CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY BY THE DEPARTMENT OF MINERAL RESOURCES (DEPARTMENT) TO GRANT A MINING LICENCE TO THE COMPLAINANT, FAILURE TO INVESTIGATE ALLEGATIONS OF ILLEGAL MINING AND TO ASSIST THE COMPLAINANT WITH A SURFACE LEASE AGREEMENT
CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY BY THE DEPARTMENT OF MINERAL RESOURCES (DEPARTMENT) TO GRANT A MINING LICENCE TO THE COMPLAINANT, FAILURE TO INVESTIGATE ALLEGATIONS OF ILLEGAL MINING AND TO ASSIST THE COMPLAINANT WITH A SURFACE LEASE AGREEMENT

a) INTRODUCTION

1.1 This is a closing report in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 This closing report is submitted to the Complainant, Mr Sphiwe Kettledas.

1.3 This report relates to my investigation into allegations of undue delay by the Department of Mineral Resources (Department) to grant a mining licence to the Complainant, failure to investigate allegations of illegal mining and failure to assist the Complainant with a surface lease agreement.

b) THE COMPLAINT

2.1 The Complainant mentioned that he is a beneficiary and the secretary for the "Jesse Mahubuke Makhothe Trust" (Makhothe Trust).

2.2 The Complainant’s great grandfather Jesse Mahubuke Makhothe bought “Portion 4” of Farm Ruighoek 426. The property was later subdivided and the Complainant’s claim relates only to Portion 13 (the Farm) which he alleges is owned by his immediate family (the Trust).

2.3 The Complainant lodged an initial complaint on 13 May 2013 making the following allegations:

"We appeal to the Public Protector for a thorough investigation of the Department of Minerals and Resources illegal and fraudulent issuance of
mining rights on private land in breach of the provisions of the MPRDA Act 2002 and refusal... of the said property legal title holder to apply for such rights.

(2) The property is Ruighoek 169JP Mankweng District NorthWest.

(3) Despite concerted engagement with the DMR and their written submission that there are no mining right over said property, the Department refuses to process our application for mining rights”.

2.4 On 11 November 2014 an Alternative Dispute Resolution Meeting (ADR) was conducted with the Department of Mineral Resources (DMR), the Complainant and the Public Protector Investigation team. The Complainant was given reasons why his application for a mining license was declined and the DMR made an undertaking to assist the Complainant with a surface lease agreement.

2.5 A closing letter dated 13 June 2017 was sent to the Complainant informing him that the DMR acted on his complaint by suspending the mining rights of Batlhako Mine, and further that his application for a mining right was being processed.

2.6 The Complainant was unhappy with the closure of the file and a meeting was conducted with him together with the Executive Manager, Chief Investigator and the Senior Investigator of the Public Protector on 17 August 2017. The Complainant raised new issues, which were not contained in his initial complaint form. In essence the new allegations made are as follows :

2.6.1 The Trust made an application for a mining permit over a mining dump situated on the Farm in 2007/2008, and subsequently for a mining right on the Farm, however his applications were rejected by the Department.
2.6.2 The Trust has not received any compensation from Bathako Mining for the mining and use of their land, and there is no surface lease agreement in place.

2.6.3 The Complainant alleged further that there is illegal mining being conducted on the Farm. He informed the investigation team that he reported the matter to the Department and the South African Police Services and the matter was never addressed by the Department and the South African Police Services.

c) POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body established under section 181(1) (a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that:

"The Public Protector has power as regulated by national legislation –

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice,
(b) to report on that conduct; and
(c) to take appropriate remedial action."

3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the
conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate Alternative Dispute Resolution (ADR) mechanism.

3.5 In the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016), the Constitutional Court per Chief Justice Mogoeng stated the following when confirming the powers of the Public Protector:

3.5.1 The remedial action taken by the Public Protector has a binding effect, "When remedial action is binding, compliance is not optional, and whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences" (para 73);

3.5.2 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);

3.5.3 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (para 67);

3.5.4 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);
3.5.5 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (para 69);

3.5.6 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (para 70);

3.5.7 The Public Protector’s power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (para 71);

3.5.8 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence (para 71(c));

3.5.9 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));

3.5.10 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e));

3.6 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December
2017), [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 all SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the Court held as follows, when confirming the powers of the Public protector:

3.6.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (para 79);

3.6.2 The Public Protector has power to take remedial action, which include instructing the Members of the Executive including the President to exercise powers entrusted on them under the constitution where that is required to remedy the harm in question (para 82);

3.6.3 The Public Protector, in appropriate circumstances, has the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective (para 85 and 152);

3.6.4 There is nothing in the Public Protector Act or Ethics Act that prohibit the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (para 91 and 92);

3.6.5 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords the Public Protector with the following three separate powers (para 100 and 101):

(a) Conduct an investigation;
(b) Report on that conduct; and
(c) To take remedial action.

3.6.6 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (para 104);
3.6.7 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (para 105).

3.6.8 The fact that there are no firm findings on the wrong doing, this does not prohibit the Public Protector from taking remedial action. The Public Protector’s observations constitute prima facie findings that point to serious misconduct (para 107 and 108);

3.6.9 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (para 112);

3.7 The Department mentioned in this report is an organ of state and its conduct amounts to conduct in state affairs, as a result the complaint falls within the ambit of the Public Protector’s mandate. Accordingly, the Public Protector has the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.

3.8 The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties in this investigation.

d) THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2 The complaint was classified as a Service Delivery complaint for resolution by way of a formal investigation in line with sections 6(4) and (5) of the Public Protector Act.
The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration

**4.2 Approach to the investigation**

**4.2.1** Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

(i) What happened?

(ii) What should have happened?

(iii) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?

(iv) In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

**4.2.2** The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry primarily focussed on whether the Department unduly delayed to grant a mining licence to the Complainant, failure to investigate allegations of illegal mining and failure to assist the Complainant with a surface lease agreement.

