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The Regional Manager
Mineral Development – Gauteng Region
Department of Mineral Resources
Private Bag X5
Braamfontein
2017
Attention: Mr Sunday Mabaso
By email: Sunday.Mabaso@dmr.gov.za

15 March 2018

CC: Jimmy.Sekgale@dmr.gov.za
CC: Max.Madubane@dmr.gov.za

Copied to the Honourable Minister of Mineral Resources: Mr Gwede Mantashe
C/O Assistant to the Minister Vuyelwa Siyeka: vuyelwa.siyeka@dmr.gov.za
C/O PA to the Minister Mandisi Mavata: mandisi.mavata@dmr.gov.za

Copied to Department of Water & Sanitation
Regional Director: Gauteng Region
Mr Anil Singh
By Email: singhA3@dws.gov.za

Dear Sir

BASIC ASSESSMENT APPLICATION FOR ENVIRONMENTAL AUTHORISATION FOR THE PROPOSED CESSATION OF PUMPING AND ASSOCIATED DECOMMISSIONING OF THE UNDERGROUND WORKINGS OF THE EZULWINI MINING COMPANY (PTY) LTD (REFERRED TO AS EZULWINI OR EMC) COOKE 4 SHAFT

1. We act on behalf of the applicant in the abovementioned application namely, Ezulwini Mining Company (Pty) Ltd (hereinafter referred to as "EMC or "Ezulwini") and its shareholder Sibanye Gold Limited trading as Sibanye-Stillwater.

2. Your letter to EMC dated 15 February 2018, received by our client on the afternoon of 22 February 2018 regarding the abovementioned matter, refers. Kindly note that Mr Frik du Preez, to whom your letter is addressed, has left EMC and the responsible person to whom all future correspondence should be addressed is Mr Wayne Robinson (Executive Vice President & Head of SA Operations).

3. The purpose of this letter is to address the requests made in your letter of 15 February 2018 for further information in order for your department to reach a final decision on EMC's application for environmental authorisation for the proposed cessation of pumping and associated decommissioning of Ezulwini's underground workings.

4. At the outset we are instructed to record our client's disagreement with the view expressed in the introductory paragraph of your letter that the information provided in our client's Final Basic Assessment Report (FBAR) is not adequate and does not comply with the minimum requirements for such reports prescribed in the 2014 Environmental Impact Assessment regulations (2014 EIA regulations) published under the National Environmental Management Act 107 of 1998 (NEMA). To the contrary our client contends that the Final Basic Assessment Report (FBAR) compiled by Jones & Wagener (our clients' independent Environmental Assessment Practitioner (EAP)) that was submitted to your department on 12 October 2017 complies with the minimum requirements prescribed in the regulations, contains sufficient information for your department to have made a final decision on its application and contains much of the information requested in your letter.

5. Of more concern for present purposes, however, is that much of the further information requested is not legally required in order for our client to obtain environmental authorisation for the proposed works and, given that it is impossible for our client to obtain the information, suggests that your department has already unlawfully prejudged our client's application.

6. In this regard and believing that there is no statutory basis for the further information requested in your letter, our client requested your department to indicate which statutory provisions it was relying on to request the further information. We are advised that notwithstanding an assurance to respond given by your Mr Jimmy Sekgale to our client's Mr Grant Stuart and Mr Nico Gewers at a meeting held on 26 February 2018, no response to this letter has yet been provided by your department. A copy of our client's letter is attached for your ease of reference.

7. The basis of our client's concern with the requests for further information contained in your letter of 15 February 2018, is in summary, that -

