

# The liability of historical mine authorisation holders for rehabilitation of 'old order mine dumps'

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## **Abstract**

Mine dumps or tailings (i.e. 'mine waste') created by mining activities are some of the main environmental impacts of mining. Historically little or no regard was given to the environment while planning mine dumps, since planning was based on minimum cost, the availability of land and the safety of underground workings. Mine dumps continue to cause water and air pollution when abandoned without being rehabilitated.

Abandoned mines and their dumps are common features of the South African landscape. Section 46 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) provides that the state is responsible to rehabilitate abandoned mines if the owner is deceased, cannot be traced, ceased to exist or has been liquidated. Rehabilitation of these mines has extensive financial consequences for the state and indirectly to the taxpayer.

The aim of this article is to determine the responsibility of historical mining right holders for such rehabilitation. 'Historic polluters' refer to mining companies who caused pollution and environmental degradation due to mining activities before the Minerals Act came into force in 1991. Also to be addressed in this article is the question whether owners of tailings created through an authorisation issued in terms of the now repealed Minerals Act or prior legislation (old order dumps) would be able to escape their rehabilitation obligations or not. Reference will be made to the new proposed amendments to the MPRDA as well in addressing the question.

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## 1 Introduction

Mine dumps or tailings<sup>1</sup> created by mining activities are some of the main environmental impacts of mining. Historically little or no regard was given to the environment while planning mine dumps, since planning was based on minimum cost, the availability of land and the safety of underground workings.<sup>2</sup> Mine dumps continue to cause water and air pollution when abandoned without being rehabilitated.<sup>3</sup>

Abandoned mines and their dumps are common features of the South African landscape. Section 46 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) provides that the state is responsible to rehabilitate abandoned mines if the owner is deceased, cannot be traced, ceased to exist or has been liquidated.<sup>4</sup> Rehabilitation of these mines has extensive financial consequences for the state and indirectly to the taxpayer.

In terms of the MPRDA rehabilitation liability only ceases once the Department of Mineral Resources<sup>5</sup> issues a closure certificate.<sup>6</sup> The MPRDA repealed the Minerals Act (MA) and its regulations. The transitional provisions in the MPRDA provided that mining rights obtained in terms of the MA (old order rights)<sup>7</sup> had to be converted before 1 April 2009 and the conditions, *inter alia* obtaining a closure certificate, in the old order right remained valid until it was converted to a new order right.<sup>8</sup> The MPRDA did not address rehabilitation of mines where operations ceased before the MA came into force.<sup>9</sup> In *Bareki No v Gencor Ltd*<sup>10</sup> (Bareki case) the court held that the respondent, who ceased mining

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<sup>1</sup>The term 'tailings' was defined in the Minerals Act 50 of 1991, to include all 'mine waste, such as tailings dams, sand dumps and other waste dumps'. (In this article the term 'tailings' will bear the meaning assigned to it by the Act.)

<sup>2</sup>Strydom and King (eds) *Fuggle and Rabie's environmental management* (2009) 551.

<sup>3</sup>Kidd *Environmental law* (2011) 225.

<sup>4</sup>Section 46(1) MPRDA, as amended by the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (MPRD Amendment Act) that came into operation on 2013-06-07 – Proc 17 in GG 36541 of 2013-06-06. The Mineral and Petroleum Resources Development Amendment Bill [B15B-2013] (2013 Bill) substitutes the amended s 46(1) and (2) – cl 33.

<sup>5</sup>The former Department of Minerals and Energy (DME) was split into two departments in 2009, namely the Department of Mineral Resources (DMR) and the Department of Energy. In this article reference to both DME and DMR will be made depending on the historical context.

<sup>6</sup>See discussion of closure certificates in terms of the MPRDA in 5.1.

<sup>7</sup>Minerals Act 50 of 1991. It must be noted that in terms of the provisions of the MPRD Amendment Act, the definition of 'old order mining right' was extended to embrace rights that had been granted in terms of legislation operative prior to the MA, such as claims, mynpachten and tributing agreements. The interpretation of the definition of 'old order right' is contentious – see *Holcim (South Africa) Pty Ltd v Prudent Investors (Pty) Ltd* 2011 1 All SA 364 (SCA).

<sup>8</sup>Item 10 of the MPRDA.

<sup>9</sup>See discussion in 5.1.

<sup>10</sup>2006 1 SA 432 (T).

activities between 1980 and 1985, were not liable in terms of the Mines and Works Act (MWA) or the MA, because the MPRDA repealed these two acts on 1 May 2004.<sup>11</sup> Furthermore the court established that section 28 of the National Environmental Management Act 107 of 1998 (NEMA) did not have retrospective application. The consequence of this judgment was that mining companies would only have been liable for pollution that occurred after the promulgation of NEMA on 29 January 1999.<sup>12</sup> According to Du Plessis and Kotzé<sup>13</sup> the *Bareki* case left the question open as to who was to be held liable for historical pollution. NEMA has subsequently been amended to address this issue.<sup>14</sup> In the court case *De Beers Consolidated Mines v Ataqua Mining (Pty) Ltd*<sup>15</sup> (*De Beers* case) the court held that the MPRDA is not applicable to tailings created through mining conducted before the MPRDA was enacted. The implication of this decision was that if the MPRDA is not applicable to old order tailings, owners of the dumps in question would not have been liable to rehabilitate the area once such tailings are re-mined, re-processed or not mined at all.<sup>16</sup>

Although *De Beers Consolidated Mines* (*De Beers*) argued that the Jagersfontein dumps are not governed by the MPRDA and as a consequence *De Beers* would not have to comply with the rehabilitation provisions in section 39 of the MPRDA the question in this case was not whether *De Beers* could be obliged to rehabilitate the Jagersfontein dumps. *De Beers* acknowledged that it still had to comply with its rehabilitation obligations, unfortunately not all companies were environmentally responsible and could have seen this judgment as an opportunity to escape their rehabilitation obligations. The subsequent amendments to the MPRDA and the proposed 2013 amendments may change this position.<sup>17</sup>

The aim of this article is to determine the responsibility of historical mining right holders for rehabilitation. 'Historic polluters' refer to mining companies who caused pollution and environmental degradation due to mining activities before the MA came into force in 1991. The implication of *De Beers*' argument that the Jagersfontein dumps were not governed by the MPRDA, was that *De Beers* would possibly not have to comply with the rehabilitation provisions in section 39 of the MPRDA. Although the dispute in this case did not relate specifically to *De Beers*' rehabilitation obligations, the facts of the case will be used to determine if owners of tailings created through an authorisation issued in terms of the MA

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<sup>11</sup>Minerals Works Act 27 of 1956. See discussion in 5.1.

<sup>12</sup>The retrospective application of NEMA is discussed in 5.2.

<sup>13</sup>Du Plessis and Kotzé 'Absolving historical polluters from liability through restrictive judicial interpretation: Some thoughts on *Bareki No v Gencor Ltd* (2007) *Stell LR* 193.

<sup>14</sup>See 5.2.

<sup>15</sup>OPD 13-12-2007 case no 3215/06.

<sup>16</sup>See discussion of the *De Beers* case in 2 below.

<sup>17</sup>See the discussion in 6 below.

or prior legislation (old order dumps or dumps that cannot be regarded as such under the MPRDA) would have been able to escape their rehabilitation obligations. Reference will also be made to the new proposed amendments to the MPRDA.

In the *De Beers* case reference was made to tailings and residue stockpiles and a brief description of the facts of the *De Beers* case will be given. The article will then attempt to define tailings and residue stockpiles and refer to possible methods of rehabilitation. The responsibility of mining authorisation holders before 2004, between 2004 and 2013 and post-2013 will be discussed to determine whether companies with so-called old order dumps would be able to escape their rehabilitation responsibility.

## 2 *De Beers* case

In the *De Beers* case the court had to interpret the legal status of old order mine dumps.<sup>18</sup> The central question in this case was whether the MPRDA deprived De Beers of the ownership of the minerals in its Jagersfontein dumps. The court confirmed that the MPRDA removed mining rights of minerals that have not been mined out of private hands and vested it in the state.<sup>19</sup> The court, however, held a different opinion with regard to old order mine dumps.