**4.2.3** The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the officials of the Department.
4.4.1.2 Correspondence exchanged between the Complainant and the Public Protector Office on 10 August 2017;

4.4.1.3 Correspondence exchanged between the Complainant and the Public Protector Office on 8 March 2018;

4.4.1.4 Correspondence exchanged between the Complainant and the Public Protector Office on 17 April 2018;

4.4.1.5 Correspondence exchanged between the Complainant and the Public Protector Office on 4 October 2018;

4.4.1.6 Correspondence exchanged between the Complainant and the Public Protector Office on 5 October 2018;

4.4.1.7 Correspondence exchanged between the Complainant and the Public Protector Office on 6 October 2018;

4.4.1.8 Correspondence exchanged between the Complainant and the Public Protector Office on 11 October 2018;

4.4.1.9 Correspondence exchanged between the Complainant and the Public Protector Office on 15 October 2018;

4.4.1.10 Correspondence exchanged between the Complainant and the Public Protector Office on 1 November 2018;

4.4.1.11 Letter dated 11 March 2010, from the Regional Manager North West Region of the Department to the Complainant informing the latter about the decision in terms of Section 27 (3) (b) of the MPRDA to decline application for a mining permit to mine dumps;

4.4.1.12 A letter dated 06 October 2011, signed by the Acting Director- General NE Ragimana to Lokwe Leburu Attorneys (Lokwe Attorneys). Lokwe Attorneys were the legal representatives of the Complainant. This letter was to inform the Complainant about the decision to withdraw the Regional Manager’s
decision to reject his application for a mining permit to mine the dump and also further stated that the matter is referred back to the Regional Manager for him to reconsider the application;

4.4.1.13 A letter dated 11 November 2011, signed by the Regional Manager North West Region to the Trustees of the Jesse Mahabuke Makhothe Trust. This letter related to the rejection of the Complainant’s application to mine a dump and reasons for the application were based on the Court decision in the matter between De Beers and Ataqua Mining¹;

4.4.1.14 A letter dated 28 May 2013, signed by the Chief Director: Mineral Regulation and Administration Western Region, Mr AP Cronje, which was addressed to the Complainant, wherein he responded to the Complainant’s representations about their application for mining rights;

4.4.1.15 A letter dated 29 July 2014, together with attachments from the Director-General Dr Thibedi Ramontja addressed to the Public Protector responding to the inquiry raised with his office, relating to the allegations of the Complainant;

4.4.1.16 An email received on 12 September 2018 from Ms Ipeleng Wesi, of the Mineral Regulation Section of the Department, responding to the enquiries of the investigation team, and including supporting documents relating to the granting of mining licences over the Farm;

4.4.1.17 Documents received from the Department on 20 November 2018, relating to all the mining licenses that were granted from the time the initial property was sold to the Complainant’s great grandfather, including the sale agreement which contained a session of mining rights; and

4.4.1.18 A letter from Batlhako Mining to Mr Letshabisa Makhothe dated 11 March 2013, informing him of the status of the surface lease agreement and the

¹ De Beers Consolidation Mines Limited v Ataqua Mining (PTY) Ltd and Others , North West High Court, 14 April 2011.
availability of funds that have been retained by Batlhako Mining to be paid over to the rightful owners of Portion 13.

4.4.2 Meetings held

4.4.2.1 Meeting held with the Complainant and Investigator on 31 July 2017;

4.4.2.2 Meeting held with the Department on 24 July 2017; and

4.4.2.3 Meeting held with the Department and the Complainant on 4 October 2018.
e) THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Whether the Department failed to process an application and issue a mining permit to the Complainant to allow him to mine the dump situated on the Farm, and further failed to assist him with his application for a mining right over the Farm.

Common cause issues

5.1.1 According to Deed of Transfer 33057 dated 9 October 1945, Portion 4 of Portion A of the Farm Ruighoek 428 was sold to Jesse Mahabuke Makhothe. Hereunder is the extract of the title deed:

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said

JACOBUS ABRAMAH ROBINSON

had truly and legally sold, and that he, in his capacity afore-

said, did by these presents, oodc, and transfer, in full and

fore property, to and on behalf of

JESSE MAHABUKA MAKHO THE (a Native) 428,

born on the 1oth day of August, 1877,

his Heirs, Executors, Administrators or Assigns:-

Portion 4 of Portion A of the Farm

RUIGHOEK 428, situated in the District of RUSTENBURG;

HEADING: One Hundred and Forty decimal six two

eight (140.92) square;

EXTENDING: as Deed of Partition Transfer No.

435/1944, with diagram annexed, made in favour of

a person, Constituent on the 4th day of September, 1944.

FILL more fully point out.
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"en 121/1933S" was already contained in the Deed of Transfer of "Portion 4" of Farm Ruighoek 426 to the late Jesse Mahabuke.

**Issues in dispute**

5.1.3 The issue for my determination is whether the Department failed to process an application and issue a mining permit to the Complainant to allow him to mine the dump situated on the Farm, and further failed to assist him with his application for a mining right over the Farm.

5.1.4 According to the information obtained from the Department, the Jesse Mahabuke Makhothe Trust applied for a mining permit around 2009 to mine chrome from the dump on the Farm and their application was rejected on 11 March 2010, by a letter from the then DMR's Regional Manager of the North West, Mr Kharivhe for the following reasons:

"there are existing prospecting and mining rights in respect of the area applied for and Section 27 (3) (b) of the MPRDA prohibits the granting of more than one right on the same area and same mineral."

5.1.5 The Jesse Mahabuke Makhothe Trust lodged an appeal against the rejection of the mining permit for the dump. The Acting Director – General of the Department Mr Ragimana withdrew the Regional Manager’s initial decision to reject the application by letter dated the 6th of October 2011 addressed to the Trusts attorneys and also referred the matter back to the Regional Manager to reconsider the application.

5.1.6 On receipt of the referral from the Acting Director General the then Regional Manager, Mr Swart reconsidered the application and he subsequently rejected it again in a letter dated 11 November 2011 to the Trust for the following reasons:
“there are no existing prospecting and mining rights in respect of the area applied for, having regard to the judgement in the matter of De Beers Mines Limited v Ataqua Mining (Pty) Ltd and Others (3515/06) [2007] ZAFSHC 74 (13 December 2007), the Regional Manager is not authorised to accept applications for prospecting rights, mining rights and permits in respect of dumps which originated prior to the commencement of the Mineral and Petroleum Resources Development Act 28, 2002. According to the aforesaid judgement, these dumps are excluded from the operation of the above mentioned Act.”