    a. your request, in paragraph 1 of your letter for *"proof that an application for a closure certificate has been applied for since the listed activity 22 of GN 983...triggers section 43 of MPRDA"* and your statement *"that in terms of the legislation, there is no applicable provision to (sic) the so called "partial closure" of mine"* are not only legally incorrect requirements but, indicate that you have unlawfully already prejudged our client's application, alternatively are imposing incorrect or unlawful preconditions to the consideration of our client's Basic Assessment application;
    b. your request, in paragraph 3 of your letter requesting that our client indicate *"how the issues raised by South Deep Gold Mine were addressed to the satisfaction of both parties"* constitutes a request for information that is not legally required in order for our client to obtain environmental authorisation for the proposed works. Since it is unlikely, if not impossible, for our client to be able to address the issues raised by South Deep Gold Mine "to the satisfaction of both parties", your request further indicates that you have unlawfully already prejudged our client's application. Similar concerns arise in relation to the requests contained in *inter alia* paragraphs 4, 14 and 19 of your letter;
    c. The FBAR submitted by Jones & Wagener complies with the 'minimum requirements' for basic assessment reports prescribed in the 2014 EIA regulations and there is no legal basis for the department's request to provide additional information. Furthermore, several other requests in your letter are not legally required in order for

our client to obtain environmental authorisation for the proposed works and could rather be included, where appropriate and reasonable, as conditions to an environmental authorisation; and

d. your letter requesting the further information was received by our client after the date prescribed in the 2014 EIA regulations for a final decision to be reached on our client's application. The procedure envisaged by your request for further information thus falls outside the procedure contemplated in the regulations. We note further in this regard that to the extent that your office has "provisionally" evaluated our client's application, as is stated in the first line of your letter - the process prescribed in regulation 20 of the 2014 EIA regulations does not provide for such a "provisional" evaluation. On the contrary, the regulations require a final decision to have been reached on an application for environmental authorisation within 107 days of receipt of such an application. It is evident that such a final decision has not been made within the time frame stipulated in the regulations.

8. Notwithstanding these concerns, which we elaborate on below, our client has endeavoured to address the issues raised in your letter to the extent possible. They have done so by forwarding your letter to Jones & Wagener who have provided an independent response to the issues raised in your letter. Our clients submit that these responses show that EMC has fully complied with the minimum requirements for the submission of a Basic Assessment Report. In this regard we refer you to the Checklist Table in the FBAR, which commences on page 23 and references the section of the report where each and every requirement of the relevant Appendices to the 2014 EIA regulations has been complied with. To the extent that any issues raised in your letter are not addressed in the response from Jones & Wagener, our client is of the view, for the reasons set out above and elaborated on below, that such issues are not required to be addressed for your department to make a final decision on its application.

The Application for a Closure Certificate in terms of section 43 of the MPRDA

9. In paragraph 1 of your letter dated 15 February 2018, our client is requested to provide proof that an application for a closure certificate has been applied for "since the listed activity 22 of GN 983 identified on the BAR triggers section 43 of MPRDA".

10. Activity 22 of GN 983 identifies the relevant activity as follows:

"The decommissioning of any activity requiring –

(i) a closure certificate in terms of section 43 of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002)

(ii) ..."

11. Section 43(3) of the MPRDA provides, in relevant part, as follows:

"The holder of a prospecting right, mining right, retention permit, mining permit, or previous holder of an old order right or previous owner of works that has ceased to exist... as the case may be, must apply for a closure certificate upon

(a) the lapsing, abandonment or cancellation of the right or permit in question;

(b) cessation of the prospecting or mining operation;

(c) the relinquishment of any portion of the prospecting of the land to which a right, permit or permission relate; or

(d) completion of the prescribed closing plan to which a right, permit or permission relate."

12. It is evident that Listed Activity 22 of GN R983 does not trigger section 43 of the MPRDA. Rather, it is section 43 of the MPRDA that triggers Listed Activity 22 of GN R983. Your statement to the contrary in paragraph 1 of your letter is thus incorrect.

13. Jones & Wagener indicated in the FBAR that application for a closure certificate will be made in terms of section 43(3)(d). In the FBAR Synopsis on page iv and in the Report Context and Objectives on page 38 it is specifically stated -

    "In addition to this, EMC must submit a partial mine closure application to the DMR in terms of Section 43(3)(d) of the MPRDA for the termination of underground workings at Sibanye Gold: EMC operation. Section 43(3)(d) states that a mining right holder must apply for closure on "completion of the prescribed closing plan to which a right, permit or permission relate" (MPRDA)."

