P O Box 176

Mahwelereng

0626

5 December 2015

The Director-General

Department of Mineral Resources

Pretoria

0001

Dear Dr T. Ramontja

Re: Request for Investigation of Allegations of Impropriety

Introduction and Background

1. In my capacity as a member of a traditional community affected by mining operations by Ivanplats as well as in my capacity as a member of various community-based structures, I hereby request the Director-General (DG) of the Department of Mineral Resources (DMR) to institute investigations against officials Mr Aaron Kharivhe and Mr Vinesh Devchander for alleged improprieties committed in the course of their duties as officials of the DMR: Limpopo Region.
2. In my personal capacity I am directly affected by mining and mining-related activities taking place in Mokopane and Bakenberg traditional villages. As an informal land rights holder of the communal and state land that falls under the traditional leadership of Mokopane Traditional Council and a resident of Masehlaneng village, I am affected by mining and mining-related activities of mining companies Ivanplats and Angloplats.
3. I am a trustee of the estate of my late mother Mrs M. J. Langa, which is located in Masehlaneng, Masodi, Ga-Kgobudi and Rooiwal (Bakenberg) villages.
4. I am an active member of community-based structures called Masehlaneng Development Committee (MDC), Kopano Formation Committee (Kopano), Interim Community Representatives (ICRs) and Lebjana Land Claim and Grave Relocation Committee.
5. I am a Kings-man (“mokgoma-o-mogolo”) of the Langa Bakenberg Royal Council in Bakenberg, and for many years served as advisor to the Bakenberg Traditional Council concerning mining-related matters. In this capacity I initiated and founded the Royal Economic Forum (REF), which is

constituent of traditional leadership of the Langa Mapela community ("tribe") led by HM Kgoshi D. K. Langa, Langa Bakenberg community led by HM Kgoshi L.P. Langa, Matlala-wa-Thaba community led by HM Kgoshi P. Matlala, Matlala-wa-Bakone led by HM Kgoshigadi Matlala, Moletji community led by HM Kgoshi S.K. Moloto and Bahananwa community led by HM Kgoshi N. I. Lebogo.

6. Led by Chairperson HM Kgoshi K. D. Langa, the REF is currently a lobbying structure for a regional economic initiative but which aspires to in terms of section 20 of the Traditional Leadership Governance Framework Act of 2003 (TLGFA) apply for allocation of economic development and land administration functions by relevant national departments.
7. Pursuant to proposal of allocation of the mentioned functions, the REF made representation to the State President Mr Jacob Zuma on the proposed regional economic development initiative. The initiative aims to rely on active involvement and meaningful participation in both extractive and beneficiation components of exploitation of a vast mineral resources endowment found in this region.
8. The region is renowned for the platinum of the Northern Limb of the Bushveld Igneous Complex, which because of its comparative and competitive advantage in respect of the nature and extent of its platinum mineral resources relative to the platinum mineral resources found in the eastern and southern limbs, it has propelled the Angloplats' Mogalakwena Platinum Mine (MPM) into a very profitable operation. On several occasions MPM was declared the most profitable operation in the world.
9. The region is for now notably less renowned for its vast and world-class vanadium mineral resources. Noting its comparative and competitive advantage as a classified exotic mineral or element owing to its unique energy storage capacity, the REF in its presentation to the State President dubbed community-controlled local beneficiation of vanadium as the ultimate, god-sent gift, targeted to give the communities occupying this region a passage out of poverty, unemployment and inequalities that is associated with this region.
10. Such control must of necessity start with a significant stake in the extractive component of the mineral exploitation business in order to enable accessibility to raw material for the beneficiation initiative, especially for beneficiation of vanadium and platinum into energy products such as redox-battery and hydrogen fuel cell respectively. This has the potential to create and establish the region as a world-class renewable energy hub for local, national and international end-users.
11. From the community's perspective, a most potent enabling and empowering mechanism for cost-effectively gaining access to mineral resources is through maximum exploitation of the free-rider shareholding principle that lawful occupiers of communal and state land are entitled to by operation of law.

12. The mechanism was activated in the late 1990's in a two-folded manner to ensure effective facilitation of acquisition this free-rider entitlement and other benefits. The mechanism was formulated against the backdrop of the Land Reform White Paper of October 1996, which promised consultation and community participation in all decisions concerning development on communal. Following in this mode was the Mineral and Mining White Paper of 1998, which provided that licensing must allow for state determined royalty to the rights holder and surface rental to the owner [para 1.3.6.2].
13. One of the folds presents that by operation of law the Minister of DLA as nominal owner and trustee of communal and state land is since the 18 May 2000 vested with the powers to decree that the minimum 10% royalty revenue accruing to the state in terms of section 213 of the Constitution be paid to occupiers and users of state land.
14. Manifestation of the second fold is that the Minister of DLA (now DRDLR) is empowered to decree procedural rights to consultations, negotiations, decision-making participation, contracting and self-determination, in favour of all occupiers and users of communal and state land. This procedural right is embodied in an instrument called "Interim Procedures Governing Land Development Decisions Which Require The Consent Of The Minister Of Land Affairs As Nominal Owner Of The Land", which was approved on the 20 November 1997 by a ministerial committee called POLCOM. Specifically for the mining industry, on the day the Mineral and Petroleum Resources Development Act (MPRDA, 10 October 2002) was enacted the Minister of DLA announced that the Interim Procedures is reinforced by a ministerial co-operative governance agreement entered into with the Minister of DME (See addendum to this text). More about this is provided hereunder.
15. Because the above entitlements were about reversing the legacy of dispossession of the land (and customary right to minerals on, in and under the land) and the resultant poverty and vulnerability that befell Africans due to colonialism and apartheid systems, we view the failure or refusal on the part of Mr Aaron Kharivhe as Regional Manager (RM) of DMR: Limpopo Region to implement the above entitlements that are embodied in the said agreement as a betrayal of the battle fought against this legacy and as a callous perpetration of the legacy.
16. His reign in this instrumental position does thus not auger well for productive and transformative management of ancestral mineral resources in our region, as envisioned by an initiative the State President applauded when presented to him by the REF. The State President so much bought into the initiative that he ordered the erstwhile Minister of Cogta (Co-operative Governance and Traditional Affairs), Hon Minister Tsenoli, to investigate how government at executive level could assist and participate in the proposed initiative.
17. The other measure is a more generous implementation by officials and an aggressive pursuit by occupiers (now called landowning traditional communities), of preferent right to mineral rights landowning traditional

communities are entitled to in terms of section 104 of the MPRDA. This entitlement, particularly the right to adequate and proper consultation, is articulated by the 2010 Bengwenyama Constitutional Court judgment.