5.1.7 On 11 November 2011 the Department also sent a letter to the Trustees of the Jesse Makholте Trust informing them of the decision made above and also drawing their attention to an order of the North West High Court, Mafikeng on 14 April 2011 in the case of Bathako Mining Limited v Makgothi, Mosimanegape Thomson and Others Case number 508/2011, the operation of which would frustrate the processing of any application to mine a dump on the aforesaid property. In this matter Bathako Mining obtained a high court order “interdicting the respondents from removing any rock from the rock dump located on portion 13 of the farm Ruighoek 169 JP of the Magisterial District of Mankwe”.

5.1.8 According to the evidence obtained, the Complainant also later escalated his complaint to the then Minister of Mineral Resources, Ms Susan Shabangu who responded as follows:

“In response to your letter I must advice as follows; minerals contained in dumps, unlike minerals in the ground, have come about as a result of a mining authorization, and are the property of the person who created the dump, or such person’s successor in title. Furthermore, in terms of the definitions of “mineral” of “residue deposit” and of “residue stockpile” in the Minerals and Petroleum Resources Development Act (the Act), minerals contained in dumps created prior to the commencement of the Act do not constitute minerals in respect of which a right can be issued in terms of the MPRDA. While it is an intention to amend the Act to allow the
processing of applications over such dumps, the Act is not yet amended and the Regional Manager presently has no legal authority to accept or process applications over dumps created prior to the commencement of the Act.

The regional Manager for the North West Region has therefore been compelled to reject the application lodged by the trustees of the Makothe Family Trust, and you are herewith advised that the said decision to reject that application cannot be overturned.”

5.1.9 The Complainant indicated that he tried to apply later online for a mining right over the Farm, but the electronic system indicated that there was an existing mining right on the Farm. Due to the existing mining right on the Farm the Complainant was unable to make an online application.

5.1.10 The Complainant disputed that the Department correctly processed their application for a mining permit of a dump and alleged that there was a duty on the part of the Department to grant them a mining permit by virtue of them being the owners of the Farm. The Complainant also indicated that the licence of Batlhako Mining was suspended by the Department.

5.1.11 The Complainant also disputed the rejection of his online application for a mining permit, indicating that no mining right exists over the Farm.

5.1.12 In its response, the Department maintained that the system correctly rejected the application of the Trust to mine Portion 13 because there was an existing mining licence registered that included Portion 13. In support of this contention, the Department presented evidence and produced the mining permit that is held over the Farm. The evidence provided is the following:

(a) Mining right of Batlhako Mining Ltd was registered under protocol 18/2008 with reference 324 MR. In terms of section 1 Description of the mining area shall comprise of the following: portions 2, 3,4,6,9,10,11,12,13.
14 and the remaining extent of **portion 1 of the Farm Ruighoek 169 JP**. This mining right was in subsistence for a period of seven (7) years until 17th August 2015.

5.1.13 During the meeting held on 4 October 2018, Mr Mogopudi of the Department indicated that a renewal for a licence was received by the Department from Batlhako Mining five (5) months before the expiry of the permit in March 2015 on which an acknowledgement letter was issued to Batlhako Mining acknowledging receipt of the application. The Department indicated that the application was still pending.

5.1.14 The Department was requested to clarify why the application was pending for a period of four (4) years and in a correspondence dated 29 August 2019, the Acting Regional Manager, North West Region, indicated that:

> "the application for renewal of the mining right is dealt with in terms of section 24 of the Mineral and Petroleum Resources Development Act, 2002. In terms of the above provision there are no timeframes in place to process this kind of application. Despite this, the office is treating this matter with a sense of urgency it deserves. Upon adjudicating the above application it was established that the right holder / Batlhako has a shortfall in financial provision which must be addressed. The right holder has been requested to address this matter, which is pending".

5.1.15 In the same correspondence dated 29 August 2019, the Department also responded to the Complainant’s contention that Batlhako’s mining right had been suspended. The Department indicated that "the mining right was suspended on the basis that there was no meaningful participation of the BEE as required in terms of section 2(d) of the MPRDA. Post issuing this notice by the Regional Manager, it was later realised that the Regional Manager had no delegated authority to suspend the mining licence in terms of section 47 of the MPRDA as it is only the Minister who has such authority. Hence the notice was withdrawn".

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5.1.16 A correspondence dated 21 October 2011, was issued by the Regional Manager of the Department withdrawing the suspension, and citing the case of State Vs Louis Brendell (case number 84/06/2011) as further authority to withdraw the suspension.

Conclusion

5.1.17 The Complainant did not submit any proof for his alleged online application for mining and in the absence of any evidence I cannot adjudicate on this matter. As regards the application to mine the dump, the issue will be determined by application of the law hereunder.

Response to the notice of intention to close the file

5.1.18 In response to the notice of intention the Complainant indicated that he rejected the Provisional report findings as being at odds with the recent rulings of the Constitutional Court (Xolobeni/DMR), Case no 594/17 SCA judgement (mineral cessions). He further stated the following:

3. MPRDA 12,1 "The minister may facilitate assistance to any historically disadvantaged person to conduct mining and direct any".
5. MPRDA sect 10(2) if a person objects to the granting of a prospecting right, mining right or mining permit , the regional manager must refer the objection to the regional mining development and environmental committee to consider the objections.
7. In terms of the Provisions of the MPRDA the state accepted the right to exercise sovereignty overall the Minerals resources within the Republic of South Africa. As such the state became the sole custodian of the nation's mineral resources.
8. In terms of the MPRDA the state and no longer the common law owner of the land becomes the custodian of all mineral resources on
behalf of the people of South Africa. The aim of the MPRDA is succinctly described by the Constitutional Court in Bengwenyama.

9. Mogoeng CJ echoed these sentiments in AgriSA v Minister for minerals and energy [20]

We submit the DMR cannot lawfully issue prospecting rights, mining rights over any property without the owners full and informed consent as ruled by the Constitutional Court in the Xolobeni matter and the Bakgatla Ha Kgafela High court.

