



the federation for a sustainable environment

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## BASEL GOLD DAY: PRESENTATION BY THE FSE

### **Basel Gold Day: How to obtain clean gold – The consumer perspective**

Basel University, Switzerland

9 October 2020

*“Human rights are frequently violated in mining e.g. licences obtained through corruption, land grabbing, toxic waste, conflict with local communities.*

*“Increasingly, consumers are demanding “clean” gold. They don’t want to run the risk that the gold for their wedding ring, for example, has been mined by children.*

*“This workshop deliberately does not focus on either large-scale mining or on artisanal and small-scale mining – its goal is to explore how to improve the supply of sound gold.*

*“Its location in Basel is no coincidence. Basel hosts the worldwide jewellery and watchmaking fair Baselworld, it is the place where the “central bank of central banks” – the Bank for International Settlements – has its head office. It is also the home of the Basel Institute on Governance, an institution specialised in international regulation.”*

## INTRODUCTION

The FSE is a federation of community based civil society organisations committed to the realisation of the constitutional right to an environment that is not harmful to health or well-being, and to having the environment sustainably managed and protected for future generations. Their mission is specifically focussed on addressing the adverse impacts of mining and industrial activities on the lives and livelihoods of vulnerable and disadvantaged communities who live and work near South Africa’s mines and industries.

## SOUTH AFRICAN LEGISLATION AS IT PERTAINS TO GOLD MINING

South African legal framework includes the National Environmental Management Act, 107 of 1998 (NEMA)<sup>1</sup>, the National Water Act, 36 of 1998 (NWA) and Regulations on Use of Water for Mining and Related Activities Aimed at the Protection of Water Resources (GN.R. 704 of 4 June 1999)<sup>2</sup>, the National Nuclear Regulator Act, 47 of 1999 (NNRA)<sup>3</sup>, the Mineral and Petroleum Resources Act, 28 of 2002 (MPRDA) and its Regulations<sup>4</sup>.

Gold mining must give effect to the country's Constitution, the supreme law of the land. The constitutional environmental right contained in Section 24 of the Bill of Rights, for example, states the following: *“Everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and environmental degradation, promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”*

In addition to the Bill of Rights, South Africa has accepted international obligations as a state party to key human rights treaties, notably the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). South Africa has agreed to additional responsibilities by ratifying the African Charter on Human and Peoples' Rights (Banjul Charter). It has also joined international and regional treaties dedicated to protecting the rights of specific groups, including women and children.

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<sup>1</sup> Section 28. **Duty of care and remediation of environmental damage.** *“Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.”*

<sup>2</sup> Section 19. **Prevention and remedying effects of pollution.** *“An owner of land, a person in control of land or a person who occupies or uses the land on which any activity or process is or was performed or undertaken; or any other situation exists, which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.”*

<sup>3</sup> Section 22. **Application for certificate of registration or exemption for certain actions.** *“Any person wishing to engage in any action described in section 2(1)(c) [any action which is capable of causing nuclear damage] may apply in the prescribed format to the chief executive officer for a certificate of registration or a certificate of exemption and must furnish such information as the board requires.”*

<sup>4</sup> Section 23 & 38. **Granting and duration of mining right.** *“...the Minister must grant a mining right if the mineral can be mined optimally in accordance with the mining work programme; the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally; the mining will not result in unacceptable pollution, ecological degradation or damage to the environment; the applicant has provided financially and otherwise for the prescribed social and labour plan.”* **Integrated environmental management and responsibility to remedy.** *“The holder of a ... prospecting right, mining right, mining permit...must manage all environmental impacts- in accordance with his or her environmental management plan or approved environmental management programme, where appropriate ... must as far as it is reasonably practicable, rehabilitate the environment affected by the prospecting or mining operations to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development; and is responsible for any environmental damage, pollution or ecological degradation....”*

