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RE: PROGRESS REPORT ON ISSUES AROUND OPTIMUM COAL MINE (OCM) AND THE BUSINESS RESCUE PROCESS

- 1 The Chairperson of the Portfolio Committee on Justice and Correctional Services, Mr BG Magwanishe, MP, invited the Minister and the NPA to provide the Committee with a Progress report on issues around Optimum Coal Mine (**OCM**) and the business rescue process.
- 2 The NPA welcomes this opportunity since it wishes to be as transparent as possible in relation to this matter.
- 3 The NPA is well aware of the fact that there are many persons who have lost their jobs at the mine who are hopeful to be re-employed in the long run. For this reason, the NPA has expressed its desire to, once the mine is forfeited, sell it in a transparent process so that the mine can start full operations as soon as possible.

- 4 This matter involves various competing interests, and in a constitutional democracy, it is to be expected that parties will, as far as possible, endeavour to exercise their constitutional rights. As a result there are few options to expedite the matter. Unfortunately, the various forms of litigation delay the finalisation of the NPA's forfeiture application as will be explained below.
- 5 The NPA has attempted throughout to keep members of the public informed by responding in detail to press queries in this regard. The NPA has also met with representatives of the community at various stages.
- 6 In what follows, we will provide:
 - 6.1 The background to the OCM matters,
 - 6.2 Information regarding the pending appeals and interlocutory applications;
 - 6.3 The NPA's efforts to pursue the applications expeditiously; and
 - 6.4 Areas of concerns relating to the current operations at the mine.
 - 6.5 A brief report on issues relating to the Barberton Lily mine inquest.

BACKGROUND

- 7 In **December 2021**, the NDPP instituted on notice two related preservation applications in terms of section 38 (1) of the Prevention of Organised Crime Act 121 of 1998 (POCA) in the Gauteng Division of the High Court, Pretoria.
- 8 In the first application (**the OCM preservation application**) brought under case number 62604/2021, the NDPP sought an order preserving the shares of Tegeta Exploration and Resources (Pty) Ltd (**Tegeta**) in Optimum Coal Mine (**OCM**), all Tegeta's shares in Optimum Coal Terminal (Pty) Ltd (**OCT**) and the business of OCM. The OCM

preservation application was brought on notice to Tegeta and the Business Rescue Practitioners (**BRPs**) of OCM, OCT and Tegeta. After intervention applications, the National Union of Mineworkers (**NUM**) and a group of creditors (referred to as Panky Trading CC and 133 Others) were all joined in the OCM preservation application.

9 In the second application (**the Templar preservation application**) brought under case number 62601/2021, the NDPP sought an order preserving the claims of Templar Capital Limited (Templar) against OCM (the Templar claims). The NUM and the Mpumalanga Action Movement joined in the preservation application after intervention applications.

10 The NDPP was successful in both preservation applications, and a preservation order in each application was granted by two Judges, Fourie and Mbongwe, on 23 March 2022.

11 On **1 July 2022**, the NDPP served her forfeiture application in terms of section 48 of POCA (the Templar forfeiture application). On 2 July 2022, the NDPP served her forfeiture application in the OCM matter in terms of section 48 of POCA (the OCM forfeiture application).

12 On **4 October 2022**, the BRPs filed their answering affidavit in the OCM forfeiture application. No other answering affidavits have been filed in either the forfeiture applications.

APPEALS

Appealing the OCM preservation order

- 13 On 12 April 2022, the NUM and on 13 April, the BRPs applied for leave to appeal the OCM preservation order. On 11 May 2022, Templar, and Liberty Coal (Pty) Ltd (Liberty Coal) filed an application for leave to intervene and appeal.
- 14 The application for leave to appeal and intervention was heard on 15 June 2022 and leave to appeal and to intervene was granted on the same day. The appeal will be heard in the SCA on a date still to be determined.
- 15 The NUM is a party to the proceedings and is in an ideal situation to influence proceedings if it is felt that the matter is not progressing quickly enough. Thus far, the NPA has not gained the impression that the NUM is in any particular hurry to bring the matter to finality. This impression is justified by the NUM's appeal of the preservation order which seems to contradict the stated position of COSATU that it is supporting all measures to tackle corruption and state capture and recover stolen assets.

Appealing a Rule 7 decision

- 16 In both preservation applications, a section 39 (3) notice was filed purportedly by Tegeta to oppose the granting of a forfeiture order. The NDPP and the BRPs dispute the authority of the directors of OCM and OCT (both in business rescue) to represent OCM and OCT in the OCM forfeiture application. The NDPP filed a notice in terms of Rule 7, disputing the authority of Van der Merwe and Van der Merwe Attorneys (**VDM Attorneys**), to represent Tegeta at the instance of the directors of Tegeta. Following the issue of the Rule 7 notice, VDM Attorneys filed a power of attorney purportedly issued by the directors of Tegeta, to authorise the attorneys to represent Tegeta in the two forfeiture applications. They have not, however, filed any answering papers on behalf of Tegeta. On 5 October 2022, VDM Attorneys wrote to the NDPP indicating that they had been instructed to bring an application for declaratory relief to determine their authority

to represent Tegeta in both forfeiture applications. No application has been launched thus far.

