

Illegal mining deaths

Who bears responsibility?

Recently the public was shocked to hear of the multiple deaths of illegal miners at a disused Harmony Gold mine.

Phillip Masilo examines the question of who bears the legal responsibility to ensure safety and prevent injuries in a mine that has been closed.

Recently in a much publicised event over 80 miners died in a disaster while illegally mining at Harmony Gold Mining in the Free State.

This mining disaster raised a number of legal questions, particularly as far as health and safety in closed mine shafts is concerned. It raised questions around the legal implications of mine closure provisions, the employer's legal obligation to ensure safety and/or prevent injuries in a mine that has been closed; and whether the Department of Minerals and Energy is obliged to conduct an inquiry in terms of section 65 of the Mine Health and Safety Act of 1996 (MHSA) into a fatal accident involving illegal mine-workers at a closed mine shaft.

More than 80 people went underground at the disused Eiland shaft in Welkom. The shaft belongs to Harmony which is the fifth largest gold producer. It is said that people accessed this abandoned shaft by breaking down ventilation seals or by bribing the security guards.

Harmony in particular has experienced this unauthorised mining since 1999 and since then about 290 people mining illegally have been brought to the surface at the shaft in question. It is clear that such activities were known to the mine for all these years.

OBLIGATION TO ENSURE SAFETY

The employer's obligation to ensure safety is set out in section 2 of the MHSA. Section 2(2) provides that, "the employer of a mine that is not being worked, but in respect of which a closure certificate in terms of the Minerals Act has not been issued must take reasonable steps to continuously prevent injuries, ill-health, loss of life or damage of any kind from occurring at or because of the mine."

The employer is the owner and is defined as the holder of a prospecting permit or mining authorisation issued under the Minerals Act or the last person who worked the mine or successor in title.

The above provision is open to different interpretations.

The one interpretation is that the

employer has a legal obligation to ensure safety at a mine shaft that has been closed only up until a certificate of closure has been issued. From the wording of the above provision, it could be argued that the issuing of the closure certificate absolves employers of their legal responsibility to ensure safety to people entering the mine thereafter.

It is my view that had the legislation intended to absolve the employer or permit holder of its legal obligation to ensure safety this would have been set out expressly in the Act. Even if it is accepted that the above provision absolves employers of their responsibility, it is my view that the employer or permit holder has a common law duty to ensure the safety of its workers and any other person whose health and safety may be affected by the disused mine.

The MHSA does not deal with the issue in detail. Since the Minerals Act has been repealed, the closing of mines and issuing of closure certificates is now dealt with by the Minerals and Petroleum Resource Development Act of 2002 (MPRDA) and its regulations.

Section 43 of the MPRDA provides that, "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. And... must apply for a closure certificate upon: completion of the prescribed closing plan to which a

right, permit or permission relate.”

What needs to be contained in the closure plan is set out in detail in regulation 62 of the MPRDA. It is important to note that the regulation refers only to environmental management issues but is silent on the health and safety aspect related to the closure of a mine.

The closure certificate may not be issued unless the Chief Inspector of Mines has confirmed in writing that the provision pertaining to health and safety has been addressed. This provision raises questions around the legal status of the closure certificate and the written confirmation by the Chief Inspector of Mines. It seems that the written confirmation by the Chief Inspector, removes liability or responsibility for health and safety from the permit holder or employer to the Department of Minerals and Energy.

Yet the employer still has the common law duty to ensure safety.

I am of a view that the written confirmation does not remove the legal obligation to ensure safety from the employer or permit holder. The confirmation merely confirms that

the permit holder has undertaken in its closing plan to take reasonable steps to continuously prevent injuries, ill-health, and loss of life or damage of any kind from occurring in a disused mine.

Regulation 60 of the MPRDA on the other hand, requires that an application for a closure certificate must be accompanied by an environmental risk report which will cover the assessment of all possible environmental risks and their classification. This regulation also does not deal with risk assessment of hazards that may pose a threat to public health and safety.

Although no reference is made to health and safety in regulations 60 and 62 of the MPRDA, the acceptance of a closure plan does not affect legal requirements under other laws. The intention of the closure plan is to ensure that upon closing, a mine site will not pose any threat to public health and safety, or cause environmental damage.

Without pre-empting the outcome of any investigation into the disaster at the Harmony Gold mining shaft, I am of the view that Harmony has a legal obligation to take reasonable steps at the closed shaft in order to

prevent any unauthorised entry into the mine, including the provision of security. However, this does not in any way mean that an employer has a legal duty to ensure the safety or a safe working environment for unauthorised people working in the closed mine illegally.

The question of whether the steps taken, including the security provided, if any, were reasonable in the circumstances, is a question that an inspector (appointed by the Chief Inspector) inquiring into the fatal accident, will have to answer.

INQUIRY INTO FATAL ACCIDENT

The MHSA requires that the Chief Inspector of Mines directs an inspector to conduct an inquiry into any accident or occurrence at a mine that results in the death of any person. It further provides that such an inspector must, at the conclusion of the inquiry, prepare a written report of the findings, recommendations and any remedial steps.

A mine is defined in the Act as “any borehole, or excavation, in any tailing or in the earth, including the portion of the earth that is under the sea or other water, made for the purpose of searching for or winning a mineral, whether it is being worked or not...”

It is clear that section 65(1) applies to the mine areas that have been closed and it does not matter whether a fatally injured person was legally or illegally in the mine. LB

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Illegal miners brought to the surface in body bags at Harmony's disused shaft.