NOTES ON THE LEGAL LIABILITY OF MINING COMPANIES FOR THE PUMPING OF EXTRANEOUS WATER FROM DEFUNCT UNDERGROUND WORKINGS: LEGAL UNCERTAINTIES ILLUSTRATED BY

Ezulwini Mining Company Pty Ltd v Minister of Mineral Resources and Energy [2021] ZAGPPHC 4

1 Introduction

In 2015, the 193 United Nations (UN) member states adopted the UN 2030 Agenda for Sustainable Development, which includes a set of 17 Sustainable Development Goals (SDGs) to be reached by 2030 (UNGA "Transforming Our World: The 2030 Agenda for Sustainable Development" Resolution adopted by the General Assembly (25 September 2015) A/Res/70/1). The SDGs represent a global call for action towards social inclusion, economic development and environmental sustainability. Meeting the SDGs by 2030, however, requires unprecedented cooperation and collaboration among various stakeholders on various levels, ranging from governments, non-governmental organisations and the private sector, including the mining sector. Although it is not the main aim of this contribution to unravel the linkages between the respective SDGs and mining, the country's mining sector is expected to incorporate relevant SDGs into their operations, business practices and decisions.

It is trite that the mining industry, through all its activities and stages, has contributed to many of the challenges that the SDGs set to address, including the displacement of communities, worsening economic and social inequality, and environmental degradation that impacts water security, for example. Nevertheless, in pursuance of the SDGs, South Africa's mining sector is expected to prioritise the protection of the environment, over exploitation and pollution. In fact, successful advancement of the SDGs also requires substantial and ongoing partnership or collaboration between stakeholders. This is particularly true for interconnected or neighbouring mines, for example.

To guide and ensure sustainable and responsible mining, the South African legislature promulgated a comprehensive environmental management and regulatory framework for the country, including the Mineral and Petroleum Resources Development Act (28 of 2002) (MPRDA), the National Environmental Management Act (107 of 1998) (NEMA) and the National Water Act (36 of 1998) (NWA). However, as is discussed in more detail below, regulatory shortcomings, and therefore legal uncertainty, are

apparent. This contribution presents the issue of environmental obligations and liabilities to pump extraneous water after mine closure. Naturally, legal uncertainties inherently inhibit the realisation of some of the SDGs, including, for example, SDG 6 (to ensure the sustainable management of water) and SDG 9 (to promote sustainable industrialisation).

The 2021 case of *Ezulwini Mining Company Pty Ltd v Minister of Mineral Resources and Energy* ([2021] ZAGPPHC 4) (*Ezulwini* case) stimulated a much-needed discourse in environmental liability scholarship, and more specifically, as it relates to the dewatering or pumping of extraneous water from defunct underground workings. Although the final court order cannot be criticised, the court did not address a key question – namely, what is the legal liability of a holder of a mining authorisation with regard to pollution, ecological degradation, or the pumping and treatment of extraneous water after mine closure? Uncertainties arise from the wording and interpretation of section 43 of the MPRDA and section 24R of NEMA and the relevance and mobilisation of environmental authorisations or licences, respectively. The uncertainties are multiplied if there are interconnected and neighbouring operating mines. Clarity on these aspects may not only contribute towards attaining social, financial and environmental goals as set out in the SDGs but may ultimately also enhance future legal discourse in the development of environmental liability law.

This case note, therefore, maps the facts of the *Ezulwini* case to illustrate the legal uncertainties regarding (a) applications for authorisations in the case of partial mine closure and (b) the continued liability for the pumping of extraneous water if mines are interconnected.

