

MASHALA – FERREIRA MINE, ERMELO

Importance:	<p>Whilst this case demonstrates many of the prevailing themes that have arisen in the case studies (e.g. inadequate access to information, insufficient consultation, inadequate consideration of alternative and no-go options), it is interesting for the following less common issues:</p> <ul style="list-style-type: none"> • The exercise of the Minister of Minerals’ discretion to grant a mining right in the face of apparent illegal mining operations for a year and a half prior to the granting of the right or approval of the EMPR. • The extent of false and misleading information alleged to have been included in the EMPR and IWULA applications. In this regard the identity and conduct of the consultants who prepared the reports could be investigated. • The legal issues surrounding the closure and opening of access roads to mining areas. • The dynamics involved in negotiation for compensation to landowners living adjacent to the mining area. Two very different pictures emerge from the account provided by the mining company vis-à-vis the representation put forward by the appellants.
Alleged Facts:	<p>This is a complex case involving multiple authorizations and interventions. The case centres on the Ferreira mine (also referred to in the documentation as the Penumbra mine), owned by Mashala Resources (Pty) Ltd (MR) (registration number 2003/002244/07) and situated on Portion 19 of Farm Witbank 262 IT in the district of Ermelo (Mpumalanga Province). MR are owners of this portion of the farm.</p> <p>The land in this district is used mainly for agricultural purposes, however there are also important grassland species and wetlands on the site. The proposed mining area contains both seasonal and temporary wetlands and has high species richness.</p> <p>A diverse set of civil society players have intervened in this case, with the most active being the Dolla van Rensburg Trust (owner of the adjacent Portion 27 of the Farm Witbank 262, Mr A. van Rensburg snr and Mrs E. van Rensburg (co-owners of the trust), and Kleinbegin Boerdery (a partnership within the Van Rensburg family that conducted farming operations on the Trust’s property)).</p> <p>The documentation available dates from August 2008 to October 2010 and covers the following processes:</p> <ul style="list-style-type: none"> • Process 1: Appeal against the granting of a mining right. MR’s application for a mining right in respect of the aforementioned property was accepted on 10 October 2008. It would seem that the scoping report was made available for public review for a period of 30 days from 31 October 2008 and that the EMP was submitted to the relevant authorities and the public on 15 December 2008. A mining right in respect of the afore-mentioned property was granted in favour of MR to mine coal (DME Reference No. <i>F2008/08/25/003</i>). The decision to grant the mining right was apparently made by the Regional Manager. The mining right was notarially executed on 19 May 2010 at which time it seems the EMPR was also approved. The mining right was for a limited period

of four years. **However, according to the testimony of the appellants mining activities already commenced on the site in October 2008.** The appellants (being the Dolla van Rensburg Trust, members of the Van Rensburg Family and Kleinbegin Boedery) appealed against the granting of the mining right and the approval of the EMPR. They requested the Minister to set aside the right and, pending the outcome of the appeal, to suspend or cancel the right. The appellants had previously objected to the granting of the mining right on 15 February 2010.

- **Process 2: Objection to the granting of a WUL.** MR commenced mining operations in October 2008 and continued with these without having obtained the required water use licenses. Formal intervention on the part of civil society commenced in September 2010 after the DWAE indicated that a water use license for the operations on Portion 19 were in the final stages of approval. The letter indicated that according to the documentation supplied by MR consultation with I&APs had been undertaken. The Regional Head: Gauteng of Dept of Water Affairs indicated the appellants should resolve outstanding issues with MR. They also indicated that after consultation with the MR the mining footprint had been reduced and that the concerns of the appellants could be addressed as license conditions. Two written objections were subsequently submitted: One in September 2010 by Cameron Cross on behalf of the appellants which requests that DWAE suspend the application process until the appellants are afforded the opportunity to make representations to the Department on the impact of the operations on water quality in the area; and that the Department immediately issue a directive to MR calling upon it to suspend its operations until the WUL is granted. The appellants themselves seemed to have submitted another written objection, dealing with substantive concerns relating to information supplied in the IWULA application in October 2010. It appears from a letter addressed to MR's attorney by Cameron Cross, that the Department did indeed suspend the application process until engagement and consultation with stakeholders took place.
- **Process 3: Attempt to negotiate compensation.** An attempt on the part of MR to negotiate with the Van Rensburg family and Kleinbegin boedery commenced in April 2009 and continued until March 2010, after mining had already commenced illegally on the site. The Van Rensburgs were approached by representatives of the applicant (Johan Huystek, Thys de Bruyn and Paul Gericke) and invited to negotiations to locate the family and their farming operations on the premise that the impacts of the mine could not be mitigated. It was at all times an understanding between the appellants and the representatives of MR that pending the reaching of an acceptable agreement pertaining to the relocation of the appellants, MR would not conduct any further mining operations or formalize its application in respect of the MPRDA. As the amounts