The facts of the case are as follows. The New Jagersfontein Mining and Exploration Company Ltd (referred to as the New Company) conducted mining operations at Jagersfontein in 1887 and became part of De Beers Consolidated Mines Limited ('De Beers') in 1932.<sup>20</sup> Mining operations on Jagersfontein were discontinued in 1971 and the mine was deproclaimed in 1972.<sup>21</sup> De Beers became the owner of the Jagersfontein dumps<sup>22</sup> in 1973, when the New Company ceded, assigned and transferred its entire movable and immovable assets to De Beers, which was fully aware that the Jagersfontein dumps contained diamondiferous material and that the material could be re-mined when economic circumstances were conducive to further exploitation.<sup>23</sup> De Beers was in the possession of a section 6 mineral prospecting permit,<sup>24</sup> issued in terms of the MA (MA authorisation), in respect of the Jagersfontein dumps. When the MPRDA came into effect in 2004 De Beers chose not to apply for conversion of its MA

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<sup>18</sup>Badenhorst and Van Heerden 'Status of tailings dumps: Let's go working in the past?' (2010) *Stell LR* 116.

<sup>19</sup>(N 15) para 67.

<sup>20</sup>*Id* para 4. Also see Badenhorst and Van Heerden (n 18) 117–119 for facts of the case.

<sup>21</sup>(N 15) para 6.

<sup>22</sup>Situated on Subdivision 16 of the farm Jagersfontein 14, Magisterial District Fauresmith.

<sup>23</sup>(N 15) para 4.

<sup>24</sup>Permit number 13/2000.

authorisation under the MPRDA, because of its interpretation that old order mine dumps are not subject to control by the MPRDA.<sup>25</sup>

The battle started when the former Department of Minerals and Energy (DME) issued a prospecting right in terms of the MPRDA to an empowerment company Ataquia Mining (Pty) Ltd (Ataquia), authorising them to conduct prospecting operations on the Jagersfontein dumps.<sup>26</sup> De Beers applied to the High Court of South Africa (Orange Free State Provincial Division) for an order declaring that De Beers was the owner of the Jagersfontein dumps and that Ataquia was not entitled to conduct prospecting operations on its dumps.<sup>27</sup> De Beers further applied for an order to review and set aside the decision of the Deputy Director-General, DME and the then Minister of Minerals and Energy to grant the prospecting right to Ataquia.<sup>28</sup> The court held that there were several reasons why tailings and in particular De Beers' tailings, which formed the subject matter of this case, were not subject to control by the MPRDA.<sup>29</sup>

The court pointed out that the MA recognised the mining of tailings. The MPRDA, however, has an explicit definition of a 'residue stockpile'<sup>30</sup> that does not include tailings created under an old order right.<sup>31</sup> According to the court the applicant's MA authorisation did not continue under schedule II of the MPRDA's transitional arrangements.<sup>32</sup> The court made it clear that the MPRDA did not intend to regulate mining in old order tailings and that the regime under the MA in respect of tailings did not persist.<sup>33</sup> The court indicated that mining of tailings was to be regarded as processing or the winning of a mineral.<sup>34</sup> The court further confirmed that the Jagersfontein dumps were movables owned by De Beers. Tailings and the diamonds in the dumps did not occur naturally on the earth.<sup>35</sup> The court found further that no absurd conclusion would arise if old order tailings were to be excluded from the MPRDA.<sup>36</sup> If old order tailings were left out it would not be difficult to give full and proper effect to the MPRDA. Mining rights in unsevered minerals in the ground were targeted by the MPRDA and not the already mined minerals found in tailings.<sup>37</sup>

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<sup>25</sup>(N 15) para 68 (viii), see discussion on transitional provisions of the MPRDA at 5.1.

<sup>26</sup>*Id* para 2.

<sup>27</sup>Badenhorst and Van Heerden (n 18)119.

<sup>28</sup>(N 15) para 2.

<sup>29</sup>*Id* para 68

<sup>30</sup>See 3.2 below for the definition of residue stockpile.

<sup>31</sup>(N 15) para 68(iv).

<sup>32</sup>*Id* para 68(iv).

<sup>33</sup>Badenhorst and Van Heerden (n 18) 127

<sup>34</sup>*Id* para 68(iv).

<sup>35</sup>*Id* para 68(i).

<sup>36</sup>*Id* para 68 (vii). Also see Badenhorst and Van Heerden (n 18) 125.

<sup>37</sup>*Id* para 68 (vii).

As a result of this ruling, it seems that at that stage mining of tailings was not subject to the provisions of the MPRDA. The implication was that owners of old order tailings therefore would not have had to assure the Minister of Mineral Resources that they had the necessary technical and financial ability to conduct mining operations. By further implication they would not have to submit the prescribed social and labour plan,<sup>38</sup> environmental management plan<sup>39</sup> or the financial provision for environmental rehabilitation.<sup>40</sup> The court held in its conclusion that the processing of minerals from dumps created in terms of the MA was not an unregulated activity.<sup>41</sup> The legislature must have contemplated that environmental legislation, such as NEMA, would regulate the processing of minerals in tailing when the MPRDA was enacted.<sup>42</sup> In their argument, the respondents submitted that NEMA did not regulate the taking of minerals from tailing dumps and that there was no requirement in NEMA that instructed a holder of a mining right to undertake an environmental impact assessment (EIA)<sup>43</sup> or financial provisions for rehabilitation.<sup>44</sup> This argument did not succeed. Although

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<sup>38</sup>Section 23(1)(e) MPRDA.

<sup>39</sup>Section 39 MPRDA. S 33 of the MPRD Amendment Act repealed this section. S 39 will be replaced by s 24N of the National Environmental Management Amendment Act 62 of 2008 (NEM Amendment Act). S 14(2) of the NEM Amendment Act stipulates that any provision relating to prospecting, mining, exploration and production and related activities comes into operation 18 months after the commencement of either the NEM Amendment Act or the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (MPRD Amendment Act), whichever commences last. The National Environmental Management Laws Amendment Act 25 of 2014 (NEMLA) was published in GN 448 of GG 37713 of 2014-06-02. The Act came into operation on 2 September 2014 and amended the NEMA, the National Environmental Management: Waste Act 59 of 2008 and the NEM Amendment Act. The NEMLA deleted s 14(2) of the NEM Amendment Act and amended s 24N which will come into operation on 2 September 2014. Ss 38 and 39 of the MPRDA are repealed (see the MPRD Amendment) – there are currently no measures regulating environmental management programmes or environmental management plans and therefore rehabilitation. The repeal of the MPRDA sections will have to be interpreted in light of s 11 of the Interpretation Act 33 of 1957: ‘When a law repeals wholly or partially any former law and substitutes provisions for the law so repealed, the repealed law shall remain in force until the substituted provisions come into operation’. See also Badenhorst and Mostert *Mineral and petroleum law of South Africa* (2004) para 17-1.

<sup>40</sup>Section 41 of MPRDA; see also 5.1. below 33 of the MPRD Amendment Act repeals this section and it will be replaced by s 24P of the NEM Amendment Act. Note that the NEMLA amends some of the sections to transfer the decision-making on environmental matters from the Minister of Environmental Affairs to the Minister of Mineral Resources and to address some issues that have not been properly addressed in the MPRD Amendment Act or the NEM Amendment Act.

<sup>41</sup>Badenhorst and Van Heerden (n 18) 126.

<sup>42</sup>(N 15) para 68(ix).

<sup>43</sup>Sections 24 and 24D of NEMA read with GN R385 in GG 28753 of 2006-04-21. See also 7.

<sup>44</sup>Section 24P(1) of the NEM Amendment Act states that: ‘an applicant for an environmental authorisation relating to prospecting, mining, exploration, production or related activities on a prospecting, mining, exploration or production area must make the prescribed financial provision for the rehabilitation, management and closure of environmental impacts, before the Minister of

the main thrust of the judgment was not based on rehabilitation and environmental matters, the facts of the *De Beers* case is used to illustrate the difficulty to determine the identity of the responsible person who has to rehabilitate.<sup>45</sup> The amendment to the MPRDA as well as NEMA, the introduction of the Mineral and Petroleum Resources Amendment Bill, 2013 and the amendments to the National Environmental Management: Waste Act 59 of 2008 (NEM:WA) complicate the matter further.