We reject as racist condescension the disingenuous assertion that Mr Kettledas "incorrectly" understood Pieter Swart's written email clearly stating" There are No Mining or prospecting rights over said area".

Aaron Khariive regional manager also states Batlhako mining programme does not include P13.

We have previously submitted that J Raubenheimer Early Resolution Unit is fatally conflicted as he has a vested interest in protecting family relations commercial interests holding the expunged cessions hence the undue delay in resolving this case and the unit advancing an argument untenable in law and unlikely to withstand legal scrutiny.

It therefore follows Batlhako Mining and Boynton Platinum cannot be in lawfull possession of mining rights as

(a) It is common cause the MPRDA repealed old order rights as All rights reverted to the State and therefore equally available to All comers.

(b) It is common cause Batlhako Mining is Not in possession of a lease and access agreement and unlikely to obtain one.

We contend as HDSA and landowners we submit we enjoy a mining right over P13 as a legally compliant first applicant.
Our right was upheld after challenging the initial rejection through the Promotion to Justice Act.

We submit the DeBeer/Attaqua ruling has no relevance in this context as Batlhako Mining has no locus standi re:Rughoek P13 as it's rights where repealed by statute and they failed to conclude a commercial agreement with the landowner as required by the MPRDA as we deadlocked.

5.1.19 In essence, the Complainant made the following contentions in responding to the provisional report:

5.1.19.1 The Minister of Mineral resources should have an obligation to assist them as historically disadvantaged person to conduct mining.

5.1.19.2 In terms of the Provisions of the MPRDA the state accepted the right to exercise sovereignty overall the Mineral resources within the Republic of South Africa.

5.1.19.3 The DMR cannot lawfully issue prospecting rights, mining rights over any property without the owner's full and informed consent.

5.1.19.4 Batlhako Mining and Boynton Platinum cannot be in lawful possession of mining rights as the MPRDA repealed old order rights as all rights reverted to the State and therefore equally available to all new comers.

5.1.19.5 Furthermore Batlhako Mining is not in possession of a lease and access agreement and unlikely to obtain one.

5.1.19.6 Aaron Khariivhe, the Regional Manager also states Batlhako mining programme does not include P13

5.1.20 Even though some of the issues raised by the Complainant in responding to the provisional report are new issues that were not part of the initial
complaint, I have considered them and will be determined by application of the law hereunder.

*Application of the relevant law*

5.1.21 Section 27 of the MPRDA provides for application for issuing and duration of mining permit and subsection (3) authorises the Regional Manager to accept an application for mining permit if no other person holds a prospecting right, mining right, mining permit or retention for the same mineral and land. The MPRDA also provides for the definition of minerals as:

""mineral" means any substance, whether in solid liquid or gaseous form, occurring naturally in or on the earth or in or under water and which were formed by or subjected to a geological process, and includes sand, rock, gravel, clay soil and any mineral occurring in residue stockpiles or in residue deposits...."

The Court case of *De Beers Consolidated Mines v Ataqua Mining (PTY) Ltd*\(^2\), held that tailing dumps are not subjected to control by the MPRDA the reason being that:

"(i) The tailing dumps are movable, and the diamonds occurring in them do not occur naturally in or on the earth;
(ii) Tailing dumps do not occur naturally. They are formed by the placement of processed and partly processed materials, to be reworked in future years when technology improves;
(iii) The tailing dumps have been owned by the applicant since 1973..."

5.1.22 In the High Court case of *Bathlako Mining Limited v Makgothi, Mosimanegape Thomson and Others Case number 508/2011*, Bathlako

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\(^2\)Supra – De Beers v Ataqua, Footnote 2.
Mining interdicted the occupants of Farm, Portion 13 and any other person from mining dumps that were situated on the Farm. The dump which the Complainant intended to mine belongs to Batlhako Mining as the holder of the mining right. Further, in order for the Complainant to make the application to mine the dump, he was required to obtain the permission from Batlhako Mining to do so. It is clear from the High Court interdict that Batlhako Mining did not intend to give the Complainant permission to mine on the dump.

5.1.23 I have considered the facts of the following cases that you have referred to in response the provisional closing report:

a) Baleni and Others v Minister of Mineral Resources and others (7376/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP) (22 November 2018) (referred as the Xolobeni case).


c) Agri South Africa v Minister for Minerals and Energy (CCT 51/12) [2013] ZACC 9.

d) Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another [2018] ZACC 41

5.1.24 As regards the Complainant’s assertion that in terms of the provisions of the MPRDA the state “accepted the right to exercise sovereignty over all mineral resources in the Republic”, the common law position is that minerals vested in the owners of land and no one could compel them to extract or consent to the extraction of these minerals. Landowners were able to safeguard their land from mining activities by refusing to consent to mining. The MPRDA which came into force on 1 May 2004 changed this by providing that landowners could no longer prevent the State from granting qualifying applicants authorisation to mine.

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3 Agri South Africa v Minister of Minerals and Energy 2013 (4) SA 1 (CC).
5.1.25 In terms of section 2 of the MPRDA the objects of the Act are, *inter alia*, to —

a) *recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;*

b) *give effect to the principle of the State’s custodianship of the nation’s mineral and petroleum resources;*

c) .......

5.1.26 Section 23(1) of the MPRDA empowers the Minister for Mineral Resources (the Minister) to grant mineral rights if certain listed conditions are met. The Minister is free to impose whatever terms and conditions under which the right may be exercised. Every right so granted comes into effect on the date on which the Environmental Management Programme (EMP) is approved.

5.1.27 The MPRDA and section 4(2) of the Mining Titles Registration Amendment Act (MTRAA), classify mining rights as limited real rights, in other words, real rights which one has in respect of a thing belonging to another.⁴ Holders of mining rights may enter the land with their employees; they may bring any plant, machinery or equipment required for the purpose of prospecting on to the land; and they may build, construct or lay down any surface or underground infrastructure necessary for that purpose.⁵ They may prospect for the mineral on or under the land; may remove and dispose of it during the course of its mining operations; may use water on the land subject only to the provisions of the National Water Act;⁶ and may carry out any other activity incidental to mining which does not contravene the provisions of the MPRDA.⁷

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⁴ Sections 5(4) (c), 10(2), 16(4) (b), 22(4) (b) and 27(5) (b) of the MPRDA read with regulation 3 published under section 107 of the MPRDA.
⁵ See Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2006 (1) SA 350 (T).
⁷ Section 5(3) of the Act.
5.1.28 The Constitutional Court\(^8\) highlighted the implications of section 2 of the MPRDA in relation to the rights of landowners emphasising that –

"...transformation of the mining and petroleum industries could not be achieved without abolishing private ownership of mineral rights and vesting the resources in the nation as a whole, and giving the state a free hand in allocating rights to exploit those resources ... accordance with an internationally accepted practice".