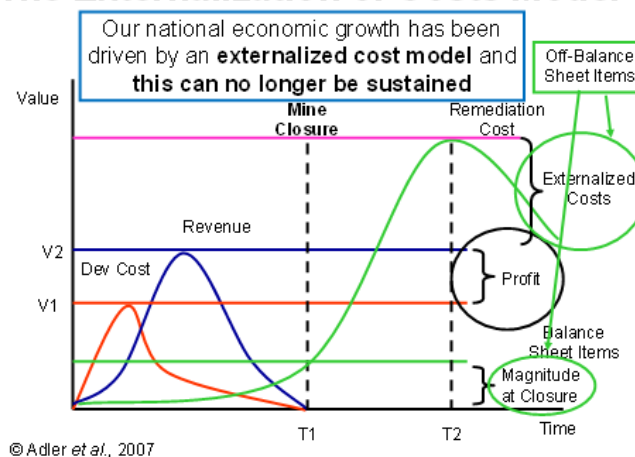
MPR Regulation 57. **A holder must apply for a closure certificate upon lapsing or abandonment of his right/permit; cessation of mining operations or relinquishment of any portion of land to which the right relates.** Within 180 days from these situations occurring, the holder must complete and submit a prescribed closing plan including an environmental risk assessment to the DMRE Regional Manager. Only after the Chief Inspector and DWS confirmed in writing that provisions have been complied with pertaining to health and safety and the management of potential pollution to water resources, may a closure certificate be issued.

Harmonizing multilateral treaties with domestic law, South Africa's Constitution requires courts to take international law into account when interpreting the Bill of Rights.

## CURRENT PROBLEMS WITH LARGE SCALE GOLD MINING

- Mining affected communities are characterized by widespread poverty and in need of employment; they have high, often unrealistic, expectations of recruitment (limited job opportunities due to the mechanisation of the mining industry); the notion of sustainable development, particularly intra-generational equity, with its medium-long term horizons does not resonate.
- *“Overall the mining sector is riddled with challenges related to land, housing, water, the environment and the absence of sufficient participation mechanisms and access to information...Non-compliance, the failure to monitor compliance, poor enforcement, and a severe lack of coordination amongst especially government stakeholders exacerbate the socio-economic challenges faced by mining-affected communities.”*<sup>5</sup>
- Externalization of Cost Model

### The Externalization of Costs Model



The costs associated with rehabilitation including the cost to human and environmental health (e.g. asbestosis and silicosis cases) and the social legacy of people employed, supported and attracted to the mine was not brought onto the balance sheets of companies. Environmental and socio-economic consequences take several decades to take effect. When these consequences become noticeable the mines have typically closed or become insolvent and thus cannot be compelled anymore to contribute to rehabilitation.<sup>6</sup>

- Legacy of gold mining<sup>7</sup>

<sup>5</sup> South African Human Rights Commission: National Hearing on the Underlying Socio-Economic Challenges of Mining Affected Communities in South Africa. 13-14 September; 26 and 28 September; 3 November 2016.

<sup>6</sup> RA Adler, M Claassen, L Godfrey & AR Turton. 'Water, mining and waste: An historical and economic perspective on conflict management in South Africa.' The Economics of Peace and Security Journal. USSB 1749-852X. 2007.

<sup>7</sup>M Liefferink. Federation for a Sustainable Environment. 'Selected extracts from South Africa's environmental

*“It is as unacceptable for companies, when they move on, to leave great holes in the earth and polluted rivers as it is to leave disrupted or unenriched communities....”*  
(quoted in Anglo America 2002b:3)

- Having yielded more than one third of all the gold ever produced on the planet, the Witwatersrand Basin held the world’s largest gold reserves.
  - The Witwatersrand has been mined for more than a century.
  - It is the world’s largest gold and uranium mining basin with the extraction from more than 120 mines, of 43 500 tons of gold in one century and 73 000 tons of uranium between 1953 and 1995.
  - The basin covers an area of 1600 km<sup>2</sup>, and led to a legacy of some 400 km<sup>2</sup> of mine tailings dams (270 tailings dams and 380 MRDs) containing 6 billion tons of pyrite tailings and 600 000 t of low-grade uranium.
  - It is estimated that 6000 km<sup>2</sup> of soils are significantly impacted by gold mining on the Witwatersrand Basin alone.
- Pass the Parcel

(Pass the parcel is a classic party game in which a parcel is passed from one person to the other. A gift is wrapped in a large number of layers of wrapping paper. The game continues until every layer is removed by and the prize is claimed by the person who removes the last layer.)

