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**LAWYERS FOR  
HUMAN RIGHTS**

# **Blyvooruitzicht Mine Village: the human toll of state and corporate abdication of responsibility in South Africa**



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# I. Introduction



Abandoned Mine building near Mine Shaft 4.

For over seven decades, South Africa's Blyvooruitzicht Gold Mine ("the Mine") operated as one of the world's largest and most profitable mining concerns, yielding some one million kilograms of precious metals and other commodities over its life. The Blyvooruitzicht Mine Village (the "Village") grew up around this operation: a thriving, relatively integrated community of Mine employees, their families, schools, health clinics, churches, playgrounds and meeting spaces. As in many mining towns in South Africa, the Mine provided access to all basic services, including water, sanitation, rubbish collection, and security, despite that these are the legal responsibility of the state. In August 2013, however, the Mine abruptly initiated insolvency proceedings. Overnight, operations stopped, thousands lost their jobs, and environmental mitigation measures ceased entirely. Residents' continued access to basic services and their homes was threatened, and an adequate standard of living for the area collapsed.

Today, **the Village of some 6 000 exists on the edge of the defunct Mine.** Residents battle health concerns associated with exposure to the unrehabilitated shafts and tailings dams. They fight for continued access to water and sanitation. They face continual uncertainty about their ability to remain in their homes. Grinding poverty is rampant. Industry and government stakeholders acknowledge that the Village is in crisis, but residents' ability to obtain relevant information and participate in directing their futures remains nearly impossible.

The catastrophe at Blyvooruitzicht is the result of a toxic cocktail involving private sector abdication of responsibility, an inadequate legislative framework and state enforcement effort, and an underestimation on the part of all role players in anticipating the scope and severity of the impacts of a sudden liquidation of a major mining operation. The surrounding community has borne the brunt of this systemic failure.

The plight of the Village residents may also be a harbinger of a much greater and more widespread crisis to come, as the country's largest gold and platinum mining districts enter the twilight of their multi-decade lives. If the experience of these individuals is a template for the scores of other South African mining communities, the next decade will give rise to a crisis on a much wider scale. More broadly, the Blyvooruitzicht story is an important warning to mining-based economies across the continent.

This report was researched and written by Lawyers for Human Rights (an FIDH member organization),

together with the Blyvooruitzicht Village residents and with the support of FIDH. It focuses on the description and analysis of the broad impacts on the Village of the collapse of the Mine, and in particular on the residents' rights to development, to an environment not harmful to their health or well-being, and to adequate housing.

## **A. Methodology**

This report combines desk and field research, as well as expert opinion, and reflects a methodology that employs human rights as the analytical reference point to evaluate the impacts of investment projects. The process centres on the participation of the affected community.<sup>1</sup> The research team gathered data from door-to-door interviews with some 300 households during May and June 2016, and conducted targeted, more substantive discussions as warranted from October to December 2016. The Blyvooruitzicht Residents Committee ("the Committee"), a locally-elected body that works to address the numerous challenges facing residents today, worked closely with the research team to facilitate interviews, and provided logistical support, interpretation and important background information.

Qualitative interviews were then sought with key stakeholders such as company representatives, the Mine's liquidators, industry bodies, local and national government authorities, civil society organizations, and the South African Human Rights Commission. This process of engagement was integral to the analysis, although attempts to engage local government and the Mine's previous owner/operators were unsuccessful.<sup>2</sup> All stakeholders were provided with the opportunity to comment on a draft version of this report prior to publication.<sup>3</sup>

Analysis of the alleged human rights violations was then undertaken by contrasting the information reported by Village residents and other stakeholders with relevant legal and normative frameworks, including the international system of human rights, the African Charter on Human and Peoples' Rights and associated legal analyses, the South African Constitution, and applicable national legislation and jurisprudence. The report takes account of the responsibility of all public and private actors involved in the provisional liquidation of the Mine and its aftermath. It uses as guiding principles the obligation of the state to respect, protect, and fulfill human rights and the responsibility of private actors to at least respect human rights independently of any state duty.

## **B. Acknowledgements**

Lawyers for Human Rights and FIDH express their gratitude to the many Village residents who shared their deeply personal, and often painful experiences with the research team during interviews for this report.

A number of experts also made important contributions. Dr. Rens Verburg, a U.S.-based geochemist with expertise in mine closure, provided substantive input on the likely implications of the failure to rehabilitate the Mine. Scientific Aquatic Services and Airshed Planning Professionals provided water and air quality assessments, respectively. Mariette Liefferink, CEO of the Federation for a Sustainable

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1. The research team principally relied, with some modification, on a tool used for the evaluation of human rights impacts called "Getting it Right: A Step-by-Step Guide to Assessing the Impact of Foreign Investment on Human Rights" and developed by Rights & Democracy, a Canadian non-governmental organization.

2. The municipality in whose jurisdiction the Village exists, Merafong City Local, did not respond to the request for an interview. However, it must be noted that at that time, Lawyers for Human Rights represented the Village in a case against the Municipality and other spheres of government in its quest for continued access to water and adequate sanitation. The case has since been adjudicated and the Village leadership is hopeful that a more productive working relationship with local government may be established. With respect to the Mine's previous owner/operators, Village Main Reef responded to the research team's request for a meeting by stating in an email dated 12 July 2016 that the team should "direct all correspondence to the liquidator." DRDGold Limited initially agreed to a meeting on 4 August 2016 with the research team, but canceled the engagement on 2 August 2016. The research team then provided DRDGold Limited with written questions, but was unable to obtain answers to them despite four follow-up emails.

3. Stakeholders were provided with a copy of the draft report on 6 and 7 December 2016, respectively.

Environment, facilitated tours of the mine site, and generously shared copious background information on the environmental challenges facing the Village today. Advocate Mpilo Sikhakhane provided detailed legal analysis of the intersection between insolvency law and the environmental obligations of mining concerns. Lawyers for Human Rights' Louise Du Plessis reviewed the housing segments of the report. Melanie Murcott, Senior Lecturer in the Faculty of Law, University of Pretoria, provided an invaluable critique of the report in full.

Finally, Priscilla Lekalake, Mohube Makgaretsa, Tselane Makhetha, and Tebogo Mohaswa assisted the research team throughout the interview process, skillfully and sensitively interpreting in relevant local languages and helping to capture data in the aftermath.

### **C. Structure of the Report**

This report is divided into three subsequent sections.

Section II ("General Context") provides the historical context of gold mining in South Africa, as well as a detailed history of the Mine and Village, including a basic timeline of past ownership.

Section III ("Rights, Findings, and Responsibility") provides a legal and normative overview of the three key rights assessed in the course of this study, findings in respect of their violation, and identifies stakeholders responsible for those negative impacts. Thus:

- **Section III (A)** considers the **right to development**;
- **Section III (B)** considers the **right to an environment not harmful to health or well-being** and;
- **Section III (C)** considers the **right to adequate housing**.

For clarity, the report therefore assesses each of these rights separately. There can be no question, however, that they are closely inter-related. For example, fulfilment of the right to an environment not harmful to health or well-being facilitates a right development, and the latter must include access to adequate housing. Similarly, although this study considers in detail the impact of the initiation of insolvency proceedings on these three key rights, other rights have been infringed in the course of their violation and these impacts are likewise identified and discussed within Sections III.A – III.C. For example, the right to information and participation is critical to the realization of each of these socio-economic rights; an assessment of the Village's limited access to information and participation with respect to the environment and housing is thus included within these respective sections. Similarly, the right to sufficient water and sanitation is integral to the fulfilment of the right to development and is facilitated by the fulfilment of the right to an environment not harmful to health or well-being, and thus is discussed within these sections as well.

Section IV ("Conclusion and Recommendations") includes a conclusion to the report and recommendations to address the identified human rights impacts. The recommendations are divided into two sections so as to offer advice on both remedying the particular situation in the Village and in the context of insolvency and mine closure in South Africa and the region more generally.

## II. General Context

### A. History of Gold Mining in South Africa

The exploitation of gold, perhaps more than any other single factor, has shaped South Africa's natural landscape, its socio-political history, and its economic trajectory. Gold's discovery in the Witwatersrand area of South Africa marked a turning point in the country's history – transforming South Africa from an agricultural society to a mining and metals powerhouse, spawning the creation of a mammoth migratory labour system, and confirming South Africa's place as one of Africa's key economic drivers. While the gold mining industry's contributions to South Africa's development are therefore unparalleled, these have come at a significant price. The environmental and social impacts of the industry, including its early discriminatory labour practices and close ties with the apartheid regime, took a heavy toll on marginalised communities. These effects remain evident today, despite the South African government's post-apartheid commitment to a human rights-based legal framework, anchored by the country's 1996 Constitution and certain international treaties.

#### a. Early days

The advent of gold mining in South Africa predated the arrival of white settlers in the 19<sup>th</sup> century, but the mid-1800s ushered in an era of frantic exploration and small-scale mining operations that persisted until the last quarter of that century. In 1874, "payable gold" was discovered in the Witwatersrand Basin, located in what is now the Gauteng Province and home to the Blyvooruitzicht Gold Mine, amongst many others. A decade later, the Witwatersrand Goldfield and the mining village of Johannesburg were officially proclaimed. The world's most lucrative gold mining industry was born.<sup>4</sup>



Blyvooruitzicht Mine Shaft 4 complex.

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4. Jade Davenport *Digging Deep: A History of Mining in South Africa* Kindle e-book edition (2013) 2804.

This period in South Africa also broadly coincided with a shift in global monetary policy, out of which emerged the “gold standard” – a system by which the value of domestic currencies was defined in terms of the fixed weight of gold. This created a sudden demand for substantial new gold resources that could be mined consistently over a long period.<sup>5</sup> The role that South African mining played in supporting the new monetary system cannot be understated; just over a decade after discovery of the metal, the Witwatersrand Basin was supplying close to a quarter of the global economy’s newly mined gold.<sup>6</sup>

However, given the geological nature of the gold reef in the Witwatersrand Basin, which contains thin veins of metal running deep into the earth, it became quickly apparent that the new industry would require huge numbers of unskilled workers in order to meet this demand. The resultant labour model, which would become the unseemly hallmark of the industry to modern times, was based on groups of black manual labourers overseen by a coterie of white supervisors.<sup>7</sup> It relied on the recruitment of young migrants to work for “the absolute minimum wage while being forced to live within ethnically segregated compounds on the mine properties, far away from the white residential areas.”<sup>8</sup> This system enabled the mine managers to exert maximum control over their employees.<sup>9</sup>

## **b. Gold mining and the apartheid regime**

The mining industry therefore both helped lay the foundation for and was found to be a primary beneficiary of, the country’s apartheid regime. The South African Truth and Reconciliation Commission (“TRC”) determined that mining houses “had a significant formative impact on the apartheid political economy,”<sup>10</sup> and worked at “influencing legislation that forced black workers into the wage system; promoting state-endorsed monopolistic practices; [and] exploiting black labour.”<sup>11</sup> The TRC identified the mining industry as having played a central role in designing and implementing the era’s oppressive labour policies: “rather than relying simply on the forces of supply and demand, the mining industry harnessed the services of the state to shape labour supply conditions to their advantage.”<sup>12</sup> Although mining industry profits declined in the final years of the regime primarily due to a falling gold price and the need to mine at deeper levels, there can be no question that the industry peaked under the apartheid government.<sup>13</sup>

The environmental implications of the state’s reliance on mineral income during this period were also considerable.<sup>14</sup> The industry’s profits were essential to the government’s ability to maintain apartheid in the face of international penalties and stagnating domestic growth, the combination of which strained the country’s economy to the breaking point. As a result, government allowed mines to “ignore common safety and pollution precautions.”<sup>15</sup> The industry was effectively exempt from complying

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5. Ibid at 5333.

6. Ibid at 5348; see also Anthony Turton ‘When Gold Mining Ends – an Environmental Catastrophe for Johannesburg?’ (2015) *New South African Review* 5, 1 (noting that 40% of gold produced on the entire planet in all of recorded history comes from the Witwatersrand Goldfields.).

7. Davenport, *Digging Deep*, 5398.

8. Ibid at 5406. As would remain the case to the present day, a significant portion of the workforce came from what would become Mozambique, Botswana, and Lesotho, as well as Swaziland and the Eastern Cape of South Africa. See also Harvard, International Human Rights Clinic ‘The Cost of Gold: Environmental, Health, and Human Rights Consequences of Gold Mining in South Africa’s West and Central Rand’ (2016) 15, available at <http://hrp.law.harvard.edu/wp-content/uploads/2016/11/The-Cost-of-Gold-Full-Report-Final.pdf> accessed on 12 January 2017.

9. Davenport, *Digging Deep*, 5406.

10. Archbishop Desmond Tutu *Truth and Reconciliation Commission of South Africa Report*: volume 4 (1998) 33, available at <http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf>, accessed on 1 December 2016.

11. B Ibhawoh ‘Rethinking Corporate Apologies: Business and Apartheid Victimization in South Africa’ in Mark Gibney (ed) *The Age of Apology: Facing up to the Past* (2008) 277.

12. Archbishop Tutu *Truth and Reconciliation Commission Report*, volume 4 at 33; see also Harvard, *The Cost of Gold*, 15.

13. Davenport, *Digging Deep*, 345.

14. Tracy Humby ‘Environmental Justice and Human Rights on the Mining Wastelands of the Witwatersrand Gold Fields’ (2013) Volume 43 *Revue générale de droit*, 71 (noting that “South Africa has a long and shameful history of environmental injustices interwoven with the abuses of colonialism, apartheid, capitalism and patriarchy.”).

15. Worldwatch Institute *Apartheid Devastating South African Environment* available at <http://www.worldwatch.org/apartheid-devastating-south-african-environment>, accessed on 1 December 2016.

with environmental standards, and relieved of its obligation to monitor or report on the environmental impact of its operations.<sup>16</sup> The environmental cost of mining – from polluted watercourses to entirely unrehabilitated mine dumps – fell disproportionately onto marginalised black communities, whose townships and settlements were often downwind and downstream from mining operations.<sup>17</sup> Evidence of this environmental abuse remains visible today.<sup>18</sup>

### c. Post-apartheid – present: an industry under pressure

In the aftermath of apartheid, a number of imperatives mandated the creation of a new legal framework reflecting a commitment to remedying the historical ills of the minerals sector. The TRC's findings regarding the mining industry and the need to further the aims of the country's 1996 Constitution, which commits the state to respecting, promoting, and fulfilling fundamental human rights, prompted some of this transformation.<sup>19</sup> South Africa also signed or ratified a number of international human rights conventions, whose obligations are reflected in domestic law and considered by courts in interpreting constitutional rights.<sup>20</sup>

Environmental legislation governing mining and mandating rehabilitation was therefore passed and effected. Policies and laws were implemented affirming the need to promote upliftment of mining-affected communities and expand opportunities for historically disadvantaged persons to benefit from mineral resources.<sup>21</sup> A "Broad-Based Socio-Economic Empowerment Charter" setting specific targets for mining companies in order to achieve these aims was published.<sup>22</sup> Community consultation and public participation processes are now required of mining companies prior to initiating projects.<sup>23</sup> Robust access to information and administrative justice processes have been established in law.<sup>24</sup> Together, these laws and initiatives have laid the foundation for the modern regulatory framework in which South Africa's gold explorers and operators exist today.

Despite its long history, the Witwatersrand Basin is, from a geological perspective, still "truly an extraordinary and unique phenomenon."<sup>25</sup> It remains the world's largest gold resource, from which

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16. 'Study Says Apartheid Hurts the Environment' *The New York Times* 13 May 1990, available at <http://www.nytimes.com/1990/05/13/world/study-says-apartheid-hurts-the-environment.html> accessed on 1 December 2016; see also Alan Durning 'Apartheid's Environmental Toll' (1990) 15, available at <http://www.rci.rutgers.edu/~hallman/PDF/Apartheid2.pdf> accessed on 1 December 2016.

17. Durning 'Apartheid's Environmental Toll' 15.

18. See Humby, 'Environmental Justice and Human Rights on the Mining Wastelands of the Witwatersrand Gold Fields' 71 – 72. See also *Federation for a Sustainable Environment and Another v Minister of Water Affairs and Others*, unreported decision case no. 35672/12 (considering pollution of the town of Carolina's drinking water supply by acid mine water from the surrounding coal mines); *Harmony Gold Mining Co Ltd v Regional Director: Free State, Department of Water Affairs and Forestry and 1 Other* (2006) SCA 65 (issuing a directive, in terms of s 19(3) of the National Water Act 36 of 1998, requiring the companies to take anti-pollution measures in respect of pollution on their land despite no longer owning it).

19. The Preamble to the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as "the Constitution") states that its intention is to "[h]eal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights." The Constitution's Bill of Rights safeguards both civil and political but also socio-economic rights.

20. E.g., the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Economic, Social and Cultural Rights.

21. Preamble of the Mineral and Petroleum Resources Development Act 28 of 2002 (hereinafter referred to as the "MPRDA"); s 2(d) of the MPRDA.

22. Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (2004). A new draft Mining Charter containing more stringent targets for mining corporates was proposed in April 2016 and is currently under review.

23. Regulations 39 – 44 of the Environmental Impact Assessment Regulations, 2014 (hereinafter referred to as "EIA regulations") in terms of ss 24(5) and 44 of the National Environmental Management Act, 1998 (hereinafter referred to as "NEMA"); Section 10 of the MPRDA; Regulation 3 of the MPRDA regulations in terms of s 107 of the MPRDA.

24. Section 32 of the Constitution; Promotion of Access to Information Act 2 of 2000 (hereinafter referred to as "PAIA"); see also s 41(6)(a) of the EIA Regulations which states that when complying with the EIA regulations, "the person conducting the public participation process must ensure that - (a) information containing all relevant facts in respect of the application or proposed application is made available to potential interested and affected parties"; see further s 5 of the Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as "PAJA").

25. Davenport, *Digging Deep*, chapter 8.

more than 2 billion ounces of gold have to date been extracted.<sup>26</sup> South Africa's gold mining industry is, however, one in sharp decline; at current gold prices, approximately half of its production base is unprofitable, and newly-mined gold from South Africa accounts for only 5% of worldwide supply.<sup>27</sup> Over the past decade, the industry's contribution to GDP has reduced significantly, and employment in the sector has likewise declined steadily.<sup>28</sup> Many of the country's gold mines are therefore expected to close over the next decade, as labour disputes, declining ore grades and rising costs increasingly make deep-level underground mining unprofitable.<sup>29</sup>

South Africa's regulatory system governing mine closure from an environmental perspective but also with regard to broader socio-economic obligations may allow mining-affected communities to survive and even flourish, if properly enforced. Nevertheless, gaps exist. Initiation of insolvency proceedings, for example, may offer a way for mines to cease operation without properly discharging these obligations.<sup>30</sup> Reports further suggest that there are currently some 6 000 "derelict and ownerless" mines in South Africa – many times the number of operational mines in the country – which have never been rehabilitated; previous owners have simply "locked the gate and walked away."<sup>31</sup> In the current economic climate, this manner of ceasing operation risks becoming more common, leaving affected communities with little recourse. The need for robust regulation and oversight of the last phase of the mining cycle has therefore become critical, as events in the Village attest.

## B. History of Blyvooruitzicht Gold Mine and Mine Village

### a. 1937 – August 2013

Blyvooruitzicht Gold Mining Company Ltd ("BGMC") was incorporated and registered as an independent company in South Africa on 10 June 1937. BGMC's primary asset, the Mine is located on "the richest gold-bearing reef ever discovered" on the north-western rim of the Witwatersrand Basin, approximately 80 kilometres outside of Johannesburg.<sup>32</sup> Technical challenges associated with sinking a deep-level mine shaft initially delayed production until 1942, after which the Mine operated continuously until 2013.<sup>33</sup> At various times over the course of its operational life, the Mine was heralded as "the richest gold mine in the world,"<sup>34</sup> nearly "one hundred percent payable,"<sup>35</sup> and a source of "confidence and pride."<sup>36</sup> Dividends of 100 percent or more were purportedly paid out for five straight years.<sup>37</sup> The Mine ultimately grew to comprise both underground and surface reclamation operations, a metallurgical plant, multiple tailings facilities and associated infrastructure, as well as the operations of the nearby Doornfontein

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26. Chamber of Mines website available at <http://www.chamberofmines.org.za/sa-mining/gold> accessed on 1 December 2016.

27. Ibid.

28. Ibid.

29. 'South Africa's Gold Mines Face Uncertain Future' *The Wall Street Journal* 1 September 2015, available at <http://www.wsj.com/articles/south-africas-gold-mines-face-uncertain-future-1441113689> accessed on 1 December 2016.

30. Jana Marais 'Lessons from Blyvoor's demise' *Miningmx* 6 August 2014 available at <http://www.miningmx.com/special-reports/mining-yearbook/mining-yearbook-2015/10948-lessons-from-blyvoor-s-demise/> accessed on 1 December 2016.

31. David Oliveira 'Mine closure, rehabilitation getting more attention from regulators' *Mining Weekly* 27 May 2016 available at <http://www.miningweekly.com/print-version/mining-industry-resistant-to-mine-closure-and-rehabilitation-2016-05-27> accessed on 1 December 2016. See also Kerry Bobbins 'Acid Mine Drainage and its Governance in the Gauteng City-Region' (2015) 12, 18.

32. Davenport, *Digging Deep*, 6031.

33. Ibid. Davenport notes that a key challenge for operators in the area was the complexity associated with sinking the shafts through multiple pockets – or reservoirs – of underground water.

34. A.P Cartwright *The Gold Miners* (1962) 319.

35. Humby 'Facilitating dereliction?' 11.

36. DRDGold Blyvooruitzicht Gold Mine Media Day Presentation (22 January 2004) at 37 available at [www.drd.co.za/investors-and-media/presentations/2004/jan\\_21.pdf](http://www.drd.co.za/investors-and-media/presentations/2004/jan_21.pdf) accessed on 1 December 2016.

37. Kevin Crowley 'Goldrich Faces Fraud Allegations as NUM Draws Aurora Parallel' *Bloomberg* 19 March 2014 available at <http://www.bloomberg.com/news/articles/2014-03-19/goldrich-faces-fraud-allegations-from-auditor-at-blyvoor-mine> accessed on 1 December 2016.

Mine.<sup>38</sup> The Mine is estimated to have yielded a million kilograms of gold, silver, uranium and other commodities during its life.<sup>39</sup>

Over this period, BGMC housed the majority of its employees in company-owned homes and hostels within the Village, where residents remain today.<sup>40</sup> A two-tier, racially divided housing system gradually gave way in the 1990s, when many black mineworkers and, in some instances, their families, were integrated into the Village, which had been traditionally reserved for white employees.<sup>41</sup> BGMC built and maintained community meeting halls, sports fields, a golf course and other recreational facilities. Schools, a medical clinic, and multiple churches sprung up on the property. The Mine also provided all basic services to its Village residents and employees, from whose paychecks a nominal monthly fee was deducted in exchange for access to running water, sanitation, electricity, and rubbish collection – essentially, all of the services that should otherwise have been provided by local government. Private security, rather than the state police force, kept crime to a minimum.

In September 1997, a publicly-listed South African gold company, DRD Gold Limited (“DRD”), acquired the entire share capital of BGMC and took over day-to-day management of the Mine.<sup>42</sup> DRD initiated various projects to increase the Mine’s profitability and extend its duration, starting in 2007 that the planned life of the operation was at least another twenty years – until 2027.<sup>43</sup> In 2005, black economic empowerment company Khumo Bathong Holdings (Pty) Limited agreed to acquire a stake in the Mine, but DRD, as majority shareholder, nevertheless continued to operate it.<sup>44</sup> The BGMC board of directors likewise was primarily composed of DRD officers and directors throughout the period of DRD ownership.<sup>45</sup>

DRD regularly reported on the Mine to DRD shareholders<sup>46</sup> and South African regulatory authorities, including submitting to the Department of Mineral Resources (“DMR”) on behalf of BGMC an Environmental Management Programme (“EMP”) for the Mine in 2001 and again in 2007 as it sought to update the BGMC mining right under the terms of the new mining legislation.<sup>47</sup> The 2007 EMP

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38. A tailings facility is used to store byproducts of mining operations after separating out the economic ore. Tailings themselves are a mix of finely ground rock and process effluents, which, unless properly managed are easily blown off the TSF to settle in and around the surrounding area; DRDGold Limited Business Overview [Annual Report] (2002), available at [http://www.drdgold.com/assets/files/annual/ar\\_2002/downloads/DRD\\_business\\_overview\\_2002.pdf](http://www.drdgold.com/assets/files/annual/ar_2002/downloads/DRD_business_overview_2002.pdf) accessed on 1 December 2016.