- 17 However, in the Nulane case (also related to the Guptas), the same issue was raised, and the court found against the Directors of Nulane. They applied for leave to appeal, which was refused. They then petitioned to the SCA and were granted leave to appeal in that matter.

INTERLOCUTORY APPLICATIONS

The NDPP's Substituted Service Application

- 18 In the OCM forfeiture application, the NDPP seeks as ancillary relief the setting aside of the OCM and OCT business rescue plans. *Ex abundanti cautela* the NDPP has cited in the OCM forfeiture application not only parties who filed notices under section 39 (3) of POCA, but all creditors of OCM and OCT.
- 19 The NDPP made several attempts to obtain from the BRPs service addresses for all of the creditors of OCM and OCT. The NDPP also sought to establish from Liberty Coal which of the OCM creditor' claims Liberty Coal has acquired. (In a public process, Liberty Coal has offered to purchase all claims of OCM creditors). The BRPs and Liberty Coal were unable or unwilling to provide the NDPP with the requested information. This resulted in the NDPP being unable to ascertain which parties remain creditors of OCM and what their service addresses are. On 22 August 2022, the NDPP filed an application for substituted service on creditors of OCM. The application was provisionally set down for hearing on the unopposed roll of 13 January 2023, because it is the earliest available date on the ordinary court roll.
- 20 The OCM forfeiture application might be delayed should creditors come forward to oppose the relief sought after service. The letter to the DJP emphasises that the

substituted service application is urgent to make the forfeiture application ripe for hearing.

The BRPs' application for an order declaring that the operation and execution of the OCM preservation order is suspended pending the outcome of the OCM appeal

21 After being granted leave to appeal the OCM preservation application, the BRPs attitude was that the granting of leave to appeal suspended the OCM preservation application. This moved the BRPs to file an application for an order declaring that the operation and execution of the OCM preservation order is suspended pending the outcome of the OCM appeal. The application, filed on 22 August 2022, is brought under case number 16480/22.

22 The NDPP maintains that the OCM preservation order, or at the very least those parts of the order relating to the *curator bonis* appointed in respect of the OCM property, is “an interlocutory order not having the effect of a final judgment” and is therefore not suspended pending the appeal. The NDPP is accordingly opposing the application.

23 To cater for the possibility that her primary submissions may not be accepted, the NDPP has also filed a conditional counterclaim for an order putting into effect the OCM preservation order pending the finalisation of the appeal. The BRPs have neither filed their reply to the NDPP’s answering affidavits in the BRP application for declaratory relief nor their answering affidavits in the NDPP’s conditional counterclaim.

Application to remove BRPs

24 On 18 October 2022, the Directors of Tegeta served an application to remove the BRPs in the OCM matter.

25 The date of the hearing of this application still has to be determined.

THE NPA'S EFFORTS TO PURSUE THE APPLICATIONS EXPEDITIOUSLY

Section 61 certificate

26 The NDPP filed a certificate in terms of section 61 of POCA with the Registrar of the High Court before the hearing of both preservation applications. This procedure, which has never been used before, deals with the expedition of applications brought under Chapter 6 (civil recovery of property) of POCA. In terms of section 61 (a), the NDPP may file a certificate with the Registrar of the High Court concerned, stating that, in her opinion, the case is of general public importance. The Judge President acted in accordance with section 61 (c) and designated two Judges to hear the application. The matters were heard, and judgment was handed down on 23 March 2022.

Call for a judicial case manager

27 During October 2022, the NDPP called for a case management meeting with the Deputy Judge President in both forfeiture applications.

28 The NDPP placed on the agenda for that meeting that a case management Judge be appointed; that the same Judge be appointed to manage both forfeiture applications and any matters incidental to the forfeiture applications or the preceding preservation applications and orders; that timetables for the filing of outstanding papers and heads of argument be set; that the NDPP's application for substituted service possibly be heard in chambers.

29 The NDPP indicated that she was neutral as to whether the same Judge should be appointed to case manage the application ostensibly brought by Tegeta for the removal of OCM's BRPs under case number 35371/2022.

30 A meeting was held with the Deputy Judge President, Judge A P Ledwaba on 2 November 2022. The BRPs, Templar, Liberty Coal, NUM and Tegeta were present. We are awaiting the Deputy Judge President's directive.

CONCERNS RELATING TO CURRENT OPERATIONS AT THE MINE

31 In terms of the Prevention of Organised Crime Act 121 of 1998 a *curator bonis* was appointed over the mine to care for the property and to retain its value. However, according to the court order, the business rescue practitioners remain in control of the property and the business, which dilutes the curator's ability to preserve the business, property and assets. The appointed *curator bonis* is Mr Peter Van den Steen.

Safety concerns at the Mine

32 Mr Van den Steen raised his concerns surrounding three areas:

32.1 Water and waste management and the ramifications as a result of the water treatment plant that is not operational anymore and has not been operational for some time.

32.2 Safety and environmental concerns involving humans and animals (on the property as well as adjacent agricultural and settlement areas) and

32.3 Rehabilitation compliance and funding thereof - the potential increase of liabilities in this regard due to insufficient rehabilitation activity and/or provisions.