5.1.29 In the matter of Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd\(^9\) the Supreme Court of Appeal emphasised that MPRDA introduced a new administrative system which has completely superseded the previous system of mineral rights. The Constitutional Court further explained in the matter of Agri South Africa v Minister for Minerals and Energy\(^10\) that the

"...MPRDA represents the pinnacle in the development of the right of the state to intervene in matters pertaining to the subsurface of land without nationalising the resources located there. It provides that mineral and petroleum resources belong to the nation, with the state - as custodian - responsible for ensuring that these resources are exploited for the benefit of the nation as a whole." (Emphasis added)

5.1.30 In the Smith-case\(^11\), Judge Froneman explained that under the MPRDA, consultation should be conducted to "ascertain whether an accommodation of sorts can be reached in respect of the impact of the landowner's right to use his land." The Courts reitered that it does not however, mean that the holder of rights to minerals has to conclude a contract with the landowner to agree to accommodate the holder of a mining or prospecting right as the MPRDA does not allow the landowner the

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\(^8\) Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another (CCT 51/13) [2013] ZACC 45; 2014 (2) BCLR 212 (CC); 2014 (2) SA 603 (CC) (12 December 2013)

\(^9\) Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd 2011 1 All SA 384 (SCA).

\(^10\) Agri South Africa v Minister for Minerals and Energy (CCT 51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (18 April 2013)

\(^11\) S v Smith 2008 (1) SA 135 (T)
prerogative of deciding whether or not a holder of prospecting or mining rights can enter his or her land.\textsuperscript{12}

5.1.31 Effectively section 5(3) of the MPRDA grants entitlements to prospective holders of prospecting or mining rights, even though the landowner has ownership of his or her land. The entitlements in terms of section 5 of the MPRDA will not only impose on the rights held by the landowner at the time of the granting of a mining or prospecting right, but once the mining rights of the holder have clearly been established, will continue to apply to the property until mining in respect of the relevant area has been completed; until the right is allowed to lapse\textsuperscript{13} or if the right is relinquished.

5.1.32 However, a landowner only has the obligation to allow a holder of prospecting or mining rights to gain access to his or her land if such a holder has fulfilled all the prerequisites as prescribed by the MPRDA. In the \textit{Bengewenyama}\textsuperscript{14} case the Constitutional Court considered the purpose of consultation and emphasised the importance of the landowner to be equipped with the necessary knowledge regarding the processes in the MPRDA, so that landowners can make informed decisions in advance “\textit{insofar as the interference with the landowner’s rights to use the property is concerned}”.

5.1.33 In the case of \textit{Baleni and Others v Minister of Mineral Resources and others (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP) (22 November 2018)} (referred as the Xolobeni by the Complainant). The Australian mining company applied for a mining right for titanium ores and other heavy metals. The Applicants have lived in this area for generations, and the land according to the \textit{community’s customary law} accrues to persons by virtue of them being members of the community. The Applicants in Xolobeni are common law owners of the property. There

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{12} \textit{Coal of Africa Limited v Akkerland Boerdery (Pty) unreported case number: 38528/2012} (judgment: 5 March 2014). See also \textit{Joubert v Maranda Mining Company (Pty) Ltd [2010] 2 All SA 67 (GNP)}
\item \textsuperscript{13} Section 56 of the MPRDA
\item \textsuperscript{14} Bengewenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2010 ZACC
\end{itemize}
\end{footnotes}
was no initial mining right over the property nor was there a cession of mineral rights in existence over the property, in the case of Xolobeni. The Applicants in Xolobeni opposed the mining activities on the basis that it will not only bring about a physical displacement from their homes, but will lead to economic displacement of the community and bring about a complete destruction of their cultural way of life.

5.1.34 The Farm in the matter that is the subject of the investigation is a private property that was purchased under Deed of Transfer 33057 dated 9 October 1945 with a cession of mineral rights already contained in the deed of sale and predecessors in title, making this case different from that of the Xolobeni communities.

5.1.35 The case of Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (CCT 39/10) [2010] ZACC 26, dealt with an application to set aside the granting of a prospecting right. The Applicants lodged a written objection to the Department against a granting of a prospecting right to Genorah. The owner of the land is no ordinary owner, they are a community that was previously deprived of formal title to their land by past discriminatory laws, and the entity to which the prospecting right has been granted qualifies for treatment as a historically disadvantaged person, further complicating the matter.

5.1.36 The case of the Complainant, Mr Kettleas, differs in that his family was never deprived of their formal title to their land, in fact they bought the land and it was registered in the name of the Complainant’s great grandfather, with ceded mineral rights.

5.1.37 Furthermore in the case of Bengwenyama when a prospecting right was granted in this matter the attorneys acting for Bengwenyama Minerals and the community lodged an appeal against the granting of the prospecting rights to Genorah. The Constitutional Court set aside the decision to grant a prospecting right to Genorah. This case of Bengwenyama can be distinguished from the Complainant’s matter as at the time that the
Complainant initially approached my office as stated above in paragraph 5.2.1 the mining right of Bathlako mining Ltd was registered under protocol 18/2008 with reference 324MR and was dated 18 August 2008, and it was in place until 17 August 2015. Furthermore, contrary to the Complainant’s assertions that Mr Kharivhe told him that their licence did not include portion 13, in terms of section 1 description of the mining area, the mining area shall comprise of the following: portions 2, 3, 4, 6, 9, 10, 11, 12, 13, 14 and the remaining extent of Potion 1 of the Farm Ruikhoek of the Farm 169 JP. An extract of the mining right permit is as follows:

1. Description of the Mining Area

   The Mining Area shall comprise the following:
   Certain: Portions 2, 3, 4, 6, 9, 10, 11, 12, 13, 14 and the remaining extent of portion 1 of the farm Ruikhoek 169 JP
   Situated: North West Magisterial/Administrative District of Mankwe
   Measuring: 2040.8300 hectares in extent.
   (In the case of various farms being involved, a list can be attached and referred to as Annexure C);
   Which Mining Area is described in detail on the attached Diagram/plan marked AnnexureC.