Bigger and more well-resourced mining companies sell to smaller companies, to circumvent the need to obtain a closure certificate or to apply for the transfer of environmental risks and liabilities.

The liability for pollution, ecological degradation, the pumping and treatment of extraneous water, and latent and residual impacts, as well as the obligation to apply for a closure certificate, vests in the last holder of the right, in all likelihood the least well-resourced and most precarious corporate entity. This “pass-the-parcel” approach to the custodianship of the closure plan, where the “gift” ends up in the hands of the weakest, seriously undermines the value and integrity of the forward planning approach to mine closure. The last link in the chain of mining companies operating a site then often results in liquidation.<sup>8</sup>

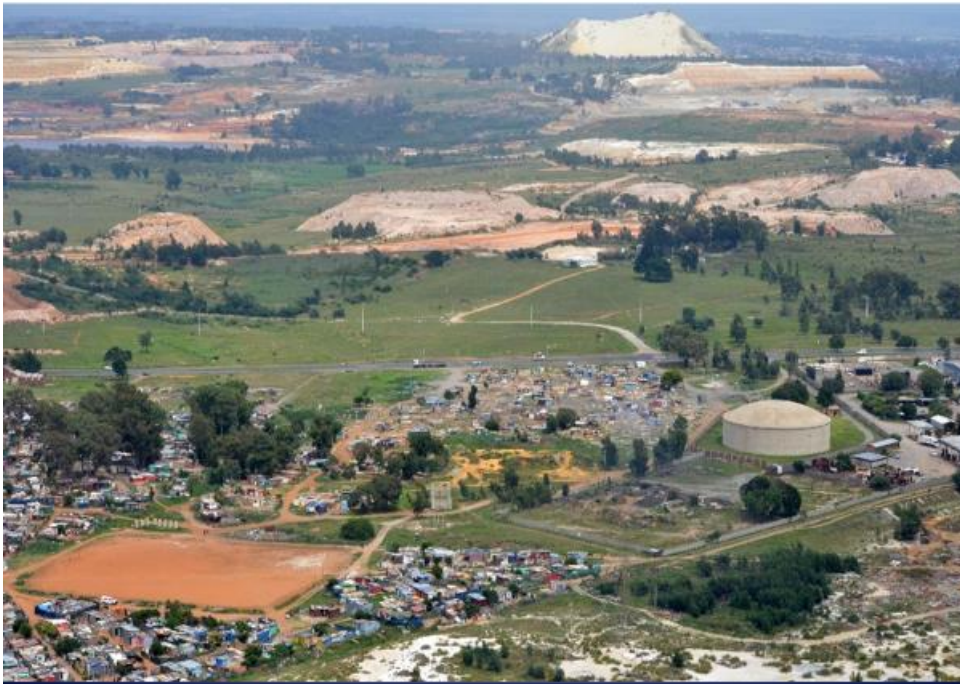
The liquidation of the Mintails’ Group exemplifies what happens subsequent to liquidation. It left clusters of open pits without access control, radioactive and toxic dams, unmanaged and unmitigated TSFs, unrehabilitated footprints with residual radioactivity, partially reclaimed TSFs, the “mining” of costly infrastructure, the digging out of cables, extensive vandalism of buildings, the introduction of criminal syndicates and heavy armed gangs, and significant safety risks to host communities and

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legislation: challenges with the management of gold tailings within the Witwatersrand gold fields and case studies’ AB Fourie, AJC Paterson and D Reid (eds) © 2019 Australian Centre for Geomechanics, Perth, ISBN 978-0-9876389-2-2.

