

EX PARTE: Umnotho weSizwe Resources (Pty) Ltd

IN RE: The legality of the TMT shaft, related infrastructure and waste rock dump

OPINION

1. Introduction

1.1 Our consultant is Umnotho weSizwe Resources (Pty) Ltd ("**UWR**").

1.2 We have been requested to advise whether the TMT shaft, related infrastructure and waste rock dump described below (collectively the "TMT Shaft") are lawful in terms of the MPRDA.

2. Factual background

2.1 UWR holds a mining right over a portion of Portion 1 and the whole of Portion 2 of the farm Mooihoek 255, Registration Division KT, Limpopo Province ("**Mooihoek 2**"), in respect of Chrome and Platinum Group Metals ("**UWR Mining Right**"). The right was granted on 4 May 2009 and notarially executed on 24 June 2009 which is also its effective date. It was registered in the MPTRO under MPT 36/2009MR. The plan prepared in terms of regulation 42 of the regulations published under the Mining Titles Registration Act 16 of 1967 ("**MTRA**") duly shows the mining area as being a portion of Portion 1 and

the whole of Portion 2 of Mooihoek (as set out in the UWR Mining Right). In the case of Mooihoek 2, the entire cadastral portion is included with no exclusions.

2.2 Dilokong Chrome Mine (Pty) Ltd ("**DCM**") is the holder of a mining right for chrome ore over Mineral Areas No. 3 and 4 on the farm Maandagshoek 254, Registration Division KT, Limpopo Province and a portion of Portion 1 of the farm Mooihoek 255, Registration Division KT, Limpopo Province ("**DCM Mining Right**").¹

2.3 There is no overlap between the UWR Mining Right and the DCM Mining Right. The respective mining areas border each other.

2.4 During 2008, DCM commenced sinking and developing the TMT Shaft on Mooihoek 2. DCM did not and does not, however, hold a mining right in respect of this land. At the time, UWR held a prospecting right in respect of Mooihoek 2 and it has since obtained a mining right in respect thereof.² UWR's attorneys at the time advised DCM that UWR's right precluded DCM from utilising the area.

2.5 DCM nonetheless conducted the following operations on Mooihoek 2:

¹ It is mentioned for the sake of completeness that DCM is in business rescue. Furthermore, before the recent grant of the application made to the DG (as the Minister's delegate) for his consent in terms of section 11 of the MPRDA to transfer the DCM Mining Right from DCM to Cheetah Chrome South Africa (Pty) Ltd ("**Cheetah**"), UWR brought an urgent application under case number 66085/2019 ("**the urgent application**") to interdict any such decision until and unless it was provided with the annexure and appendices to the s 11 application. The matter was struck from the roll, due to a lack of urgency, by Fabricius J, who also made certain remarks about the merits of the matter.

² It was common cause in the urgent application that DCM does not have a mining right in respect of the land (Mooihoek 2) on which it has sunk and developed the TMT Shaft and that UWR holds a mining right in respect of this land.

- 2.5.1 the sinking of a six metre by two metre dual decline shaft;
 - 2.5.2 underground development of the two decline shafts over a distance of approximately 700 metres;
 - 2.5.3 the creation of a waste rock dump, estimated to be between 250 000 and 275 000 tons; and
 - 2.5.4 the establishment of ancillary surface infrastructure.
- 2.6 The construction of the TMT Shaft and related operations were halted during or about 2010 due to adverse economic circumstances.
- 2.7 The question posed to us is whether the TMT Shaft inclusive of the related infrastructure and waste rock dump, located on Mooihoek 2, is lawful under the MPRDA.

3. The legal position

3.1 In 2008 when DCM sunk and developed the TMT Shaft, section 5(4) of MPRDA *inter alia* provided that “no person may ... mine ... or commence with any work incidental thereto on 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”.

3.2 This section has since been repealed and replaced³ by section 5A of the MPRDA which now similarly provides that “no person may ... mine ... or

³ By Act 49 of 2008 with effect from June 2013 (in respect of s 5A(b) and (c)) and December 2014 (in respect of s 5A(a)).

commence with any work incidental thereto on an 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".

3.3 The requirements in subparagraphs (a) to (c) of the repealed section 5(4) of the MPRDA (and now, of section 5A) are cumulative. A person thus had to hold an environmental management programme and a mining right and must have consulted and notified the owner or lawful occupier in order to mine on an area.

3.4 It was and is still an offence in terms of section 98(a) read with 99(1)(a) of the MPRDA to contravene section 5(4) of the MPRDA.⁴

3.5 As stated, DCM did not, and does not, hold a mining right in respect of Mooihoek 2 on which it sunk and established the TMT Shaft during 2008 to 2010. It is accordingly clear that DCM acted illegally, in breach of section 5(4) (prior to the amendment) of the MPRDA, when it commenced and conducted the development of the TMT Shaft.

4. DCM's defences

4.1 Environmental management programme

4.1.1 DCM's attorneys stated in correspondence⁵ that DCM submitted an

⁴ It is noted that the legislature failed to substitute the reference in section 98(a) to section 5(4) with a reference to section 5A. Section 98(a)(viii) also provides that "any person is guilty of an offence if he or she contravenes or fails to comply with any other provision of this Act".

⁵ See letter by Hogan Lovells dated 30 July 2019 ("July letter").

amendment to its approved environmental management programme (“EMP”) in 2007 in order to seek approval “for the expansion of the DCM mining operations” consisting of *inter alia* two decline mining shafts being a north shaft and a south shaft. It was further stated in the July letter that this EMP amendment was approved on 18 March 2008 (“**2008 EMP Amendment**”) and “*this then allowed DCM to commence with the development of the TMT Shaft*”. We have been instructed that our consultant has in the past requested a copy of the alleged 2008 EMP Amendment, but has to date not been provided with a copy thereof. It was alleged that DCM then commenced with construction of the gravel access road to the TMT Shaft; installation of overhead power lines; installation of water pipelines and water reservoirs; the perimeter fence; and the portal establishment at the TMT Shaft (south) and (north) shaft locations.