The discussion is structured as follows: heading 2 explores the facts of the *Ezulwini* case and contextualises the environmental legal liability question at hand. The discussion under heading 3 identifies an important but unanswered liability question that was excluded from the court's deliberations. As a result, challenges and uncertainties related to the environmental liability of pumping extraneous water after mine closure persist. Under heading 4, this note studies the judicial interpretation of legislative provisions and traces recent developments in the said legal liability discourse. In an attempt to provide clarity on the liability question, the discussion under heading 5 suggests possible regulatory instruments to determine and regulate the legal liability of mining companies. The discussion then draws to a close, ending on a positive note for the pursuit of the SDGs in a regional context.[1]

2 Facts of the *Ezulwini* case

In 2014, Ezulwini Mining Company Pty Ltd (the applicant, Ezulwini) acquired the underground and surface operations of an existing gold and uranium mine in Gauteng (*Ezulwini supra* par 4). Two years later, in 2016, Ezulwini ceased its underground mining operations, as the underground mine was no

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longer economically viable (*Ezulwini supra* par 4). The surface mining-related operations are, however, ongoing. When they still undertook underground mining, Ezulwini, as well as its predecessors, pumped groundwater from the underground workings. This dewatering initially took place pursuant to permits in terms of the repealed Water Act (54 of 1956), and more recently, in terms of a water use licence (WUL) issued in terms of the NWA (*Ezulwini supra* par 4). Notwithstanding that Ezulwini ceased its underground mining operations in 2016, Ezulwini has continued to pump and treat the water from the underground workings at a cost of R21.1 million per month (*Ezulwini supra* par 4). What followed was Ezulwini contending that the continued pumping of this groundwater is financially and physically impossible to sustain. Ezulwini therefore wished to cease the pumping of water from the defunct underground workings (*Ezulwini supra* par 4).

In 2017, Ezulwini applied for two authorisations to cease the pumping of the defunct underground workings: One was an application for an environmental authorisation in terms of section 24 of NEMA, read with the Environmental Impact Assessment (EIA) Regulations (GN R982 in *GG* 38282 of 2014-12-04, as amended); the other was an application in terms of section 50 of the NWA, for the amendment of the WUL that is currently issued to Ezulwini (*Ezulwini supra* par 4). In addition, Ezulwini submitted an application to the Regional Manager pursuant to section 43(3) of the MPRDA for a partial closure certificate for its underground workings (although this application for a partial closure certificate was subsequently withdrawn) (*Ezulwini supra* par 4). In 2018, Ezulwini's application for the authorisations was refused (*Ezulwini supra* par 4). Although an appeal was brought against this decision, the decision was upheld in 2019. As a result, the appeal decision effectively put Ezulwini in exactly the same position it was in before its applications for the environmental authorisations in 2017. (In fact, the appeal decision provided no guidance as to whether Ezulwini's application should have been granted or will be granted in future.) In light of the financial consequences, especially as a significant time period has lapsed since the initial applications, Ezulwini sought alternative legal remedies to enable it to cease the pumping of underground water.

It was against this background, and on advice received from their legal advisor, that Ezulwini brought the present application – that is, for a declaration that neither an environmental authorisation in terms of NEMA and the EIA Regulations, nor an amendment to the WUL was required to cease the pumping of water from the defunct underground workings. Ezulwini contended that an environmental authorisation in terms of NEMA and the EIA Regulations is not required, because cessation does not constitute the activity contemplated by activities 22 and 34 in Listing Notice 1 under the EIA Regulations (*Ezulwini supra* par 4 and the discussion under heading 3.1 below). It was also reasoned that an amendment to its WUL would not be required to cease pumping, because although Ezulwini's existing WUL provides for a statutory entitlement or right to pump underground water, it does not create any legal obligation to do so. The legal advice further included that, even if an environmental authorisation and an amendment to the WUL were indeed required to cease the pumping of underground workings, Ezulwini would be entitled to cease the pumping in the absence thereof based on *inter alia* financial and physical constraints. As

a further alternative, it was reasoned that the neighbouring mine (South Deep Mine), represented by GFI Joint Venture Holdings (Pty) Ltd and Gold Fields Operations Ltd, should be ordered, jointly and severally, to cover the costs of pumping underground water from Ezulwini. The latter relief is based on the fact that GFI Joint Venture Holdings (Pty) Ltd and Gold Fields Operations Ltd (Gold Fields) are the principal beneficiaries of the continued pumping of the underground water at Ezulwini (*Ezulwini supra* par 4).

