formulated. However the BGMC's mineral authorization under the Minerals Act would come to be classified as an "old order right" upon the commencement of the MPRDA in May 2004. In order to comply with the requirements for the conversion of old to new order rights, the company compiled a revised EMP for the Blyvooruitzicht/Doornfontein complex in 2007.

The revised EMP indicated that the operating parameters of the mine would include underground mining, re-mining of certain tailings dams, and re-mining of rock dumps. The planned life of the mine was until 2027, dependent on profitability (DRD Gold 2007). In line with regulation 56, the EMP included a conceptual closure plan, and mongst other closure objectives, it was stated that the BGMC would ensure that the ongoing mining project as well as historic activities subject to concurrent rehabilitation would not be a danger to public or animal health and safety, nor a source of unmanaged or unmitigated pollution. The site would be left ecologically and geophysically stable and would not pose an economic, social or environmental liability to the local community and the state now or in the future (DRD Gold 2007).

The EMP proceeded to itemise and list the activities and elements constituting the subject of decommissioning and closure and indicated that detailed and site specific closure objectives would be prepared for each defined activity or element. These activities and elements included, amongst others, demolition and rehabilitation of the metallurgical process plant and associated infrastructure, the shafts, the hostels and residential areas and workshops/salve yard complexes; permitting and closure of legal and illegal landfill sites; rehabilitation of slimes dams; and management of residual and potential latent environmental liabilities. The latter included, in particular, cleaning up "Coetzee's dam", initiating a study to verify the existence of a radiation pollution plume from the Doornfontein tailings complex (as identified in a Council of Geosciences' report), drawing up a plan of action aimed at relocating squatters on Blyvooruitzicht land, and managing the rewatering of the dolomites in the Far West Rand. In respect of two of these residual and latent liabilities (Coetzee's dam and the rewatering of the dolomites), the BGMC indicated that it would only be able to address the liabilities as part of a collaborative effort involving all mines in the area. Signalling the BGMC's commitment to concurrent rehabilitation, the EMP included a detailed schedule outlining short-term rehabilitation and closure activities (inclusive to end 2016), as well as a schedule of long-term rehabilitation and closure activities associated with decommissioning and final closure of the mine. The EMP further indicated that the BGMC would apply for closure in accordance with the prescribed regulations, including the possibility of applying for the transfer of environmental liabilities to a qualified and competent third party (DRD Gold 2007).

In accordance with the requirements of regulation 54, the EMP included a determination of the financial provision for closure. The estimated total rehabilitation obligations as at June 2007 was quantified at a cost of R56 734 742,00. Adding an amount for contingencies and VAT the grand total for rehabilitation was pegged at R75 026 023,00. It was indicated that a trust fund had been established as the vehicle for financial provision. Although the amount in the trust fund was not disclosed in the EMP, there was reference to a shortfall in funding, and that "alternative funding options and opportunities were the subject of negotiation with the (then) department of minerals and energy (DRD Gold 2007).

Although the undertaking to comply with the provisions of the MPRDA and the commitments articulated in the EMP was signed by a duly authorised officer of the BGMC, the EMP does not appear to have been approved by the department of mineral resources, and the right had accordingly not been converted.

In June 2011, the BGMC placed itself under supervision and business rescue in terms of the provisions of the Companies Act 71 of 2008 (Yao 2011). These proceedings were terminated in November 2011 when

pursuant to the business rescue plan, Village Main Reef Limited (VMR) concluded an agreement with DRD for acquisition of the latter's 74 per cent share interest and certain of DRD's loan claims against the BGMC. The purchase consideration for the equity and loan claims was settled by way of a VMR share issue to DRD to the value of R150 million (Saaiman 2013). The sale agreement between the two companies was however subject to certain suspensive conditions, which included the DMR's conversion of the BGMC's old order mining right to a new order right, and the approval by the Minister of Mineral Resources for the transfer of a controlling interest from DRD to VMR in accordance with s 11 of the MPRDA (Saaiman 2013). In May 2012 the Competition Commission granted unconditional approval for the sale of DRD's shares in the BGMC to VMR and from June 2012, VMR was appointed as the agent of DRD to carry on mining operations at Blyvoor and to render certain corporate services.

The suspensive conditions in the agreement necessitating action on the part of the department of mineral resources were however not fulfilled, with the result that the shares in the BGMC that VMR had aquired were not transferred to it (Saaiman 2013). Nevertheless, in addition to acquiring DRD's loan claims against the BGMC, VMR had advanced additional funds to the company by way of working capital loans to sustain and preserve its business operations from time to time. As of 30 July 2013, the total amount of loans thus advanced was R189 million (Saaiman 2013). In this way VMR emerged as the main creditor of the BGMC.