    In addition to these statements in the FBAR, the DMR was alerted to EMC's intention to apply for a closure certificate in terms of section 43(3)(d) of the MPRDA in the advertisements sent by Jones & Wagener in the early stages of the public participation process. The DMR have therefore had full knowledge of EMC's intended applications process for more than a year and no comments or concerns were raised by it on this.

14. In this respect, we submit that any one of the four subsections in section 43(3) triggers the need for a closure certificate application because of the use of the word "or" and that an applicant may unilaterally elect which of these trigger requirements for a closure certificate to comply with depending upon which is the most appropriate to the particular circumstances. Ezulwini will consider the content of its application for a closure certificate in further detail pursuant to a decision on its application for an environmental authorisation.

15. Section 43(4) of the MPRDA further provides that –

    "[a]n application for a closure certificate must be made to the Regional Manager in whose region the land in question is situated within 180 days of the occurrence of the lapsing, abandonment, cancellation, cessation, relinquishment or completion ... and must be accompanied by the required information, programmes, plans and reports prescribed in terms of [the MPRDA] and [NEMA]". [own emphasis]

16. Should EMC submit its application for a closure certificate on the basis of section 43(3)(d) of the MPRDA then, based on the Closure Plan having being completed on the day that it was submitted to your Department for decision making, i.e. on 12 October 2017, EMC has at least until 3 July 2018 to submit its application to your Department in terms of section 43 of the MPRDA. That is, within 180 working days as per the definition of days in the MPRDA to mean –

    "a calendar day excluding a Saturday, Sunday or public holiday and when any particular number of days are prescribed for the performance of any act, those days must be reckoned by excluding the first and including the last day;
    [Definition of "day" substituted by s. 1 of Act 49/2008 w.e.f. 7 June 2013]"

Partial closure of a mine is legally permissible.

17. Paragraph 1 of your letter of 15 February 2018 further states *"that in terms of the legislation, there is no applicable provision to so called "partial closure" of mine"*.

18. This is also incorrect.

19. An applicant is entitled to a closure certificate as contemplated in section 43 of the MPRDA provided its application for such a certificate satisfies the statutory requirements.

Should such a compliant application be submitted for the partial closure of a mine, there is no reason why a closure certificate for that part of the mine that is to be closed cannot be granted.

20. When submitted, Ezulwini's application, in terms of section 43 of the MPRDA, for the partial closure of EMC's underground operations, will satisfy the necessary requirements contained in section 43 of the MPRDA, read together with section 24R of NEMA, to the extent that such section is applicable. It is further confirmed that the closure plan submitted as an appendix to the FBAR complies with the requirements of Appendix 5 to the 2014 EIA regulations. EMC will then be entitled to be issued with a closure certificate in respect of the closure of its underground workings only.

21. Condition 4.3 of Ezulwini's mining right further supports the view that partial closure of a mine is legally permissible as it specifically provides that Ezulwini may abandon or relinquish a portion of the mining area. The clause provides as follows:

> *"With effect from the date the Holder has abandoned or relinquished a portion or portions of the mining area, and subject to section 43 of the Act, the Minister is entitled to grant any right, permit, or permission referred to in the Act in, on, or under the portion/s so abandoned or relinquished, to any persons".*

22. Therefore if EMC were to apply for a closure certificate in terms of section 43 of the MPRDA, it follows, for the reasons mentioned above, that should EMC also abandon or relinquish a portion of its mining area (such as its underground workings in the present instance) it would be entitled to a closure certificate in respect of only the abandoned or relinquished portions therefore providing for partial closure. This approach is supported by Dale *et al*, in the leading commentary on the MPRDA.[1]

23. Further confirmation that partial closure of a mine is legally permissible is provided by wording of activity 22 of GN 983 (listing notice 1 of the 2014 EIA regulations). The listing of this activity means that an environmental authorisation is required for the decommissioning of any activity that requires a closure certificate in terms of section 43 of the MPRDA. Decommissioning is defined in Listing Notice 1 as *"to take out of active service permanently or dismantle partly or wholly, or closure of a facility to the extent that it cannot be readily re-commissioned"*. (our emphasis) The wording of this activity, read with the definition of "decommissioning" presupposes that an environmental authorisation is required for the partial decommissioning of a facility. By parity of reasoning, it implies that a closure certificate can be issued for the partial closure of a mine.