18. In a letter to Mr Joel Raphela, DDG: Mineral Regulation, Kopano called for this generous implementation generally in respect of all applications in our region and specifically in applications that were lodged by a company called PGM Resources relating to communal land of the Bahananwa community.
19. As a test case, I made an oral representation to the RM for the Bahananwa community in legitimate expectation of this generous approach considering the Bengwenyama Judgement but the RM failed to rise to the occasion by clearly having conducted himself in favour of the mining company as opposed to being pro-community not only in line with the judgment but based on expansive interpretation and implementation of the letter and spirit of section 12 of the MPRDA and the Mine Community Development Element of the Revised Mining Charter, if implementing the above-mentioned co-operative governance agreement was too much to ask. He assisted the company to exploit the vulnerability of the community, which looked up to him to ascertain their preferent right entitlement and entitlement to assistance in terms of section 12 of the MPRDA.
20. Hereunder we present factual and legal points on the basis of which allegations of impropriety area made and on which we request Mr Aaron Kharivhe and Mr Vinesh Devchander to be investigated.
21. Owing to the influential position that the two men hold in the DMR: Limpopo Regional Office, we are apprehensive that probability of interference with the investigations is very high. Further considering my very active involvement with the office as outlined, we are of the view that it will be untenable for Mr Aaron Kharivhe to be objective in his official dealings with me and matters related to me dealt with by the office.
22. In the circumstances, we urge the DG to consider suspending Mr Aaron Kharivhe and Mr Vinesh Devchander. This would be pursuant to promotion of good administrative justice as well as protection of the integrity of the DMR.
23. This report is structured as follows:
    - 23.1. Framing of the alleged impropriety;
    - 23.2. Dispensing with allegations against Mr Vinesh Devchander, followed by
    - 23.3. Making specific allegations against Mr Aaron Kharivhe:
        - **23.3.1.** Failure to recognise interplay between the MPRDA and the IPILRA;
        - **23.3.2.** Failure to respond followed by investigation of allegations against the RMDEC;
        - **23.3.3.** Failure to comply with Regulation 74;
        - **23.3.4.** Failure to adjudicate notice in terms of Section 47;
        - **23.3.5.** Lack of enforcement of section 5(4)(c);
        - **23.3.6.** Failure to act in terms of section 93; and
        - **23.3.7.** Failure to investigate allegation of BBBEE fronting practise; and

23.4. Summary of the text

Framing of the alleged impropriety

24. The impropriety relates to the pair's undermining the rule of law with a clear intention of disadvantaging the rights of the community whilst forbearing from exercising duties of the office in order to accept or be given gratification. This had the effect of jeopardizing sustainable development of the Ivanplats project and denting the credibility of the DMR.
25. According to Kopano, lack of sustainable development of the Ivanplats project is caused by questioned validity of the mining right and approved mining EMP on the basis that during the bulk sample prospecting phase Ivanplats has allegedly breach material terms and conditions of the prospecting right as well as requirements of the approved Environmental Management Plan. In terms of section 23(1)(g) of the MPRDA, the Minister of DMR must not grant mining right if the applicant is in contravention of any provisions of the Act.
26. Kopano alleges that the said contraventions are of sections 19(2)(d) and 19(2)(e) of the MPRDA relating to social, economic and environmental aspects of the prospecting right. Section 19(2)(d) of the MPRDA provides that "the holder of a prospecting right must comply with the terms and conditions of the prospecting right, relevant provisions of the Act, and **any other relevant law** (emphasis added). Section 19(2)(d) of the MPRDA provides that the holder of a prospecting right "must comply with the requirements of the approved Environmental Management Plan".
27. Mr Aaron Kharivhe is accused of not only having disregarded operation of law applicable only to communal and state land, which affords occupiers of the land procedural and substantive rights, and thus failed to take the law as relevant when from July 2013 to May 2014 he was a central figure in the adjudication of Ivanplats' application for mining right, but abused his position of power mainly through forbearance from enforcement of applicable rules of the law in this situation.

Allegations against Mr Vinesh Devchander

28. We allege that Mr Vinesh Devchander received a kickback (gratification) for improperly assisting Ivanplats against an objection Kopano lodged with Regional Mining Development and Environmental Committee (RMDEC). The alleged kickback is indirectly received from Ivanplats as a rain-water harvesting contract awarded to his wife. Directly, he was on the 3 July 2015 introduced at the Ga-Kgobudi traditional council sitting as "the contractor" for the water harvesting contract. We allege that the kickback is for his abuse position of authority, forbearance and violation of administrative justice, as will be substantiated hereunder.

29. On the 29 May 2014 and at the RMDEC hearing at which Mr Vinesh Devchander was Acted Chairman, Kopano requested that prior to it orally representing grounds of objection against granting of mining right it was imperative that a dispute relating to procedural and substantive provisions of the IPILRA be resolved. Presumably that would had procedurally been referred to the Mining and Mineral Development Board, which in terms of section 58(1)(g)(iv) of the MPRDA advise the Minister on dispute resolution.
30. Kopano posted that the dispute is zeroed to resolving the tug of war concerning which legal instrument – one administered by the DMR under the MPRDA or one administered by the DRDLR under operation of law that vested powers in the Minister- has an upper hand in governance of consultation rights, elections of community representatives and regulation of the BBBEE transaction as far entitlement to accommodation of a free-rider equity principle is concerned. The dispute persisted owing to failures by Mr Aaron Kharivhe and Mr Tinyiko Makamu (of DRDLR) refusals to recognise and implement the ministerial co-operative governance agreement. It is noted that the co-operative governance process is procedurally initiated by the DME, given that the DME would be the first to know that a mineral right application received is in respect of a communal and state land.
31. The dispute was fresh in that it arose during the weekend of 23 May 2014, in which community representatives elections initiated by Kgoshi L. V. Kekana - allegedly at the instigation of Ivanplats - were conducted contrary to the ministerial co-operative governance agreement reported by the DLA and DME on the 10 October 2002, provisions of the IPILRA and specifically resolutions taken at the meeting of the 8 May 2014. Details of the meeting of the 8 May 2014 will be provided hereunder.
32. The bone of contention is that Kopano holds that the Minister as trustee of the communal and state land in respect of which Ivanplats is applying for mining right, has unfettered powers vested in him entitling the communal land owners to the:
    32.1. Right to choose to be consulted in accordance with interim procedures prescribed in terms of the IPILRA, which explicitly recognises living customary of the community in question. Noting that both the MPRDA and the NEMA do not define the word ‘consultation’ and as such do not prescribe the manner of consultation;
    32.2. Right to control the use or occupation of or access to the land by non-rights holders for the purpose of commercial development of the land, and that this right in terms of the IPILRA is not superseded by the statutory right of access granted to Ivanplats in terms of the MPRDA but that the laws operates alongside each other;
    32.3. Right to participate as co-owners in decision-makings relating to the planning, designs and implementation of the proposed project, noting that this right is exercisable from the first step in the journey of a thousand mile to progressively develop the proposed project, soon

after the protocol to greet the Chief of the land is dispensed with. It is pointed out that the journey started in 1998;

32.4. Right to negotiate the terms of occupation of their communal land, pursuant to embodying the terms agreed to in a tripartite contract;

32.5. Right to a ring-fenced and direct minimum 10% free-rider interest in Ivanplats, in addition to right to other benefits accruing from and including but not limited to compensation for loss of use of the land and for damages incurred, surface lease agreement, servitude and preferential right relating to skills development and/or skills transfer, employment, procurement of mine utilities and enterprise development; and

32.6. Right to self-determine how to use the benefits accrued for self-development. It is noted that Ivanplats has not only imposed a self-appointed trustee to ‘nanny’ trustees of the Platreef Communities Umbrella Trust (PCUT) but also imposed an agent entity called Computershare to “assist in administering the” [our] benefits.