39. Humby ‘Facilitating dereliction?’ 9.

40. Interview with Pule Molefe, 28 November 2016.

41. Interview with Joseph Rammusa, 29 November 2016.

42. DRDGold Fact Sheet (2016) 1, available at [http://webcache.googleusercontent.com/search?q=cache:wPcgzE6WugEJ:www.drd.co.za/investors-and-media/fact-sheets/2016/drdgold\\_fs\\_feb16.pdf+&cd=1&hl=en&ct=clnk&gl=za](http://webcache.googleusercontent.com/search?q=cache:wPcgzE6WugEJ:www.drd.co.za/investors-and-media/fact-sheets/2016/drdgold_fs_feb16.pdf+&cd=1&hl=en&ct=clnk&gl=za) accessed on 1 December 2016.

43. These projects include: in 2001, the Blyvooruitzicht Expansion Project to open up additional mining areas and increase the life of the mine by 25 years (see DRDGold Blyvooruitzicht Gold Mine Media Day Presentation 22 January 2004 at 37); in 2003, the re-mining and treating tailings from two storage facilities (see DRDGold Form 20-F (2003) 28 available at <http://globaldocuments.morningstar.com/documentlibrary/Document/a060f9c61c74f1c0.msdoc/original> accessed on 1 December 2016); in 2005, a project to re-establish mining operations at the previously closed Blyvoor’s no. 2 shaft in order to prolong the life of mine by 17 years (see DRDGold Form 20-F (2005) 41, available at <http://globaldocuments.morningstar.com/documentlibrary/Document/e727182179f418f6.msdoc/original> accessed on 1 December 2016); in 2007, the initiation of a uranium programme (see DRDGold Form 20-F (2008) 42 available at <http://globaldocuments.morningstar.com/documentlibrary/Document/6a23808f1277a8da.msdoc/original> accessed on 1 December 2016).

44. DRDGold Form 20-F (2015) 38, available at <http://globaldocuments.morningstar.com/documentlibrary/Document/484f511578a8d9261c177abab64e9a08.msdoc/original> accessed on 1 December 2016. DRDGold Integrated Report (2013), available at <http://drdgold.integrated-report.com/2013/download/DRDGOLD-integrated-report-2013.pdf> accessed on 1 December 2016, (stating that DRDGold held 74% of Blyvooruitzicht, Khumo Bathong Holdings held 20%, and an empowerment trust held 6%); see also DRDGold Annual Integrated Report (2011) 5; DRDGold Annual Report (2010) (noting that Blyvooruitzicht is “owned and run by DRDGOLD SA”).

45. Windeed Company Report for Blyvooruitzicht Gold Mining Company (2016).

46. As a company listed on both the South African and New York stock exchanges, DRDGold filed the relevant reporting documents in both jurisdictions. See, e.g. DRDGold 20-F (2013) available at <http://globaldocuments.morningstar.com/documentlibrary/Document/b44cf6cfa2526a738046edd6b41ef9b0.msdoc/original> accessed on 1 December 2016; DRDGold Annual Report (2013).

47. BGMC’s original mining authorization was granted under the Minerals Act 50 of 1991. Under the terms of the new MPRDA enacted in 2002, such “old order rights” are required to be converted to “new order rights”, which process requires, *inter alia*, the submission of an updated environmental management plan (“EMP”). The research team was unable to obtain the approved 2001 EMP but did review the 2007 EMP purportedly submitted to obtain this conversion. Although it is unclear if the 2007 EMP was ultimately approved by the Department of Mineral Resources, it nevertheless serves as an important reflection of DRD’s understanding of the Blyvooruitzicht asset and its associated obligations at that time. See also Humby ‘Facilitating dereliction?’ 10.

detailed a commitment to “concurrent rehabilitation aimed at progressively and systematically reducing rehabilitation and closure liability,”<sup>48</sup> included a conceptual closure plan, and stated that neither the then-current mining project nor its historic activities were “a source of any pollution which is not mitigated and/or managed” or “an economic, social, or environmental liability to the local community or the state now or in the future.”<sup>49</sup>

Beginning in 2009, DRD began to experience financial difficulties and over the following four years attempted to alleviate this pressure through efforts at the Mine, including contemplating an asset sale and initiating business rescue proceedings,<sup>50</sup> which were subsequently terminated when the gold price again increased. In early 2012, South African gold mining concern Village Main Reef Limited (“VMR”) agreed to purchase DRD’s entire shareholding – then 74% - in BGMC in exchange for VMR shares issued to DRD.<sup>51</sup> Although the deal was subject to a number of conditions that had not yet been fulfilled, VMR assumed operational management of the Mine in June 2012. It advanced millions of rands in working capital to BGMC and assumed various other obligations under the terms of the mining legislation.<sup>52</sup> These efforts included updating the Mine’s Social and Labour Plan (“SLP”) and engaging local government regarding various development projects.<sup>53</sup>

By July 2013, however, neither purported new owner VMR nor previous owner DRD acknowledged any responsibility for the Mine. The gold price had fallen, presumably making efforts to sustain the Mine or begin the process of proper closure of the operation, including fulfilling environmental and socio-economic obligations required under law, significantly less attractive. VMR therefore announced that the deal to take over the Mine from DRD had not been properly concluded and it would no longer act as owner/operator.<sup>54</sup> While DRD, however, insisted that “enough” of the deal had been completed to absolve DRD of any responsibility for the Mine.<sup>55</sup> Both companies publicly stated that they would provide no further funding to the operation.<sup>56</sup>

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48. DRDGold Environmental Management Plan for the Blyvooruitzicht Gold Mine (2007) 1.

49. *Ibid* at 71.

50. DRDGold Form 20F (2011) 11, available at <http://globaldocuments.morningstar.com/documentlibrary/Document/7fdb5cec0f689c23556b647e0a2ff3f.msdoc/original> accessed on 1 December 2016. “Business rescue” is a procedure allowed for in terms of the South African Companies Act 71 of 2008. It allows financially distressed companies to so file and, with the assistance of a business rescue practitioner, reorganise and restructure the business to return it to profitability.

51. Village Main Reef (“VMR”) Annual Report (2012) 17, 74, 131, available at <http://www.villagemainreef.integrated-report.com/2012/> accessed on 1 December 2016.

52. *Ibid* at 2. These conditions included the conversion of BGMC’s old order mining right and ministerial approval of the deal.

53. When a company applies for a mining right under the terms of the MPRDA, it is required to submit a number of documents on its plans to mine, which the Department of Mineral Resources (“DMR”) then uses to assess whether the potential mine is viable. One of these documents is a social and labour plan (“SLP”), which set out how the company intends to share some of the benefits that flow from mining and generally assist in the socio-economic upliftment of the surrounding area. See s 23(1) (f) of the MPRDA; see also VMR Integrated Annual Report (2012) 48.

54. ‘Village suspends financial assistance to Blyvooruitzicht Gold Mining Company Limited’ *Moneyweb* 30 July 2013, available at [http://www.moneyweb.co.za/mny\\_sens/village-main-reef-limited-village-suspends-financial-assistance-to-blyvooruitzicht-gold-mining-company-limited/](http://www.moneyweb.co.za/mny_sens/village-main-reef-limited-village-suspends-financial-assistance-to-blyvooruitzicht-gold-mining-company-limited/) accessed on 12 January 2017. VMR Annual Report (2013) 18, available at <https://www.jse.co.za/content/JSEAnnualReportsItems/20130930-Village%20Main%20Reef%20Limited%202013%20Integrated%20Annual%20Report.pdf> accessed on 1 December 2016 (noting that the provisional liquidator, who was appointed by the Master of the High Court, took over all operational control of Blyvoor); VMR Integrated Annual Report (2014) 114, available at <http://static.globalreporting.org/report-pdfs/2014/73a818c066cd75ee885fcaac7a737daa.pdf> accessed on 1 December 2016, (stating that “the liability to rehabilitate therefore does not fall into the hands of Village.”).

55. Crowley ‘Goldrich Faces Fraud Allegations as NUM Draws Aurora Parallel’ *Bloomberg*; See also Siphos Kings ‘Blyvoor: legal minefield is a deadly hazard’ *Mail & Guardian* 22 November 2013, available at <http://mg.co.za/article/2013-11-21-legal-minefield-is-a-deadly-hazard> accessed on 1 December 2016; Siphos Kings ‘Blyvooruitzicht: Desolation in the land of plenty’ *Mail & Guardian* 6 December 2013, available at <http://mg.co.za/article/2013-12-05-desolation-in-the-land-of-plenty> accessed on 1 December 2016.

56. ‘Village suspends financial assistance to Blyvooruitzicht Gold Mining Company Limited’ *Moneyweb* 30 July 2013; ‘Village Main Reef Suspends Financial Assistance to Blyvooruitzicht Gold Mining Company Limited’ *DRDGold Media Release* 31 July 2013 available at <http://www.drd.co.za/investors-and-media/media-releases/2013/village-main-reef-limited-suspends-financial-assistance-to-blyvooruitzicht-gold-mining-company-limited-07-31-2013> accessed on 1 December 2016 (stating that “whilst the transaction [with VMR] was designed to be implemented in phases, enough of the deal has been finalised for the position of DRDGOLD to have been reduced to that of “notional” shareholder and for Blyvoor to have become a subsidiary of VMR, as contemplated in the Companies Act. Hence DRDGOLD confirms that it will neither intervene nor will it provide any financial assistance to Blyvoor.”) (emphasis added)

Purportedly because both companies rejected ownership of the Mine, the BGMC board voted in early August 2013 to place the Mine under provisional liquidation.<sup>57</sup> The board at that point was comprised primarily of VMR representatives.<sup>58</sup> Pursuant to South African insolvency law, four joint provisional liquidators were appointed to manage the Mine on an interim basis prior to a court order of final liquidation.<sup>59</sup> The impact of the initiation of insolvency on BGMC employees and the surrounding Village was swift and acute.



Abandoned Blyvooruitzicht Gold Mine building.

### **b. August 2013 – present**

In August 2013, the Mine's underground facilities consisted of the operational Shaft 5 as well as Shafts 4 and 6, which were used exclusively for water pumping to prevent flooding and the accumulation of acid mine drainage, which is associated with water and soil pollution. **The initiation of insolvency proceedings meant these activities effectively ceased overnight due to lack of funds.**<sup>60</sup> All Mine employees save for a skeletal staff required for basic maintenance of the Mine found themselves immediately unemployed.<sup>61</sup>

57. VMR Annual Report (2013) 106; see also DRDGold Integrated Annual Report (2014) 135 available at <http://www.drd.co.za/investors-and-media/annual-reports/2014> accessed on 1 December 2016.

58. VMR Annual Report (2012) 74.

59. The provisional liquidators are Mssrs. Leigh Roering, Kgashane Monyela, Gregory Keletso Mohosh, and Jayant Daji Pema. Under South African law, a provisional liquidator has the duty to secure and preserve the business with a view to preserving it for ultimate sale. A final liquidator, later appointed by the creditors, sells the assets according to the directions of creditors.

60. Shaft 5 was put on "care and maintenance," a state of temporary closure in which production is halted but the shaft is maintained and kept stable for possible re-starting in the future. Note that since this period, South Africa has introduced regulations governing a "care and maintenance" period, including time limits, submission of a specific care and maintenance plan, reporting obligations, and a requirement to maintain the financial provision for rehabilitation. See Chapter 3 of the NEMA Regulations Pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations. A neighbouring gold mining company, AngloGold Ashanti Limited, obtained a court order to take over pumping of Shafts 4 and 6 itself in order to prevent flooding of its own downstream assets. Interview with Japie Harmse of Covalent Water Company (Pty) Ltd, 25 May 2016.

61. Interview with Leigh Roering, 5 August 2016. South African insolvency law provides for a period of employee "suspension" during provisional liquidation, when individuals are technically considered unemployed but are not officially terminated until a final order of liquidation is obtained. See s 38 of the Insolvency Act 24 of 1936.

Pursuant to their mandate under South African insolvency law, the liquidators then began investigating options to sell the Mine and associated assets. Leigh Roering, one of the lead liquidators, reported that pressure to complete a sale mounted in November 2013 when the liquidators received a notice of electricity termination from the state power supplier, Eskom Holding SOC, due to lack of payment. Roering stated that electricity termination would have rendered the Mine difficult, if not impossible, to re-start.<sup>62</sup> Mine operator Goldrich Holdings (Pty) Ltd then entered into a sale agreement with the liquidators at the eleventh hour, but relations between the two soon soured.<sup>63</sup> After Goldrich missed several payments to the estate, and was accused of, *inter alia*, halting pumping operations underground and allowing acid water<sup>64</sup> to accumulate in the mine shafts, the agreement between Goldrich and the liquidator was voided.<sup>65</sup>

At around the same time, the liquidators also received an offer from a local property developer, Double D & G, to purchase the homes in the Village. The deal was purportedly subject to the condition that local government officially declare the Village part of the Merafong City Local Municipality (“the Municipality”), in whose jurisdiction the Village is located.<sup>66</sup> When the Municipality refused this request, the purchase and sale agreement for the Village was likewise cancelled.<sup>67</sup>

Against this backdrop of attempted asset sales, the Village faced increased hardship. Months, then years, dragged on without former Mine employees being paid salaries or their full preference creditor packages, despite the efforts of Roering and his fellow liquidators.<sup>68</sup> The Mine’s free hospital closed in late 2013.<sup>69</sup> Organized groups of informal miners, or “zama zamas,” invaded the unsecured Mine’s premises to access the remaining gold, and clashes with the residents erupted.<sup>70</sup> Local news reports described the area as having descended into chaos and a “war zone.”<sup>71</sup>

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62. Interview with Leigh Roering, 5 August 2016.

63. Interviews with Leigh Roering, 5 August 2016 and 11 November 2016. The Goldrich directors were linked to liquidation of other mines in which they were accused of asset-stripping, flooding shafts, and refusing to pay wages. Sally Evans and Same Sole ‘Jacob Zuma, Khulubuse and the missing millions’ *amaBhungane* 16 May 2014 available at <http://amabhungane.co.za/article/2014-05-15-jacob-zuma-khulubuse-and-the-missing-millions-1> accessed on 1 December 2016.

64. Acid mine drainage forms as result of the oxygenation and hydrolysis of sulphide-based ores including pyrite, which is commonly associated with veins of gold in the Witwatersrand Basin. Release of AMD-contaminated water can cause permanent damage to the ground and surface water resources, as well as the physical stability of the land.

65. Dianne Hawker (contributor) ‘Goldrich Not Impressed with Aurora Comparison’ *enca* 30 April 2014, available at: <https://www.enca.com/south-africa/goldrich-not-aurora-owners> accessed on 1 December 2016.

66. Interview with Leigh Roering, 5 August 2016; Comprehensive Report in Respect of Blyvooruitzicht Gold Mining Company Limited prepared by ENS Africa, legal representatives for Leigh Roering, joint liquidator for the Blyvooruitzicht Gold Mine 22, 44.

67. Interview with Leigh Roering, 5 August 2016.

68. Pursuant to South African insolvency law, such payments are only released upon the final order of liquidation. Roering reports that because it has become clear over time that “the jobs aren’t coming back”, he has worked to pay out several preferent creditor packages over the course of the previous years.

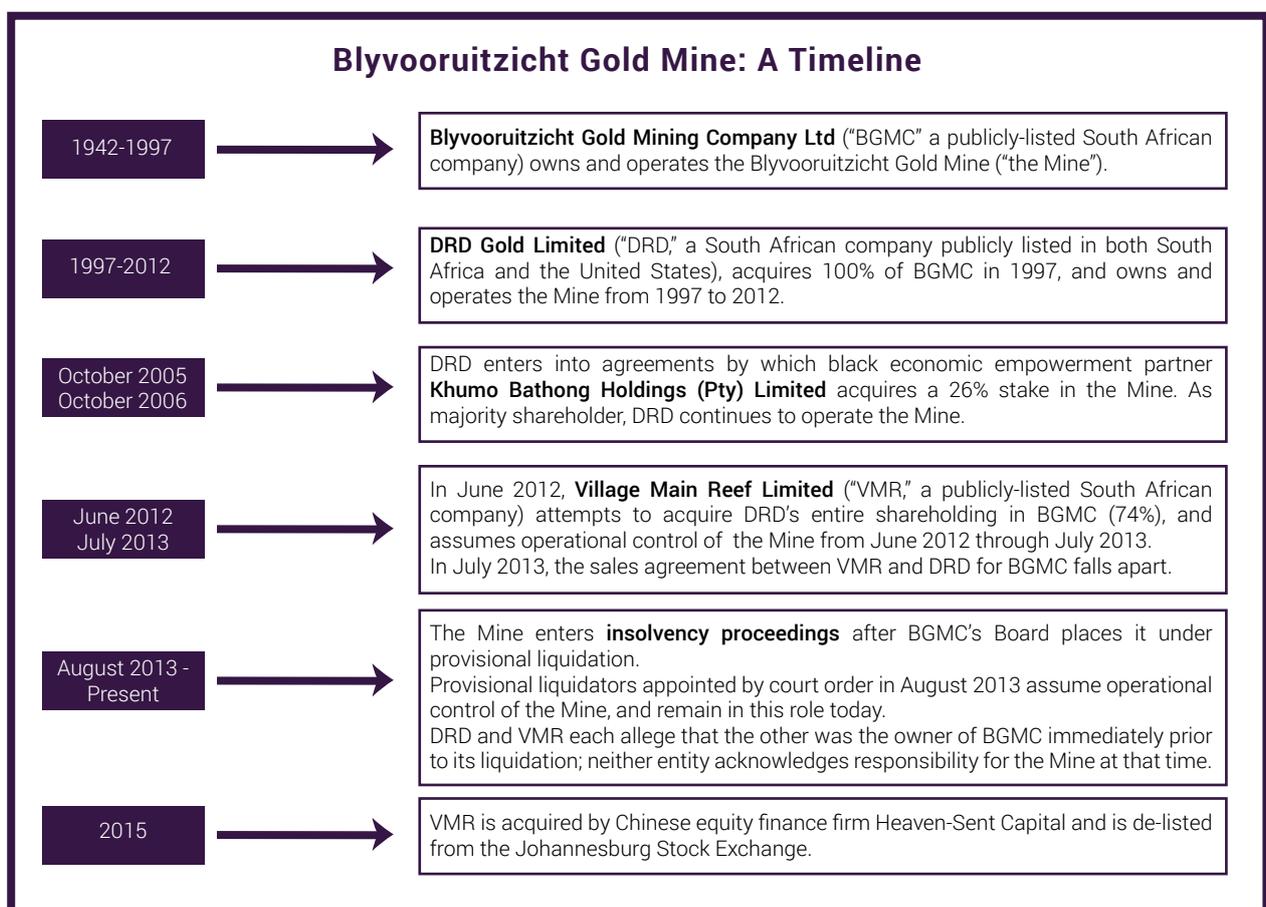
69. Siphso Kings ‘Blyvooruitzicht: Desolation in the land of plenty’ *Mail & Guardian* 6 December 2013, available at <http://mg.co.za/article/2013-12-05-desolation-in-the-land-of-plenty> accessed on 1 December 2016.

70. “Zama zama” is the colloquial term for miners operating independently of the constraints of regulated gold and other precious metals mining industry. South African Human Rights Commission, ‘Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa’ (2015), available at <https://www.sahrc.org.za/home/21/files/Unregulated%20Artisanal%20Underground%20and%20Surface%20Mining%20Activities%20electronic%20version.pdf> accessed on 10 January 2017.

71. Dineo Faku ‘Blyvoor crisis goes critical’ *IOL* 30 March 2014, available at <http://www.iol.co.za/business/companies/blyvoor-crisis-goes-critical-1668328> accessed on 1 December 2016; Sally Evans, Justice Kavahehatui, Tabela Timse ‘Aurora meets Marikana at bloody Blyvoor’ *Mail & Guardian* 7 March 2014, available at <http://mg.co.za/article/2014-03-06-aurora-meets-marikana-at-bloody-blyvoor-1> accessed on 1 December 2016.

In March 2014, electricity to the Mine's Shaft 5 – the only operational shaft – was terminated. The shaft flooded and acid water has continued to collect in the interim, leading to a significant risk of water and soil pollution. Other environmental mitigation measures on the Mine, such as dust suppression at the tailings storage facilities, ceased when liquidation proceedings started and have never been re-initiated, resulting in significant health risks to the Village residents and damage to the surrounding environment.<sup>72</sup> Rubbish collection halted and garbage has piled up around the Village. Local infrastructure, including the sewage system, is breaking down for lack of maintenance. The Village's access to basic services such as water and electricity has been repeatedly threatened. The question of whether residents will be able to remain in their homes, which are the technical property of the BGMC (in liquidation) estate, hangs in the balance.

**Today, the Village community of some 6 000 people lives in the shadow of the abandoned Mine, in abject poverty, and battles perpetual uncertainty about its continued existence.**



72. Interview with Leigh Roering, 5 August 2016.

<b>Key Stakeholders</b>	
<b>Blyvooruitzicht Mine Village (“the Village”)</b>	Former mine village of the Blyvooruitzicht Gold Mine currently composed of some 6 000 residents, and approximately 700 households.
<b>Blyvooruitzicht Residents Committee (“the Committee”)</b>	Committee of approximately 10 individuals elected by Village residents in the aftermath of the Mine’s liquidation in an effort to deal systematically with the many challenges facing the Village.
<b>Blyvooruitzicht Gold Mining Company (in liquidation) (“BGMC”)</b>	The mining concern currently in provisional liquidation whose assets include the Mine and the Village. The team of joint provisional liquidators managing the liquidation is headed by Leigh Roering of Harvard Corporate Recovery.
<b>Chamber of Mines South Africa</b>	A mining industry employers’ organization that supports and promotes the South African mining industry. Former Mine owner/operator DRDGold Limited is a member.
<b>The Department of Environmental Affairs (“DEA”)</b>	A government department mandated to give effect to the right of citizens to an environment that is not harmful to their health or well-being, and to have the environment protected for the benefit of present and future generations.
<b>The Department of Mineral (“DMR”)</b>	A government department dedicated to both promoting and regulating the minerals and mining industry, including with respect to the environment, for purposes of “transformation, growth, and development.”
<b>The Department of Human Settlement (“DHS”)</b>	A government department dedicated to facilitating “the creation of sustainable human settlements and improved quality of household life.”
<b>The Department of Social Development (“DSD”)</b>	A government department responsible for the management and oversight of social security, to prevent and alleviate poverty.
<b>The Housing Development Agency (“HDA”)</b>	A national public development agency responsible for the development of housing and human settlement.
<b>The Inter-Ministerial Committee on the Revitalisation of Distressed Mining Communities (“IMCRDMC”)</b>	A multi-department government group charged with holistically address concerns within distressed mining villages. Chaired by the Minister in the Presidency and composed of representatives from the DMR, DHS, DSD, and HDA, amongst others.
<b>The Merafong City Local Municipality (“the Municipality”)</b>	The Village is located within the jurisdiction of the Municipality, which is located in Gauteng Province.
<b>BlyvoorGold Capital (Pty) Ltd</b>	A newly incorporated gold mining concern attempting to purchase certain of the assets of the Mine from the liquidators.
<b>Village Main Reef (“VMR”)</b>	Historically, a publicly-listed South African mining company with shares on the Johannesburg Stock Exchange and the last to operate the Mine, from June 2012 through August 2013. VMR has since been purchased by a foreign investor and no longer exists in this form.
<b>DRDGold Limited (“DRD”)</b>	A publicly-listed South African mining company with shares on the New York and Johannesburg stock exchanges. DRD owned and operated the Mine for approximately 12 years before attempting to sell it to VMR in 2012.
<b>Federation for a Sustainable Environment (“FSE”)</b>	A local NGO focussed on addressing the adverse environmental impacts of mining and industrial activities on communities in South Africa. The FSE has worked within Blyvooruitzicht and its surrounds on a number of key environmental issues.
<b>The South African Human Rights Commission (“SAHRC”)</b>	A national institution responsible for promoting, helping to protect, and developing a culture of human rights in South Africa. The SAHRC is currently assessing socio-economic impacts of mining on affected communities.

### III. Rights, Findings, and Responsibility

#### A. Right to Development

The right to development is broad-based and closely interconnected to a variety of other human rights, including the right to an environment not harmful to health or well-being and the right to adequate housing, which are explored in more detail in Sections III(B)(a) and III(C)(a) of this report. Given the breadth of the manner by which the right to development can be interpreted, this assessment is necessarily limited in its focus to certain elements of that right, primarily focusing on equal access to resources and basic services and the fair distribution of the benefits of development.