### 3 Definitions

As the court in the *De Beers* case did not regard the 'rewinning' of tailing dumps as mining and therefore consequently most probably not subject to rehabilitation, it is necessary to determine what 'rehabilitation' is as well as to investigate the possible interpretations of 'tailings' and 'residue stockpiles' to determine whether the court's assumption is correct.

It is uncontested that current South African mining legislation imposes an obligation on mining companies to rehabilitate the environment after mine closure. However the word 'rehabilitation' was never defined by the legislator or the courts.<sup>46</sup> The MWA was silent on rehabilitation until 1980 when rehabilitation became a legal requirement with the insertion of regulations 5.11 to 5.15 into the MWA Regulations<sup>47</sup> (GN R992) but rehabilitation was not specifically defined.<sup>48</sup>

One of the aims of the MA was rehabilitation. Nonetheless, the MA itself did not provide a clear definition of rehabilitation, but stated in section 1 that: 'Rehabilitation means, in relation to the surface of land and the environment, the execution by the holder of a prospecting permit or mining authorisation of the rehabilitation programme referred to in section 39 to the satisfaction of the regional director'.<sup>49</sup> The MPRDA currently regulates rehabilitation, but also does not provide a definition of rehabilitation. The now repealed section 38(1)(d) and the NEMA section 24N(2)(f) state that the holder of a prospecting right or mining right must rehabilitate the environment affected by his prospecting or mining activities as far as is practicable to its natural state or to a predetermined and agreed standard or land use which conforms to the concept of sustainable development.<sup>50</sup>

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Minerals and Energy issues the environmental authorisation.' See also 7.

<sup>45</sup>See 1 above.

<sup>46</sup>Barnard *Environmental law for all* (1999) 97.

<sup>47</sup>GN R992 in GG 2741 of 1970-06-26.

<sup>48</sup>GN R537 in GG 6892 of 1980-03-21.

<sup>49</sup>Section 1 of the MA.

<sup>50</sup>See 5.1 below. Sustainable development is defined in s 1 of NEMA as: 'the integration of social, economic and environmental factors into planning, implementation, and decision-making so as to ensure that development serves present and future generations.'

Kidd<sup>51</sup> suggests that rehabilitation may be seen as the measures one takes after the damage to the environment have been done. Rehabilitation in a mining context may be defined as a process to restore the land affected by mining to a condition similar to the condition it was before mining commenced.<sup>52</sup> It is, however, not always possible or reasonable to restore the land back to its natural state but if it is not practicable the affected environment should be rehabilitated to a sustainable usable condition, with the minimal loss of land use capability that is of net benefit of the community.<sup>53</sup> It might not always be a viable option to rehabilitate the affected environment to a predetermined and agreed standard if major societal changes in the area took place.<sup>54</sup> According to Barnard,<sup>55</sup> rehabilitation is acceptable once a piece of land is replaced with a use that is not necessarily of similar nature but has similar value. The result of rehabilitation should be that the degraded land is re-vegetated or restored as closely as possible to the previous condition. For the purposes of this article 'rehabilitation' is defined as the process of restoring the environment impacted by mining to, or as close as possible to, its natural state, as far as it is practicable. If this is not practicable the environment must be restored to a sustainable usable condition that has similar value as its prior natural state agreed upon by government and the affected communities.

If rehabilitation includes the restoration of the environment to at least a sustainable use condition, it is also necessary to determine what is meant by tailings or mine dumps and residue stockpiles. Franklin and Kaplan<sup>56</sup> state that the expression 'mine dump' includes all dumps comprising tailings, slimes, waste rock, sand or other residues produced in the course of mining operations and deposited upon land in respect of which mining operations are being or have been conducted. The Chamber of Mines<sup>57</sup> includes tailings in its definition of residue: 'A residue means any waste rock, slimes or tailings derived from any mining operation or processing of mineral and includes part of a material that remains or results after processing to extract those constituents or parts which is profitable to extract at the time.' The Mines and Works Act 12 of 1911, MWA, Precious

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<sup>51</sup>Kidd *Environmental law* (1997) 119.

<sup>52</sup>Gauteng Department of Agriculture, Environment and Conservation (GDACE) (2008) *Mining and environmental guide* <http://www.gdard.gpg.gov.za/DocumentsandForms/Documents/MiningandEnvironmentalImpactGuide.pdf> (accessed 2014-12-04).

<sup>53</sup>Chamber of Mines South Africa and Coaltech Research Association (2007) *Guidelines for the rehabilitation of mines* <http://chamberofmines.org.za/media-room/environmental-publications> (accessed 2014-12-04).

<sup>54</sup>Chamber of Mines (n 53).

<sup>55</sup>Barnard (n 46) 241.

<sup>56</sup>Franklin and Kaplan *The mining and mineral laws of South Africa* (1982) 45.

<sup>57</sup>Chamber of Mines (n 53).



Stones Act 73 of 1964 and the Mining Rights Act 20 of 1967 did not provide a definition of tailings. The MA introduced the concept 'tailings' and defined it as 'waste rock, slimes or residue derived from any mining operation or processing of any material.'<sup>58</sup> Unlike the MA the MPRDA did not provide a specific definition of 'tailings', but it defined 'residue stockpile' as:<sup>59</sup> 'any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated for potential reuse, or which is disposed of, by the holder of a mining right, mining permit or production right.'<sup>60</sup> The National Water Act 36 of 1998 (NWA), on the other hand, defines residue as: 'any debris, discard, tailings, slimes, screenings, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any product incidental to the operation of a mine.'<sup>61</sup> It seems that there are different interpretations of what 'tailings' or 'dumps' entail and therefore for the purposes of this article, tailings will be defined as the material that is either stockpiled or accumulated for potential reuse after most of the recoverable valuable mineral or economical recoverable material has been extracted or material that is to be discarded.<sup>62</sup>

The MPRDA further stipulates that no person may prospect for, remove or 'mine' any 'mineral' without a prospecting right, mining right or mining permit.<sup>63</sup> The definition of 'mineral' in the MPRDA does not make reference to tailings, but includes minerals that occur in residue stockpiles or in residue deposits. 'Mine' is defined in the MPRDA both as a noun and verb and refers to 'any operation or activity directed at excavating, extracting or mining any mineral,' *inter alia*, 'from any residue deposit or residue stockpile.'<sup>64</sup> The definition of 'mining area' also includes residue stockpiles. A residue deposit is currently defined as 'any residue stockpile remaining at the termination, cancellation or expiry of a prospecting right, mining right, mining permit, exploration right, production right or an old order

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<sup>58</sup>Section 1 of the MA. Also refer to Kaplan and Dale (n 54)10.

<sup>59</sup>The 2013 Bill, however, proposes amendments to this definition. 'Beneficiation' is to be replaced with 'mineral processing' and the stockpile must be stored or accumulated 'within the mining area'. Most probably to counter the effect of the *De Beers* case, the words 'including historical mines and dumps created before the implementation of this Act' were added to the end of the definition.

<sup>60</sup>The MPRD Amendment Act amended the definition to add holders of old order rights. Again this was most probably to counter the effects of the *De Beers* case.

<sup>61</sup>GN R704 in GG 20119 of 1999-06-04.

<sup>62</sup> Gauteng Department of Environmental Affairs (GDACE) 'Mining and Environmental Impact Guide' available at: <http://www.gdace.gpg.gov.za> (accessed 2009-07-18).

<sup>63</sup>Section 5(4).

<sup>64</sup>The original definition of 'mine' was extended by the MPRD Amendment Act.

right.<sup>65</sup> The holder of a right to mine minerals in residue stockpiles or in residue deposits is responsible for rehabilitation in terms of the MPRDA.<sup>66</sup>

In the *De Beers* case the court ruled that the MPRDA did not govern old order tailings, because the words 'old order mining right' were not included in the definition of a 'mining right' in the MPRDA.<sup>67</sup> Consequently tailings created under a MA mining right did not fall within the definition 'residue deposit'. The amendments to the definitions of residue deposit and the proposed amendments to residue stockpiles may change this position.<sup>68</sup> However, owners of tailings created under a MPRDA mining right always had to comply with the rehabilitation requirements, because it fell within the definition of 'residue stockpile' and 'residue deposit'.<sup>69</sup> The post-2004 owner of a tailings dump will be required to apply for a mining right to remove minerals from residue deposits created under the MPRDA, because the definition of 'mine' refers to residue deposits. A person who removed minerals from a residue deposit created under the MPRDA without a mining right would have been in contravention of section 5(4) of the MPRDA and since the coming into force of the MPRD Amendment, of section 5A. The definitions do not provide a solution as to who would be responsible for the rehabilitation of old order rights and it is therefore necessary to discuss the responsibility of mining authorisation holders for rehabilitation before and after 2004.