32.7. Under supervision of a designated official of DRDRL, right to elect interim and permanent community representatives mandated to deal with all matters relating to the proposed mining development; and

32.8. Right to choose administration and distribution agencies for the benefits accrued.

33. Regarding acquisition of a ring-fenced direct minimum 10% free-rider shareholding in Ivanplats it is noted that by operation of law the Minister of DLA was on the 18 May 2000 vested with the power to entitle the occupants and users of communal and state land acquisition of the royalty revenue that used to accrue to the state for use of its land for purpose of all types of commercial developments including mining development.

34. Noting that the 10% free-rider equity is a thorny issue, it is necessary to stress that because the Minister’s powers in this regard are derived directly from the Constitution as per operation of law, this provision prevails over any other empowering legislation administered by a government department. Kopano further argues that whilst the BEE Act that was enacted in 2003 may have provided that acquisition of shareholding is on commercial terms, this did not disentitle the community from the free-rider equity allocation by the Minister. Until legislation that provides formal security of tenure to communal land owners is enacted, the Minister must by operation of law adhere to fiduciary duties that include maintaining the free-rider equity principle.

35. It is noted that the BBBEE Amendment Act of 2013 introduces a broad definition of "fronting practice", which essentially is a transaction, arrangement or other act that directly or indirectly undermines or frustrates the achievement of the objectives or the implementation of any of the provisions of the 2003 Act, as amended (hereinafter referred to as "the BEE Act").

36. The Amendment Act provides for a knowledge requirement in criminalizing fronting practice, providing that any person who knowingly engages in a

fronting practice commits an offence. The definition of "knowingly" includes where the person has actual knowledge of the fronting practice as well as where the person concerned was in a position in which they reasonably ought to have had:

36.1. actual knowledge;

36.2. investigated the matter to the extent where they would have obtained actual knowledge; or

36.3. taken other measures which, if taken, would reasonably be expected to provide the person with actual knowledge, of the fronting or other misrepresentations regarding the BEE status of the enterprise

37. Kopano in the circumstances submits that the actions of Mr Vinesh Devchander bring the DMR into disrepute in multiple ways and not only that he allegedly received a kickback that constitutes corruption. We thus call on the DG to, based on the allegation we make suspecting corruption and fronting practise, alongside internal investigation also collaborate with investigations currently conducted by the SAPS and the BEE Commission/DTI BEE Unit.

38. As far as abuse of position of power for the day, it is reported that Mr Vinesh Devchander:

38.1. Conducting himself in a bullying manner designed to intimidate, has forced Mr Shimane Kekana as the main presenter for the community to speak in English, denying to acquire for him a Sepedi interpreter;

38.2. Made up an excuse to silence me based on his false accusation that I am adding up stories when interpreting for Mr Shimane Kekana; and

38.3. Tried to appoint for us who should take over the representation when Mr Shimane Kekana became not so well owing to battering, bullying and intimidating antics of Mr Vinesh Devchander.

39. Regarding violation of administrative justice, he:

39.1. initially disregarded Kopano’s request that the dispute mentioned be fully resolved prior to Kopano’s oral representation of its objection but upon insistence by Kopano that he makes a ruling on the request, he then undertook to adjourn and confer with other members of RMDEC;

39.2. he then allowed himself to be influenced by Ivanplats to change his mind about the undertaking to adjourn and confer in that he, after Ivanplats made its representation and objected to the dispute resolution request, he changed his mind about adjourning and stated that the RMDEC will not take a decision about the request on that day;

39.3. apparently never acted on all the undertakings above. Instead, the next day the 30 May 2014 Kopano heard that the DG as delegate of the Minister of DMR has decided to grant mining right.

40. In a letter of complaint sent to Mr Aaron Kharivhe (and copied to Ivanplats) about the undertaking Mr Vinesh Devchander made regarding the request, the lawyer of Ivanplats Mr Pieter Smit arrogantly remarked that RMDEC is not a dispute resolution body (this is disputed considering the Xolobeni case).

41. As far as forbearance is concerned, Mr Vinesh Devchander abstention from enforcing the rule of law provided expressly in sections 38(3) and 38(8) of the NHRA. The failure emanates from an objection Kopano made that Ivanplats has contravened section 38(8) of the NHRA (transcribed hereunder at paragraph 45) by having failed to integrate consultations pertaining to management and mitigation of impact on heritage resources into the EIA consultation processes, pursuant to obtaining integrated authorisation or approval of the two processes.
42. Noting that Ivanplats introduced the topic of mitigation and management of impact on graves only at a public meeting of the 23 March 2014, the EIA process had already prescribed in January 2014. More details about this matter are provided hereunder.
43. In addition, Ivanplats has specifically failed to comply with a SAHRA requirement that Ivanplats provides a proper motivation for use the proposed Operation Area. Such motivation, because it is required in terms of section 38(8) of the NHRA, must include submission of results of consultation with communities affected by the proposed development and other interested parties regarding the impact of the development on heritage resources, as stipulated in section 38(3)(e) of the NHRA.
44. Given Mr Pieter Smit's misleading response in appeal on this matter, it is necessary to point out that the consultations referred here is not relating to permission to relocate graves but it is consultations relating to the community's and other interested parties' approval of proposed mitigation and management of graves found within the proposed Operational Area.
45. It is noted that the DMR as the consenting authority is in terms of section 38(8) of the NHRA prohibited by the SAHRA as the commented authority from granting mining right prior to Ivanplats having submitted results of consultation in terms of section 38(3)(e) of the NHRA as well as having complied with comments and recommendations of the SAHRA. Besides the failure to comply with the above-mentioned, Ivanplats has also failed to comply with the following comments and recommendations of the SAHRA:
    45.1. Approval of TSF Option 1 and disapproval of TSF Option 2, "considering that the TSF 2 and its related pipelines will likely result in negative impact on heritage resources".