<sup>8</sup> T Humby, School of Law, University of the Witwatersrand, South Africa. ‘Facilitating dereliction? How the South African legal regulatory framework enables mining companies to circumvent closure duties.’

neighbouring mines. Mintails Limited, an Australian listed company, evaded the company's environmental liability by divesting itself from its South African subsidiaries and then renamed itself Orminex Limited.<sup>9</sup>



The Mintails Group's operations with partially reclaimed TSFs, sand dumps, unrehabilitated footprints, toxic and radioactive dams, clusters of open pits without access control, fences or warning signs adjacent to densely populated residential areas.

- Facilitation of the dereliction of duty<sup>10</sup> - how the South African legal regulatory framework enables mining companies to circumvent closure<sup>11</sup> duties:
  - The lack of articulation between the closure requirements in the MPRDA and the process for winding up companies as set out in chapter 14 of the Companies Act, 1973. Chapter 14 establishes a process whereby insolvent companies are placed under the custodianship of a liquidator.
  - The liquidator is not obliged to apply for a closure certificate where the company itself has failed to do so, or whether the liquidator(s) would be responsible for environmental damage occurring during the liquidation phase.
  - It is not clear whether the financial provision for rehabilitation already "made" would be regarded as an asset of the company available for distribution to the creditors.

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<sup>9</sup> www.mindthegap.ngo 'Corporate strategies to avoid responsibility for human rights abuses' (10 July 2020)

<sup>10</sup> T Humby (n 8 as above).

<sup>11</sup> Regulation 56 of the MPRD Regulations (cessation of mining or lapsing of mining right or permit):

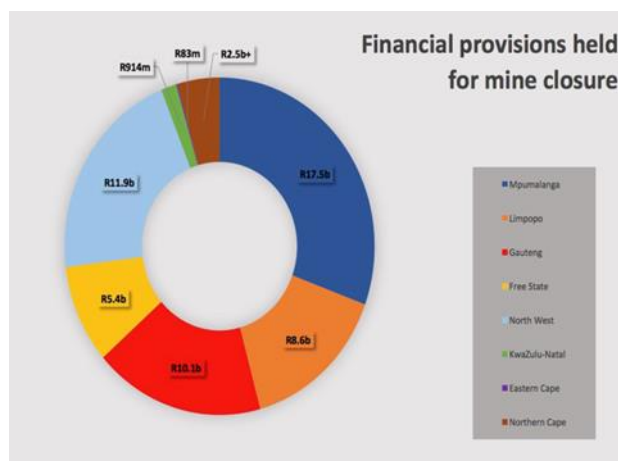
- "The closure of mining operations incorporates a process which must start at the commencement of the operation and continues throughout the life of the operation.
- "The land is rehabilitated, as far as practicable, to its natural state, or to a predetermined and agreed standard or land use which conforms with the concept of sustainable development."
- Closure objectives: immediate harm to human health and safety must be eliminated; groundwater and surface water must be fit for current and future basic human needs and aquatic ecosystems requirements; risks of harm to non-aquatic organisms must be eliminated; soil must be fit for use consistent with current and future land use.

- The MPRDA, chapter 14 places no specific obligation on the court to determine whether a company applying for a provisional liquidation order has applied for a closure certificate, ensured the transfer of environmental liabilities, or actually topped up any shortfall of funds in the chosen vehicle for financial provision. This lack of specificity is exacerbated by the narrow notice requirements, as chapter 14 requires only that employees, trade unions and SARS [government departments and IAPs not required to be notified] [should be notified of a company’s intention to initiate winding up proceedings (s 346A Companies Act, 1971).
  - The most serious consequences of the winding up procedure is that the company ceases to exist as a legal person. The environmental obligations specified in the MPRDA are linked to the “holder” of a prospecting or mining right, and this in turn is defined with reference to a “person”. If no “person” legally exists these obligations by extension cannot be enforced.
  - *“The DMR must identify clearly and specifically the gaps between mining, insolvency and company law that have led to this ongoing situation, where the polluter does not pay, it is the state that ends up paying.*
  - *“DMR should get specific legal opinion on these complex issues.*
  - *“The DMR must report to the Committee in Parliament on what it will do [or needs to do] differently in future to ensure that this situation does not continue.*
  - *“The DMR should further explore the regulatory gaps resulting from the business rescue process and come up with regulations that will ensure full environmental compliance during the period when a mine is experiencing financial distress.*
  - *“The DMR should design and implement standardized approaches when dealing with the relaxation of environmental financial provisions for mines that are undergoing business rescue process.”<sup>12</sup>*
- Under-capacitated and potentially inhibited law enforcement agency.<sup>13</sup>
  - Inadequate financial provisions

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<sup>12</sup> Announcements, Tablings and Committee Reports No 174—2018. No 174—2018, Fifth Session, Parliament. 22 November 2018: Pages 39 – 52.