	<p>offered by MR for compensation and relocation of the appellants was not regarded as acceptable (see MR’s letter of 3 February 2010 setting out the items and amounts of compensation), negotiations reached an impasse in March 2010.</p> <ul style="list-style-type: none"> • Process 4: Court case relating to access to road. When MR recommenced mining activities in June 2010, they did so on the northern side of the N2 national road adjacent to the trust’s property, in the process obstructing the only access road which the appellant’s had used to gain access to the property from the N2. The appellants subsequently initiated spoliation proceedings in the High Court. Only the answering affidavits from MR are available but they provide interesting contextual information on the relationship between MR and the appellants. In particular, MR alleges that the appellants demanded an unreasonable amount for purchase of the Trust Property and compensation (in excess of R20 million). They also point out that restoration of the road would fatally compromise the viability of the operation and affect their supply contracts. These included a contract with ESKOM for the supply of 20 000 tonnes of coal per month at its Camden power station and an export allocation of 207 000 tonnes per month for export through the Richard’s Bay coal terminal.
<p>Forum:</p>	<p>Administrative appeal to the D-G/Minister of the Department of Minerals in terms of s 96 of the MPRDA; objection submitted to the Department of Water Affairs; and spoliation proceedings initiated in the High Court.</p>
<p>Issues:</p>	<p>The processes outlined above raise the following key issues: Regarding process 1:</p> <ul style="list-style-type: none"> • Access to sufficient and relevant information. Despite the assurances given in MR’s final scoping report of October 2008 that the final EMP would be made available to both the authorities and the public on 15 December 2008, the EMPR was submitted on 23 December 2008 without any further consultation with I&APs. The appellants obtained an electronic copy of the EMPR in March/April 2009 though it is not clear through what means. A request for this documentation was made in terms of the Promotion of Access to Information Act 2 of 2000 on 1 August 2010. A copy of the mining right and the approved revised EMPR was only formally made available to them on 26 August 2010. • Illegal mining. According to the testimony of the appellants mining activities on Portion 19 of the Farm commenced in October 2008, prior to the approval of the mining right or EMPR. Some of the illegal activities included construction of an opencast pit which has destroyed some of the wetlands. The dam situated within the wetland on the southern portion has been half filled with overburden and topsoil and therefore the associated wetland around the dam has been destroyed and a portion of the wetland’s topsoil on the northern section has already been removed also ensuring the destruction of the wetland. In addition to the illegal

commencement of mining, the appellants contended that the applicant was in contravention of the terms and conditions of the mining right and the approved EMPR. For instance, the right specified that no mining was to take place within 100m from any public road. However mining activities were being conducted within the prohibited proximity.

- **EMPR was insufficient.** The appellants contended that the assessment of cumulative impacts, alternatives and the no-go option was insufficiently considered in the EMPR. The EMPR also contained a number of contradictions and false allegations (para 17, appeal). There were major differences between the EMPR submitted in October 2008 and the fifth version which was finally approved (para 18, appeal).
- **Failure on the part of the Minister to apply criteria for granting of mining right.** In terms of s 23(1)(g) of the MPRDA, the Minister may only grant a mining right if the applicant is not in any contravention of the MPRDA. The appellants highlighted the irregularity of the Minister subsequently granting the right in May 2010 even though the illegal mining activities outlined above had been brought to her attention. Further, in terms of s 23(1)(d) a mining right may not be granted if the mining will result in unacceptable pollution, ecological degradation or damage to the environment. The destruction of wetlands and grassland species had not been appropriately canvassed in the EMPR and the Minister's decision was thus defective in having failed to take the true extent of the operations on an environmentally-sensitive area into account.
- **Inappropriate delegation of powers.** The appellants contested the delegation issued by the Minister of 12 May 2004, contending that it did not serve to delegate her powers in terms of s 103(1) of the MPRDA.
- **Insufficient and inappropriate consultation.** The Regional Manager's notice of acceptance was displayed in the Ermelo Magistrate's Court, being the least conspicuous place of publication. This was inappropriate given the demographic composition of the area. The notice also failed to contain sufficient information for the reader to take an informed decision on the content of the application. The mining company also failed to notify I&APs and refused to provide them with access to the EMPR and supporting documentation until well after the mining right was approved in May 2010. As such the mining company was not in compliance with s 22(4)(b) of the MPRDA. In light of this non-compliance, the Minister also erred in granting the mining right.
- **Failure to obtain a water use license.** The applicant mining company was conducting operations without having obtained the requisite water use license and was thus in contravention of s 23(6) and s 25(2)(d) of the MPRDA. A letter from the Department of Water Affairs had confirmed that no water use license had been