        It is noted that section 38(8) of the NHRA provides that the DMR as "the consenting authority **must** (emphasis added) ensure that the evaluation fulfils the requirements of the relevant heritage resources authority in terms of subsection (3), and any comments and recommendations of the relevant heritage resources authority with regard to such development have been taken into account **prior to the granting of the consent** (emphasis added)".

Based on the above peremptory provision the DMR as represented by Mr Vinesh Devchander and Mr Aaron Kharivhe has failed constitutional obligation requiring them to ensure that Ivanplats complies with the above comment by in compliance with sections 37 to 40 of the MPRDA refrain from proposing to the DMR approval of TSF Option 2.

It is noted that the above-mentioned final comment by the SAHRA was issued on the 8 November 2013, which was during the EIA phase in which the Minister (as represented by the two officials) is in terms of section 40 of the MPRDA is required to request comments from any State department which administers any law relating to matters affecting the environment.

It is submitted that based on the above comment and representation by Kopano, the two officials ought not have recommended that the Minister approves the EMP. It will be deliberated hereunder that, prior to the approval of the EMP, Mr Aaron Kharivhe was copied an email sent to Minister Ramathlodi in which the Minister was notified of disapproval of TSF Option 2 by the LEDET. It is further noted that the Minister delegated Mr Aaron Kharivhe to approve the EMP.

Given that TSF Option 2 was at sequential occasions approved by the two chairpersons of RMDEC, we submit that there was an organised or concerted effort involving at least the two officials mentioned to ensure that there is abstention from enforcing Ivanplats to comply with comments and recommendations of the SAHRA. The two officials militated against their own obligation to ensure that Ivanplats comply with the comments, and there is evidence that one of the officials in this organised chain of events has received a kickback for this forbearance from exercising official duties.

45.2. Failure to comply with the SAHRA's recommendation that if TSF Option 2 or 3 and their associated pipeline are selected for development, SAHRA must be informed in writing as to the motivation of this selection and further mitigation studies may be required".

Firstly, when Ivanplats in 2013 applied for waste management licence (WML) in respect of the farm Bultongfontein at which TSF Option 3 is located, Ivanplats failed in its obligation to inform the SAHRA as to the motivation for this selection. As such, the SAHRA was short-changed in its constitutional duty to protect heritage resources in this area in that Ivanplats failed to inform it of its selection of this area for development.

Consequently, Ivanplats got this area approved by DEA without the SAHRA given an opportunity to approve or disapprove it. And, if approved, to have conditions attached to such approval.

It is noted that Ivanplats omitted to mention the farm Bultongfontein in the Heritage Statement (HS) dated the 18 June 2013, which **must** (emphasis added) in terms of section 38(8) of the NHRA inform the Notice of Intention to Develop (NID). The HS should include sufficient information regarding existing and potential heritage resources that may occur in the Ivanplats project. This means that the WML was granted without Ivanplats having provided the Department of Environmental Affairs (DEA) with sufficient information, especially the SAHRA's motivation requirement.

So the WML is defective and incapable of comprehensive and effective enforcement. Noting that we at the 3 December 2014 meeting made Mr Aaron Kharivhe as a heritage inspector aware that we lodged a complaint that Ivanplats is suspected of contravening the approved EMP in that it keeps on generating waste albeit its WML and thus management is suspended by the appeal we lodged, we request that the implication of this defect be investigated.

45.3. The initial forbearance by Mr Vinesh Devchander is a breeding ground for the following incidents of breaking of environmental law, which for failing to comply with or contravening the conditions applicable to any environmental authorisation (EA) granted by the LEDET for a listed activity or specified activity constitute offence in terms of section 24F(c) of the NEMA:

- Condition 8, which provide that "all the heritage resources identified on the site be managed as per the approval of the South African Heritage Resources Agency (SAHRA)", was contravened when on the 26 November 2016 Ivanplats commenced with mining operation in the Operational Area prior to the SAHRA approving selection of this site for development.

  At Finding (x) of Findings in the EA, the LEDET found that the SAHRA "is yet to make a decision regarding the management of heritage resources and archaeological features on site". This finding support our contention that the geographical area at which Ivanplats is presently constructing a shaft is not approved by the SAHRA and that the operation thus constitutes illegal mining from this perspective. Ivanplats has itself to blame for failing to provide the SAHRA with a proper motivation for selecting this site.

  It is noted at the meeting of the 3 December 2015 that Mr Aaron Kharivhe tried to create confusion about this clear take by the

LEDET about approval or disapproval of this space for development.

- Condition 11 of the EA requires that “the relevant Waste Management Licence (WML) must be obtained prior to commencement of such activities as the proposed landfill site that requires WML on site”.

  Noting that the WML was granted only in March 2015 and that Ivanplats has since in November 2013 commenced with construction of a shaft for bulk sampling, we suspect contravention of the EMP and request the DG to investigate.

  At the meeting of the 3 December we requested Mr Aaron Kharivhe to follow up on the case we reported and which Ms Neo Kgokong is aware of. Noting that blasting at the construction site is continuing, we suspect high probability of contravention.
- Item 3.19 under Commencement of the Development, which instructs that “construction activities must be suspended and representatives of the South African Heritage Resources Agency (SAHRA) and/or Limpopo Heritage Resources Agency (LIHRA) be contacted immediately in the event of finding or uncovering any subterranean (middens, graves, etc)”.

  At the site inspection of the 10 June 2015, we pointed out the burial ground of Moasi family which was previously unknown to Ivanplats. A month later Ivanplats was still using an access road that traverses the burial and thus in contravention of this condition of the EA, Ivanplats has failed to immediately cease using the access;
- Item 3.12 under Commencement of Development, provides that “section 28 of the NEMA places a duty of care on the holder of the EA to ensure that reasonable measures are taken to prevent pollution or degradation of the environment from occurring, continuing or recurring. Should any environmental damage result from this development or the operation thereof, the holder of the EA, must within 14 days of the damage being caused, rectify the situation at his/her own expense”.

  This item specifically criminalizes failure by Ivanplats not to have within 14 days rectified damages to the graves of Monyamane family and other graves, following the compliance directive that the Office of the RM issued on the 24 December 2014. The

burial grounds and graves remained not fenced off up until the end of July 2015 at least.

Although Mr Aaron Kharivhe was made aware of Ivanplats failure to remedy contravention of section 36(6) of the NEMA following a compliance directive issued on the 24 December 2014, he joined in the forbearance by Mr Vinesh Devchander. It is in this sense that we submit that the forbearance by Mr Vinesh Devchander is breeding ground for further crimes.

