
PUBLIC PROTECTOR
SOUTH AFRICA

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REPORT ON AN INVESTIGATION INTO THE ALLEGED FAILURE BY THE DEPARTMENT OF MINERAL RESOURCES TO ACT AGAINST MINING ENTITIES AND RELATED BUSINESSES WHOSE WERE ALLEGEDLY INVOLVED IN ILLEGAL MINING AND OTHER ACTIVITIES ON 422 IP HARTEBEESTFONTEIN FARM, STILFONTEIN
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Executive Summary

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

(ii) The report communicates my findings and the appropriate remedial action that I am taking in terms of section 182(1) (c) of the Constitution, following an investigation into allegations into the alleged failure by the Department of Mineral Resources (DMR) to act against mining entities and related businesses who were allegedly involved in illegal mining and other activities on 422 Hartebeestfontein Farm, Stilfontein.

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

(iv) Based on an analysis of the allegations, I have identified the following issues to inform and focus this investigation:

a) Whether the DMR continuously, diligently and injudiciously failed to properly attend to complaints and allegations by the Complainant that Buffelsfontein Gold Mine (BGM) is illegally occupying the Complainant's property and conducting mining and related activities without the legal right to do so, and/or not following proper legislative procedures;

b) Whether the DMR failed to diligently and expeditiously execute its statutory duties and obligations to intervene in, or take action with respect to, the demolition of Hostel no 4 on the Complainant's property by BGM without either conference nor consultation with the Complainant as the Landowner;
c) Whether the DMR failed to diligently and expeditiously execute its statutory duties and obligations to intervene in or take action in respect of a dispute between the Complainant and BGM regarding compensation owed to the Complainant as landowner;

d) Whether the DMR continuously, diligently, and injudiciously failed to properly attend to complaints and allegations by the Complainant that BGM had entered into an agreement with two companies to work on the mine dumps on the property, for the production and sale of sand and stone, and the manufacturing of concrete blocks and paving dumps on the property which do not constitute mining activities covered by any surface right permit; and

e) Whether the DMR improperly failed to ensure that BMG gave effect to the objectives of integrated environmental management laid down in Chapter 5 of the National Environmental Management Act No 107 of 1998 (NEMA) and the Mineral and Petroleum Resources Development Act No 28 of 2002 (MPRDA) by conducting mining operations under a valid EMPR and making the prescribed financial provision for the rehabilitation or management of negative environmental impacts of its mining operations.

v) Key laws taken into consideration in determining whether the DMR has properly responded and attended to the complaints and concerns raised by the Complainant regarding the alleged unlawful mining operations on his property, as well as its alleged failure to comply with its environmental protection obligations include -

a) The Constitution of the Republic of South Africa Act No 108 of 1996 (the Constitution);

b) The Public Protector Act No 23 of 1994;

c) The Mineral and Petroleum Resources Development Act No 28 of 2002 (MPRDA);
d) The National Environmental Management Act No 107 of 1998 (NEMA); and


vi) The key laws taken into account to help the Public Protector determine if there had been undue delay, gross negligence and maladministration by the DMR were principally those imposing administrative standards that should have been upheld, including sections 195 and 7(2) of the Constitution, which require the State to promote and protect the rights entrenched in the Bill of Rights.

vii) Having considered the evidence uncovered during the investigation, as against the relevant regulatory framework, the complaints received as against the concomitant responses by the DMR and Department of Environmental Affairs (DEA), I make the following findings:

a) Regarding whether the DMR continuously and injudiciously failed to properly and diligently attend to complaints and allegations by the complainant that BGM is illegally occupying his property and conducting mining and related activities without the legal right to do so or not following proper legislative procedures, I find that:

aa) The allegation that the DMR continuously and injudiciously failed to properly and diligently attend to complaints and allegations by the Complainant regarding BGM’s presence and operations on his property, is substantiated.

bb) All the complaints, concerns and issues that the Complainant has been raising with the DMR since 2003 about the activities of BGM, and subsequently of C & C Crushers on his property, fell within the scope of its regulatory, compliance and enforcement functions in terms of sections 38, 41, 47 and 98 of the MPRDA.
cc) Throughout its engagement with the Complainant, the DMR relied on Mining License ML 4/2001 and the converted mining rights in terms of the MPRDA to dismiss the Complainant’s complaints that BGM and C & C Crushers were unlawfully occupying and conducting mining operations on the Property.

dd) If the DMR and the Minister took appropriate action in terms of, *inter alia*, sections 91 and 92 of the MPRDA to investigate and verify the complainant’s claims and concerns, they would have discovered that the DMR failed to register in 2000 that Durban Roodepoort Deep (DRD) had in fact relinquished its mining rights on Complainant’s property as well as twenty two (22) properties when it consolidated the mining operations of Hartebeestfontein Gold Mine and BGM when it excluded these properties from its application for a mining licence (ML 4/2001).

ee) The DG: DMR conceded in January 2019 that the Regional Manager erred by not addressing this issue with BGM and the Complainant’s property was not the subject of BGM’s older order right in terms of mining licence ML 4/2001, or the converted mining right as it was not included on the application form.

ff) The manner and inordinate timeframes that it took the DMR to respond to the Complainants numerous communications between 2003 and 2012, displayed nothing short of a *laissez-faire* attitude and a total lack of respect for the individual rights of the Complainant as a landowner and a disregard of its social and environmental responsibilities in terms of the Constitution and section 3 of the MPRDA as the custodian of the mineral and petroleum resources of the Country for the benefit of all its people.
gg) The balance of probabilities favour a conclusion that the DMR when it was enlightened by the Complainant of a potential irregularity in respect of the mining operations on his property under the auspices of either temporary Mining Licence no. T5/1999 or mining License ML 4/2001, did not sufficiently interrogate and investigate the concerns raised by the Complainant in accordance with its obligations in terms of section 5 of the MPRDA, the standards of accountability and transparency in section 195(1)(f) and (g) and the requirement of a high standard of professional ethics in section 195(1)(a) of the Constitution.

hh) The DMR's conduct is in total disregard of its regulatory, compliance and enforcement functions in terms of sections 38, 41, 47 and 98 of the MPRDA, its responsibilities in terms of section 25 of the Constitution, as well as the Constitutional values expected of public administration as enshrined in section 195 of the Constitution.

ii) Accordingly the conduct of the DMR in relation to the manner it disregarded the Complainants complaints and concerns over a period of more than ten (10) years, in favour of an approach that effectively endorsed unauthorised mining operations on the Complainant's property, constitute maladministration and improper conduct as envisaged in section 182(1)(a) of the Constitution read with sections 6(4)(a)(i), (ii) and (iv) of the Public Protector Act, 1994
b) Regarding whether the DMR failed to diligently and expeditiously execute its statutory duties and obligations to intervene in or take action in respect of the demolition of Hostel no 4 on the Property by BGM without any conference or consultation with the Complainant as the Landowner, I find that:

aa) The allegation that the DMR failed to take the requisite steps to prevent BGM from demolishing Hostel no 4 and disposing of assets that might not have belonged to it and the complainant wanted to retain, is substantiated.

bb) Throughout its engagement with the complainant the DMR relied in Mining Licence ML 4/2001 and the converted mining rights in terms of the MPRDA to dismiss the Complainant’s complaints that BGM and C & C Crushers were lawfully occupying and conducting mining operations on the Property.

cc) Even though the property is reflected on a sketch plan annexed to BGM’s conversion application in 2007, it is not sufficient as the relevant legislation, including section 1 of the MPRDA, regulation 79 of the MPRDA Regulations and Item 7 of Schedule II of the MPRDA required the registered description of the land, area or offshore blocks to which such an application related.

dd) Conversely, the same list of properties covered in the deed of session (which excluded the description of the Complainant’s property), were used in BGM’s consolidated application that resulted in the granting of mining Licence ML 4/2001, and again in the 2007 conversion application.

ee) The DMR’s contention that BGM was lawfully conducting mining operations on the Complainant’s property (Portion 37 of the farm Hartebeestfontein 422 IP) under the authority of mining Licence ML 4/2001 is not supported by the available evidence.
ff) The DMR, therefore failed to register as far back as 2000 that Hartebeestfontein/BMG had relinquished is mining rights under mining license ML7/19951999 in respect of the complainant’s and twenty three (23) other properties on which it had been conducting mining operations prior to its acquisition by AVGOLD.

gg) I therefore agree with the Complainant’s contention that any surface rights registered against the Property could not continue in force and ipso facto lapsed in terms of Section 90 (11) of the MPRDA and Section 48 (3) of the MA with the lapsing of Temporary Mining Authorisation Permit No T5/1999 on 20 August 2000.

hh) It follows that BGM or Simmer & Jack Limited could therefore not become the holder, user or acquirer of any reservation, permission or right to use the surface of land and the surface right permits was first incorrectly transferred by the DMR to AVGOLD and then several years later in 2006, improperly registered in favour of BGM in terms of item 3 of Schedule II of the MPRDA.

ii) I do not however, agree with the Complainant’s contention that his property as well as the other properties excluded from mining license ML4/ 2001 automatically became freehold properties, free from the burden of limited real rights held by Hartebeestfontein Gold Mine, when the temporary mining authorisation lapsed in 2000.

jj) In terms of the MA, the environmental protection regime covering mining operations, any property that has been subjected to mining activities and operations, have to be returned to its natural state, through a rehabilitation process and the issuing of a closure certificate, before the rights holder is absolved from his/ her responsibilities and the said property becomes part of the dominium of the land owner.
kk) Accordingly, DRD/ Hartebeestfontein/BGM were supposed to commence with the decommissioning of the mine on the Complainant’s properties and the closure process prescribed in the MA after 2000, which included consultation with the landowner in terms of Section 40 (c) of the MA to establish if he wished to keep certain infrastructures or buildings on his land.

ll) The DMR failed to ensure that DRD/ Hartebeestfontein/BGM submit a Closure Plan, covering final performance of EMPR and environmental rehabilitation liabilities with details of all the land under the mining operations and list of the infrastructures and buildings in terms of the Regulations 5.18.11.1 - 2 of the MA and to assess whether or not that R85 million in the Trust Fund account of Hartebeestfontein Gold Mine provided adequate financial provision for rehabilitation

mm) The DMR furthermore, since 1999 failed to ensure that DRD or BGM complied with their rehabilitation obligations in respect of the Complainant’s property in terms of the approved EMPR for Hartebeestfontein Gold Mine, including a notice to prevent the disposal of assets such as Hostel no 4.

nn) The Conduct of DMR constitute maladministration and improper conduct as envisaged in section 182(1) (a) of the Constitution read with sections 6(4) (a) (i), (ii) and (iv) of the Public Protector Act, 1994.

c) Regarding whether the DMR failed to diligently and expeditiously execute its statutory duties and obligations to intervene in or take action in respect of a dispute between the Complainant and BGM regarding compensation owed to the Complainant as landowner, I find that:

aa) The submission by the Complainant that the Regional Manager was obliged to initiate the arbitration process as envisaged in section 54(4) of the MPRDA as a result of the impasse created by BGM’s refusal or failure to enter into a rental or compensation agreement with him for the use of his
land, have become moot in view of the fact that the DMR ought to have been aware of the fact that the Complainant’s property was no longer the subject of the old order mining rights held by BGM under the authority of Mining License ML7/2001 or the converted new order right.

bb) As a result, the procedure provided for in the MPRDA or preceding legislation (such as the MA) would in all probability not have been available to resolve the dispute between the Complainant and BGM, as any grounds for compensation, including the potential unlawful encroachment on the Complainant’s property rights, the unlawful extraction of minerals through the exclamation of the mine rock dumps, or the presence and activities of C & C Crushers and Boleng Concrete Products would not have been covered under the concept of “damages” as envisaged in section 42 of the MA or section 54(7) of the MPRDA, caused by valid mining operations in terms of either the MA or MPRDA.

c) Had the DMR registered the fact that BGM’s presence and activities on the Complainant’s property were in fact not sanctioned by mining license ML7/2001 or the subsequent converted mining rights, its role in terms of the MA and MPRDA would have been to protect a landowner against illegal mining activities, by stopping and preventing such activities, and not the mediation of disputes about compensation.

d) The conduct of DMR which actually amounted to maladministration and prejudicial conduct as envisaged in section 182(1)(a) of the Constitution read with sections 6(4)(a)(i), (ii) and (iv) of the Public Protector Act, 1994, therefore refers to its initial failure in 1999/2000 to properly record and register the amendment of BGM’s mining rights towards certain properties, including that of the Complainant, as well as its purported transfer and registration of the relevant surface right permits to AVGOLD and BGM in 2002 and 2006 respectively.
d) Regarding whether the DMR continuously diligently and injudiciously failed to properly attend to complaints and allegations by the Complainant that BGM had entered into an agreement with two companies to work the mine dumps on the property for the production and sale of sand and stone and the manufacturing of concrete blocks and paving, dumps on the property to produce and sell sand and stone, which do not constitute mining activities covered by any surface right permit, I find that:

aa) The allegation that the DMR and the Minister improperly failed to take action against C & C Crushers and Boleng Concrete Products for unauthorised mining activities on the Complainant’s property and operating without the requisite environmental authorisations, is substantiated.

bb) From an analysis of the agreement between BGM and C & C Crushers against the legal framework, including case law, it is clear that C & C Crushers’ exploitation of the waste rock dump could primarily be regarded as the processing or the winning of a mineral or minerals and therefore conducting mining operations on the property as a contractor for BGM.

c) There is no indication in the agreement that C & C Crushers was responsible for the rehabilitation of the dumps as an integral part of the reclamation operation in accordance with the conditions contained in the EMP on which BGM relied.

dd) Instead the agreement purported to cede or place such an obligation (unlawfully) on C & C Crushers after the termination of the agreement, contrary to the guiding principle of the controlling legislation that the polluter (Hartebeestfontein Gold Mine as the original mining rights holder) must pay for the costs of rectifying the impacts of pollution.
ee) The determination and management of the environmental impact of any unnatural man-made landforms on the Complainant's property such as waste rock dumps and slimes (tailings) dams created through mining activities and the monitoring of its rehabilitation action plans and environmental management measures, had to take place in accordance with the management criteria contained in the Environmental Management Programme (EMP) that was actually approved for mining and rehabilitations operations on the Property in question, which was not the EMP approved to DRD in 2002 in terms of the Section 39 (2) (b) of MA as the Complainant's property was not part of the mining authorisation issued in terms of mining license ML4/2001 and the EMP conditions approved by DMR [DRD-NWEMP (Nov 2001)].

ff) DMR had to ensure that the owner of mining rights on the Complainant's property in terms of the lapsed Mining License ML7/1995 and the approved EMP of Hartebeestfontein Gold mine, commenced with its rehabilitation obligations immediately after 1999, and long before BGM entered into an agreement with C & C Crushers to purportedly comply with rehabilitation obligations in terms of the 2002 EMP.

gg) Even if the reclamation of the Waste Rock Dump on the Complainant's property might have constituted bona fide rehabilitation or waste management measures in terms of the 2002 EMP as opposed to the applicable Hartebeestfontein EMP, there is no indication that the DMR took any action to deal with the Complainant's concerns about the environmental impact of the operations of both C & C Crushers and Boleng Concrete Products to ensure that these operations were carried out in accordance with the generally accepted principles of sustainable development (section 37 of the MPRDA) or monitored the assessment and management of
impacts identified as part of the environmental management programme process laid out in section 39 of the MPRDA.

ii) The surface right permits (including for the waste rock dump) were incorrectly registered (several years later in 2006) in favour of BGM in terms of item 3 of Schedule II of the MPRDA, therefore DMR's impression that the waste rock dump reverted to BGM as a movable asset by virtue of surface rights permits, re-registered in the Minerals and Petroleum Titles Office in terms of its old order mining right ML 4/2001 over various properties, including the property held by the complainant, cannot stand.

jj) C & C Crushers' (and BGM's) exploitation of the dumps was therefore not covered under the EMP approved in terms of section 39(4) of the MPRDA, and C & C Crushers would thus have needed environmental authorisation for those activities in terms of section 24 of NEMA.

The DMR failed to follow through after initiating action against BGM and C & C Crushers on the very same issues that the Complainant has been raising, including:

1) Its 2011 notice to BGM in terms of section 93 of the MPRDA to cease all operational activities relating to the reclamation of the dump as its approved Environmental Management Programme did not cater for operational activities relating to reclamation of the dumps; and

2) The recent issuing of "Pre-Compliance notice and the Compliance Notices to C & C Crushers as well as Boleng Concrete Products in terms of Section 31L of the NEMA for undertaking the operational activities relating to the processing of the dumps without Environmental Authorisation."
There is no evidence to conclude, on a balance of probabilities that the DMR duly complied with its obligations in terms of environmental monitoring for the purpose of –

1) Monitoring and enforcing the Hartbeestfontein EMP approved under the lapsed mining license ML7/1995 which ought to have regulated the rehabilitation of the Complainants property;

2) In so far as it purported to monitor and enforce the 2002 DRD EMP, determining the BGM’s progress towards meeting the defined management measures and rehabilitation criteria in the EMP that was purportedly approved for its mining operations, including reclamation of the Waste Rock Dump on the Complainant’s property; or.

3) Ensuring compliance by BGM with its obligations in terms of other legislation including NEMA, the National Water Act 36 of 1998 (NWA) and the National Environmental Management: Waste Act 59 of 2008 (NEMWA).

The manner in which the DMR discarded the Complainant’s complaints and concerns about the operations of BGM, C & C Crushers and Boleng Concrete Products was furthermore inconsistent with its environmental responsibilities in terms of section 24 of the Constitution and the Constitutional values expected of public administration as embodied in section 195 of the Constitution.

The Conduct of the DMR therefore constitutes maladministration and improper conduct as envisaged in section 182(1) (a) of the Constitution read with sections 6(4) (a) (i), (ii) and (iv) of the Public Protector Act, 1994.
e) Regarding whether the DMR improperly failed to ensure that BMG gave effect to the objectives of integrated environmental management laid down in Chapter 5 of NEMA and the MPRDA by conducting mining operations under a valid EMPR and making the prescribed financial provision for the rehabilitation or management of negative environmental impacts of its mining operations, I find that -

aa) The allegations that the DMR failed to ensure that BMG conducted mining operations on the actual properties validly covered under mining Licence ML 4/2001 and any converted mining rights under a valid EMPR and made the prescribed financial provision for the rehabilitation or management of negative environmental impact of its mining operations, are substantiated.

bb) The original EMPR approved in July 2002 to DRD may, in terms of the transitional arrangements provided in Schedule II to the MPRDA, have been valid until 2005 when BGM was taken over by Simmer & Jack Limited and ceased to be a subsidiary of DRD.

cc) In addition, the DMR rejected the said EMPR in 2006 as being non-compliant with section 39 of the MPRDA and Regulations 49, 50 and 51 of the Regulations issued in terms of the MPRDA.

dd) An amended and realigned EMPR submitted by BGM and Simmer & Jack, in 2008, was not approved by DMR because of a shortfall in the financial provision for environmental liability, which meant that BGM might effectively have been conducting mining operations under mining licence ML 1/ 2001 in contravention of sections 5(4) and 98 of the MPRDA.

ee) The DMR only issued an order to BGM in terms of section 93 of the MPRDA to correct the shortfall in its environmental liability, and a suspension notice in terms of section 47 of the MPRDA approximately on 19 June 2012, five
(5) years after the updated EMPR was due, and seven (7) years after the shortfall was identified.

ff) In 2014 after BGM commenced with the decommissioning and closure process of its mining operations, the DG: DMR accepted and approved an application submitted by BGM for the “amendment” to the Environmental Impact Assessment and the EMPR which significantly reduced the quantum of the environmental rehabilitation liability although it is not clear which EMPR the application sought to amend because the EMPR submitted by BGM to the DMR in 2008 was never approved.

gg) In addition, there is no indication if an independent environmental consultant conducted a final performance assessment of the environmental rehabilitation liability of BGM before approval of the “amended” EMPR by DMR, or that the DMR had consulted with the Department of Water Affairs as required in terms of section 43(6) of the MPRDA.

hh) The DMR’s failure, since the significant shortfall in BGM’s environmental liability was identified in 2005 to comply with its obligations and duties in terms of the MPRDA therefore posed a threat not only to the constitutional environmental rights of members of the Public and Communities, but also increased the risk that taxpayers might eventually be burdened with the costs of rehabilitation of the environmental impact of BGM’s mining operations.

ii) The Conduct of the DMR therefore constitutes maladministration and improper conduct as envisaged in section 182(1) (a) of the Constitution read with sections 6(4) (a) (i), (ii) and (iv) of the Public Protector Act, 1994.
viii) REMEDIAL ACTION

a) Introduction

aa) While this investigation focussed on the complaints and concerns of the Complainant as an individual, and the Public Protector did not conduct a systemic investigation as such, the issues highlighted by the investigation are of general concern to the public as a whole and particularly vulnerable communities affected more directly by mining operations.

bb) From the literature and jurisprudence reviewed by the Public Protector, as reflected in this report, there are concerns about the perception that the DMR is generally not taking sufficient action in terms of its social and environmental constitutional duties, to ensure compliance with the MPRDA, NEMA and other legislation by mining rights holders.

cc) While the actions of the DMR in the matter at hand have in my view contributed to the prejudice suffered by the Complainant as a result of its endorsement of a purported mining right over his property, which by its very nature subtracts from the landowner’s bare dominium of land and deprived him from the full use and benefit of his property, the public law realm within which I operate, does not provide for an appropriate remedy that would effectively place the Complainant in the position that he would have been, had the DMR taken his complaints and concerns seriously and established the correct state of affairs from the onset in 2003.

dd) I noted the contributing factors such as lacunae and uncertainties in the legal and regulating framework, insufficient capacity and the fact that responsibilities were divided amongst various Departments.

ee) While it is perhaps too soon to determine if and to what extent the "One Environmental System" might alleviate some of the enforcement issues
uncovered in this investigation, the inordinate delay by the relevant state institutions to align their collective responsibilities to remediate environmental impact of mining operations on air, soil, water and infrastructure, poses significant threats to the health, livelihood, culture and survival of communities and the people of the Country.

ff) If drastic action is not taken by DMR and the DEA, to improve the level of compliance by mining rights holders with its obligations and duties in terms of the MPRDA, the situation will increasingly pose a threat not only to the Constitutional environmental rights of members of the public and communities, but also increased the risk that taxpayers might eventually be burdened with on the costs of rehabilitation of the environmental impact of mining operations across the country.

b) Appropriate remedial action

Against this background I take the following remedial action in terms of section 182(1) (c) of the Constitution in order to address the individual complaints of the Complainant, while also serving a wider public interest:

aa) The Director General: Mineral Resources must within sixty (60) days of the issue of this report take action to-

1) review and correct its records and any mining rights and surface permits registered against the Complainant's property at the Mining Titles Registration office to reflect the position as conceded to, namely that the property was not the subject of any older order right held by BGM under mining licence ML 4/ 2001, or any converted new order mining right;
2) review the closure and rehabilitation process embarked upon by BGM since 2013 to distinguish between the properties covered under the older order mining right under mining licence ML 4/2001, as well as those properties that were not subject to such rights, but on which it continued to conduct mining and related operations, with the view to ensure that:

aaa) performance assessments of the actual environmental management plan or environmental management programme that was approved for the mining operations on the said properties are conducted by the actual (former) rights holder or its successor in law;

bbb) the closure and rehabilitation process in respect of the Complainant’s property is conducted in accordance with an approved updated EMPR which complies with the MA or the MPRDA and Regulations;

ccc) the financial provision for the rehabilitation or management of negative environmental impact of its mining operations on the Complainant’s property, is independently assessed and determined, in consultation with external role players such as the Director-General of Water Affairs (Water and Sanitation) as required by section 41(4) and (6) of the MPRDA or the corresponding provisions of the MA.

bb) **The Director General and the Minister of Mineral Resources** must within ninety (90) days of the issue of this report take steps to –

1) independently assess and review the the environmental liability of BGM which was drastically reduced from the determined shortfall of
R226 531 714.00 in 2012 to an amount of R8 361 396.13 in BGM’s 2014 application for an amended IEA and EMPR; and

2) ensure that the environmental liability of Hartebeestfontein Gold mines/ BGM/ Simmer & Jack is corrected before any closure certificates are issued in terms of section 43 of the MPRDA in respect of the mining operations on the Complainant’s property as well as other mining operations conducted by BGM/ Simmer & Jack under the auspices of mining licence MI 4/ 2001 or any converted new order mining rights.

cc) The Director General Mineral Resources, in consultation with the Director General Environmental Affairs, must take steps within 60 days of the issue of this report, to deal with the operations and activities on the complainant’s property conducted without an approved EMPR in terms of the MPRDA, as well as the operational activities relating to the processing of the waste rock dumps without the required environmental authorisations in terms of section 24 of NEMA.

dd) The Director General Mineral Resources, must consult with the Director-General of Water Affairs (Water and Sanitation) within 60 days of the issue of this report, in respect of the activities on the complainant’s property conducted without the required a water use license from the Department of Water Affairs in accordance with the provisions of section 5(3) (d) of the MPRDA or might constitute an offence under section 151(1) (a) of the NWA.

ee) The Directors General of Mineral Resources and of Environmental Affairs must within ninety (90) days of the issue of this report, take steps to improve and encourage public participation in the monitoring of the One Environmental System and to establish effective mechanisms to deal with complaints, grievances and concerns from members of the Public in
accordance with the standards set in section 195 of the Constitution, in order to avoid a duplication of the events that gave rise to the complaint under investigation.

ff) The Director General Mineral Resources must within 60 days of the issue of this report issue a written apology to the Complainant for the manner in which he has been treated in disregard of its constitutional obligations and the Batho Pele Principles governing public administration.

gg) Since I am of the opinion that the facts encapsulated in this report might disclose the possible commission of offences, a copy of the report is referred to the National Director for Public Prosecutions in terms of section 6(4)(c)(i) of the Act.
REPORT ON AN INVESTIGATION INTO THE ALLEGED FAILURE BY THE DEPARTMENT OF MINERAL RESOURCES TO ACT AGAINST MINING ENTITIES AND RELATED BUSINESSES WHICH WERE ALLEGEDLY INVOLVED IN ILLEGAL MINING AND OTHER ACTIVITIES ON 422 IP HARTEBEEESTFONTEIN FARM, STILFONTEIN

1. INTRODUCTION

1.1. This is my report as the Public Protector in terms of Section 182(1)(b) of the Constitution of the Republic of South Africa Act no 108 of 1996 (the Constitution) and Section 8(1) of the Public Protector Act No 23 of 1994 (the Public Protector Act).