2. Granting of Mining Right

   Without detracting from the provisions of sections 5 and 25 of the Act, the Minister grants to the Holder the sole and exclusive right to mine, and recover the mineral/s in, on and under the mining area for the Holder’s own benefit and account, and to deal with, remove and sell or otherwise dispose of the mineral/s, subject to the terms and conditions of this mining right, the provisions of the Act and any other relevant law in force for the duration of this right.

3. Commencement, Duration and Renewal

3.1. This mining right shall commence on 18th August 2008 and, unless cancelled or suspended in terms of this clause 13 of this right and or section 47 of the Act, will continue to be in force for a period of Seven (7) years ending on 17th August 2015.
5.1.38 The Complainant also referred me to the case of *Agri South Africa v Minister for Minerals and Energy (CCT 51/12) [2013] ZACC 9* which dealt with getting clarity from the court relating to the commencement of the MPRDA having the effect of expropriating mineral rights conferred on holders by commencement of the Minerals Act.

5.1.39 The issue at the centre of this application was the question of whether Sebenza’s mineral rights, enjoyed during the subsistence of the Minerals Act, were expropriated when the MPRDA took effect. The appeal court upheld the decision of the High Court, that Sebenza’s mineral rights had been “legislated out of existence” and that this constituted a deprivation in terms of section 25 (1) of the Constitution. The reasoning of the court was that Sebenza has failed to approach the Department under the new MPRDA to convert and obtain a right to mine. This had the effect of their right being legislated out of existence. In the Complainants matter, Bathlako mine approached the Department and applied for a conversion of the mining right within the stipulated period allowed by the MPRDA and was granted a mining right. This case is therefore different from the dictum in the Agri case above.

5.1.40 In the case of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another [2018] ZACC 41*, the Constitutional Court upheld an appeal by thirteen (13) families of the Lesetlheng community who had been facing mining-induced eviction from the land they purchased a century ago that had remained in trust for them due to racially discriminatory laws forbidding them from owning it. The community sought to enforce their informal land rights under the constitution and the Interim Protection of Informal Land Rights Act (IIPILRA), as well as their right to be consulted under the MPRDA. The Court held that the mining companies had failed to consult, negotiate with, and seek the consent of the informal land rights holders, as required by law. This case differs from the Complainant’s contention and cannot assist the matter as there is enough evidence that there was adequate consultation between the legal representatives of the mine and the Trust. Furthermore as stated above Bathlako mining had a
permit that commenced on 18 August 2008 until 17 August 2015 and the Department acknowledged receipt of the renewal application on 27 March 2015. In terms of section 24(5) of the MPRDA “a mining right in respect of which an application for renewal has been lodged shall, despite its stated expiry date, remain in force until such time as such application has been granted or refused”.

5.1.41 As regards the assertion that the Minister of Mineral Resources has an obligation to assist the Complainant as a historically disadvantaged person, I have noted that the former Minister of Mineral Resources Ms S Shabangu considered and responded to your complaint in 2013.

Conclusion

5.1.42 The Department processed the Complainant’s application for a dump and provided adequate reasons for their decision to reject the application for a mining permit on a mine dump.

5.1.43 The Department also communicated to the Complainant the outcome and reasons for rejecting the application for a mining permit over the mine dump. This was done by the Acting Director-General and the then Regional Manager, Mr Swart who reconsidered the application and he subsequently rejected it again in a letter dated 11 November 2011.

5.1.44 When the land was sold to the Complainant’s great grandfather, it already contained cession of Mineral Rights, therefore all the successors in title of these Mineral Rights, including Batlhako Mining, have held preferential mining rights over the Farm and therefore mining permits cannot also be issued to the landowners. All sessions of mining rights from the time that the Complainant’s grandfather purchased the land have been registered and filed with the Deeds Office in Pretoria. In a correspondence dated 29 August 2019, the Department also confirmed that Batlhako Mining is the legal holder of mining rights in respect of the Farm, Portion 13.
5.2 Whether the Department failed to assist the Complainant to obtain a surface lease agreement with the Batlhako Mining, for the payment of surface rights use.

Common Cause Issues

5.2.1 It is not disputed that Batlhako Mining was prospecting and mined on Ruighoek Farm, Portion 13. The Mining right of Batlhako Mining Ltd was registered under protocol 18/2008 with reference 324 MR. In terms of section 1 Description of the mining area shall comprise of the following: portions 2, 3, 4, 6,9,10,11,12,13, 14 and the remaining extent of portion 1 of the Farm Ruighoek 169 JP. This mining right was in subsistence for a period of seven (7) years until 17 August 2015, and thereafter Batlhako Mining applied for renewal of the mining right licence. The Department acknowledged receipt of the renewal application on 27 March 2015.

5.2.2 It is further common cause that there were discussions between Batlhako Mining and the Complainant around the "Surface Rights Use" the discussions collapsed when both parties reached a deadlock. Further, Batlhako Mining had signed "surface rights use agreements" with other land owners of Portions of Farm Ruighoek 169JP.

5.2.3 The Complainant thereafter engaged with Batlhako Mining through his legal representative Lokwe Attorneys. Batlhako Mining communicated with Lokwe Attorneys on 27 September 2011 advising them of the following:

"(a) Batlhako acknowledged that they held a mining right over Portion 13;
(b) They requested a copy of the letter of executorship in respect of the Farm; and
(c) Batlhako advised them that they are no longer mining on Farm, Portion 13, and have not been doing so for a period of time."
In a correspondence dated 11 March 2013, Batlhako Mining advised the executrix of the Farm *inter alia* of the following:

"(1) We are still, after a number of years, attempting to execute a lease agreement over the property.