24. For all the reasons mentioned above, it is respectfully submitted that your statement that "in terms of the legislation, there is no applicable provision to the so called "partial closure" of the mine is not supported by the relevant legislation is incorrect. Furthermore, this does not preclude the DMR from considering EMC's Basic Assessment application for an environmental authorisation.

[1] Dale et al *South African Mineral and Petroleum Law* (Lexis Nexis), Issue 23, at para 278.3.1.

25. Ezulwini's partial closure plan was completed on 12 October 2017 - the same day as the FBAR was submitted to your department for approval. Your department was, however, aware of EMC's intention to apply for a partial closure certificate since the beginning of April 2017 when the Consultation Basic Assessment Report was submitted to your Department by Jones & Wagener. Your department has therefore been aware of EMC's intended application for a partial closure certificate for several months, yet no comments or concerns were raised regarding this issue raised in your letter of 15 February 2018. In the circumstances, for the department to express the view that partial closure is not permissible for the first time in this letter is, in addition to being legally incorrect, also procedurally unfair.

26. Your conclusion that partial closure of the mine is not legally permissible also suggests that you have prejudged our client's application for environmental authorisation and decided that it cannot be granted. To the extent that you have done so, you have acted unlawfully and procedurally unfairly.

27. To the extent that your view that our client's application does not meet the minimum requirements set out in the 2014 EIA regulations is premised on your view that partial closure of the mine is not legally permissible, you have acted in breach of your powers. In this regard it must be emphasised that our client's application is an application for an environmental authorisation in terms of the 2014 EIA regulations read with NEMA. It is not an application for a closure certificate in terms of the MPRDA or in terms of section 24R of NEMA. Accordingly, whether a partial closure certificate is permissible in terms of the relevant legislation, is not relevant to your consideration of our client's application for environmental authorisation, neither can this issue preclude your department from considering our client's Basic Assessment application.

28. In the premises we respectfully submit that the statement made regarding partial closure in paragraph 1 of your letter is legally incorrect, procedurally unfair and provides no basis for your conclusion that our client's FBAR is inadequate or does not meet the minimum requirements for a BAR as set out in the 2014 EIA regulations.

There is no legal basis for your request that Ezulwini reaches agreement with South Deep Gold Mine (South Deep), or any other I&AP, regarding the proposed project or that the issues raised by South Deep have been addressed to the satisfaction of both parties.

29. In paragraph 3 of your letter our client is required to indicate "*how the issues raised by South Deep Gold Mine were addressed to the satisfaction of both parties*".

30. Nowhere in NEMA or the EIA regulations is the consent of an affected neighbor required for the undertaking of a listed activity on land owned by or controlled by the project proponent. The Act and the regulations merely require that such neighbor (and indeed all interested and affected parties (I&AP's)) must be consulted in the application process and the results of that consultation submitted to the competent authority for approval.

31. This requirement for consultation is foreshadowed in the national environmental management principles contained in section 2 of NEMA and expressly provided for in Chapter 6 of the 2014 EIA regulations.

32. "Public participation process" is defined in section 1 of NEMA, in relation to the assessment of the environmental impact of any application for an environmental authorisation, to mean "*a process by which potential interested and affected parties are given opportunity to comment on, or raise issues relevant to, the application*".

33. Regulation 41(6) of the 2014 EIA Regulations sets out what is required of the person conducting the public participation process in support of an application for environmental authorisation. Such a person must ensure, firstly, that all relevant information

is made available to I&APs and secondly, that a reasonable opportunity is provided to all I&APs to comment thereon. Regulation 41(6) reads as follows:

> *"the person conducting the public participation process must ensure that [firstly] information containing all relevant facts in respect of the application or proposed application is made available to potential interested and affected parties; and [secondly] participation by potential or registered interested and affected parties is facilitated in such a manner that all potential or registered interested and affected parties are provided with a reasonable opportunity to comment on the application or proposed application."*

34. Following a duly-completed public participation process, the applicant for environmental authorisation has a further obligation to place the comments and issues raised by I&APs before the Competent Authority as the final decision-maker.