1.2. This report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of this investigation:

1.2.1. The Minister of Mineral Resources, Mr Gwede Mantashe MP;

1.2.2. The Minister of Environment, Forestry and Fisheries: Ms Barbara Creecy, MP;

1.2.3. The Minister of Human Settlement and Water and Sanitation, Ms Lindiwe Sisulu, MP

1.2.4. The Director General: Mineral Resources, Adv T Mokoena;

1.2.5. The Director General: Environmental Affairs, Ms Nosipho Ngcaba;

1.2.6. The Director-General of Water and Sanitation, Ms Deborah Mochothi;

1.2.7. The National Director of Public Prosecutions, Advocate S. Batohi; and

1.2.8. The complainant, Mr A Thobani.
1.3 This report relates to an investigation into the alleged failure by the Department of Mineral Resources (DMR) to act against mining entities and related businesses who were allegedly involved in illegal mining and other activities on 422 Hartebeestfontein Farm, Stilfontein.

2. THE COMPLAINT

2.1 The complaint was lodged in August 2011 by Mr A Thobani (the Complainant), owner of the Portion 37 of the farm Hartebeestfontein 422 IP.

2.2 In the Complainant’s original complaint he disputed and challenged the validity and lawfulness of the mining operations on his farm, Portion 37 of the Farm Hartebeestfontein 422 IP (the Property), based on primarily non-compliance with the requirements and conditions of the mining licenses and rights granted by DMR, as well as non-compliance and contravention of the Mineral and Petroleum Resources Development Act No 28 of 2002 (MPRDA) by Buffelsfontein Gold Mines (Pty) Ltd (now Simmer and Jack Mines Ltd) (“BGM”) and lack of enforcement by DMR.

2.3 On 30 January 2017 the Complainant supplemented his original complaint by alleging that he obtained conclusive evidence and information showing that the Property was excluded (abandoned) from a BGM/ Hartebeestfontein consolidated Application for Mining Authorisation dated 16 August 1999. As a result DMR granted Mining Licence no. ML4/2001 to BGM in terms of the then Minerals Act No 50 of 1991 (MA) excluding the Farm Portion 37.
2.4 Original complaint

2.4.1 When the complaint was lodged with the Public Protector in August 2011, the Complainant alleged that -

2.4.1.1 Buffelsfontein Gold Mines (Pty) Ltd (now Simmer and Jack Mines Ltd) (BGM) is illegally occupying his property, and mining without the legal right to do so or in contravention of the Minerals and Petroleum Resources Development Act, 2002 (MPRDA) by:

a) Operating without an approved environmental management programme (EMP) (section 5(4)(a));

b) Commencing with mining activities without notification to and consultation with the land owner (section 5(4)(c));

c) Commencing with mining activities without a valid water use license for mining purpose (section 5(4)(d));

d) Failing to comply with the requirements for the conversion of the old order mining right to a new order right (section 24);

e) Failing to give effect to the objectives of integrated environmental management laid down in Chapter 5 and section 24 of National Environmental Management Act no. 107 of 1998 (section 38 (1)(c));

f) Illegally exploiting or engaging third parties in contravention of surface Right Permit C46/1967, to exploit Waste Rock dump on the property producing and selling sand, stone, aggregate and producing bricks, paving and concrete products for illicit financial gain (section 106); and
g) Demolishing Hostel no 4 on the property before the mining operations on the property have ceased and without any conference or consultation with the Complainant as the Landowner (section 44 read with section 40 of the MA).

2.4.2 The Complainant stated that he advised the DMR that C & C Crushers and Boleng Concrete Products are occupying and operating illegally on the Property by mining industrial minerals from waste rock dumps on the Property for the production and sale of sand and stone and the manufacturing of concrete blocks and paving, without a valid mining right and in contravention of surface Right Permit C46/1967.

2.4.3 The Complainant furthermore, alleged that he has been communicating with the DMR and the Ministry for Mineral Resources since 2003, which communication intensified since 2009, and has over the years lodged several complaints regarding the alleged illegal mining operations on the Property.

2.4.4 The DMR allegedly failed to attend to these complaints and reports to address the alleged illegal activities of BGM, C & C Crushers and Boleng Concrete Products.

2.4.5 In addition, the DMR allegedly failed to:

a) intervene in a dispute in terms of section 54 (6) of the MPRDA around compensation owed to the Complainant as a the landowner by BGM;

b) ensure that BGM is operating with a valid and approved Environmental Management Programme as required by section 39(1) of the MPRDA;
c) ensure that BGM made the prescribed financial provisions for the rehabilitation or management of negative environmental impact of its mining activities on the property as required by section 41(1) of the MPRDA;

d) ensure that BGM complied with its obligations in terms of section 41(3) of the MPRDA to annually assess its environmental liability and increase its financial provision to the satisfaction of the Minister of Mineral Resources; and

e) consult with him as the landowner before granting a new order prospecting right (1488PR) in respect of the property.

2.5 Additional allegations

2.5.1 In 2017 the Complainant added that according to information that he obtained after he had been seeking access to from the DMR for a number of years, confirmed that the Property was originally part of the Mining License No ML7/1995 granted on 28 August 1995 in terms of the MA to Hartebeestfontein Gold Mines Limited a subsidiary of Anglovaal Limited.

2.5.2 The Complainant alleged that the DMR and the Minister erred in advising the Public Protector and other institutions, including the South African Police Service (SAPS) and the National Prosecuting Authority (NPA) that BGM was operating on the property under a valid mining license or mining right. He alleged that the relevant records reflect that the Property was excluded (abandoned) when BGM/ Hartebeestfontein applied for a consolidated Mining Authorisation on 16 August 1999. As a result the Property was not included when DMR granted Mining License No. ML4/2001 to BGM in terms of the then MA.
2.5.3 According to the complainant, the additional information confirmed that the DMR failed to verify his claims that BGM is illegally occupying his property, and mining without the legal right to do so or in contravention of the MPRDA, 2002.

3. 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 the 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 mechanism.
3.5 In the Constitutional Court, (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), Chief Justice Mogoeng stated the following with own emphasis, 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, 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), the Court held as follows:

3.6.1 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);

3.6.2 The Public Protector, in appropriate circumstances, have 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);

3.6.3 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);

3.6.4 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford 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.

3.6.5 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (para 104);
3.6.6 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).

3.6.7 The fact that there is 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);

3.6.8 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 institutions mentioned in this report are organs of state and their conduct amounts to conduct in state affairs, as a result the complaints fall 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.

3.9 Regarding the exercise of my discretion in terms of section 6(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute ‘special circumstances’, some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the fact that the conduct complained about was ongoing; the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation;
whether the prejudice suffered by the complainants persists; whether my refusal to investigate perpetuates the violation of section 195 of Constitution; whether my remedial action will redress the imbalances of the past. What constitutes as 'special circumstances' depends on the merits of each case.

4. 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 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 -

4.2.1.1. What happened?

4.2.1.2. What should have happened?

4.2.1.3. Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct or to maladministration?

4.2.1.4. In the event of improper conduct or maladministration what would it take to remedy the wrong occasioned by the said improper conduct or maladministration?
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. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. In this particular case, the factual enquiry focused on whether and to what extent the DMR fulfilled its responsibilities and whether or not the DMR acted improperly in the manner that it dealt with the Complainant's complaints against mining entities and related businesses who were allegedly involved in illegal mining and other activities on 422 Hartebeestfontein Farm, Stilfontein.

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 Department or organ of state to prevent maladministration and prejudice. In this case, key reliance was placed on legislation, prescripts and policies that regulate the standard that should have been met by the DMR to prevent maladministration and prejudice.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where he would have been had the Department complied with the regulatory framework setting the applicable standards for good administration.

4.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of the improper conduct or maladministration.
4.3 Based on the analysis of the allegations contained in the media reports as well as information that came to my attention from various sources, I identified the following issue to inform and focus this investigation:

4.3.1 Whether the DMR continuously, diligently and injudiciously failed to properly attend to complaints and allegations by the complainant that BGM is illegally occupying his property and conducting mining and related activities without the legal right to do so or not following proper legislative procedures;

4.3.2 Whether the DMR failed to diligently and expeditiously execute its statutory duties and obligations to intervene in or take action in respect of the demolition of Hostel no 4 on the Property by BGM without any conference or consultation with the Complainant as the Landowner;

4.3.3 Whether the DMR failed to diligently and expeditiously execute its statutory duties and obligations to intervene in or take action in respect of a dispute between the complainant and BGM regarding compensation owed to the Complainant as landowner.

4.3.4 Whether the DMR continuously diligently and injudiciously failed to properly attend to complaints and allegations by the Complainant that BGM had entered into an agreement with two companies to work on the mine dumps on the property for the production and sale of sand and stone and the manufacturing of concrete blocks and paving, which do not constitute mining activities covered by any surface right permit?

4.3.5 Whether the DMR improperly failed to ensure that BMG gave effect to the objectives of integrated environmental management laid down in Chapter 5 of the National Environmental Management Act No 107 of 1998 (NEMA) and the MPRDA by conducting miming operations under a valid EMPR and
making the prescribed financial provision for the rehabilitation or management of negative environmental impacts of its mining operations?

4.3 The Key Sources of Information

4.3.1 Documents

a) Correspondence between the Complainant and the DMR;
b) Reports filed with the DMR in terms of the MPRDA;

4.3.2 Interviews conducted with:

a) The complainant;
b) The North West Regional Manager of the DMR;
c) Management and officials of the Chief Directorate: Mineral Regulation of the DMR
d) Officials of the DMR and the Complainant jointly.

4.3.3 Correspondence sent and received -

4.3.3.1 The Complaint provided me with the following documentary evidence of his communications with the DMR in chronological order:

a) 6 March 2003: Letter from the Complainant's attorney to the Deputy Minister of DMR (then DME) pertaining to the fact that Durban Roodepoort Deep (later BGM) had no lease agreement with the landowner;

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b) 18 March 2003: Acknowledgement of receipt of the Complainant’s earlier communication to the Deputy Minister;

c) 30 May 2003: Deed of transfer for Portion 37 (portion of portion 30) of the farm Hartebeestfontein 422;

d) 21 November 2005: Letter from the Deputy Information Officer of DMR (then DME) acknowledging an application for access to information in terms of the Promotion of Access to Information Act (PAIA);

e) 23 September 2009: Letter from the Complainant to the Minister of DMR to lodge an objection against the renewal of the old order mining rights;

f) 2 October 2009: E-mail communication from the Regional Manager: DMR to advise the Complainant that the conversion process (of the old order mining rights) was in progress/process;

h) 5 October 2009: E-mail correspondence from the Complainant to the Regional Manager to seek clarification on issues relating to the environmental management plan (EMP), the conversion process and the rights of the landowner;

h) 14 October 2009: E-mail communication from the Complainant to the DMR enquiring about the conversion process and raising issues pertaining to the demolition of
Hostel 4 and the presence of C & C Crushers and Boleng Concrete Products on the property;

i) 8 December 2009: E-mail communication from the Complainant to the DMR to request an appointment with the Minister;

j) 24 November 2010: Letter from the Complainant’s attorney to the Minister of DMR advising of BGM’s refusal to enter into an agreement on the land, failing to pay land rehabilitation costs of R425 million, failing to provide an EMP, as well as the demolition of Hostel no 4;

k) 3 August 2011: Communication from the South African Police Service, Klerksdorp to request certain information and documentation;

l) 28 August 2011: E-mail communication from the Complainant to the Minister of Mineral Resources to complaint about the lack of responses;

m) 14 September 2011: Letter to the Minister of Mineral Resources advising that there has been no positive response from BGM;

n) 23 September 2011: Letter from the SAPS, Klerksdorp

o) 28 March 2012: Letter from the Complainant to the Minister of Mineral Resources bringing all the issues mentioned above, for his attention;

p) 10 April 2012: letter from the Complainant to the Minister of Mineral Resources around the issues of the validity of the
surface right permit, failure to offer reasonable compensation; failure to make financial provision and the presence of C & C Crushers and Boleng Concrete Products;

q) 10 May 2012: Letter from the Complainant to the Minister of Mineral Resources as a follow up to the letter of April 2012;

4.3.3.2 I obtained and scrutinised amongst other, the following documentary evidence from the DMR:


b) Form J: Lodgement form for the application of an old order mining right by BGM dated 22 November 2006;

c) Letter from the Regional Manager, DMR to BGM dated 25 March 2006 (8): Mine Economics evaluation of an application for the conversion of an old order mining right;

d) Response from BGM to DMR dated 25 April 2008 on outstanding information and queries raised by Mine Economics;

e) Notarial deed of cession of mineral rights from Avgold Limited to BGM dated 29 November 1999;
f) Notarial deed of cession of mineral rights from Beatrix Mining Company Limited to BGM dated 23 July 1996;

g) Memorandum from the Chief Mine Economist to the Regional Manager: DMR dated 23 May 2008: Mine Economics evaluation of an application for the conversion of an old order mining right;

h) Draft memorandum from the Regional Manager to the Director-General, DMR, dated 12 March 2009 recommending the approval of the application by BGM for the conversion of its old order mining right to a (new order) mining right;

i) Converted Mining Right granted to BGM dated 24 April 2013;

j) Environmental Impact Assessment and Environmental Management Programme Amendment dated 22 September 2014, submitted in support of an issued converted mining right and section 102 application in terms of section 39 and of Regulations 50 and 51 of the MPRDA; and

k) Rehabilitation Progress report (BGM) for the month July 2018.

4.3.3.3 I also provided both the DMR and the Department of Environmental Affairs (DEA) with opportunities to take note of and provide additional information or evidence in respect of the issues that I identified in terms of section 7(9)(a) of the Public Protector Act.
4.3.4 Legislation and other prescripts.

f) The Constitution of the Republic of South Africa Act No 108 of 1996 (the Constitution);

g) The Public Protector Act No. 23 of 1994 (the Public Protector Act);

h) The Mineral and Petroleum Resources Development Act No 28 of 2002 (MPRDA);

i) The National Environmental Management Act No 107 of 1998 (NEMA);


4.3.5 Case Law

a) Agri South Africa v Minister of Minerals and Energy 2013 (4) SA 1 (CC);

b) Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2006 (1) SA 350 (T);

c) Aquarius Platinum (SA) (Pty) Ltd against the Minister of Mineral Resources and the Minister of Environmental Affairs and other parties [2015] ZAGPPPHC 584 (27 July 2015);

d) Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 7 BCLR 687 (CC);

e) Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd 2011 (4) SA 113 (CC);

f) Coal of Africa Limited v Akkerland Boerdery (Pty) unreported case number: 38528/2012 (judgment: 5 March 2014);

g) De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others (3215/06) [2007] ZAFSHC 74 (13 December 2007);
h) Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd 2011 1 All SA 384 (SCA);

i) Joubert v Maranda Mining Company (Pty) Ltd [2010] 2 All SA 67 (GNP);

j) Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (CCT 10/13) [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) (18 December 2013);

k) MaccSand (Pty) Ltd and Another v City of Cape Town and Others 2012 (4) SA 181 (CC);

l) Meepo Yase Chaba v Kotze & Four others 2008 (1) SA 104 (NC);

m) Minister for Environmental Affairs and Another v Aquarius Platinum (SA) (Pty) Ltd and Others (CCT102/15) [2016] ZACC 4; 2016 (5) BCLR 673 (CC) (23 February 2016);

n) 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);

o) S v Smith 2008 (1) SA 135 (T); and

p) Sechaba v Kotze and others [2007] 4 All SA 811 (NC)

5. THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether the DMR failed to diligently and injudiciously attend to complaints and concerns by the Complainant that Buffelsfontein Gold Mines
(Pty) Ltd (BGM) is occupying his property and conducting mining and related activities without his consent or any agreement with him as the landowner and in contravention of the law.

5.1.1 Common cause issues

5.1.1.1 It is common cause that the Complainant's company, Pyramid Investments (Three) (Propriety) Limited, purchased the Property in 2003. BGM, a subsidiary of Durban Roodepoort Deep (DRP) occupied the Property and was conducting mining operations.

5.1.1.2 The Property (consisting of Shaft No 4, Hostel No. 4 & Waste Rock Dump) including other thirty one (31) farms/portions were originally part of the Mining License No ML7/1995 granted on 28 August 1995 in terms of the Section 9 of the MA to Hartebeestfontein Gold Mining Company Limited (Hartebeestfontein Gold Mine) a subsidiary of Anglovaal Limited.

5.1.1.3 Prior to the issuance of Old Order Mining License No ML7/1995 Hartebeestfontein Gold Mine had been conducting mining operations on the property under the authority of multiple surface right permits, including Surface right permit No.C50/1961 & C33/1966 for sole purpose of "Bantu Compound" (Hostel No. 4) and Surface Right Permits No C49/1961 issued for the sole purpose of "Shaft equipment and waste rock dump with fencing", and other Surface Right Permits for particular purposes related to mining operations.

5.1.1.4 Durban Roodepoort Deep ("DRD") was formed in September 1997 when Durban Roodepoort Deep Limited merged with Blyvooruitzicht Gold Mining Company Limited and Buffelsfontein. In August 1999, DRD acquired the
Hartebeestfontein mining operations with liabilities from Avgold Limited (Anglovaal stable) for R45 million and incorporated it into BGM.

5.1.1.5 Subsequent to the acquisition of Hartebeestfontein, it was decided to consolidate both operations (i.e. Buffelsfontein Gold Mine and Hartebeestfontein Gold Mine) under a single management structure, following a programme of internal restructuring and negotiations with DMR and SARS and other regulatory bodies.

5.1.1.6 On 16 August 1999 BGM applied for a consolidated mining authorisation (mining license) in terms of Section 9 (1) of the MA. On 20 August 1999 the DMR issued a Temporary Mining Authorisation Permit No. T5/1999 in terms of Section 10 of MA to BGM to continue mining operations for gold for a period of twelve (12) months ending on 19 August 2000 on the Farm Hartebeestfontein 422 IP and various other Farms.

5.1.1.7 DMR approved consolidated Mining License No. ML4/2001 to BGM in terms of Section 9 (1) of the MA on 26th February 2001, consolidating both mining operations of BGM and Hartebeestfontein Gold Mine in one mining license, for underground mining for Gold on sixty eight (68) farms/portions including 9 farms/portions retained from Mining License ML7/1995.

5.1.2 **Original subject of complaint: DMR’s alleged failure to properly respond to the Complainant’s concerns about BGM’s presence on his Property without any consultation and agreement with him as landowner.**

5.1.2.1 It is not in dispute that immediately after his purchase of the Property, in March 2003, the Complainant started to engage the DMR (then the Department of Mineral and Energy Affairs) about the presence and
operations of BGM and other companies on the Property and to seek information and to raise objections that, *inter alia*:

a) None of the companies and businesses that have been or are still operating on the Property, have made any effort to enter into any agreement with him as the landowner "as required by Law";

b) From 2005 there has been no effort to pay any money into the trust account relating to the land rehabilitating costs (in excess of R425 million);

c) No Environmental Impact Management Plan as required by Law has ever been provided to him, despite numerous requests as well as successful applications for Access to Information;

d) He was never consulted on the issues of compensation or the compiling of an Environmental Impact Plan;

e) BGM has also illegally entered into agreements with companies which are mining the dump on the Property to extract and produce sand and stone without any mining permit, as well as manufacturing concrete blocks and paving, which have no mining relevance; and

f) No royalties were being paid by the State for the mining of industrial minerals.

5.1.2.2 The Complainant stated that after he purchased the Property, he approached BGM to establish the basis of their presence on the Property and to explore the basis and nature of an agreement with him as the new landowner. He was advised that no agreement was required and that "they
occupied and would continue to occupy the property and to extract therefrom (sic) such minerals as they deem on the basis that they have mineral rights registered against the title deed of the property". (emphasis added)

5.1.2.3 The Complainant submitted that he spent the next six (6) years unsuccessfully communicating with the DMR in order to seek information and clarification about BGM’s activities on his property under Mining License ML4/2001 and the EMPR issued to DRD North West and to raise his concerns and grievances with the activities on the Property.

5.1.2.4 The Complainant provided the Public Protector with the following documentary evidence reflecting his attempts to raise this matter with the DMR (in chronological order):

a) 6 March 2003: Letter from the Complainant’s attorney to the Deputy Minister of DMR (then DME) pertaining to the fact that Durban Roodepoort Deep (later BGM) had no lease agreement with the landowner;

b) 18 March 2003: Acknowledgement of receipt of the Complainant’s earlier communication to the Deputy Minister;

c) 30 May 2003: Deed of transfer for Portion 37 (portion of portion 30) of the farm Hartebeestfontein 422;

d) 21 November 2005: Letter from the Deputy Information Officer of DMR (then DME) acknowledging an application for access to information in terms of the Promotion of Access to Information Act (PAIA);
f) 23 September 2009: Letter from the Complainant to the Minister of DMR to lodge an objection against the renewal of the old order mining rights;

f) 2 October 2009: an e-mail from the Regional Manager: DMR to advise the Complainant that the conversion process (of the old order mining rights) was in process/progress;

g) 5 October 2009: an e-mail from the Complainant to the Regional Manager to seek clarification on issues relating to the environmental management plan (EMP), the conversion process and the rights of the landowner;

g) 14 October 2009: e-mail from the Complainant to the DMR enquiring about the conversion process and raising issues pertaining to the demolition of Hostel 4 and the presence of C & C Crushers and Boleng Concrete Products on the property;

h) 8 December 2009: an e-mail from the Complainant to the DMR to request appointment with the Minister;

i) 24 November 2010: Letter from the Complainant's attorney to the Minister of Mineral Resources advising of BGM's refusal to enter into an agreement on the land, failing to pay land rehabilitation costs of R425 million, failing to provide an EMP, as well as the demolition of Hostel no 4;

j) 3 August 2011: Communication from the South African Police Service, Klerksdorp to request certain information and documentation;

k) 28 August 2011: an e-mail from the Complainant to the Minister of DMR to complaint about the lack of responses;

l) 14 September 2011: Letter to the Minister of Mineral Resources advising that there has been no positive response from BGM;
m) 23 September 2011: Letter from the SAPS, Klerksdorp

n) 28 March 2012: Letter from the Complainant to the Minister of Mineral Resources bringing all the issues mentioned above, to his attention;

o) 10 April 2012: letter from the Complainant to the Minister of Mineral Resources around the issues of the validity of the surface right permit, failure to offer reasonable compensation; failure to make financial provision and the presence of C & C Crushers and Boleng Concrete Products;

p) 10 May 2012: Letter from the Complainant to the Minister of Mineral Resources as a follow up to the letter of April 2012;

q) 14 May 2012: Reminder by the Complainant to the Ministry of Mineral Resources.

5.1.2.5 In 2009 the Complainant was reportedly informed by the Regional Manager: Mineral Regulation of the DMR that BGM was lawfully operating on the Property as the holder of an “old order mining right”.¹

5.1.2.6 In 2012, the Minister of Mineral Resources responded to one of the Complainant’s enquiries and explained that the waste rock dump on the Property was “legally deposited under authorisation of a surface right permit prior to the date on which the ... MPRDA came into effect”, and was by virtue of a High Court judgment² excluded from the operation of the MPRDA. Therefore, the DMR did not agree with the allegation that the activities of C & C Crushers on the Property constituted illegal mining.

¹ Schedule 2 of the MPRDA. These were the rights awarded by virtue of mining authorisations granted in terms of the Minerals Act 50 of 1991, which remained in force for a limited period of five years as ‘old order mining rights’ when the MPRDA came into operation in 2004

² In the matter of De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others (3215/06) [2007] ZAFSHC 74 (13 December 2007)
5.1.2.7 The Complainant states that at the time when he received the Minister's response he did not have any information to verify BGM's legal right and permission to occupy the Property and to conduct mining and related activities on the Property, despite having repeatedly requested information from the DMR for, including lodging an urgent application as Intervening Party in Pretoria High Court on 17th October 2005, as well as lodging a criminal complaint with the South African Police Service (Organised Crime Unit – Precious Metals & Diamond Section).