Nevertheless, Gold Fields opposed the application and brought a counterapplication. The counterapplication was for a declaration that Ezulwini remained responsible for the pumping and treatment of extraneous water from its underground workings until at least the time that the Minister issued a closure certificate in terms of section 43 of the MPRDA, or such longer period as is contemplated in section 24R of NEMA. Section 43(1) of the MPRDA provides:

> "The holder of a prospecting right, mining right, retention permit or mining permit remains responsible for any environmental liability, pollution or ecological degradation, and the management thereof, *until the Minister has issued a closure certificate to the holder concerned*." (Emphasis added)

In turn, section 24R of NEMA provides:

> "Every holder, holder of an old order right and owner of works remain responsible for any environmental liability, pollution or ecological degradation, the pumping and treatment of polluted or extraneous water, the management and sustainable closure thereof notwithstanding the issuing of a closure certificate by the Minister responsible for mineral resources in terms of the Mineral and Petroleum Resources Development Act, 2002, to the holder or owner concerned."

In its judgment, the court granted Gold Fields's application for declaratory relief (*Ezulwini supra* par 56). The counterapplication, therefore, *inter alia* brings to the fore the proper interpretation of section 43 of the MPRDA and section 24R of NEMA.

In the interpretation exercise, it is noted that the court did not address the question of whether an environmental authorisation and WUL amendment were indeed required for the cessation of pumping of extraneous underground water.

3 A fundamental liability question apparently left out by the court

3 1 Environmental authorisation

Although from the facts above it is clear that Ezulwini went out of its way to determine and clarify its legal position, the judgment leaves it yet to be determined whether the applicant (or any other mine in a similar position), would require an environmental authorisation and WUL amendment to cease pumping water from defunct underground workings. In fact, the judgment apparently precluded any deliberation on the matter.

Section 24 of NEMA requires those that undertake any of the activities listed in the 2014 EIA Regulations and Listing Notices to obtain an environmental authorisation before the commencement of such specific listed activities (GN R982 in *GG* 38282 of 2014-12-04; the Listing Notices are published in GN R983–985 in *GG* 38282 of 2014-12-04, as amended). Listing Notice 1 provides for activities that trigger a basic assessment, while Listing Notice 2 provides for activities that trigger a scoping and environmental impact report (S&EIR) (Regulations 19 and 21 in GN R982 in *GG* 38282 of 2014-12-04 respectively). Although the pumping of water is mentioned in sections 43(1) and 43(5) of the MPRDA, and in sections 24N(7)(*f*) and 24R(1) of NEMA, as well as in Appendix 5 of the 2014 EIA Regulations, it is not expressly listed as an activity that requires environmental authorisation. Notably, the cessation of pumping water is not expressly mentioned anywhere in the foregoing provisions.

The above notwithstanding, the court noted that the foregoing provisions aim to regulate the cessation of pumping water and require that the consequences thereof be considered and reported to the competent authorities (*Ezulwini supra* par 22). Furthermore, the court opined that the cessation of pumping water may only take place once the reports (basic assessment report, environmental management programme and, where applicable, the closure plan) are approved, and after the Department of Mineral Resources and Energy (DMRE) has issued a closure certificate (*Ezulwini supra* par 22). Seemingly, the court assumed that the aforementioned provisions relating to pumping also include the cessation thereof. However, the stated provisions do not mention cessation of pumping of water, nor the required compilation of reports, but instead, indicate who bears the liability for pumping of extraneous water.

With regard to whether cessation requires an environmental authorisation, activity 22 in Listing Notice 1 is relevant. Ezulwini argued in its pleadings that it was advised that an environmental authorisation is not required in such an instance because the cessation of pumping extraneous water does not constitute, or trigger, listed activity 22 of Listing Notice 1 (*Ezulwini supra* par 5). Activity 22(i) of Listing Notice 1 requires an environmental authorisation when decommissioning any activity that requires a closure certificate in terms of section 43 of the MPRDA.