## 4 Responsibility of mining authorisation holders before 2004

The responsibility of mining authorisation holders before the MPRDA came into effect in 2004 will be discussed according to the MWA and MA.

### 4.1 MWA

The MWA was concerned with the operation of mines and works and the machinery used in connection with these activities and not the right to mine.<sup>70</sup> When the MWA was introduced in 1956 it only regulated the safe and efficient operation of machinery, and the protection of employees at mines. Its principal

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<sup>65</sup>As amended by the MPRD Amendment Act.

<sup>66</sup>Section 43.

<sup>67</sup>See discussion of *De Beers* case in 2.

<sup>68</sup>*Ibid.*

<sup>69</sup>See 5.1.

<sup>70</sup>The right to mine was regulated in terms of the Mining Rights Act 20 of 1967 and the Precious Stones Act 73 of 1964. Franklin and Kaplan (n 57) 539.

concern was for safety at mine closure.<sup>71</sup> The MWA did not include requirements for environmental rehabilitation when mining operations ceased.<sup>72</sup> GN R992 (which came into operation on 26 June 1970) included some provisions for environmental protection in chapter 5 entitled 'Surface Protection'. In terms of regulation 2.1 the owner of a mine who discontinued operations or abandoned the working of a mine had to give written notice to the Inspector of Mines or the Inspector of Machinery within 14 days.<sup>73</sup> In terms of regulation 2.11 the owner, or the person acting as manager, remained responsible to comply with the requirements of the MWA regulations until the Inspector of Mines issued a certificate that all the regulations had been complied with.<sup>74</sup> To prevent the dissemination of dust or sand from mine dumps regulation 5.10 required that dumps had to be covered with sludge or soil or as per the requirements of the Inspector of Mines.<sup>75</sup>

The MWA was amended in 1977 to enable the Minister to make regulations to conserve the environment at or near mines.<sup>76</sup> This included the restoration of land on which activities in connection with mines or works were performed or had been performed.<sup>77</sup> Due to water pollution and dust nuisance caused by mining operations that had been discontinued and abandoned mines, legal requirements to provide for rehabilitation of mines were introduced in 1980 when regulations 5.11 to 5.15 were inserted into GN R992.<sup>78</sup> Regulation 5.12 directly regulated the rehabilitation of mining surfaces and introduced the rehabilitation programme.<sup>79</sup> Regulation 5.12.2 required that rehabilitation of the surface of open cast mines had to form an integral part of the mining operations.<sup>80</sup> Mines had to conduct rehabilitation while the mine operated and in certain situations rehabilitation had to be done according to a programme that was laid down by the Inspector of Mines after he or she consulted with the manager and after the plan was approved by the Government Mining Engineer.<sup>81</sup> Regulation 5.13.3 imposed a duty on the owner to rehabilitate the surface as far as practicable to its natural state when the operations ceased.<sup>82</sup> The owner was defined in the MWA as the person or company who leased a mine, works, machinery or any part thereof and

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<sup>71</sup>Franklin and Kaplan (n 57) 556.

<sup>72</sup>Strydom and King (n 2) 551, also see 3.

<sup>73</sup>Franklin and Kaplan (n 57) 556.

<sup>74</sup>*Id* 567.

<sup>75</sup>*Id* (n 54) 567; Du Plessis and Kotzé (n 13) 170.

<sup>76</sup>Section 12 of the MWA was amended by the Mines and Works Act 83 of 1977.

<sup>77</sup>Strydom and King (n 2) 547.

<sup>78</sup>GN R537 in GG 6892 of 1980-03-21. Also see Franklin and Kaplan (n 57) 556.

<sup>79</sup>*Id* (n 57) 568.

<sup>80</sup>*Ibid*.

<sup>81</sup>*Ibid*.

<sup>82</sup>See discussion in 2.3 and Franklin and Kaplan (n 57) 569.

who was or the person who contributed to the working of the mine; the definition of owner did not include a person who only owned the surface rights of the land on which the mine, works or machinery was situated.<sup>83</sup>

Once the clearance certificate in terms of regulation 2.11 was issued by the Inspector of Mines, the owner or manager could not be held responsible for compliance with the regulations in chapter 5.<sup>84</sup> Although liability in terms of the MWA ended with the issuing of a clearance certificate an owner could at that time still be held liable for pollution caused by mining in terms of the then Water Act 54 of 1956 and the Atmospheric Pollution Prevention Act 45 of 1965.<sup>85</sup> It is clear from the facts of the *De Beers* case that De Beers was regulated, *inter alia*, in terms of the Water Act 54 of 1956, the Atmospheric Pollution Prevention Act 45 of 1965 and the MWA, when the Company became the owners of the Jagersfontein tailings in 1973.<sup>86</sup> In terms of Regulation 5.10 of GN R992 De Beers would at least have been required to cover the tailings dump with sludge or soil.

## 4.2 MA

The MA came into operation on 1 January 1992 and repealed, *inter alia*, the MWA.<sup>87</sup> Section 68(2) of the MA provided that any regulation made under the MWA and in force immediately prior to the commencement of the MA would remain in force until amended or repealed. Regulation 15.2.2 and regulation 15.3.13 were repealed in terms of section 63 of the MA, effective from 1 January 1992 and replaced by the rehabilitation provisions in sections 38, 39 and 40 of the MA.<sup>88</sup> Regulation 5.10 remained in force under section 63.<sup>89</sup> Section 38 of the MA enforced rehabilitation on all holders of authorisations, including holders of authorisations to re-mine tailings.<sup>90</sup> It is important to note that whereas under the Mining Rights Act, 1967, it was only precious metals and precious stones mines that required a specific authorisation, the MA now applied to base minerals. Accordingly, such mines were now required to hold a mining authorisation and to prepare rehabilitation plans. Authorisation holders had to rehabilitate the surface of the prospecting or mining area during the lifetime of the operations and after

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<sup>83</sup>See definition of owner in section 1 of the MWA.

<sup>84</sup>Franklin and Kaplan (n 57) 572.

<sup>85</sup>*Id* 578.

<sup>86</sup>At para 6 of the *De Beers* case. Due to restrictions on the length of this article the Water Act and Atmospheric Pollution Prevention Act could not be discussed in detail.

<sup>87</sup>See 2 and Kaplan and Dale *A guide to the Minerals Act 1991* (1992) 187.

<sup>88</sup>Kaplan and Dale (n 88)195. Du Plessis and Kotze (n 13) 192.

<sup>89</sup>GN R 5.10 imposed a duty to cover dumps sludge or soil. Refer to 3 and 4.1.

<sup>90</sup>See 3.

closure thereof as an integral part of the operation, according to the conditions stipulated in the EMP and to the satisfaction of the Regional Director.<sup>91</sup>

Authorisation holders had to apply for a closure certificate when the authorisation lapsed, or was suspended, cancelled or abandoned.<sup>92</sup> Liability for compliance with the MA remained with the authorisation holder until the Regional Director issued a closure certificate.<sup>93</sup> This entailed that the authorisation holder was accountable for rehabilitation until the certificate was issued.<sup>94</sup> A section 12 closure certificate only relieved authorisation holders from liabilities in terms of the MA and not in terms of other environmental legislation. It was not necessary to consult other departments before the certificate was issued.<sup>95</sup> The provisions of the MA only applied to authorisations issued post-1991. De Beers was in the possession of a MA authorisation.<sup>96</sup> This entailed that De Beers had to prove to the Director of Mineral Development that it had the ability to carry out rehabilitation,<sup>97</sup> and De Beers had to be in the possession of an approved Environmental Management Programme (EMP) before prospecting operations could commence.<sup>98</sup> The question remains, whether De Beers could have been forced to rehabilitate in terms of the post-2004 legislation and the subsequent 2013 amendments.