5.1.2.8 He later obtained the requested information, which reflected the following:

a) The Department of Mineral and Energy Affairs (DMR's predecessor in law) granted Mining Licence No ML7/1995 to Hartebeestfontein Gold Mines a subsidiary of Anglovaal Limited (Anglo - Transvaal Consolidated Investment Company on 28 August 1995 in terms of Section 9 of the MA on 32 farms/portions including the Complainant's property (Farm Portion 37 -consisting of Shaft No 4, Hostel No. 4 & Waste Rock Dump).

b) Subsequent to the acquisition of Hartebeestfontein Gold Mine in 1999, it was decided to consolidate both operations (i.e. BGM and Hartebeestfontein Gold Mine) under a single management structure as BGM.

c) On 16 August 1999 BGM applied for a consolidated Mining Authorisation (Mining License) in terms of Section 9 (1) of the MA listing 59 properties where it had previously been conducting mining operations as BGM but only nine (9) of the thirty two (32) properties where Hartebeestfontein Gold Mine had been conducting mining operations.

d) The Complainant’s Property (Portion 37 of the Farm Hartebeestfontein 422 IP, Stilfontein) was amongst twenty three
(23) properties previously listed under Hartebeestfontein Gold Mine's Mining Licence No ML7/1995, which were not listed in BGM's application for a consolidated mining license.

e) The Complainant’s Property was also not listed in the Notarial Deeds of Cession of Mineral Rights from Avgold Limited to BGM dated 29 November 1999.

f) In order to enable BGM to continue mining pending the consideration of its application for a consolidated license, DMR issued a Temporary Mining Authorisation Permit no. T5/1999 on 20th August 1999 for a period of one year ending on 19 August 2000 in terms of Section 10 of MA³ on the Farm Hartebeestfontein 422 IP, which included the Complainant’s Property and various other Farms;

g) On 26 February 2001, DMR approved a consolidated Mining License ML4/2001 to BGM in terms of Section 9 (1) of MA in respect of the 68 farms/portion listed in its application⁴;

h) DRD placed BGM into provisional liquidation on 22 March 2005 due to financial losses and financial viability of the mining operation;

i) BGM was taken out of the provisional liquidation with the approval of a scheme of compromise under section 311 of the Companies Act No 61 of 1973, sanctioned by the High Court on 20 Oct 2005 and sold to Simmer and Jack Limited;

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3 Temporary authorization to continue with prospecting or mining operations.—The Director: Mineral Development may, pending any application for a prospecting permit or a mining authorization, issue a temporary permit or authorization authorizing the continuation of prospecting or mining operations on the land comprising the subject of such application and which had been authorized under a prospecting permit or mining authorization which has lapsed in terms of section.

4 The Buffels Section consists of one mining license, ML4/2001 in respect of statutory mining rights, ... DRD Registration Statement Pursuant To Section 12(B) Or (G) Of The Securities Exchange Act of 1934 - filed with the SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549
j) BGM submitted an application for conversion of the Old Order Mining Right to New Order Mining Right in terms of Item 7 of the Transitional Arrangements in Schedule II of MPRDA to the DMR North West Region on 22 November 2006.

k) The Complainant’s Property was again not included in the land area (farms/ portions) listed in BMG’s application for the conversion of its old order mining right in terms of Mining License no. ML4/2001.

l) In 2011 Village Main Reef Limited (VMR) acquired BGM from Simmer and Jack Limited and continued with underground mining operations;

m) In 2013 the converted Mining Right was issued and in May 2013 BGM announced that it had ceased its underground mining operations and put the operation in care and maintenance; and

n) The operations have since been in a decommissioning phase and preparations are underway for the closure phase.

5.1.2.9 During the course of a lengthy process of investigation by my office, and continued communications from the Complainant, the DMR initially persisted in disputing most of the substantive issues that formed the basis of the Complainant’s enquiries and complaints to the DMR about BGM’s operations on his Property.

5.1.2.10 I obtained and scrutinised the following documentary evidence from the DMR in respect of the application by BGM for the conversion of an old order mining right:

a) Form J: Lodgement form for the application of an old order mining right dated 22 November 2006;
b) Letter from the Regional Manager, DMR to BGM dated 25 March 2006 (8): Mine Economics evaluation of an application for the conversion of an old order mining right;

c) Response from BGM to DMR dated 25 April 2008 on outstanding information and queries raised by Mine Economics;

d) Notarial deed of cession of mineral rights from Avgold Limited to BGM dated 29 November 1999;

e) Notarial deed of cession of mineral rights from Beatrix Mining Company Limited to BGM dated 23 July 1996;

f) Memorandum from the Chief Mine Economist to the Regional Manager: DMR dated 23 May 2008: Mine Economics evaluation of an application for the conversion of an old order mining right; and

g) Draft memorandum from the Regional Manager to the Director-General, DMR, dated 12 March 2009 recommending the approval of the application by BGM for the conversion of its old order mining right to a (new order) mining right.

5.1.2.11 Upon further enquiry the Regional Manager conceded that the application did not explicitly refer to the Complainant’s property as part of the land or area to which the application referred, but contended that it was included as it was reflected in the sketch plan of the areas covered under the application.

5.1.2.12 I also scrutinised the conversion application Form J including number of appendixes, which provided for the description of the land or area to which the application relates, identifying such land by Farm name, Farm Number and Registration division, Magisterial District, Farm Subdivision name, and farm subdivision number. The specific portions of the farm Hartebeestfontein 422 IP covered by mining license ML 4/2001, were listed by name, size and title deed number in the following documents:
a) Part A of Form J. Annexure I (section 16 of the MPRDA): *Lodgement Form for the Conversion of an Old Order Mining Rights*, dated 21 November 2006;

b) Appendix A to Form J: *Details of Land or Area* (Including sketch Plan, coordinates and list with name, size and title deed numbers);

c) Appendix H to Form J: *Mining Work Programme*; and

d) Appendix J to Form J: *Existing Rights and Past Compliance with Provisions of the Act*.

5.1.2.13 The following portions of Hartebeestfontein 422 IP were listed in the Form J and the relevant appendixes by (registered) Farm name, Farm number, Portion, area (size) and Title Deed number:

a) Remaining extent of Portion 10

b) Remaining extent of Portion 11(Voorspoed)

c) Remaining extent of Portion 8

d) Remaining extent of Portion 5

e) Portion of Portion 2

f) Portion 31(a portion of Portion 12) (Bonnievale);

g) Portion of Portion 11 (Voorspoed);

h) Portion 18 (a portion of Portion 10)

i) Portion 30 (a portion of Portion 10)

j) Portion 27(a portion of Portion 26)

k) Remaining extent of Portion 26

l) Portion 40 (a portion of Portion 9)

m) Portion 16 (a portion of Portion 10)

n) Portion 31 (a portion of Portion 12)

o) Portion 14 (a portion of Portion 3)

p) Portion 13

q) Remaining extent (Springvale)
r) Mineral Area 5 on Portion 8;
s) Remaining extent of Portion 12 (Bonnievale);
t) Portion 19 (a portion of Portion 11) (Voorspoed)
u) Portion 15 (a portion of Portion 11) (Voorspoed);
v) Portion of Portion 10;
w) Remaining extent of Portion 2 (a Portion of Portion 1
x) Portion 38 (a portion of Portion 5)
y) Portion 3 (a portion of Portion 1)
z) Portion 53 (a portion of Portion 41)
aa) Portion 47(a portion of Portion 31)
bb) Remaining extent of Portion 31 (Bonnievale);
c) Portion 44 (a portion of Portion 41)
dd) Portion 58 (a portion of Portion 41)

5.1.2.14 I further obtained and scrutinised a copy of an application dated 17 October 2006 by BGM for a prospecting right in respect of the same land and area covered in its application for the conversion of an old order mining right. The specific portions of the farm Hartebeestfontein 422 IP covered by mining license ML 4/2001, were again listed by name, size and title deed number in the following documents:

a) Part A of Form B. Annexure I. (section 16 of the MPRDA): Application for Prospecting Right dated 16 October 2006;
b) Appendix A to Form B: Details of Land or Area (Including sketch Plan, coordinates and list with name, size and title deed numbers)
c) Appendix B to Form B: Prospecting Work Programme
Part A of Form B. Annexure I. (section 16 of the MPRDA): Application for Prospecting Right;

5.1.2.15 The same properties were also listed in the Notarial Deeds of Cession of Mineral Rights from Avgold Limited to BGM dated 29 November 1999 as well as from Beatrix Mining Company Limited to BGM dated 23 July 1996.

5.1.2.16 The lodgement form (Form J) for the conversion of the old order mining rights submitted by BGM in 2006 did not provide for or contain any record of notifications to or consultation with any of the farm owners of the land or areas listed in the application. The application was evaluated by the DMR as well as by the Chief Mine Economist on 25 March 2008 and 23 May 2008 respectively. When BGM responded to the first evaluation report of the Chief Mine Economist and the DMR on 25 April 2008, a checklist was completed by the DMR and under the heading "Checklist: Mineral Law Administration" it was noted that one of the documents that was not enclosed in BGM's response was "Proof of consultation with landowner/interested/affected parties".

5.1.2.17 However, the issue of consultation with the land owners was not identified as one of the shortcomings in the course of any of the evaluations by the DMR or the Chief Mine Economist. The conclusion of the Chief Mine Economist was that the application complied with the requirements of section 23(1) (a), (b) and (c) (of the MPRDA) and schedule II, item 7 (3)(a)(b) and (c).

5.1.2.18 Despite being the appropriate authority and custodian of all official records relating to the mining operations of BGM, Simmer and Jack, VMR, the DMR did not in response to the enquiries from my Office, offer any evidence or information to explain the apparent delays or inaction to substantively deal with and respond to the Complainant’s efforts over a number of years to ascertain the lawfulness of the mining and related activities on his Property.
in a period of more than fifteen (15) years, the DMR seemed to have only attempted to provide decent responses on this issue on two (2) occasions, dismissing the enquiries on the basis that the parties operating or conducting mining and other operations on his property, were acting under lawful mining permits or rights.

5.1.2.19 The balance of probabilities favour the Complainant's version that his queries and grievances were largely ignored by the DMR and not meaningfully interrogated with an open mind in terms of its powers and functions and responsibilities, as discussed under the legal framework below.
5.1.3 Application of the relevant law on the merits of the Complainant's concerns about the validity of the mining operations on his property

5.1.3.1 Section 5(2) of the (repealed) MA, which applied at the time when BGM and Hartebeestfontein Gold Mine were consolidated, precluded anybody from mining or prospecting for any mineral without any authorisation granted to him/her in accordance with the MA.

5.1.3.2 Section 9 of the MA dealt with the issuing of mining authorisations. In terms of section 10 of the MA, Mineral Development may, pending any application for a prospecting permit or a mining authorisation, issue a temporary permit or authorisation authorising the continuation of prospecting or mining operations “on the land comprising the subject of such application and which had been authorised under a prospecting permit or mining authorisation which has lapsed in terms of section 16”. (Emphasis added)

5.1.3.3 Section 16 of the MA provided that mining authorisation shall lapse, inter alia, whenever the holder of such permit or authorisation who is also the holder of the right to the mineral concerned in respect of the land or tailings, as the case may be, comprising the subject of such permit or authorisation, ceases to be the last-mentioned holder;

5.1.3.4 Section 15 of the MA imposed restriction on issuing of more than one prospecting permit or mining authorisation in respect of the same mineral and land

5.1.3.5 In terms of section 13 of the MA a prospecting permit or mining authorisation could not to be transferred from the rights holder to another party or incumbent.

5.1.3.6 Whilst the MPRDA repealed the MA, it introduced a new legal framework that governs the mining industry, but did not abolish old order rights immediately upon coming into operation. It contains transitional provisions which preserved some of the old order rights for a period of time. During this
period, the holders of the old order rights had a choice to convert their rights in terms of the MPRDA or allow them to lapse. Those old order rights ceased to exist upon conversion or when they lapsed.5

5.1.3.7 Item 7 of Schedule II of the MPRDA provided in effect that "old order mining rights" would continue for five (5) years from date of the commencement of the operation of the MPRDA (1 May 2004 to 30 April 2009). Item 7 also provided that during that period of five years, a holder of such right had to lodge such right for conversion into a mining right under the MPRDA. Item 7(8) further provided that, if such right was not lodged within the five year period for conversion, it would "cease to exist." An "old order mining right" is defined in item 1 of Schedule II as meaning: "any mining lease, consent to mine, permission to mine, claim license, mining authorisation or right listed in Table 2 to this schedule in force immediately before the date on which this Act took effect and in respect of which mining operations are being conducted.

5.1.3.8 Regulation 79 of the MPRDA Regulations stated that an application for the conversion of an old order mining right contemplated in item 7(1) of Schedule II of the Act must be completed in the “Form J” which required "the registered description of the land, area or offshore blocks to which this application relates together with respective SO diagrams" (emphasis added).

5.1.3.9 From the discussion of the legal framework above, the DMR’s contention that BGM was lawfully conducting mining operations on the Complainant’s property (Portion 37 of the farm Hartebeestfontein 422 IP) under the authority of mining License ML 4/2001 is not supported by the available evidence. Even though the property is reflected on a sketch plan annexed to BGM’s conversion application in 2007, the sketch plan, although said to

5 Minister of Mineral Resources and others v Sishen Iron Ore Company (Pty) Ltd and another 2014 (2) BCLR 212 (CC)
represent certain portions of the named farms, without the names or limits of any of the farms concerned, did not mean that the land covered should "be treated as a single indivisible unit in which cadastral boundaries are irrelevant to the right conferred" by the licence.\(^6\)

5.1.3.10 When the MPRDA came into operation in 2004 it did not abolish old order rights immediately upon coming into operation. It contains transitional provisions which preserved some of the old order rights for a period of time. During this period, the holders of the old order rights had a choice to convert their rights in terms of the MPRDA or allow them to lapse. The Constitutional Court\(^7\) defined old order rights as a new right created by the MPRDA which consisted of, inter alia, the common law mineral right together with the mining authorisation.

5.1.3.11 The old order rights that were the subject of BGM’s conversion application therefore, had to be established by means of the legal instruments that sought to transfer mineral rights to BMG by means of Notarial Deeds of Cession of Mineral Rights), and grant mining rights to BGM under the auspices of either temporary Mining License no. T5/1999 or mining License ML 4/2001. If none of these legal instruments actually included the registered description of the Complainant’s Property amongst the properties that formed the subject of such cession, application or license, it stands to reason whether or not BGM had in fact established an old order right in terms of which it could carry out mining operations on the Complainant’s property and which could be converted into a “new order” right in terms of the MPRDA.

5.1.3.12 The DMR is further bound by the basic values and principles governing public administration set out in section 195 of the Constitution. In the matter

\(^6\) Holcim v Prudent Investors (641/09) [2010] ZASCA 109 (17 September 2010)

\(^7\) Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Limited and Another [2013] ZACC 45
of Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal 8 the Constitutional Court emphasised that when a responsible functionary is enlightened of a potential irregularity, section 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if needs be, to correct any unlawfulness through the appropriate avenues. This duty is founded, inter alia, in the emphasis on accountability and transparency in section 195(1) (f) and (g) and the requirement of a high standard of professional ethics in section 195(1) (a) of the Constitution.

5.1.4 Application of the relevant law regarding the original complaint on the lack of consultation with and consent from a landowner for BGM’s mining operations on his/her property

5.1.4.1 The discussion on the issue of consultation with the Complainant may become somewhat moot in view of the fact that the subsequent evidence revealed that the Complainant was in fact not in the typical position of a landowner vis-à-vis the rights of the holders of mining rights as DMR acknowledged that the Complainant’s property was not covered under the authority of mining license ML4/2001. However, I needed to reflect on the Complainant’s initial complaint as part of the investigation process into the DMR’s role and responsibilities towards landowners and the community at large.

5.1.4.2 It is not in dispute that BGM did not seek any consultation or agreement with the Complainant when he took possession of the Property after having purchased it in 2003. It is also not in dispute that the DMR did not take any

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8 Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (CCT 10/13) [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) (18 December 2013)
action against BGM because of its view that the requisite mining authorisations had been approved and granted under the MA (and that no further agreement or consensus was required from the Complainant as the new owner to continue with its mining operations on the Property).

5.1.4.3 The Complainant’s expectation that the DMR was obliged to compel BGM to consult with him and seek an agreement to proceed with its mining activities, is primarily based on the Complainant’s assumption at the time that the DMR was correct with its declaration that his property was included under mining License ML4/2001, as well as his interpretation of section 5(4)(c) of the MPRDA. In terms of the said section, mining activities may not be done without notifying and consulting with the landowner or lawful occupier of the land.  

5.1.4.4 As far as the rights of landowners such as the Complainant are concerned, our courts have developed jurisprudence and has entrenched the right to “notify” and “consult” interested and affected parties prior to the granting of the prospecting or mining right in giving effect to section 24 of the Constitution, which provides that -

“Everyone has the right -

a) to an environment that is not harmful to their health or well-being;

b) to have the environment protected, for the benefit of present and future generations”.

5.1.4.5 Under the common law, 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

9 Section 5(4)(c) of the Act.
10 Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd 2011 (4) SA 113 (CC). Meepo Yase Chaba v Kotze & Four others 2008 (1) SA 104 (NC).
11 Agri South Africa v Minister of Minerals and Energy 2013 (4) SA 1 (CC).
force on 1 May 2004 changed this by providing that landowners could no longer prevent the State from granting qualifying applicants authorisation to mine.

5.1.4.6 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) ..... 

5.1.4.7 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.

5.1.4.8 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. 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. They may prospect for the mineral on or under the land; may remove and dispose

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12 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.

13 See Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2006 (1) SA 350 (T).
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;\textsuperscript{14} and may carry out any other activity incidental to mining which does not contravene the provisions of the MPRDA.\textsuperscript{15}

5.1.4.9 The Constitutional Court\textsuperscript{16} 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".

5.1.4.10 In the matter of Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd\textsuperscript{17} 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\textsuperscript{18} 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 -

\begin{footnotesize}
\begin{enumerate}
\item Act 36 of 1998.
\item Section 5(3) of the Act.
\item 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)
\item Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd 2011 1 All SA 384 (SCA).
\item 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)
\end{enumerate}
\end{footnotesize}
responsible for ensuring that these resources are exploited for the benefit of the nation as a whole.” (Emphasis added)

5.1.4.11 In the Smith-case\textsuperscript{19}, 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 reiterated 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 prerogative of deciding whether or not a holder of prospecting or mining rights can enter his or her land.\textsuperscript{20}

5.1.4.12 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 prospection right, but once the mining rights of the holder has 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{21} or if the right is relinquished.

5.1.4.13 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 Bengewenyama\textsuperscript{22} 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

\textsuperscript{19} S v Smith 2008 (1) SA 135 (T)
\textsuperscript{20} Coal of Africa Limited v Akkerland Boerdery (Pty) unreported case number: 38528/2012 (judgment: 5 March 2014). See also Joubert v Maranda Mining Company (Pty) Ltd [2010] 2 All SA 67 (GNP)
\textsuperscript{21} Section 56 of the MPRDA
\textsuperscript{22} Bengewenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2010 ZACC 65
MPRDA, so that landowners can make informed decisions in advance "... insofar as the interference with the landowner's rights to use the property is concerned."

5.1.4.14 Prior to the promulgation of the MPRDA the State, the landowner and the holder of prospecting or mining rights formed a "triangle of legal relationships". The holder of a prospecting or mining right was obliged to compensate (directly or indirectly) the landowner for the rights granted to it and the State had to make sure that the necessary legislative requirements were met. Subsequent to the promulgation of the MPRDA, landowners are not actively involved in the decision-making process with regards to the granting of prospecting or mining rights.

5.1.4.15 Experts in the field of mining law reiterated that landowners are in terms of the dispensation under the MPRDA at a disadvantage because the "legal triangle is skewed in favour of the holder of prospecting or mining rights, at the expense of the landowner." The Court confirmed the situation in the matter of Anglo Operations Ltd that -

"The landowner, as outlined above, is left in a vulnerable position as is evident from case law in support of the now-settled principle in South African mining law that in instances where the rights of a mining right holder and those of a landowner are in conflict, the mining of minerals will reign supreme, and all other land uses will be regarded as subservient."

23 Draper RW. A landowner's ability to negotiate compensation with the holder to rights to minerals / Richard William Draper. [Thesis]. North-West University; 2014

24 Draper RW. A landowner's ability to negotiate compensation with the holder to rights to minerals / Richard William Draper. [Thesis]. North-West University; 2014

25 This principle was confirmed by the court in Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2007 (2) SA 363 (SCA)
5.1.5 Application of relevant law regarding the duties of DMR to take action and to timeously and accurately respond to the complaints and enquiries from the Complainant (issue 2)

5.1.5.1 The DMR is the competent authority and custodian of all the related records and information on the mining operations and related activities on the Complainant’s Property, including:

a) Details and nature of the various surface rights permits, mining licenses (ML7/1995, ML4/2001) and authorisations granted to BGM and other mining companies;

b) The applications from BGM for a consolidated mining license in 1999, and the conversion of an old order right in 2006; and

c) The mandatory EMPRs dealing with the environmental impact and financial liability assessment of BGM and its environmental management and rehabilitation responsibilities.

5.1.5.2 The Complainant has been communicating with the DMR since 2003 to verify the legitimacy of BGM’s occupation of and operations on his Property and to raise concerns about latent environmental impacts resulting from such mining operations and related activities. Yet, it does not seem that the DMR meaningfully and with an open mind interrogated the information and records at its disposal, to verify the complainant’s concerns and enquiries about the lawfulness of the operations of BGM and related activities of C & C Crushers and Boleng Concrete Products. It is only now, after the information was obtained pursuant to and in the course of my investigation, and after having been confronted with the veracity of its own records by the complainant, that the DMR realises that BGM was in fact not operating on the Complaint’s Property under a valid mining license or mining right (ML4/2001).
5.1.5.3 The discussion above on the role and responsibilities of DMR vis-à-vis the mining companies and land owners clearly illustrates that both land owners and the community are largely dependent on the DMR for the protection of their rights and interests as envisaged in the Constitution.

5.1.5.4 Section 24(b) of the Constitution places a duty on the state to ensure sustainable development by (i) protecting the environment for the benefit of present and future generations; and (ii), in doing so, taking measures that "secure ecologically sustainable development...". Section 24(b) thus places a positive obligation on the state to "make decisions" that would ensure the protection of the environment and to execute this governance function in a manner that would ensure sustainable development.

5.1.5.5 The State also has to ensure that any interference with property rights of the landowner does not amount to arbitrary deprivation of property in a specific instance in violation of section 25 of the Constitution, which in relevant part provides:

"(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—

(a) for a public purpose or in the public interest; and

…

(4) For the purposes of this section—

(a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources…"

5.1.5.6 The MPRDA provides the DMR and the Minister with extensive powers to fulfill its statutory and Constitutional duties and to enforce the law. Section
47 of the MPRDA provides that the Minister may cancel or suspend any mining right or mining permit if the holder thereof conducts any mining operations in contravention of the Act, breaches any material term or condition of such right; contravenes the approved environmental management programme; or submits inaccurate, incorrect or misleading information. An authorised person has, subject to confirmation by the Director General, the power to issue similar orders in terms of section 93 of the MPRDA.

5.1.5.7 In terms of section 91 of the MPRDA an authorised person may, on the authority of a warrant, for inspection purposes or to obtain evidence, enter any mining, exploration, production or retention area, if he or she has reason to believe that any provision of this Act has been, is being or will be contravened. Routine inspections may also be conducted without a warrant in terms of section 92 of the MPRDA.

5.1.5.8 In terms of section 98 of the MPRDA the compliance and enforcement responsibilities of the Department include ensuring that mining companies do not engage in illegal mining activities by, inter alia;

a) Conducting mining activities without approval (e.g. mining permits).

b) Conducting mining outside of the boundaries of authorisation;

c) Presenting false information regarding mining activities, permits or related matters; and

d) Non-compliance with the MPRDA (including failure to manage all environmental impacts in accordance with the company’s environmental management plan or approved environmental management programme).²⁶
5.1.5.9 Given the custodial role of the State and the vulnerable position of the landowner in terms of the MPRDA, the DMR had a constitutional obligation to "ensure that both the access to our mineral resources and exploitation thereof are imbued with the values of equity, sustainability and fairness".27

5.1.5.10 MPRDA and the Constitution (section 25) required the DMR to perform its regulatory functions in respect of prospecting and mining, in a manner that balanced the rights of the mining right holder against the rights or the private property (land) owner as well as the state’s social responsibilities, including "... job creation, the advancement of the social and economic welfare of all our people, the promotion of economic growth and the development of our mineral and petroleum resources for the common good of all South Africans".

