



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

Mr David D Msiza
Director-General
Department of Mineral Resources

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26 October 2016

Dear Director-General Msiza

THE OPTIMUM MINE REHABILITATION FUND

1. The Centre for Environmental Rights (CER) is a non-profit organisation of activist lawyers who help communities and civil society organisations in South Africa realise our Constitutional right to a healthy environment, by advocating and litigating for environmental justice.
2. In view of the large-scale and severe impacts of mining on the environment and on the environmental rights of affected communities, the CER is interested in and concerned about the rehabilitation of environmental damage caused by mines. It is particularly important that financial provision for such rehabilitation be legally protected.
3. We have noted with concern speculation in the media¹ during the past two weeks regarding the status of the financial provision for rehabilitation (“rehabilitation funds”) for the Optimum Colliery in Mpumalanga. In particular, we refer to the speculation that some or all of these rehabilitation funds have been:
 - a. transferred from the Optimum Mine Rehabilitation Trust in order to be used for purposes other than the rehabilitation of the extensive environmental damage caused by mining at Optimum Colliery;² and/or
 - b. used to provide security for the part funding of the purchase of Optimum Colliery.

¹ <http://www.businesslive.co.za/bd/opinion/columnists/2016-10-17-stuart-theobald-optimum-trust-is-the-nexus-of-guptas-tax-commissioner-and-mining-minister/>; <http://www.rdm.co.za/politics/2016/10/17/minister-mosebenzi-zwane-s-r1.5bn-favour-for-the-guptas>; <http://www.miningmx.com/top-story/28235-oakbay-denies-raiding-optimum-fund-day-ceo-resigns/>; <http://www.dailymaverick.co.za/article/2016-10-15-amabhungane-where-is-optimums-r1.3-billion-mine-rehab-money/#.WANJ7skdYnw>.

² It is not permissible in law for any transfer from the Optimum Mine Rehabilitation Trust to have occurred for any purpose other than rehabilitation. Section 37A(1)(a) of the Income Tax Act, 1962 stipulates that the purpose of such a trust must be “solely for rehabilitation upon premature closure, decommissioning and final closure, and post closure coverage of any latent and residual environmental impacts on the area... to restore one or more areas to their natural or predetermined state, or to a land use which conforms to the generally accepted principle of sustainable development”. It is also not legally permissible to liquidate the trust and use those funds for another purpose, since the funds in a rehabilitation trust fund can only be moved to another fund with a similar purpose.

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4. There is also broad speculation in the media about the exact amount of financial provision in the Optimum Mine Rehabilitation Trust. See, for example, the detailed speculation in *Business Day* earlier this week at <http://www.businesslive.co.za/bd/opinion/columnists/2016-10-24-stuart-theobald-guptas-show-money-in-optimum-trust-but-figures-indicate-there-should-be-more/>.
5. As you will no doubt be aware, it is a legal requirement that funds sufficient to enable the rehabilitation of environmental damage caused by mining be set aside by every mining company in South Africa before mining can commence, and that the amount of financial provision be regularly assessed to ensure that it remains sufficient. Financial provision for rehabilitation is meant to be sacrosanct, and cannot be used for any purpose other than rehabilitation.
6. If a mining company fails to rehabilitate, then the responsibility to do so falls to the Minister of Mineral Resources, with funds appropriated by Parliament for this purpose. What this ultimately means is that the financial burden of unrehabilitated mines falls to the South African taxpayer.
7. Both the Minister³ and designated Environmental Management Resource Inspectors in the DMR⁴ have extensive powers to direct a mining right holder to submit records that provide evidence of compliance of the right holder with regard to the provision of adequate financial provision for rehabilitation.
8. It is in the public interest that clarity on the status of the Optimum Mine Rehabilitation Trust be obtained, and that the status be made public. We are also placing this letter in the public domain.
9. If the DMR has already investigated the matter and ascertained the current status of the Optimum Mine Rehabilitation Trust, we request that this information be placed in the public domain. If not, please provide confirmation that the DMR will take such steps as are necessary to confirm the status of the Trust forthwith, and will then provide these facts to the public.

We look forward to hearing from you within 7 days of receipt of this letter.

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

Melissa Fourie

Executive Director

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³ Section 29 of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) empowers the Minister of Mineral Resources to direct in writing that any information or data be submitted to the DMR by any holder of a prospecting right, mining right, retention permit or mining permit, if that information or data is required in order to achieve the objects of the MPRDA.

⁴ Section 31BB, as read with sections 31D(2A) and (3), 31H(1) and (2), and section 31L of the National Environmental Management Act, 107 of 1998 (NEMA) provide extensive powers to environmental management resource inspectors to investigate reasonable suspicions of violations of NEMA, which would include non-compliance with the Regulations pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations under NEMA.