## 5 Rehabilitation between 2004 and 2013

The MPRDA is the primary legislation that governs the mining industry and its activities post-2004.<sup>99</sup> The industry also have to comply with the provisions of other environmental legislation such as the NEMA, the NWA and the NEM:WA.

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<sup>91</sup>See for a discussion Kidd (n 51) 119, Swart 'The South African legislative framework for mine closure' 2003 *Journal of South African Institute of Mining and Metallurgy* 491; Kaplan and Dale (n 88) 490, Mabiletsa and Du Plessis 'Impact of environmental legislation on mining in South Africa' 2001 *SAJELP* 195.

<sup>92</sup>Section 12; also see Swart (n 92) 491; Kaplan and Dale (n 88)195.

<sup>93</sup>Section 12.

<sup>94</sup>Kaplan and Dale (n 88) 195.

<sup>95</sup>Mabiletsa and Du Plessis (n 92) 196.

<sup>96</sup>Refer to 2 and at para 45 and para 66 of the *De Beers* case.

<sup>97</sup>Sections 6(2)(c) and 9(3)(c), also see Mabiletsa and Du Plessis (n 92) 193.

<sup>98</sup>Section 39 of MA.

<sup>99</sup>Glazewski *Environmental law in South Africa* (2005) (2 nded) 466; see also Glazewski and Du Toit (eds) *Environmental law in South Africa* (2013) 17-31-17-34.

## 5.1 MPRDA

The MPRDA repealed the MA and the environmental regulations of the MWA that remained under the MA.<sup>100</sup> The MPRDA does not include a savings clause for the MWA regulations that regulated matters pertaining to the environment and rehabilitation.<sup>101</sup> One of the objectives of the MPRDA is to give effect to the constitutional environmental right in section 24 of the Constitution.<sup>102</sup> Therefore, environmental management has to be integrated into all aspects of mining.<sup>103</sup> An EMP must be approved before mining can commence.<sup>104</sup> Rehabilitation must take place during and after mining<sup>105</sup> and rehabilitation plans must therefore be included in the EMP to prevent irremediable impacts to the environment and to ensure that the site will be usable in future.<sup>106</sup> An EMP will also be approved by the DMR only if the applicant can prove that there will be sufficient capacity to rehabilitate and manage negative effects on the environment.<sup>107</sup> Schedule II of the MPRDA provides for transitional arrangements.<sup>108</sup> Schedule 10(1) provides that EMPs that were approved in terms of section 39(1) of the MA and in force when the MPRDA took effect, continued to remain in force. The Minister has the authority to direct that such a programme be amended to bring it in line with the requirements of the MPRDA.<sup>109</sup> This provision is not adequate to enforce the rehabilitation of old order mine dumps, because if an EMP had not been approved under section 12 of the MA and the old order right holder decided not to apply for conversion the holder cannot be forced to manage the environmental impacts. If De Beers had an approved EMP the question is whether the EMP would remain in force, because the court stated that De Beers' MA prospecting permit did not continue under schedule II of the MPRDA's transitional arrangements.<sup>110</sup> In addition Item 10(1) of the MPRDA does not address mines that ceased

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<sup>100</sup>The applicable health and safety regulations of the MWA regulations remained under the Mine Health and Safety Act 29 of 1996. Also see Du Plessis and Kotzé (n 13) 170 and Glazewski (n 100) 467.

<sup>101</sup>Kidd *Environmental law* (2008) 192. See a discussion of the regulations in 4.1 and also Franklin and Kaplan (n 57) 556-570.

<sup>102</sup>Glazewski (n 100) 467 and Strydom and King (n 2) 548.

<sup>103</sup>Section 37. Also see Glazewski (n 100) 468.

<sup>104</sup>Section 39 was repealed by the MPRD Amendment Act on 7 June 2013 and is to be replaced by s 24N NEMA.

<sup>105</sup>Section 38 was repealed by the MPRD Amendment Act on 7 June 2013 and is to be replaced by s 24N(2) NEMA read with GN R 527 in GG 26275 of 2004-04-24. Also see Strydom and King (n 2) 517.

<sup>106</sup>Glazewski (n 100) 473.

<sup>107</sup>Section 39(4)(a)(iii) to be replaced by s 24O(1)(b) NEMA.

<sup>108</sup>See Badenhorst, Mostert and Pienaar *Silberberg and Schoeman's law of property* (2003) 692 for a discussion on transitions from old order rights to new order rights.

<sup>109</sup>Item 10(2).

<sup>110</sup>At para 68(vi) of the *De Beers* case and 2.

operations before the MA came into force, because old order rights are defined as rights obtained in terms of section 6 and 9 of the MA.<sup>111</sup> If De Beers did not have an MA authorisation rehabilitation would not be enforceable in terms of the Jagersfontein tailings.

Section 38(2) imposed a duty on holders of rights in terms of the MPRDA to rehabilitate the affected environment once mining ceases.<sup>112</sup> It meant, by implication that if a company with old order mine dumps was not a holder of a mining right, it would not have been obliged to rehabilitate its dumps according to the MPRDA requirements. The seriousness of rehabilitation is noted in *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Ltd and Others*<sup>113</sup> (*Stilfontein* case) where the respondents were ordered to undertake the costs of continuing to pump underground mine water out of a liquidated mine, which, if it remained unpumped it would cause significant environmental damage to underground water, flooding of the applicants mine and will lead to eventual pollution in the Vaal River.<sup>114</sup> Furthermore, the court sentenced the respondents with a fine of R15 000 or a prison sentence of 6 months and costs of the applicant.<sup>115</sup>

It was illustrated in *Bareki* that historic polluters cannot be liable for rehabilitation in terms of the MWA regulations, because they were repealed by the MA and the MPRDA.<sup>116</sup> Item 10(5) provides that section 38 of the MPRDA was applicable to holders of old order rights. Unfortunately, item 10(5) does not address historic polluters and they cannot be forced to rehabilitate.<sup>117</sup>

Financial provision for the rehabilitation of the mining area is an essential requirement of the MPRDA.<sup>118</sup> Before the Minister approves the EMP the

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<sup>111</sup>Refer to 1.

<sup>112</sup>Glazewski (n 100) 473. Section 38 is to be replaced by s 24N(7) NEMA.

<sup>113</sup>2006 JOL 17516 (W). See also the subsequent case *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs* (971/12) 2013 ZASCA 206 (4 December 2013).

<sup>114</sup>For a discussion of the case refer to Kotzé 'Enforcing liabilities and responsibilities for pollution prevention and remediation: A legal reflection on the legacy and future of the mining industry in South Africa' in Paddock *et al* (eds) *Compliance and enforcement in environmental laws: Towards more effective implementation* (2011) 475-499; Kotzé and Lubbe 'How (not) to silence a spring: The Stilfontein Saga in three parts' 2009 *SAJELP* 49-77.

<sup>115</sup>At para 22 of the *Stilfontein* case (n 114). The amended NEMA s 24N(7)(f) will place an obligation on mines to pump and treat extraneous water. See a similar provision in the now amended MPRDA s 43(5).

<sup>116</sup>Du Plessis and Kotzé (n 13) 170.

<sup>117</sup>See 1.

<sup>118</sup>Section 41 to be replaced by s 24P NEMA; also see Glazewski (n 100) 474.

applicant must prove that he or she made the prescribed financial provision<sup>119</sup> to rehabilitate the mining area and manage the negative environmental impacts caused by the mining activities.<sup>120</sup> Regulation 53<sup>121</sup> provides for the various methods in which financial provision indicated in section 41 may be provided. The *quantum* of the financial provision must be determined according to a guideline<sup>122</sup> published by the former DME in terms of regulation 54(1).<sup>123</sup> The Minister has the authority to use all or part of the financial provision to rehabilitate the area affected by mining if the holder abandons a mine without rehabilitating it or unable to rehabilitate.<sup>124</sup> The Minister may keep a portion of the financial provision to cover the cost of dealing with the rehabilitation of latent or residual environmental impacts after closure.<sup>125</sup>

During mining operations the ultimate objective of a holder of a mining right should be to obtain a closure certificate.<sup>126</sup> The MPRDA provides that the holder will remain responsible for any environmental liability, pollution or ecological degradation and to manage it until the Minister of Mineral Resources has issued a closure certificate.<sup>127</sup> The holder is obliged to apply for a closure certificate when the right of the holder lapses, is cancelled, the holder decides to abandon the right, when the holder sells or cedes the mining operations to a third party or when a holder relinquishes a portion of the land where prospecting or mining takes place, to another party. A closure certificate must be applied for when the prescribed closure plan is completed.<sup>128</sup> The application for the closure certificate must be made to the appropriate Regional Manager<sup>129</sup> within 180 days from when the event that requires a closure certificate occurred.<sup>130</sup> No closure certificate may be issued without confirmation from the Chief Inspector of Mines and the Department of Water Affairs that the provisions pertaining to health and safety

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<sup>119</sup>Financial provision is defined as insurance cover, bank guarantee, trust fund or cash that an applicant must provide to guarantee the availability of sufficient funds to undertake the agreed rehabilitation.