The court, *obiter*, also referred to Appendix 5 of the 2014 EIA Regulations. Appendix 5 sets out details with regard to the content of a closure plan. Item 1(h) of the Appendix to the 2014 Regulations requires a closure plan to include "the process for managing any environmental damage, pollution, pumping and treatment of extraneous water or ecological degradation as a result of closure". The court held that Ezulwini's conduct – "taking out of service, such as the complete re-watering of the underground mine area of the defunct mine" – amounted to decommissioning that triggers activity 22 of Listing Notice 1 and therefore requires a closure certificate in terms of section 43 of the MPRDA (*Ezulwini supra* par 42).

It is argued here that the court was correct in its view that the cessation of pumping water triggers activity 22 of the EIA Regulations of 2014, especially when the concepts of "decommissioning" and "mining operations" are considered. Decommissioning generally means to "take out of active service

permanently or dismantle partly or wholly, or closure of a facility to the extent that it cannot be readily re-commissioned" (item 2 of Listing Notice 1 Schedule GN R983 in *GG* 38282 of 2014-12-04 as amended; see also Watson, Humby, Hermanus and Moodliar "Terrestrial and Deep Seabed Mining" in King, Strydom and Retief (eds) *Fuggle & Rabie's Environmental Management in South Africa* 3ed (2018) 899). Clearly, the cessation of pumping of underground water by Ezulwini will satisfy the requirements of "decommissioning". Naturally flowing from this, the question emerges as to whether the said decommissioning relates to the activity that requires a closure certificate in terms of section 43 of the MPRDA. Section 43(3)(*b*) of the MPRDA provides for the application for a closure certificate "upon cessation of the prospecting or *mining operations*" (emphasis added. Application for a closure certificate is regulated by regulation 57 of the MPRDA Regulations published in GN R527 in *GG* 26275 of 2004-04-23). A mining operation means "any operation relating to the act of mining and matters directly incidental thereto". The pumping of water is vital for mining operations to take place safely. In fact, failure to pump water may result in flooding of the mine, adversely affecting productivity and the surrounding environment (Watson *et al* in King, Strydom and Retief (eds) *Fuggle & Rabie's Environmental Management* 896). *In casu*, the applicant itself (Ezulwini) stated that applicants and their predecessors pumped the groundwater in order to undertake the underground mining operations. (This view was reaffirmed by South Deep, which argued that there was enormous and rapid flow of water into the mine, which would fill its mining area if not pumped). Based on the foregoing analogy, it is argued herein that the pumping of water constitutes a "mining operation" or an "operation" directly incidental to a "mining operation". Therefore, cessation of pumping water (which constitutes a mining operation or matters directly incidental thereto) from the defunct mine requires a closure certificate, thereby constituting activity 22 of the Listing Notice 1. Therefore, Ezulwini requires an environmental authorisation to cease pumping of water, notwithstanding the continuing surface operations.

3 2 WUL amendment

It is common cause that Ezulwini and its predecessors pumped water pursuant to the now-repealed Water Act (54 of 1956) and a WUL issued in terms of the NWA. As already mentioned, the court did not address the issue of whether the WUL amendment is required for the cessation of pumping water from the underground workings. The question, therefore, persists as to whether Ezulwini needs to amend its WUL to cease pumping water. Section 50 of the NWA provides for the formal amendment of the WUL and states that the responsible authority may amend a licence condition "if the licensee or successor-in-title has consented to or requested that amendment or substitution" (s 50(1)(*a*) of the NWA). It is therefore argued here that Ezulwini must apply for a WUL to cease pumping water from the defunct mine. Therefore, Ezulwini would remain responsible and liable to pump extraneous water unless this obligation is altered pursuant to an environmental authorisation or WUL amendment. As neither of these authorisations was granted, nor an indication given as to whether such authorisations may or will ever be granted in future, it seems as if Ezulwini

(and other mines in similar positions) may be liable for the pumping of water from its defunct underground workings in perpetuity. As this may not necessarily be financially or otherwise viable, it is essential to revisit and critically discuss the source of the environmental liability for the pumping of extraneous water. It is also important to trace recent developments in this legal discourse, and to suggest possible and appropriate answers or remedies.