##### a. Legal and Normative Framework

**Internationally,** United Nations member states have undertaken to promote “higher standards of living, full employment and conditions of economic and social progress and development” through the Charter of the United Nations.<sup>73</sup> The Universal Declaration of Human Rights likewise endorses the promotion of social progress and better standards of life, recognizing the right to non-discrimination, the right to participate in public affairs, and the right to an adequate standard of living.<sup>74</sup>



Former Blyvooruitzicht Mine Village community recreational center.

Building on these principles, the UN General Assembly adopted in 1986 the United Nations Declaration on the Right to Development (“UNDRD”) by its resolution 41/128.<sup>75</sup> Concretely, the UNDRD advocates that states have a duty to promote development processes that help ensure: “fair distribution of the

73. Preamble and art 55 of the Charter of the United Nations (1945).

74. Preamble, arts 7, 21, 25 of the Universal Declaration of Human Rights (1948).

75. While the United Nations Declaration on the Right to Development, 1986 (“UNDRD”) itself is not legally binding, many of its provisions are anchored in legally binding instruments as detailed below and importantly including the International Covenant on Economic, Social, and Cultural Rights and the African Charter on Human and Peoples’ Rights.

benefits” of development for the entire population;<sup>76</sup> “equality of opportunity” in terms of access to basic resources and services;<sup>77</sup> and “popular participation” with respect to development.<sup>78</sup>

The International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), ratified by South Africa in early 2016, also recognizes that “all peoples have the right of self-determination” and that “[b]y virtue of that right they...freely pursue their economic, social and cultural development.”<sup>79</sup> It further safeguards “an adequate standard of living...including adequate food, clothing, and housing, and [...] the continuous improvement of living conditions.”<sup>80</sup> The Committee on Economic Social and Cultural Rights (“CESCR”)<sup>81</sup> has also recognized that Article 11 of the ICESCR, which specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living, should be read to include the right to water, which is inextricably linked to the highest standard of health, adequate housing and food, and securing livelihoods, amongst others.<sup>82</sup> Access to adequate sanitation likewise falls within this sphere, as it is fundamental for human dignity and privacy.<sup>83</sup> Retrogressive measures taken by state parties without justification in relation to the right to an adequate standard of living – including with respect to basic services like water and sanitation – are prohibited.<sup>84</sup>

International commitments also reflect a close link between sustainable development and good environmental practice. The 2030 Agenda for Sustainable Development, adopted by the UN General Assembly on 25 September 2015, for example, states that “eradicating poverty...is the greatest global challenge and an indispensable requirement for sustainable development,” which includes economic, social and environmental dimensions.<sup>85</sup> The notion that a healthy environment creates the conditions for social justice in terms of human flourishing and well-being is increasingly acknowledged at the international level.<sup>86</sup>

**Regionally**, the right to development is explicitly protected by the African Charter on Human and Peoples’ Rights, which South Africa signed and ratified in 1996. Article 22 of the Charter provides that “[a]ll peoples shall have the right to their economic, social, and cultural development with due regard

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76. Article 2, s. 3 of the United Nations Declaration on the Right to Development 1986 holds that “States have the right and duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.”

77. Article 8(1) of the UNDRD states that “States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.”

78. Article 8(2) of the UNDRD.

79. Article 1.2 of the International Covenant on Economic, Social, and Cultural Rights (1996) (“ICESCR”).

80. Article 11 of the ICESCR. Other, more specific, ICESCR provisions also accord with principles affirmed in the UNDRD, including the rights to work (requiring state parties to make efforts to achieve steady economic, social, and cultural development), education, health (requiring states parties to take steps to “improve all aspects of environmental and industrial hygiene), social security.

81. The CESCR is a body of 18 independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its states parties.

82. UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 15: Right of Water’ (2002) UN Doc, E/2002/11, Substantive Issues Arising in the Implementation of the ICESCR: The right to water (arts. 11 and 12 of the ICESCR), paras 3 and 6 (state parties have an obligation to “progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children.”).

83. UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 15: Right of Water’ (2002) UN Doc, E/2002/11, Substantive Issues Arising in the Implementation of the ICESCR: The right to water (arts. 11 and 12 of the ICESCR), para 29.

84. UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 15: Right of Water’ (2002) UN Doc, E/2002/11, Substantive Issues Arising in the Implementation of the ICESCR: The right to water (arts. 11 and 12 of the ICESCR), at para 19; General Comment 3 para 9.

85. United Nations ‘Transforming our world: the 2030 Agenda for Sustainable Development’, available at <https://sustainabledevelopment.un.org/post2015/transformingourworld> accessed on 12 January 2017.

86. See, e.g., CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), para 4 (noting that the right to the highest attainable standard of physical and mental health “embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.”).

to their freedom and identity and in the equal enjoyment of the common heritage of mankind.”<sup>87</sup> The Preamble of the Charter also emphasises this principle, providing that it is “essential to pay particular attention to the right to development.” Case law with respect to this right at the regional level has thus far been limited, but at a minimum, it has been held that development must improve peoples’ capabilities and choices<sup>88</sup> and the right to development is violated when the development in question decreases the well-being of the community.<sup>89</sup> Participation of interested and affected parties is essential, requiring consultation and communication throughout the development process.<sup>90</sup>

**Nationally**, although there is no explicit right to development under South African law, the government has expressed an awareness of the right, attesting that it is both “indispensable” and “intrinsically linked to the enjoyment of economic, social, and cultural rights, which are essential in ensuring the enhancement of the quality of life of those afflicted by extreme poverty.”<sup>91</sup>

National law reflects this purported commitment by protecting key elements of the right, and by structuring key legislation to facilitate development. No less than the preamble to the Constitution provides that its purpose is to “improve the quality of life of all citizens and to free the potential of each person,” while the Bill of Rights safeguards a number of specific rights related to ensuring a continuous improvement of the population’s living conditions.<sup>92</sup> The constitutional environmental right in South Africa further provides an explicit link between sustainable development and the environment, enshrining the right to environmental protection “for the benefit of present and future generations through reasonable legislative and other measures that [...] (c) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”<sup>93</sup> The Constitutional Court has noted that “the environment and development are [...] inexorably linked,” as “development cannot subsist upon a deteriorating environmental base.”<sup>94</sup>

Myriad pieces of national legislation help add content to these basic constitutional rights. In the context of the intersection between the right to development and mining-affected communities, legislation and jurisprudence regarding basic service provision and the legal framework that details the socio-economic and environmental obligations of the mining industry are of particular relevance.

### *i. Basic Service Provision*

As is the case under international law, South African law protects the right of access to sufficient water and adequate sanitation; such access is indispensable to the fulfilment of a right to development. Section 27 of the Constitution guarantees a right to sufficient water and requires the state’s reasonable measures to achieve the progressive realisation of this right.<sup>95</sup> The National Water Act 36 of 1998 and the Water Services Act 108 of 1997 enshrine the national government’s “overall responsibility for and authority over the nation’s water resources and their use, including the equitable allocation of water for beneficial use...” and provide for the rights of access to both basic water supply and basic sanitation.<sup>96</sup>

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87. Article 22 of the African Charter on Human and Peoples’ Rights (1981).

88. *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* case no. 276/03 para 297, available at <http://caselaw.ihra.org/doc/276.03/> accessed on 1 December 2016.

89. Ibid.

90. Ibid.

91. Department of International Relations and Cooperation media statement, 22 September 2016, available at <http://www.dirco.gov.za/docs/2016/un0923.htm> accessed on 1 December 2016.

92. These include equality, dignity, an environment not harmful to one’s health, adequate housing, health care services, sufficient food and water, social security, and access to information held by the state and/or another person for the exercise or protection of any rights. See South African Constitution, ss 9, 10, 24, 26, 27, 32.

93. Section 24 of the Constitution.

94. *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) at para 44.

95. Section 27 of the Constitution.

96. Preamble of the National Water Act 36 of 1998; Water Services Act 108 of 1997.

An explicit right to electricity is less-well developed under South African law, but the Constitutional Court has affirmed that “electricity is one of the most common and important basic municipal services and has become virtually indispensable...”<sup>97</sup> No less than the former Department of Minerals and Energy has publicly acknowledged that “electrification greatly improves the quality of life and welfare of households.”<sup>98</sup>

Finally, while all spheres of government must strive to fulfil these obligations, “the Constitution specifically entrenches the developmental duties of municipalities. [...] [A] municipality is obliged to prioritise the basic needs of the community and to promote the social and economic development of the community.”<sup>99</sup> Local government is explicitly charged with the provision and prioritisation of basic services, as well as the promotion of a safe and healthy environment as a general matter.<sup>100</sup>



Neighbourhood park where residents dump rubbish in the absence of municipal refuse collection.

## *ii. Sustainable Mining*

The Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”) and its associated regulations function as the primary piece of legislation governing the mining industry, including with respect to licensing, operational management, and closure. However, the broad aims of the MPRDA also reflect a commitment to the concept of human rights-based development; the law provides that mineral exploitation in South Africa must be done for the benefit of all and promote economic and social development.<sup>101</sup> It further acknowledges the need to “promote local and rural development and the social upliftment of communities affected by mining.”<sup>102</sup> To this end, mining rights holders are specifically charged with contributing towards the socio-economic development of the areas in which they operate.<sup>103</sup>

The primary way in which the MPRDA aims to achieve socio-economic upliftment is through its requirement that an applicant for a mining right must submit and adhere to a SLP, which must be approved and is purportedly then monitored by the country’s DMR, whose Minister is technically empowered to

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97. *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) para 34.

98. *Ibid.*

99. *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) para 36.

100. Sections 152, 153 of the Constitution. See also *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) para 34 – 50; *Le Sueur and Another v Ethekwini Municipality and Others* (2013) ZAKZPHC 6, para 19, 22; see further Tracy Humby ‘Localising Environmental Governance: The *Le Sueur* Case’ (2014) 17 4 *PER*, 1997 - 1669.

101. Preamble of the MPRDA.

102. *Ibid.*

103. Section 2(f)(i) of the MPRDA.

withdraw mining licenses for SLP non-compliance.<sup>104</sup> DMR guidelines state that an SLP should describe how a company will ensure that affected communities will benefit from the operation, including after the relevant operation has closed.<sup>105</sup> The SLP should therefore detail “specific programmes to save jobs and manage downscaling and/or closure”<sup>106</sup> and “ameliorate the social and economic impact” of closure, including by providing assessment and counselling services as well as training and re-employment programs.<sup>107</sup> Mining rights holders are thus obliged to bolster a diversification of skills not dependent on mining activities in order to help ensure the survival of affected communities after operational closure.

The National Environmental Management Act 62 of 2008 (“NEMA”) and its associated regulations further protect the right to sustainable ecological development. The details of the NEMA framework are explained in more detail in Section III(B)(a), which specifically assesses the impact of the collapse of the Mine on the residents’ environmental rights, but it is significant that NEMA mandates that “development must be socially, environmentally and economically sustainable,”<sup>108</sup> such that the negative impacts on “people’s environmental rights [must] be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.”<sup>109</sup> Further, “the environment is held in a public trust for the people [and] the beneficial use of environmental resources must serve the public interest...”<sup>110</sup> As a general matter, NEMA therefore requires that people and their needs exist at the forefront of decision-making, including in the context of mining.<sup>111</sup>

## **b. Findings**

The interview process and additional interventions<sup>112</sup> undertaken by the research team revealed that the Village has experienced a widespread and precipitous decline in both environmental<sup>113</sup> and socio-economic well-being since Mine’s collapse. Unemployment, the daily struggle to meet basic needs, and threatened termination of access to basic services dominated much of the discourse during the community interview process. Although the Mine reaped profits for over seven decades, there is almost nothing left to show for it after the operation’s sudden and unceremonious closure. An overwhelming majority of interviewees stated that life in the Village has become “extremely difficult” since the closure of the Mine.

### ***i. Unemployment***

A majority of those interviewed came to Blyvooruitzicht specifically to work at the Mine or in a related service industry, or accompanied a family member who was so employed. Of those employed by the Mine itself, approximately 62% had worked at the Mine for over 10 years around the time of liquidation, and 40% of this cohort had worked at the Mine for over 20 years at that point. These former employees built lives, often with their families, in the Village over the course of their employment.

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104. South Africa’s Centre for Applied Legal Studies, which as undertaken extensive analysis on the SLP system, has determined that despite this possible sanction, there have been only “two instances in which a mining right was withdrawn partially as a result of the mine’s non-compliance with its SLP. On the face of it, it would therefore appear that mining companies are not being held accountable for their SLP commitments.” The Social and Labour Plan Series, Phase 1: System Design Trends Analysis Report, Centre for Applied Legal Studies (March 2016) 105, available at <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-ntities/cals/documents/programmes/environment/resources/Social%20and%20Labour%20Plans%20First%20Report%20Trends%20and%20Analysis%2030%20March%202016.pdf> accessed on 12 January 2016.

105. Paragraph 1.2 of the Department of Mineral Resources’ Revised Social and Labour Plan Guidelines (October 2010) (the “SLP Guidelines”); see also reg 46 of the MPRDA Regulations.

106. Paragraph 4.4 of the SLP Guidelines.

107. Paragraph 4.4 of the SLP Guidelines; see also reg 46(d) of the MPRDA.

108. Section 2(3) of NEMA.

109. Section 2(4)(a)(i) of NEMA.

110. Section 2(4)(b)(o) of NEMA.

111. Section 2(2) of NEMA.

112. Lawyers for Human Rights represented the community in several cases against the government in respect of access to water, sanitation, and electricity during the period of June 2015 through October 2016.

113. Section III(B)(b).

As the primary employer and economic driver in the immediate area, the sudden closure of the Mine has had, in the words of Committee member Pule Molefe, **“a devastating impact”** on the Village itself, and is directly connected to a significant decline in community income and marked increases in unemployment, related poverty, and crime.<sup>114</sup> Before closure, nearly 70% of survey respondents reported earning over R4 000 per month; today, nearly half of all respondents reported monthly incomes of less than R2 000, with most relying on informal piece work and/or hand-outs to survive. A full 75% of respondents reported being unemployed today. A similar percentage reported their fruitless search for employment since the closure of the Mine.

There does not appear to be any relief on the horizon. Interviewees cited a number of significant obstacles to finding new employment, including age, foreign migrant status, and the fact that they have skills specifically related to a mining industry in sharp decline. Indeed, **“[t]he mining industry was built on foreign labour and now the laws have changed and we have been dumped”** said one Village resident who requested anonymity. “Poverty is so evident – grown able-bodied men, willing to work, who don’t have shoes.”<sup>115</sup> Thirty-five percent of respondents indicated that the only education or qualification they currently have is a mine-related certification; a mere 15% of those interviewed stated that they also matriculated from high school. Respondents were primarily skilled in mining-related work and reported limited exposure to formal education or alternative livelihood training.

Village resident Elizabeth Magrietha Jansen reported that **“we are just living in Blyvoor, there are no jobs here. I’ve tried to get a job but I am told that I am too old. And the mining industry around us is crumbling,”**<sup>116</sup> while Deborah Thoresson stated that “age is counting against me and I have very good job experience but I don’t think vacancies exist in other mines.”<sup>117</sup> Katrina Mokgotho described the difficulty of having significant past experience in a mine support service rather than having been employed by the Mine directly: “those who worked underground have papers from the liquidator showing that they worked for the Mine. I worked for the Recreation Club and I have nothing to show that I have previously been employed.” Instead, she has taken to volunteering within the community. She works to “clean up Blyvoor – there are about 100 of us who volunteer to do this without being paid,” given that few municipal services – including rubbish collection – have been extended to the area post-provisional liquidation.<sup>118</sup>

Testimony provided during interviews further revealed that Mine employees and the surrounding Village had little to no warning of the operation’s closure, leaving them unprepared for unemployment. “No one actually told us that the Mine was going to enter into liquidation” said Deborah Thoresson.<sup>119</sup> Others echoed this view. Comfort Zwane, former Mine payroll coordinator stated that “we were reaching targets and paying bonuses. [VMR] had taken away the payroll department’s access to the bank accounts, so we had no idea that there were any problems. It was a huge surprise to us when they announced that the Mine was to be liquidated”.<sup>120</sup> Pule Molefe similarly reported that, “we were never told [in advance]. It came as shock to us, one morning when we woke up and went to work, we were told Blyvoor is going to be liquidated.”<sup>121</sup> Resident Obakeng Cecilia Nkomo noted that “when I went to the shaft - when I arrived at the gate, it was locked. **My supervisor told me I must sit at home because the Mine is going to be liquidated and they will tell us what will happen next, but since then, we have just been sitting at home.**”<sup>122</sup>

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114. Interview with Pule Molefe, 26 October 2016.

115. Interview with anonymous, 31 July 2016.

116. Interview with Elizabeth Magrietha Jansen, 11 November 2016.

117. Interview with Deborah Thoresson, 11 November 2016.

118. Interview with Katrina Mokgotho, 11 November 2016.

119. Interview with Deborah Thoresson, 11 November 2016.

120. Interview with Comfort Zwane, 29 November 2016.

121. Interview with Pule Molefe, 28 November 2016.

122. Interview with Obakeng Cecilia Nkomo, 9 November 2016.

Ninety percent of the survey respondents could not recall having had access to training opportunities during or just after the liquidation process in order to mitigate the impact of closure and their subsequent unemployment. A similar percentage could recall no trainings or development opportunities provided to the surrounding community either. This inaction is striking in light of a commitment by the Mine in its 2012 SLP<sup>123</sup> – updated merely one year prior to liquidation – to actively manage the negative socio-economic impacts of mass retrenchment, downscaling or closure on its employees and the surrounding community by deploying a multi-pronged plan in such events.<sup>124</sup> Relevant initiatives were intended to include:

- . establishing “strong lines” of regular communication with affected employees;
- . working with the Department of Labour to facilitate counselling, skills training to “assist [affected employees] to locate alternative employment after closure,” and
- . creating a “Job Advice Centre” to aid in identifying alternative employment or income-generating opportunities in collaboration with local government.<sup>125</sup>

The SLP further notes that this strategy for “managing downscaling and closure” was to be funded jointly by the Mine and the Department of Labour.<sup>126</sup>

Interviews with both residents and liquidator Leigh Roering confirm that no such initiatives were put in place despite that most employees were immediately “suspended” in terms of South African insolvency law and effectively rendered unemployed once liquidation proceedings were invoked.<sup>127</sup> According to Roering, the cessation of the Mine was governed by insolvency law rather than the MPRDA and associated regulations.<sup>128</sup> From a liquidator’s perspective, therefore, the SLP – required and governed by the MPRDA – is essentially irrelevant in such circumstances, despite that the MPRDA mandates that the SLP is legally binding until the DMR has issued a “mine closure certificate” confirming that the operation has been properly closed and rehabilitated.<sup>129</sup> As detailed in Section III(A)(c)(i), **the Mine’s closure certificate was neither sought nor issued.**

The Department of Labour likewise does not appear to have participated in any of the initiatives included in the SLP to mitigate the impact of mass unemployment on the community, although the liquidators were in contact with the Department.<sup>130</sup> “There were no job centres set up, no trainings or counselling provided by the Department of Labour,” said Comfort Zwane. “The most the Department did for us is visit the property to tell us how to claim unemployment [benefits]. We were left without any of these protections.”<sup>131</sup>

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123. The 2012 SLP appears to be the document prepared for the process of converting the “old order mining right” to a “new order mining right,” as was required under South African mining law. The research team was unable to confirm whether the 2012 SLP was actually submitted during this process and/or approved by the state.

124. Regulation 46 of the MPRDA.

125. Blyvooruitzicht Gold Mine Village Main Reef/DRDGold Social and Labour Plan (2012) 75 – 76.

126. Ibid at 81.

127. Interview with Leigh Roering, 11 November 2016. See also Insolvency Act 24 of 1936, ss 39, 98A. While employee suspension technically differs from retrenchment from a labour law perspective, suspended employees are deemed to be unemployed and entitled, for example, to claim unemployment insurance from the state.

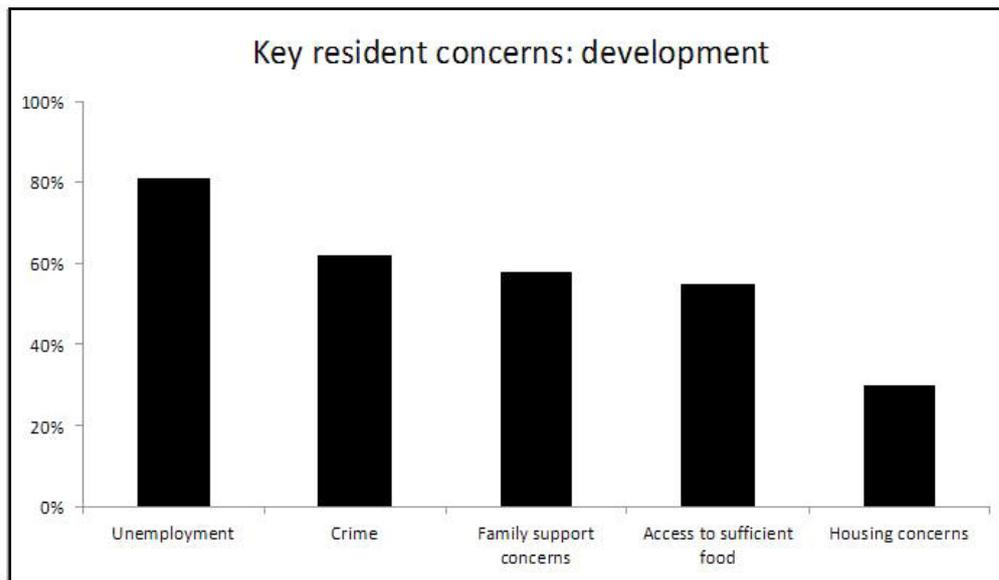
128. Interview with Leigh Roering, 5 August 2016 and 11 November 2016.

129. Interview with Leigh Roering, 5 August 2016. See also Reg 43 of the MPRDA.

130. Interview with Leigh Roering, 11 November 2016.

131. Interview with Comfort Zwane, 28 November 2016.

## ii. Basic Needs



\*Residents frequently reported multiple concerns

The enormous spike in unemployment and associated income decline in the Village has impacted on residents' ability to meet basic needs. Close to 60% of respondents reported not having enough money to buy food, and a similar percentage reported being unable to support their children. During the interview process, a collective sense of hopelessness pervaded. Resident Morotei Mojoale noted that "[l]ife has become very hard because we don't have anything to eat in Blyvoor. Kids are forced to leave school because we cannot afford to send them."<sup>132</sup> Elizabeth Magrietha Jansen reported "[w]e are living on senseless piece jobs that pay nothing. **We can't afford the basics for our kids. We are struggling to continue to send them to school.**"<sup>133</sup>

Nearly 20% of respondents rely exclusively on charitable hand-outs or assistance from extended family members in order to survive. Resident Meisie Thamae reported that the "[c]losure of the mine has affected us badly. We are unemployed and we can't find employment. We are struggling to feed the children and ourselves."<sup>134</sup> She, like others, informed the research team that, "[m]y children get lunch from the food programme after school, but sometimes there isn't enough to feed all the children and mine don't get any. It is mostly on Saturdays, when we make sure to go very early, that my children [manage to] get lunch from the food programme."<sup>135</sup>

An interview with the head of a local soup kitchen, Charles De La Harpe, illustrates the community's plight. The feeding scheme was established just three months after the Mine entered into liquidation, and today aims to feed at least 200 children per day. However, De La Harpe stated that while "the project was initially aimed at feeding hungry children, there is a lot of suffering and poverty in Blyvoor, so today we try to feed [anyone] who is hungry and doesn't have enough money for food. There is no relief in

132. Interview with Morotei Mojoale, 11 November 2016.

133. Interview with Elizabeth Magrietha Jansen, 11 November 2016.

134. Interview with Meisie Thamae, 11 November 2016.

135. Ibid.

sight.”<sup>136</sup> Survey respondents regularly asked research team members for help meeting basic needs, including providing access to food aid, during the interview process.