<sup>120</sup>Section 41(1) – to be replaced by s 24P(1). Also see Kidd (n 102) 190.

<sup>121</sup>GN R 527– see 6.

<sup>122</sup>This guideline may be updated from time to time.

<sup>123</sup>Companies and persons who receive, hold and apply money to be used to rehabilitate, protect or make land safe, prevent or combat pollution or to protect water sources, following mining, prospecting, quarrying or similar operations will qualify for such exemptions. Tax exemption for rehabilitation is provided for in s 10(1)(cH) of the Income Tax Act 58 of 1962.

<sup>124</sup>Kidd (n 102) 190 and Strydom and King (n 2) 554.

<sup>125</sup>Glazewski (n 100) 475 Strydom and King (n 2) 554.

<sup>126</sup>Glazewski (n 100) 474.

<sup>127</sup>Section 43(1) (to be replaced by s 24R NEMA) - see also Strydom and King (n 2) 553 and Glazewski (n 100) 475.

<sup>128</sup>Section 43(4); Strydom and King (n 100) 553.

<sup>129</sup>Regional Manager appointed in terms of s 8 by the Director General of the DM in a specific area.

<sup>130</sup>Reg 57 of GN R 527 sets out the requirements for an application of a closure certificate.



and management of potential pollution to water resources have been addressed.<sup>131</sup> As illustrated in the *Bareki* case, regulation 2.11<sup>132</sup> of the MWA, which required compliance with the MWA until the Inspector of Mines issued a certificate that all the regulations had been complied with, remained in force in terms of section 68(2) of the MA when the MWA was repealed in terms of section 12(2) of the Interpretation Act 33 of 1957.<sup>133</sup> Regulation 2.11 will only be enforceable if legal proceedings were instituted before the MPRDA came into force.<sup>134</sup> Although Item 10(4) directs holders of old order rights to apply for closure certificates when mining operations cease in terms of section 43 of the MPRDA, these provisions still do not address rehabilitation of mines where operations ceased before the MA came into force by forcing historic polluters to apply for a closure certificate in terms of the MPRDA.

In the *De Beers* case the court stated that De Beers would not need a mining right to 're-mine' the tailings, which would have excluded them from the provisions of the MPRDA with regard to rehabilitation, financial obligations and the obtainment of closure certificates.<sup>135</sup> The question would then be whether De Beers could have been forced to rehabilitate in terms of NEMA, the NWA or the NEM:WA.

## 5.2 NEMA and NWA

Section 28 of NEMA (hereafter referred to as section 28) and section 19 of the NWA (hereafter section 19) both impose a general duty of care on polluters to prevent pollution and remediate pollution caused.<sup>136</sup> Section 28 addresses air,

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<sup>131</sup>Section 43(5). In terms of the MPRD Amendment Act a closure certificate will only be issued when each government department, charged with the administration of any law which relates to any matter affecting the environment (not only the Department of Water Affairs), has confirmed in writing that the provisions pertaining to health and safety and management of potential environmental impacts, pollution of water resources and the pumping and treatment of extraneous water have been addressed. This amendment promotes environmental cooperative governance and gives insurance to the holder that all his or her liabilities and responsibilities end with regard to the mining area. The 2013 Bill proposes an amendment to the MPRD Amendment Act in that only the permission of (as stated) Department of Water and Department of Environmental Affairs will be necessary – cl 30. Most likely the permission of both the Department of Water Affairs and the Department of Environmental Affairs will be necessary.

<sup>132</sup>In GG 2740 of 1970-06-26.

<sup>133</sup>Du Plessis and Kotze (n 13) 170.

<sup>134</sup>Paragraph 449I-J of the *Bareki* Case.

<sup>135</sup>Refer to para 67 of the *De Beers* case.

<sup>136</sup>Sections 28(1) and 19(1). Also see Strydom and King (n 2) 211, 660; Glazewski (n 100) 150, 568, 623-624.

land and water pollution,<sup>137</sup> while section 19 only concentrates on the protection of water resources.<sup>138</sup> Sections 28 and 19 place an obligation on a number of people to minimise and remediate pollution *inter alia*, landowners, persons in control of land and a person who has a right in or a right to use the land.<sup>139</sup> Therefore it is not only originators of pollution that can be held responsible.<sup>140</sup>

The retrospective application of section 28 was challenged in the *Bareki* case.<sup>141</sup> The court established that section 28 does not have retrospective application and that mining companies could only be held liable for rehabilitation for pollution that occurred after the promulgation of NEMA on 29 January 1999.<sup>142</sup> The loophole was closed when the NELAA came into operation on 18 September 2009. Subsection 28(1A) was inserted which states that: 'Subsection (1) also applies to a significant pollution or degradation that (a) occurred before the commencement of this Act; (b) arises or is likely to arise at a different time from the actual activity that caused the contamination, or arises through an act or activity of a person that results in a change to pre-existing contamination.'<sup>143</sup> The retrospective application of section 19 has never been challenged in the courts. The Chamber of Mines and the then Minister of Water Affairs and Forestry<sup>144</sup> entered into an agreement called the 'Fanie Botha Accord' in 1976. According to this agreement the state is responsible for pollution control measures, the maintenance of such measures and all related costs of mines or works abandoned prior to 13 July 1956.<sup>145</sup> It seems that, on the basis of this agreement, one could argue that the retrospective application of section 19 would only apply until 1956. Due to the agreement, the *De Beers* case scenario would be excluded, would any pollution have occurred before 1956.

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<sup>137</sup>Kotzé (n 116). Section 1(xxiv) of NEMA defines 'pollution' as: 'any change in the environment caused by substances; radioactive or other waves; or noise, odours, dust or heat emitted from any activity, including the storage or treatment of waste or substances, construction and also proposed the provision of services, whether engaged in by any person or an organ of state, where that change has an adverse effect on human health or well-being or on the composition, resilience and productivity of natural or managed ecosystems, or on materials useful to people, or will have such an effect in the future.'

<sup>138</sup>Kotzé (n 116). See also the definition of 'pollution' – s 1(xv) of NWA.

<sup>139</sup>For example contractors and sub-contractors.

<sup>140</sup>Kidd (n 102)136.

<sup>141</sup>Du Plessis and Kotzé (n 13) 162.

<sup>142</sup>Paragraph 445C-D, 440H-I, 440I and 440J of the *Bareki* case.

<sup>143</sup>Section 12(a) of the NELAA.

<sup>144</sup>Currently the Minister of Water and Sanitation.

<sup>145</sup>Franklin and Kaplan (n 57) 574.

### 5.3 NEM:WA

The NEM:WA came into operation on 1 July 2009.<sup>146</sup> The aim of the Act is to 'reform the law regulating waste management.'<sup>147</sup> A duty of care is also imposed on holders of waste in section 16 of NEM:WA.<sup>148</sup> Mines are the biggest producers of waste in South Africa, however the majority of mining waste was excluded from the ambit of the NEM:WA prior to the NEMLA.<sup>149</sup> Residue stockpiles and residue deposits were excluded from the ambit of NEM:WA in terms of section 4(b) of NEM:WA and were regulated in terms of the MPRDA. As the MPRDA does not govern old order tailings, it may imply that the NEM:WA may have to be interpreted to regulate old order tailings.<sup>150</sup>

If it can be argued that NEM:WA regulates old order tailings, rehabilitation could be enforced through NEM:WA. The aim of part 8 of chapter 4 of NEM:WA is to establish control over contaminated land in South Africa. NEM:WA applies to the contamination of land even if that contamination occurred before the NEM:WA came into force.<sup>151</sup> Historic polluters may be ordered through the contaminated land provisions to rehabilitate land their operations contaminated.

