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ESG implications of mine rehabilitation in Africa

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Return to Africa Connected: Issue 4

Introduction

In many African countries, mining is the backbone of their economies. Often, however, little consideration is given to environmental, social and governance (ESG) implications when a mining resource has been depleted or becomes uneconomical to mine. An appropriate legal framework that deals with mining rehabilitation is vital as part of sustainable mining.

In 2016, the copper and nickel mining company BCL was placed into liquidation in Botswana. The liquidator's report disclosed that BCL had, at some point, made provision of USD100 million for rehabilitation on closure. When the company ran into difficulties, however, it used a significant amount of this sum to fund its operations, leaving insufficient funds to cover the costs of any meaningful rehabilitation of its mines.

The BCL saga highlights two major issues. First, the need for adequate financial provision for mine rehabilitation. And second, that funds set aside for mine rehabilitation must be adequately ringfenced.

Understanding of the scope of mine rehabilitation

Most discussion on mine rehabilitation focuses on remedying the physical, environmental and structural damage to the ground and surrounding areas from mining. But rehabilitation in a wider sense looks at the effects of closure on employees and communities reliant on the mine for employment and other social considerations like education, housing, health and community development.

Rehabilitation isn't something to consider only on the closure of a mine. It must also be properly planned prior to the opening of a mine, and continuously carried out during mining operations.

General problems facing mine rehabilitation

At the February 2020 Mining Indaba conference in Cape Town, a panel discussion on rethinking mine closure and rehabilitation highlighted some of the challenges:

1. Legacy issues: mine rehabilitation is a relatively new concept. Many countries are faced with a large number of disused, abandoned and closed mines that are damaging the environment and hazardous to local communities. Usually, no rehabilitation provision has been made for these mines, leaving governments to shoulder the burden.
2. Governance: this ranges from failure to implement the prevailing laws and regulations to corrupt officials who

make provision for rehabilitation.

3. Inadequate legislation or regulations to address the issue of mine rehabilitation for the benefit of all stakeholders.

Legislation and regulation

In Botswana, Part IX of the Mines and Minerals Act obliges the holder of a mineral concession to ensure that their concession area is rehabilitated from time to time and ultimately reclaimed as far practically possible in a manner acceptable to the Director of Mines.

If a holder fails to do so, the government can, without prejudice to any other remedies available, carry out the necessary "restoration," the costs of which becomes a debt owed to the government by the concession holder. The obvious shortcoming of this provision is that it's not much assistance if the company doesn't have the financial means or sufficient assets to cover the costs, or goes into liquidation with little or no provision for rehabilitation in place – leaving the government no meaningful right of recourse and shouldering the social, environmental and financial burden.

The Act allows the Minister to make regulations for the protection of the environment, but so far this hasn't happened, leading to uncertainty among stakeholders as to the expectations of the Director of Mines regarding rehabilitation. Any proposed regulations should be consulted on, to find the right balance of rehabilitation without onerous conditions that may affect the viability of any mining undertaking.

South African law requires mining companies to set aside funds at the outset of a project for rehabilitation of the local area when the mine closes. If the company is unwilling to use these funds after a mine closure, the government can take the money and carry out the rehabilitation work itself.

When it comes to enforcement of compliance laws, the most notable recent case involved the Gupta family-owned Tegeta mining company. Tegeta had been accused by the Public Protector of attempting to access funds set aside for mining rehabilitation. According to Tegeta, its intention was to use the funds for ongoing rehabilitation. However, South African law does not allow the funds to be used for ongoing rehabilitation – only for rehabilitation work on closure.

The National Prosecuting Authority obtained a court order preserving the funds held in two trusts established to retain the rehabilitation funds. The preservation order followed allegations that Tegeta, which is part of the Guptas' Oakbay Investments, withdrew money from the accounts and used it as collateral for loans, purportedly for mine rehabilitation.

Methods of safeguarding rehabilitation funds

How can funds be set aside and preserved for rehabilitation? Some responsible mining companies make payments into a separate high-interest bank account, obtain insurance or bank guarantees issued to provide sufficient financial security necessary for the company to fulfil its obligations for mine rehabilitation.

Another increasingly popular method is the creation of mine rehabilitation trusts by the mining companies. The board of trustees oversees and administers the trust funds to protect them from being used for other purposes. The mining company drafts the necessary plans and estimates for rehabilitation, and makes periodic payments to the trust, which accumulates adequate resources over time for rehabilitation projects. Recently, several mining companies in Botswana have used trusts as their preferred method of ringfencing such funds.

Conclusion

With increased focus on ESG issues, mine rehabilitation has become more important such that stakeholders including mining companies, communities and governments will have to look at ways to effectively address mine closures and their adverse effects.

Legacy mines in disuse are challenging, and will unfortunately have to be addressed by governments as many of the companies that owned the mines are no longer in existence. When it comes to modern mining, the more responsible industry players already include robust provisions for mine rehabilitation when planning to undertake new mining operations. The modern ethos that will increasingly develop in mining is aptly stated by a spokesman of the Minerals Council of Australia (MCA): "rehabilitation and mine closure are planned and considered across all stages of modern mine development and operation, from design to closure and rehabilitation is a critical component of a company's environmental management."

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