45.4. Failure to contract a professional palaeontologist to conduction of paleontological impact assessment, noting that none of the specialists mentioned in the HIA report is hired as a professional palaeontologist;

46. Kopano submits that Mr Vinesh Devchander and Mr Aaron Kharivhe breached procedural requirements in terms of the PAJA (Promotion of Administrative Justice Act) by having failed to revert to Kopano about the decision RMDEC has taken as well as to provide reasons for the decision. This prejudiced Kopano's constitutional right to administrative justice that is lawful, fair and reasonable.
47. As will be substantiated hereunder, it is allege that Mr Aaron Kharivhe violated legal duty by failing to investigate report that Mr Vinesh Devchander has abused his position of power on the day and has acted in a manner that amounts to the illegal, dishonest or biased exercise of functions of the RMDEC (and Mining and Mineral Board dispute resolution mandate). In so failing Mr Aaron Kharivhe appears to be protecting his foot soldier, Mr Vinesh Devchander.
48. It is noted that at the meeting of the 3 December 2013 I reported to Mr Aaron Kharivhe that Mr Vinesh Devchander was allegedly introduced at the Kgobudi Local Council as a contractor who is awarded the rain-water harvesting contract and that we view this as a gratification for having acted unlawfully in favour of Ivanplats, at the RMDEC hearing of the 29 May 2014.

Allegations against Mr Aaron Kharivhe

- **Failure to recognise practical interplay among the MPRDA, the IPILRA, the NEMA, the NHRA and the PAJA during mineral rights application phase**

49. Despite persistent urging submissions that Masehlaneng Development Committee (which later formed Kopano) has from June 2013 formally made in objections, appeals and specific meetings that Mr Aaron Kharivhe (and Ivanplats) consider to specifically take into account the interplay among the MPRDA, the IPILRA, the NE MA, the NHRA and the PAJA during application for mineral rights if such application relates to communal and state land, Mr

Aaron Kharivhe could not bring himself around heeding the urging notwithstanding the substantiation Kopano made.

50. Notably, provincial officials of the DRDLR as well as Ivanplats (see paragraphs 148 and 149 of response to appeal against EA) joined the bandwagon in rejecting the urging. This forced Kopano to call for the intervention of the Minister and DG of the DRDLR, resulting in a meeting on the 8 May 2014 among Kopano, Ivanplats and provincial officials of the DRDLRD.
51. Although by this time the EIA process statutory period supporting application for mining right had lapsed in January 2014 and adjudication of the mining right application was underway, the meeting still centred on the interplay between the MPRDA and the IPILRA. This means that the issue of ministerial decree (reproduced hereunder as an addendum to this text) that the community must be consulted in terms of the IPILRA during the application phase of the mining right was still pursued, at this stage the purpose being to ensure that the provisions of IPILRA are applied during consultation required in terms of section 5(4)(c) of the MPRDA.
52. As background it was noted at this meeting of the 8 May that a meeting arranged earlier amongst Mr Aaron Kharivhe, Mr Tinyiko Makamu (Manager: State Land Disposal Unit, DRDLR) and I on this topic as well as the issue relating to the validity and currency of the co-operative governance agreement reported on the 10 October 2002 by ministries of DME and DLA, failed to materialise.
53. As further background material it should also be noted that in August 2015 an official of DRDLR: Head Office called Ms Queen Filani (Director: IPILRA Unit) was commissioned by the DDG Nxasana to hold an interview with me on the topic and submit a report. My contention in the interview was that Mr Tinyiko Makamu is coercing Kopano to forgo demanding that for stable occupation of the land there must be implementation of a ministerial consent process in terms of the IPILRA, as a pre-requisite condition to engaging into surface lease agreement with Ivanplats, which in the order of processing is rightfully required in terms of the IPILRA and articulated in the State Land Lease and Disposal Policy (SLLDP). This means that it is irregular in the order of procedural processing to process a surface lease agreement prior to processing ministerial consent relating to access, use and occupation of the land in question. The report was submitted but was not made available to me.
54. As a further background material it is noted that Ivanplats suffered from the same misconception regarding the interplay, as it is evident from its response to the appeal against the environmental authorisation the LEDET granted on the 27 June 2014.

At paragraph 148 Mr Pieter Smit responds to “concerns about the integrity of the consultation process based on Kopano’s submissions regarding the “interplay” between NEMA, the MPRDA, IPILRA and the SLLDP”. At

paragraph 149 he makes the following concession: "to the extent that there may be some substance to the submission that IPILRA is relevant to consultation process, we note that the EIAR recognises the community member's rights under the IPILRA".

55. The thrust of defence by Ivanplats is against assertion by Kopano that the constitutional principles of sustainable development, co-operative governance and integrated environmental management require not only that "there must be intergovernmental co-ordination and harmonisation of policies, legislations and actions relating to the environment" (section 2(4)(l) of the NEMA) but that social, ecological and economic elements of the environment must not be compartmented for management in silos.
56. From the above it can be worked out that Ivanplats is inconsistent in rejecting or accepting applicability of provisions of the IPILRA during application phase. The main problem for Ivanplats appears to be accepting the free-rider equity principle, which as stated herein it granted by operation of law and does not owe its origin in the SLLDP. Clause 23.4 of the SLLDP merely emphasis that:
    - a free-rider principle must be accommodated for all commercial developments on communal land, notwithstanding that a specific sector prescribes its own empowerment rules (We submit that this can only be provided for by a law and not a policy, and that therefore this free-rider principle cannot be changed based on an overnight telephone call between the DG and Minister of the DRDLR);
    - the allocation must be ring-fenced and direct in the operating entity as opposed to being warehoused within an opportunistic intermediary. (We submit that this constitutes a fronting practise); and
    - an anti-dilution protection is set at a minimum of 10% equity. So there is no way in which Aubrey Langa can get a piece of this slice, though Ivanplats' propaganda says otherwise!
57. Our submission on the interplay is, as a point of departure, that Mr Aaron Kharivhe failed to consider that sections 19(2)(d), 38 and 39 of the MPRDA provide that a competent authority must take into account compliance by the applicant with provisions of the MPRDA and **any other relevant law** (emphasis added) as well as objectives of integrated environment management stipulated in Chapter 5 of the NEMA when granting an application for a mining right, noting that a mining right cannot be effective prior to environmental authorisation in the form of approved EMP (environmental management programme).
58. Chapter 5 provide as objectives that for approval of EMP there must be:

    58.1. Alignment or integration of environmental authorisation. Section 24L(4)(2) provides that an integrated environmental authorisation may only be issued if relevant provisions of the NEMA **and the other law or specific environmental management Act** (emphasis added) have been complied with.