Although interview respondents could not recall any substantive government interventions undertaken in an effort to help alleviate the growing desperation,<sup>137</sup> government at multiple levels appears to recognise that the Village is in crisis.<sup>138</sup>

At the local government level, two elected community representatives, or councillors, for the Municipality live within the Village. Testimony provided by Joseph Rammusa, a member of the Committee, indicated that these councillors have long attended Committee meetings and therefore would be intimately familiar with the various challenges facing most Village residents.<sup>139</sup>

National government is similarly mindful. In June 2015, the Minister of Mineral Resources convened an “urgent” meeting to address the “humanitarian challenges facing those who worked at the [Mine] and who stay in surrounding areas.”<sup>140</sup> The DMR subsequently announced the formation of a governmental task team, noting that it would oversee interventions including distribution of “distress packages” in the short term, “as the team explores...long term measures including environmental, economic, and infrastructural concerns.”<sup>141</sup> The DMR further acknowledged the broader importance of the socio-economic impacts associated with the Mine’s collapse, stating **“it is crucial that we learn from this, in order to prevent a similar situation from occurring when a mine is liquidated.”**<sup>142</sup> Nevertheless, the DMR acknowledged in a meeting with the research team that interventions have so far been limited, in spite of the deepening crisis. Representatives simply noted that the DMR is in communication with the Municipality and the Department of Social Development (“DSD”), but declined to further elaborate.<sup>143</sup>

The DSD<sup>144</sup> itself reported the difficulty of mounting a formal intervention in the Village, despite having observed an “overwhelming feeling of hopelessness” amongst residents because “these people cannot go anywhere else and won’t be able to work again. They are in despair.”<sup>145</sup> Representatives described initiating “community dialogues” in the Village in October 2015 in order to determine key challenges facing the residents.<sup>146</sup> However, they have so far been unable to take further steps, citing a lack of

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136. Interview with Charles De La Harpe, 25 October 2016.

137. Approximately 10% of respondents could recall some limited government interventions, including canvassing by the Department of Social Development and various food parcels deliveries.

138. Approximately 10% of respondents could recall some limited government interventions, including canvassing by the Department of Social Development and various food parcels deliveries.

139. Interview with Joseph Rammusa, 29 November 2016.

140. ‘SA: Minister calls urgent meeting on Blyvooruitzicht matter’ *Polity.org.za* 11 June 2015 available at <http://www.polity.org.za/article/sa-minister-calls-urgent-meeting-on-blyvooruitzicht-matter-2015-06-11> accessed on 1 December 2016. Attendees of the meeting purportedly included representatives from the Departments of Cooperative Governance and Traditional Affairs, Water Affairs and Social Development, as well as the Merafong City Local Municipality.

141. ‘Dpt. of MR: Intergovernmental task team intervenes in Blyvooruitzicht matter’ *Polity.org.za* 12 June 2015 available at <http://www.polity.org.za/article/dpt-of-mr-intergovernmental-task-team-interven-es-in-blyvooruitzicht-matter-2015-06-12> accessed on 1 December 2016.

142. ‘Dpt. of MR: Intergovernmental task team intervenes in Blyvooruitzicht matter’ *Polity.org.za* 12 June 2015 available at <http://www.polity.org.za/article/dpt-of-mr-intergovernmental-task-team-interven-es-in-blyvooruitzicht-matter-2015-06-12> accessed on 1 December 2016.

143. Interview with Jimmy Segale of the Department of Mineral Resources, 11 August 2016.

144. The DSD is charged with management and oversight of social security in the country, including the administration of “developmental social welfare services that aim to reduce poverty...through sustainable development”. See DSD website available at [http://www.dsd.gov.za/index.php?option=com\\_content&task=view&id=31&Itemid=54](http://www.dsd.gov.za/index.php?option=com_content&task=view&id=31&Itemid=54) accessed on 1 December 2016.

145. Interview with Mpho Mngxitama of the Department of Social Development, 4 August 2016.

146. These findings purportedly included unemployment and poverty caused by the liquidation of the Mine, forcing residents to rely primarily on hand-outs from their families and charities; a striking spike in crime post-liquidation; poor basic services; lack of information regarding the future of the area, including with respect to whether the Mine will be re-opened and/or if former employees will receive pay-outs; work permit and passport problems amongst foreign migrant workers; and housing-related concerns, particularly around security of tenure. Interview with Mpho Mngxitama of the Department of Social Development, 4 August 2015.

resources, limited commitment from other government departments, and the logistical difficulties associated with coordinating efforts of three tiers of government as a general matter.<sup>147</sup>

The South African Human Rights Commission also indicated in a meeting with the research team that while it was aware of the challenges facing the residents, a file on the Village had been “procedurally closed” due to a variety of funding and capacity constraints.<sup>148</sup> A senior representative of the Commission, however, highlighted the Commission’s continued interest in the plight of the Village residents and affirmed a commitment to investigating and supporting this community and others like it in future.<sup>149</sup>

### *iii. Basic Services*

As detailed in Section II(B)(a), the Mine while in operation functioned as a near “quasi-state” in terms of service provision to the Village, taking responsibility for maintaining access to water, sanitation, and electricity. At provisional liquidation, however, access to these services was threatened; the Municipality reported that it had neither the financial resources nor the capacity to incorporate the Village into its realm of service provision and could only attempt to supply water tanks to the area in place of the running water to which the community had long had access.<sup>150</sup> The Municipality said that it had no duty to intervene in this manner because, *inter alia*, the Village is located on “private property,” which is not incorporated as a formal township within its jurisdiction.<sup>151</sup> But continued access to these services is crucial: the Village simply “**won’t survive without water or electricity**,” stated resident Katrina Mokgotho.<sup>152</sup>

In 2015, the Village thus experienced multiple sudden terminations of its piped water supply, with wide-ranging impacts – individuals forced to relieve themselves in surrounding fields because the sanitation system relies on a piped water supply to function, a near permanent collapse of the water infrastructure due to lack of pressure in the pipes, and tremendous difficulties for the schools and health clinics in the community.<sup>153</sup> When a water truck visited the sprawling Village during these terminations, community members – and particularly women – reported waiting for hours in the cold for the truck, sometimes to no avail, and needing to walk long distances when it did arrive.<sup>154</sup> In each instance of termination, the community was forced to turn to the courts to obtain water reconnection, and in October 2016 managed to secure a court order requiring local government to develop a plan to ensure sustainable access to water and sanitation.<sup>155</sup>

The Village has faced similar challenges with respect to access to electricity. In the immediate aftermath of the Mine’s collapse, an electricity termination had a severe impact on the community, with violent

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147. Interview with Mpho Mngxitama of the Department of Social Development, 4 August 2015. DSD made reference to a government project purportedly intended to intervene in mining-affected communities in order to assist with unemployment including with respect to re-skilling, but noted that commitment from other departments has so far been lacking, as they simply do not view socio-economic upliftment as part of their core work. DSD reported that it “is ready, but we must mobilize our provincial colleagues for resources and our fellow government departments for additional support.”

148. Interview with Matthew Du Plessis of the South African Human Rights Commission, 5 August 2016; telephone call with Matthew Du Plessis on 6 December 2016.

149. Telephone call with Matthew Du Plessis of the South African Human Rights Commission, 6 December 2016.

150. First Respondent’s Answering Affidavit, *Molefe and 1 Other v Merafong City Local Municipality and 10 Others* unreported case no. 85928/15, paras 98.5; 144.1; 154.

151. First Respondent’s Answering Affidavit, *Molefe and 1 Other v Merafong City Local Municipality and 10 Others* unreported case no. 85928/15, paras 118.2; 138; 144.2.

152. Interview with Katrina Mokgotho, 11 November 2016.

153. Founding affidavit of Pule Molefe, *Molefe & 6 Others v Merafong City Local Municipality & 3 Others* unreported case no. 42203/15, para 59 and founding affidavit of Pule Molefe in *Molefe & 1 Other v Merafong City Local Municipality & 10 Others* unreported case no. 85928/15, para 60.2.

154. Founding affidavit of Pule Molefe, *Molefe & 6 Others v Merafong City Local Municipality & 3 Others* unreported case no. 42203/15, para 36; 61.

155. *Molefe & 6 Others v Merafong City Local Municipality & 3 Others* unreported case no. 42203/15 and *Molefe v Merafong City Local Municipality & 1 Other* unreported case no. 88064/15. The court order allows the Municipality 120 days to prepare and submit the plan, which process must include community consultation. The relevant time period had not elapsed at the time of this report’s publication.

crime and infrastructure theft skyrocketing.<sup>156</sup> Although electricity was subsequently re-connected, Eskom alerted the Village in late 2015 that it again intended to terminate. In addition to violence and crime, a disconnection also affects access to water and sanitation: the water pumps for the area rely on electricity. Resident Elizabeth Magrietha Jansen warned that the Village's survival in the absence of electricity was questionable: "If they switch off electricity, the same thing that happened in 2013, where three people were being killed per day by [those who] came in to steal all the infrastructure, will happen again. If the lights go out and the water goes off, the same thing will happen."<sup>157</sup>

In the early months of 2016, urgent negotiations between Eskom and the Village led to an agreement by which residents would cover the cost of a bulk electricity supply to the Village for several months, while Eskom attempted to install individual electricity metres to the homes in the Village by mid-year. Whilst the Committee organized and collected payment from thousands of residents over this period, and the community initiated a subsequent court case<sup>158</sup> to deem the Village within Eskom's supply jurisdiction, future provision of electricity still remains uncertain. The cost of the bulk electricity supply and the inability to monitor individual household use have presented enormous challenges for the Village. "We have asked for the installation of electricity metres and we thought that our negotiations with Eskom were going to allow this to happen. So far, it hasn't. We don't know what is next, but we aren't asking for hand-outs. **We want to be able to pay for our electricity like anyone else living in South Africa,**" said Pule Molefe.<sup>159</sup>

Private and state stakeholders are aware of these challenges. Both the DMR and Roering, for example, reported that although they had each spoken to the Municipality about proclaiming the Village as a formal township, in order to more easily facilitate basic service delivery, the Municipality has so far declined.<sup>160</sup> Provincial and national government have likewise failed to substantively assist. In September 2015, a member of the relevant provincial government's Executive Council (the "MEC") specifically charged with coordinating "the effective functioning of local government" and "accelerating service delivery"<sup>161</sup> convened a meeting with various stakeholders to consider the problem of continuing access to water and electricity in the Village. No solution was reached. The MEC instead simply foreshadowed a time when the Village "will turn into dark city...A ghost town...[and] all existing infrastructure is going to potentially be at risk of scrap metal dealers."<sup>162</sup> The Ministers of Water and Sanitation and Cooperative Governance, respectively, later opposed the Village's court application seeking the intervention of the national government in the water crisis. Neither regional nor national government has thus far seen fit to substantively assist in facilitating the Village's continued access to basic services.

### **c. Responsibility**

The reality facing residents today reveals that the community has not benefited in any sustainable way from the 70 years that the Mine was in operation. The Village is now significantly worse off since the Mine's collapse into provisional liquidation, in violation of the residents' right to development and, in many instances, in violation of the domestic laws that are intended to ensure fulfilment of this right. Various state and private actors bear responsibility.

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156. Paul Burkhardt 'Blyvooruitzicht: The fallout from a gold mine's closure' *Moneyweb* 18 December 2013 available at <http://www.moneyweb.co.za/archive/blyvooruitzicht-the-fallout-from-a-gold-mines-clos/> accessed on 18 November 2016.

157. Interview with Elizabeth Magrietha Jansen, 11 November 2016.

158. *Molefe & 1 Other v Merafong City Local Municipality & 2 Others* unreported case no. 47104/15

159. Interview with Pule Molefe, 28 November 2016.

160. Interview with Jimmy Segale of the Department of Mineral Resources, 11 August 2016; interview with Leigh Roering, 5 August 2016.

161. See Gauteng Province Co-Operative Governance and Traditional Affairs website available at <http://www.provincialgovernment.co.za/survey/37/Gauteng/Co-operative-Governance-and-Traditional-Affairs> accessed on 1 December 2016.

162. 'Bleak outlook for Blyvooruitzicht villages' *Business Day* 24 September 2015 available at <http://www.bdlive.co.za/business/mining/2015/09/24/bleak-outlook-for-blyvooruitzicht-villagers> accessed on 1 December 2016.

*i. Failure to abide by and enforce socio-economic obligations of the mining law*

The initiation of insolvency proceedings rather than pursuing proper mine closure has effectively eliminated the protection that should otherwise be provided to both Mine employees and the surrounding community to mitigate the socio-economic impacts of an operation's end of life. Relevant stakeholders appear to believe that the country's insolvency laws supplant the MPRDA and its associated regulations, as well as the NEMA principle dictating that people and their needs must be at the forefront of decision-making with respect to mining-related activities. This sets a dangerous precedent for the declining gold industry. Provisions of the mining law in particular may be read to include instances of insolvency as detailed below and must be enforced by the DMR. However, if the law is not so interpreted, it must be amended. **Indeed, if liquidation provides an escape from such obligations, there is little incentive for corporations with mature assets to fulfill them.**

As noted in Sections III(A)(a)(ii) and III(B)(a) the MPRDA is clear that companies contemplating downscaling and/or closure must implement mitigation measures to "ameliorate the social and economic impact" of closure.<sup>163</sup> Although such commitments were acknowledged and planned for in the Mine's 2012 SLP, neither Mine management, the majority shareholders and board members,<sup>164</sup> nor the team of liquidators honoured these obligations in the context of the Mine's insolvency, which left thousands unemployed.<sup>165</sup>

"Everyone knows the jobs aren't coming back," stated liquidator Roering. Although the liquidators report having no knowledge of the contents of the SLP and believe that they anyway do not pertain to their work, Roering acknowledged the "desperation" of the Village and on this basis initiated preferential creditor payments to former Mine employees even before the issuance of a final order of liquidation (normally the point at which such payments are effected). Broader interventions to facilitate future employment opportunities – including the lower-cost initiatives to which the Mine committed in its SLP such as providing help to "formulate employee CVs, [setting up] interactions with potential employers, and training in interview techniques"<sup>166</sup> – were simply never initiated by the Mine's board (composed entirely of representatives of its majority shareholders, DRD and VMR) nor by the liquidator at a later point. It must likewise be noted that pursuant to the SLP, some R25 500 000 was purportedly available to effect the strategy for humanely managing the closure impact; the SLP attests that this was "sufficient provision" even in the event of unforeseen closure or downscaling.<sup>167</sup> Presuming this amount was ring-fenced to give effect to the commitment of having it "available at any given time," it is striking that no interventions to assist former employees or the Village have been undertaken.

The Mine's board seems to have also failed to abide by notification procedures required by the mining law to help limit the socio-economic consequences of closure and mass unemployment. Section 52 of the MPRDA provides that where a mining operation is facing specific financial constraints or will be downscaled such that 500 employees or more will lose their jobs, the mining right holder must notify the Minister and make recommendations regarding the expected socio-economic and labour impacts.<sup>168</sup> Failure to do so is a contravention of the MPRDA, particularly as such notification provides the Minister with a manner in which to intervene, before it is too late. DMR representatives said that the department did not intervene in these or related matters at the time of liquidation because it was not

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163. Regulation 46(d) of the MPRDA.

164. As detailed in Section II(B), a dispute arose between DRD and VMR regarding which entity actually owned the Mine in its last years. DRD did not respond to written questions and was not able to schedule a meeting with the research team; VMR told the research team in an email dated 12 July 2016 to contact the liquidators with all queries. In any event, community interviews indicate that neither shareholder fulfilled the SLP obligations described herein.

165. Former employees are technically "suspended" rather than "retrenched" pursuant to relevant labour law definitions, but practically speaking are left unemployed.

166. Blyvooruitzicht Gold Mine Village Main Reef/DRDGold Social and Labour Plan (2012) 75.

167. Ibid at 81.

168. Sections 52(1)(b) of the MPRDA.

informed that the Mine had initiated insolvency proceedings until after the fact. Despite the fact that the Mine was clearly financially distressed prior to the decision to liquidate and nearly the entire workforce was immediately let go thereafter, notification was purportedly not provided. The DMR has pursued no sanction for this violation.<sup>169</sup>

### **ii. Failure to facilitate continued access to basic services**

It is an unfortunate reality that many mining villages in South Africa today exist or are perceived by municipalities responsible for service provision to exist separately from the rest of the country. Even given this perception, however, South African and international law require the adoption of a state programme to protect the current status and the progressive realization of the rights discussed in this Section, which have been threatened by the Mine's closure. This requirement stands even where those rights were historically fulfilled by private entities. Residents' ability to maintain access to a piped water supply and adequate sanitation is explicitly safeguarded under national law; retrogressive action taking away such access is plainly prohibited without robust justification.<sup>170</sup> Similarly, electricity termination will severely undermine the residents' ability to progressively pursue an adequate standard of living.<sup>171</sup> Thus, the state has a positive duty to both plan for and help facilitate continued access to services for communities after mine closure, such as the Village in this case.

Under South African law, such plans must be "reasonable:" in other words, coordinated and comprehensive.<sup>172</sup> In this context these plans could include, for example, proclamation of mining villages, capacity-building at the municipal level and securing financial support from the relevant mining operation prior to mine closure, and engagement across all government levels and with the affected communities. It is a violation of the rights of Village residents, however, for the state to do nothing as these individuals descend further into crisis.

Blyvooruitzicht provides an invaluable lesson in the context of a declining gold industry. While local government has responsibilities towards the Village residents, who are its constituents, the sudden collapse of the Mine has also placed significant pressure on the Municipality, which appears to have neither prepared for this role nor anticipated the widespread consequences of the Mine's sudden collapse. Where so many of South Africa's mining communities are structured as Blyvooruitzicht was, local government must be financially and technically bolstered to be able to assume these responsibilities at the a mine's closure. Such preparation must happen well in advance, as the gold price volatility can often mean – as it did here – that closure or collapse comes earlier than anticipated.

### **iii. Failure to collaborate**

Similarly, the state has the obligation to consult and collaborate across government spheres to fulfil its duty of improving living conditions and the "capabilities and choices" of its population.<sup>173</sup>

In the case of the Village, both the DMR and DSD in particular have long been aware of the challenges facing the Village. Nevertheless, the challenges of cooperative governance appear to have stymied intervention by relevant departments: the research team heard of and met with multiple government departments and inter-governmental task teams purportedly created to alleviate the suffering in the

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169. Interview with Jimmy Segale of the Department of Mineral Resources, 11 August 2016.

170. See e.g. *Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC)* para 45; *Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)* para 41, 105, 138, 139; *Residents of Bon Vista Mansions v Southern Metropolitan Local Council 2002 (6) BCLR 625 (W)*.

171. See, e.g. Article 11 of the International Covenant on Economic, Social and Cultural Rights (guaranteeing the "right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.").

172. *Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)* paras 39 – 40.

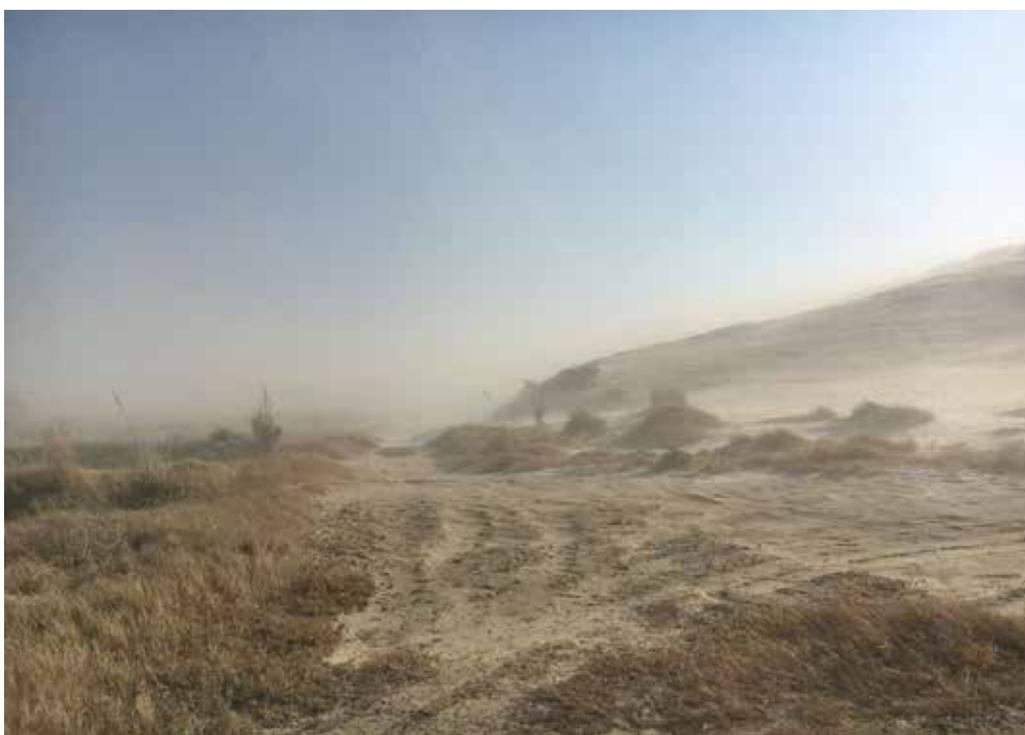
173. Section 41 of the Constitution.

Village and other mining-affected communities like it, but to date, the Village has seen no relief.<sup>174</sup> The DSD, in particular, noted that other departments simply “do not view socio-economic upliftment as part of their core work.”<sup>175</sup> There can be no question, however, that at least DSD is cognizant of both the deepening crisis in the Village and the need for government intervention in the area: it requested continued engagement with the research team until government is able to properly collaborate to stage an intervention.<sup>176</sup>

## **B. Right to an Environment Not Harmful to Health or Well-Being**

### **a. Legal and Normative Framework**

**Internationally**, consideration of the connection between environmental protection and human rights began in earnest with the 1972 UN Conference on the Human Environment, out of which emerged the “Stockholm Declaration” that proclaimed a “fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.”<sup>177</sup> Twenty years later, the “Rio Declaration” emerged from the UN Conference on Environment and Development, articulating a right to a “healthy and productive life in harmony with nature.”<sup>178</sup>



Dust blows off unrehabilitated Tailings Dam 6.

Multiple binding international treaties also contemplate the link between a healthy environment and fulfilment of other human rights.<sup>179</sup> The International Covenant on Civil and Political Rights, for example,

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174. A “Blyvoor Task Team” was purportedly established immediately after the liquidation of the Mine but has yet to act (see Section III(A)(b)(ii)). The research team at a meeting with the Department of Housing on 27 September 2016 was also informed of the existence of a Distressed Mining Village Task Team purportedly created to aid communities like the Village. The DSD also indicated that it had created an “Ex-Miner Project” to aid communities that are home to many unemployed mineworkers as the industry begins to contract.

175. Interview with Mpho Mngxitama of the Department of Social Development, 4 August 2016.

176. Ibid.

177. Principle 1 of the Stockholm Declaration on the Human Environment (1972).

178. Principles 1 and 2 of the Rio Declaration (1992).

179. See, e.g., the United Nations Conventions on the Law of the Sea (1982); The International Covenant on Economic, Social and Cultural Rights (1996); The International Covenant on Civil and Political Rights (1996).

affirms the right to life as fundamental and non-derogable,<sup>180</sup> which has been interpreted to therefore impose duties on states parties to safeguard against environmental hazards.<sup>181</sup> Similarly, while the ICESCR does not explicitly recognize a right to a healthy environment, the CESCR has nonetheless recognized that enjoyment of a broad range of economic, social and cultural rights depends on a healthy environment.<sup>182</sup> Specifically, Article 12 of the ICESCR recognizes that the right to “enjoyment of the highest attainable standard of physical and mental health,” requires states parties to work towards “the improvement of all aspects of environmental and industrial hygiene.”<sup>183</sup> The CESCR has interpreted this state requirement to not only ensure an adequate supply of safe and potable water and adequate sanitation, but also to protect populations from exposure to harmful chemicals or other environmental contaminants.<sup>184</sup>

International normative principles also acknowledge that information and participation rights are a “key point of intersection between environmental and human rights law.”<sup>185</sup> Principle 10 of the Rio Declaration, for example, states that “[e]nvironmental issues are best handled with participation of all concerned citizens,” and further provides that individuals should have appropriate access to information and effective access to judicial and administrative proceedings, including remedy with respect to environmental concerns or violations.<sup>186</sup>

**Regionally**, the African Charter on Human and Peoples’ Rights states that “all peoples shall have the right to a general satisfactory environment favourable to their development.”<sup>187</sup> The African Commission, which interprets the Charter for citizens of its member states, has determined that governments must consequently “take reasonable and other measures to prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural resources,” along with, *inter alia*, publicizing environmental and social impact studies associated with development projects, and undertaking appropriate monitoring of those communities exposed to hazardous materials and activities.<sup>188</sup> In line with relevant international principles, the Commission has further noted that affected individuals must be provided with information and meaningful opportunities to be heard, and afforded the chance to participate in the development decisions affecting their communities.<sup>189</sup>

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180. Articles 6(1) and 4 of the International Covenant on Civil and Political Rights (1996). South Africa is a signatory to and ratified the ICCPR on 10 December 1998.

181. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Final Report on Human Rights and the Environment 1994, E/CN.4/Sub.2/1994/9.

182. See, e.g., UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 15: Right of Water’ (2002) UN Doc, E/2002/11 (Arts 11 and 12 of the ICESCR), para 3 (considering Article 11 establishing the right to an adequate standard of living and explaining that this right as found in the ICESCR is intentionally expansive, specifying a number of rights emanating from, and indispensable for, the realization of that right, including the right to “safe and clean drinking water and sanitation”); UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 14: The right to the highest attainable standard of health’ (2002) UN Doc, E/2000/4, para 4 (stating that “the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as...a healthy environment”).