35. This is succinctly summarised in the High Court case of *Muckleneuk/Lukasrand Property Owners and Residents Association v The MEC: Department of Agriculture Conservation and Environment, Gauteng Provincial Government and others*[2] (the *MLPORA* case):

> *"The combined effect of [section 24 of the Constitution and the NEMA section 2 principles] is that the impact of a development must be carefully assessed according to the principles contained in the Constitution and in NEMA by people who are fully equipped to deal with such applications, and who are fully informed on all environmental aspects with the aid of a compulsory public participation process. They must inform the decision-maker of all relevant considerations and inputs and advise the decision-maker. Thereafter the decision-maker is to get fully acquainted with the information, consider the advice and make a decision."*

36. It is not an environmental authorisation applicant's legal obligation to obtain agreement from I&APs on the proposed development or activity. The case of *MLPORA*[3] highlighted the fact that not all I&APs will agree with a proposed project that has been lawfully and duly subjected to assessment, public participation and decision-making. The High Court held in this regard as follows:

> *"Another aspect of importance in determining whether the decision is reviewable or not is the fact that although the applicants feel very strongly that their views must prevail they are only a small number of all the interested and affected parties. The views of those parties are divergent. There are also competing interests ... . It follows that once the decision-maker is satisfied that the project is desirable an alignment must be chosen. If from a planning point of view a responsible alignment is chosen the decision-maker cannot be faulted. The fact that there will of necessity be parties who are deeply unhappy does not make the decision unlawful."*

37. These principles were confirmed by the Constitutional Court (albeit in the context of an application for a prospecting right) in the matter of *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others.*[4]

38. EMC and its EAP (Jones & Wagener) have fully complied with all of its public participation legal obligations, namely it has provided all relevant information to all I&APs and it has provided all I&APs with a reasonable opportunity to comment thereon. In fact, I&APs were provided with an extended period for comment, as the period to review the Consultation Basic Assessment Report (CBAR) was extended from 7 May 2017 to 21 May 2017. The

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[2] [2007] 4 All SA 1265 (T) at paragraph 31.
[3] [2007] 4 All SA 1265 (T) at paragraph 53.
[4] 2011 (4) SA 113 (CC).

comment period commenced on 3 April 2017 and therefore I&APs were provided with 48 days to comment on the CBAR, rather than the statutorily specified period of 30 days. The revised CBAR was then made available for a further period of comment by I&APs from 16 August 2017 to 15 September 2017 in terms of regulation 19(1)(b) of the EIA regulations, with the written consent of the DMR. Furthermore, EMC has placed all of the comments and issues raised by I&APs during the extended comment periods before the Competent Authority, as the decision-maker, in the FBAR. Even the comments received from Gold Fields *after* the expiration of the second comment period on the revised CBAR, have been supplied to the DMR.

39. As set out above, it is not EMC's legal obligation to obtain I&APs' agreement on the proposed activity. As such, it is not EMC's legal obligation to obtain South Deep's agreement on the proposed re-watering and decommissioning activities. It is moreover not possible for EMC to address all of the issues raised by South Deep "to the satisfaction of both parties", nor to obtain all necessary consents from South Deep, nor to obtain South Deep's consent to contingency plans prepared by EMC for the South Deep Mine as contemplated in paragraphs 4 and 19 of your letter.

40. Your request for our client to provide such agreements accordingly constitutes a request for information that is not legally required in order for our client to obtain environmental authorisation for the proposed project.

41. Since it is unlikely, if not impossible, for our client to be able to address the issues raised by South Deep " to the satisfaction of both parties" as required in paragraph 3 of your letter or to obtain the consent and agreement you request in paragraphs 4 and 19, your request indicates that you have unlawfully already prejudged our client's application.

42. In the premises we respectfully submit that your requests in paragraph 3, 4 and 19 are legally impermissible, procedurally unfair and provide no basis for your conclusion that our client's FBAR is inadequate or does not meet the minimum requirements for a BAR as set out in the 2014 EIA regulations.

