Bench Marks Foundation Annual Conference
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Theme: Mining Closures: the Burning Issue of our Times
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Mining closure conferences are a regular feature in some historic mining countries such as Australia, but have not yet surfaced here in any significant way. The Bench Marks Foundation intends to reverse this neglect and bring to focus mining closures which, as the theory goes, begin the day mining commences.

This area of work, mine closures, is thus critical for the people, the environment and wider societal benefit, especially in the time of climate change. It is a critical pillar in the mining cycle and the Bench Marks Foundation seeks to engage this process for many reasons; in particular:

- To provide context for a full and proper discussion on illegal mining and the related issues concerning the rights of artisanal mining as well as the failures of formal rights holders to comply with the law;
- To help us understand the legal, regulatory frameworks that govern mining closures and, particularly, the obligations to rehabilitate such closures; and
- To show that the neglect to regulate in favour of the environment, workers and the poor, - particularly those living in and around mining townships, shacks and towns - is an externalisation of costs, and thus a deprivation of basic human rights for these constituencies who have little or no voice in our current democratic dispensation. And have direct decision-making in operations in matters affecting them directly or indirectly.

Renewed Public Interest

The recent media frenzy around illegal mining was sparked by the rape of about eight women in what was initially assumed to be an abandoned mine dump in Krugersdorp, west of Johannesburg. Shamefully, it was only after the portfolio committee on mining and energy visited the area some two weeks later, that it was revealed that the mines were not abandoned. The committee reported that:

"*The mine was operated by Mintails South Africa under Mogale Gold's mining licence. However, operations were suspended in 2018 by the Department of Mineral Resources and Energy (DMRE) due to non-compliance with the approved mine work programme. According to the prescribed mine work programme, Mintails South Africa was required to mine and treat its own ore, but the company treated over 60% of ore from third parties.*
In 2015, the mine was issued with a notice for non-compliance with the financial provision for environmental liability. According to the DMRE, the mine has an environmental liability of more than R383 million and provided only R2.6 million financial provision by bank guarantee. The shortfall remains."

The fines are outstanding and, to our shame, the issues of rape remain unaddressed but the public debate on the challenges of illegal mining are at last being addressed. Some intelligent programmes have sought to highlight the debate by framing it as “ Illegal Mining: a threat to our democracy?”

Whether one agrees with it or not, it does provide a Segway (an opportunity) to discuss the critical issues at hand, which I will do below.

Mining in South Africa - Some undeniable facts:

- Mining came about through conquest and dispossession of the indigenous people.
- Since the “discovery” by the Europeans of diamonds in 1869 and of gold in 1886, the South African economy became the playground for imperial powers, in particular Britain. They used the country and its mineral resources to build a racialized capitalist economy for which, in the ensuing years, needed cheap labour. To obtain labour meant further disruptions and dislocations through use of law, violence and media of the indigenous peoples' ways of living.
- The notorious (male) migrant labour system began through sourcing cheap labour from neighbouring countries like Mozambique, Lesotho, Zimbabwe, Malawi and others. It was cheap and in abundant supply. According to The Journal of the South African Institute of Mining and Metallurgy, the employment of “cheap black labour” in the gold sector jumped from 14,000 in 1890 to 534,000 in 1986 (quoted by JP Cassey, 2019)
- Mining in South Africa has been a regional activity involving hundreds and thousands of workers from the sub continent. During the 1970s, hundreds and thousands of workers worked, got injured and died in

the mines. Or left to die (through illnesses like silicosis) , a slow and premature death, in their countries of origin.

- The role of the master (and servant conflict) in the mining sector helped to shape the development of the apartheid system through, in part, the use of cheap black labour and formation of racist laws which, interalia, denied trade union rights to black workers and unions whilst granting it to white unions, that kept the master in place. These legacies we continue to endure today.

Mining since 1994

It is with this background of over 150 years of racialised capitalist mining in South Africa that we explore the issue of illegal mining. The African National Congress led government has tried to utilise the "benefits" of mining by interalia seeking to change laws and policies as well as through the ill-fated Mining Charters reform ownership structures. During 2021, the Minister of Minerals and Energy resources sought to change black ownership of mining rights from 26 to 30%, which itself appears to have been in limbo or contested by the mining "majors" and their representatives - the Minerals Council.