5.1.5.11 It is further imperative that the state, through functionaries such as the DMR carries out its functions in terms of legislation and other policy measures adopted by the Legislature or the Executive respectively, and interpreted by courts, in accordance with the democratic principles and values enshrined in section 195 of the Constitution.

5.1.5.12 Among other things, the Department’s conduct should have complied with the specific requirements of section 195, that -

(1) Public administration must be governed by democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained;

(b) ......

27 Mostert H(2104), The 'Thing' Called 'Mineral Right': Re-Examining the Nature, Content and Scope of a Rather Confounding Concept in South African Law, Henri Mostert, University of Cape Town (UCT); University of Groningen, November 15, 2014. 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)
(c) Public administration must be development oriented;
(d) Services must be provided impartially, fairly, equitably and without bias;
(e) People’s needs must be responded to...

5.1.5.13 The nexus between section 195 and the Bill of rights is created in section 8(1) of the Bill of Rights, which binds the legislature, the executive, the judiciary and all organs of state, and section 7(2) of the Bill of Rights, which provides that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights". These two sections confirm that governance should accord with the Bill of Rights.

5.1.5.14 The DMR repeatedly failed to take resolute action to deal with the Complainant's enquiries over a number of years and to provide him proper and fair treatment. The lack of interest shown by the DMR to consider and respond to the complaints and grievances by the Complainant, and to provide him with accurate information, reflected a total lack of accountability as envisaged in section 195(1) (f) and (g) of the Constitution.

5.1.6 Conclusion

5.1.6.1 The evidence shows that all the complaints, concerns and issues that the Complainant has been raising with the DMR since 2003 about the activities of BGM on his property, fell within the scope of its regulatory, compliance and enforcement functions in terms of sections 38, 41, 47 and 98 of the MPRDA. Yet, the Complainant only received responses that could be remotely regarded as somewhat substantive, with an attempt to address issues around the validity of BGM's mining rights, as well as the presence of Boleng Concrete Products and C & C Crushers, in 2006 and 2012.
5.1.6.2 There is no evidence in the information at the disposal of the Public Protector that the DMR or the Minister considered or took any action in terms of sections 91 and 92 of the MPRDA to physically investigate and verify the Complainant’s claims and concerns that BGM was also conducting mining outside of the boundaries of authorisation, and later on, that the Complainant’s assertion that his property was not covered by mining license ML4/2001 and was in fact a “freehold” property.

5.1.6.3 Throughout its engagement with the complainant, the DMR relied in Mining License ML 4/2001 and the converted mining rights in terms of the MPRDA to dismiss the Complainant’s complaints that BGM, C & C Crushers were lawfully occupying and conducting mining operations on the Property.

5.1.6.4 However, given the overwhelming evidence that the registered description of the Complainant’s property was not included in all the relevant legal instruments, where the registered descriptions of all the other properties that were the subject of the relevant deed of cession, application or mining license, were duly listed, the balance of probabilities favour a conclusion that the DMR did not sufficiently interrogate and applied its mind to the concerns raised by the Complainant in accordance with its obligations in terms of the MPRDA and section 195 of the Constitution.

5.1.6.5 When confronted with the above evidence in my notice to the DG: DMR in terms of section 7(9) of the Act, the Director General conceded in January 2019 that -

"The Regional Manager erred by not addressing this issue with the Buffelsfontein Gold Mines (Pty) Ltd... to correct the coordinates/Sketch Plan accordingly. This was an oversight on the part of the Regional Manager. In this regard it can be concluded that portion 37 of the farm Hartebeestfontein 422 IP was not subject of the converted mining right as it was not included on the application form" .(Emphasis added).
5.1.6.6 Similarly, there is no indication that the DMR or the Minister took action in terms of section 93 of the MPRDA to consider orders, suspensions or instructions to address the concerns around the environmental impact of BGM's activities, its compliance with the approved environmental impact management plan, and most importantly, its failure to rectify a substantial financial shortfall in its environmental liability assessment.

5.1.6.7 The manner and timeframes of responses from the DMR to the Complainants numerous communications between 2003 and 2012, display nothing short of a laissez-faire attitude towards the Complainant and its responsibilities in terms of the Constitution and the MPRDA, and a total lack of respect for the rights of the Complainant as a landowner. The DMR's conduct is in total disregard of its responsibilities in terms of section 25 of the Constitution and the Constitutional values expected of public administration as enshrined in section 195 of the Constitution.

5.2 Regarding whether the DMR failed to diligently and expeditiously execute its statutory duties and obligations to intervene in or take action in respect of the demolition of Hostel no 4 on the Property by BGM without any conference or consultation with the Complainant as the Landowner;

5.2.1 Common cause issues:

5.2.1.1 It is not in dispute that in 2001 there were four (4) single sex hostels on mining premises operated by BMG where employees were housed. One of the buildings, Hostel No 4 was situated on the Complainant's property at the time of purchase.
5.2.1.2 It is further common cause that soon after the Complainant purchased the property, BGM commenced with the demolition of Hostel no 4, purportedly in terms of the rehabilitation criteria provided for in its original EMP – DRD-NW EMPR (NOV 2001). The said criteria determined as follows:

“No rehabilitation work, demolition of buildings shall take place without the approval of the General Manager in consultation with the Manager (group Environmental Department)…

All buildings, structures and other objects shall be dealt with in accordance with section 40 of the Minerals Act, 1991”.

5.2.2 Issue in dispute

5.2.2.1 The issue for my determination is whether or not the DMR failed to take the requisite steps to prevent BGM from demolishing Hostel No 4 and disposing of assets that might not have belonged to it and which the Complainant wanted to retain.

5.2.2.2 According to the complainant, he had meetings with the Regional Manager and a senior representative of BGM before purchasing the farm and regarding the use of the Hostel no 4 for chicken farming with the intention to creating 200 jobs. The farm with the Hostel No 4 was shown and introduced by the North West Province responsible during a SAITEX Trade Fair and the Complainant was invited to visit Stilfontein for investment to create jobs for the retrenched mine workers. The responsible Provincial official allegedly introduced the Complainant to the representative of BGM to help them to create employment for the retrenched workers of the mining company and they were looking for people to exploit the Hostel no 4.
According to the Complainant the representative of BGM knew very well of his plans when he bought the farm.

5.2.2.3 The Complainant stated that he subsequently called the then Mine Manager, Mr Jonker because he was at the time, made to believe that BGM was the owner of the hostel and waste rock dumps in terms of Mining License ML4/2001 and the relevant Surface Right Permits. He advised Mr Jonker that he wished to retain and to utilise the Hostel building for chicken farming. Mr Jonker reportedly advised the Complainant that they intended to demolish the Hostel and to return that portion of the Property to the owner. He advised that they were required to demolish the Hostel unless the Minister of Mineral Resources approved otherwise.

5.2.2.4 Subsequent to the meeting with Mr Jonker the Complainant was called by the Legal Advisor of DRD, Ms Benita Morton, to discuss the matter of Hostel no 4 and compensation. The Complainant even offered the land free by subdividing the land to keep the Hostel no 4 for his chicken farm plan in order to create jobs for retrenched mine workers. Ms Benita Morton explained to the complainant that she needed to consult with the Board of Directors of DRD and get instructions. Her successor, Mr Niel Pretorius undertook to do the same when he took the matter over from Ms Morton.

5.2.2.5 The Complainant further advised that he made an offer to purchase subject to the availability of the Hostel, knowing that BGM had to obtain permission from the Minister and the land owner before any steps could be taken to demolish the Hostel.

5.2.2.6 Later, when the Complainant and his Attorney went to the mining site to make enquiries about the lease agreement, he noticed that the Hostel was being demolished and immediately contacted Mr Pretorius of BGM/ DRD as well as the provincial office of the DMR. Mr Pretorius advised that the hostel had been sold to a scrap company to recuperate the metal content, including
the roof, windows and doors. The relevant Manager at DMR reportedly advised him that he was not aware of the developments and that the decision to demolish the Hostel was taken by the Regional Office of the DMR. The Complainant stated that the DMR Regional Office did not obtain the required permission from the Minister and the landowner.

5.2.2.7 The Minister later confirmed that the DMR has subsequently inspected the compound and found that the buildings have been largely demolished. The buildings are no longer utilised for the purpose in terms of which the Surface Right Permits were granted. In light of this, the Minister advised that the DMR would proceed to initiate the required process in terms of legislation, to cancel Surface Right Permits Number C50/61 and 33/66 for Bantu compound and extension to Bantu compound” respectively.

5.2.2.8 The Minister further advised that the cancellation of permits involved a process based on the principles of administrative justice, and that such cancellation was therefore not automatic. If however, the cancellation was successful, the land in respect of which the said Surface Right Permits existed would revert back to the freehold owner.

5.2.2.9 The Complainant concurred with the Minister that prior to the issuance of Mining License No. ML7/1995 in terms of Section 9 of MA, multiple Surface Right Permits had been issued in terms of Sections 68 and 70 of Precious and Base Metals Act No 35 of 1908 to Hartebeestfontein Gold Mine under the Mining Lease No 513. Surface Right Permits No C50/1961 & C33/1966 were specifically issued for the sole purpose of a mineworkers' quarters (Bantu compound - Hostel No 4 buildings) working at mining operation of Shaft no 4 on the Complainant’s property.

5.2.2.10 The complainant reiterated however, that the Surface Right Permits were issued to Hartebeestfontein Gold Mine, for purposes of their mining operations on 32 farms/portsions covered by the mining leases granted to
Hartebeestfontein Gold Mine by the Department of Mines in the 1960s. The holder of the mining leases were later required to replace the said mining leases by applying for Mining Authorisation and Mining Licences in terms of Section 9 (1), Section 47 (1) (e) and Chapter VII of the Transitional Provisions of the MA.

5.2.2.11 Hartebeestfontein Gold Mine Limited applied in terms of Section 9 (1) of the MA and obtained Mining Licence ML7/1995 on 28 August 1995. The Surface right Permits, notwithstanding the repeal of the said Acts under which the Surface rights were issued, remained in force in terms of Section 48 of the MA attached to the Mining Licence ML7/1995.

9. Issuing of mining authorization.—(1) The Director: Mineral Development shall, subject to the provisions of this Act, upon application in the prescribed form and on payment of the prescribed application fee, issue a mining authorization in the prescribed form for a period determined by him authorizing the applicant to mine for and dispose of a mineral in respect of which he—
(a) is the holder of the right thereto; or
(b) has acquired the written consent of such holder to mine therefor on his own account and dispose thereof, in respect of the land or tailings, as the case may be, comprising the subject of the application

47. Continuation of mining rights.—(1) (a) Any right to dig or to mine granted or acquired or deemed to have been granted or acquired or which continues to exist or is in force—
as the case may be, or any share in such right, and which was in force immediately prior to the commencement of this Act, shall, notwithstanding the repeal of the said Acts, remain in force subject to the terms and conditions under which it was granted or acquired or deemed to have been granted or acquired and which are contained in the document or documents concerned and in force immediately prior to such commencement, save as is otherwise provided in this Act.

e) For the purposes of this Act the holder of any mining right or share therein or his successor in title shall, for the period of two years referred to in paragraph (c), be deemed to be the holder of a mining authorization, and in order to be able to continue mining upon the expiration of such period, a mining authorization shall be obtained in accordance with section 9 from the Director: Mineral Development concerned, and such first-mentioned holder or his successor in title shall for the purposes of this Act be deemed to be the holder of the right to the mineral concerned in respect of the land or tailings concerned.

48. Continuation of reservations, permissions and certain rights.—(1) (a) Any reservation or permission for or right to the use of water or the surface of land granted or acquired or deemed to have been granted or acquired or which continues to exist or is in force—
(i) in terms of section 75 of the Precious and Base Metals Act, 1908 (Act No. 35 of 1908), of the Transvaal;
(ii) in terms of section 24, 58, 57, 59, 60, 64 or 128 (2) of the Precious Stones Act, 1964 (Act No. 73 of 1964);
(iii) in terms of section 18, 47, 90, 91, 92, 93 (4) or (7), 95, 100, 102, 103, 111, 113 or 116 of the Mining Rights Act, 1987 (Act No. 20 of 1967);
(iv) in terms of sections 127, 128 and 129 read with section 130 of the said Mining Rights Act, 1967;
(v) in terms of section 131 or 132 of the said Mining Rights Act, 1967;
as the case may be, and in force immediately prior to the commencement of this Act, shall, notwithstanding the repeal of the said Acts, remain in force subject to the terms and conditions under which it was granted or acquired or
5.2.2.12 The Complainant referred me to the following entry which was made on the original surface right permit on 26 June 2002 by the DMR North West Regional Director: Mineral Development:

"Transferred to AVGOLD limited by virtue of the Director mineral Development North West Region’s consent granted i.t.o Section 90(9) of Act 20 of 1967 read with Section 48(1)(b) of Act 50 of 1991 and dated 26/02/2002 vide MT 220/379/34. This endorsement is made i.t.o Section 51(1) of Act No 16 of 1967. Mining Titles Office

Pretoria

17/02/02"

5.2.2.13 The Complainant maintains that at the time when the Regional Director purportedly “transferred” the surface rights to AVGOLD Limited in 2002, AVGOLD had already (in August 1999) disposed of the Hartebeestfontein Gold Mine and was no longer the holder of any mining on the Property. In his view the purported transfer was therefore invalid.

5.2.2.14 Another entry dated 18 August 2006 on behalf of the Director-General: Minerals and Energy (Mineral and Petroleum. Titles Registration Office) stated that “(t)his right has been registered under no 37/2006 i.t.o item 9 Schedule II of Act 28 of 200231".

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31 9. (1) Any reservation or permission for or right to the use of the surface of land granted or acquired or deemed to have been granted or acquired—
(a) ...
(b) ...
(c) in terms of section 90, 91, 92, 93(4) or (7), 102, 103, 111, 113 or 116 of the Mining Rights Act, 1967 (Act No. 20 of 1967);
(d) in terms of section 127, 128 or 129 read with section 130 of the Mining Rights Act, 1967 (Act No. 20 of 1967); or
(e) by virtue of a reservation under section 158 of the Mining Rights Act, 1967 (Act No. 20 of 1967),
5.2.2.15 On 20 October 2010 the lawyers for Simmer & Jack responded to a request from the Complainant for copies of the mining license and permits for Buffelsfontein Gold Mine no 4 Shaft, Stilfontein, and advised as follows:

"... our client is of the opinion that it is the valid holder of all requisite surface right permits ("SRPs") pertaining to Portion 37 of Farm Hartebeestfontein 422 IP owned by Pyramid Investments (Three) (Pty) Ltd.

The SRPs cover the whole area of the farm including the waste rock dumps, roads, railways, cables, electrical power lines, sewage and water pipelines, waste and water evaporation areas, water drains, the No. 4 shaft compound area and the recreation area."

5.2.2.16 The Complainant contended however, that since this Property was not covered under Mining License ML 4/2001, BGM or Simmer and Jack Limited did not become the "holder, user or acquirer of any reservation, permission or right to use the surface of land" and the surface right permit was incorrectly registered in terms of item 3 of Schedule II of the MPRDA. In his view any surface rights registered against the Property could not continue in force and ipso facto lapsed in terms of Section 90 (11)\(^{32}\) of the MRA and Section 48 (3) of the MA with the lapsing of Temporary Mining Authorisation Permit No T5/1999 on 20 August 2000. Mining operations ceased in Area 2 in January 2012.

5.2.2.17 The Complainant is accordingly of the view that his Property became a "Freehold" property in real terms, free of any rights from the time of the

\(^{32}\) Any permission referred to in subsection (9) shall ipso facto lapse upon the lapsing of the mining title to which it relates.
lapsing of the Temporary Mining Authorisation Permit No T5/1999 of BGM on 20 August 2000. The property was therefore not under any mining license, surface right permit or EMPR when DRD/BGM demolished and sold the Hostel No 4 in June 2003, and ownership of the Hostel should have revert back to him as the landowner.

5.2.2.18 The Complainant further submits that even if it was argued that DRD/ BGM had initially acquired the surface rights as owners of Hartebeestfontein Gold Mine under Mining License ML7/1995, they would have had no valid mining rights in respect of his Property in terms of mining license ML 4/2001 in June 2003 when DRD/ BGM sold the Hostel No 4 buildings. In fact, in his view Hartebeestfontein Gold Mine or DRD was obliged to follow the closure procedure in terms of Sections 12, 38, 40 & Regulations 5.12.5 with 5.18.11.1-2 MA, and in terms of the "Closure Process" provided for in the EMPR approved for Hartebeestfontein Gold Mine under mining License ML 7/1995.

5.2.2.19 The Complainant contends that DRD/ Hartebeestfontein/ BGM was required to cease mining operations on his Property after the lapse of Temporary Mining Authorisation Permit No T5/1999 of BGM on 20 August 2000 since it was excluded from the mining authorisation granted in terms of Mining License ML 4/2001.

5.2.3 Application of the relevant law

5.2.3.1 It is trite in our law that the holder of the mineral rights (now called mining rights) enjoys preference over the owner of the freehold, not only in regard to his underground mining operations but also in regard to the use of the surface for all purposes necessary to enable him to carry out his prospecting
and mining operations effectively, provided that such rights are exercised in a reasonable manner which is least injurious to the property of the freehold owner.³³

5.2.3.2 In the matter of Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another³⁴ the Constitutional Court confirmed that the granting of a mining right does not in and of itself extinguish other surface rights including ownership on the land in question. The Court further confirmed that the holder of the mining right is only granted a limited real right, which means that the owner of the land remains the owner of the surface but burdened with the limited real right in terms of which the mining right holder can exercise such rights in respect of the surface as are necessary in order to mine the minerals effectively.³⁵ The only impediment to exercise the entitlements is that the rights must be exercised civility modo: in a manner least injurious to the interests of the holders of surface rights to the farm.

5.2.4 In this matter the Complainant in essence contends that BGM/ DRD had relinquished the mining rights that Hartebeestfontein Gold Mine held in terms of Mining License No ML7/1995, when consolidating both mining operations of BGM and Hartebeestfontein Gold Mine in one mining license and excluded the Complainant’s property from the 68 properties listed in its application. The complainant submits that his property was no longer burdened with a limited real right but became freehold property in terms of which he was the de facto or true owners of all assets on the property. In his view, all the administrative decisions and purported legal actions pertaining to the sale and demolition of these assets by

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³³ Hudson v Mann and Another 1950 (4) SA 486 T at 488 E-G, Anglo Operations Lid v Sandhurst Estates (Pty) Ltd 2007 (2) SA 363 SCA

³⁴ [2018] ZACC 41

³⁵ The juristic nature of the right to mine is described in section 5(1) of the MPRDA as follows: "A...mining right ... granted in terms of this Act and registered in terms of the Mining Titles Registration Act, 1967 (Act No. J 6 of 1967), is a limited real right in respect of the mineral ... and the land to which such right relates".
BGM, including Hostel no 4, were invalid because they were taken on the erroneous assumption that the BMG was holder of the mining rights and limited real rights to certain surface areas and infrastructure on the Property.

5.2.4.1 If the BGM was indeed in possession of a valid mining right to the Property they would have had to comply with section 38 (1) (d) and (e) of the MPRDA which makes it clear that the holder of the mining right must as far as it is reasonably practicable, rehabilitate the environment affected by mining operations to its natural or pre-determined state or to a land use that conforms to the generally accepted principles of sustainable development.

5.2.4.2 Although the MPRDA obliges mining right holders to rehabilitate mines, the holders may in terms of section 44 of the MPRDA not demolish buildings, structures or objects if such removal is regulated by another law or if the holder and the surface owner had come to another agreement.

"Whenever a prospecting permit or mining authorisation which is held is suspended, cancelled or terminated or lapses, and the prospecting for or exploitation of any mineral finally ceases, the holder of the permit or authorisation may not demolish or remove any building structure or object: 49

(a) Which may not be demolished or removed in terms of any law;

(b) Which has been identified in writing by the Regional Manager for the purpose of this section; or

(c) Which is to be retained in terms of the agreement between the holder and the owner or occupier of the land, which agreement has been approved by the Regional Manager in writing."

5.2.4.3 If, however, DRD or BGM is suspected of having relinquished any mining rights to the Complainant’s property in 1999 or 2000, the relevant provisions
of the MPRDA on the demolition or removal of any building structures associated with mining operations, would not apply as it was not yet in force at the time. Instead the conduct of DRD/ BGM and the obligations of the DMR would have been regulated by the MA.

5.2.4.4 In terms of section 11 of the MA the holder of any prospecting permit or mining authorisation could, at any time, by notice in writing to the Regional Director concerned, abandon it or any portion of the land comprising the subject thereof. Section 54 of the MA furthermore required the holder to notify the Director: Mineral Development in writing at least fourteen (14) days before he/she intends to permanently or temporarily cease operations.

5.2.4.5 In terms of section 12 of the MA, the responsibility to comply with the relevant provisions of the act remained with the holder of a prospecting permit or mining authorisation until a closure certificate has been issued to the effect that the said provisions have been complied with. However if residual impacts have been identified, these had to be described in the mine’s EMP and adequate and irrefutable arrangements had to be put in place to ensure that these impacts would be adequately dealt with.

5.2.4.6 Section 32 of the Atmospheric Pollution Prevention Act, 1965 contained a prohibition against the disposal of assets by mines in certain circumstances. Where a mine has been abandoned, the persons falling within the definition of a mining rights owner continue to be responsible for taking all preventative measures under the act until a clearance certificate was issued.

5.2.4.7 In terms of section 38(2) (a) of the MA the Director: Mineral Development, when he was of the opinion that the mine was likely to cease mining operations within a period of five years, had to give written notice to the owner of that mine “and such owner shall not dispose of any of his assets in relation to that mine without a certificate furnished by the Director: Mineral
Development to the effect that the necessary steps have been taken or
adequate provision has been made for the rehabilitation of the mining area
concerned."

5.2.4.8 Any right issued in terms of the MA or MPRDA lapses, amongst others,
whenever it expires or is abandoned. Writers such as Van der Schyff
(2016)\textsuperscript{36} are of the view that abandonment cannot amount to the unilateral
relinquishment of a mining right on the part of right holders and the
government must be aware of the abandonment. She points out that a
mining right is accompanied by a plethora of obligations on the recipient of
the right. These include environmental responsibilities as well as obligations
owed to people and communities affected by prospecting or mining
operations.

5.2.4.9 In the matter of Van Heerden v Minister of Minerals and Energy\textsuperscript{37} both the
High Court and Supreme Court of Appeal agreed with Van der Schyff's
approach that the abandonment of mining Rights could not be effected
unilaterally. The Courts confirmed that the abandonment procedure requires
a process through which the Department (DMR) or the Director: Mineral
Development (at the time) is notified of the intention by a right holder to
surrender or relinquish his/ her right and amendment or cancellation of the
mining license or authorisation is requested and duly registered.\textsuperscript{38} The
Supreme Court of Appeal further emphasised that:

"It is trite that abandonment or relinquishment of a right is never
presumed: clear proof is required and it must be shown that the person

\textsuperscript{36} E van der Schyff Property in Minerals and Petroleum (2016) 508-510

\textsuperscript{37} Van Den Heever v Minister of Minerals and Energy & Others (unreported, Case No. 2090/2010, Northern Cape High
2015)

\textsuperscript{38} Van den Heever v Minister of Minerals and Energy (150/14) [2015] ZASCA 19 (19 March 2015), par 19
intended this result with full knowledge of the right in question. The test is objective: the intention of the person is to be determined by the outward manifestation of his or her conduct".  

5.2.4.10 In the matter at hand it is clear that while DRD consolidated both mining operations of BGM and Hartebeestfontein Gold Mine, it did not merely apply for the mining licenses of the two mining companies to be consolidated and reissued as one license covering all the existing operations. The exclusion of not only one, but 23 specific properties that were covered under mining license ML7/1995, illustrated an unambiguous intention on the part of DRD and BGM to amend the existing mining licenses under which BGM and Hartebeestfontein had been conducting their respective operations. The fact that the DMR did not expressly cancel or deregister the mining rights in respect of the 23 properties that were excluded, does not detract from the fact that the process was completed when the DMR issued a new mining license to BGM in respect of the 68 properties listed in its application and therefore confirmed the relinquishment or surrendering of part of the mining rights previously held by Hartebeestfontein Gold Mine.

5.2.4.11 The DMR conceded towards the end of my investigation that the Complainant’s property could not have been the subject of BGM’s registered old order mining rights under mining licence ML4/2001 or the converted mining right, as it was not included on either application forms. I therefore agree with the Complainant that any surface rights registered against the Property could not continue in force and ipso facto lapsed in terms of Section 90 (11)\(^{40}\) of the MRA and Section 48 (3) of the MA with the lapsing of Temporary Mining Authorisation Permit No T5/1999 on 20 August 2000. It follows that BGM or Simmer and Jack Limited could therefore not become

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39 Ibid
40 (11) Any permission referred to in subsection (9) shall ipso facto lapse upon the lapsing of the mining title to which it relates.
the “holder, user or acquirer of any reservation, permission or right to use the surface of land” and the surface right permit was incorrectly registered (several years later in 2006) in favour of BGM in terms of item 3 of Schedule II of the MPRDA.

