



HEALTHCARE & LIFE SCIENCES

Illegal Miners: The Mine Health and Safety Obligations of Mining Right Holders for Mines No Longer “Being Worked”

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1. The tragedy which occurred in Stilfontein earlier this year (“the Stilfontein tragedy”) has uncovered important legal questions concerning the obligations of mining right holders in circumstances where illegal miners are trapped in a mine which is no longer being worked but where no closure certificate has been issued.

2. The Stilfontein tragedy involved hundreds of illegal miners who unlawfully entered the shaft of a non-operational goldmine and became trapped whilst conducting illegal mining operations. It led to at least 78 deaths and necessitated an extraction operation that rescued more than 240 illegal miners. The rescue operation was conducted by Mine Rescue Services over the course of four days and cost millions of Rand. The question of who should carry these costs was vexed, with all government stakeholders denying financial liability. This sparked a debate within the industry about which parties bear statutory obligations in these circumstances.

3. Within the South African mining landscape, illegal mining continues to be a serious problem, and whilst the Stilfontein tragedy happened to catch the attention of the media, its facts are not unique. This notwithstanding, there is no case law dealing with what a mining right holder’s responsibilities are in such instances. However, earlier this year, the leading commentary on the Mine Health and Safety Act 29 of 1996 (“the MHSA”), Willem Le Roux’s *Mine Health and Safety Law*, updated the relevant portion of its chapter dealing with this aspect of the MHSA. This offers some guidance. Section 2(2) of the MHSA provides that –

*“The employer of every mine that is **not being worked**, but in respect of which a closure certificate [...] 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**”.*

4. At the outset, it is important to understand the meaning of the word “work” and the words “being worked”, given that the MHSA does not define either. This lacuna in the legislation, and the lack of authority on this point necessitate that we apply the rules of statutory interpretation to understand what the MHSA means when it employs these words – which must be interpreted in the context of the statute as a whole.

4.1. In section 102 of the MHSA, when used as a noun, the word “mine” is defined as –

“any borehole, or excavation [...] made for the purpose of searching for or winning a mineral, whether it is being worked or not ...”

4.2. In relation to a “mine”, the word “owner” is defined as “the last person **who worked the mine** or that person’s successor in title”.

4.3. The verb “work” must be read in conjunction with the word “owner” and the activities mentioned in paragraphs (a) and (b) of the word “mine”.

5. As an example of its deployment in the MHSA, the mere pumping of water without the inclusion of any other listed activity does not constitute the “working” of a “mine”.

6. Additionally, we can only determine the standard of care required of a mining right holder once a mine is classified as being worked or not being worked – given the vast difference between these two positions.

7. Section 2(1) of the MHSA provides that the employer of a mine that is being worked is under a duty to –

*“ensure as far **as reasonably practicable** that the mine is designed, constructed and equipped —*

(i) to provide conditions for safe operation and a healthy working environment; and

(ii) with a communication system and with electrical, mechanical and other equipment as necessary to achieve those conditions.”

8. In terms of the MHSA, the requirement that health and safety measures be taken “as far as reasonably practicable” typically includes the obligation on the part of the mining right holder to “maintain a healthy and safe mining environment”, “ensure an adequate supply of health and safety equipment” and “assess and respond to risk”. These obligations are extensive and have been amplified by means of regulations because a working mine requires such measures to prevent or mitigate the hazards caused by mining activities.

9. However, in respect of a mine that is not being worked, the standard of care is less stringent. The threshold is reduced from what is “reasonably practicable”, as required by section 2(1), to the standard of “reasonableness” referenced in section 2(2). “Reasonableness” simply describes the care that “can be expected of a reasonable person”. For a mine that is not being worked, this only requires that the mining right holder take ‘reasonable’ steps insofar as health and safety are concerned. The extent of these steps is determined with reference to the factual circumstances of each mine.

10. The difference between these provisions is demonstrated by the Mine Health and Safety Regulations (GNR.93 of 15 January 1997) (“the Regulations”). For example, Regulation 16.5 provides that where there are 100 or more people underground, the mine’s employer is required to “provide and maintain [...] mine rescue teams” which are “readily available”. A plain reading of this regulation reinforces the position that a non-operational mine in rehabilitation (which is not being worked) would not trigger the obligation in that it should not have any “number of persons [...] underground”, let alone the 100 required for the obligation to arise. The need to maintain a mine rescue team is exactly the kind of requirement that the employer of a mine which is “being worked” would incur, given the requirement that the employer be appropriately poised to “respond to risk”.

11. In conclusion, the extent of a mining right holder’s legal obligations becomes limited once a mine is no longer “being worked”. In such circumstances, the mining right holder is only required to absorb the costs associated with taking those steps that a reasonable person would to maintain the health and safety standards of the mine – and not to “ensure, as far as reasonably practicable” that the mine is maintained to the standards required to safely accommodate its employees. The application of this provision could not have been intended to extend to cover the costs associated with the extraction of hundreds of illegal miners who became trapped after unlawfully entering the shafts of a gold mine that had not been worked for more than a decade.

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