The management of the mineral resources in terms of the constitution and the history of resistance in our country to racial monopoly of ownership of the mineral and other natural resources, power, knowledge and the democracy / political power has been tiring and long.

As a result, the dominant sentiment is that the leadership of the country has been unable to deal with regulating the mining sector in line with the public interest. The problem of illegal mining is one aspect that largely - but not entirely - raises its head at the end of mining. (We have heard that illegal mining by syndicates and gangs have also impinged on formal rights holders of mining).

The authorities, including Chapter 9 and 10 bodies, have been producing reams of paper that contain excellent policies, laws and recommendations which have become (remain) unheeded. These include:

1. Reports by the South African Human Rights Commission that tried to address these issues long before this crisis. See, for instance:
    1. Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa (released in February 2013): "The prevalence of "illegal mining" has been part of the South African mining landscape for many years and it has become a flourishing business, one that appears almost impossible to contain".
    2. Underlying Causes affecting Mining Communities (released in November 2018), which already informed us that the SAPS had said that they had established the "Priority Committee focusing on illegal mining". They also recommended that: "DMR must, together with relevant stakeholders,

develop a Regional Master Plan aimed at addressing environmental rehabilitation and the remediation of derelict and ownerless mines. The Plan should specifically refer to legacy issues such as acid mine drainage and illegal miners (colloquially known as zama-zamas), as well as sites with potential nuclear contamination and must include timelines and funding mechanisms." Finally, they concluded that: "The Commission accordingly finds that a considerable gap exists in the mining licence application process, where mining companies, the DMR and the DRDLR appear to systematically disregard key pieces of legislation, particularly the Municipal Systems Act and SPLUMA. The Commission further finds that there is an immediate need for municipalities to be consulted throughout the licence application process to enable them to provide for integrated and sustainable land use systems."

2. The DMRE belatedly released a government gazette *Artisanal and Small-Scale Mining Policy*. It included what they called the "GOVERNMENTS POLICY STANCE ON ILLEGAL MINING", which estimated that over R70 billion per annum in revenue is lost through the smuggling of this commodity and similar negative impacts are also evident in other sectors, such as chrome, coal and diamonds. Communities are directly affected by the scourge of illegal mining activities in terms of environmental degradation, health risks, and gang violence emanating from rival illegal mining gangs and syndicates.

   In various other interventions, they point out that syndicates are actively drawing on the skills of former mine workers from the subregion and, not surprisingly, it is reported that workers from Lesotho, Zimbabwe and others rank highly amongst the illegal mining activity.

   The Bench Marks Foundation, together with LRC and ILRIG made a submission on the regularisation of artisanal mining which is distinct from illegal mining. It can be found on the website: ARTISANAL MINING SUBMISSIONS WITH LRC, ILRIG

3. Other Civil society groups working on this sphere of work including Ilrig, LRC, Groundworks, MACUA-WAMUA, NAAM, Cals, FSE, CER have for years campaigned for transparency and accountability in the management of the Mine Rehabiliation Funds. The Centre for Environmental Rights' (CER's) most recent report *Full Disclosure* report presents and "analyses disclosures by eleven listed mining companies about their financial provision for environmental rehabilitation, i.e. the money that mining companies must set aside to rehabilitate the environmental damage they cause. They recommended that "neither the law, nor the accounting standards governing company disclosures, ensure the necessary transparency and accountability about financial provision for environmental rehabilitation. The information disclosed by mining companies, about the costs of rehabilitation of the environmental damage that they cause, and about the money that they are obliged to set aside to fix it, is inconsistent, unclear, in some cases unreliable,

and not comparable between companies. It is therefore impossible for shareholders or taxpayers to hold companies or regulators to account".

4. The Auditor General in a FOLLOW-UP PERFORMANCE AUDIT On the rehabilitation of derelict and ownerless mines noted that there are over 6 000 ownerless and derelict mines which become the hunting ground for criminality and the cause of tension in many communities. The mines, unclosed mines, are a problem worsened by the massive intrusion of unplanned and unregulated mining. Furthermore, they invite those who seek to harm the national, public and collective interest. But where does the problem start?