5.2.4.12 I am however, hesitant to agree with the Complainant’s contention that his property as well as the other properties excluded from mining license ML4/2001 automatically became freehold properties free from the burden of limited real rights held by Hartebeestfontein Gold Mine, when the temporary mining authorisation lapsed in 2000. In terms of the MA the and environmental protection regime covering mining operations, any property that has been subjected to mining activities and operations, has to be returned to its natural state, through a rehabilitation process and the issuing of a closure certificate, before the rights holder is absolved from his/ her responsibilities the said property becomes part of the dominium of the land owner.

5.2.4.13 Sections 11 and 54 of MA therefore required BGM to notify in writing Director: Mineral Development and the Chief Inspector of Mines 14 days before their intention to abandon or cease mining operations on the 23 properties of Hartebeestfontein under the Mining License ML7/1995 (including the Complainant’s property) of such intended commencement or cessation, and was obliged to provide particulars in connection with the location, nature and extent of such operations.

5.2.4.14 Accordingly, DRD/ Hartebeestfontein/ BGM was supposed to take the following steps:
a) Notify the Director: Mineral Development that it was abandoning 23 of the properties or portions of the land comprising the subject of Mining License ML7/1995 in terms of section 1141 of the MA.

b) Inform the Director: Mineral Development, the Chief Inspector and the landowner at least 14 days before their intention to cease mining operation on the Property under the Surface Right Permits in terms of Sections 54(1)42 and (2) 43 of the MA;

c) Obtain a certificate in terms of Section 38 (2)44 of MA from the Director: Mineral Development to the effect that the necessary steps have been taken or adequate provision has been made for the rehabilitation of the mining area concerned before being allowed to dispose of any of his assets in relation to that mine;

d) Submit an amended EMPR with a Closure Plan in terms of Regulations 5.12.5.-6 of the MA as prescribed;

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41 The holder of any prospecting permit or mining authorization may, at any time, by notice in writing to the Director: Mineral Development concerned, abandon it or any portion of the land comprising the subject thereof, and thereupon it shall be deemed to have lapsed as from the date of such notice to the extent indicated therein.

42 (3) If any portion of the land is abandoned under subsection (2), the notice referred to in that subsection shall be accompanied by a sketch plan acceptable to the Director: Mineral Development, indicating the portion so abandoned.

54. Notice of commencement or cessation of prospecting or mining operations or works.—(1) The holder of or applicant for any prospecting permit or mining authorization shall, at least 14 days before he or she commences with any operations under any such permit or authorization, or intends to cease such operations temporarily or permanently, notify the Director: Mineral Development concerned and the Chief Inspector in writing of any such intended commencement or cessation, and provide particulars in connection with the location, nature and extent of such operations. area concerned

43 Not relevant: (2) The holder or applicant referred to in subsection (1) shall, at least 14 days prior to commencing any operations under any prospecting permit or mining authorization so referred to, notify the occupier of the land comprising the subject of such permit or authorization in writing of his intention to commence such operations.

44 2) (a) If the Director: Mineral Development is of the opinion that having regard to the known and disclosed mineral reserves of any mine, that mine is likely to cease mining operations within a period of five years, he shall in writing give notice accordingly to the owner of that mine and such owner shall not dispose of any of his assets in relation to that mine without a certificate furnished by the Director: Mineral Development to the effect that the necessary steps have been taken or adequate provision has been made for the rehabilitation of the mining area concerned. (Own emphasis)
Consult the landowner (Complainant) in terms of Section 40 (c) of the MA to establish if he wished to keep certain infrastructures or buildings on his land, which would in terms of a written agreement between the parties not be demolished as part of the surface rehabilitation;

The Closure Plan must be covering final performance of EMPR and environmental rehabilitation liabilities with details of all the land under the mining operations and list of the infrastructures and buildings in terms of the Regulations 5.18.11.1 - 2 of the MA, provide adequate financial provision for rehabilitation if it is more than R85 million in the Trust Fund account of "Hartebeestfontein Gold Mining Company Limited Nature Conservation Trust" Registration No. 2532/92 and submit to the State Departments concerned with mining environment DEA, DWS, Agriculture and landowners for consultation and consent.

5.2.4.15 DRD/BGM/Hartebeestfontein Gold Mine were furthermore required to submit a sketch plan acceptable to the Director: Mineral Development in terms of Section 11 (2) (3) of MA indicating the abandoned portion under the surface right Permit once the portion containing Hostel no 4 buildings,

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40. Removal of buildings, structures and objects.—Whenever a prospecting permit or mining authorization which is held is suspended, cancelled or terminated or lapses, ... the person who was the holder of such permit or authorization immediately prior to such suspension, cancellation, termination or lapsing, as the case may be, shall demolish all buildings, structures or any other thing which was erected or constructed in connection with prospecting or mining operations on the surface of the land concerned ... and, as far as is practicable, restore any such surface to its natural state to the satisfaction of and within a period determined by such Director: Mineral Development: Provided that such demolition or removal shall not be applicable in respect of buildings, structures or objects—...
(c) which the owner of the land wishes to retain and which has been agreed upon accordingly in writing with such former holder of such permit or authorization.

(3) If any portion of the land is abandoned under subsection (2), the notice referred to in that subsection shall be accompanied by a sketch plan acceptable to the Director: Mineral Development, indicating the portion so abandoned.
Shaft no 4 is back-filled with Waste rock Dump and the said farm completely rehabilitated of soil and underground water following the closure plan.

5.1.1 Conclusion

5.1.1.1 It is clear that while the Complainant was negotiating with BGM about the retention of the Hostel 4 on his property, the mining authorisation under Mining License ML7/1995 had already lapsed and/ or the property was abandoned by virtue of its exclusion of the property from the application for a mining license lodged with DMR on 16 August 1999 and the subsequent issuing of mining license ML4/2001 to BGM.

5.1.1.2 The DMR however, failed to register the fact that Hartebeestfontein/ BGM had relinquished its mining rights under mining license ML7/19951999 in respect of the Complaint’s and 23 others on which it had been conducting mining operations prior to its acquisition by AVGOLD. The DMR acknowledged at the close of my investigation that the Complainant’s property could not have been the subject of BGM’s registered old order mining rights under mining licence ML4/ 2001 or the converted mining right, as it was not included on either application forms.

5.1.1.3 However, BGM was allowed to continue with its operations on the Complainant’s property, with the approbation of the DMR, throughout the sixteen (16) years that the Complainant has been challenging the validity of its presence and activities on his property, erroneously confirming the status quo in initial responses to my enquiries by both the DMR and the Minister and in statements provided to the South African Police Service in the course of criminal investigations.
5.1.1.4 The DMR had a duty to ensure that previous holder(s) of mining rights to the Complainant's property comply with their legal responsibilities in terms of the MA, including their rehabilitation obligations in terms of the approved EMPR for Hartebeestfontein Gold Mine. The DMR further failed to issue a notice to prevent the disposal of assets such as Hostel no 4 in accordance with the above provisions of the MA, which required amongst others, consultation with the Complainant to determine if he wished to retain any of the structures.

5.1.1.5 The DMR furthermore had a duty to prevent the disposal of assets in relation to the mining activities on the Complainant’s property until a closure certificate was issued to confirm that the necessary steps have been taken or adequate financial provision in the Hartebeestfontein Trust Fund had been made for the rehabilitation of abandoned mining area (23 farms/portions) under the Mining License ML7/1995 of Hartebeestfontein in accordance with the obligations and commitments of closure process set out in the EMPR issued to Hartebeestfontein.

5.2 Regarding whether the DMR failed to diligently and expeditiously execute its statutory duties and obligations to intervene in or take action in respect of a dispute between the Complainant and BGM regarding compensation owed to the Complainant as landowner.

5.2.1 Common cause issues

5.2.1.1 It is common cause that the Complainant and BGM could not reach an agreement on the amount of compensation claimed from BGM by the Complainant. According to the complainant, he received a cheque of R3 372.50 as compensation for the year 2010 (it comes to R1.16 per hectare
per month) by post from BGM with a letter without any agreement or consultation. The Complainant returned the cheque with a letter seeking consultation on all the concerns regarding the illegal mining, demolition of Hostel no 4, the EMP as well as the financial provision of R425 million in the trust account for the rehabilitation and compensation. The copy of the letter was forwarded to the Minister and also copied the Director-General and the Deputy Director-General of the DMR.

5.2.2 Issues in dispute

5.2.2.1 If BGM validly operated on the property of the Complainant under authority of mining license ML4/2001 and the MPRDA was applicable, the issue for my determination would have been whether or not the DMR failed to perform its duties in terms of the MPRDA by failing to intervene in a dispute between the holder of mineral rights and the landowner (the Complainant) regarding the payment of compensation under certain circumstances.

5.2.2.2 The Complainant advised that at some point in time he lodged a criminal complaint against BGM with the South African Police Service (SAPS), where after BGM reportedly sent their representative, Mr Thoba, to negotiate with the Complainant. According to the complainant, Mr Thoba “promised to sort out all the legal concerns” and requested the complainant not to follow any legal route through attorneys and courts as the company wished to sort out the matter amicably. After a long delay the Complainant received a letter from BGM’s attorney with an offer of R50 000 per year.

5.2.2.3 According to the complainant the Regional Manager deliberately misinformed him “that the Ministry of the Mineral Resources do not have any power to resolve the conflict between the mining company and the landowner”.

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5.2.2.4 The Minister advised me that the amount of compensation payable in terms of Surface Right Permits is determined by the provisions of the legislation in terms of which the permit is granted. Section 48 (2) of the MA provided that the user of any reservation “shall pay the owner of the concerned or any other person to whom may accrue, compensation, which shall be the same amount which accrued periodically to such owner by virtue of any such reservation, unless otherwise agreed upon by the parties concerned.” BGM has offered to compensate the complainant “on an unusual basis” and paid R 3 372.50 to the complainant during 2010, and has offered to pay all outstanding fees to the amount of R 39 950.73 in full. The Minister was aware of the fact that complainant has disputed this amount. However, until there is an agreement, the rates stipulated in the MA remain applicable.

5.2.3 Application of the relevant law

5.2.3.1 This aspect of the investigation covered the circumstances pertaining to and the evaluation of the DMR’s duties in terms of the MPRDA, under the premise that BGM operated under the mining authorisation in terms of mining license ML4/2001. However, in view of the evidence and information discussed above alluding to the fact that the complainant’s property was excluded from the application for the consolidated mining license ML4/2001 this issue may very well become moot as any compensation owed to the complainant in respect of BGM’s operations on his property would not have been regulated by the MPRDA and common law principles might have applied.
5.2.3.2 Under the previous mineral-law dispensation, landowners had control over whether or not to allow others access to the minerals in their land. The landowner had the ability to determine on which conditions the right to mine would be granted. The (now repealed) MA, which was applicable at the time when the Complainant purchased the property, provided for two forms of compensation to the landowner:

a) Section 42 of the MA provided for compensation for damages caused in the course of mining operations. This section provided landowners with a right to compensation for the loss of minerals on their land, as well as the infringement of a landowner's ownership attributable to losses suffered or harm incurred due to or during the mining activities in certain circumstances.

b) Section 48(2) of the MA provided for compensation to the landowner in exchange for “reservation or permission for or right to the use of water or the surface of land” for which mining rights had been granted. In terms of the transitional arrangements of the MA, the amount of such compensation was the same amount that accrued "periodically to such owner ..., unless otherwise agreed upon by the parties concerned."

5.2.3.3 The MPRDA introduced a number of fundamental changes to the statutory regulation of the mineral resources of the Republic of South Africa. One such change was that no provision is made for the compulsory compensation of a landowner for the surface use of its property for purposes of prospecting or mining for minerals except in cases of
expropriation (Schedule 2 paragraph 12) or by means of arbitration (section 54).47

5.2.3.4 Section 54 of the MPRDA provides for the intervention of the Regional Manager in disputes between the holder of mineral rights and the landowner regarding the payment of compensation under certain circumstances, where he/she is:

a) notified by the holder of mineral rights that the landowner is obstructing mining operations by, inter alia, refusing access to the property or makes unreasonable demands (section 54(3) of the MPRDA), or

b) notified by the owner or lawful occupier, owner or lawful occupier that he/she has suffered or is likely to suffer damages as a result of mining operations on such property (section 54(7) of the MPRDA).

5.2.3.5 The Regional Manager will request the parties concerned to endeavour to reach an agreement on an amount of compensation for such loss or damage. Section 54(4) of the MPRDA further stipulates that if the parties cannot reach an agreement on the payment of compensation, an arbitrator must be appointed to determine the compensation, and if that fails, the parties may approach a competent Court to settle the matter.

5.2.3.6 Section 54(5) provides that if, after having considered the issues raised and the representations made by both parties, the Regional Manager concludes that any further negotiation may detrimentally affect the objects of the Act, the Regional Manager may recommend to the Minister that the land be expropriated. If, however, the Regional Manager concludes in terms of section 54(6) that failure to reach an agreement is due to the fault of the

47 As confirmed by the Court in Sechaba v Kotze and others [2007] 4 All SA 811 (NC)
mining right holder, the Regional Manager may prohibit the holder from commencing or continuing with mining operations until such time that the dispute has been resolved by arbitration or a competent court.

5.2.3.7 Writers such as Badenhorst (2011)\textsuperscript{48} suggests that the initial operation of section 54(3) of the MPRDA "hinges on unreasonable demands" by the landowner in return for granting access to the holder of rights to minerals. If access to land is then refused by the landowner "the holder of the rights to minerals sets the ball rolling by informing the regional manager, the owner would only be able to recover compensation if the regional manager concludes that the owner has suffered or is likely to suffer loss or damage as a result of the mining operations and a settlement is reached or compensation is determined by arbitration or a court of law"\textsuperscript{49} (emphasis added).

5.2.3.8 The key issue is that in terms of section 54 of the MPRDA, the Regional Manager, could only consider arbitration once he/ she has formulated an opinion, based on representations from both parties, on the extent or likelihood of "loss" or "damage" to the landowner as a result of mining operations on his/ her property.

5.2.3.9 In regard to what constitutes "loss" or "damage" for the purpose of section 54 of the MPRDA, compensation was determined by using the provisions of section 12 of the Expropriation Act, 1975\textsuperscript{50}. Compensation is usually provided for the loss of the land's minerals as well as the infringement of a landowner's ownership attributable to losses suffered or harm incurred due


to or during the mining activities. The second category could inter alia include surface damage, dust deposits on crops or the inability to continue with farming activities on a particular portion of the land.  

5.2.3.10 The Courts have made it clear that the only topic for consultation in terms of section 54 of the MPRDA is the question of compensation for loss or damage suffered or to be suffered as a consequence of the mining operations. Such compensation is furthermore, distinguishable from compensation for the surface and water use of the landowner’s property for purposes of prospecting or mining for minerals in terms of section 48(2) of the MA, which was the subject of the deliberations between the Complainant and BGM. According to writers such as Elmarie Van der Schyff (2009), the landowner is not expressly compensated for this inroad into ownership or the infringement of his entitlements through the provisions of section 54. Section 54 merely creates a mechanism that can be used to claim compensation in cases where prospecting and mining operations cause damage or loss to the landowner or lawful occupier.

5.2.3.11 The Judgment in the matter of Sechaba v Kotze and Others confirms that “the mechanisms provided for in sections 10(2) and 54 of the MPRDA, which mechanisms are designed to resolve objections or disputes between an applicant for or a holder of a prospecting right and a landowner, consultation is the only prescribed means whereby a landowner is to be

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52 Joubert NNO and Others v Maranda Mining Company (Pty) Ltd and Others (55216/09) [2009] ZAGPPHC 136; [2010] 2 All SA 67 (GNP) (5 November 2009)
54 (2007) 4 All SA 811 (NC)
appraised of the impact prospecting activities may have on his land and, for instance, his farming activities”

5.2.4 Conclusion

5.2.4.1 The submission by the Complainant that the Regional Manager was obliged to initiate the arbitration process as envisaged in section 54(4) of the MPRDA as a result of the impasse created by BGM’s refusal or failure to enter into a rental or compensation agreement with him for the use of his land, have become moot in view of the fact that DMR ought to have been aware of the fact that the Complainant’s property was no longer the subject of the old order mining rights held by BGM under the authority of Mining License ML7/2001 or the converted new order right.

5.2.4.2 As a result, the procedure provided for in the MPRDA or preceding legislation (such as the MA) would in all probability not have been available to resolve the dispute between the Complainant and BGM, as any grounds for compensation, including the potential unlawful encroachment on the Complainant’s property rights, the unlawful extraction of minerals through the exclamation of the mine rock dumps, or the presence and activities of Boleng Concrete Products and C & C Crushers would not have been covered under the concept of damages caused by valid mining operations in terms of either the MA or MPRDA.

5.2.4.3 Had the DMR registered the fact that BGM’s presence and activities on the Complainant’s property were in fact not sanctioned by mining license ML 7/2001 or the subsequent converted mining rights, its role in terms of the MA and MPRDA would have been to protect a landowner against illegal mining
activities, by stopping and preventing such activities, and not the mediation of disputes about compensation.

5.3 Regarding whether the DMR continuously diligently and injudiciously fail to properly attend to complaints and allegations by the Complainant that BGM had entered into an agreement with two companies to work the mine dumps on the property for the production and sale of sand and stone and the manufacturing of concrete blocks and paving, which do not constitute mining activities covered by any surface right permit?

5.3.1 Common cause issues

5.3.1.1 It is common cause that C & C Crushers and Boleng Concrete Products were operating on the Complainant’s property to process the waste rock dump deposited next to Shaft No 4. It is not in dispute that C & C Crushers and Boleng did not apply for or were granted any mining rights on the property and that they operated in terms of a written agreement which they had with BGM, purportedly as part of its rehabilitation strategy. The agreement was to separate gold bearing rocks from waste rock dump and deliver it to BGM and to use the waste rock dump for the sale of sand, stone and aggregate.

5.3.1.2 The agreement specified that the exploitation started from 1 December 2005 (although the agreement was only signed on 11 May 2006). In terms of the agreement C & C Crushers and Boleng Concrete Products were allowed to build the entire infrastructure to exploit the waste rock dump.
5.3.2 Issues in dispute

5.3.2.1 The issue for my determination is whether or not the DMR failed to take action against BGM, C & C Crushers and Boleng Concrete Products about the latter two business’ alleged illegal presence and unlawful mining activities on the Property.

5.3.2.2 According to the complainant, he repeatedly raised his concerns with the DMR. In 2011 the Chief Director: Mineral Regulations Western Region and the Acting Deputy Director-General: Mineral Regulation undertook to look into the issue of the subcontracting of C & C Crushers and Boleng Concrete Products and specifically to “establish whether or not those activities are addressed in the Environmental Management Programme of the Mine ...”

5.3.2.3 On 17 October 2011 the DMR Regional Manager: North West Region, responded to complaints that the Complainant had lodged through the Presidential Hotline and advised as follows:

“Buffelsfontein Gold Mines Limited is the holder of an old order mining right ML 4/2001, issued in terms of the now repealed Minerals Act, Act 50 of 1991 to mine gold in respect of various farms, including portion 37 of the farm Hartbeesfontein 422 IP. The old order mining right is in the process of being converted into a new order mining right.

Buffelsfontein is also the holder of various surface rights permits over various properties, including the property held by the complainant. Those rights have been in existence for a number of years and predate the acquisition of the property by the complainant. All the surface right permits were re-registered in the Minerals and Petroleum Titles Office.” (Own emphasis)
5.3.2.4 On 28 March 2012 the Minister responded to the Complainant on this particular issue and advised that the waste rock dump situation at no 4 Shaft of BGM was "legally deposited on the property under authorisation of a surface right permit" issued prior to the date on which the MPRDA came into effect. These Surface Right Permits are held in terms of the Precious and Base Metals Act, Act 35 of 1908, and in terms of Mining Rights Act, Act 20 of 1967. The permits concerned remain valid under the current legislation in terms of the transitional arrangement accorded therein. The company holds two Surface Right Permits for waste rock dumps. The permits were issued in 1961 and 1976 respectively. According to the Minister, the company was therefore, in terms of the aforementioned permits, legally utilising the said land and waste rock dumps for purposes of mining.

5.3.2.5 The Minister continued to state that in terms of a judgment in the High Court between De Beers Consolidated Mines Limited vs Ataqua Mining55, the DMR was "not authorised to accept applications for prospecting rights, mining rights and mining permits in respect of dumps which originated prior to the commencement of the MPRDA. According to the judgment these dumps are excluded from the operation of the MPRDA...For this reason my department cannot agree with your allegation that the activities of C & C Crushers on the property concerned constitute illegal mining"..

5.3.2.6 On 3 May 2012 the Regional Manager of the DMR again responded to complaints that the Complainant had lodged via the Presidential Hotline and advised as follows:

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55 De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others (3215/06) [2007] ZAFSHC 74 (13 December 2007)
"The dumps created by Buffelsfontein Gold Mines reverts (sic) back to them as a moveable asset, and it was addressed in their approved EMP (Environmental Management Programme) that the processing of the dumps will form part of their rehabilitation strategy".

5.3.2.7 The Regional Manager further advised that C & C Crushers was contracted by BGM to carry out activities as required for rehabilitation, in particular the processing of waste rock dump, and operated within the parameters of BGM's surface rights permits. He stated that

"...the activity is not regarded as illegal under the MPRDA as this forms part of the mines (sic) rehabilitation strategy."

Rudolph Boerdery Trust, Trading as C & C Crushers CC is contracted to Buffelsfontein to carry out activities required for rehabilitation, in particular processing of Waste Rock Dump at their Number 4 shaft, in terms of a contract entered between the parties in 2006. Given this contractual agreement we submit therefore that the activities of C & C Crushers are not illegal."

5.3.2.8 According to the Regional Manager, the operations of Boleng Concrete Products were not regulated by the MPRDA as this activity did not constitute "mining". He continued to state that –

"This activity should be regulated by the Department of Labour as it fall (sic) under the Factories Act. The Mine also confirmed in writing that they have no agreement or relationship with Boleng Concrete".

5.3.2.9 The Minister, in responding to my investigation, also confirmed the views of the DMR on this issue and advised that the activities of Boleng Concrete Products could not be defined as mining. The DMR could therefore, not take any action in respect of these activities in terms of the MPRDA. The Minister further stated that
the operations of Boleng Concrete Products on the Property were not authorised by the DMR and "their presence appear to be of a civil nature". The Minister suggested that the matter should be resolved between the Complainant and Boleng Concrete Products.

5.3.2.10 Evidence obtained and submitted by the complainant revealed that Simmer and Jack (BGM) entered into an agreement with Rudolph Boerdery Trust (the Contractor) on 11 May 2006 to process the waste rock dump situated at no 4 shaft on the complainant’s property. In terms of the agreement the Contractor was supposed to:

a) produce crusher stone of various sizes and crusher sand in order to sell to the market;
b) reef pick gold bearing ore for the Company;
c) deposit sludge in the encatchment dams;
d) sell non-gold-bearing waste rock.

5.3.2.11 In terms of the agreement the "works" performed by the Contractor included the erection of a Reef Picking Plant on site and the processing of the waste rock dump to produce crusher stone and sand, including "the reef picking of gold bearing ore" from the Dump and stock pile in a secured area within the site. The Contractor was supposed to inform the Company’s surveyor when reef picked ore is available for sampling. Such samples would have been stored in a sample bin supplied by BGM and loaded onto the BGM trucks.

5.3.2.12 The agreement between the parties further provided that the Contractor may not sub-let the Site or any portion thereof or encumber or pledge the agreement or cede or assign its rights and
obligations in terms of the agreement. The Contractor was obliged to “ensure that all Environmental legislation is complied with during the execution of the Works including the Company’s (BGM’s) Environmental Management Programme”.

5.3.2.13 Most importantly, the agreement provided that the Contactor must “upon termination of this Agreement, rehabilitate the Site in accordance with the requirements of the Company’s Environmental Management Programme (EMP) and all legislation pertaining thereto ensuring that the Site is returned to its natural habitation”. (emphasis added)

5.3.2.14 Boleng Concrete Products installed the plant to produce brick, paving and concrete products next to C & C Crushers with the consent from BGM.

5.3.2.15 The Complainant raised a number of issues with the DMR in relation to the agreement between Simmer and Jack and the Contractor is so far as it is purported to serve as the legal basis and authorisation for the activities of C & C Crushers on his Property.

5.3.2.16 In the first instance, the processing of the waste rock dump commenced from 1 December 2005 as acknowledged in the agreement signed on 11 May 2006, while C & C Crushers (Pty) Ltd was only registered as a business enterprise on 1 July 2009 under registration number CK Registration 2009/012538/07.

5.3.2.17 Secondly, the Complainant disputed the Minister and DMR’s assertion that the dumps reverted to Simmer & Jack/ BGM as it is a moveable asset and that it was entitled to enter into an agreement

56 As confirmed at https://eservices.cipc.co.za/Search.aspx

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with C & C Crushers. According to the Complainant the said Waste Rock Dump was not created by BGM, but by Hartebeestfontein Gold Mine mining operations, mining on his Property from the Shaft No 4. The dump was deposited next to Shaft No 4 as authorised by the then Department of Mines (now DMR) under authority of Surface right Permit No C49/1961 - issued on 24 June 1961 in terms of the Section 68 & 70 of the Precious and Base Metals Act, 35 of 1908 to Hartebeestfontein Gold Mine.