183. Article 12(2)(B) of the ICESCR.

184. UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 15: Right of Water’ (2002) UN Doc, E/2002/11 paras 8 (noting that states have an obligation to take steps to prevent threats to health from unsafe water conditions) and 12 (stating that water must be free from “micro-organisms, chemical substances, and radiological hazards that constitute a threat to a person’s health”); UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 14: The right to the highest attainable standard of health’ (2002) UN Doc, E/2000/4.

185. United Nations Environment Programme *Compendium on Human Rights and the Environment* (2014) Available at <http://www.unep.org/delc/Portals/119/publications/UNEP-compendium-human-rights-2014.pdf> accessed on 1 December 2016, 167.

186. Principle 10 of the Rio Declaration (1992).

187. Article 24 of the African Charter on Human and People’s rights (1986).

188. *Social and Economic Rights Action Centre (SERAC) and Another v the Federal Republic of Nigeria* (Communication No. 155/96, 30<sup>th</sup> Ordinary Session) para 53, available at: [http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30\\_155\\_96\\_eng.pdf](http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf) accessed on 1 December 2016.

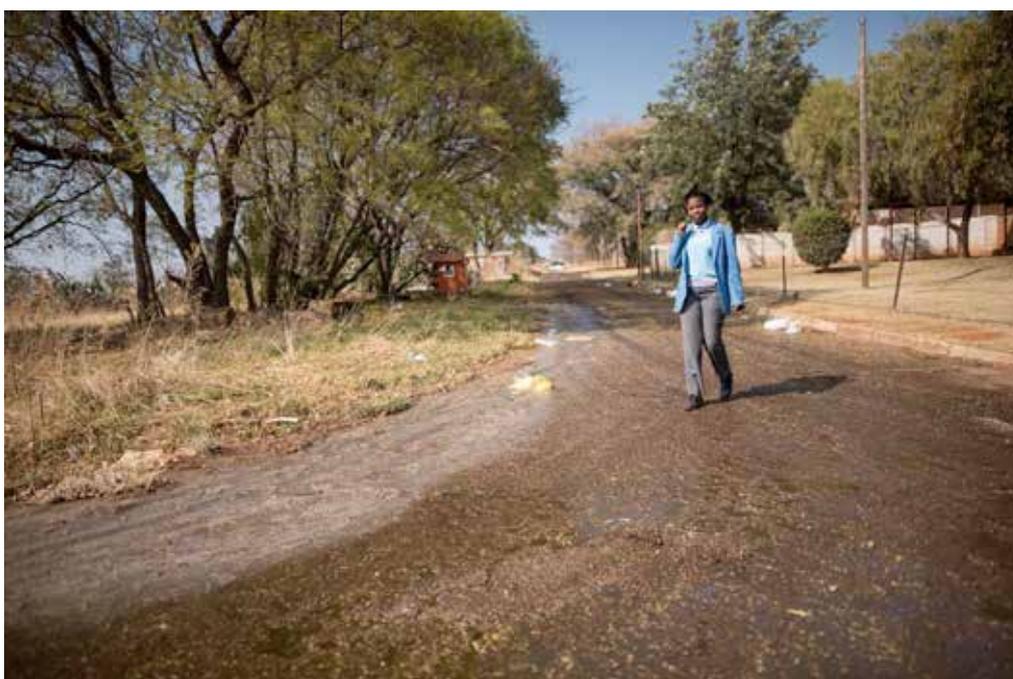
189. *Social and Economic Rights Action Centre (SERAC) and Another v the Federal Republic of Nigeria* (Communication No. 155/96, 30<sup>th</sup> Ordinary Session) para 53, available at: [http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30\\_155\\_96\\_eng.pdf](http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf) accessed on 1 December 2016.

**Domestically**, a legislative regime exists to govern environmental issues in South Africa, stemming from the explicit right set out in Section 24 of the Constitution, which states:

*Everyone has the right –*

- (1) to an environment which is not harmful to their health or well-being; and*
- (2) to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that –*
  - (a) prevent pollution and ecological degradation;*
  - (b) promote conservation; and*
  - (c) secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development.*

NEMA functions as the overarching framework facilitating the Section 24 right, and evinces a commitment to environmental protection in the course of justifiable economic development,<sup>190</sup> during which reasonable measures must be taken to prevent pollution and environmental degradation.<sup>191</sup> Key NEMA principles include a commitment to environmental justice so that adverse environmental impacts shall not be distributed in a discriminatory manner and “equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being.”<sup>192</sup>



Resident Nonhlanhla Nongalo walks home from school through raw sewage.

190. *Fuel Retailers Association of South Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment in Mpumalanga Province and Others* 2007 (6) SA 4 (CC) paras 71, 74 – 75, 79.

191. Section 2(3) of NEMA.

192. Section 2(4)(d) of NEMA.

NEMA also entrenches international normative principles regarding the significance of access to information and participation with respect to environmental issues. For example, the participation of all interested and affected parties in environmental governance is required and “all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation.”<sup>193</sup> Decisions “must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.”<sup>194</sup>

NEMA provides specific guidance relevant to the closure of mining operations, mandating that mining rights holders:

- . **rehabilitate the environment as far as reasonably practicable** to its natural state or to a land use which conforms to the generally accepted principle of sustainable development<sup>195</sup>;
- . set aside a financial provision - which only the state can access - to **ensure such rehabilitation occurs**;<sup>196</sup> and
- . **retain liability** for environmental damage even after closure of the operation.<sup>197</sup>

The state is charged with the duty of trustee of the environment for the benefit of the people.<sup>198</sup> As such, it is empowered to ensure that remedying measures are undertaken by those responsible<sup>199</sup> or indeed to undertake those measures itself and recover costs that result from those responsible for or that contributed to the mining-related pollution.<sup>200</sup> The Minister of Mineral Resources must be satisfied that there is sufficient financial provision for rehabilitation, which requirement aims to prevent situations in which mines, as in the case of Blyvooruitzicht, simply close, cease operation, or are liquidated without properly closing or rehabilitating the mine.<sup>201</sup>

Note that a number of other laws have been established to give effect to the constitutional right to an environment not harmful to health or well-being. These include the National Environmental Management Act: Air Quality Act 39 of 2004 (“NEMAQA”), various provisions of the National Water Act, and their associated regulations. Perhaps most importantly, the MPRDA also gives effect to this right. It explicitly emphasizes that NEMA’s guiding principles apply to all mining operations and such operations must be conducted in accordance with sustainable development.<sup>202</sup> It further mandates that the intention of the mining law is to “give effect to section 24 of the Constitution by ensuring that the nation’s mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.”<sup>203</sup>

The MPRDA, like NEMA, provides specific guidance with respect to mine closure, including regarding the process and powers that are intended to ensure that environmental issues are properly addressed and

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193. Section 2(4)(f) of NEMA.

194. Section 2(4)(k) of NEMA.

195. Section 24N7 of NEMA.

196. Section 24P of NEMA. Note that significant revision to the requirements of financial provision have recently been undertaken. See Regulations pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations GNR1147 of 20 November 2015 (“the new Financial Provision Regulations”). Nevertheless, the financial provision requirement was well-established during the period of the Mine’s operation and closure.

197. Section 24N7 of NEMA; see also s 24R(1) of NEMA. Note that this provision explicitly conflicts with section 43(1) of the MPRDA, which provides that such liability ends with the issuance of a closure certificate.

198. Section 2(4)(o) of NEMA.

199. Section 28(4) of NEMA.

200. Section 28(7)-(8) of NEMA.

201. Section 24P of NEMA. The new Financial Provision Regulations instituted after the closure of the Mine require, for example, that the holder of a right must ensure that the financial provision is “at any given time, equal to the sum of the actual costs of implementing the plans and report contemplated in Regulation 6 and 11(1) for a period of at least 10 years.”

202. Section 37 of the MPRDA.

203. Section 2(h) of the MPRDA.

provided for.<sup>204</sup> Mining rights holders must, for example, apply for a “closure certificate” from the DMR when mining operations have ceased; in order for the certificate to be issued, environmental matters must have been addressed.<sup>205</sup> The Minister of Mineral Resources is further accorded broad latitude to direct mining rights holders to take pollution prevention measures, to effect those measures him/herself where the holder fails to comply, and to recover costs as necessary.<sup>206</sup> Where the right holder has been liquidated, the Minister may “instruct the Regional Manager concerned to take the necessary measures to prevent pollution or ecological degradation of the environment or to rehabilitate dangerous health and social occurrences or to make an area safe.”<sup>207</sup> Such work can be funded from “the financial provision made by the holder of the relevant right...or if there is no such provision or if it is inadequate, from money appropriated by Parliament for the purpose.”<sup>208</sup>

## **b. Findings**

Residents consistently expressed concerns regarding the impact of the sudden cessation of the Mine’s operations in 2013 on the surrounding environment, particularly with respect to the increasing amount of dust in the air, exposure to raw sewage, and risks associated with ground water contamination. The **total lack of environmental measures undertaken at the Mine since provisional liquidation** means that residents live on the doorstep of an entirely unrehabilitated, non-operational gold mine.<sup>209</sup> **Fifty-eight percent of interview respondents therefore stated that mine pollution is a serious worry for the community.**

### *i. Air Quality*

#### Exposure to Tailings Dust

The primary environmental health complaint from residents centred on exposure to dust blowing off the unrehabilitated tailings storage facilities (“TSF” or “slimes dam”) that formed part of the Mine, and particularly “TSF No. 6.” Eighty-six percent of respondents identified dust inhalation as a worry. Resident Morotei Mojoale noted that **“the slimes are a constant concern. The dust comes straight to us. We are not sure what it is [...] It is very difficult to breathe...”**<sup>210</sup>

A number of residents remarked on the futility of attempting to keep their homes clean, as the dust blankets all surfaces. Lenah Kediarametse Mokgothu noted that “every morning, my house is filled with dust...from the slimes dams...It’s like fine white powder.”<sup>211</sup> A local shop owner complained of sand particles appearing in bread baked on the premises, which is situated directly opposite TSF No. 6.<sup>212</sup> Resident Committee member Pule Molefe stated that **on particularly windy days, the dust is so thick in the area that drivers must use their headlights to navigate, even in the middle of the day.**<sup>213</sup> Although residents noted that the dust is at its worst during the “windy season,” the investigative team also observed dust plumes emanating from TSF No. 6 during a number of visits from June through August 2016.<sup>214</sup>

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204. Section 43 of the MPRDA.

205. Ibid.

206. Section 45(2) of the MPRDA.

207. Section 46 of the MPRDA.

208. Ibid.

209. Interview with Leigh Roering, 5 August 2016; Interview with Jimmy Segale of the Department of Mineral Resources, 11 August 2016.

210. Interview with Morotei Mojoale, May 2016.

211. Interview with Lenah Kediarametse Mokgothu, May 2016.

212. Interview with Paulo De Gouveia, 24 May 2016.

213. Interview with Pule Molefe, May 2016.

214. Residents have indicated that the “windy season” in 2016 began in August and continued through October, although in previous years lasted from June through August.

### Worsening conditions post-liquidation

While some dust generation associated with operational tailings dams is not uncommon as a general matter,<sup>215</sup> residents cited a **marked deterioration in air quality** since the Mine's closure, when all mitigation measures were abandoned. Resident Mojoale noted that "when the Mine was operating, [the slimes dams] were treated. Now they are just standing."<sup>216</sup> Resident Elizabeth Magrietha Jansen echoed this sentiment, stating that the Village "is in the middle of the old Blyvoor tailings dams and AngloGold's tailings dams. Blyvoor is not being maintained at all – the dust is very bad and it is only getting worse."<sup>217</sup>

Independent and third party analysis supports the perception of worsening conditions. During mining operations, dust control is typically actively controlled through suppressants or water.<sup>218</sup> After operations cease, dust generation must be prevented through permanent means such as covers and revegetation; without such measures, the tailings will dry out, creating conditions akin to what residents now describe.<sup>219</sup> Blyvoor Gold Capital (Pty) Limited ("BGC"), a new gold mining concern attempting to purchase certain of the former Mine's assets, has publicly stated that "[s]ince the cessation of mining operations, **the Blyvoor TSF No. 6 has become a serious dust source which [...] negatively impacts the communities. Tailings dust is blown off the uncovered top surface, slope and beach areas almost on a daily basis, leading to large plumes which settle around the nearby villages.**"<sup>220</sup> The termination of tailings management at the Mine in 2013 has therefore likely had a serious impact on air quality around the Village.<sup>221</sup>

### Health impacts

Residents articulated concern about the possible health impacts associated with inhaling the dust, especially as **no information has been provided to the Village in this respect**. "This cannot be good for us or our children to be breathing," said Katrina Mokgotho. "The dust impacts both the old and the very young who inhale it."<sup>222</sup> Former Mine employees, with some knowledge of what may be present in the dust, articulated particular apprehension: Stephen Tseliso Ralikaniki posited that the "dust contains chemicals which can cause TB."<sup>223</sup> Sekepe Chobokoame, stated that the "dust is too dangerous, it is all over the Village. People should be informed about what is in the dust."<sup>224</sup>

State authorities and independent experts confirm that residents are likely right to be concerned about the **health impacts related to tailings dust**. An expert dust study undertaken for this report noted that "wind-blown dust from mine tailings facilities can be a significant source of dust emissions... affecting both the environment and human health," and stated that slimes dams located in close proximity to human settlements – such as the Village – in particular pose these health risks. Indeed, the World Health Organization has stated as a general matter that for airborne particulate matter, or

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215. Dr. Rens Verburg "Blyvooruitzicht Environmental Evaluation: Desktop Analysis" (the "Verburg Report"), 6 (stating that "dust generation is a common occurrence around tailings impoundments due to the fine-grained nature of the sands and slimes ...").

216. Interview with Morotei Mojoale, May 2016.

217. Interview with Elizabeth Magrietha Jansen, 11 November 2016.

218. This report draws no conclusions about the efficacy of the dust management efforts undertaken by the Mine while in operation, but rather reflects the view of residents and other stakeholders that dust generation has markedly increased since closure.

219. Verburg Report, 6. Given that no environmental management measures were undertaken post-liquidation, this is precisely what occurred at the Mine; new mining concern BlyvoorGold Capital publicly stated that the surface of TSF 6 simply "dried out after the mine went into liquidation." See Eco Partners *Environmental Impact Assessment and Environmental Management Programme for the Blyvooruitzicht Gold Mining Company* (2016).

220. Eco Partners *Environmental Impact Assessment and Environmental Management Programme for the Blyvooruitzicht Gold Mining Company* (2012) 36.

221. In his report, Verburg notes that if "[t]he dust issue, if left unchecked, will represent a growing concern over time. As the tailings continue to dry out, and any rehabilitation measures currently in place (if any) continue to deteriorate due to a lack of care and maintenance, dust generation will intensify." 7.

222. Interview with Katrina Mokgotho, 11 November 2016.

223. Interview with Stephen Tseliso Ralikanik, 11 November 2016.

224. Interview with Sekepe Chobokoame, 11 November 2016.

dust, **a threshold concentration below which no adverse effects are expected is simply not likely to exist.**<sup>225</sup> Further, many epidemiological studies have been conducted that **confirm the relationship between particulate matter and adverse health outcomes, including respiratory and cardiac health effects.**<sup>226</sup>

Results of the Village dust study, which measured, *inter alia*, particulate matter, or “PM10,” in the air, identified that the relevant daily limit under the country’s national air quality standards was exceeded three times.<sup>227</sup> Provided that a total of four exceedances are allowed annually under national law, **“three exceedances over 29 days is likely to result in non-compliance over a year.”**<sup>228</sup> While the study could not pinpoint the Mine’s tailings dams as the specific or singular cause of the dust due to varying wind patterns during the short assessment period and the Village’s location in the heart of the Witwatersrand Basin gold mining belt, experts nevertheless definitively recommended that “mitigation measures be implemented at the Blyvooruitzicht Mine TSFs to ensure minimisation of windblown dust under conditions of high wind speeds.”<sup>229</sup>

**The content of the tailings dust is also troubling.** The Mine’s tailings are acid generating, such that sulphate and metals can be transported in the form of dust particles but also via runoff or seepage from the dams after a rainfall.<sup>230</sup> The major concern in this respect is therefore around the “mobilization of metals from soil or tailings to water supplies and increased concentration of metals in surface or groundwater that may be used as potable water sources.”<sup>231</sup>

Residents’ exposure to the unrehabilitated TSFs is also troubling given that **the tailings - and hence the dust - contain uranium and thorium.**<sup>232</sup> Indeed, uranium grades in the gold ore were of such a level that the first uranium-extraction pilot plant in the region was built at the Mine in 1949.<sup>233</sup> Radiation emitted from the radionuclides present in the dust may therefore represent a health risk; a 2012 environmental impact assessment and management programme for the Mine makes precisely this point, stating that “[r]adioactive dust might have a health impact on employees and surrounding communities.”<sup>234</sup> Mariette Liefferink, CEO of local NGO Federation for a Sustainable Environment (“FSE”) expressed similar concerns, noting that “small uranium particles can be transported through the contaminated air and settle into the lungs. Depending on their solubility, they may reside in the lungs for years, causing chronic radiotoxicity.”<sup>235</sup> While **lung cancer is the “primary radiological effect associated with uranium exposure,”**<sup>236</sup> health impacts can also include **irreparable damage to tissue**

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225. World Health Organization. 2006. WHO Air Quality Guidelines for Particulate Matter, Ozone, Nitrogen Dioxide and Sulfur Dioxide, Global update 2005, Summary of risk assessment. WHO, Geneva, Switzerland. (noting that standard setting must therefore be aimed at achieving the lowest particulate matter concentration possible, given the local context and priorities of the region).

226. World Health Organization. 2006. WHO Air Quality Guidelines for Particulate Matter, Ozone, Nitrogen Dioxide and Sulfur Dioxide, Global update 2005, Summary of risk assessment. WHO, Geneva, Switzerland.

227. Airshed Planning Professionals *Particulate and Dustfall Sampling Report for Blyvooruitzicht Gold Mine Project done on behalf of Lawyers for Human Rights* (2016) 14 (the “Airshed Report”). Section 3 of the National Ambient Air Quality Standards in terms of section 9(1) of the National Environmental Management: Air Quality Act 39 of 2004.

228. Airshed Report, 14.

229. *Ibid* at 16.

230. Verburg Report, 7. In its 2001 through 2014 20F annual reports, DRDGold acknowledged the acid-generating nature of the tailings and reported the regular application of lime to the TSFs to neutralize these conditions, see pages 25 (2001 20-F); 63 (2002 20-F); 57 (2003 20-F); 45 (2004 20-F); 44 (2005 20-F); 43 (2006 20-F); 40 (2007 20-F); 38 (2008 20-F); 41 (2009 20-F); 37 (2010 20-F); 41 (2011 20-F); 44 (2012 20-F); 40 (2013 20-F); 40 (2014 20-F).

231. Email discussion with Audrey Wagenaar, Senior Environmental Scientist at Golder Associates (5 December 2016).

232. Verburg Report, 11.

233. *Ibid* at 7 – 8.

234. Environmental Impact Assessment and Environmental Management Programme, Submitted in Support Mining Right Conversion Application (2012) 94, 104, 109, 131.

235. Interview with Mariette Liefferink, 1 August 2016.

236. Email discussion with Audrey Wagenaar, Senior Environmental Scientist at Golder Associates (5 December 2016).

## and result in mutagenic defects, endocrine disruption, and impacts on the immune system.<sup>237</sup>

The state has long been aware of the risks of exposure to mine water and dust from TSFs containing radionuclides. In 2006, the National Nuclear Regulator conducted and published an assessment of the Wonderfontein Catchment, which is located near the Village, finding that contaminated dust may cause elevated radiation exposure to the public, and is likely to occur in the vicinity of the TSFs located there.<sup>238</sup> Further, FSE's Liefferink in mid-2014 alleged criminal violations of the environmental duty of care pursuant to NEMA obligations by the Mine at the hands of the DRD and VMR company officers who acted as directors of the Mine's board, including with respect to air and water quality.<sup>239</sup> The Department of Environmental Affairs ("DEA") and the DMR purportedly worked with FSE to investigate and prepare the case, which was submitted to the National Prosecuting Authority ("NPA") over one year ago.<sup>240</sup> To date, no action appears to have been taken. The DEA informed the research team that the "wheels of justice are slow" with respect to environmental matters, which are not a priority within the NPA due to their complexity.<sup>241</sup>

### ii. Sewage water

#### Exposure to raw sewage

As noted in Section II(B), the Village had long had access to adequate sanitation and enjoyed a functioning water reticulation and sewerage system provided and maintained by the Mine while in operation. Their maintenance ceased after closure. As a result, residents report that raw sewage regularly spills into the residential streets and the surrounding environment.<sup>242</sup> The research team likewise observed this infrastructure breakdown during multiple visits to the Village from April through September 2016.

Consequently, approximately **84% of interview respondents cited sanitation as a key environmental concern**. Katrina Mokgotho reported that, "**sewage flows through the streets. It is all over and smells very bad. When no one is looking after the children, they play in the sewage water.**"<sup>243</sup> Resident Sekepe Chobokoame also noted that "the smell is so terrible and unbearable, it can't be good for your health."<sup>244</sup>

#### Health impacts

Independent analysis confirms residents' fears. An expert assessment of one of the places at which the contaminated water emerges from the dilapidated sewage system revealed that it **qualifies as "hazardous waste," with serious potential environmental and health and safety risks.**<sup>245</sup> The analysis further cautioned that although the water is most likely not used for drinking purposes, human exposure is likely to occur in the form of "intermediate contact recreational use – such as persons walking and children playing in the road (as was observed during the site assessment)."<sup>246</sup> Particularly because this sampling point was one of many locations at which the infrastructure has broken within the Village, the

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237. Federation for a Sustainable Development presentation on 'Environmental Risks And Hazards Pertaining To Radioactivity Within The Witwatersrand Goldfields: Findings Of Peer Reviewed Academic Reports And Governmental Reports', 43.

238. BS Associates "Assessment of The Radiological Impact of The Mine Water Discharges To Members of The Public Living Around Wonderfontein-spruit Catchment Area" prepared on behalf of the National Nuclear Energy Regulator (2006) 38.

239. Affidavit of Mariette Liefferink in support of the criminal charges against former directors of DRDGold and VMR. Liefferink laid the charges pursuant to section 28 of NEMA.

240. Interview with Mariette Liefferink, 1 August 2016.

241. Interview with Grant Walters of the Department of Environmental Affairs, 10 August 2016.

242. *Molefe and Other v Merafong City Local Municipality and 10 Others* unreported case no. 85928/15

243. Interview with Katrina Mokotho, 11 November 2016.

244. Interview with Sekepe Chobokoame, 11 November 2016.

245. Scientific Aquatic Services *Water Quality Assessment of Aquatic Resources within the vicinity of the Blyvooruitzicht Gold Mine, Carletonville, Gauteng Province Prepared for Lawyers for Human Rights* (2016) 14 (the "SAS Report"). Hazardous waste is defined by the National Environmental Management: Waste Act No. 59 of 2008 as "any waste that contains organic or inorganic elements or compounds that may, owing to the inherent physical, chemical or toxicological characteristics of that waste, have a detrimental impact on health and the environment."

246. SAS Report, 16.

public health risks for the community are significant. These include: **gastrointestinal illness, and by extension, exposure to pathogenic bacteria, which are responsible for the transmission of multiple infectious diseases, including cholera and typhoid fever.**<sup>247</sup>

Other stakeholders echo the risk of exposure to raw sewage in the Village and the surrounding area. FSE's Liefferink called the residents' exposure a "grave environmental and public health risk".<sup>248</sup> She has further cautioned that the sewage problem may ultimately result in the broader contamination of the nearby Wonderfontein stream, which feeds into the Bosmanskop Reservoir that supplies drinking water to some 450 000 residents of the nearby town of Potchefstroom.<sup>249</sup>

### *iii Water Quality*

#### Exposure to Polluted Water

Expert analysis raised questions regarding the impact of the abandoned underground shafts at the Mine on the area's surface water and groundwater quality, particularly with respect to the possibility of acid mine drainage ("AMD"). AMD is a process associated with the oxidation of reactive sulphides present in TSFs, waste rock, and underground rock, which, once initiated, is irreversible without intervention.<sup>250</sup> It is associated with water pollution, the degradation of soil quality, and allowing heavy metals to seep into the environment.<sup>251</sup>

In 2013, **DRD publicly acknowledged that water from the Mine's abandoned underground mining areas could potentially rise to the surface and decant into surrounding areas, posing a serious pollution risk to the groundwater, streams and wetlands.**<sup>252</sup> DRD also acknowledged for many years that it was imperative for the same reason to control the rate at which the water at its underground operations rose.<sup>253</sup> These risks reflected the need for a comprehensive and continuous water management programme to limit the risk of AMD generation and the release of this contaminated water into the environment.<sup>254</sup>

In light of the overnight cessation of the Mine's operations and lack of subsequent environmental measures after that, this has not occurred, beyond the intervention of neighbouring mining company AngloGold Ashanti Limited, which secured a court order allowing it to continue pumping the water out of one of the shafts in order to protect its own assets downstream.<sup>255</sup> This arrangement may prove problematic for the surrounding communities on several fronts. The relevant court order allows but does not require AngloGold Ashanti to pump water from the Mine shaft, suggesting that should its commercial

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247. *Ibid* at 12 – 13.