Kopano arguably substantiated that the IPILRA qualifies as "the other law or specific environmental management Act" noting that:

- Schedule 2 of the NEMA recognises the DRDLR as an organ of state exercising functions involving management of the environment. IPILRA is administered by the DRDLR as a law that comprehensively protect the communal and state land environment that constitutes ecological, social and economic aspects;
- Inferring from reference to section 42 of the Mineral Act of 1991 by section 1(2)(b) of the IPILRA, the interplay was recognised under the old mineral regime. We argue that this recognition never ceased as evidenced by absence of repeal of this section by neither the MPRDA nor the IPILRA. This can hardly be suggested to be a forgotten act noting that IPILRA is re-enacted yearly since 1996;
- The Minister of DRDLR is still and has never a moment ceased to be nominal owner and trustee of communal land who since the enacted of the IPILRA in 1996 was vested with the power of formal disposal of informal land rights. The rights include but are not limited to control of the use of, occupation of, or access to land for purposes that include commercial development of the land;
- The DRDLR in the State Land Lease Disposal Policy (SLLDP) specifies mining as commercial (Clause 22 of Chapter 3) and environmental (Clause 34 of Chapter 3) listed activity. Based on its control of access to communal land, the IPILRA prohibits commencement with mining-related activities (including investigations or feasibility studies) as specified listed activities under NEMA prior to majority community approval and the consent of the Minister of DRDLR in accordance with the Interim Procedures prescribed in terms of the IPILRA. According to Ms Queen Filani this approval and consent must be obtained as a precondition to granting of a mineral right and initiation of surface lease agreement.

  [It is noted that the provincial officials of the DRDLR tried but failed to get or 'bribe' Kopano to waive this prerequisite condition and agree to engage with Ivanplats regarding initiation of surface lease agreement. When Kopano refused Mr Tinyako Makamu retaliated by dismissing our request that at least mining operation be interdicted on the ground that Ivanplats unlawful access, use and occupation of the land];

58.2. Adherence to criteria that must be taken into account by competent authority when considering application for integrated environmental authorisation. (Section 24O). Section 24O(1)(b)(vii) provides that the competent authority must take into account all relevant factors including information contained in reports, comments, representations and any document submitted in terms of the NEMA in connection with the application.

As a point of departure, it is noted that this section recounts section 6(2) of the PAJA, which is incorporated in section of the MPRDA. The Constitution enjoins all government officials to respect and promote living customary law, and officials of DMR are specifically enjoined based on recognition of IPILRA as relevant law to respect demand by the community living customary law be applied all its interaction with Ivanplats.

As stated above, Mr Aaron Kharivhe failed to take into account the representation Kopano made on the interplay and has further refused to investigate the validity and currency of the ministerial co-operative governance agreement reported on the 10 October 2002, subsequent to the meeting at which Mr Tinyiko Makamu failed to turn up but sent one Mr Malatji, who had no clue why he was sent to the meeting. Mr Malatji erroneously presented the 10% free-rider equity as a policy matter whereas it is a law matter; and

58.3. As will be deliberated more hereunder Mr Aaron Kharive has prior to approving the EMP and the HIA report attached to it, failed to take into account comments of the SAHRA and the LEDET as some of the organs of State charged with the administration of law which relates to management of heritage resources, as contemplated by section 24O(4)(c) of the NEMA.

This relates to the Final Comment issued on the 8 November 2013 by the SAHRA that the geographical area which Ivanplats proposes as Operational Area and within which 42 burial grounds are identified will not be approved in terms of section 38(8) of the NHRA prior to Ivanplats providing proper motivation for approval. In terms of section 38(3) of the NHRA, Ivanplats must provide proof that it has consulted with the community pertaining to the latter's amenability to relocation of the burial grounds.

At the RMDEC hearing and in a subsequent email to Mr Aaron Kharivhe, Kopano reported that Ivanplats has failed to obtain such approval from the community at public meetings held on the 1 December 2013 and the 23 March 2014 at Mmadikana Sports Ground

and subsequent meeting soon thereafter that were held at villages of Ga-Kgobudi, Ga-Magongoa, Masodi and Mzombane, in that Ivanplats never pitched and engaged the community on the requirement of proper motivation by the SAHRA.

Consequently, the SAHRA was never able to in terms of section 38(8) of the NHRA make to the DMR and LEDET a definite recommendation whether or not it approves the Operational Area that Ivanplats proposes, thereby enabling the two departments to make decisions as competent authorities. It is noted that the LEDET at Finding 3.19 of the EA issued on the 27 June 2014, commented that the SAHRA had not yet taken a 'decision' to approve the Operational Area.

On this ground we submit that it was not in the strict letter and spirit of section 38(8) of the NHRA that Mr Aaron Kharivhe and Mr Vinesh Devchander recommended to the Minister to grant the mining right. This improper administrative action puts Mr Aaron Kharivhe in a conflicted and/or compromised position to take action against Ivanplats for contravention of the term and conditions of the mining right and the approved EMP.

59. Noting that the NEMA, in terms of its purpose and provisions for, inter alia, co-operative environmental governance by establishing principles on matters affecting the social, ecological and economic elements of the environment, the following principles are pertinent:

59.1. The participation of **all interested and affected parties in environmental governance** must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured. (section 2(f) of the NEMA)

In this regard we note that the participation of the DRDLR as an affected party owing to its nominal ownership and trusteeship of the land in question requires not only to be promoted but that its participation is statutorily provided in terms of provisions of the NEMA and directly by the Constitution by virtue of its direct recognition of living customary law.

As an owner besides being an organ of state that in terms of Schedule 2 of the NEMA exercises environmental management functions, participation of the DRDLR is more involved than simply providing comment in terms of section 24O(1)(b)(viii) of the NEMA. The participation of the DRDLR is also statutorily obliged in terms of the interim procedures prescribed in terms of the IPILRA for regulation of

corporate engagement between occupiers and the developer. As stated in this text, the IPILRA expressly recognises living customary law.

It is noted that the NEMA does not prescribe the manner of consultation in that, in terms of section 24(1A) of the NEMA, every applicant must comply with requirement prescribed in terms of this Act in relation to any procedure relating to public consultation and information gathering. Noting that it was simultaneously during the prospecting and EIA process phases when Ivanplats refused to consult with the community in accordance with interim procedures prescribed under the IPILRA, this contravened section 38 of the MPRDA which in turn incorporates Chapter 5 of the NEMA.

Because section 23(g) of the MPRDA prohibits the Minister from granting mining right if any the applicant for a mining right has contravened any provision of the MPRDA, the Minister ought not to have on the 30 May 2014 granted mining right and on the 5 November 2014 approved mining EMP. Ivanplats.

Pertinent to the allegations herein made, RMDEC and the office of the RM as represented by Mr Vinesh Devchander and Mr Aaron Kharivhe ought not to have recommended the granting and the approval on the grounds that Ivanplats contravened section 38 of the MPRDA. On the other hand, it is noted that the two officials by having colluded with Ivanplats against application of IPILRA during the EIA process phase or having failed to direct Ivanplats to comply with provisions of the IPILRA, the need to be considered as accomplices in an offence in terms of section 38(1)(c) of the MPRDA;

59.2. Section 2(2) of the NEMA, which provides that an environmental management principle must place people and their needs at the forefront of its concerns, and serve the physical, psychological, developmental, cultural and social interests equitably.