The FBAR submitted by Jones & Wagener complies with the 'minimum requirements' for basic assessment reports prescribed in the 2014 EIA regulations and there is no legal basis for the department's request to provide additional information

43. In addition to what is set out above, our client is of the view that there is no legal basis for the additional information you request in your letter as the FBAR compiled by Jones & Wagener contains all the information required for a basic assessment in terms of NEMA read with the 2014 EIA regulations. In particular, and having regard to the FBAR, it is evident that it satisfies the objective of the basic assessment process set out in Appendix 1 to the regulations and includes all the information required in terms of regulation 3 of Appendix 1.

44. It is for this reason that our client requested your department to indicate which statutory provisions it was relying on to request the further information. As mentioned above, to date, no response to this letter has been provided by your department. This, in and of itself, suggests that there is indeed no legal basis for your requests for additional information.

45. Despite there being no legal basis for the requests in your letter of 15 February 2018, many of the issues raised are addressed in the attached response provided by Jones & Wagener and/or, in our client's view, in the FBAR. Where they are not addressed, our client is of the view, for the reasons set out above, that such issues are not required to be addressed for your department to make a final decision on its application for environmental authorisation.

A possible means of addressing certain of the issues raised in the department's letter

46. We respectfully submit that a more apposite means for the department to address certain of the issues raised in its letter of 15 February 2018, could be to include appropriate and reasonable conditions in the environmental authorisation.

47. For example, numerous statements are made in the FBAR that re-watering will not commence prior to the plugs between Cooke 3 and Ezulwini being in place. There is therefore no reason why the Competent Authority cannot issue an environmental authorisation containing appropriate conditions that these kinds of measures be put in place prior to the commencement of the activity.

48. A further example relates to the confirmation requested regarding the 1 meter pipeline for decant at the Gemsbokfontein Eye (paragraph 10 of your letter). Our clients confirm that should there be issues of concern with the capacity or integrity of the 1 metre pipeline highlighted in the geohydrological study referred to in Jones & Wagener's attached response, or which may arise in future, our client will take the necessary steps to address any capacity or integrity issues regarding the 1 metre pipeline at their own cost and risk. Therefore, our clients would gladly accept the imposition of appropriate and reasonable conditions in this regard in an environmental authorisation.

49. Similarly, the applicant is fully aware that it has a legal obligation to make financial provision (see the detailed information provided by our clients on financial provision in Appendix G to the FBAR) and to take responsibility for the re-watering risks. Therefore, the imposition of relevant and reasonable conditions in this regard, are to be expected.

Requests to your department

50. For all the reasons set out above, we respectfully submit that the further information requested by you in your letter of 15 February 2018 is not legally required in order for our client to obtain environmental authorisation for the proposed project.

51. For this reason, we advise that our client will not be submitting an amended BAR as requested in the final paragraph of your letter. Nevertheless, as previously mentioned, our client has instructed Jones & Wagener to respond to your requests to the extent it is able to do so. Its responses are attached to this letter.

52. Taking into account this letter and the additional responses provided by Jones & Wagener, we accordingly request that you immediately attend to the final consideration of our client's application for environmental authorisation and provide a final decision thereon within 14 days of this letter.

53. In considering our client's application, we respectfully request that you take into account the dire financial impact that the failure to receive a decision has on EMC and Sibanye-Stillwater in that the average maintenance and operating costs of continuing to pump water from EMC's underground workings are approximately R20 million per month. These costs exclude any capital replacement costs or infrastructure upgrade costs which may

be required in future. Furthermore, for as long as the Ezulwini shaft remains open and pumping continues, the mine is also exposed to the risks of illegal mining, which may exacerbate the potential risks of re-watering when it eventually proceeds.

54. We accordingly look forward to your decision on our client's application for environmental authorisation within 14 days of this letter as mentioned above. Should we not receive your response within this time frame, we are instructed to launch an application in the High Court to compel your department to make a decision on the application and to declare that a response to your requests for further information contained in your letter is not required for the purposes of making a decision on our client's application.

55. Our clients' rights are reserved.

Yours faithfully

Warburton Attorneys

Per Catherine Warburton