248. Interview with Mariette Liefferink, 1 August 2016.

249. *Ibid*.

250. Verburg Report, 8 - 9. Further, AMD may continue to varying degrees until the sulphides themselves have been exhausted; evidence from historic mining in Europe demonstrates that acid mine drainage formation can persist for thousands of years.

251. Eeded, Liefferink, and Tempelhof "Environmental ethics and crime in the water affairs of the Wonderfontein Spruit Catchment, Gauteng, South Africa" (2008) *TD* volume 4 no. 1, 34.

252. DRDGold 20-F (2013), available at: <http://globaldocuments.morningstar.com/documentlibrary/Document/b44cf6cfa2526a738046edd6b41ef9b0.msdoc/original> accessed on 1 December 2016; DRDGold 2013 Annual Report, available at <http://drdgold.integrated-report.com/2013/> accessed on 1 December 2016. DRD reported in 2005 that the Mine had to maintain a rate of pumping of fissure water sufficient to keep the rate of rise of underground water below the level of underground workings. Water not used in the operations was discharged into the Wonderfonteinspruit and the Doordraai Dam. DRDGold 2005 Form 20-F at 44 available at <http://globaldocuments.morningstar.com/documentlibrary/Document/e727182179f418f6.msdoc/original> accessed on 1 December 2016).

253. DRDGold 20F 2004 through 2012 p 13 (2004 20-F); 10 (2005 20-F); 11 (2006 20-F); 9 (2007 20-F); 8 (2008 20-F); 8 (2009 20-F); 7 (2010 20-F); 8 (2011 20-F); 9 (2012 20-F).

254. SAS Report, 16. Acid mine drainage forms as result of the oxygenation and hydrolysis of sulphide-based ores including pyrite, which is commonly associated with veins of gold in the Witwatersrand Basin. Release of AMD-contaminated water can cause permanent damage to the ground and surface water resources, as well as the physical stability of the land.

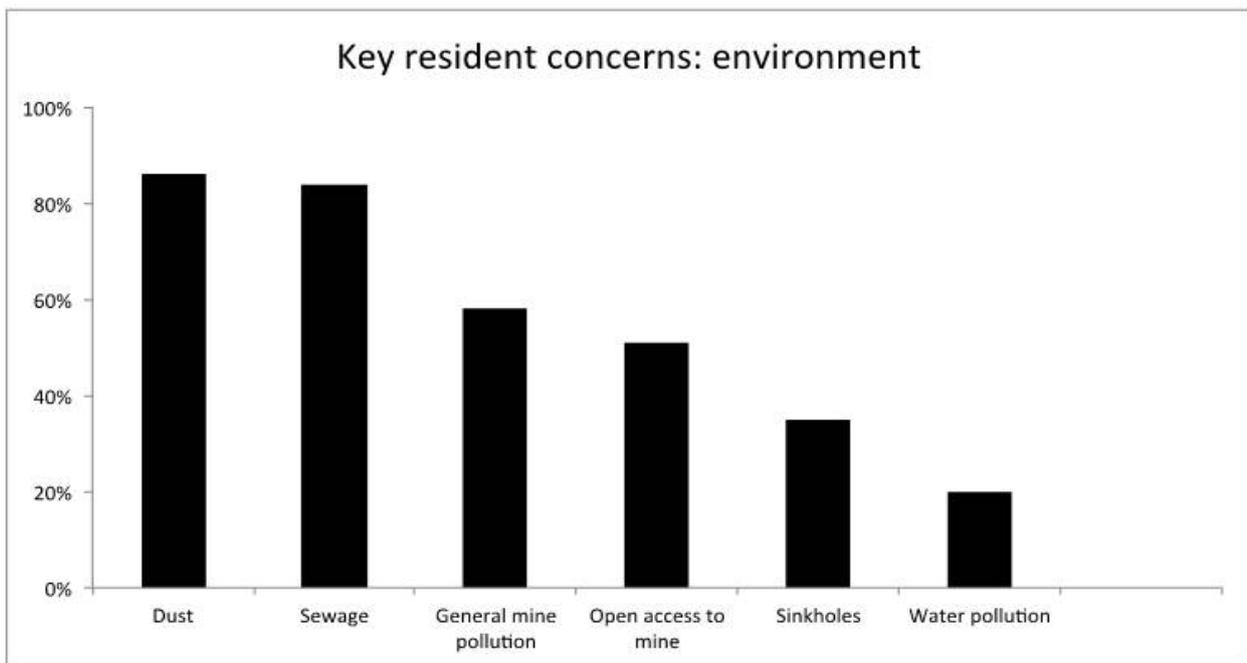
255. ENS Africa Comprehensive Report in Respect of Blyvooruitzicht Gold Mining Company Limited 8 (indicating that AngloGold Ashanti Ltd took responsibility for the water pumping).

imperative to maintain the current pumping programme cease, so too will the pumping programme.<sup>256</sup> Further, AngloGold Ashanti has been instructed by the Department of Water and Sanitation that it is only responsible for monitoring the water quality, not remedying it; indeed, AngloGold Ashanti cannot be held liable for the remediation of another company's operation.<sup>257</sup> Independent assessment of the raw water extracted from the defunct shaft and released into a dry tributary of a local stream revealed that it is marginally outside of acceptable standards and guidelines applicable for uranium concentration, domestic use, agricultural irrigation, and discharge of wastewater into a water resource.<sup>258</sup>

Health impacts

Water pollution, particularly as a result of AMD, in the area may pose serious health risks for the Village and surrounding communities and may result in significant environmental degradation. Amongst other things, AMD is associated with degradation of soil quality and allowing heavy metals to seep into the environment.<sup>259</sup> Long-term exposure by individuals to this "concoction of highly toxic and radioactive waste materials" can purportedly lead to increased rates of cancer, decreased cognitive functioning, and skin infections.<sup>260</sup>

*iv. Miscellaneous Environmental Concerns*



\*Residents frequently reported multiple reasons

256. Interview with Japie Harmse of Covalent Water Company (Pty) Ltd, 25 May 2016.

257. Ibid.

258. SAS Report, 15.

259. Eeded, Lieferink, and Tempelhof "Environmental ethics and crime in the water affairs of the Wonderfontein Spruit Catchment, Gauteng, South Africa" 34.

260. Ibid.

Beyond those related to air and water in the area, residents noted a number of other environmental concerns due to the cessation of environmental mitigation measures at the Mine in 2013.

Fifty-one percent of those interviewed expressed concern regarding the generally unsecured nature of both the underground shafts and the TSFs. In June 2016, the research team toured TSF No. 6 and observed the lack of any barricade or warning sign that would otherwise prevent access to the area. FSE's Liefferink likewise noted that children regularly swim in water that has gathered in the TSF's footprint, despite them being likely radioactive.<sup>261</sup> Committee member Joseph Rammusa cautioned that, "**behind Number One Shaft, there is a big open area, which was used for ventilation of the shaft. That place is now completely open. It's very dangerous; somebody was found dead there. Those places need to be sealed off. Children are running around.**"<sup>262</sup>

Thirty-five percent of residents also highlighted concerns about sinkholes, caused by ground water seepage into the underground dolomitic structures, which dissolves and weakens the rock structure. Sinkholes are a well-known problem in the area given its dolomitic geology, and DRD regularly reported on its efforts to manage these dangers.<sup>263</sup> Post-liquidation, this type of structured risk management immediately ceased, exacerbating the risk of sinkholes. Rammusa confirmed that "[w]hen the Mine was operating, we had someone addressing these issues and filling up sinkholes, but now we have no one. **I have a crack in my house, which can be a sign of a sinkhole forming, but there is [nothing to be done]. I can't leave my house. I have nowhere to go.**"<sup>264</sup> The sinkhole risk has almost certainly been compounded by the deteriorating water and sewerage infrastructure in the Village, and the unrehabilitated underground shafts.

#### *v. Access to Information and Participation*

Accurate, current information regarding these environmental risks appears nearly impossible for the Village to obtain. **One hundred percent of those interviewed reported that the government has never discussed or provided any details on possible environmental risks associated with the defunct operations.** A similar number of respondents also stated that the same was true of the relevant private actors – including the liquidator and the Mine's previous owner/operators.

Despite the clear risks to the Village, residents have been left guessing as to what this means for their health and the surrounding environment. This has made it impossible for them to know how best to protect themselves from risks associated with dust inhalation, exposure to raw sewage, sinkholes, and possible water contamination. Residents have also been denied information regarding long-term impacts of such pollution exposure, which has further limited their ability to advocate for themselves and participate in decisions regarding the future of the Village.

#### **c. Responsibility**

The lack of any environmental mitigation measures at the Mine since the cessation of operations over three years ago has negatively impacted on the residents' right to an environment not harmful to health or well-being.<sup>265</sup> Responsibility to put in place measures to prevent pollution and rehabilitate the general

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261. When tailing storage facilities have either been partially or completely reclaimed, a contaminated footprint of the former tailings material remains. Interview with Mariette Liefferink, 1 August 2016. Desktop analysis undertaken by Dr. Verburg supported this view, noting that radionuclides (uranium, thorium and their daughter products) which are present in the tailings, waste rock, and underground rock emit radiation and represent a health risk, depending on the potential for contact with and usage of any mine-related discharges. Verburg Report, 9.

262. Interview with Joseph Rammusa, 29 November 2016.

263. Verburg Report, 9-10.

264. Interview with Joseph Rammusa, 29 November 2016.

265. While various infractions of environmental law may have occurred while the Mine was in operation, these are largely beyond the scope of this report, which primarily assesses the responsibility for and impact of the wholesale lack of environmental mitigation measures at the Mine since the initiation of insolvency proceedings.

environment even where insolvency proceedings are initiated rests with the mining right holder, the owner/operators and directors of the Mine at the time of liquidation, and with the state, which must ensure that it holds those responsible to account. While gaps in the law have allowed certain of these violations to occur, the environmental and mining legislative frameworks arm the state with a wide range of powers to prevent and remedy them. These must be used.

*i. Failure to take proper environmental measures pre-liquidation*

Basic international principles dictate that at a minimum, a corporate actor must respect the human rights of those affected by its operations, including regarding the rights to water and environment. South African law goes farther in many respects, detailing the obligations of mining rights holders with respect to environmental management, proper closure, and rehabilitation. **Initiating insolvency proceedings without properly providing for the environmental management, orderly cessation of operations, and/or ultimate closure of the operation during the provisional liquidation period suggests a violation of these requirements.** Responsibility for these infringements rest with both the mining right holder, which remains BGMC (in liquidation),<sup>266</sup> as well as the historical owner/operators and directors of the Mine.

First, South African courts have refused to countenance “the absurdity that a polluter could walk away from pollution caused by it with impunity, irrespective of the principle that it must pay the costs of preventing, controlling or minimising and remedying pollution” under domestic environmental law.<sup>267</sup> Rather, South African environmental law specifically provides that any person “in control” of or using land in a way that causes, has caused or may cause environmental damage, or who has directly or indirectly contributed to pollution, may be liable for pollution arising from that land.<sup>268</sup> This includes BGMC (in liquidation) but this may mean little in practice, particularly once a final liquidation order is issued and the company ceases to exist. Domestic case law, however, suggests that this could also include the relevant parent companies of the operation, DRD and VMR. These companies directed and benefitted from the work of their subsidiary company BGMC as the owner/operators of the Mine, and their representatives formed the whole of the BGMC board during the relevant periods.<sup>269</sup>

South African insolvency law also dictates that **notwithstanding the non-existence of a company, once a final liquidation order is issued, its directors or shareholders – in this case DRD and/or VMR and the BGMC directors – remain responsible** for any action or omission that took place during the existence of the company.<sup>270</sup> Amongst other things, it may be particularly noteworthy that the financial provision purportedly made for rehabilitation purposes while the Mine was in operation (and under the direction of DRD and/or VMR) amounts to a mere R36 million.<sup>271</sup> While a definitive investigation into whether an

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266. BGMC (in liquidation) remains the holder of the relevant mining right for the Mine, despite entering into provisional liquidation in 2013. Under South African law, a provisionally liquidated company continues to exist – under the control of a liquidator – until a final liquidation order has been issued and the company’s name has been removed from the companies register. See s 82(1) of the Companies Act 71 of 2008. Thus, prior to that point, the company – BGMC here – remains in existence and thus may attract liability for environmental damage.

267. *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs and Forestry* 2014 (3) SA 149 (SCA), para 24.

268. Section 28(1) – (2) of NEMA; s 28(8) of NEMA (stating that costs for remedial action taken by the Departments of Environmental Affairs or Mineral Resources to remedy such environmental damage may be recovered from, *inter alia*, anyone who “is or was responsible for, or who directly or indirectly contributed to, the pollution or degradation” at issue). See also s 19 of the National Water Act 36 of 1998 (stating that an owner of land, a person in control of land, or a person who occupies or uses the land on which (a) any activity or process is or was performed or undertaken, or (b) any other situation exists, which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring).

269. Windeed Company Report for Blyvooruitzicht Gold Mining Company (2016). See also *Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs and Forestry* 2014 (3) SA 149 (SCA) (holding that Harmony, as controlling owner of African Rainbow Minerals Limited, whose gold mining operations were ultimately polluted during the period of Harmony ownership, could be held liable for that water pollution after selling those operations to another entity and thus relinquishing control).

270. Section 83 of the Companies Act 71 of 2000.

271. Humby ‘Facilitating dereliction?’ 11.

improper amount was set aside by the BGMC directors under the then-prevailing regulations is beyond the scope of this report, this amount is widely believed to be inadequate for a full remediation of the environmental impacts of the Mine.<sup>272</sup> Importantly, the 2007 Environmental Management Plan submitted by DRD to the DMR for the Mine estimated rehabilitation obligations to be some R75 million (and made reference to a shortfall in this funding),<sup>273</sup> while several years later, VMR estimated the environmental rehabilitation liability for the Mine to be R142 million.<sup>274</sup>

Second, **the BGMC directors may also be individually liable under the country's environmental laws.** NEMA provides that company directors can be held liable in their personal capacities for any negative environmental impact caused by the company, whether advertently or inadvertently, including "damage, degradation or pollution."<sup>275</sup> The breadth of this provision therefore suggests that **the failure to properly provide for rehabilitation, secure the Mine at provisional liquidation and ensure that appropriate environmental mitigation measures would be taken at the decision to liquidate** may render former BGMC directors liable. NEMA makes further provision for directors to be held criminally liable for failures to take reasonable steps to prevent the commission of an environmental crime.<sup>276</sup>

#### *ii. Failure to take proper environmental measures during provisional liquidation*

Since initiation of insolvency proceedings and the end of all pollution mitigation efforts at the Mine, environmental concerns in the Village have grown appreciably. South African law indicates that a provisionally liquidated company may be held to account for the breach of its environmental obligations; indeed, prior to a final order of liquidation, the company remains in existence, all of its legal obligations persist, and these can still be enforced, particularly by the state.<sup>277</sup> Containment and/or rehabilitation efforts that would normally be undertaken by the provisionally liquidated company's officers must therefore be undertaken by the liquidator, who is responsible for the affairs of the company in this circumstance, and must comply with the state's directives to take such measures.<sup>278</sup>

Both the liquidator and DMR officials appear to have been aware of this obligation. The DMR reported to the research team that it issued a non-compliance notice to the joint liquidators in 2014, requiring them to immediately commence with rehabilitation.<sup>279</sup> Although the liquidator has confirmed that to date no such efforts have been undertaken, the DMR has taken no further action in this respect.<sup>280</sup>

Liquidator Roering and his team, who have commendably committed significant resources to aiding the Village with respect to basic service access, security, and general maintenance over the course of the provisional liquidation, indicated to the research team that environmental management is simply

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272. Roering stated in an interview with the research team that initial investigations into the remediation costs of TSF 6 alone were revealed to be well over the R36 million purportedly in the rehabilitation trust. Interview with Leigh Roering, 5 August 2016. FSE's Liefferink confirmed that this amount was "certainly inadequate." Interview with Mariette Liefferink, 1 August 2016. See also Siphso Kings' 'Blyvoor: Legal minefield is a deadly hazard' *Mail & Guardian* 22 November 2013, <http://mg.co.za/article/2013-11-21-legal-minefield-is-a-deadly-hazard>

273. DRDGold Environmental Management Plan for the Blyvooruitzicht Gold Mine (2007).

274. See Golder Associates *EMP Update for Tailings Reclamation & Underground Mining at Blyvooruitzicht Gold Mine* (September 2016) 80, available at [http://www.golder.com/af/en/modules.php?name=Pages&sp\\_id=1850](http://www.golder.com/af/en/modules.php?name=Pages&sp_id=1850) accessed on 1 December 2016.

275. Section 24N(8) of NEMA.

276. Section 34(7) of NEMA which further provides for criminal liability for directors for the director or firm's failure to take reasonable steps to prevent the commission of an environmental crime.

277. Under South African law, a provisionally liquidated company continues to exist – under the control of a liquidator – until a final liquidation order has been issued and the company's name has been removed from the companies register. See s 82(1) of the Companies Act 71 of 2008.

278. Section 24N(7)(e) – (f) of NEMA requires that the right holder "must, as far as is reasonably practicable, rehabilitate the environment affected by the prospecting or mining operations to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development; and is responsible for any environmental damage, pollution, pumping and treatment of polluted or extraneous water or ecological degradation as a result of his or her operations to which such right, permit or environmental authorization relates."

279. Interview with Jimmy Segale of the Department of Mineral Resources, 10 August 2016.

280. Interview with Leigh Roering, 5 August 2016.

too costly given the estate's limited assets and significant debts.<sup>281</sup> Roering further indicated that he believes the financial provision set aside by the Mine for rehabilitation purposes to be beyond the reach of the estate and its creditors, and confirmed that it had not been included in the estate's assets.<sup>282</sup> Nevertheless, the mining right holder, BGMC (in liquidation), as the entity technically responsible for rehabilitation even during the provisional liquidation, would appear to be able to access these funds with the approval of the DMR. Having stepped into the shoes of the mining right holder, the liquidation team should have explored this option.<sup>283</sup>

Finally, the particular grey area in which the Mine currently exists, i.e. neither operational nor properly closed, is also problematic. However, both the environmental and mining legislation require that some notice be provided to the state and environmental management plans be at minimum discussed with the relevant authorities should mining operations cease or be likely to cease.<sup>284</sup> This is presumably to help ensure that circumstances like those in the Village do not arise. Failure to provide such notice is an offence under the law.<sup>285</sup> Operations at the Mine have ceased entirely, but none of the relevant private stakeholders provided formal advance notice to the relevant authorities in this respect.

### *iii. Enforcement failures and legal gaps*

Although responsibility to prevent pollution and rehabilitate the environment rests primarily with the polluter under the domestic legal framework, the state is charged with a duty under international law, the Constitution, and domestic environmental law to ensure that it holds those who caused the pollution to account and directs them to rehabilitate the environment as necessary. Indeed, as the public trustee of the environment, state regulatory authorities bear responsibility for the current environmental circumstances in the Village, even as they face challenges with respect to limitations in the governing legal regimes.<sup>286</sup>

First, the MPRDA and NEMA arm the relevant state authorities with significant power to ensure remedial action is taken at the Mine. These powers include, *inter alia*, requiring that a closure certificate be pursued,<sup>287</sup> that the environmental rehabilitation required in order for the certificate to be granted be undertaken,<sup>288</sup> imputing criminal liability to directors of entities that cause pollution,<sup>289</sup> and undertaking environmental rehabilitation at mining operations themselves where the relevant entity cannot or will not take the measures as directed.<sup>290</sup> Where the state is thus obliged to take these measures on behalf

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281. *Ibid.*

282. *Ibid.*

283. Roering confirmed that the financial provision had not been included in the assets of the estate and that it was his understanding that only the State could access the financial provision. Interview with Leigh Roering, 5 August 2016. Note, however, that Professor Tracy Humby has recorded that in the Mine's *ex parte* insolvency application lodged in the High Court on 9 August 2013, the total assets of the company were stated to be comprised of "total fixed assets and rehabilitation provisions." See Humby 'Facilitating dereliction?' 11. See also s 24(P)(6) of NEMA (stating that the "Insolvency Act, 1936 (Act No. 24 of 1936), does not apply to any form of financial provision contemplated in subsection (1) and all amounts arising from that provision.").

284. See s 43(3) MPRDA (requiring that mining rights holders apply for a closure certificate when mining operations have ceased, and providing the requirements that must be met in order for the certificate to be issued, including that environmental problems have been rectified); s 33 of the National Environmental Management: Air Quality Act 39 of 2004 ("NEM AQA") (requiring that the Minister of Environmental Affairs be notified in advance of any cessation, where a mine "is likely to cease mining operations within a period of five years," and future pollution prevention plans must be provided).

285. Section 98(a)(viii) of the MPRDA; s 33 of the NEM AQA.

286. Section 2(4)(o) of NEMA.

287. Section 43 of the MPRDA.

288. *Ibid.*

289. Section 24(f) of NEMA.

290. See, e.g. s 28(7) of NEMA. See also s 45(2)(a) of the MPRDA (providing that the Minister of Mineral Resources may take such steps as necessary to protect the health and environment of any affected person, or to remedy or stop pollution, and may cover related expenses by recovering costs from the holder or using funds appropriated by Parliament); s 46 (stating that the Regional Manager may "take the necessary measures to prevent pollution or ecological degradation of the environment or to rehabilitate dangerous health and social occurrences or to make an area safe.").

of the holder, it is likewise entitled to use the operation's financial provision to rehabilitate or manage the negative environmental impact, including in the case of liquidated operations.<sup>291</sup>

To date, state authorities do not appear to have pursued pollution containment or rehabilitation of the Mine with any seriousness. Although DMR officials report issuing letters to the liquidator warning of environmental non-compliance, these were purportedly "ignored" and no subsequent remedial measures were ever taken by either state or private actors.<sup>292</sup> Neither did the authorities make use of the Mine's financial provision to do so itself, despite that operations have been halted at the Mine since 2013.<sup>293</sup> This reflects an overall failure to take decisions and actions in a manner consistent with the principles detailed in the NEMA framework: namely, a failure to pursue environmental justice and sustainable development that puts people and their needs at the forefront of environmental decision-making, in clear contravention of domestic law.

Intricacies of the mining law as it is interpreted by the DMR may appear to prevent the state from accessing financial provisions for operations like the Mine until a final order of liquidation has been issued.<sup>294</sup> In the three years since insolvency proceedings were initiated, however, environmental damage at the Mine has continued unabated, likely ramping up the ultimate cost of rehabilitation once a final order of liquidation is issued. If this money likewise sits beyond the reach of the liquidated estate under the terms of the country's current insolvency and environmental laws, amendment and clarification of the relevant legal provisions may therefore be required. Without this, the precedent set by the Blyvooruitzicht circumstance is alarming: **if mining companies may sidestep their environmental obligations by initiating insolvency proceedings and the state likewise refuses to take action itself, mining-affected communities across South Africa face a dire future.** Communities may be forced to rely on a thus far little-used provision of NEMA, which empowers communities to seek a court order directing the DMR to take reasonable measures to prevent pollution or degradation of the environment to protect their interests.<sup>295</sup>

Finally, the lack of clear and robust notification requirements for mining companies specifically contemplating or completing provisional liquidation is troublesome. Because a mining right holder may only be held responsible for its environmental obligations to the extent that the holder exists, this suggests that the periods leading up to the decision to initiate insolvency proceedings and the issuance of final orders of liquidation under the current legal framework must be ones of critical engagement for the state and the right holder. However, this remains difficult in the absence of a clear legal obligation to engage.<sup>296</sup> Thus, although the DMR, for example, issues mining rights and is charged with regulating operations, a right holder may be able to de-register without providing assurance that the liquidation will not adversely affect compliance with environmental obligations, including closure. As detailed in Section III(A)(c)(i), DMR officials reported learning about the provisional liquidation of the Mine through the media; efforts to initiate structured engagement with past management and/or the new liquidators were delayed and negatively impacted by the fact that the DMR could not require engagement as a

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291. Section 24P(2) of NEMA; s 46 of the MPRDA.