On 30 July 2013, VMR issued a stock exchange notice that its board of directors had voted to suspend financial assistance to the BGMC because of continuing losses (Greve 2013). In August 2013, DRD announced that it too would not extend any funding to the BGMC, stating that it had no financial interest in Blyvoor or exposure to its operations since June 2012 (Seccombe 2013). At a meeting held on 5 August 2013, the board of directors of the BGMC accordingly resolved to place the company under compulsory winding-up by court order and as a matter of urgency in terms of the provisions of the Companies Act 61 of 1973.

An *ex parte* application to this effect was lodged in the South Gauteng High Court on 9 August 2013. The application outlined the BGMC's total assets and liabilities as proof of the submission that the company was "hopelessly insolvent" (Saaiman 2013). The total assets of the company stood at R241 475 602, 00 comprised of total fixed assets *and rehabilitation provisions* of R180 309 783, 00 and current assets of R60 860 568, 00. Significant here was the inclusion of the financial provision for environmental rehabilitation, being the R36 947 540,00 held in a trust fund, within the category of "total fixed assets" (Saaiman 2013). Additionally significant is that the funds in the trust were substantially lower than the financial provision outlined in the BGMC's 2007 EMP. The papers indicated that the BGMC's total liabilities amounted to R891 098 234,00 made up of a non-current liability in respect of the financial provision for rehabilitation of R108 340 367,00 and current liabilities of some R782 757 867,00 for the most part made up of VMR's loan claims against the BGMC. While the accounted for but "unpaid" financial provision for rehabilitation was therefore represented as a liability, there was no indication in the papers – or subsequently in the court order – of how the financial provision for environmental rehabilitation would compete against the other creditors of the company.

The court (per Boruchowitz J) granted a provisional winding-up order on 6 August 2013. Anglogold Ashanti Limited had intervened in the matter (the only party to do so) in order to ensure continued water pumping on behalf of Blyvoor, but without acceptance of liability for this function. The court granted the relief sought by Anglogold, thus recognising the critical importance of continuity in water pumping for both commercial and environmental reasons. Other than this, however, the court made no reference to the financial provision for rehabilitation and did not flag its unique status by, for example, pointing out that the amount actually held in the trust fund should not be available for allocation to creditors, or that the trust should be topped up from realisation of the BGMC's assets to include the unpaid portion before other creditors were satisfied. The court order, which was published in the *Government Gazette of* 23 August 2013, called upon all persons having a legitimate interest in the matter to put forward their reasons on 1

October 2013 at 09h30, as to why the court should *not* order the final winding up of the BGMC. The granting of the final winding up order has however been deferred.

Nevertheless, following the granting of the provisional winding up order a group of four liquidators was appointed to begin the laborious task of compiling the liquidation and distribution account. From the start, the approach of the liquidators was to attempt to find a buyer for the mine in order to save the jobs of employees and contractors and ensure continuity in the supply of services, particularly electricity, to the surrounding Blyvooruitzicht and Doornfontein villages, which house approximately 1700 people, and the mine itself (especially for the critical pumping operations). The need to find a buyer became a crisis when Eskom (the state electricity supplier) threatened to cut the electricity at short notice. With none of the major mining companies interested in taking over the Blyvooruitzicht operations, the liquidators turned to the little-known Goldrich Holdings, which offered to avert the crisis by putting down a deposit for the outstanding electricity payment. A sale agreement in the amount of R70 million payable over six months was subsequently concluded between the liquidators and Goldrich Holdings (Hawker 2014a). A significant amount of media attention focused on the allegation that two of the directors of Goldrich Holdings had been involved in the Aurora Empowerment Systems scandal, which had in turn also involved the sale-in-liquidation of Pamodzi Gold and later allegations of asset stripping and non-payment of workers (Prinsloo & Marias 2014).

The situation at Blyvooruitzicht post the signing of the sale agreement with Goldrich does appear to have rapidly deteriorated. In January 2014 the directors of Goldrich brought a successful court application against the liquidators for “unlawfully evicting” them from the premises of Blyvooruitzicht after the former alleged that an agreed R6 000 000, 00 installment toward the sale had not been paid (Evans & Falanga 2014). However soon after Goldrich took control of the mine there were reports of a rapidly worsening security situation and a “Wild West war between security guards employed by the company and illegal miners” (Marais 2014). In March 2014, the mine manager was arrested after 1.3 kg of gold was found at his house near Carletonville and it was suspected that he was dealing in mine equipment and scrap metal on behalf of a third party (Prinsloo & Marais 2014). In the same month a forensic auditor working for Goldrich alleged that fraudulent transactions and money laundering had occurred at Goldrich and alerted SARS (Crowley 2014). The National Union of Mineworkers, representing workers at the mine, alleged that workers had not been paid since September 2013 and that asset stripping was taking place (Crowley 2014). The situation came to a head in May 2014 when the liquidators were successful in obtaining an order from the South Gauteng High court voiding the sale of the mining and evicting Goldrich from the property (Hawker 2014b). Since the cessation of operations at Blyvoor in September 2013, there have been ongoing reports on severe dust pollution afflicting nearby residents as a result of failure to properly manage the slimes dams (Kings 2013). Following a local non-governmental organization laying criminal charges, an interdepartmental team comprising officials from national, provincial and local government departments recently investigated the environmental conditions at the mine (Bega 2014).