(2) We have been advised that you were appointed the executrix over the estate of the late Makhotse Jesse Mahabuke.

(3) The difficulty remains that the Letters of Executorship issued reflect that you are the Executrix of the Estate of the late Makhotse Jesse Mahabuke, who died on 1 January 1967.

(4) The latest deeds office print out, which we conducted on 11 March 2013 in respect of the above property is attached hereto as Annexure A. The Letters of Executorship you provided to us is attached hereto as Annexure B. It is clear from the two annexures that the name which appears on the deeds office print out differs from the Letters of Executorship. We have no way of confirming that the registered owner of the property is in fact the person reflected on the Letter of Executorship. The land Lease Agreement is required to be in the name of the landowner, who in the case of being deceased, is required to be in the name of the Executor/ix.

(5) Until such time as the Letter of Executorship is in the name of the landowner, alternatively the landowners name has been changed at the Deeds Office to be that as reflected in the Letters of Executorship, we have no way of identifying the correct landowner for the purposes of the Lease Agreement. This has been a problem which we have communicated for a number of years.

(6) We furthermore acknowledge that there is a desire for the rentals under the Lease Agreement to be paid into a Trust, which we have been advised is named the Jesse Mahabuke Makhiti Trust. We have
no difficulty with making payment to the aforesaid Trust for and on behalf of the landowner however we first need to establish the identity of the landowner and the person representing such landowner, with the necessary authority to enter into such lease agreement.

(7) We further wish to point out to you that there is a substantial amount of rental income, which we are accruing for and on behalf of the landowner. Such amount continues to accrue but can only be paid against a valid and binding lease agreement.”

The Department indicated that it is not a pre-requisite for mining companies have a surface lease agreement when a mining licence is being considered by the Department.

5.2.5 According to the Department, royalties are paid directly to the South African Receiver of Revenue Services (SARS). Holders of rights do sometimes furnish the Department with their surface lease agreements although it is not a requirement in terms of the MPRDA.

5.2.6 The Department engaged in a series of meetings with the parties involved to try and resolve the impasse, and provided the investigation team with copies of letters that the Department sent to the Jesse Makhothe Trust, and further provided the investigation team with copies of several e-mails exchanged between the Department the Complainant and the previous investigator at the office of the Public Protector, Mr Motona. These letters and e-mails confirm arrangements of meetings and engagements between the parties, to resolve this issue.

Application of the relevant legal framework

5.2.7 Section 5(4)(c) of the MPRDA, 2002 requires mining or prospecting permit holders to notify and consult with the land owners before commencing with their prospecting work.
Section 5(4) was deleted by section 4(d) of Act 49 of 2008 (Amendment Act) with effect from 7 June 2013.

There was an insertion of section 4 which states in the Amendment Act\textsuperscript{15}  
"4. Section 5 of the principal Act is hereby amended –  
(a) by the substitution for subsection (1) of the following subsection:  
(1) A prospecting right, mining right, exploration right or production right granted in terms of this Act and registered in terms of the Mining Titles Registration Act, 1967, (Act No. 16 of 1967), is a limited real right in respect of the mineral or petroleum and the land to which such right relates."; and  
(b) by the substitution in subsection (3) for paragraph (a) of the following paragraph:  
"(a) enter the land to which such right relates together with his or her employees, and \textbf{may} bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purpose[s] of prospecting, mining, exploration or production, as the case may be;";  
(c) by the insertion in subsection (3) after paragraph (c) of the following paragraph:  
"(cA) subject to section 59B of the Diamonds Act, 1986 (Act No. 56 of 1986), (in the case of diamond) remove and dispose of any diamond found during the course of mining operations;" and  
(d) by the deletion of subsection (4).

\textbf{Insertion of section 5A of Act 28 of 2002}  
5. The following section is hereby inserted in the principal Act after section 5:  
"Prohibition relating to illegal act\textsuperscript{15}"

\textsuperscript{15} Act 49 of 2008, amended the MPRDA, 2002, with effect from 7 June 2013.
5A. No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without—

(a) an environmental authorisation;

(b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and

(c) giving the landowner or lawful occupier of the land in question at least 21 days written notice.”

5.2.8 It follows from the evidence discussed above that the Department was part of the consultative process when Batlhako Mining consulted with the Complainant, however their discussions deadlocked and collapsed, resulting in no agreement between the parties. Since December 2014, the Department has provided proof of e-mail correspondences that they tried to mediate between Batlhako Mining and the land owners to assist with the surface lease agreement. This was not a successful process, as after several attempts by the Department to intervene in the matter no agreement could be reached between the parties.

5.2.9 In a correspondence dated 15 April 2015, Mr Swarts indicated that he arranged a follow up meeting with the land owners, they confirmed attendance of the meeting, but he waited for two (2) hours and there was no attendance or apology received from the land owners.

5.2.10 The Complainant was also aware from the correspondence dated 27 September 2011 and 11 March 2013 sent to Lokwe Attorneys, that they were required to provide proof of ownership of the land, to enable payment to be made, and the Complainants failed to comply with the request of Batlhako Mining, hence payment was not made.
5.2.11 The MPRDA, 2002, before its amendment is applicable in the circumstances, as the Department granted a mining right to Batlhako for a period of seven (7) years commencing on 18 August 2008 and ending 17 August 2015. The mining licence was granted before the MPRDA was amended. The test required by the MPRDA, 2002 is that a consultative process took place between the mine and the land owners, which is confirmed from the correspondence between Batlhako Mining and Lokwe Attorneys, that they were engaged in a consultative process, however it ended in a deadlock between the parties.

5.2.12 Application for a renewal of a mining licence is dealt with in Section 24 of the MPRDA, 2002. Section 24, does not stipulate that the owners of the land need to be consulted for a renewal of a mining licence application. Section 24 is silent on this matter, and therefore by application of the law the Department does not require the consent of nor are they responsible for consultation with land owners to consider an application for renewal of a mining licence.

Conclusion

5.2.13 The evidence revealed that there were discussions facilitated by the Department between Batlhako Mining and the Complainant represented by Lokwe Attorneys, however no “Surface Rights Use Agreement” was signed between them, due to the parties reaching a deadlock.