292. Interview with James Segale of the Department of Mineral Resources, 10 May 2016.

293. Section 24P(2) – (4) of NEMA; s 46 of the MPRDA. The law is clear that financial provision must be used for rehabilitating or managing the negative impact on the environment caused by the right holder, and places the obligation on the Minister of Mineral Resources to rehabilitate or manage the negative environmental impact. Further, as noted above, an investigation into whether an improper amount was set aside by the BGMC directors under the then-prevailing financial provision regulations is beyond the scope of this report – and recent amendments to the regulations may resolve such shortfalls in future with respect to other mines. In this case, even if the amount in the rehabilitation fund is insufficient to rehabilitate the entire mine, use of the provision during the provisional liquidation period may have helped stem the tide of environmental damage that has continued during this time. More broadly, enforcement of the annual review requirement with respect to financial provisions must be enforced to ensure these amounts sufficient and current, particularly in the event of early closure.

294. Section 24P(2) of NEMA; s 46 of the MPRDA.

295. Section 28(12) of NEMA.

296. The requirement to seek a closure certificate would only require DMR engagement in the instances where mining has ceased, which is not the case in all liquidations.

matter of course.<sup>297</sup> This, too, highlights the possible need for legislative amendment and, in the interim, the grave need for effective oversight of the financial provision and environmental management measures undertaken during an operation's life.

#### *iv. Failure to provide information and facilitate participation*

Beyond the responsibility to ensure or undertake environmental remediation, the state also bears the primary legal duty under both international and domestic law to “proactively put into the public domain Government information of public interest”<sup>298</sup> with respect to the environmental health risks facing Village residents, and to undertake processes of obtaining this information if it is not known to the state. Such information does not appear to have been forthcoming, and it remains unclear if state authorities have attempted to obtain it if necessary.

### **C. Right to Adequate Housing<sup>299</sup>**

#### **a. Legal and Normative Framework**

**Internationally**, the right to adequate housing is well-established as part of the right to an adequate standard of living and is recognized by both the 1948 Universal Declaration of Human Rights<sup>300</sup> and Article 11 of the ICESCR.<sup>301</sup> The CESCR has clarified the scope and content of this right in its General Comments, noting that it must be interpreted broadly, as “the right to live somewhere in security, peace, and dignity.”<sup>302</sup> Further, “adequate housing” means, at a minimum: legal security of tenure;<sup>303</sup> availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.<sup>304</sup> Participation in housing-related decision making at the national and community levels is also imperative.<sup>305</sup> A number of other international human rights treaties have similarly addressed the right to adequate housing,<sup>306</sup> while the UN Special Rapporteur on Adequate Housing has assessed how international human rights norms on the right to housing can be transformed into domestic law, particularly with respect to the most vulnerable populations – migrant workers and people living in poverty.<sup>307</sup>

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297. Interview with Jimmy Segale of the Department of Mineral Resources, 10 May 2016.

298. United Nations Human Rights Committee, ‘General Comment No. 34: Freedoms of Opinion and Expression’ (2011) UN Doc, GE.11-45331, para 19.

299. There can be no question that the right to adequate housing is closely linked to the enjoyment of other human rights, including the right to an adequate standard of living, as well as the rights to work, health, social security, water, and education. Many of the impacts associated with the Village residents’ fears around their continued access to housing have therefore been discussed in Sections II(B)(b) and III(A)(b)(ii) of this report. Nevertheless, given the considerable concern residents report regarding their housing status, this report devotes a specific section to assessing the community’s right to adequate housing in the context of the Mine’s liquidation.

300. Article 25(1) Universal Declaration of Human Rights (1948).

301. Article 11 of the ICESCR guarantees the “right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”

302. Office of the United Nations High Commissioners for Human Rights, UN Habitat “Right to Adequate Housing” Fact Sheet 21 (2015) 3 - 4, available at [http://www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf) accessed on 1 December 2016.

303. The concept of secure tenure – not having to worry about being evicted or having one’s home taken away – is of particular relevance to the Village. Amongst other principles, international law requires that evictions be carried out as a last resort, affected parties must be afforded effective procedural guarantees, and should not result in individuals becoming homeless or vulnerable to further human rights violations. See UN Committee on Economic, Social and Cultural Rights ‘General Comment No. 7: The Right to Adequate Housing’ (1991) UN Doc E/1992/23, Office of the United Nations High Commissioners for Human Rights, UN Habitat “Right to Adequate Housing” fact sheet 21 (2015) 5 - 6, available at [http://www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf) accessed on 1 December 2016.

304. Office of the United Nations High Commissioners for Human Rights, UN Habitat “Right to Adequate Housing” fact sheet 21 (2015) 3 - 4, available at [http://www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf) accessed on 1 December 2016.

305. Office of the United Nations High Commissioners for Human Rights, UN Habitat “Right to Adequate Housing” Fact Sheet 21 (2015) 3.

306. These include, *inter alia*, Convention Relating to the Status of Refugees (art. 21), The International Convention on the Elimination of All Forms of Racial Discrimination (art. 5(e)(iii)), International Covenant on Civil and Political Rights (art. 17), and the Convention on the Elimination of All Forms of Discrimination against Women (art. 14(2)(h)).

307. Office of the High Commissioner on Human Rights website, available at <http://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx>



Residents on the front porch of a Village home.

**Regionally**, somewhat less explicit provision has been made for the right to adequate housing. Nevertheless, while the African Charter on Human and Peoples' Rights does not overtly refer to such a right, the African Commission's commentary nevertheless suggests that its protection can be derived from the enjoyment of other human rights, including the rights to privacy and protection of the family.<sup>308</sup> It has likewise recognised that the right to shelter goes further than having a roof over one's head, and must entail security of tenure and a corresponding obligation on the part of the state to protect and promote this right.<sup>309</sup>

**Domestically**, the right to adequate housing is unequivocally recognized and safeguarded by the South African Constitution, and the country's highest court has consistently relied on international human rights instruments and interpretations to add content to this right. Section 26 of the Constitution states:

- (1) Everyone has the right to have access to adequate housing.*
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.*

Thus, the Constitution provides not only for access to adequate housing but also imposes an obligation on the state to take all reasonable measures to protect the enjoyment and achieve the progressive realisation of the right of access to adequate housing.

In the case of *Jafta vs Schoeman*, the Constitutional Court considered the extent to which access to housing is linked to "dignity and self-worth."<sup>310</sup> Relying directly on Article 11 of the ICESCR, the Court approvingly cited the CESCR's interpretation of this right, and provided that in South Africa, as in international law, the right to adequate housing is not "interpreted in a narrow or restrictive sense...rather it should be seen as the right to live somewhere in security, peace and dignity."<sup>311</sup> Further, "adequate

308. See *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (Communication No. 155/96), in which the Commission determined that while the right to housing or shelter is not explicitly provided for under the African Charter, "the combined effect of articles 14, 16, and 18(1) reads into the Charter a right to shelter or housing...."

309. *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* para 61.

310. *Jafta v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) para 27.

311. *Ibid* at paras 23-25.

housing should not be equated with, for example, the shelter provided by merely having a roof over one's head...."<sup>312</sup> South African jurisprudence therefore must be read to take a broad view of the right to adequate housing, whose contours include those highlighted by the CESCR – particularly security of tenure, availability of services, affordability, and habitability, amongst others.<sup>313</sup>

The Constitutional Court has identified close links between the right to adequate housing and other rights. First, it has explicitly upheld the right to information and participation in the context of housing concerns, requiring “meaningful engagement” with interested and affected parties before housing-related decisions may be undertaken.<sup>314</sup> Further, the Court has acknowledged as a general matter that the “[t]he right of access to adequate housing cannot be seen in isolation. [...] Socio-economic rights must all be read together in the setting of the Constitution as a whole.... Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.”<sup>315</sup> On this basis, threats by the state to terminate a community's access to basic services and failure to protect the environment – within which people live, work, and play – may impact negatively on its right to adequate housing.

South Africa has likewise developed a robust legislative architecture to give effect to the constitutional right to adequate housing. Fundamental amongst these is the Housing Act 107 of 1997, which lays down the legal framework and principles for housing development and establishes state responsibility at all levels of government for housing obligations.<sup>316</sup> It aims to commit the state to housing programmes that prioritise the needs of the poor, guarantee their participation and involvement in decisions regarding housing developments, and promote integrated and sustainable social and economic development.



Dilapidated Mine Village playground.

312. UN Committee on Economic, Social and Cultural Rights ‘General Comment No. 7: The Right to Adequate Housing’ (1991) UN Doc E/1992/23, para 7.

313. The Constitutional Court has been clear that Section 26 “emphasises the importance of adequate housing and in particular security of tenure in our new constitutional democracy.” See *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) para 29.

314. *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC)

315. *Government of the Republic of South Africa and Others v Grootboom and Others* 2001(1) SA 46 para 24.

316. Housing development is defined in the Act as “*the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis have access to – (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing ensuring internal and external privacy and providing adequate protection against elements and (b) potable water, adequate sanitary facilities and domestic energy supply.*”

Other laws, such as the Prevention of Illegal Evictions and Unlawful Occupations of Land Act 19 of 1998 (prohibiting evictions without an order of court and in circumstances where residents will be rendered homeless), the Rental Housing Act 50 of 1999 (committing government to measures that promote equity, affordability and lawfulness in the housing rental market), and the Social Housing Act 16 of 2008 (recognizing the concept of a “social housing institution” that aims to provide “a rental or co-operative housing option for low-income persons”), protect and promote more specific elements of the right to housing.

**The state has also explicitly acknowledged a growing social crisis with respect to housing and development in mining-affected communities** – particularly regarding mine closures, housing shortages, and poverty in informal settlements sprawling out of mining towns. To this end, the MPRDA and associated regulations specifically require that the mining right holder must include measures for improving the standard of housing for mine employees and consider the surrounding community in its SLP.<sup>317</sup> The SLP in this respect is expected to promote home ownership.<sup>318</sup> Further, in 2015, the government introduced a Distressed Mining Towns Revitalisation Programme, with an estimated budget of R18 billion. Purportedly established by a special Inter-Ministerial Committee to tackle problems in mining towns and labour sending locations, the programme is intended to revitalise these areas, and transform them into sustainable human settlements.<sup>319</sup>

## **b. Findings**

Resident interviews with respect to housing issues in the Village reflect the complexity of the current circumstances: while an overwhelming majority of residents expressed concern about their ability to remain in their current homes, and in particular highlighted the fact that they have nowhere else to go, residents likewise spoke to the challenges associated with living in the Village, especially with respect to crime. Inadequate access to information regarding the future of the community remained a strong theme in interviews: some **74% indicated that neither public nor private stakeholders had substantively engaged them on their housing-related concerns.**

### *i. Security of tenure*

Most of those interviewed by the research team reported living in the Village for a good portion of their lives. “I have worked at Blyvoor since I was young, have been living in the Village since 1990, and in Blyvoor before then” said Joseph Rammusa.<sup>320</sup> Approximately **37% of respondents reported having lived in their current accommodation for at least five years, with 20% having lived there for more than ten years.** “This is my home,” stated resident Robert Burnet, a quadriplegic man who has lived with his mother in his Village home for over 40 years. “Even if I don’t own it.”<sup>321</sup>

There can therefore be no question that where the Mine functioned not only as the main employer for the area, but also the gatekeeper of the Village, the official owner of those homes, and the supplier of all basic services as detailed in Section II(B)(a), its sudden declaration of insolvency threatened the very existence of this community. A number of subsequent events also contributed to the residents’ collective anxiety, reported Committee member Pule Molefe, including efforts by Double D & G developers to purchase the Village homes and erect barriers around the area to keep out those who refused to pay the envisioned rental amounts.<sup>322</sup> **“We couldn’t afford the rentals that we were going**

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317. See s 100 of the MPRDA; reg 46(c)(iv) of the MPRDA Regulations; Guideline 4.7 of the SLP Guidelines.

318. Guideline 4.7 of the SLP Guidelines.

319. Mpinane Senkane “Mining Towns Get R18bn Facelift” *Mining News* 2 July 2015 available at: <http://www.miningnews/2015/07/02/mining-towns-get-r18bn-facelift-part-2/> accessed on 1 December 2016.

320. Interview with Joseph Rammusa, 29 November 2016.

321. Interview with Robert Burnet, May 2016.

322. Interview with Pule Molefe, 28 November 2016.

**to be required to pay, especially after we were left stranded without jobs, income of any kind, and were spending what little we had on maintaining and repairing the houses instead,"** said Molefe.<sup>323</sup>

Although the developer's deal was ultimately scrapped and residents have managed to hang onto their homes through the provisional liquidation process, **53% of those interviewed do not feel confident today in their ability to stay in their current homes.** "We are in these houses but we are completely in the dark. Someone could come tomorrow morning and tell me to pack my things and throw me into the street," said Elizabeth Magrietha Jansen.<sup>324</sup> Compounding this uncertainty is the fact that a central tenet of insolvency mandates that the liquidator must attempt to sell the assets of the Mine – which liquidator Roering reports include the Village and all the houses in it – to the highest bidder. Though the liquidators have not been successful in these efforts so far, such a sale is not impossible.<sup>325</sup> Community members report concern about how their future housing needs will be met should this occur. **"Many of us, like me, have lived at Blyvoor for the whole of our lives," said Molefe. "It is the only home we know and have nowhere else to go. We are stranded here."**<sup>326</sup>

However, even if no buyer for the Village emerges prior to the final order of liquidation, the law does not provide for automatic transference of the houses to the families residing in them. The properties may revert to the state.<sup>327</sup> As discussed in more detail below, it remains unclear what plans, if any, the government may have with respect to the Village should this circumstance arise. Joseph Rammusa reported that when residents "had a protest march to the Municipality after the property developer bought the houses, we told the Municipality about the threats of eviction. The Municipal Manager told us that Blyvoor is a private property and there is nowhere and no way that the Municipality comes in [to help]."<sup>328</sup> Efforts by the liquidator to encourage the Municipality to proclaim the Village as a township in order to have it formally incorporated into the Municipality have likewise been unsuccessful.<sup>329</sup>

To this end, **60% of interview respondents reported eviction as their primary housing concern.** Former mineworker Rethabile Sekhampu, who has lived in the Village for 15 years, stated that, "we don't know who will come, on which day and how, to tell us we have no rights to stay here anymore."<sup>330</sup> **Nearly 32% also reported fearing being charged rents they cannot afford.** "If someone came here to charge us rentals we won't be able to afford, we will be forced to leave. I don't know where [to]," said Deborah Thoresson.<sup>331</sup> Resident Committee member Comfort Zwane echoed these views: "I have lost so much in the closure [of the Mine]. I am hanging on here to try and get a title to my house."<sup>332</sup>

## *ii. Access to information and participation*

Closely linked to the pervasive sense of insecurity observed by the research team with respect to housing concerns in the Village is the inadequacy of information available to residents. Natalia Adolfo Juselio stated that, "I don't even know if the Government knows there is a place like Blyvoor. We've heard nothing."<sup>333</sup> Approximately **74% of respondents indicated that they had not been provided with any information regarding their ability to stay in their current homes post-closure of the Mine,** from

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323. Ibid.

324. Interview with Elizabeth Magrietha Jansen, 11 November 2016.

325. Interview with Leigh Roering, 5 August 2016.

326. Interview with Pule Molefe, 28 November 2016.

327. Interviews with Leigh Roering, 5 August 2016 and 11 November 2016.

328. Interview with Joseph Rammusa, 29 November 2016.

329. Interviews with Leigh Roering, 5 August 2016 and 11 November 2016.

330. Interview with Rethabile Sekhambu, 15 November 2016.

331. Interview with Deborah Thoresson, 11 November 2016.

332. Interview with Comfort Zwane, 11 November 2016.

333. Interview with Adolfo Juselio, 11 November 2016.

either state or private actors. **“We have been dumped by the government and the gold mine,”** said one male interviewee who preferred to remain anonymous.<sup>334</sup>

Few individuals indicated that they'd tried to obtain this information, pointing out that they didn't know who or how to ask for assistance. “I know I need help,” said Sanele Mkawansai, “but I don't know how I can get it.”<sup>335</sup> Amongst those residents who reported attempting to access information, none had been successful. Comfort Zwane recalled trying to speak with “the Municipality, liquidator, Department of Human Settlement, whatever door was open. They all told us we must write down our problems and they will come back to us but they haven't. The Municipality in particular informed us we are ‘just tenants’ ....”<sup>336</sup> Another female resident who requested anonymity stated that, “when we went to [the Municipality] to seek help, they told us we were in the private property. What surprises me is that this doesn't seem to apply during elections because they come here to seek our votes. We even have councillors living here.”<sup>337</sup> Liquidator Roering also reported attempting to engage both the Municipality and the Department of Human Settlement (“DHS”), which is charged with overseeing housing and urban development, with respect to the Village on multiple occasions over the previous three years without success.<sup>338</sup>

In the context of this study, the research team attempted to secure meetings with relevant state actors to discuss the housing situation in the Village. In September 2016, the team met with DHS, the Housing Development Agency, and a representative from the national government's Distressed Mining Town Revitalisation Programme. DHS confirmed that it was indeed aware of the housing crisis in the Village and had been approached by the community for intervention, but after opening a file for the area it had trouble tracing community representatives, and subsequently closed it.<sup>339</sup> Beyond attempting to engage the Municipality, it took no further action. However, all parties at the meeting acknowledged that current circumstances suggest that the Village is an appropriate case for intervention; the officials requested that the team make a formal request on behalf of the community for assistance but were unclear on what type of help may be provided. Officials indicated an “in-depth study” will be required to understand the challenges that Village residents face.

### *iii. Crime*

Crime was also reported to be a major issue for residents at the time that the interviews were conducted. Nearly 60% of respondents stated that safety and security is a primary concern, with **92% noting that crime has risen markedly since the Mine was provisionally liquidated.** Murder and theft, including home invasions, were reported to be common crimes within the community.<sup>340</sup> Violent crime against women is a further concern.<sup>341</sup>

Residents also reported a lack of timely intervention by the local police force when such incidents occur. Long-time Village resident Robert Burnet reported that with respect to safety concerns, “if anything happens, who can help us? I am on my own.”<sup>342</sup> This accords with a media review of problems reported to be faced by the Village in the aftermath of liquidation, with accounts indicating that it was approaching “lawlessness” and “chaos,” and incidents of crime were spiking.<sup>343</sup>

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334. Interview with anonymous, 11 November 2016.

335. Interview with Sanele Mkawansai, 11 November 2016.

336. Interview with Comfort Zwane, 11 November 2016.

337. Interview with anonymous, 2 December 2016.

338. Interview with Vusi Tshose, Itumeleng Segone, and Pamela Sekhonyana of the Department of Human Settlement and Malibongwe Dyki of the Housing Development Agency, 27 September 2016.

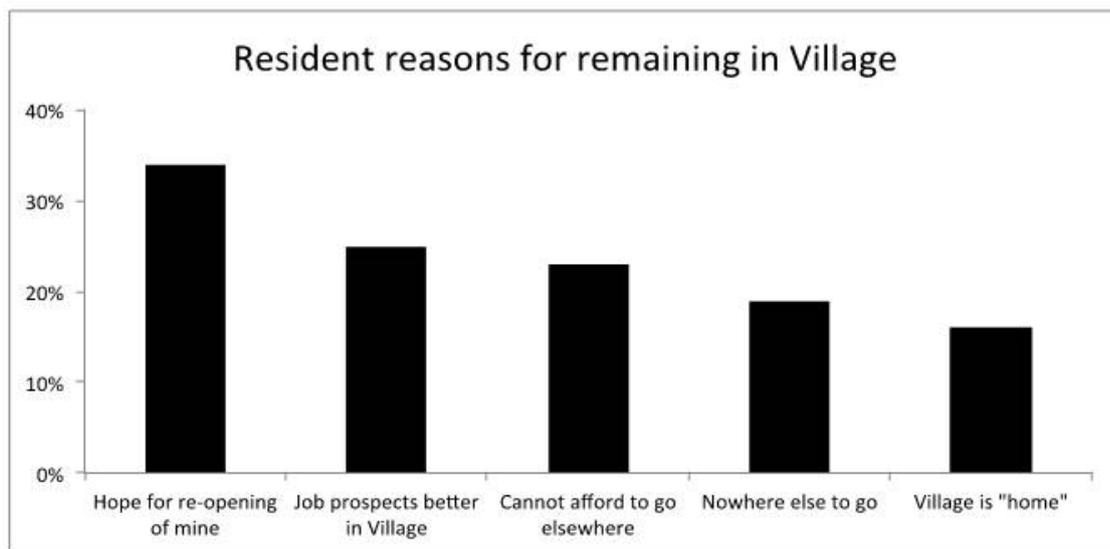
339. Ibid.

340. Seventy-six percent of those interviewed cited murder and 83% cited robbery/theft as a common crimes in the Village.

341. Nearly 57% percent of those interviewed indicated that crimes against women are common in the Village.

342. Dineo Faku 'Blyvoor crisis goes critical' *IOL* 30 March 2014, available at <http://www.iol.co.za/business/companies/blyvoor-crisis-goes-critical-1668328> accessed on 1 December 2016.

343. Sally Evans, Justice Kavahehatui, Tabela Timse 'Aurora meets Marikana at bloody Blyvoor' *Mail & Guardian* 7 March 2014, available at <http://mg.co.za/article/2014-03-06-aurora-meets-marikana-at-bloody-blyvoor-1> accessed on 1 December 2016.



\*Residents frequently cited multiple reasons for remaining in the Village

In an interview with the research team, Colonel Abel Gaza of the local police force acknowledged that in the immediate aftermath of the Mine's liquidation, "crime skyrocketed. It was a free for all because the Mine was not closed properly."<sup>344</sup> The area saw an enormous influx of the zama-zamas who purportedly moved in to "scavenge the scrap metals left lying around the mine property, unguarded equipment and mine shafts that were left open without anyone taking responsibility for them."<sup>345</sup> Colonel Gaza drew a distinction between individual informal miners eking out a living and the purported "gangs" that moved into the Village area: **"the zama-zamas were not ordinary criminals but part of heavily armed criminal syndicates that opportunistically took advantage of the abandoned mine scenario and who always shot at police.** We could never just send one police van into the area when there were problems; we'd have to organise reinforcements.... That often meant delays" to the detriment of the community.<sup>346</sup> Resident reports similarly suggest that after the Mine was effectively "abandoned" without consideration for the welfare of the surrounding community, the area became a "Wild West atmosphere, with gunshots at night."<sup>347</sup>

In recent months, however, Colonel Gaza reported that the circumstances in the Village had normalized due to a combination of organized police interventions, the presence of the liquidator's private security forces, and the community's own mobilization. Nevertheless, he warned of **the importance of avoiding an electricity termination in the area, as crime would once again increase, and the ability of the police to intervene would be hindered, particularly as the illegal miners continue to work in and around the defunct Mine today.**<sup>348</sup> According to resident Casisa Landu, "without jobs, people are trying to survive on all sorts of small businesses like selling beer, "spaza shops" and the like." She stated that since most of these businesses thrive primarily at night, opportunities for crime are heightened.<sup>349</sup> The community's safety and security is tenuous at best.

#### *iv. Viable Accommodation Alternatives*

Despite the difficulties faced by the Village residents and the current economic climate of the area, most respondents expressed a desire to remain there. Reasons ranged from not having anywhere else to go, to hopes that the Mine will re-open and provide employment, to the fact that the Village is simply

344. Interview with Abel Gaza, 11 November 2016.

345. Ibid.

346. Ibid.

347. Interview with Annette Wolfaard, 11 November 2016.

348. Interview with Abel Gaza, 11 November 2016.

349. Interview with Casisa Landu, 2 December 2016.

“home.”<sup>350</sup> Village resident Natalia Adolfo Juselio stated, “[**l]ife is just so hard. We have no money. It’s as if Blyvoor is saying ‘go away’ but we have nowhere to go.**”<sup>351</sup>

A mere 15% of respondents stated that they expected to be able to secure accommodation in the surrounding area if forced to leave the Village. Pule Molefe stated, “**believe me, if there was somewhere else for us to go, none of us would be living in Blyvoor. But for most of us, there isn’t and we are trying our hardest to make the best of it.**”<sup>352</sup> Most interview respondents stated that if forced to leave, they did not know where they would go or they would relocate to an area where they have familial roots – reflecting the migrant nature of the former Mine’s workforce – despite not having lived there in decades. A significant number of those interviewed reported hailing from South Africa’s neighbouring countries, including Lesotho and Mozambique, or from rural areas within the country where viable economic prospects were perceived to be extremely limited. According Moilwa Maretlwa, who hails from a small village in the North-West Province of South Africa, he remains in the Village in spite of all the problems because “in Blyvoor, at least people get piece jobs occasionally. Prospects for jobs are better at Blyvoor than at home ..... There is nothing I can do there.”<sup>353</sup> A full 70% of respondents did not believe they would be able to find employment in those locations and access to services there was widely believed to be inadequate. “There are no jobs where I come from and there is a drought, so I cannot even farm,” said Patlo Mokati, a former Mine employee from Lesotho.<sup>354</sup>

### **c. Responsibility**

The circumstances surrounding continued access to housing in the Village are complex, as the homes have always been the technical property of the Mine itself – despite how long residents have lived in them and their stated lack of alternative accommodation. At a minimum, residents today seek clarity on their current and future housing situation, and the opportunity to live in security, peace and dignity. More broadly, the residents would like the opportunity to own their homes, or to pay reasonable rent given their financial circumstances. The residents’ rights to adequate housing and related information must be at least respected by all actors, and protected and fulfilled by the state.