4.1.2 It is patently incorrect that the 2008 EMP Amendment entitled DCM to commence with the development of the TMT Shaft by taking the above-mentioned steps. As stated above, the requirements of section 5(4) at the time (and now, section 5A) are cumulative. DCM needed an EMP and a mining right in order to mine legally on the area.

4.1.3 At the time that DCM sunk the shaft, the word “mine” as a verb was defined as “*any operation or activity for the purposes of winning any mineral on, in or under the earth ... whether by underground or open working or otherwise and includes any operation or activity incidental thereto*”.

4.1.4 The above-mentioned operations as well as the generation and dumping of waste rock that emanated from the development operations, are all incidental to mining at and from the TMT Shaft and were all struck by the prohibition in section 5(4). Indeed, section 5(4) expressly provided that no person may mine or commence with any work incidental thereto on an area without *inter alia* a mining right.

4.1.5 There is accordingly no merit in DCM's submission that the EMP amendment entitled DCM to conduct any mining related work on Mooihoek 2. It required a mining right to conduct such operations. We have not had sight of the 2008 EMP Amendment but the approval of such an amendment to authorise mining related operations on an area in respect of which no mining right is held is probably in any event *ultra vires*.

4.2 Waiver and estoppel

4.2.1 DCM also suggested in the July letter that "*the TMT Shaft is not illegal because the alleged infringement of the UWR Mining Right was waived by UWR and/or UWR is estopped from denying the representation that led to the development of the TMT Shaft on portion 2 Mooihoek*".

4.2.2 This statement is incorrect in a number of respects.

4.2.3 Firstly, and as a matter of law, no waiver or even consent by another party (such as UWR) can render legal, mining operations which are conducted on an area without a mining right. They remain objectively

illegal. Only the Minister (or his delegate⁶) can grant a mining right.⁷ A mining right, once granted, can be ceded, transferred, let or sublet but also only with the written consent of the Minister.⁸ The Minister has not granted a mining right to DCM in respect of Mooihoek 2 and UWR has not ceded, transferred, or let the UWR Mining Right or a portion thereof to DCM.

4.2.4 Secondly, and on a factual level, the only documentary evidence attached to the July letter in support of this statement is a letter on UWR's letterhead (signed by one B Sivalingum) addressed to ASA Metals (reg no 96/15728/07)⁹ and dated 4 July 2008 ("UWR letter").¹⁰ The UWR letter is marked "without prejudice to rights" and reads as follows:

"Dear Herman

With reference to our lawyer's letter ... to you dated 2 July 2008 and following on from the meeting with you and your team at your offices on Thursday 3rd July 2008, our understanding of the outcomes of that meeting is as follows:

- It is not ASA Metals' intention to sterilize Umnotho weSizwe Resources'

⁶ The power to grant a mining right was duly delegated to the Director-General of the DMRE in terms of section 103 of the MPRDA.

⁷ See s 3 of the MPRDA.

⁸ In terms of section 11 of the MPRDA.

⁹ It is stated in the July letter that DCM was a government mine until the Chinese Govt and Limpopo Economic Development Agency ("LEDA") concluded a JV to form ASA Metals. DCM then became a wholly owned subsidiary of ASA, with LEDA holding 40% in ASA and the remaining 60% being held by East Asia Metal Investment. In 2016 both ASA and DCM commenced business rescue proceedings. DCM's adopted business rescue plan contemplates the sale of DCM's assets (including the DCM Mining Right) to Cheetah.

¹⁰ Annexure B to the July letter, at p 248 of the papers in the urgent application.

mineral resource on the farm Mooihoek 255KT.

- Both parties will cooperate and work towards a speedy resolution of this matter.
- Both parties have agreed to share with one another plans with coordinates that clearly delineate where each party proposes to build their infrastructure. The rationale is to superimpose both sets of infrastructure on one plan with a view to both discussing and negotiating changes of siting of infrastructure that will result in both parties being suitably accommodated.
- Subsequent to this exercise above, both parties have agreed to meet to discuss and resolve.
- It is in the best interest of all parties to resolve this matter as soon as possible.

Can you please confirm in writing that your understanding of our respective positions is the same?"

4.2.5 The UWR letter clearly envisages further steps, discussions, negotiations and a resolution of "the matter" in future and is not on its face "a representation" on which DCM could rely to commence mining operations.

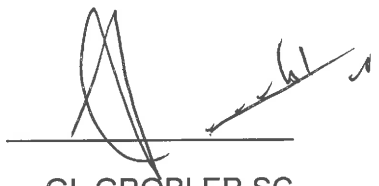
4.2.6 In any event, even if DCM could prove a waiver or rely on estoppel, it would not render the operations legal. As far as the regulatory authority is concerned, DCM should have obtained a mining right (either by way of a direct grant by the Minister or by agreement with the holder thereof and with the Minister's consent in terms of section 11) before it could legally commence mining on Mooihoek 2.

5. **Conclusion**

We are accordingly of the view that the TMT Shaft inclusive of the related infrastructure and waste rock dump have been illegally established on Mooihoek

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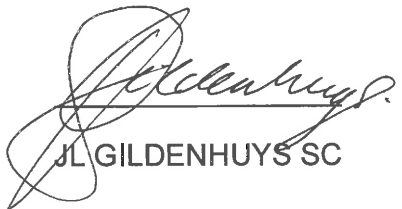
13 November 2019



GL GROBLER SC



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