The IPILRA was enacted to expressly and comprehensively protect the rights and interests of African who were and are still marginalised and vulnerable to selfish exploitation by perpetrators of an economic structure that denudes whereas it falsely promises empowerment.

Mr Vinesh Devchander and Mr Aaron Kharivhe, through their abuse of power and forbearance antics, have decided to put illicit acquisition of wealth at the forefront of management of the environment than placing the people of Mokopane and their needs at forefront of their concerns;

59.3. Section 2(1)(a) provides that the NEMA principles shall apply alongside all other appropriate and relevant considerations, including the State responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination.

Officials of the DMR and DRDLR as well as Ivanplats denies that the IPILRA is an appropriate and relevant consideration under these circumstances, notwithstanding the inference Kopano made that Schedule 2 of the NEMA stipulates that the DRLDR is an organ of state that is exercising functions involving management of the environment.

Noting that the Constitution has vested powers in the Minister of DRDLR as nominal owner and trustee of communal land to in terms of the co-operative governance agreement he entered into with the Minister of DME fulfil both social and economic rights of occupiers of the land, failure of Mr Aaron Kharivhe to take into account the constitutional obligation to intervene upon complaint by Kopano that Ivanplats refuses to comply with this constitutional requirement, amounts to failure to comply with a standard directive that the Minister of DME has issued on the 10 October 2002 in order to facilitate the allocation of the 10% free-rider equity and other benefits.

It is emphasised that the directive is for the DME **to take the initiative and to implement the agreed befits once the DRDLR advises so.** Further, allocation of the free-rider equity is by operation of law and thus not negotiable and amenable to tribal resolution. The community is not legally competent to take a tribal resolution against the allocation of free-rider equity. In any event, this is nonetheless practically not feasible that a community can refuse such an allocation and in this case, the community in fact fought for it.

Not to be marginalised or denigrated by a ‘nanny’ called Computercare but to be treated with respect as an equal partner in terms of basic rights is what any community needs in a new democratic dispensation. The community 10% equity in Ivanplats must enjoy the same and equal basic rights as the Japanese 10% interest in Ivanplats. An equality principle demands a pro-rata principle and in this case the community cannot have an equal number of directors with the Japanese in the Board of Directors of Ivanplats and you rebuke us for calling the BBBEE transaction a fronting practise. You do not denigrate a community and expect it to respect you and the mining right you falsely or questionably acquired.

It is noted that Mr Pieter Smit states in the response to appeal Kopano lodged against the permission to conduct bulk sample prospecting operations that he has searched but failed to find the co-operative governance agreement in the websites of the DMR and DRDLR. He however argues that the agreement predates the MPRDA (which is patently false and designed to mislead) and is thus not any longer valid. The same view is consistently held by Mr Aaron Kharivhe, disregarding substantiations Kopano made. And, at the meeting of the 3 December 2015 the Chief Director rejected applicability and currency of the agreement based only and merely on her lack of knowledge of the agreement and that it is nonetheless not administratively practised within the DMR.

It is further noted that the agreement or applicability of the IPILRA was not the subject of the Bengwenyama Constitutional Court judgment and so the statement that "consultation is also undertaken **in lieu of agreement in relation to the use of their land as the MPRDA no longer** (emphasis added) requires such an agreement before mining operation may commence" must be read in this context. As stated, the Minister of DLA is since the late 1999 vested with the powers to amplify the IPILRA by requiring an agreement in these special circumstances, which is provided for as per operation of law that applies only to communal land and not to any other type of land. In any event, the DRDLR as an organ of state is mandated to implement B-BBEE transactions in exercising its function.

59.4. Regarding the 'impact' referred to in the Bengwenyama Judgment, the following principle is apposite: "the social, economic and environmental impacts of activities, including disadvantage and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment". (Section 2(4)(f)). In the light of this principle, it is misleading for Mr Pieter Smit to suggest that only ecological impacts were referred to in the judgment.

60. The following provisions of the NHRA are pertinent:

60.1. Section 38(8), which makes compliance with provisions of this section a pre-requisite condition to granting of mining right and approval of EMP. The provisions bring about interplay among the MPRDA, the NEMA, the NHRA and arguably the IPILRA, based on the integrated environmental management principle prescribed commonly by all these legislative instruments. The IPILRA is involved by the requirement of community consultation in these circumstances. (Section 38(3) of the NEMA). The NEMA is involved based on comment by the SAHRA that

HIA and EIA approval processes be integrated. The MPRDA is involved expressly by section 39(3)(c) in respect of preparation of mining EMP; and

60.2. Section 4(c)(ii) provides that recommendations made by the SAHRA in terms of section 38 must be considered in terms of other law dealing with heritage resource. It is argued that the IPILRA as a comprehensive legislation must also deal with heritage resources. A tribal resolution taken under the IPILRA must be submitted by Ivanplats as proof of consultation with the community, as contemplated by section 38(3) of the NHRA.

In terms of section 38(8) of the NHRA read with the NEMA 2010 Regulations and section 39 of the MPRDA this consultation must be conducted during the EIA phase, which in this case occurred between July 2013 and January 2014. According to Mr Pieter Smit's (email dated 7 July 2014) comment regarding public meeting of the 23 March 2014, "grave relocation was only mentioned briefly, and the reference was merely intended to invite next-of-kin to make contact with Platreef, and notify community members that they could expect further engagement on this issue in future". In this regard it is noted that on the 8 November 2013 the SAHRA had issued a final comment requiring Ivanplats to in terms of section 38(8) of the NHRA provide a proper motivation for approval of the Operational Area.

We submit that the motivation is what Ivanplats ought to have engaged with the community about on this day. Introducing a topic on grave relocation in terms of section 36(3) of the NHRA prior to dealing with the comment to provide motivation in terms of section 38(8) is not only premature but we suspect that Ivanplats was up to something fishy like cover-up for having failed to comply with the NEMA 2010 Regulation that prescribes this matter be dealt with during the EIA approval phase. The SAHRA interim comment dated the 21 August 2013 requiring the same is noted.

At the RMDEC hearing that took place on the 29 May 2014, Kopano alerted the RMDEC that Ivanplats had not consulted the community pertaining to the requirement for provision of proper motivation. Further, as alluded above, that Ivanplats has thus failed to comply with the SAHRA recommendation that it must integrate consultations pertaining to impact on heritage resources with ordinary consultation under the EIA process. Both Mr Vinesh Devchander and Mr Aaron Kharivhe colluded to ignore Kopano's objection and representation when recommending to the Minister to grant mining right.

These allegations and all averments are factually substantiated hereunder.