	<p>granted as of 2 September 2010. The applicant had thus been operating without a water use license for two years.</p> <ul style="list-style-type: none"> • Failure to obtain environmental authorizations required under NEMA. It appeared that the applicant had failed to obtain authorization for any of the relevant activities listed in the NEMA EIA regulations that were associated with the mining operations. • Contravention of legislation relating to roads. In contravention of s 44 of the South African National Roads Agency Ltd and National Roads Act 7 of 1998 (SANRALNRA), the applicant had closed the existing servitude road providing the only access to the trust's property and the dwellings situated thereon. It had also created a new access road for which no authorization had been obtained under NEMA and had illegally taken access to the N2 national road without having obtain permission from SANRAL in terms of s 44. <p>Regarding process 2:</p> <ul style="list-style-type: none"> • Proper consultation prior to the finalization of a WUL. From the documentation available it is not clear whether proper consultation took place between the applicant mining company and the appellants, although DWAE seems to have been under the impression that proper consultation was undertaken on the basis that the appellants were invited to a meeting but did not attend. • False/misleading data supplied in the IWULA application. In the objection submitted in October 2010, the appellants points out numerous instances in which the information contained in the IWULA application is false. For instance, it was stated at v of the Executive Summary to this document that no mining takes place in a wetland, which was patently false. <p>Regarding process 4:</p> <ul style="list-style-type: none"> • Rights to the old access road. The proceedings in this matter are likely to revolve around the appellants rights to the access road, the applicant mining company's rights to move or close the road, and their duty to restore access to the road or pay appropriate compensation.
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Paper Trail: The documentation received for this case is too voluminous to list in the paper trail. The most critical documents have been identified and included in separate folders.

Document	Author /Originator	Date
Process 1: Appeal against mining right		
Application for prospecting right	Mashala Resources	25 Aug 2008
Environmental Scoping Report	GCS (on behalf of Mashala resources)	October 2008
Environmental Management Report	GCS (on behalf of Mashala resources)	December 2008
Request for information and objection re Mashala Resources mining right application	Unknown (presumably Dolla van der Merwe trust)	15 February 2010
Appeal against granting of mining right to Mashala Resources	Cameron Cross	14 September 2010

Process 2: Objection to granting of Water Use Licence		
Notice of intention to apply for integrated water use licence	Mashala Resources	16 July 2010
Undated/unsigned objection to grant of WUL to Mashala Resources	Dries van Rensburg	Undated
Unsigned further correspondence relating to objection to granting of WUL to Mashala Resources	Dries van Rensburg	26 August 2010
Unsigned further correspondence relating to objection to granting of WUL to Mashala Resources	Dries van Rensburg	2 September 2010
Unsigned further correspondence relating to objection to granting of WUL to Mashala Resources	Dries van Rensburg	2 September 2010
Response from DWAE regarding status of Mashala Resources' WUL application	DWAE	3 September 2010
Objection to the granting of a WUL to Mashala Resources	Cameron Cross	14 September 2010
Letter acknowledging suspension of WUL to Mashala Resources pending consultation with stakeholders	Cameron Cross	14 September 2010
Letter requesting Mashala Resources to suspend operations until WUL issued	Cameron Cross	14 September 2010
Objection against granting of WUL	Dries van Rensburg <i>et al</i>	October 2010
Process 3: Negotiation for compensation		
Letter offering compensation to Dolla van Rensburg Trust	Mashala Resources	3 February 2010
Undated/unsigned letter responding to offer of compensation	Dries van Rensburg	Undated
Process 4: Court case brought by Van Rensburgs relating to the access road		
Answering affidavit (including 2 annexes, one of which contains the mining right)	Mashala Resources	23 September 2010