5.3.2.18 The Complainant contends that the actions of the DMR through which it purported to transfer Surface Right Permit No C49/1961 for “Shaft equipment and waste rock dump with fencing” to AVGOLD Limited on 25 June 2002 and to (re)register the said permit at the Mining Titles Registration Office in terms of item 9, Schedule II the MPRDA on 18 August 2006 in favour of BGM, were invalid, as neither of them were the rightful owner of any mining rights to his property on the respective dates.

5.3.2.19 In the third instance, the exploitation of dumps was not part of BGM's approved EMPR for the purpose of its mining operations in terms of Mining Licence ML4/2001 (which in any event, excluded the Complainant’s Property). Any rehabilitation operations would therefore have had to be conducted in terms of the EMPR approved for Hartebeestfontein Gold Mine operations in terms of (the lapsed) mining license ML7/ 1995. The Complainant submits that even if the DMR or the Minister was of the opinion that the actions of BGM/C & C Crushers and Boleng Concrete Products constituted bona fide rehabilitation activities in terms of the EMPR (DRD-NW EMPR) approved for DRD for purposes of its operations in terms of mining licence ML4/2001, the rehabilitation had to be approved in terms of
a valid EMPR amended for the purpose of the rehabilitation with a closure process plan submitted for approval.

5.3.2.20 The Complainant emphasised that the said EMPR did not contain any strategy for the processing or commercial exploitation of the waste rock dump as part of the rehabilitation or closure process. In fact, the EMPR provided in 2002 that after the "cessation of underground mining", mining operations may continue in the form of the "use of surface infrastructure for dump reclamation":

"The mine closure will take place as a series of partial closures in terms of Regulation 5.12.5. of ACT 50 of 1991, as different areas of mine become redundant ... Underground ore reserves may be expected to be depleted at any time within the next 8 years, depending on the gold price. The potential exists for retreatment of surface stock piles for many years after underground reserves run out, but again this is highly dependent on the gold price".

5.3.2.21 On 18 July 2011 the DMR Regional Manager: Mineral Regulation North West Region issued a notice to BGM to cease all operational activities relating to the reclamation of the dumps:

"Instruction In Terms Of Section 93 Of Mineral And Petroleum Resources Development Act, 2002(Act 28 Of 2002): In respect of certain portions of the farms ....Hartebeestfontein 422 ... and Town and Townlands IP of Klerksdorp 424 IP situated in the Magisterial District Of Klerksdorp. This office hereby instructs you to cease with all operational activities relating to reclamation of the dumps as your approved
Environmental Management Programme do not cater for such activities. You are hereby instructed to refrain from any reclamation process with immediate effect and all activities related thereto, in terms of section 93.

In terms of section 98(a)(vi) any person is guilty of an offence if he or she contravenes or fails to comply with any directive, notice or suspension, order, instruction or condition issued, given or determined in terms of this Act."

5.3.2.22 According to the Complainant this notice illustrated that the "DMR did in fact consider the reclamation of the waste rock dumps mining activities in terms of the rules and regulations of the MPRDA, "contrary to the letter of the Minister dated 28 March 2012 which (stated that) the dump mining is excluded from the MPRDA"

5.3.2.23 Fourthly, it is contended that neither DMR nor the DEA took the necessary step to ensure that the contractor, C & C Crushers or Boleng Concrete Products had the necessary authorisations in of terms the National Environmental Management Act, 1998 (NEMA), a Waste Management License in terms of Environmental Conservation Act, 1989 ("ECA") or a Water Use License in terms of National Water Act 1998 (GNR 704 Water Use For Mining Purposes) for their operations on the Complainant's Property. An Audit report dated 12 June 2013 from Mr T Ntili, the Regional Head: Free State Water Affairs, confirmed that "C&C (was) storing slimes material on the site. The storage dams for slime are not constructed or managed property. The dams are illegal and not part of the EIA or EMPR of the mine and no storm water management is taking place at the crusher operations". (emphasis added)
5.3.2.24 The Complainant also referred to a press statement by the DMR in June 2008 indicating that the De Beers judgement only applies to the Jagersfontein dumps, that it (DMR) was going to appeal the decision and consider amendments to the MPRDA "so that it encompasses old mine dumps". According to the Complainant the De Beers judgement\(^\text{57}\) also did not affect the application of either the National Environmental Management Act No 107 of 1998, the National Water Act No 36 of 36 of 1998 or the National Nuclear Regulations in respect of reclamation operations or waste arising from such operations.

5.3.2.25 The Complainant further submits that the \textit{De Beers} judgement\(^\text{58}\) was only delivered on 13 December 2007 and the findings of the Court would not apply retrospectively to the (illegal) operations of C & C Crushers between 2005 and 2007.

5.3.2.26 The Complainant reiterated that BGM's mining license was for gold only and therefore applied to underground mining. The activities of BGM to "mine" waste rock dump through C & C Crushers as a subcontractor as well as the operations of Boleng Concrete Products were therefore in contravention of the mining license ML 4/ 2001, as well as surface right permit No C 49/1961.

5.3.2.27 The Complainant also included this matter in the criminal complaints lodged with the SAPS in 2011 and contended that it was illegal for BGM and or C & C Crushers to produce and sell sand, stone and aggregate from waste rock dump as it is in contravention of the Section 106 of the MPRDA.

\(^{57}\) Supra

\(^{58}\) Supra
5.3.2.28 On 14 September 2012 the Director of Public Prosecutions, North West advised the complainant that it declined to prosecute:

"There are no reasonable prospects of successful prosecutions. Simmer and Jack Mines Ltd are occupying your property pursuant to a valid mining license. This company has in turn contracted C and C Crushers (Pty) Ltd to process their residue stock pile as part of an approved Environmental management plan.

You are advised to evict Boleng Concrete Products from your property".

5.3.3 Application of the relevant law

Introduction

5.3.3.1 The subject of the objections and grievances of the complainant and the responses of the DMR, namely the management of mineral residue and mine waste is heavily fragmented between economic development and environmental protection. Organisations and environmentalists have noted that mining waste, such as tailing dams and waste rock dumps are regulated by "at least two primary and eleven secondary pieces of legislation and by three primary and six secondary government departments." 59

5.3.3.2 The reprocessing of old tailings dumps known as "dump reclamation" has a commercial objective in the sense of supplementing mining (or re-mining as alleged by the complainant) through the further extraction of an energy or mineral resources from previously mined areas or materials. At the same time, it is recognised as a rehabilitation option that alleviates environmental impacts during mining and post-mining waste storage to produce landforms

that are safe, stable and non-polluting that can be integrated into the surrounding environment and land management practices. To this extent it could be subject to the environmental management regime for mining related activities, administered in terms of the MPRDA.

5.3.3.3 In the third instance mining activities or activities incidental thereto in a mining area, including the management of mining waste and mine water also have environmental impacts that would invariably trigger a range of environmental provisions contained in other legislation including NEMA, the National Water Act 36 of 1998 (NWA) and the National Environmental Management: Waste Act 59 of 2008 (NEMWA).

Regulation of the reclamation activities of BGM/ C & C Crushers and Boleng on the Complainant's property.

5.3.3.4 Section 5(2) of the MA provided that "no person shall prospect or mine for any mineral without the necessary authorisation granted to him in accordance with this Act". In the MA, the extraction of minerals from waste rock dumps ("tailings") was considered to be a mining activity because the definition of "mining" included "any excavation in the earth, including any tailings, whether or not it is being worked, or made for the purpose of searching for or winning of material". (Emphasis added).

5.3.3.5 The definition of "mineral" in the MA meant "any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth, in or under water or in tailings, excluding water, but including sand, stone, rock, gravel and clay, as well as soil, other than topsoil" (emphasis added).

5.3.3.6 In terms of section 5(4) of the MPRDA "no person may ... remove, mine, conduct technical co-operation operations, ... and produce any mineral or petroleum or commence with any work incidental thereto on any area without-
(a) an approved environmental management programme or approved environmental management plan, as the case may be;

(b) a mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be...

5.3.3.7 The term “mine” is defined in section 1 of the MPRDA to mean any operation or activity for the purposes of winning any mineral on, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto.

5.3.3.8 “Any operation relating to the act of mining and matters directly incidental thereto”. A “mining area” is defined in section 1 of the MRPDA in relation to a mining right or a mining permit as, amongst others, “the area for which that right or permit is granted”. 60

5.3.3.9 In the MPRDA the definition for tailings in the MA was not repeated: Instead, the MPRDA introduced two new concepts, namely “residue deposits” and “residue stockpiles.” The MPRDA, prior to its amendment in 2013, defined residue deposits as “any residue stockpile remaining at the termination, cancellation or expiry of a prospecting right, mining right, mining permit, exploration right or production right. (Own emphasis).

5.3.3.10 Subsequent to the Promulgation of the MPRDA the management of waste rock dumps, or residue stock piles as it was described in the Act, was supposed to be regulated under the MPRDA. However the Court stated in the matter of De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd & others 61 that the MPRDA has an explicit definition of a residue stockpile.

60 A mining area also has a separate defined meaning in relation to any environmental, health, social and labour matter and any latent or other impact thereto. This is discussed later in these heads of argument.

61 De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others (3215/06) [2007] ZAFSHC 74 (13 December 2007)
which does not include tailings dumps that were created under an old order right (before the promulgation of the MPRDA).

5.3.3.11 The court pointed out that the MA recognised the mining of tailing dumps. However, the MPRDA has an explicit definition of a residue stockpile, which did not include tailings dumps that were created under an old order right. According to the court, the applicant's MA authorisation did not continue under schedule II of the MPRDA's transitional arrangements. The court made it clear that the MPRDA did not intend to regulate mining in old order tailings dumps and that the regime under the MA regarding tailing dumps did not persist. The Court also explained that the regime under the MA regarding tailing dumps did not persist as MA authorisation did not continue under schedule II of the MPRDA's transitional arrangements.

5.3.3.12 The Court further held in the *De Beers*\(^{62}\) matter that the exploitation of a tailings dump is to be regarded as the processing or the winning of a mineral and therefore constituted "mining". In the matter of *Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another v Maledu and Others*\(^{63}\) the Court was required to deal with the question of whether or not a mining right can be executed through an agent (contractor). The Court relied on the provisions of section 101 of the MPRDA, which provides that: "If the holder of a right ... appoints any person or employs a contractor to perform any work within the boundaries of the ... mining ... area ... such holder remains responsible for compliance with this Act". The Court held that the mining Company, as the holder of the mining right has the right to exercise its right and to employ any person or contractor to perform any work. This is confirmed in the matter of *Ekapa Minerals (Pty) Ltd and Others v Seekoei and Others*\(^{64}\) where the Court held that a third party that has been
processing tailing dumps by virtue of an agreement with the mining rights holder (De Beers), has in fact been “conducting mining operations on the property as a contractor for de Beers…” 65

5.3.3.13 Following the *De Beers* decision 66 the Legislature was faced with a *lacuna* as the Minister had no regulatory control over objects which could, for purposes of the MPRDA, still be re-mined. (According to the court in *De Beers* such control vested in the Minister of Environmental Affairs, as mine dumps were under the regime of MPR).

5.3.3.14 To address the regulatory gap, Parliament tried to remove “*ambiguities in certain definitions*” of the MPRDA by way of the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (“MPRDA”), which came into effect on 7 June 2013. The MPRDA amended the definitions of both residue deposits and stockpiles to link it to “a mining right, mining permit, exploration right, [or] production right or an old order right”.

5.3.3.15 The inclusion of the term “old-order right” in the new definitions, however, led to new problems as illustrated by the judgement of the Supreme Court of Appeal in *Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd and Others* 67. In the latter case the Court held that the concept of old-order rights referred to a very specific genre of right, which was created by the MPRDA and which had not by themselves existed prior to the MPRDA coming into force. For a common law mineral right to have continued in terms of the MPRDA’s transitional arrangements, it had to underlie a valid mining authorisation under the MA. Thus the effect of including “old-order

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65 This is confirmed by the Court in the matter of *Ekapa Minerals (Pty) Ltd and Others v Seekoei and Others* (2057/2016) [2017] ZANCH where the Court held that a third party that has been processing tailing dumps by virtue of an agreement with the mining rights holder (De Beers), has in fact been “conducting mining operations on the property as a contractor for de Beers…”

66 Supra

67 *Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd and Others* (641/09) [2010] ZASCA 109 (17 September 2010).
rights" within the definition of residue stockpiles and deposits is that "only stockpiles and deposits created under old order rights after the enactment of the MPRDA on 1 May 2004" would effectively fall under the jurisdiction of the Act.

5.3.3.16 Furthermore, since legislation only applies prospectively and not retrospectively (unless clearly stated otherwise in the relevant legislation), and the MPRDA only came into effect on 7 June 2013, only mine dumps created under old order rights after 7 June 2013 would effectively be regulated by the MPRDA. By that time, most if not all of the so-called old order rights had either been converted or had lapsed following the lapse of the transitional time period in Schedule II of the MPRDA.

5.3.3.17 This lacuna has since been addressed by the MPRDA, the changes from which came into effect in 2013, and a mining right must now be obtained before a mine dump can be mined. A dump created through the mining process is classified as a "residue stockpile" by the MPRDA for the duration of a mining right. The holder of the right has the automatic right to mine the stockpile and extract minerals therefrom. However, on the expiry of such a right, the mine dump is rendered a "residue deposit". The mining of the dump in these circumstances would require that a new right is granted in terms of the MPRDA, which includes an environmental management plan and proof of financial provision for environmental rehabilitation. The right will not automatically be granted to the creator of the dump.68

Rehabilitation responsibilities of the mining rights holder

68 Richard Cramer (2016). Mining mine dumps in South Africa: the interests of mining companies that create dumps, 26 May 2016, UCT
5.3.3.18 The obligations with respect to the rehabilitation of mine sites are largely contained in the Constitution (section 24), the MPRDA and accompanying regulations. Section 24 of the Constitution is directly relevant to environmental law and states that everyone has the right to:

"An environment that is not harmful to their health or well-being; and have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that: Prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".

5.3.3.19 Before 2000, rehabilitation was regulated by the Mines and Works Act No 27 of 1956 (MWA) and the MA. Although the MWA came into effect in 1956, rehabilitation only became a requirement in 1980 when rehabilitation regulations were promulgated. When regulation 5.13.3 came into effect in 1980, owners or managers of mines were required to rehabilitate the mining surface. The rehabilitation of tailings had to be effected in the course of mining operations. When the recovery of the mineral ceased, rehabilitation had to ensure that the surface was returned to its natural state to the greatest extent possible and to the satisfaction of the Inspector of Mines. The rehabilitation of tailings had to be done in accordance with the conditions contained in the EMP and to the satisfaction of the Regional Director.

5.3.3.20 Section 38 of the MA\(^69\) enforced rehabilitation on all holders of authorizations, including holders of authorisations to re-mine tailings.

\(^{69}\) The rehabilitation of the surface of land concerned in any prospecting or mining shall be carried out by the holder of the prospecting permit or mining authorization concerned:

(a) in accordance with the rehabilitation programme approved in terms of section 39, if any;

(b) as an integral part of the prospecting or mining operations concerned;

(c) simultaneously with such operations, unless determined otherwise in writing by the regional director; and

(d) to the satisfaction of the regional director concerned.
Authorization holders were required to rehabilitate the surface of the prospecting or mining area during the course of their operations and after the suspension, cancellation, abandonment or lapping or the authorisation. Rehabilitation therefore became an integral part of the operation and had to be done in accordance with the conditions contained in the EMP and to the satisfaction of the Regional Director. Authorisation holders were required to apply for a closure certificate when the authorization lapsed, was suspended, cancelled or abandoned. Liability for compliance with the provisions of the MA remained with the authorisation holder until the Regional Director had issued a closure certificate. This provision entailed that the authorisation holder was accountable for rehabilitation until the certificate was issued. A closure certificate that was issued in terms of section 12 relieved authorisation holders from their liabilities in terms of the MA only and not from liabilities imposed by other environmental legislation.

5.3.3.21 The MPRDA repealed MA and its regulations. The transitional provisions in Item 10 of the MPRDA provide that mining rights obtained in terms of the MA (old order rights) must be converted to a MPRDA mining right and that the conditions, *inter alia* the obtaining of a closure certificate, pertaining to the old order right will remain valid until they are converted in terms of section the MPRDA, the liability for rehabilitation only ceases once the DMR issues a closure certificate.

5.3.3.22 Section 38(1)(d) of the MPRDA and Regulation 57(e) of the Mineral And Petroleum Resources Development Regulations70 (MPRDA Regulations) state that the holder of a prospecting right or mining right must rehabilitate the environment that has been affected by his/her prospecting or mining activities, as far as it is practicable, to its natural state or to a predetermined

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70 Published under Government Notice R527 in Government Gazette 26275 dated 23 April 2004. Commencement date: 23 April 2004
and agreed standard or land use which conforms to the concept of sustainable development. In terms of section 5(c) of the MPRDA the rehabilitation process must be executed according to a detailed environmental management programme.

5.3.3.23 In South Africa, the term "rehabilitation" has traditionally been used for the range of activities relating to the remediation of environmental damage to the surface of a mine after extraction is completed.\textsuperscript{71} The word "rehabilitation" has not been defined by the legislator or by the courts.\textsuperscript{72} Rehabilitation in a mining context may be defined as a process of restoring land that has been affected by mining to a condition similar to that in which it was before mining commenced\textsuperscript{73}.

5.3.3.24 In terms of the MA, a person who held rights to minerals over a property was also the holder of the rights to minerals with regards to tailings produced from the mining operations in terms of that right. This meant that a mining company operating on a certain property would automatically be the holder of the right to any minerals occurring in the dumps produced from the operation, regardless of whether that company is also the owner of the land or not.

5.3.3.25 The mining company or holder of the rights to the minerals in the dump or tailing would also be responsible for its management (including the construction, operation, maintenance, decommissioning and rehabilitation), in accordance existing approved management measures, including an environmental management programme and applicable legislation.\textsuperscript{74}


\textsuperscript{72} Barnard D \textit{Environmental Law for All} (Impact Books Pretoria 1999)

\textsuperscript{73} GDACE 2008 www.bullion.org.za.

\textsuperscript{74} Regulation 73 of the MPRDA Regulations
Environmental protection and authorisation in terms of NEMA and related legislation for mining activities or activities incidental thereto in respect of Waste Rock Dumps in a mining area.

5.3.3.26 In terms of NEMA a person needs an environmental authorisation as contemplated in section 24 if the person intends to commence an activity identified in a Listing Notice. The Listing Notices are promulgated by the Environment Minister and identify the competent authority for granting the environmental authorisation.

5.3.3.27 Mining as such was not a listed activity. However a company intending to embark on mining would typically have had to perform activities which could be listed activities for instance, establishing infrastructure for the bulk transportation of water; erecting facilities for the storage of fuel; clearing indigenous vegetation covering more than 1 hectare, and would thus have needed environmental authorisation for those activities in terms of section 24 of NEMA.

5.3.3.28 The Minister of Mineral Resources, responsible for implementing the MPRDA, is specifically tasked to “ensure the sustainable development of South Africa’s mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development”. To ensure this, the MPRDA stipulates that the principles of the NEMA apply to all mining, and serve as guidelines for the interpretation, administration and implementation of the environmental requirements of the MPRDA.

5.3.3.29 Prior to 8 December 2014, section 23(5) of the MPRDA provided that a mining right came into effect on the date on which the applicant’s EMP was approved in terms of section 39(4). In that regard section 37 stated that the
principles set out in section 2 of NEMA applied to all mining operations. Section 38 provided that the holder of a mining right had to consider, investigate, assess and communicate the impact of its mining on the environment as contemplated in section 24(7) of NEMA and had to manage all environmental impacts in accordance with its approved Mining EMP. Section 39(1) provided that every person who applied for a mining right in terms of section 22 had to conduct an Environmental Impact Assessment (EIA) and submit an EMP within one hundred and eighty (180) days of the date of being so notified by the Regional Manager, these processes being prescribed in the Mining Regulations.

5.3.3.30 On 2 September 2014, the National Environmental Laws Amendment Act, 2014 (NEMLAA) came into operation together with the National Environmental Management: Waste Amendment Act. These acts were aimed at implementing the so-called “One Environmental System” with the view to integrate the mining industry into the environmental management system applicable to all other industries. These Acts introduced new and different requirements in the storage and management of mining tailings. The amendments required that “residue stockpiles and residue deposits” be managed in the prescribed manner on a site demarcated for that purpose in the environmental management plan or programme. The manner of managing tailings was to be prescribed by regulations.

5.3.3.31 However, when the legislative amendments to NEMA, the MPRDA and the Waste Act came into effect, it was without the necessary supporting regulations in order to properly implement them. This prompted a court challenge by Aquarius Platinum (SA) (Pty) Ltd against the Minister of Mineral Resources and the Minister of Environmental Affairs and other

75 26 of 2014 (Waste Amendment Act)
parties. The court agreed with Aquarius and ruled that the decision to do so was irrational and thus, the relevant proclamation was invalid (subject to confirmation by the Constitutional Court – which was granted on 23 February 2016).

5.3.3.32 After this judgment was handed down, the relevant regulations forming the subject of this decision under the Waste Act were published in their final form on 24 July 2015. With effect from 24 July 2015, the establishment and reclamation of mine dumps and stockpiles of similar waste from or incidental to a mining operation must comply with the Regulations Regarding the Planning and Management of Residue Stockpiles and Residue Deposits (GN NO. R. 632 Government Gazette, 24 July 2015).

5.3.3.33 In terms of Regulations Regarding the Planning and Management of Residue Stockpiles and Residue Deposits (GN NO. R. 632 Government Gazette, 24 July 2015). Mineral rights holders (as at 24 July 2015) must continue to manage the mine residue deposits and stockpiles approved in terms of the MPRDA in accordance with the approved mitigation measures prescribed in the holders approved Environmental Management Plan. Existing Environmental Management Plans that have been approved under the MPRDA are deemed approved as a Waste Management License under the Waste Act. Again, however, experts raised the question of whether or not the impasse introduced by the De Beers Judgement means that old order tailing dumps which have not been approved in terms of the MPRDA are not regarded as existing approved residue stockpiles and deposits. This could mean that such dumps are excluded from this exemption and the

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76 Aquarius Platinum (SA) (Pty) Ltd against the Minister of Mineral Resources and the Minister of Environmental Affairs and other parties [2016] ZAGPPHC 584 (27 July 2015)
77 Minister for Environmental Affairs and another v Aquarius Platinum (SA) (Pty) Limited and others (Bekker as amicus curiae) 2016 (5) BCLR 673 (CC)
78 Supra
establishment or reclamation of such dumps must comply with the Mining Residue Regulations.

5.3.3.34 The fact remains however, that under the legislation that applied at the time when the Complainant raised his concerns and grievances, the DMR was recognised as the responsible authority for the implementation and enforcement of mining-related environmental governance.\(^7^9\) In terms of Regulation 55 of the MPRDA Regulations the holder of mining right or mining permit was obliged, in order to ensure compliance with an environmental management programme or environmental management plan and to assess the continued appropriateness and adequacy of the environmental management programme or environmental management plan, to:-

(a) conduct monitoring on a continuous basis;

(b) conduct performance assessments of the environmental management plan or environmental management programme as required; and

(c) compile and submit a performance assessment report to the Minister in which compliance was demonstrated.
5.3.4 Conclusion

5.4.3.1 I am not convinced that the DMR sufficiently interrogated the agreement between BGM and C & C Crushers to process the Waste Rock Dump at the Number 4 shaft as part of BGM's rehabilitation strategy or in compliance with its rehabilitation responsibilities.

5.4.3.2 From an analysis of the agreement between BGM and C & C Crushers against the legal framework, including case law, it is clear that C & C Crushers' exploitation of the waste rock dump could primarily be regarded as the processing or the winning of a mineral or minerals and therefore conducting mining operations on the property as a contractor for BGM. There is no indication in the agreement that C & C Crushers was responsible for the rehabilitation of the dumps as an integral part of the reclamation operation in accordance with the conditions contained in the EMP. Instead the agreement purported to place such an obligation (unlawfully) on C & C Crushers after the termination of the agreement.

5.4.3.3 In view of DMR's acknowledgement that the property could not have been the subject of BGM's registered old order mining rights under mining license ML4/ 2001 or the converted mining right, its reliance on the agreement between BGM and C & C Crushers as authorisation for the latter's presence and activities on the Complainant's property, appears to have been misdirected.