4 The regulatory framework for environmental liability and the pumping of extraneous water

4 1 Section 43 of the MPRDA and section 24R of NEMA

As suggested by the *Ezulwini* judgment, the sources of responsibility for the pumping of extraneous water can be traced to section 43 of the MPRDA and section 24R of NEMA. In its interpretation of section 43 and section 24R, it becomes evident that the court only focused on the first part of the sections, and not on their entirety. The court focused only on the provisions that stipulate that holders of mining rights (among others) "remain responsible for the pumping and treatment of extraneous water". If, however, the provisions are read in full, an additional element comes to light. Section 43 of the MPRDA states further that such holders remain responsible *until* a closure certificate is issued. In turn, section 24R of NEMA seems to create a continuous liability in stating that *notwithstanding* the issuing of a closure certificate, a holder of rights will remain responsible for the pumping of water. Clearly, the two provisions that refer respectively to closure certificates are not aligned and provide contradictory guidance on the liability question.

An attempt was made by the drafters of the Mineral and Petroleum Resources Development Bill [B13-2013] to remedy this situation by amending section 43 of the MPRDA. The section was then envisioned to read "*despite* [own emphasis] the issuing of a closure certificate," the holder will remain liable for the pumping of water. However, this Bill was withdrawn, and no other amendments were proposed to align the two sections.

In addition to the apparent inconsistency in the legislative provisions, another challenge presents itself in section 43(12) of the MPRDA. The latter also places an obligation on interconnecting mines to pump water and allows the Minister of Mineral Resources and Energy and the Minister of Forestry, Fisheries and the Environment to apportion the liability among such interconnecting mines for the pumping of water.

A judicial interpretation of these legislative provisions, therefore, necessitates a brief reference to history. In fact, the reason for the introduction of sections 43 of the MPRDA and 24R of NEMA has a historical connection to the so-called Klerksdorp, Orkney, Stilfontein and Hartbeesfontein basin (KOSH) cases and are therefore briefly referred to as background. (These cases have been discussed extensively by other authors. See, for e.g., Bosman "Water Quality Management" in King,

Strydom and Retief (eds) *Fuggle and Rabie's Environmental Management* 3ed (2018) 1013; Kotze and Lubbe "How (Not) to Silence a Spring: The Stilfontein Saga in Three Parts?" 2009 16(1) *The South African Journal of Environmental Law and Policy* 49–77; Mofokeng "Good Corporate Governance Affirms the Board (Led by the Chairperson) as the Focal Point of Governance and the Courts Have No Mandate to Undermine This Principle" 2020 6(1) *Journal of Corporate and Commercial Law & Practice* 66 71.)

4 2 Case law leading to the introduction of sections 43 and 24R

The case of *Harmony Gold Mining Company Limited v Regional Director: Free State Department of Water Affairs and Forestry* ([2006] ZASCA 66) (the first *Harmony* case) dealt with the interpretation of section 19 of the NWA. Section 19(1) of the NWA provides that an obligation to take measures to prevent pollution rests upon an owner of the land on which any activity or process was undertaken, or any situation exists. The precedent, however, established is that the obligation to take "reasonable measures" to prevent pollution in terms of section 19(1) of the NWA is not confined to measures that can be effected on one's own land, but extends to land owned, controlled or used by another. The then-Department of Water Affairs, therefore, issued a section 19(3) directive that the five interconnected mines should continue pumping water because if one of the mines stopped pumping, the others would flood. Harmony, however, tried to avoid its responsibility to pump by first selling their shares to another company (*Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs, Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs* [2012] ZAGPPHC 127), and when they could not get out of their responsibility, all the directors resigned (*Minister of Water Affairs v Stilfontein Gold Company Limited* [2006] 5 SA 333 (W) par 1 and *Kebble v Minister of Water Affairs* [2007] SCA 111 (RSA) par 3). The court, however, held the directors personally liable. The mine disregarded the court order to pump water and was held to be in contempt of court (*Minister of Water Affairs v Stilfontein Gold Company Limited supra* and *Kebble v Minister of Water Affairs supra* par 1). A subsequent court overturned the court's contempt-of-court decision in that the directives' phrasing would have been unclear (*Kebble v Minister of Water Affairs supra*). As a result, the uncertainty as to who is responsible for pumping water in the case of interconnected mines remained a challenge.

