

SUPREME COURT OF APPEAL

OF SOUTH AFRICA

MEDIA STATEMENT – HARMONY GOLD MINING CO LTD v REGIONAL DIRECTOR: FREE STATE, DEPARTMENT OF WATER AFFAIRS AND FORESTRY

FROM: The Registrar, Supreme Court of Appeal

Date: 29 MAY 2006

Status: Immediate

If underground water in the defunct gold mines of North West Province's KOSH basin (an acronym for Klerksdorp, Orkney, Stilfontein and Hartebeesfontein) is not constantly and adequately pumped out it will flow down to the two active mines Harmony and AngloGold, and flood them. If that happens there will be grave risk of large scale loss of life and permanent destruction of those mines with catastrophic economic and job losses. Pumping operations at the defunct mines – Stilfontein, Hartebeesfontein and Buffelsfontein (the latter two under the control of DRD Gold) – have been going on for years. Pristine underground water occurs in abundance in dolomitic aquifers in the area and is a valuable component of the nation's overall water resource. It finds its way into the defunct mines which lie at a shallower depth than Harmony and AngloGold. The pumps at the shallow mines are equipped to deal with large volumes of water, those at Harmony and AngloGold not. The flow

to Harmony and AngloGold will occur because all the mines are interlinked by a maze of shafts and tunnels which are the result of 60 years of mining.

Apart from the flooding problem, old gold mining reefs contain iron pyrites which oxidises in contact with air and water. The result is that pristine water which enters the mines becomes polluted. This has to be avoided if the constitutional right to a pollution-free environment is to be protected because this polluted water will find its way into the Vaal Rivier system.

Matters came to a head when in March 2005 Buffelsfontein went into liquidation and indicated it would not continue paying its share of the pumping costs. In addition DRD Gold intimated a possible withdrawal of its own contribution. Faced with this crisis, the State stepped in. The Minister of Water Affairs delegated the Regional Director: Free State to take action. This he did, issuing a directive under the National Water Act's anti-pollution section requiring the pumping to continue and ordering that Harmony and AngloGold not only participate but contribute to the cost.

Harmony accepted responsibility for tackling pollution in its own mine but objected to undertaking, and paying for, operations on land belonging

to other companies. This despite the obvious risk to its own mine if it backed out. Nevertheless it considered the Regional Director was not empowered by the particular section of the Water Act to give the directive he did. It accordingly pursued that argument in the Johannesburg High Court. It lost. AngloGold was cited as a party but abided the decision. Not so Harmony. It took its case to the Supreme Court of Appeal and lost again. The appeal judges held that even if there was an understandable official motive also to combat flooding, the directive was still a lawful one if there was the motive to fight pollution. The provision imposing the obligation to take reasonable anti-pollution measures was wide enough to require Harmony to take such measures not only in its own mine but also, on the facts of the case, in the mines of the other companies.