5 Discussion

The Blyvooruitzicht mine has moved fairly rapidly from a situation of at least formal compliance with the rule of law, to a situation of rampant disorder. The causal relationship between law and *dis*order is not linear or necessarily straightforward. How then did the design flaws in the regulated closure model contribute toward this chaotic situation?

The Blyvooruitzicht case study illustrates how very thin the veneer of order established by the regulated closure model is, especially in the context of old order rights. Until 2007, the full extent of financial provision for rehabilitation at Blyvooruitzicht was a paltry R10 000 for mining operations that had spanned more than half a century. What kind of difference forward plannning for mine closure or the requirement to rehabilitate concurrently could make in this situation is highly debatable. The requirement to set aside a big enough chunk of the profit from twilight mining operations for financial provision for rehabilitation

could alleviate the situation. In the Blyvooruitzicht case it is unclear whether the amount of R75 million proposed in the EMP would have been sufficient to deal with decommissioning, closure and management of latent and residual environmental impacts. But that question is rendered moot by the fact that the full R75 million was not transferred to the trust fund, and by the fact that the EMP does not appear to have been approved. Whether the BGMC as the ongoing holder of the mining right could then be held accountable to the EMP is unclear.

While it may be clear that the BGMC holds the mining right to the Blyvooruitzicht/Doornfontein mining operations, the provision for transfer of mining rights allows for the obfuscation of who the true owner of this company is at the current point in time. As a listed company, ministerial consent for the change of a controlling interest in the BGMC was strictly speaking not required, although it was made a suspensive condition of the agreement between DRD Gold and VMR. The structure of the agreement between the companies possibly even gave VMR an incentive to delay seeking approval of the transfer, approval of the EMP, and conversion of the right, because until these steps had been taken the right, and liability for closure requirements, remained vested in DRD Gold. The provisions on company ownership set out in the Companies Act 71 of 2008 could also be applied to argue that ownership had in fact shifted to VMR, but this question is unlikely to be answered without a judgment from the courts. In the absence of such a determination it is difficult to apply s 43 of the MPRDA.

The provisions for transfer have further contributed to the chaotic situation at Blyvooruitzicht by creating the conditions of possibility for Goldrich Holdings to enter the scene. Because it is possible that a mining right may be transferred indefinitely, it grounds a liquidation strategy that tries to keep the hope of continued operations alive at all costs even where it is highly unlikely that accumulated liabilities will outweigh any profit that can be made. In all likelihood the transfer of the mining right from the BGMC to Goldrich Holdings would have required ministerial consent, but the lack of detail in the law on how consent articulates with control of operations is a huge concern. Because of this lack of detail Goldrich Holdings was allowed access to the site and this may have had deleterious consequences for the state of the assets at the mine.

Clearly the outdated winding up provisions in the Companies Act, 1973 contribute to undermining the regulated closure model. The narrow notice requirements allow for the under-the-radar initiation of the winding-up process, with the consequences that the previous “holder” of a mining right can be dissolved as a legal entity and its assets distributed without adequate protection of the financial provision for rehabilitation and without the authorities responsible for implementing the provisions of the MPRDA and NEMA being any the wiser. The winding up provisions simply do not accommodate the financial provision for rehabilitation as a special call on the company’s assets that should be set aside before any other creditors are satisfied. This is clearly discernible in the manner in which the BGMC’s financal provision was dealt with in the winding up papers submitted to court.

Finally, while the regulated closure model provides a fairly elaborate frame for dealing with environmental impacts, it pays scant regard to the critical social issues that cloud and potentially radically disrupt any possibility of orderly closure. These include the legally unacknowledged and unaccommmodated phenomenon of illegal mining and the continued provision of basic services such as electricity, as illustrated in the Blyvooruitzicht study. There is also a connection between non-compliance with the environmental aspects of closure and continuing deterioration of the social fabric: As law-abiding residents move out of an area, forced to move by environmental conditions harmful to their health and well-being, the locality is increasingly dominated by agents unresponsive to the rule of law.

6 Conclusion

This paper has outlined the regulated model for mine closure in South Africa as constituted by standards and regulatory techniques, and with reference to the Blyvooruitzicht study, has argued that the rules

relating to the transfer of mining rights and the winding up of companies seriously undermine this model. Failure to adddress the social aspects of closure is also a serious deficiency. The paper accordingly grounds a call for the authorities to pay specific and urgent attention to these aspects of mining regulation in the future. In the absence of addressing these issues it is quite possible that the regulated model for mine closure in South Africa, paradoxically, facilitates dereliction.

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