In the above quoted report, the Auditor General put blame squarely on the department thus: The Department of Mineral Resources and Energy (DMRE) needs to speed up its management of rehabilitating South Africa's abandoned mines, as they "pose serious health, safety and environmental hazards for nearby communities," Auditor-General (AG) Tsakani Maluleke warned on Thursday, 31 March 2022. The majority of the 6 100 D&O mines closed down before the Mineral and Petroleum Resources Development Act of 2002 that compelled the holder to fully rehabilitate mines before a closure certificate is issued by the department.

In addition to the 6 100 mines, the department is also reporting on and managing 1 170 mine openings (referred to as holings), of which 507 were closed by 31 March 2021.

In the 2009 audit, the AGSA found that the department's rehabilitation efforts had not effectively addressed the environmental and social impact of unrehabilitated abandoned mines, and that the department did not have an approved national strategy or policies and procedures to clearly link rehabilitation objectives to set time frames, priorities and responsibilities.

In this latest audit, the auditors found that the department's management of the 6 100 abandoned mines and 1 170 mine openings was ineffective and did not address the environmental, social and health impact of unrehabilitated mines within a set time frame.

In its 2009 audit, the AGSA found that the department did not have an integrated information system to record and report on the status of abandoned mines. As a result of the department's inadequate capacity, systems and funds, the D&O mines database had not been regularly updated.

Often questions are directed at the South African Police Service (SAPS): what are they doing? These questions and others lay at the door of law enforcement agencies, such as: who are the syndicates and who the ultimate buyers are? It has been reported that the "stolen gold" finds its way to the United Arab Emirates (UAE), India, and possibly China. News reports, in particular the eNCA one, suggest that more than "34 tons of gold arrived from South Africa between 2012 and 2016 this gold was likely exported illegally after being processed by small refineries in Gauteng that are at least 100 small refineries in Gauteng alone"

Setting up a specialised unit to deal with illegal mining is one thing but, as the Lt General Ernest Mawela said in the media, the failure lay with mining corporations who have failed to comply with their licensing obligations. In an interview with the Bench Marks Foundation, the SAPS informed us that they have formed a working group that involved the political office bearers and the six police stations where mining is taking place in the West rand, including traffic, crime intelligence offices. These meetings will take place monthly: "the SAPS, the District Commissioner's office will be the secretariat, SAPS will be Chairperson and DMRE will be Deputy Chairperson. Meetings will be held once a month, the venue for meetings will rotate amongst all role players". This is a place where CSOs working with mines must be present as well.

Conclusion

The failure to keep corporations accountable is negligence on the part of the authorities. This failure and a weakened regulatory framework and or weak enforcement by particularly the DMRE suggests maladministration, the lack of political will to prosecute the powerful or simply complicity of government with the corporations in permitting them to externalise their costs onto the poor, the environment and society at large. There are many questions that arise and these are worth exploring:

- Why have mine not been closed as per legal requirements? What about the transparent and accountable rehabilitation of mine funds?
- Who regulates mining closures in the public interest? Why have the concerns of the SAHRC and the AGSA been ignored? Where is parliamentary oversight in all this work?

Additional Questions from the Various Reports:

1. Questions asked by the SAHRC in 2013 remain relevant:

MINE CLOSURES: Section 24: what can and is being done by the government about mines who cease their operations without closure plans and without SLPs? • The holder of a right is at all times accountable for the environmental management of the site but, in events where the right lapses, the holder must apply for a closure certificate in terms of section 43 of the MPRDA. If an offence is committed, there are penalties prescribed.

THE SAHRC (2018): *The Commission accordingly finds that a considerable gap exists in the mining licence application process, where mining companies, the DMR and the DRDLR appear to systematically disregard key pieces of legislation, particularly the Municipal Systems Act and SPLUMA. The Commission further finds that there is an immediate need for municipalities to be consulted throughout the licence application process to enable them to provide for integrated and sustainable land use systems.*

The Commission finds that it is unacceptable for mining companies to not provide detailed and sufficient information to enable communities and local governments to clearly understand how land can be used post-closure.