5.4.3.4 A guiding principle of the controlling legislation is that the polluter (holder) pays for the costs of rectifying the impacts of pollution, \(^\text{80}\) and therefore

\(^{80}\) (Chamber of Mines, 1999; South Africa, 2001b).
mining rights holder remains responsible for compliance with all the provisions in the MA or the MPRDA relating to rehabilitation. 81

5.4.3.5 In respect of the complainant’s property the rehabilitation obligation would therefore actually have fallen on Hartebeestfontein Gold Mine as the last valid mining rights holder under authority of Mining license ML7/1995. This meant that the ongoing determination and management of the environmental impacts of “unnatural man-made landforms such as waste rock dumps and slimes (tailings) dams created through mining activities”, on the complainant’s property and the monitoring of its rehabilitation action plans and environmental management measures, had to take place in accordance with the management criteria contained in the EMPR that was actually approved for mining and rehabilitations operations on the Property in question, which was not the EMPR issued to DRD in terms of the section 39 (2) (b) of MA as the Complainant’s property was not part of the mining authorisation issued in terms of mining license ML4/2001 and the EMPR conditions approved by DMR [DRD-NWEMPR (Nov 2001)].

5.4.3.6 In fact DMR had to ensure that the owner of mining rights on the complainant’s property in terms of the lapsed Mining License ML7/1995 and the approved EMPR of Hartebeestfontein Gold mine, commenced with its rehabilitation obligations immediately after 1999, and long before BGM entered into an agreement with C & C Crushers to purportedly comply with rehabilitation obligations in terms of the 2002 EMPR.

5.4.3.7 In any event it is not clear what informed the DMR’s decision to accept or condone the agreement between BGM and C & C Crushers and its activities

81 The same ideology is enshrined in the Rio Declaration on Environment and Development Principle 16: “National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle bear the costs of pollution, with regard to the public interest and without distorting international trade and investment”
on the Property as part of BGM's rehabilitation strategy. As far as it could
be established the approved EMPR [DRD-NWEMPR (Nov 2001)] which it
purported to enforce, only provided for the reclamation of rock from waste
rock dumps through the Multigold process\(^{82}\) and others (rocks) to be
"crushed by Stone and Allied Ltd for the purpose of construction material".
The activities and facilities of C & C Crushers were not specifically included
in the approved EMPR and there were no indicators to demonstrate an
achievement with the environment management and rehabilitation criteria
and the reporting requirements for waste sites.

5.4.3.8 It is further not clear if the required annual performance assessment was
done to monitor and compare the waste site activities and management
measures implemented by BGM and/or C & C Crushers to acceptable
practices or the objectives and requirements of the approved EMPR (which
has according to the information at my disposal, has never been updated to
reflect the actual activities, impacts, risks and management measures).

5.4.3.9 Even if the reclamation of the Waste Rock Dump on the Complainant's
property might have constituted \textit{bona fide} rehabilitation or waste
management measures in terms of the 2002 EMPR as opposed to the
applicable Hartebeestfontein EMPR, there is no indication that the DMR
took any action to deal with the Complainant's concerns about the
environmental impact of the operations of both C & C Crushers and Boleng
Concrete Products to ensure that these operations were carried out in
accordance with the generally accepted principles of sustainable
development (section 37 of the MPRDA) or monitored the assessment and
management of impacts identified as part of the environmental
management programme process laid out in section 39 of the MPRDA. The

\(^{82}\) [DRD-NWEMPR(Nov 2001)] page paragraph 4.3.3 page 61 and page

123
DMR also did not refer any aspect of their activities that did not fall within its ambit, to the relevant authorities, including DEA.

5.4.3.10 Experts agree that Waste Rock Dumps or residue stockpiles created before the One Environmental System (OES) was legislated through the enactment of the National Environmental Management Laws Amendment Act, 2014, required at least a water use license under the National Water Act, 1998 (NWA) and approval in terms of an EMPR. EMPRs generally, provide a link between the impacts predicted and mitigation measures specified within the EIA report, and the implementation and operational activities of the project. EMPRs outline the environmental impacts, the mitigation measures, roles and responsibilities, timescales and cost of mitigation.  

5.4.3.11 Risks pertaining to the environmental impact of the management of mine waste and residue that are generally identified from waste rock dump development and rehabilitation plans as well as environmental audits on EMPR’s include –

a) Natural Surface Drainage Requirements
b) Topsoil Capture and the recovery of harvestable material;
c) Management of waste materials with the potential to generate acid or leach or seeping of environmentally polluting materials;
d) Vulnerability of the groundwater resource within the zone that could potentially be affected by the residue facility;
e) Surface Water Control;
f) Armouring and/or re-vegetation;
g) Noise pollution; and
h) Dust control (particularly during reclamation processes)

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5.4.3.12 The surface right permits (including for the waste rock dump) were incorrectly registered (several years later in 2006) in favour of BGM in terms of item 3 of Schedule II of the MPRDA. It follows therefore, that DMR’s impression that the waste rock dump reverted to BGM as a movable asset by virtue of surface rights permits, re-registered in the Minerals and Petroleum Titles Office in terms of its old order mining right ML 4/2001 over various properties, including the property held by the complainant, cannot stand. Against its acknowledgement that the property of the complainant was in fact excluded from said mining license. The DMR cannot in good conscience maintain a position that BGM, and its contractor, C & C Crushers, operated under a valid permission or right to use the surface of land”.

5.4.3.13 A further dilemma arises from the DMR’s original submission that the dumps were excluded from the MPRDA\textsuperscript{84}, because it originated prior to the commencement of the MPRDA, and that the activities of C & C Crushers did not constitute mining, because it meant that:

a) The latter (and BGM’s) exploitation of the dumps was not covered under the EMPR approved in terms of section 39(4), of the MPRDA; and

b) C & C Crushers would thus have needed environmental authorisation for those activities in terms of section 24 of NEMA.

\textsuperscript{84} based on judgment in the High Court between De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others (3215/06) [2007] ZAFSHC 74 (13 December 2007)
5.4.3.14 These submissions to me are in any event negated by the own DMR’s actions when they initiated action against BGM and C & C Crushers on the very same issues that the Complainant has been raising, including –

a) Its 2011 notice to BGM in terms of section 93 of the MPRDA to cease all operational activities relating to the reclamation of the dump as its approved Environmental Management Programme did not cater for operational activities relating to reclamation of the dumps; and

b) The recent issuing of “Pre-Compliance notice and the Compliance Notices to C & C Crushers as well as Boleng Concrete Products in terms of Section 31L of the NEMA for undertaking the operational activities relating to the processing of the dumps without Environmental Authorisation.

5.4.3.15 South Africa has adopted the United Nations’ 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs). The principle of sustainable development, with its three pillars: social, economic and environmental is the bedrock of the National Development Plan (NDP) and guides the actions of organs of state and for the country. The Constitutional Court\(^{85}\) confirmed the Government’s responsibility to enforce the laws that have been enacted to safeguard the environment, as follows:

> “Every Minister carries an obligation to uphold the Constitution as well as to respect and promote the rights in the Bill of Rights. One of them is everyone’s right to an environment that is not harmful to their health or wellbeing and also the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures.”

\(^{85}\) Minister for Environmental Affairs and Another v Aquarius Platinum (SA) (Pty) Ltd and Others (CCT102/15) [2016] ZACC 4; 2016 (5) BCLR 673 (CC) (23 February 2016)
The Environmental Amendment Act is a legislative measure the Minister was duty-bound to enforce...

5.4.3.16 There is no evidence to conclude, on a balance of probabilities that the DMR duly complied with its obligations in terms of environmental monitoring for the purpose of:-

a) Monitoring and enforcing the Hartebeestfontein EMPR approved under the lapsed mining license ML7/ 1995 which ought to have regulated the rehabilitation of the complainant’s property;

b) In so far as it purported to monitor and enforce the 2002 DRD EMPR, determining the BGM’s progress towards meeting the defined management measures and rehabilitation criteria in the EMPR that was purportedly approved for its mining operations, including reclamation of the Waste Rock Dump on the Complainant’s property; or

c) Ensuring compliance by BGM with its obligations in terms of other legislation including NEMA, the National Water Act 36 of 1998 (NWA) and the National Environmental Management: Waste Act 59 of 2008 (NEMWA).

5.5 Regarding whether DMR improperly failed to ensure that BMG gave effect to the objectives of integrated environmental management laid down in Chapter 5 of NEMA by conducting mining operations under a valid EMP as making the prescribed financial provision for the rehabilitation or management of negative environmental impacts

5.5.1 Common cause issues
5.5.1.1 When BGM, a wholly owned subsidiary of DRP acquired Hartebeestfontein Gold Mine in August 1999, it was resolved to consolidate the two operations under a single management structure. Following a programme of restructuring and negotiations with the South African Revenue Services (SARS), the DMR and other regulatory bodies, the two operations were integrated as a single entity in September 2000.

5.5.1.2 The amended license applied for in terms of Sections 9(1) and 9(3)(e) of the MA 1991 reflected this status and both operations were to operate under a single mining authorisation. In the meanwhile individual EMPR’s for both Hartebeestfontein and BGM has been submitted to the DMR. Revision 2 of the Hartebeestfontein EMPR was submitted on 5 January 2000, and the Buffelsfontein EMP, revision 2, in January 1999.

5.5.1.3 However, as a result of the consolidation of BGM and Hartebeestfontein as DRP - North West Operations, it was resolved, in collaboration with the DMR, to submit a single EMP document, addressing the environmental impacts associated within the combined operations. The single Environmental Management Program Report (EMPR) was approved in terms of section 39 of the MA by the Regional Manager on 22 July 2002.

5.5.2 Issues in dispute

5.5.2.1 The first issue in dispute relates to the validity of the approved EMPR (DRD-NW EMPR (NOV 2001)) since it was at the time issued under the name of DRP and has not been upgraded. The secondary issue relates to its application to the mining operations of BGM on the Complainant’s property since it has been established that that said property was excluded for the mining authorisations issued under mining license ML4/2001, and therefore, the EMPR submitted in respect of any mining activities under the said
license would not have been applicable to the complainant's property. The third issue relates to a shortfall in the financial provision for the environmental rehabilitation liability of BGM/Simmer & Jack.

5.5.2.2 The Minister stated that BGM had an approved Environmental Management Programme, accorded in terms of section 39(1) of the MA, and which remained valid in terms of the transitional arrangements of the MPRDA.

5.5.2.3 Subsequent to the approval of Mining License ML4/2001 by DMR on 26 February 2001 to BGM, DMR approved the EMPR (DRD-NWEMPR -Nov 2001) on 22 July 2002 submitted by DRD as Durban Roodepoort Deep-North-West -Operations in terms of Section 39 (1) of the MA.

5.5.2.4 BGM was acquired by Simmer & Jack in terms of scheme of compromise sanctioned by the High Court, in Pretoria on 20 October 2005 from DRD with all the liabilities including the environmental provisioning liability of R425 749 968.

5.5.2.5 *The Complainant* assessed the environmental rehabilitation liability for his property with Golder Associates which came between R31 million to R74 million with the entire liability of R425 749 968. He lodged an urgent application with the Pretoria High Court to get an order forcing Simmer & Jack to take responsibility for environmental rehabilitation liabilities of BGM, but the honourable Judge dismissed the urgent application stating that the applicant did not have *locus standi* as landowner and the financial provision related matters was responsibility of the DMR.

5.5.2.6 The BGM Mining Rights Conversion Application was submitted to the DMR North West Region on 22 November 2006. It was accepted under reference number NW 30/5/1/2/2/323.

5.5.2.7 The application was not approved as the DMR noted in its submissions in this regard to the Director General that the mine had not met some of the requirements of the MPRDA. BGM was in 2007 requested to update its
EMP as the initial EMP was done under Durban Roodepoort Deep-North-West which was the initial trading company but was no longer in partnership with BGM. On 26 February 2007 the Regional Manager addressed a letter to BGM (Simmer & Jack) with *inter alia* the following instructions:

"... you are therefore requested to submit the following documentation for consideration of this request:....

A copy of an approved EMP under the name of Buffelsfontein Gold Mines (Pty) Limited not the Durban Roodepoort Deep EMP. Also note that you have been requested to upgrade the old document in the past..."

(emphasis added)

5.5.2.8 BMG submitted an updated EMP on 13 April 2007, which was rejected by the Regional Manager with the following observations:

"The mining company only concentrated on the first instruction of changing the name form Durban Roodepoort Deep to Buffelsfontein Gold Mines (Pty) Limited, however, the mining company did not consider the provisions of regulations 49, 50 and 51 of the Mineral and Petroleum Resources Development Act and therefore failed to follow the necessary instruction.

You are therefore requested to submit a document that is compliant with the provision of above said sections and regulations of the Act." (Emphasis added).

5.5.2.9 On 28 March 2007 the DMR requested BGM to submit its realigned EMPR by 31 August 2007. However, this was never approved due to a shortfall in the financial provision for environmental rehabilitation liability.

5.5.2.10 On 8 May 2007 BGM advised the Regional Manager that it was still in the process of compiling the required document "as requested... owing to the detail required... In July 2007 GSC (Pty) Ltd (GSC), acting on behalf of BGM
issued notices to affected and interested parties, announcing its intention to undertake environmental studies for the purpose of updating and realignment of the EMP in terms of the MPRDA.

"In conjunction with the MRCA (Mining Rights Conversion Application) the mine has to amend their existing Environmental Management Programme (EMPR) to reflect the requirements of section 51 of the … legislation. The amendment will involve the restructuring and updating of the existing EMP. The existing EMP will therefore be amended to comply with the MPRDA and will submitted to the Department … on, or before 30 August 2007.

5.5.2.11It appears from the evidence that issues arose earlier in relation to BGM's total environmental liability assessment when it went into provisional liquidation in 2005 and Simmer and Jack Limited took over the mining operations. The DMR called up the Environmental Rehabilitation Trust Fund of BGM and transferred the funds which were available on the Trust, namely R107 148 079, 45 to its account. In 2005 the DMR together with an independent consultant, Golder and Associates (Golder assessment) evaluated BGM's total environmental liability assessment and determined its total liability as R425 749 968. The environmental liability assessment therefore reflected a shortfall in the financial provision of R318 601 899, 00.

5.5.2.12GSC was also tasked by BGM to assess the 2005 - Golder assessment of the closure costs, with the view to conduct an “independent estimation of the quantum of financial provision for mine rehabilitation and closure”. The GSC report was submitted to DMR on 30 March 2007. On 2 July 2007 the DMR responded in writing with various issues that they required to be clarified in the GSC report. Further communications subsequently ensued between BGM and the DMR, with GSC being requested to conduct further assessments. According to GSC's further assessment, the amount considered as environmental liability was R255 254 000, 000.
5.5.2.13 The DMR advised BGM in December 2007 that the GSC determination was incorrect "on the ground that they deliberately omitted certain structures" which fell within the mining area. A "final response" with BGM's closure cost estimation was submitted to the DMR in June 2008. In December 2009 BGM submitted a (further) revised closure cost estimation to the DMR which was again not acceptable.

5.5.2.14 A report on an inspection conducted by the DMR on 17 November 2009 reflected that—

a) BGM had not addressed the financial shortfall for the remedying of environmental damage since 2005;

b) BGM has not adjusted the financial provision accordingly as committed on the approved EMP;

c) BGM has been failing to address unacceptable levels of pollution caused by the lack of dust suppression measures on the tailing dumps;

d) BGM has failed to address a problem where material from tailing dams were found to be "migrating beyond the dam's footprint"; and

e) BGM has not submitted a proper rehabilitation plan to address outstanding environmental liability.

5.5.2.15 Following further communications and assessment, the DMR eventually accepted an assessment report and determination dated 10 December 2010, which determined the environmental liability at R343 531 714, 75. This still left a shortfall of R226 531 714, 00.

5.5.2.16 In June 2012, despite several notices, BGM has still not addressed the shortfall and the DMR issued instructions in terms of the MPRDA, advising BGM that it would "invoke the provisions of section 47 or suspend the
operations in terms of section 93" (of the MPRDA) if the shortfall was not addressed, and an outstanding environmental performance assessment report was not submitted by 18 August 2012. At the time when the investigation was concluded, I had not yet been advised if BGM has by now complied with these instructions, and if not, if the relevant provisions of the MPRDA were indeed invoked. According to the complainant no action has been taken.

5.5.2.17 Five years after Simmer and Jack was initially instructed to submitted an updated EMP, the records of the DMR at my disposal reflected that the last Departmental performance assessment on the implementation of its EMP by BGM in August 2012 was still using the outdated 2002 EMP and a new EMP had not yet been approved.

5.5.2.18 On 24 April 2013 the Minister approved the conversion of BGM’s old order mining right.

5.5.2.19 In May 2013 BGM announced that it had ceased the underground mining and put its mining operations under care and maintenance with effect from 1 August 2013. The mine has since been in a decommissioning phase and preparations are underway for the closure phase. A closure application has been lodged with the DMR. The decommission process involves demolition of infrastructure such as; shafts, metallurgical plants, hostels, mine offices and rehabilitation of open cast areas and reprocessing of the Waste Rock dump.

5.5.2.20 As part of the supporting documents for the closure application, the EMP had to be amended and approved by DMR before the closure process could be initiated. In the amended EMP BGM also proposed different rates for the calculation of the quantum of the financial provision for its environmental rehabilitation liability because-
a) The rates used are market related;
b) Some infrastructures have been partially rehabilitated;
c) Hostels, villages and some offices have been vandalised;
d) Different rehabilitation methods were proposed;
e) Technological advancement rendered the rates that were endorsed by the DMR in 2004, to be outdated; and
f) The quantum was independently audited by KPMG.

5.2.2.19The DG: DMR confirmed that BGM’s amended EMP has been approved as being in line with Regulations 50 and 51 of the MPRDA. In light of the ongoing rehabilitation activities, the environmental liability has now been significantly reduced such that the amount that was determined as shortfall in 2012 that is R226 531 714.00, is no longer applicable. As of June 2018, the environmental liability was determined at an amount of R8 361 396.13.

5.2.3 Application of the relevant law

5.2.3.1 Section 37 of the MPRDA provides that the principles set out in section 2 of NEMA apply to all prospecting and mining operations. Section 38 of the MPRDA determines that holders of permits or rights in terms of the MPRDA must give effect to the objectives of integrated environmental management laid down in Chapter 5 of NEMA. This means that the holder of such permit or right has an obligation to rehabilitate areas affected by mining to its natural or predetermined state and makes the holder of such permits or licenses liable for environmental damage, pollution or ecological degradation as a result of their mining activities.
5.2.3.2 In terms of section 5(4)(a) of the MPRDA no person may prospect for or remove, mine, explore for and produce any mineral or petroleum without an approved environmental management programme or approved environmental management plan.

5.2.3.3 The MPRDA provides that the Minister must approve an environmental management plan/programme within one hundred and twenty (120) days from the lodgement thereof provided that –

(a) the requirements as specified in section 39(3) have been complied with (including the content regarding baseline environmental information, an identification, assessment and evaluation of socio-cultural impacts.);

(b) the applicant has made financial provision for the rehabilitation or management of negative environmental impacts, as required by section 41(4); and

(c) the applicant has the capacity, or has provided for the capacity, to rehabilitate and manage negative environmental impacts (section 39(4) (a)).

5.2.3.4 The 120-day deadline on the making of a decision is, however, subject to the proviso that the Minister may not approve the environmental management plan/programme unless he/she has considered, firstly, any recommendation by the relevant RMDEC and, secondly, the comments of any State department charged with the administration of any law which relates to matters affecting the environment (section 39(4) (b) of the MPRDA). The latter obligation is associated with the Minister’s obligation, in terms of section 40(1) of the MPRDA, to consult with such departments when considering an environmental management plan/programme. (As part of the introduction of the so-called ‘One Environmental System’, section 41
of the MPRDA was repealed with effect from 7 June 2014 and the financial provision for Environmental Rehabilitation is now regulated by NEMA).

5.2.3.5 In terms of section 23(5) of the MPRDA a mining right granted in terms of subsection (1) comes into effect on the date on which the environmental management programme is approved in terms of section 39(4).

5.2.3.6 Section 1 of the MPRDA defines a “financial provision” to mean “the insurance, bank guarantee, trust fund or cash that applicants … must provide in terms of section 89 guaranteeing the availability of sufficient funds to undertake the agreed work programmes and to rehabilitate the prospecting, mining, reconnaissance, exploration or production areas, as the case may be”.

5.2.3.7 Section 89 provides that no exploration or production operations may commence unless financial provision has been made that is “acceptable to the designated agency guaranteeing the availability of sufficient funds for the due fulfilment of all exploration and production work programmes by the holder”.

5.2.3.8 Government Gazette 26275 dated 23 April 2004, item 53-54, provides that such financial provisions may be in the form of-

a) a contribution to a trust fund as contemplated in section 10(1) (cH) of the Income Tax Act;

b) a financial guarantee from a bank or financial institution approved by the Director-General;

c) a deposit into an account specified by the Director-General; or

d) such other method as the Director-General may approve.

5.2.3.9 The Constitutional Court’s decision in the Bengwenyama Minerals86 matter has also made it clear that environmental satisfaction is a prerequisite or

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86 Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2010 JDR 1446 (CC)

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jurisdictional fact to the approval of a prospecting right. This relates to the question of the integration of environmental reports in the decision to authorise prospecting or mining.

5.2.3.10 In terms of section 43 of the MPRDA the holder of mining right or mining permit remains responsible for any environmental liability, and the management thereof, until the Minister has issued a closure certificate to the holder concerned. The holder must apply for a closure certificate upon cessation of the prospecting or mining operation, which must be accompanied by the prescribed environmental risk report.

5.2.3.11 Regulation 62 of the MPRDA Regulations provides that, as part of their EMP/EMPR, applicants for mineral rights are required to submit a closure plan which is the vehicle for translating the closure objectives into a plan that can be implemented. The closure plan must contain a number of components all of which are necessary for establishing what measures need to be taken, how they will be taken, and how they will be funded. These components include, inter alia, details of a proposed closure cost and financial provision for monitoring, maintenance and post closure management.

5.2.3.12 The closure certificate is a regulatory mechanism for ensuring that the right or permit holder does not abandon the mine site before remediating harm to the environment. An application for the closure certificate is mandatory upon the lapsing, abandonment or cancellation of the right or permit in question; the cessation of the prospecting or mining operation; the relinquishment of any portion of the prospecting of the land to which a right,
permit or permission relate; or the completion of the prescribed closing plan to which a right, permit or permission relate.\textsuperscript{87}

5.2.3.13 When the Minister issues a certificate he or she must return such portion of the financial provision contemplated in section 41 as the Minister may deem appropriate to the holder of the prospecting right, mining right, retention permit or mining permit in question, but may retain any portion of such financial provision for latent and or residual environmental impact which may become known in the future. In terms of section 43(6) of the MPRDA no closure certificate may be issued unless the Chief Inspector and the Department of Water Affairs and Forestry have confirmed in writing that the provisions pertaining to health and safety and management of potential pollution to water resources have been addressed.

5.2.3.14 In terms of section 98 of the MPRDA a person is guilty of an offence if he or she contravenes or fails to comply with, inter alia—

a) section 5(4) (conduct mining operations without an approved environmental management programme or approved environmental management plan);

b) Section 19 (failing to comply with the requirements of the approved environmental management programme); or

c) any directive, notice, suspension, order, instruction or condition issued given or determined in terms of this Act.

\textsuperscript{87} Rehabilitation and mine closure liability: an assessment of the accountability of the system to communities R.D. Krause, University of the Witwatersrand, Johannesburg, South Africa; L.G. Snyman, University of the Witwatersrand, Johannesburg, South Africa
5.2.3.15 If a mining rights holder fails to comply with any provision of the MPRDA or the terms or conditions of any right, permit or permission or any other law granted or issued or any environmental management programme or environmental management plan approved terms of the MPRDA, the DMR may in terms of section 93 of the MPRDA order the holder of the relevant right permit or permission, to take immediate rectifying steps.

5.2.3.16 Section 47 of the MPRDA provides that the Minister may cancel or suspend any mining right or mining permit or retention permit if the holder thereof -

(a) is conducting any reconnaissance, prospecting or mining operation in contravention of this Act;

(b) breaches any material term or condition of such right, permit or permission;

(c) is contravening the approved environmental management programme; or

(d) has submitted inaccurate, incorrect or misleading information in connection with any matter required to be submitted under this Act.

5.2.4 Conclusion

5.2.4.1 The Minister’s contention that the original EMP approved in July 2002 to DRD remained valid under the transitional provisions of the MPRDA may have reflected the position until 2005 BGM ceased to be a subsidiary of DRD when it was acquired by Simmer & Jack in 2005. In any event, the DMR rejected the said EMP as being non-compliant with section 39 of the MPRDA and Regulations 49, 50 and 51 of the Regulations issued in terms of the MPRDA.
5.2.4.2 It is clear that the DMR had an obligation to ensure that BGM submitted an updated EMPR by the due date of 31 August 2007, to enable it to proceed with its mining operations under mining license ML 4/2001, or any converted mining right.

5.2.4.3 Apart from the fact that the “updated” EMP that BGM endeavoured to submit since 2006 did not comply with the provisions of section 39 of the MPRDA and Regulations 49, 50 and 51 of the Regulations, the Minister/DMR was prohibited in terms of section 39(4) and 41(1) of the MPRDA read with regulation 54 of the Regulations issued in terms of the MPRDA, to approve the submitted EMPR before the identified shortfall in the prescribed financial provision for the rehabilitation or management of negative environmental impacts have been corrected.