The KOSH cases, therefore, illustrate that (a) there may be a responsibility to pump water to prevent pollution (but also flooding of other mines); and (b) section 19 of the NWA may also be used to order the pumping of extraneous water, especially when water may be polluted. Neither of these sections exclude the liability to pump extraneous water after a closure certificate has been issued. In fact, both section 19 of the NWA and section 28 of NEMA place a general duty of care on the owner of the land, or former owner of the land, to prevent pollution and ecological degradation, even if the mine, for example, is no longer the holder of the

land. The uncertainty as to how and when a mine needs to continue to pump water, therefore, remained unclear.

It is necessary to determine whether the existing governance instruments address the liability for continuous pumping of extraneous water in case of the partial or final closure of a mine.

5 Determining liability: Regulatory instruments

5 1 Environmental impact assessments and environmental management programmes

It is common cause that, during the application for an environmental authorisation, or an EIA (a basic assessment if listed in GN R983; and an EIA if listed in GN R984), the EIA practitioner needs to address the impacts of the specific project – mostly only with regard to construction, and again in the case of modification and closure. The EIA is focused on the development footprint of the project and is set to address the cumulative impact of the specific project. The EIA therefore does not necessarily look forward towards *inter alia* the operational phase, where new mines may be established that were not foreseen, or where a mine prematurely closes or where the mine becomes insolvent. As a result, the authors of this note are not convinced that an EIA is the most appropriate instrument to determine the legal liability of mining companies to pump extraneous water from defunct underground workings.

The environmental management programme (EMPr) seems more appropriate to address the interconnection of mines. The purpose of an EMPr is to describe how negative environmental impacts will be managed, rehabilitated and monitored. Regrettably, however, an EMPr is focused on the life cycle of the activity of the specific mine and is not necessarily outward-looking as to the cumulative impact of all the mines (including future mines) in the region, which may include the pumping of water in interconnected workings, for example. An EMPr has to be amended to address modifications and closure, while an amendment to the EIA will still focus on the initial phases of the activity. The EMPr is, however, also not outward-looking and still focuses on the mine area. In 2017, Appendix 5 of the EIA Regulations was amended (GN 326 in *GG* 40772 of 2017-04-07) to state that the EMPr should include "1(1)(h) the process for managing any environmental damage, pollution, pumping and treatment of extraneous water or ecological degradation as a result of closure". This amendment still focuses on the mine itself and does not include regional mines. New EMPRs, post 2017, must comply with this amendment, while existing EMPrs would have to be amended to comply with this Appendix. Closure plans and EMPrs may be amended before or after an audit (reg 36 of the EIA Regulations as amended).

In May 2021, the 2014 EIA Regulations' Appendix 4 (GNR 982 in *GG* 38282 of 2013-12-04), which refers to the EMPr, was amended to indicate that the EMPr should also address closure activities. According to the amended Appendix 4 (GN 517 in *GG* 44701 of 2021-06-11), the EMPr must

now address: in terms of item 1(d)(iv), the "rehabilitation of the environment after construction and in the case of a closure activity, closure"; in terms of item 1(f)(ii), the "rehabilitation of the environment after construction and in the case of a closure activity, closure"; and in terms of item 1(f)(iii) how to "comply with any applicable provisions of the Act regarding closure in the case of a closure activity". However, the liability problem remains, as this only speaks to those activities that can be foreseen and not those that may happen after the fact, such as the pumping of water after mine closure, which may affect neighbouring mines. The National Mine Closure Strategy discussed in the following paragraph attempts to address some of these issues.