#### *i. Failure to reconcile insolvency and human rights obligations*

Liquidator Roering has acknowledged that the housing question in Blyvoor is complicated, made more difficult by what appear to be the competing imperatives of insolvency law and the conditions of a right to adequate housing. As a general matter, South African courts have held that the duty of a liquidator is “to recoup assets of the insolvent company, realise the assets, and apply the proceeds in satisfaction of the costs of the winding-up.”<sup>355</sup> In sum, the purpose of the liquidation process is to reduce the assets to cash so that the claims of creditors may be satisfied after the costs of liquidation are covered. Roering was clear in an interview with the research team that these mandates require that he seek a sale of the homes within the Village, as these remain technically assets of the estate.<sup>356</sup>

However, as a general matter, a corporate actor must refrain from violating or contributing to the violation of the human rights of those affected by its activities. More specifically, the Constitutional Court has been clear that the right of access to adequate housing includes a negative obligation imposed on “both

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350. Forty-two percent of respondents indicated that they either cannot afford to stay anywhere else or have nowhere else to go; 33% hope the Mine will be reopened to provide employment opportunities; and 23% simply consider the Village to be their home.

351. Interview with Natalia Adolfo Juselio, 11 November 2016.

352. Interview with Pule Molefe, 28 November 2016.

353. Interview with Moilwa Maretlwa, 11 November 2016.

354. Interview with Patlo Mokati, 11 November 2016.

355. *Pollock NO and Others v Camara and Another* (2013) ZANWHC 35 para 18.6.

356. Interviews with Leigh Roering, 5 August 2016 and 11 November 2016. However, it must likewise be noted that Roering has reported attempting to source many alternatives to the sale of these houses after the initial property deal fell through, including approaching local government to intervene and various national departments to assist. To date, these efforts have not been successful.

the State and a private person like the trustee of [an] insolvent estate” prohibiting these actors from “prevent[ing] or impair[ing] existing access to adequate housing.”<sup>357</sup> Therefore the sale of the homes to a developer intending to charge rents for the properties beyond the means of the current residents or otherwise resort to eviction suggests a possible violation of the Village’s right to adequate housing, particularly as the surrounding Municipality has publicly highlighted its challenges with a significant housing “backlog.”<sup>358</sup> The ability of the Municipality to facilitate access to alternative adequate housing for the thousands of Village residents is likely limited.

Further, evidence suggests that the Mine prior to liquidation had considered this circumstance and committed to addressing it. As detailed in Section III(A)(a), the MPRDA and its associated regulations are clear that sustainable housing development must be a priority of operating mines, whose plans to this end must be contained in their SLPs. BGMC (in liquidation) complied with this obligation, and its 2012 SLP both speaks to the municipal housing shortage, and the need to “contribute meaningfully to alleviating” this backlog.<sup>359</sup> To this end, the Mine had purportedly initiated what it termed a “*sustainable* housing project” within the Village, and committed to ensuring that these facilities would be “maintained and sustainable into the future [when] a ward councillor [would] continue ongoing monitoring and maintenance activities.”<sup>360</sup> As with respect to every other right discussed in this report, if the initiation of insolvency proceedings provide a way for the state or private actors to sidestep their legally-binding human rights obligations to mining-affected communities, liquidation undoubtedly will become an increasingly attractive option as operations near their end of lives.

## *ii. Failures of state intervention and policy development*

The state has the primary and positive obligation associated with ensuring the community’s continued access to adequate housing. The Constitution and relevant legislation mandate that each sphere of government – national, provincial, and local – shall have a role in this respect.<sup>361</sup> While the residents will of course be entitled to the protections afforded to anyone else in South Africa with respect to housing-related concerns such as evictions,<sup>362</sup> none of these legislative schemes speaks directly to the circumstance of a former mining village inhabited primarily by former workers and their families, who have no clarity on their ability to remain there in the aftermath of liquidation but likewise do not have anywhere else to go. The Village to date has been bereft of any acknowledgement or substantive intervention by the state.

In this context and in line with the principles established by the National Housing Act and the Constitution, responsibility for creating a deliberate policy of intervention to secure tenure over homes or otherwise draft a plan for dealing with the housing concerns – including crime – in communities such as the Village must rest with the state, and particularly local government.<sup>363</sup> Indeed, the state has currently any number of options adaptable to the housing crisis, including various social housing initiatives that may be well-suited to these circumstances. These include individual housing subsidy programmes,<sup>364</sup>

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357. *Sarrahwitz v Martiz N.O. and Another* 2015 (4) SA 491 (CC), para 45.

358. Blyvooruitzicht Gold Mine Village Main Reef/DRDGold Social and Labour Plan (2012) 67.

359. *Ibid.*

360. Blyvooruitzicht Gold Mine Village Main Reef/DRDGold Social and Labour Plan (2012) 67.

361. Section 2(1) of the Housing Act 107 of 1997.

362. For example, the Prevention of Illegal Evictions From and Unlawful Occupation of Land Act 19 of 1998.

363. This is particularly so given the likely transfer of the property to the state in any event. Under the terms of the National Housing Code and various government housing development programmes, local government has a key role to play in identifying and fulfilling housing needs. The Constitutional Court has likewise held that “all State action in relation to housing falls to be assessed against the requirements of s 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.” *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46, para 82.

364. The Individual Housing Subsidy Programme provides access to state assistance where qualifying households wish to acquire an existing house or a vacant serviced residential stand.

community home ownership,<sup>365</sup> and a programme to assist municipalities in bolstering their vulnerable communities by providing social and economic facilities such as clinics, community halls, and parks and playgrounds.<sup>366</sup> As detailed in Sections III(C)(a)-(b), the Distressed Mining Towns Revitalisation Programme likewise appears well-suited to assisting the Village and others like it, given its specific financial provision for housing development projects within these distressed mining communities.

Further, international and domestic law promote public participation in policy-making and require government to promote such participation by engaging meaningfully with affected communities.<sup>367</sup> Efforts to work with and consult the community in charting a way forward in this respect must form a part of the state's work in this community. Residents and the research team have recently been part of such initial engagements with the Municipality, and the Residents Committee is hopeful such interactions can continue.

It must also be noted that the state's duty of progressive realization with respect to access to adequate housing is a real one. In the Village, families are currently housed in permanent structures with access to water, sanitation and electricity infrastructure.<sup>368</sup> Residents have reported that while the financial circumstances of most families have declined in the aftermath of liquidation, the general area still provides more economic opportunity given the community's skill-set than other, more rural areas. There exist functioning schools and a health clinic within the Village. As such, removing residents and relegating them to circumstances more difficult than these will represent a significant step backward for this community, which is discouraged by both international human rights law and the relevant national legal regime. A path forward for the Village must be established.

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365. The Enhanced People's Housing Process (EPHP) involves the participation of organised community groupings in the housing process, through *inter alia* the provision of "sweat equity", which replaces their requirement for a financial contribution. "Community" can take the form of a voluntary association, community trust, or co-operative.

366. The Provision of Social and Economic Facilities Programme aims to address the historic problem of non-provision of primary social and economic facilities in housing developments and provides assistance to municipalities without the ability to fund such facilities themselves.

367. Section 195(1)(e) of the Constitution; *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC), paras 43-44.

368. Noting the current difficulties with service delivery despite existing infrastructure. See Section II(B)(b).

## IV. Conclusion and Recommendations

### A. Conclusion

The collapse of the Mine and the impact of the initiation of insolvency proceedings on the Village has led directly to violations of the residents' rights to an adequate standard of living and an environment not harmful to health or well-being, has threatened their right to adequate housing. Liquidation has unquestionably led to a severe decline in well-being, with particular respect to livelihoods, access to basic services, and the ability to fulfill basic needs. Closure without adequate environmental rehabilitation has led to serious fears amongst residents about the health impacts of breathing toxic dust, exposure to contaminated water, and the risk of sinkholes, amongst other environmental concerns. Crime in the area has increased, and uncertainty around security of tenure has contributed to a collective sense of insecurity and precariousness in the Village. **State and corporate actors both bear responsibility for these circumstances, and must take immediate action to meet these and redress this situation.**

Despite the limited action taken in respect of requiring or undertaking rehabilitative measures at the Mine since 2013, Village residents may yet benefit from an eleventh hour agreement between a new private entity, BlyvoorGold, and the liquidators of the estate.<sup>369</sup> Under the terms of the proposed agreement, BlyvoorGold will take over certain of the old BGMC assets – including the problematic TSF No. 6 – but will commit to rehabilitating the entire mine site.<sup>370</sup> Assuming this deal is completed, it appears that stakeholders, including the Village and crucially, the state, have been aided with respect to the environmental impact of liquidation by the fact that there may still be some economic potential left in the Mine assets. Although past owners have left the area an environmental disaster and the authorities have not taken on their responsibility vis à vis the Village, this new entity appears committed to cleaning up after them in an effort to obtain a mining license for the area. A limited number of local residents will likely also find employment through the partial reinvigoration of the Mine, alleviating for some the heavy burden of unemployment and associated poverty.

For the others in the community, and particularly because the BlyvoorGold deal has not been completed, engagement with the past owner / operators of the Mine is essential. DRD, in particular, appears to have achieved important growth and profitability since the liquidation of the Mine, and its commitment “to add economic value over a sustained period, rather than [employing] a hit-and-run approach [to operation]...”<sup>371</sup> and its declaration that “we want our communities and stakeholders to understand that we are committed to managing our environmental impact,”<sup>372</sup> would suggest a willingness to face and address the circumstances in Blyvooruitzicht as residents attempt to re-start their lives post-liquidation. Regardless of the fruitfulness of such potential engagement, full accountability for the violations exposed in this case may, however, only be obtained through legal recourse.

As a general matter, the Blyvooruitzicht example deftly illustrates that while the practice of casting off under-performing assets by invoking insolvency proceedings may be an effective way to safeguard

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369. BlyvoorGold, originally named Randlord Consolidated Mines (Pty) Ltd., appears to have been created in late 2015. See Kevin Crowley 'Randlord Sets Aside 100 Million Rand to Revive Blyvoor GoldMine' *Bloomberg* 16 March 2016, available at <https://www.bloomberg.com/news/articles/2016-03-16/randlord-sets-aside-100-million-rand-to-revive-blyvoor-gold-mine> accessed on 1 December 2016.

370. Golder Associates *EMP Update for Tailings Reclamation & Underground Mining at Blyvooruitzicht Gold Mine* (September 2016) 79-80. BlyvoorGold reports having access to the full costs associated with this rehabilitation via a combination of financial guarantees and an insurance policy. It is worth noting that this amount was calculated in accordance with the Guideline Document for the Evaluation of the Quantum of Closure Related Financial Provision Provided by a Mine (January 2005) rather than the new financial provision regulations published in terms of NEMA in 2015.

371. DRDGold Limited website, *available at* <http://www.drd.co.za> *accessed 1 December 2016*.

372. DRDGold Limited Integrated Annual Report, Appendix 2 “Natural Capital” (2015) 2.

shareholder profits, the negative impact on South Africa's environment and communities is tremendous. Such practices must not be countenanced in the hope that another corporate actor will always emerge to clean up after their unscrupulous counterparts.

The structural issues highlighted in this report must therefore be immediately addressed through legislative amendment, improved enforcement, the capacitation of relevant government spheres and departments, and the incorporation of mining communities into the fabric of local municipalities and mainstream service provision so as to avoid recurrence of such situations on a much broader scale. This is particularly critical as the South African mining industry enters its twilight years and the risks detailed in this report become relevant to a far greater number of communities.

## **B. Recommendations**

Many stakeholders appear to believe that the country's insolvency laws entirely supplant the MPRDA and its associated regulations in this respect, which sets a dangerous precedent for environmental and human rights protection in a backdrop of declining gold industry. Relevant provisions of the mining law may be read to include instances of insolvency as detailed below and must be enforced by the DMR in order that corporate actors are held accountable to the communities most affected by their operations. However, if the law is not so interpreted, it must be amended. Indeed, if liquidation provides an escape from such obligations, there is little incentive for corporations with mature assets to fulfill them, setting a dangerous precedent with respect to human rights protection for mining-affected communities.

### **a. General recommendations**

#### ***To the government of South Africa:***

##### ***i. Legislative amendment***

Although the current legal framework provides mechanisms for ensuring accountability of relevant stakeholders in this context, **legislative amendment and/or the creation of additional mechanisms in this respect may provide a more direct method by which to ensure effective responsibility of private actors for the negative impacts associated with liquidation of mining assets and improper closure.** To this end, government should:

1. Clarify the obligations of liquidators managing provisional liquidation processes to ensure that environmental and socio-economic commitments made by the relevant company prior to initiating insolvency proceedings are honoured as far as possible.
2. Identify the point at which a liquidator must seek approval from the DMR to access the financial provision and initiate environmental containment or rehabilitation measures.
3. Clarify the point at which the DMR must access the financial provision and initiate rehabilitation measures itself in the context of liquidated assets.
4. Develop clear requirements barring the initiation of insolvency proceedings by companies without first:
  - a. conducting an expedited assessment of the likely impacts of insolvency proceedings on the surrounding community and environment; and
  - b. providing advance notification to and engagement with affected communities and relevant government departments including the DMR, DEA, DSD, and DHS, at a minimum. Government must likewise enforce the notification requirements that exist under the current legal framework.

5. In cases where assets are liquidated to avoid proper closure procedures, explore methods to allow recourse to a holding or parent company level to ensure that closure and rehabilitation obligations are fulfilled. As a general matter, clarification of company liability and sanctions in such cases is necessary.
6. Consider clarification of ways in which companies can be held liable for human rights and environmental abuses directly or indirectly caused by inadequate or failure to conduct human rights due diligence in the course of business operations.

## ***ii. Enforcement***

1. As the gold mining industry enters its twilight years, the DMR and environmental departments must commit to improved oversight and enforcement of the environmental and socio-economic obligations of corporate actors related to operational closure, so as to better prevent adverse impacts on the human rights of communities and their environments.

Under the current legal framework, this would include ensuring that the obligation to anticipate and prevent negative impacts on the environment and human rights is fulfilled by corporate actors, and where these cannot be altogether prevented, ensuring they are minimised and remedied. Further, regulatory authorities must closely monitor financial provisions set aside for environmental rehabilitation, monitor the purported funds set aside for ameliorating the impact of unexpected closure, enforce the submission of and carefully audit Social and Labour Plans and annual reports, and ensure that commitments therein related to closure and/or mass retrenchment are fulfilled in the context of liquidation. Where violations of the legislative regime occur, actors must be held accountable under the terms of the law.

2. Considering the particular impact of tailings storage facilities and other mining waste sites on human health and the environment, the DMR should promulgate a policy on post-mining management and environmental rehabilitation for these sites, with particular focus on risks associated with sinkholes, and air and water quality. The policy should build on NEMA's current requirements, and should encourage data sharing between government departments, the private sector, and the public to help manage risk and facilitate public access to this environmental information.

## ***iii. Capacitating DMR With Respect to Mine Closure***

The DMR should create a Mine Closure Unit comprising personnel with specialist skills spanning relevant disciplines, including with training in insolvency processes. This unit would assist in preventing a recurrence of the sudden Blyvooruitzicht closure for other operations declared insolvent, as well as ensure proper closure of mines reaching the end of their operational lives, and work through any backlog of closed or abandoned mines where closure certificates have yet to be issued.

## ***iv. Capacitating Local Government Before Mine Closure***

As the circumstances of Blyvooruitzicht demonstrate, the structure of the South African gold mining industry means that the closure of a major mining operation results in a significant number of knock-on impacts for affected communities, local economies, and local government, which is forced to deal with new service provision challenges for which it may be unprepared and under-resourced. Local governments in mining districts must therefore be capacitated prior to mine closure in order that they are financially and technically equipped to deal with these challenges. To this end:

1. Local government, in negotiation with relevant companies, must ensure that Social and Labour Plans anticipate this problem and attempt to obviate it through a degree of knowledge transfer between experienced mine employees and relevant municipal employees.

2. Mining companies and local government must develop a funding arrangement to ensure that mining village infrastructure can be made compatible with that of local government on mine closure, when government takes over effective responsibility for provision of such services.

#### ***v. Strengthen the Judicial System***

1. Safeguard the ability of individuals to file criminal environmental cases and encourage the adjudication of these cases. In this regard, engage in the prompt and impartial initiation of the criminal case filed by FSE with respect to Blyvooruitzicht.
2. Engage in an education campaign, perhaps in collaboration with relevant civil society organizations, to educate judges, prosecutors, and communities with respect to environmental and mining law.

#### ***vi. Dedicated Non-Judicial Grievance Mechanism***

In light of the number of communities likely to be affected in coming years by the sudden closure of mining operations and the difficulty these communities appear to have in accessing information and pursuing corporate accountability, the state should consider taking a number of steps to improve access to justice for these communities, including:

1. Undertaking efforts to remove current practical, procedural, and financial barriers preventing access to justice for mining-affected communities within the current legal framework.
2. Considering the establishment of a dedicated state based non judicial grievance mechanism specialized in dealing with such cases. Such a mechanism should function as an additional method of achieving accountability and provide space for dialogue between communities and corporate actors, but should not preclude access to the judicial system. The design of such a mechanism should ensure:
  - a. Participation of affected communities and civil society organizations in designing and implementing such a mechanism;
  - b. Equality of the parties, safeguarded through:
    - . Provision of access to information, advice, and expertise necessary for members of affected communities;
    - . Provision of financial assistance to affected communities needing it in order to file a complaint;
    - . Development of clear procedural rules to govern mechanism processes; and
    - . Identification of means of monitoring and implementation;
  - c. Proper and effective enforcement of its decisions, including through the use of sanctions and criminal measures, where available;
  - d. Independence of the mechanism from economic and political pressures, as well as corporate influence; and
  - e. Outcomes and remedies in line with international human rights law.

#### ***vii. Royalty Ringfencing***

Consider ring-fencing a portion of mining companies' royalty payments to specifically benefit mining-affected communities, particularly in the aftermath of closure.

#### ***viii. International Human Rights Framework***

1. Sign and ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, pursuant to the African Commission on Human and Peoples' Rights Resolution 223 of 2012, in order to allow victims of violations of economic, social and cultural rights to present complaints at the international level.
2. Continue to support the process of drafting and adopting a robust international treaty regulating

transnational corporations and other business enterprises in order to reinforce human rights protection in the context of corporate activity, and as a complementary measure to legislative enforcement and amendment at the national level.

***To the previous owner/operators of the Blyvooruitzicht Gold Mine:***

1. Conduct human rights due diligence throughout business operations, including during the initiation and at completion of closure procedures.
2. Comply with the responsibility to respect human rights, including in the context of insolvency proceedings, in light of the business responsibility to respect the principles of internationally-recognized human rights to the fullest possible extent, regardless of the state's ability or willingness to fulfil its own human rights obligations.
3. Redress human rights abuses, including environmental harms, directly or indirectly caused by inadequate or lack of human rights due diligence undertaken during the course of business operations.

***To the African Commission on Human and Peoples' Rights:***

Conduct an official visit to South Africa, with the participation of the Working Group on Extractive Industries, Environment, and Human Rights Violations, so as to issue recommendations regarding the impacts of mine closure on local communities, in particular in relation to economic, social and cultural rights.

**b. Specific recommendations**

***To the South African Departments of Mineral Resources, Environmental Affairs, and Labour:***

***i. Enforcement of SLP Obligations***

1. The DMR should hold the mining right holder accountable for its Social and Labour Plan obligations, which remain valid until a closure certificate is issued. Given the financial reality of BGMC (in liquidation), engagement with and/or legal recourse against the Mine's historical owner/operators (DRD and VMR) and in particular the BGMC directors (representatives of DRD and/or VMR), will likely be necessary. These parties' failure to provide alternative livelihood skills training while the Mine was in operation and under the direction of DRD and VMR represents a particularly serious breach of their obligations, which has directly contributed to the abject poverty of the Village in the aftermath of the liquidation.
2. The Department of Labour, in collaboration with the mining right holder / liquidation team, should engage the Village's former employees pursuant to the commitments included in the Mine's Social and Labour Plan and under labour law to fulfil, at a minimum, the lower-cost initiatives detailed therein, including the creation of a "job advice centre," counselling, and, where possible, skills training.
3. The DMR must launch an investigation into the whereabouts of the funds purportedly set aside to manage the impact of "unforeseen closure or downscaling" and require their deployment to fulfill the relevant obligations attested to in the Social and Labour Plan.

***ii. State Collaboration***

The Inter-Ministerial Committee on the Revitalisation of Distressed Mining Communities is well-placed to aid relevant government departments that have recognized the crisis in Village but highlighted the challenge of inter-departmental collaboration. Therefore, it should:

1. Open a file on the Village and establish contact with the Residents Committee.
2. Begin the required audit in order to determine ways in which the IMCRDMC can assist in bettering the future prospects of the Village.
3. Initiate and manage the process of developing a comprehensive and coordinated plan to provide support to Merafong City Local Municipality in addressing the housing and basic service needs of the Village, including, *inter alia*, water, electricity, rubbish collection, and security.
4. Initiate engagement between relevant state authorities, including the Departments of Labour, Social Development, and Mineral Resources to identify and implement poverty-alleviating schemes within the Village and its surrounding areas, including with regard to unemployment, hunger, illiteracy, and skills training.

### ***iii. Environmental Rehabilitation***

1. As the public trustee of the environment, the DMR and the DEA should pursue environmental justice on behalf of the environment, the Village residents, and surrounding communities by ensuring that the rehabilitation of the Mine, including in particular TSF No. 6, is undertaken. The state may rely on the rehabilitation financial provision, but because it is likely to be insufficient to address the full rehabilitation, must consider pursuing costs from historical owner/operators.
2. The DMR and DEA should collaborate to convene a series of meetings with Village residents and local government to provide information on the likely future of the Mine, the risks to the Village residents of remaining in the polluted area, and the best ways that residents can protect themselves from health impacts related to the pollution, particularly with respect to dust and sinkholes.

### ***To Merafong City Local Municipality and local policing authorities:***

#### ***i. Resolve Security of Tenure***

1. Formally proclaim the Village as a township to facilitate funding of housing development pursuant to the National Housing Code.
2. Seek funding through any number of specific housing programmes, including the Individual Housing Subsidy Programme, Enhanced People's Housing Process, and the Provision of Social and Economic Facilities Programmes in order to facilitate the repair of existing homes and upgrading of the Village infrastructure.

#### ***ii. Ensure Access to Information and Adequate Alternative Housing***

1. If the Municipality will not consider formal proclamation of the Village as a township, it should engage Village residents to explain its refusal to formally recognize the community.
2. If residents are therefore not able to remain in the Village, the Municipality must provide sufficient information, prior notice, and adequate alternative housing in accordance with its legal obligations.

#### ***iii. Crime***

Local policing authorities should consider the establishment of a satellite police station in the Village, and in particular assist the community in addressing crime related to the informal mining syndicates in the area in order to fulfil their obligation to ensure the security of the community.

**To any company taking over the Mine in part or in full:**

*i. Safeguarding the Rights of the Village in Future*

1. Maintain sufficient financial provision for full rehabilitation of the operation.
2. Support local government in incorporating the Village into its realm of service provision rather than acting as a “quasi-state” during its operational years.
3. Provide real alternative livelihood training to employees and community members.
4. Ensure all downscaling and closure commitments are fulfilled.

**To the South African Human Rights Commission:**

*i. Human Rights Oversight*

Re-open a file on the Village with the purpose of monitoring and assessing the observance of human rights within the Village, expanding its role as necessary and in accordance with its Constitutional mandate.

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