5.2.14 The responsibility in this instance lies with the owners / trustees to get their land ownership affairs in order and registered at the deeds office to enable payment for Surface Rights Use to be paid.

5.3 Whether the Department failed to investigate the complaint of Illegal mining.

Common Cause Issues
5.3.1 It is not disputed that Batlhako Mining was prospecting and mined on Ruigoek Farm, Portion 13. The Mining right of Batlhako Mining Ltd was registered under protocol 18/2008 with reference 324 MR. In terms of section 1 Description of the mining area shall comprise of the following: portions 2, 3, 4, 6,9,10,11,12,13, 14 and the remaining extent of portion 1 of the Farm Ruigoek 169 JP. This mining right was in subsistence for a period of seven (7) years until 17 August 2015, and thereafter Batlhako Mining applied for renewal of the mining right licence.

5.3.2 The Department acknowledged receipt of the renewal application on 27 March 2015. The latter also informed Batlhako Mining that “in terms of section 24(5) of the Mineral Petroleum Resources Development Act, 2002 a mining right in respect of which an application for renewal has been lodged shall, despite its stated expiry date, remain in force until such time as such application has been granted or refused.”

*Issues in dispute*

5.3.3 The issue for my determination is whether the Department failed to investigate the complaint of illegal mining.

5.3.4 A meeting took place on 4 October 2018 with the Public Protector Investigation team, the Department and the Complainant.

5.3.5 The Complainant confirmed that the illegal mining was also reported to the SAPS. On his own evidence at the meeting in 4.3.1 he further confirmed that the SAPS investigated the matter and the DPP declined to prosecute the matter as they found that there was no evidence to substantiate his claim and the case was closed. This is common cause as it was also the version of the Department and as such it was accepted by the investigation team.

5.3.6 During the meeting mentioned in above the Department confirmed that they conducted their own investigation and also co-operated with the SAPS, and after investigation of the matter, they came to the same conclusion as the
SAPS that there was no illegal mining taking place. This evidence was not disputed by the Complainant.

5.3.7 From the above mentioned meeting, a way forward in this matter regarding this issue of illegal mining was that the Complainant would accompany the Department experts to the place where he alleged that illegal mining was taking place, and the Department would investigate, and further plot the coordinates on a map to show whether the illegal mining if any was found was within the boundaries of the Farm, and also that a report will be forwarded to the Public Protector investigation team in this regard. This was accepted by all parties including the Complainant, and an e-mail was forwarded to the Complainant and the Department on 11 October 2018, confirming the way forward from the consultative meeting with all parties.

5.3.8 The Department arranged for the pointing out to take place on 24 October 2018, at 10am, and communicated this to all parties through an e-mail correspondence.

5.3.9 The 11 October 2018, the Complainant responded to the Public Protector investigation team, informing them that he refuses to participate in the pointing out exercise with the Department experts and requested that I issue a report finalising his matter.

5.3.10 In a correspondence dated 29 August 2019, the Department responded to the Complainant’s contention that Bathako’s mining right had been suspended. The Department indicated that “the mining right was suspended on the basis that there was no meaningful participation of the BEE as required in terms of section 2(d) of the MPRDA. Post issuing this notice by the Regional Manager, it was later realised that the Regional Manager had no delegated authority to suspend the mining licence in terms of section 47 of the MPRDA as it is only the Minister who has such authority. Hence the notice was withdrawn.”
A correspondence dated 21 October 2011, was issued by the Regional Manager of the Department withdrawing the suspension, and citing the case of *State Vs Louis Brendell (case number 84/06/2011)* as further authority to withdraw the suspension.

**Conclusion**

From the evidence at hand it is clear that the Department and the SAPS investigated the matter and found that there was no illegal mining taking place on the Farm.

Furthermore, Batlhako Mining applied for renewal of the mining right licence and in terms of section 24(5) of the MPRDA a mining right in respect of which an application for renewal has been lodged shall, despite its stated expiry date, remain in force until such time as such application has been granted or refused."

**6. REASONS FOR CLOSURE**

**6.1** Regarding whether the failure of the Department to process an application and issue a mining permit for the dump, and subsequent failure to assist him with his online application for a mining right amounts to maladministration.

**6.1.1** The allegation that the Department failed to process an application and issue a mining permit for the dump, and subsequent failure to assist him with his online application for a mining right is unsubstantiated.

**6.1.2** The Department processed the Complainant's application to mine the dump according the MPRDA, 2002, relevant applicable case law, and also communicated their decision for rejecting the application to the Complainant. This allegation is not substantiated, and does not amount to maladministration.
6.1.3 It seems that the Complainant misinterpreted a letter dated 11 November 2011 that was sent to the Trustees of the Jesse Makhothe Trust from the Regional Manager of the Department and the Complainant incorrectly assumed that there was no existing Mining Licence on the Farm. Therefore the allegations that there was no mining right on the property is unsubstantiated.

6.2 Regarding whether the Department failed to assist the Complainant to obtain a surface lease agreement with Batlhako Mining, for the payment of surface rights use.

6.2.1 The allegation that the Department failed to assist the Complainant to obtain a surface lease agreement with Batlhako Mining, for the payment of surface rights use is unsubstantiated.

6.2.2 The consultative process took place, as was required by the MPRDA but failed due to a deadlock between the parties. It is the responsibility of the Complainant to get the ownership of the Farm, in order, to enable the signing of a possible surface lease agreement and the payment of possible benefits to the lawful owners of the Farm, as Batlhako Mining confirmed that a substantial amount of money was available and accruing interest to be paid over to the owners of the property. This allegation is not substantiated.

6.3 Regarding whether the Department failed to investigate the complaint of illegal mining.

6.3.1 The allegation that the Department failed to investigate the complaint of illegal mining is unsubstantiated.

6.3.2 The allegations of the Complainant were investigated by both the Department and the SAPS, and it was found that there was no illegal mining taking place, hence the DPP declined to prosecute the matter and the case was closed. This allegation is not substantiated.
6.3.3 Should there be any enquiries or responses to this closing report, kindly contact Ms Veronika Pillay, the Senior Investigator: Administrative Justice and Service Delivery the Public Protector South Africa at Veronikap@pprotect.org.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 23/09/2019