5 2 National Mine Closure Strategy

As has been alluded to, the challenge with liability for impacts emanating from mine closure is usually exacerbated where the connecting mines do not all close at the same time, especially when they are interconnected. To address regional mining closure impacts, the Department of Mineral Resources and Energy published for public comment a draft National Mine Closure Strategy 2021 (Mine Closure Strategy) (GN 446 in *GG* 44607 of 2021-05-21).

The Mine Closure Strategy acknowledges the social, economic and environmental impact of the closure of mines, as well as the challenges with interconnected mines, and states:

> "the key problem area is where mines are interconnected, or their safety, health, social or environmental impacts are integrated, which results in a cumulative impact and the socio-economic impacts post mine closure."

The closure of a mine will, therefore, often impact on the remaining mines in that region – that is, environmentally, economically, and socially (Mine Closure Strategy 5). The key challenges include surface and groundwater contamination, among others. The Mine Closure Strategy focuses on regional mine closure rather than on individual mine closure plans, which now have to be submitted with the application for a mining right. It is argued here that the idea or concept of a regional closure plan is laudable. The Mine Closure Strategy aims to re-align the EMPr, social and labour plans, and corporate social investment to prevent overlap and over-spending. However, although interconnectedness and water are mentioned, how mine closure plans will have to address this issue of pumping extraneous water is not explicitly spelt out. Seemingly, future closure plans will need to address water management and water infrastructure, but they do not address the lingering pumping-of-water dilemma. ("Water management" in the Appendix1 of the Mine Closure Strategy refers to "the use of water supply or pump mine water for catalysing" and water infrastructure to "post-mining responsibility for the funding of retained mine water" and "post-mining operation of mine water treatment utilities".)

5 3 Financial regulations

As indicated, neither the draft Strategy, nor the amended EIA Regulations addresses the cumulative impact of pumping of water by different neighbouring mines. As a result, there is still uncertainty with regard to who has the responsibility to pump water and for how long. This uncertainty is doomed to continue owing to the wording of sections 43 of the MPRDA and 24R of NEMA. It seems mines can be held liable in perpetuity for the pumping of water if section 24R is to be applied. The liability in terms of sections 43 and 24R does, however, not exclude liability in terms of section 19 of the NWA and by implication then also section 28 of NEMA. If the mine closure plan includes continued liability in terms of such other legal provisions, the question remains as to who would carry the financial liability? It remains uncertain if existing mine closure plans could be updated to ensure regional mine closure, once the draft Strategy is finalised.

As indicated, the MPRD Bill, 2013 was withdrawn. It contained a clause that the financial provision would be excluded from insolvency. As the MPRDA was not amended and, based on the KOSH cases, it may, therefore, still be possible for directors to hide behind insolvency and not contribute to the pumping of extraneous water. The Department of Forestry, Fisheries and Environment, however, published for comment new regulations relating to financial provisioning for the mitigation and rehabilitation of environmental damage caused by reconnaissance, prospecting, exploration, mining and production operations. (GN 2272 in *GG 47112* of 2022-07-11) These regulations may address some of the challenges mentioned above. The aim of the draft regulations is, among others, to "facilitate environmentally sustainable mining" (draft Regulation 2(e)), which implies, if read with some of the other measures in the regulations, that not only environmental issues but also socio-economic issues need to be addressed in the closure plan (par 3.2.2.2 of Appendix 2 includes "the social context that may influence closure activities and post-mining land use or be influenced by closure activities and post-mining land use"; par 3.5.2 refers to "a description of the sustainable end state, objectives and targets, which objectives and targets must reflect the local environmental and socio-economic context, the regulatory and corporate requirements and stakeholder expectations"; and par 3.5.3 requires "a description and evaluation of alternative closure and post-closure options where these exist, that are practical within the socio-economic context"). In addition, the Minister responsible for mineral resources and the Minister responsible for water should be able to use the financial provisioning to rehabilitate the mine or address the latent environmental risks of the mining, should the authorisation holder default (draft Regulations 2(c)–(d)). Regulation 6 indicates the aims of financial provisioning as follows:

> "The financial provision must guarantee the availability of sufficient funds for–
> (a) progressive rehabilitation;
> (b) decommissioning and closure activities; and

(c) the mitigation and management of latent environmental impacts including the ongoing pumping and treatment of polluted or extraneous water, where relevant; to ensure that–

(i) a reconnaissance, exploration, prospecting, mining or production area can be brought to the approved sustainable end state at the scheduled or unscheduled closure of operations; and

(ii) latent impacts post-closure are mitigated, rehabilitated and managed."