## 6 Solutions by the legislator

As stated above<sup>152</sup> although the MPRD Amendment Act was promulgated on 21 April 2009, it was only brought into force on 7 June 2013.<sup>153</sup> Even before the Act came into operation a Mineral and Petroleum Resources Development Amendment Bill, 2012 was published.<sup>154</sup> The eventual 2013 Bill, intending to amend the MPRD Amendment Act, has been passed through Parliament and the National Council of Provinces and is at the time of revision of the article<sup>155</sup> awaiting the signature of the President.

The court held in the *De Beers* case that the MPRDA does not regulate old tailings, but only dumps that fall within the definitions of 'residue stockpile' and

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<sup>146</sup>GN 278 in GG 32189 of 2009-04-30. Part 8 of ch 2 came into operation on 2 May 2014 – Proc 26 in GG 37547 of 2014-04-20. See also GN 331 in GG 37603 of 2014-05-02 - National Norms and Standards for the Remediation of Contaminated Land and Soil Quality in the Republic of South Africa.

<sup>147</sup>See long title of the Act.

<sup>148</sup>See s 16(1) of NEM:WA.

<sup>149</sup>Strydom and King (n 2) 738. Mining tailings and discards constitute 80% of the total waste generated in South Africa.

<sup>150</sup>Refer to 2, 3 and 5.1.

<sup>151</sup>Section 35(a).

<sup>152</sup>See 3.

<sup>153</sup>Proc 14 in GG 36512 of 2013-05-31 as amended by Proc 17 in GG 36541 of 2013-06-06.

<sup>154</sup>GN 1066 in GG of 2012-12-27.

<sup>155</sup>November 2014.

'residue deposit' and that are created in terms of a right or permit granted in terms of the MPRDA and not previous mining legislation.<sup>156</sup> The court held that tailing dumps were movable assets and that the inclusion of these tailings under the MPRDA and reallocation of mining rights would lead to expropriation.<sup>157</sup> Nevertheless, the MPRD Amendment Act amended the definitions of 'residue stockpile'<sup>158</sup> and 'residue deposits'<sup>159</sup> to include all mine dumps created under the mining rights created under old order rights created prior 1 May 2004 and mining rights created under the MPRDA.<sup>160</sup> The 2013 Bill proposes to substitute the definition of 'residue stockpile' with the following definition: 'Residue stockpile means any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry and, mineral processing plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated within the mining area for potential re-use, or which is disposed of, by the holder of a mining right, mining permit or, production right or an old order right including historic mines and dumps created before the implementation of the Act.'<sup>161</sup> To remove the idea that a stockpile or residue deposit is a movable asset the 2013 Bill proposes to amend the definition of land to include 'the surface of the land and the sea, as well as residue deposits and residue stock piles on such land, where appropriate.'<sup>162</sup>

The 2013 Bill introduces the definition of 'historic residue stockpiles' and proposes to include these dumps under the ambit of the MPRDA. Historic residue stockpiles are defined as: 'any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation and which is or was stockpiled, stored or accumulated for potential re-use, or which is or was disposed of, by the holder of any right or title (including common law ownership) other than a prospecting right, mining right, mining permit, exploration right or production right issued in terms of this Act.'<sup>163</sup>

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<sup>156</sup>See para 68(iv) of the *De Beers* case and 2 above.

<sup>157</sup>See para 68(vi) of the *De Beers* case.

<sup>158</sup>'Residue stockpile' means: 'any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated for potential re-use, or which is disposed of, by the holder of a mining right, mining permit, production right or an old order right.'

<sup>159</sup>'Residue deposit' means: 'any residue stockpile remaining at the termination, cancellation or expiry a mining right, mining permit, production right or an old order right.'

<sup>160</sup>The amendment of these definitions to include tailing dumps under the jurisdiction of the MPRDA has the implication that the State is now exposed to potential claims for compensation.

<sup>161</sup>Clause 1(q) of MPRD Amendment Bill.

<sup>162</sup>Clause 1(n).

<sup>163</sup>Clause 1 (q) of MPRD Amendment Bill.

The new section 42A(1)<sup>164</sup> provides that all historic residue stockpiles and residue deposits currently not regulated under the MPRDA belongs to the owners thereof. Ownership shall continue for a period of two years from the date on which the 2013 Bill is promulgated. De Beers will therefore remain the owner of the Jagersfontein tailings for a period of two years and will have an exclusive right to apply for a mining right or mining permit during this period.<sup>165</sup> Should De Beers decide not to apply for a mining right or mining permit for the Jagersfontein tailings within the 2 year period the custodianship shall revert back to the State.<sup>166</sup> The 2013 Bill does not indicate if the rehabilitation liability would remain with the current owner or if it would revert back to the state.

As stated above, residue stockpiles and residue deposits are regulated by the NEM:WA as waste from 2 September 2014. NEMLA deleted section 4(1)(b) from the NEM:WA which excluded residue stockpiles and residue deposits from the ambit of the NEM:WA.<sup>167</sup> The amendments to the NEM:WA have the effect that all residue deposits and residue stockpiles are regarded as hazardous waste and have to be dealt with in terms of the NEM:WA.<sup>168</sup> Residue stockpiles and deposits will remain hazardous waste until it is recovered or reclassified.<sup>169</sup> Should De Beers decide to reclaim the Jagersfontein dumps a NEM:WA licence would be required in addition to a mining right or permit.<sup>170</sup> The minister responsible for mineral resources will be the licencing authority for any waste management activity that involves residue deposits and residue stockpiles on a prospecting, mining, exploration or production areas. He or she is also responsible for the implementation of these provisions.<sup>171</sup> The minister responsible for environmental

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<sup>164</sup>Inserted by cl 30.

<sup>165</sup>Section 42A(4). See also Gen Notice 1005 in GG 38209 of 2014-11-14 - Proposed Planning and Management Residue Stockpiles and Residue Deposits Regulations, 2014 that were published for comment.

<sup>166</sup>Section 42(8). Whether this section could be regarded as an act of expropriation or deprivation is a question for further research and falls without the scope of this article. See e.g. BadenhorstandOlivier 'Expropriation of unused old order rights by the MPRDA: you have lost it!' (2012) *THRHR* 329-343.

<sup>167</sup>Section 19 of the NEMLA. The NEM:WA definitions will in future refer to the definitions of residue stockpile and residue deposit as defined in the MPRDA – s 18(b) of the NEMLA.

<sup>168</sup>The National Environmental Management: Waste Amendment Act 26 of 2014 (Waste Amendment Act) amended the definition of waste in s 1(i). A new waste classification regime has been introduced in terms whereof types of waste are no longer defined in the definitions section of the NEM:WA but listed and defined in schedule 3 of the NEM:WA as either hazardous or general waste. GN R921 in GG 37083 of 2013-11-29.

<sup>169</sup>Residue stockpiles and residue deposits together with wastes from mineral excavation, wastes from physical and chemical processing of metalliferous minerals, wastes from physical and chemical processing of non-metalliferous minerals and wastes from drilling muds and other drilling operations are all classified as hazardous wastes in Category A of Schedule 3.

<sup>170</sup>Regulation 4(2) of GN R921 in GG 37083 of 2013-11-29.