The Commission further finds that the DMR has not taken adequate steps to secure financial provision for rehabilitating damage to the environment and water resources and there is an immediate need for all EIAs and EMPs to clearly detail land quality and potential post-closure land use.

Licences should not be granted where long-term, sustainable land use cannot be guaranteed.

The Commission finds that there is an immediate need for legislative provisioning for standardised and realistic closure costing, concurrent rehabilitation, partial closure as well as the establishment of a trust account to cater for rehabilitation-related liability.

Final recommendation on REHABILITATION AND CLOSURE: *The DMR must, together with relevant stakeholders, develop a Regional Master Plan aimed at addressing environmental rehabilitation and the remediation of derelict and ownerless mines. The Plan should specifically refer to legacy issues such as acid mine drainage and illegal miners (colloquially known as zama-zamas), as well as sites with potential nuclear contamination and must include timelines and funding mechanisms.*

The National Environmental Management: Air Quality Act, 39 of 2004 (NEMAQA) was promulgated to provide for national norms and standards regulating air quality monitoring, management and control. NEMAQA is founded on the need to prevent pollution and ecological degradation, and to ensure the protection of the right to an environment that is not harmful to health and well-being. Furthermore, section 32 of NEMAQA requires the Minister or MEC to prescribe measures for the control of dust in specified places or areas; steps that must be taken to prevent nuisance by dust; or other measures aimed at the control of dust…. It noted that: *There is uncertainty around the applicability of NEMAQA to mining activities, as some mining companies do not apply for, and implement, atmospheric emission licences. A number of municipalities do not comply with the provisions of NEMAQA, as IDPs frequently do not include an air quality management plan. (p46)*

The National Nuclear Regulator (NNR) exercises regulatory control over mining and mineral processing facilities handling material containing naturally occurring radioactive properties. In line with the National Nuclear Regulator Act, 47 of 1999, companies must obtain a certificate of registration or exemption when engaging in any action capable of causing nuclear damage. The certificate of registration contains a number of conditions that must be complied with. The NNR conducts regular inspections and monitors compliance with these conditions and failure to comply constitutes an offence. To date, there have been no instances that have led to the revocation of a licence.

SLPs: In terms of the MPRDA Regulations, all mining companies are required to submit an SLP as part of their application for a mining licence. The overall impetus for the SLP component of the regulatory regime is the desire to address historical socio-economic imbalances by driving socio-economic transformation in some of the most underdeveloped and marginalised communities in the country.

2. The AG's Recommendations:

- *Finalise and adopt the National Mine Closure Strategy.*
- *Closure …will present …and an implementation plan that includes opportunities for different end-land use.*
- *Determine the government's actual liability in managing the D&O mines. The mines on the D&O mines database must be validated for the department to compile and cost a comprehensive D&O mines implementation plan based on the determined liability of the D&O mines.*
- *Oversight and intergovernmental coordination committees should be strengthened to improve coordination between different role-players and to track and monitor the swift implementation of the D&O mines programme.*

Related to this, the SAHRC wrote in their report: *Rehabilitation and closure The Commission finds that it is unacceptable for mining companies to not provide detailed and sufficient information to enable communities and local governments to clearly understand how land can be used post-closure. The Commission further finds that the DMR has not taken adequate steps to secure financial provision for rehabilitating damage to the environment and water resources and there is an immediate need for all Environmental Impact Assessments (EIAs) and Environmental Management Programmes (EMPs) to clearly detail land quality and potential postclosure land use. Licences sh. Licences should not be granted where long-term, sustainable land use cannot be guaranteed. The Commission finds that there is an immediate need for legislative provisioning for standardised and realistic closure costing, concurrent rehabilitation, partial closure as well as the establishment of a "superfund" to cater for rehabilitation-related liability.*

3. How do we address the recommendations made by the Centre for Environmental Rights? These demand that *changes to financial reporting and disclosure, as well as the legal framework, are aimed at:*

- *achieving transparency, consistency, clarity, and comparability in company disclosures; and*
- *supporting a legal system that ensures that mining companies fix and pay for the environmental damage they cause.*