Regulation 6, therefore, clearly states that not only latent environmental impacts should be addressed, but also the pumping and treatment of extraneous water. (The financial plan will have to provide itemised costing, including addressing latent environmental impacts and the pumping and treatment of extraneous water (Regulation 8(1)(f)(i)(cc)).) The financial closure plan should describe, among others, "other mining activities within a 20 km radius of the mining area".

If these regulations had been applicable at the time of the *Ezulwini* case, the obligation to pump would have been clearly indicated, as determined in an environmental risk assessment. (An environmental risk assessment is to be undertaken in terms of Regulation 8(1)(f)(i)(cc) and as set out in Appendix 3. The risk assessment should be described in the financial closure plan as set out in par 3.6 of Appendix 2. Part 2 of Appendix 3 provides for environmental risk assessments in the case of non-scheduled closure.) The Financial Regulations would also have provided for unscheduled closure of operations, which may refer to the partial closure of the mine in the *Ezulwini* case. With the unscheduled closure of mines not being clearly spelled out in the current MPRDA, NEMA and their regulations, the draft regulations further provide for mines that are liquidated or under business rescue and allow the Minister responsible for mineral resources to access the financial provisioning. (The holder of the authorisation is obliged to inform the Minister of a possible liquidation or business rescue in terms of Regulation 16. Also see Regulations 13(4), 14 and 15.) These provisions may address the current lack of regulation and provide clarity on the legal liability described in this note.

6 Concluding remarks

The *Ezulwini* case illustrates the uncertainty as to whether holders of mining authorisations should apply for a closure certificate and an environmental authorisation in the case of the partial closure of a mine. It also highlights the risk involved should one of the mines in a specific area stop its operations and/or withdraw from its pumping responsibilities and/or become insolvent and/or have its directors stage a mass resignation.

The position regarding whether the mine has to apply for an environmental authorisation or an amended WUL remains uncertain as this issue was not addressed by the court. To our mind, as argued under heading 3 above, a mine in a similar position should apply for an environmental authorisation as well as an amended WUL.

The *Ezulwini* case further illustrates the ambiguity of the measures that address the liability for the pumping of extraneous water in the case of interconnected mines before and after closure. The court held that section 43(1) of the MPRDA does indeed provide that the holder of a mining right "remains responsible" for the pumping and treatment of extraneous water until the Minister has issued a closure certificate in terms of the Act. Consequently, the court granted Gold Fields's application for declaratory relief. It seems, therefore, as if it is the court's view that legal liability will stop once a closure certificate is issued. As set out in this note, this is not at all clear in the legislation.

As to which instrument would be a better fit to address the issues of pumping of extraneous water, the EMPr seems to be the appropriate instrument. The draft Financial Regulations, however, also provide for an environmental risk assessment which, in addition to the EMPr and the initial EIA, might provide a better solution to address some of these challenges.

This contribution draws a cautionary conclusion and highlights that legal uncertainty of this nature may be detrimental to the pursuit of the SDGs. In fact, lingering uncertainty may have serious financial, environmental (e.g., water pollution) or social impacts (e.g., food production) if not addressed. This note, however, does not provide a straight-out negative assessment. According to the draft National Mine Closure Strategy, mine closure and rehabilitation should not only focus on the environmental issues, but should also incorporate a socio-economic strategy or plan for the future of the mining area. It may therefore be argued that the Strategy seems to be moving towards the achievement of the SDGs.

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