<sup>171</sup>Section 21 of the NEMLA inserting s 43(1A).

affairs, however, is able to issue regulations dealing with the management and control of residue stockpiles and deposits in these areas.<sup>172</sup>

It seems that section 43 of the MPRD Amendment Act holds historical polluters accountable for rehabilitation. 'Previous holders of old order rights' and 'previous owner of works that have ceased to exist' were included to be responsible to apply for a closure certificate in terms of section 43 of the MPRDA and will remain responsible for rehabilitation of the mine until a closure certificate is issued by the Minister.<sup>173</sup> Unfortunately the legislator did not include a clear definition of 'previous owner of works that has ceased to exist' in the MPRD Amendment Act. The MPRD Amendment Act only states that 'owner of works' has the same meaning as the definition of 'owner' in section 102 of the Mine Health and Safety Act 29 of 1996 (MHSA).<sup>174</sup> In terms of the MHSA 'owner' can be (a) a holder of a MPRDA authorisation; (b) a person who does not have a MPRDA authorisation, but undertakes activities that are defined in the MHSA as 'mine' and (c) as 'the last person who worked the mine or that person's successor in title.' If the definition of 'previous owner of works that has ceased to exist' in the MPRDA Amendment Act includes owners who owned and closed mines before the MA came into effect, many historical polluters, for example the polluters illustrated in the *Bareki* case, can be held accountable for rehabilitation.<sup>175</sup> De Beers with its MA prospecting permit could also have been held responsible for rehabilitation of the dumps if they had, for example, closed the mine before the MA came into effect. However, Burnell argues that the MPRD Amendment Act and NEM:WA as well as the Bill did not solve all the interpretations problems that exist of who would be regarded as a holder of an 'old order right'.<sup>176</sup> He argues that historically a mining right could only be granted over land and that a residue stockpile or dump was not regarded as land. In terms of the MPRDA a person could obtain a mining right over a residue deposit but such a right did not exist before 2004. Residue deposits created before 2004 could be mined without such a right. Burnell<sup>177</sup> states that the holders of 'old order rights' as defined in terms of the MPRDA can only obtain rights in residue deposits created after 7 June 2013. The amendment to the definition of 'land' may, however, change this position and bring all mine dumps, historical and present, under the working of the MPRDA.<sup>178</sup>

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<sup>172</sup>Section 24 of the NEMLA inserting s 69(1)(iA).

<sup>173</sup>Section 34(1).

<sup>174</sup>Section 1(q) of the MPRDAA.

<sup>175</sup>See 5.1.

<sup>176</sup>Burnell 'Residue stockpiles and deposits: the problem isn't solved by the Waste Act amendments' *The Times* (2014-07-18) 12.

<sup>177</sup>*Ibid.*

<sup>178</sup>*Ibid.*

The MPRD Amendment Act extends the duties and responsibilities of holders of mining rights before the issuing of closure certificates. Not only will the holder remain responsible for any environmental liabilities, pollution or ecological degradation, but he or she will also be responsible for the pumping and treatment of extraneous water, compliance to the conditions of environmental authorisations and the management and sustainable closure of the mine.<sup>179</sup> The 2013 Bill extends the liabilities of rights holders even further by providing that a rights holder will remain liable for environmental and associated damage caused by prospecting or mining operations, even after the Minister has issued it with a closure certificate.<sup>180</sup> This includes previous holders of old order rights and previous owners of works that has ceased to exist. The 2013 Bill also provides the Minister with authorisation to retain any portion of the financial provision for latent and residual environmental impacts which may become known in future for a period of 20 after issuing a closure certificate.<sup>181</sup>

## 7 Conclusion

For many years mines have caused pollution, but it was not always certain who would be responsible to rehabilitate the mines. The aim of this article was to determine the responsibility of historical mining right holders for rehabilitation. The facts in the *De Beers* case were used to illustrate the complexity of this problem. The court found that the MPRDA (as it was prior to subsequent amendments) does not regulate old order tailings. It means by implication that the rehabilitation measures of the MPRDA do not apply to the pre-2004 tailing dumps. This led to the question of what is the responsibility of other historical mining rights holders with regard to rehabilitation.

Before 2004 rehabilitation was regulated by the MWA and the MA. Although the MWA came into effect in 1956, rehabilitation only became a requirement in 1980 when rehabilitation regulations were promulgated. During the period 1970-1980 mines were only required to cover tailings with sludge or soil as instructed by the Inspector of Mines or the dumps had to be dealt with in a manner satisfactory to the Inspector of Mines. Regulation 5.10 did not require rehabilitation of dumps. When regulation 5.13.3 commenced in 1980, owners or managers of mines were required to rehabilitate the mining surface. The rehabilitation of tailings had to be done during mining operations and when the recovery of the mineral ceased as near as possible to the natural state of the

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<sup>179</sup>The liability to pump and treat extraneous water until a closure certificate is issued, might have been included as a reaction to the problems illustrated KOSH case with regard to extraneous water. See 5.2.

<sup>180</sup>Clause 30 amending s 43(1) MPRDA.

<sup>181</sup>Clause 30(e) substituting s 43(6).

surface and to the satisfaction of the Inspector of Mines. The MA imposed a duty on authorisation holders to rehabilitate tailings. Tailings had to be rehabilitated during the lifetime of the operations and after closure. Rehabilitation of the tailings had to be done according to the conditions stipulated in the EMP and to the satisfaction of the Regional Director. Post-2004 rehabilitation is regulated through the MPRDA. Tailings are included in the definition of 'residue stockpiles'. Although tailings are regarded as residue stockpiles that have to be rehabilitated in terms of the MPRDA, only holders of mining rights had to rehabilitate them.

The legislator aimed to correct the position by promulgating the MPRD Amendment Act. The MPRD Amendment Act, *inter alia*, amended the definitions of 'residue stockpile' and 'residue deposits' to include all mine dumps created under mining rights including those that existed under the old order mining rights.<sup>182</sup> The MPRD Amendment Act did not make provision for a transitional period for companies or individuals with old order tailings. When the MPRD Amendment Act came into operation all old order tailings became 'residue deposits' if the holder of an old order right did not apply for conversion of his or her right and they will have to start with rehabilitation of the tailings. The reason for this is the MPRDA states that if no conversion application is lodged in respect of an old order mining right, the old order right 'ceases to exist'<sup>183</sup> and a residue stockpile becomes a residue deposit upon expiry of an old order right. The MPRD Amendment Act extends the requirement to apply for a closure certificate to include 'previous holders of old order rights' and 'owners of previous works'. This is an excellent amendment, because it will now be possible to hold historic polluters liable for rehabilitation until a closure certificate is obtained. The only concern is that the legislator did not include a definition of 'previous owner of works that has ceased to exist', which open up the possibility of incorrect interpretation by the administrators of the Act as well as the courts.<sup>184</sup> The 2013 Bill amendments even take this further and extend liability of holders even after a closure certificate is issued.

All residue stockpiles and residue deposits will in future be dealt with as waste in terms of NEM:WA with the Minister of Mineral Resources as the decision-making body.<sup>185</sup> How this regime will pan out in future, is another question. The 2013 Bill proposes to include historic residue stockpiles under the ambit of the MPRDA. Owners of historic residue stockpiles will continue to have ownership for a period of two years from the date on which the 2013 Bill is promulgated and will have an exclusive right to apply for a mining right or mining

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<sup>182</sup>See 6.

<sup>183</sup>Item 7 of Sch II of the MPRDA.

<sup>184</sup>See 6.

<sup>185</sup>See 6.



permit during this period.<sup>186</sup> Should these owners decide not to apply for a mining right or mining permit within the 2 year period the custodianship shall revert back to the state.<sup>187</sup> The 2013 Bill is however silent on the rehabilitation liability of historic residue stockpiles should the current owner decide not to apply for a mining right or mining permit.

There is currently no definition of 'previous owner of works that has [*sic*] ceased to exist' in the MPRDA and it is important to include a definition to remove uncertainty and the risk of incorrect interpretation. A possible definition for 'previous owner of works that has [*sic*] ceased to exist' is, for example, 'a person or company who undertook activities with the aim to extract minerals in or under the earth, in water or in a residue stockpile or residue deposit including related activities, at a mine owned or leased between 1956-2004, with or without the necessary permissions, who closed, disposed, abandoned or liquidated the mine'. If the above-mentioned definition is used, numerous historical polluters will be forced to rehabilitate, because they will remain liable until the closure certificate is issued. The position of rehabilitation of mines prior to 1956 now only rests on an agreement and should also be contained in legislation. It is also recommended that historic residue stockpiles are included in section 43(1) to ensure that the current owner of a historic residue stockpile is liable to apply for a closure certificate should he or she decide not to apply for a mining right or mining permit.

Whether the numerous amendments will solve the rehabilitation problems that exist with historic holders of rights to residue deposits and residue stockpiles remain to be seen.

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<sup>186</sup>Section 42A(4).

<sup>187</sup>Section 42(8). Whether this section could be regarded as an act of expropriation or deprivation is a question for further research and falls without the scope of this article. See eg Badenhorst and Olivier (n 167) 329-343.