5.2.4.4 The DMR only issued an order to BGM in terms of section 93 of the MPRDA to correct the shortfall in its environmental liability, and a suspension notice in terms of section 47 of the MPRDA approximately 6 years later on 19 June 2012.

5.2.4.5 To date there is no indication that DMR has taken further steps to ensure that BGM operated with an approved updated EMP which complied with the MPRDA and Regulations and corrected the shortfall in the financial provision for the rehabilitation or management of negative environmental impacts of its mining operation, as required by section 41(4) of the MPRDA.

5.2.4.6 The DG: DMR alluded to the fact that an “amendment” to the EIA and the EMP was submitted by BGM in 2014 which significantly reduced the quantum of the environmental rehabilitation liability. However, it is not clear which EMP the application sought to amend because in the application itself it was noted that the EMP submitted by BGM to the DMR in 2008 was never
approved "due to the financial provision shortfall". In addition, there is no indication if any independent environmental consultant conducted a final performance assessment of the environmental rehabilitation liability of BGM before approval of the "amended" EMPR by DMR, or that the DMR had consulted with the Department of Water Affairs as required in terms of section 43(6) of the MPRDA.

5.2.4.7 Failure to remedy environmental impacts on air, soil, water and infrastructure poses threats to the health, livelihood, culture and survival of adjacent communities. Neither is there any doubt regarding the obligations of mining companies to rehabilitate the site on an ongoing basis. Thus, the substantive rights of communities are relatively clear. The financial provision for the rehabilitation or management of negative environmental impacts and particularly those relating to mine closure are key tools aimed at ensuring that the taxpayer is not burdened with the costs of rehabilitation." The DMR's failure, since the significant shortfall in BGM's environmental liability was identified in 2005, to comply with its obligations and duties in terms of the MPRDA therefore posed a threat not only to the Constitutional environmental rights of members of the Public and Communities, but also increased the risk that taxpayers might eventually be burdened with the costs of rehabilitation of the environmental impact of BGM's mining operations.

6. FINDINGS

Having considered the evidence obtained during the investigation as against the relevant regulatory framework, I make the following findings:-

6.1 Regarding whether the DMR continuously and injudiciously failed to properly and diligently attend to complaints and allegations by the Complainant that BGM is illegally occupying his property and conducting mining and related activities without the legal right to do so or not following proper legislative procedures, I find that:

6.1.1 The allegation that the DMR continuously and injudiciously failed to properly and diligently attend to complaints and allegations by the Complainant regarding BGM’s presence and operations on his property, is substantiated.

6.1.2 All the complaints, concerns and issues that the Complainant has been raising with the DMR since 2003 about the activities of BGM, and subsequently of C & C Crushers on his property, fell within the scope of its regulatory, compliance and enforcement functions in terms of sections 38, 41, 47 and 98 of the MPRDA.

6.1.3 Throughout its engagement with the Complainant the DMR relied on Mining License ML 4/2001 and the converted mining rights in terms of the MPRDA to dismiss the Complainant’s complaints that BGM and C & C Crushers were unlawfully occupying and conducting mining operations on the Property.

6.1.4 If the DMR and the Minister took appropriate action in terms of, inter alia, sections 91 and 92 of the MPRDA to investigate and verify the Complainant’s claims and concerns, they would have discovered that the DMR failed to register in 2000 that DRD had in fact relinquished its mining rights on the complainant’s property as well as 22 properties when it consolidated the mining operations of Hartebeestfontein Gold Mine and BGM when it excluded these properties from its application for a mining licence (ML 4/2001).
6.1.5 The DG: DMR conceded in January 2019 that the Regional Manager erred by not addressing this issue with BGM and the Complainant's property was not the subject of BGM's older order right in terms of mining licence ML 4/2001, or the converted mining right as it was not included on the application form.

6.1.6 The manner and inordinate timeframes that it took the DMR to respond to the Complainants numerous communications between 2003 and 2012, displayed nothing short of a laissez-faire attitude and a total lack of respect for the individual rights of the Complainant as a landowner and a disregard of its social and environmental responsibilities in terms of the Constitution and section 3 of the MPRDA as the custodian of the mineral and petroleum resources of the Country for the benefit of all the people.

6.1.7 The balance of probabilities favour a conclusion that the DMR when it was enlightened by the Complainant of a potential irregularity in respect of the mining operations on his property under the auspices of either temporary Mining Licence no. T5/1999 or mining Licence ML 4/2001, did not sufficiently interrogate and investigate the concerns raised by the Complainant in accordance with its obligations in terms of section 5 of the MPRDA, the standards of accountability and transparency in section 195(1) (f) and (g) and the requirement of a high standard of professional ethics in section 195(1) (a) of the Constitution.

6.1.8 The DMR's conduct is in total disregard of its regulatory, compliance and enforcement functions in terms of section 38, 41, 47 and 98 of the MPRDA, its responsibilities in terms of section 25 of the Constitution, as well as the Constitutional values expected of public administration as enshrined in section 195 of the Constitution.

6.1.9 Accordingly the conduct of the DMR in relation to the manner it disregarded the Complainants complaints and concerns over a period of more than 10
years, in favour of an approach that effectively endorsed unauthorised mining operations on the Complainant’s property, constitute maladministration and improper conduct as envisaged in section 182(1)(a) of the Constitution read with sections 6(4)(a)(i), (ii) and (iv) of the Public Protector Act, 1994.

6.2 Regarding whether the DMR failed to diligently and expeditiously execute its statutory duties and obligations to intervene in or take action in respect of the demolition of Hostel no 4 on the Property by BGM without any conference or consultation with the Complainant as the Landowner, I find that:

6.2.1 The allegation that the DMR failed to take the requisite steps to prevent BGM from demolishing Hostel no 4 and disposing of assets that might not have belonged to it and which the Complainant wanted to retain, is substantiated.

6.2.2 Throughout its engagement with the Complainant DMR relied in Mining Licence ML 4/2001 and the converted mining rights in terms of the MPRDA to dismiss the Complainant’s complaints that BGM, C & C Crushers were lawfully occupying and conducting mining operations on the Property.

6.2.3 Even though the property is reflected on a sketch plan annexed to BGM’s conversion application in 2007, it is not sufficient as the relevant legislation, including section 1 of the MPRDA, regulation 79 of the MPRDA Regulations and Item 7 of Schedule II of the MPRDA required the registered description of the land, area or offshore blocks to which such an application related.

6.2.4 Conversely, the same list of properties covered in the deed of session (which excluded the description of the Complainant’s property), were used
in BGM’s consolidated application that resulted in the granting of mining Licence ML 4/2001, and again in the 2007 conversion application.

6.2.5 The DMR’s contention that BGM was lawfully conducting mining operations on the Complainant’s property (Portion 37 of the farm Hartebeesfontein 422 IP) under the authority of mining Licence ML 4/2001 is not supported by the available evidence.

6.2.6 The DMR, therefore failed to register as far back as 2000 that Hartebeesfontein/ BMG had relinquished its mining rights under mining license ML7/19951999 in respect of the complainant’s and 23 other properties on which it had been conducting mining operations prior to its acquisition by AVGOLD.

6.2.7 I therefore agree with the Complainant’s contention that any surface rights registered against the Property could not continue to be enforceable and ipso facto lapsed in terms of Section 90 (11) of the MRA and Section 48 (3) of the MA with the lapsing of Temporary Mining Authorisation Permit No T5/1999 on 20 August 2000.

6.2.8 It follows that BGM or Simmer & Jack Limited could therefore not become the holder, user or acquirer of any reservation, permission or right to use the surface of land and the surface right permits was first incorrectly transferred by the DMR to AVGOLD and then several years later in 2006, improperly registered in favour of BGM in terms of item 3 of Schedule II of the MPRDA.

6.2.9 I do not however, agree with the Complainant’s contention that his property as well as the other properties excluded from mining license ML4/ 2001 automatically became freehold properties free from the burden of limited real rights held by Hartebeesfontein Gold Mine, when the temporary mining authorisation lapsed in 2000.
6.2.10 In terms of the MA and the environmental protection regime covering mining operations, any property that has been subjected to mining activities and operations, has to be returned to its natural state, through a rehabilitation process and the issuing of a closure certificate, before the rights holder is absolved from his/ her responsibilities and the said property becomes part of the dominium of the land owner.

6.2.11 Accordingly, DRD/ Hartebeestfontein/ BGM were supposed to commence with the decommissioning of the mine on the complainant’s properties and the closure process prescribed in the MA after 2000, which included consultation with the landowner in terms of Section 40 (c) of the MA to establish if he wished to keep certain infrastructures or buildings on his land.

6.2.12 The DMR failed to ensure that DRD/ Hartebeestfontein/ BGM submit a Closure Plan, covering the final performance of EMP and environmental rehabilitation liabilities with details of all the land under the mining operations and list of the infrastructures and buildings in terms of the Regulations 5.18.11.1 - 2 of the MA and to assess whether or not that R85 million in the Trust Fund account of Hartebeestfontein Gold Mine provided adequate financial provision for rehabilitation.

6.2.13 The DMR furthermore, since 1999 failed to ensure that DRD or BGM complied with their rehabilitation obligations in respect of the Complainant’s property in terms of the approved EMP for Hartebeestfontein Gold Mine, including a notice to prevent the disposal of assets such as Hostel no 4.

6.2.14 The Conduct of the DMR constitute maladministration and improper conduct as envisaged in section 182(1)(a) of the Constitution read with sections 6(4)(a)(i)), (ii) and (iv) of the Public Protector Act, 1994
6.3 Regarding whether the DMR failed to diligently and expeditiously execute its statutory duties and obligations to intervene in or take action in respect of a dispute between the Complainant and BGM on compensation owed to the Complainant as landowner, I to find that:

6.3.1 The submission by the Complainant that the regional manager was obliged to initiate the arbitration process as envisaged in section 54(4) of the MPRDA as a result of the impasse created by BGM's refusal or failure to enter into a rental or compensation agreement with him for the use of his land, have become moot in view of the fact that the DMR ought to have been aware of the fact that the complainant's property was no longer the subject of the old order mining rights held by BGM under the authority of Mining License ML7/2001 or the converted new order right.

6.3.2 As a result, the procedure provided for in the MPRDA or preceding legislation (such as the MA) would in all probability not have been available to resolve the dispute between the complainant and BGM, as any grounds for compensation, including the potential unlawful encroachment on the complainant's property rights, the unlawful extraction of minerals through the exclamation of the mine rock dumps, or the presence and activities of C & C Crushers and Boleng Concrete Products would not have been covered under the concept of "damages" as envisaged in section 42 of the MA or section 54(7) of the MPRDA, caused by valid mining operations in terms of either the MA or MPRDA.

6.3.3 Had the DMR registered the fact that BGM's presence and activities on the Complainant's property were in fact not sanctioned by mining license ML 7/2001 or the subsequent converted mining rights, its role in terms of the MA and MPRDA would have been to protect a landowner against illegal mining activities, by stopping and preventing such activities, and not the mediation of disputes about compensation.
6.3.4 The conduct of DMR which actually amounted to maladministration and prejudicial conduct as envisaged in section 182(1)(a) of the Constitution read with sections 6(4)(a)(i), (ii) and (iv) of the Public Protector Act, 1994, therefore refers to its initial failure in 1999/2000 to properly record and register the amendment of BGM’s mining rights towards certain properties, including that of the Complainant, as well as its purported transfer and registration of the relevant surface right permits to AVGOLD and BGM in 2002 and 2006 respectively.

6.4 Regarding whether the DMR continuously, diligently and injudiciously failed to properly attend to complaints and allegations by the complainant that BGM had entered into an agreement with two companies to work the mine dumps on the property for the production and sale of sand and stone and the manufacturing of concrete blocks and paving, which do not constitute mining activities covered by any surface right permit, I find that:

6.4.1 The allegation that the DMR and the Minister improperly failed to take action against C & C Crushers and Boleng Concrete products for unauthorised mining activities on the complainant property and operating without the requisite environmental authorisations, is substantiated.

6.4.2 From an analysis of the agreement between BGM and C & C Crushers against the legal framework, including case law, it is clear that C&C Crushers’ exploitation of the waste rock dump could primarily be regarded as the processing or the winning of a mineral or minerals and therefore conducting mining operations on the property as a contractor for BGM.

6.4.3 There is no indication in the agreement that C & C Crushers was responsible for the rehabilitation of the dumps as an integral part of the reclamation operation in accordance with the conditions contained in the EMP on which BGM relied.
6.4.4 Instead the agreement purported to cede or place such an obligation (unlawfully) on C & C Crushers after the termination of the agreement, contrary to the guiding principle of the controlling legislation that the polluter (Hartebeestfontein Gold Mine as the original mining rights holder) must pay for the costs of rectifying the impact of pollution.

6.4.5 The determination and management of the environmental impact of any unnatural man-made landforms on the Complainant’s property such as waste rock dumps and slime (tailings) dams created through mining activities and the monitoring of its rehabilitation action plans and environmental management measures, had to take place in accordance with the management criteria contained in the EMP that was actually approved for mining and rehabilitations operations on the Property in question, which was not the EMP approved to DRD in 2002 in terms of Section 39 (2) (b) of MA as the Complainant’s property was not part of the mining authorisation issued in terms of mining license ML4/2001 and the EMP conditions approved by DMR [DRD-NWEMPR (Nov 2001)].

6.4.6 DMR had to ensure that that the owner of mining rights on the complainant’s property in terms of the lapsed Mining License ML7/1995 and the approved EMP of Hartebeestfontein Gold mine, commenced with its rehabilitation obligations immediately after 1999, and long before BGM entered into an agreement with C & C Crushers to purportedly comply with rehabilitation obligations in terms of the 2002 EMP.

6.4.7 Even if the reclamation of the Waste Rock Dump on the complainant’s property might have constituted bona fide rehabilitation or waste management measures in terms of the 2002 EMP as opposed to the applicable Hartebeestfontein EMP, there is no indication that the DMR took any action to deal with the Complainant’s concerns about the environmental impact of the operations of both C & C Crushers and Boleng Concrete Products to ensure that these operations were carried out in accordance
with the generally accepted principles of sustainable development (section 37 of the MPRDA) or monitored the assessment and management of impacts identified as part of the environmental management programme process laid out in section 39 of the MPRDA.

6.4.8 The surface right permits (including for the waste rock dump) were incorrectly registered (several years later in 2006) in favour of BGM in terms of item 3 of Schedule II of the MPRDA, therefore DMR’s impression that the waste rock dump reverted to BGM as a movable asset by virtue of surface rights permits, re-registered in the Minerals and Petroleum Titles Office in terms of its old order mining right ML 4/2001 over various properties, including the property held by the complainant, cannot stand.

6.4.9 C & C Crushers’ (and BGM’s) exploitation of the dumps was therefore not covered under the EMP approved in terms of section 39(4) of the MPRDA, and C & C Crushers would thus have needed environmental authorisation for those activities in terms of section 24 of NEMA.

6.4.10 The DMR failed to follow through after initiating action against BGM and C & C Crushers on the very same issues that the complainant has been raising, including –

a) Its 2011 notice to BGM in terms of section 93 of the MPRDA to cease all operational activities relating to the reclamation of the dump as its approved Environmental Management Programme did not cater for operational activities relating to reclamation of the dumps; and

b) The recent issuing of “Pre-Compliance notice and the Compliance Notices to C & C Crushers as well as Boleng Concrete Products in terms of section 31L of the NEMA for undertaking the operational activities relating to the processing of the dumps without Environmental Authorisation.
6.4.11 There is no evidence to conclude, on a balance of probabilities that the DMR duly complied with its obligations in terms of environmental monitoring for the purpose of -

a) Monitoring and enforcing the Hartebeestfontein EMP approved under the lapsed mining license ML7/1995 which ought to have regulated the rehabilitation of the complainants property;

b) In so far as it purported to monitor and enforce the 2002 DRD EMP, determining the BGM’s progress towards meeting the defined management measures and rehabilitation criteria in the EMP that was purportedly approved for its mining operations, including reclamation of the Waste Rock Dump on the complainant’s property; or.

c) Ensuring compliance by BGM with its obligations in terms of other legislation including NEMA, the National Water Act 36 of 1998 (NWA) and the National Environmental Management: Waste Act 59 of 2008 (NEMWA).

6.4.12 The manner in which the DMR discarded the complainant’s complaints and concerns about the operations of BGM, C & C Crushers and Boleng Concrete Products was furthermore inconsistent with its environmental responsibilities in terms of section 24 of the Constitution and the values expected of public administration as embodied in section 195 of the Constitution.

6.4.13 The Conduct of the DMR therefore constitutes maladministration and improper conduct as envisaged in section 182(1)(a) of the Constitution read with sections 6(4)(a)(i), (ii) and (iv) of the Public Protector Act, 1994.
6.5 Regarding whether the DMR improperly failed to ensure that BGM gave effect to the objectives of integrated environmental management laid down in Chapter 5 of NEMA and the MPRDA by conducting mining operations under a valid EMP and making the prescribed financial provision for the rehabilitation or management of negative environmental impact of its mining operations, I find that

6.5.1 The allegations that the DMR failed to ensure that BGM conducted mining operations on the actual properties validly covered under mining License ML 4/2001 and any converted mining rights under a valid EMP and made the prescribed financial provision for the rehabilitation or management of negative environmental impacts of its mining operations, are substantiated.

6.5.2 The original EMP approved in July 2002 to DRD may, in terms of the transitional arrangements provided in Schedule II to the MPRDA, have been valid until 2005 when BGM was taken over by Simmer & Jack Limited and ceased to be a subsidiary of DRD.

6.5.3 In addition the DMR rejected the said EMP in 2006 as being non-compliant with section 39 of the MPRDA and sections 49, 50 and 51 of the Regulations issued in terms of the MPRDA.

6.5.4 An amended and realigned EMP submitted by BGM and Simmer & Jack, in 2008 was not approved by DMR in 2008 because of a shortfall in the financial provision for environmental liability, which meant that BGM might effectively have been conducting mining operations under mining licence ML 1/2001 in contravention of section 5(4) and 98 of the MPRDA.

6.5.5 The DMR only issued an order to BGM in terms of section 93 of the MPRDA to correct the shortfall in its environmental liability, and a suspension notice in terms of section 47 of the MPRDA approximately on 19 June 2012, five (5) years after the updated EMP was due, and seven (7) years after the shortfall was identified.
6.5.6 In 2014 after BGM commenced with the decommissioning and closure process of its mining operations, the DG: DMR accepted and approved an application submitted by BGM, for the “amendment” to the EIA and the EMP which significantly reduced the quantum of the environmental rehabilitation liability although it is not clear which EMP the application sought to amend because the EMP submitted by BGM to the DMR in 2008 was never approved.

6.5.7 In addition, there is no indication if an independent environmental consultant conducted a final performance assessment of the environmental rehabilitation liability of BGM before approval of the “amended” EMP by DMR, or that the DMR had consulted with the Department of Water Affairs as required in terms of section 43(6) of the MPRDA.

6.5.8 The DMR’s failure, since the significant shortfall in BGM’s environmental liability was identified in 2005, to comply with its obligations and duties in terms of the MPRDA therefore posed a threat to not only the Constitutional environmental rights of members of the public and communities, but also increased the risk that tax-payers might eventually be burdened with the costs of rehabilitation of the environmental impact of BGM’s mining operations.

6.5.9 The Conduct of the DMR therefore constitutes maladministration and improper conduct as envisaged in section 182(1) (a) of the Constitution read with sections 6(4) (a) (i), (ii) and (iv) of the Public Protector Act, 1994.
7. REMEDIAL ACTION

7.1 Introduction

7.1.1 While this investigation focussed on the complaints and concerns of the Complainant as an individual, and I did not conduct a systemic investigation as such, the issues highlighted by the investigation are of general concern to the public as a whole and particularly vulnerable communities affected more directly by mining operations.

7.1.2 From the literature and jurisprudence I reviewed, as reflected in this report, there are concerns about the perception that the DMR is generally not taking sufficient action in terms of its social and environmental constitutional duties, to ensure compliance with the MPRDA, NEMA and other legislation by mining rights holders.

7.1.3 While the actions of the DMR in the matter at hand have in my view contributed to the prejudice suffered by the complainant as a result of its endorsement of a purported mining right over his property, which by its very nature subtracts from the landowner’s bare dominium of land and deprived him from the full use and benefit of his property, the public law realm within which I operate, does not provide for an appropriate remedy that would effectively place the complainant in the positon that he would have been, had the DMR taken his complaints and concerns seriously and established the correct state of affairs from the onset in 2003.

7.1.4 I noted the contributing factors such as lacunae and uncertainties in the legal and regulating framework, insufficient capacity and the fact that responsibilities were divided amongst various Departments.

7.1.5 While it is perhaps too soon to determine if and to what extent the “One Environmental System” might alleviate some of the enforcement issues
uncovered in this investigation, the inordinate delay by the relevant state institutions to align their collective responsibilities to remediate environmental impacts of mining operations on air, soil, water and infrastructure, poses significant threats to the health, livelihood, culture and survival of communities and the people of the Country.

7.1.6 If drastic action is not taken by the DMR and the DEA, to improve the level of compliance by mining rights holders with its obligations and duties in terms of the MPRDA, the situation will increasingly pose a threat not only to the Constitutional environmental rights of members of the public and communities, but also increased the risk that taxpayers might eventually be burdened with the costs of rehabilitation of the environmental impact of mining operations across the country.

7.2 Appropriate remedial action

7.2.1 Against this background, I therefore I take the following remedial actions in terms of section 182(1)(c) of the Constitution in order to address the individual complaints of the Complainant, while also serving a wider public interest:

7.2.3 The Director General: Mineral Resources must within sixty (60) days of the issue of this report take action to--

7.2.1.1 review and correct its records and any mining rights and surface permits registered against the complainant’s property at the Mining Titles Registration office to reflect the position as conceded to, namely that the property was not the subject of any older order right held by BGM under mining licence ML 4/2001, or any converted new order mining right;
7.2.1.2 review the closure and rehabilitation process embarked upon by BGM since 2013 to distinguish between the properties covered under the older order mining right under mining licence ML 4/2001, as well as those properties that were not subject to such rights, but on which it continued to conduct mining and related operations, with the view to ensure that –

a) performance assessments of the actual environmental management plan or environmental management programme that was approved for the mining operations on the said properties are conducted by the actual (former) rights holder or its successor in law;

b) the closure and rehabilitation process in respect of the Complainant's property is conducted in accordance with an approved updated EMP which complies with the MA or the MPRDA and Regulations

c) The financial provision for the rehabilitation or management of negative environmental impacts of its mining operations on the Complainant's property, is independently assessed and determined, in consultation with external role players such as the Director General Water Affairs as required by section 41(4) and (6) of the MPRDA or the corresponding provisions of the MA.

7.2.2 The Director General and the Minister of Mineral Resources Minister of Mineral Resources must within ninety (90) days of the issue of this report take steps to —

7.2.2.1 Independently assess and review the the environmental liability of BGM which was drastically reduced from the determined shortfall of
R226 531 714.00 in 2012 to an amount of R8 361 396.13 in BGM's 2014 application for an amended IEA and EMP; and

7.2.2.2 Ensure that the environmental liability of Hartebeestfontein Gold mines/ BGM/ Simmer & Jack is corrected before any closure certificates are issued in terms of section 43 of the MPRDA in respect of the mining operations on the Complainant’s property as well as other mining operations conducted by BGM/ Simmer & Jack under the auspices of mining licence MI 4/ 2001 or any converted new order mining rights.

7.2.3 The Director General Mineral Resources, in consultation with the Director general Environmental Affairs take steps within 60 days of the issue of this report, to deal with the operations and activities on the complainant’s property conducted without an approved EMPR in terms of the MPRDA, as well as the operational activities relating to the processing of the waste rock dumps without the required environmental authorisations in terms of section 24 of NEMA.

7.2.4 The Director General Mineral Resources, must consult with the Director General Water Affairs (Water and Sanitation) within 60 days of the issue of this report, in respect of the activities on the complainant’s property conducted without the required a water use license from the Department of Water Affairs in accordance with the provisions of section 5(3) (d) of the MPRDA or might constitute an offence under section 151(1) (a) of the NWA.

7.2.5 The Directors General of Mineral Resources and of Environmental Affairs must within ninety (90) days of the issue of this report, take steps to improve and encourage public participation in the monitoring of the One Environmental System and to establish effective mechanisms to deal with complaints, grievances and concerns from members of the Public in accordance with the standards set in section 195 of the Constitution, in order
to avoid a duplication of the events that gave rise to the complaint under investigation.

7.2.6 The Director General Mineral Resources must within 60 days of the issue of this report, issue a written apology to the Complainant for the manner in which he has been treated in disregard of its constitutional obligations and the Batho Pele Principles governing public administration.

7.2.7 Since I am of the opinion that the facts encapsulated in this report might disclose the possible commission of offences, a copy of the report is referred to the National Director for Public Prosecutions in terms of section 6(4)(c)(i) of the Act.

8. MONITORING

8.1 The Director-General of Mineral Resources must submit an implementation plan regarding the implementation of the remedial action within 60 days of this report.

ADV. BUSISWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 14/11/2019