33 The AFU sent a letter to the Department of Mineral Resources (DMR) on 14 November 2022. No response has thus far been received.

Mini-pit operations

34 There are very lucrative mini-pit operations being carried on at the mine, and people, including ex-employees of the mine, are employed by contractors to mine those mini-pits. The NPA is concerned that the mini-pit operations are diminishing the value of the mine at the cost of the enrichment of mini-pit operators.

35 The *curator bonis* has repeatedly stated in his reports filed at court, that OCM is losing revenue from its coal, mined and exported by mini-pit contractors, as OCM only gets paid royalties.

36 The *curator bonis* filed his fourth report on 8 December 2022 at court.

36.1. He states that he met with the BRPs on 21 November 2022 to discuss his calculations of revenue lost and restructuring of the mining operations in a manner that results in OCM realising a significantly greater portion of the mining of its coal reserve. He met with NUM on 23 November 2022 and addressed their concerns.

36.2. He deals with the fact that Richard Bay Coal Terminal (RBCT) on 30 November 2022 gave notice to the BRPs of OCT, to cease its coal exporting activities through the Terminal by no later than 31 January 2023. RBCT previously granted OCT interim continuation to export. RBCT conducted a site visit at OCM on 8/9 November 2022 and following an assessment, concluded that the conditions for the previous lifting of the suspension to export (namely that the revenues from the sale and export of coal through the Terminal using OCT's entitlement would accrue to OCM for its purposes) are not being met. RBCT's letter to the *curator bonis*, quoted in his report, makes it clear that RBCT would be amenable to considering alternatives proposed by OCM and OCT and assessing their compliance with the RBCT Shareholders' Agreement.

36.3. He calculates that OCM earned an average profit of R28 562 820 (28.5 Million Rands) for the seven months from March 2022, whereas the potential profit for the same period is R6 313 801 000 (6.3 Billion Rands). Had OCM conducted its own mining activities, its profits would have been sufficient to settle in full all of OCM's creditors at current coal prices and OCM would be able to exit business rescue within a number of months.

36.4. He is of the view that the ongoing mini-pit mining operations constitute a dissipation of the property and these operations must be restructured.

ISSUES REGARDING BARBERTON LILY MINE INQUEST

37. The tragedy at the Barberton Lily Mine occurred on 5 February 2016 and the South African Police Service (SAPS) never opened a case docket.

38. An inquiry case docket CAS 01/04/2019 was registered when family members of the missing persons reported the incident at the SAPS Low's Creek in April 2019.

39. The reason apparently provided by the SAPS for not opening a case docket was that the matter was never reported to them by the mine management, the family, or the Department of Mineral Resources (DMR).

40. At some point the DMR launched an investigation into the disaster and on 15 March 2018 the DMR submitted a report of their findings to the DPP, Pretoria.

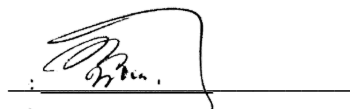
41. The Occupational Health and Safety Prosecutor attached to the office of the DPP, Pretoria, Mr Mothiba, instructed the Control Prosecutor, Barberton to obtain the case docket and present the statements therein to hold an inquest.

42. Various requests were made to SAPS by the Control Prosecutor, Barberton to submit the docket but was every time informed that the docket was at the office of the Provincial SAPS Commissioner for investigation.
43. A meeting was held on 4 February 2020 with the SAPS and the DMR and it was then established that only an inquiry docket was opened.
44. A proper case docket was opened, and this was done as per Low's Creek CAS 52/10/2020. The registration date of the said case docket was back dated to 30 January 2020.
45. When the investigation in respect of CAS 52/01/2020 was almost complete, a recommendation was made by the Senior Prosecutor appointed to deal with the matter, Mrs C Mortlock, to proceed in terms of section 8 of the Inquests Act, 58 of 1959.
46. On 16 September 2020, a meeting was held with the family members of the deceased, a community representative and a representative of the local chieftaincy of victims to inform them of the decision.
47. Evidence of several witnesses was led during the inquest proceedings including family members of the deceased, mine workers, mine managers and medical experts.
48. On 1 November 2022, an MS Team meeting was scheduled to discuss the matter. However, the meeting could not proceed due to the unavailability of the parties. Another meeting was re-arranged for 21 November 2022 for the hearing of further evidence. On 21 November 2022, a virtual meeting was held, and further evidence was led.
49. The inquest proceedings have now been set down for closing arguments on 7 to 10 February 2023 at the Barberton Magistrates Court.

CONCLUSION

50. Cases like the OCM/OCT mine case are challenged on numerous fronts in various ways and therefore require a significant investment in terms of, amongst others, time, dedication, hard work and knowledge over a broad spectrum of legal fields, to mention a few.
51. The NDPP has done and will continue to do everything in her power to expedite the matter and to bring it to conclusion.
52. We hope this assists the Portfolio Committee to address the concerns made by COSATU and other interested parties.

Kind regards,



Adv. R de Kock

Acting National Director of Public Prosecutions

Date: 08/12/2022