<sup>13</sup> *“NEMA not only requires a transparent administration but recognised the contribution that can be made to the protection of the environment by a vigilant and committed public which has most to lose... .Securing protection is therefore no longer the exclusive preserve of those engaged in these activities, nor of an opaque administration or an under-capacitated and potentially inhibited law enforcement agency which cannot claim the number of successful convictions one would have expected despite clear evidence of historic degradation to our environment.”* (Uzani Environmental v BP Southern Africa (Pty) Ltd.)



- *It is clear that some mining companies are still operating without adequate financial provision for repairing damage caused to the environment by mining activities, if they suddenly close.<sup>14</sup> (For example, Shiva Uranium (Pty) Ltd had a shortfall of R36.6 million and Mintails Mining SA (Pty) Ltd had a shortfall of R460 million at the time of their liquidation. The Blyvooruitzicht Gold Mining Company’s total liabilities exceeded R891 million at the time of its liquidation..)*
- *“The state will inherit these liabilities if the mines are finally liquidated. The DMR has failed to implement effectively and carry out the intentions of Parliament to ensure that all mines rehabilitate the damage they cause. Changes to the mining law were made by Parliament after 2002 to ensure that in mining, as elsewhere, the polluter must pay.*
- *“DMR must report on what efforts they have made to hold directors and shareholders of Shiva and Mintails liable for the environmental debts of these failed ventures.*
- *“The DMR must actively ensure that the licensing of mines goes with responsibility and accountability.”*
- Governance gap and obfuscation of ownership and liabilities (complex corporate groups – parent company and subsidiaries). Deliberate development of strategies aimed at creating and exploiting the gap between corporate accountability and corporate influence – to prevent responsibility and liability flowing along the same channels as profit.

## ARTISANAL AND SMALL SCALE MINING<sup>15</sup>

Artisanal mining has the potential to enable job creation and support informal trade. Not all of these individuals and groups are involved in or, if they are, began the activity with the intention of becoming involved in criminal syndicates. The informal nature of ASM as well as the non-existent legal protection make it amenable to illegal dealings, especially in high value minerals such as diamonds and gold. Artisanal miners are therefore easy victims of organised crime and paramilitary organisations.

<sup>14</sup> Announcements, Tablings and Committee Reports (n 11 as above).

<sup>15</sup> South African Human Rights Commission (SAHRC) pursuant to the SAHRC’s Investigative Hearing “*Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa*”

The current socio-economic situation in many parts of South Africa has pushed many people into unregulated artisanal mining. There is evidence of a direct link between the retrenchment of mine workers and informal mining where former mine workers having the requisite knowledge of not only of the process but also of the workings and underground infrastructure of the mines. Cessation of mining without proper closure and rehabilitation creates opportunities for unregulated artisanal mining activities.

Criminal and dangerous practices such as the use of mercury and working in dangerous shafts, must be prohibited. There is an urgent need for programmes for artisanal mining communities across South Africa to raise awareness about the human and environmental dangers of unsafe artisanal mining.

Artisanal mining can play a complementary role to larger mining operations. Large scale miners are to be encouraged to build relationships and partnerships with artisanal miners to assist ASM with:

- a. Building technical capacity
- b. Gain access to appropriate technology (and consequently prevent environmental degradation)
- c. Get access to prospecting and mining areas
- d. Gain access the market: the lack of business and market knowledge, and lack of finance, can force artisanal miners to sell to middlemen at low prices, perpetuating their poverty. Artisanal miners are therefore kept in a poverty trap where their operations rarely graduate above subsistence and remain economically and environmentally unsustainable.

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