- **Failure to respond and to investigate allegations against RMDEC**

61. As stated above, Kopano sent an email dated the 7 July 2014 to Mr Aaron Kharivhe bringing to his attention the averment made by Ivanplats via Mr Pieter Smit, that RMDEC was not only not going to revert to Kopano about the dispute resolution request but that the request was dismissed, considering the logic in the DG's granting of mining right on the 30 May 2014. Kopano requested Mr Aaron Kharivhe to investigate the matter but apparently the latter ignored the letter as no respond was received from him.
62. Flowing from failing or refusing to respond to our email, Mr Aaron Kharivhe further failed or refused to:
    62.1. investigate the matter; and
    62.2. give the provincial office of the Public Protector full co-operation in respect of investigations of complaint Kopano lodged about this and other matters.
63. Mr Aaron Kharivhe also failed or refused to respond to my complaint about alleged unfair procedure and treatment by RMDEC at the hearing held on the 17 November 2013. He further failed to properly investigate the matter and apply his mind to the findings after the DDG Mr Joel Raphela sent him an email instructing him to investigate the complaint.
64. The response Mr Aaron Kharivhe gave is a copy of Ivanplats' written statement on this matter, and it is on this basis that we say that he failed to properly investigate and apply his mind to the findings.
65. We submit that the plain text of the covering letter by the Moshira Tribal Council dated the 29 August 2013 was not correctly read to support allegation of misrepresentation made by Ivanplats and uncritically picked up by Mr Aaron Kharivhe. It is noted that even at the meeting with the Chief Director on the 3 December 2015 Mr Aaron Kharivhe insisted that I misrepresented myself by stating that I allegedly wrote in the covering letter and/or objection document that I represent Kgoshi L. V. Kekana.
66. The covering letter and/or objection document simply does not make such a claim. Even the Kgoshi's letter, which Mr Aaron Kharivhe so much relies on whist apparently ignoring the covering letter, does not make an accusation of misrepresentation if read properly.
67. It is noted that Mr Aaron Kharivhe ignored my account of what transpired at the hearing, particularly the conduct of Mr John Dombo of Ivanplats. When I requested Ms Ntando Dube the Acting Chairperson of RMDEC on the day that Mr John Dombo take a stand to recount events that on the 30 August took place at the Mokopane Traditional Council, I caught Mr John Dombo out making signs (winking, if you like) to the Acting Chairperson not to agree to the request. I confronted Mr John Dombo about this conduct.

68. The point being made is that if Mr Aaron Kharivhe was taking serious his "responsibility to investigate matters in an independent, impartial and fair manner" statement quoted from a letter he wrote to Kopano on the 24 January 2014, he would have interviewed both Mr John Dombo and Kgoshi L. V. Kekana about my statements regarding accusation of misrepresentation. Notwithstanding, we note that the interview would not be strictly necessary if the Kgoshi's letter and the objection document are properly read.
69. The only reason we can think of as to why Mr Aaron Kharivhe is acting defensively about this matter is that he is attempting to avoid accountability regarding contravention of provisions of the PAJA on the part of RMDEC, and to protect Mr Vinesh Devchander. The breach of administrative justice by the RMDEC has ominous implications on the recommendations made to the Minister of DMR and consequently on the legitimacy and validity of mining right.
70. Kopano submits that this is what is defended and not that there was a misrepresentation. It is noted that misrepresentation is not grounds for vitiation of an object under the RMDEC proceedings. It is further noted that the Acting Chairperson decided that I proceed making the oral representation despite Ivanplats' suggestion of misrepresentation. That has put paid the suggestion and the motion that the oral representation be dismissed on grounds of the alleged misrepresentation.
71. It is therefore submitted that the issue of alleged misrepresentation is only raised up by Mr Aaron Kharivhe for defensive and malicious purposes and not for the purpose of wanting to legitimately substantiate allegation of misrepresentation, noting that the allegation was dismissed at the hearing. It is a concern that Mr Aaron Kharivhe misled Mr Joel Raphela by omitting to disclose that the allegation was dismissed.
72. In the circumstances, it was not procedurally fair or justified for RMDEC not to keep the promise to subsequent to this meeting contact me for oral representation as undertaken at the meeting, noting that we have follow-up corresponded with Mr Makhalo Pitsi requesting him to make good the undertaking.
73. Mr Aaron Kharivhe missed the opportunity to correct the situation when he was required by Mr Joel Raphela to investigate the matter. Based on the precedent set in the Xolobeni matter in which oral representation and dispute resolution processes were permitted notwithstanding that mining right was granted, Mr Aaron Kharivhe as chairperson of RMDEC ought to have ruled that I be given an opportunity to re-appear at RMDEC to make the presentation that was disrupted owing in part to the procedural and substantive administrative injustice that took place during the first appearance. It is noted that Mr Aaron Kharivhe not only caused me to suffer second victimisation but a third victimisation by failing to co-operate with the Public Protector's investigation of the matter.

74. Attention is drawn that the meeting in November 2013 was disrupted by members of Masehlaneng Development Committee (MDC) with the assistance of the Mr Shimane Kekana, the Secretary of Kgoro-Ya-Moshira Local Traditional Council under Kgoshi L. V. Kekana. During adjournment of the hearing proceedings these members took a decision to go back to the meeting to demand reasons why they were dismissed from the meeting, and demand to be present when I make oral representation because I was also mandated by them to make an objection.
75. The matter was resolved as follows:
    75.1. The community as represented by the MDC and Kgoro-Ya-Moshira will at a date to be set be given an opportunity to make its own oral representation as a separate entity; and
    75.2. That Mr Aubrey Langa will be given another date to make his representation.
76. It is therefore denied and factually not true and misleading that I was not given an opportunity to make a representation on that day or any other date because of misrepresentation, as Mr Aaron Kharivhe reported to Mr Joel Raphela.
77. This side of my story is documented in the complaint I lodge with the Public Protector and in my appeal against granting of mining right and approval of EMP. It is noted that Mr Aaron Kharivhe may not have read my version in the appeal because he failed to comply with Regulation 74 of the MPRDA Regulations, requiring him to reply within 21 days of receiving notice of appeal. The appeal was lodged early December 2014 and on the 11 December 2014 Kopano made Mr Aaron Kharivhe aware of the appeal.

- **Failure to comply with Regulation 74**

78. Mr Kharivhe failed, as stated above, to comply with Regulation 74 of the MPRDA Regulations. Of significance is that the RM also failed to comply with Regulation 74 relating to an appeal Kopano lodged against granting to Ivanplats permission to conduct bulk sampling prospecting operations, which involved sinking of a shaft.
79. In the light of the above personal experience as well as frustrations that officials of DMR: Legal Services Directorate are expressing in this regard, it is disingenuous, dishonest as well as engaging in bad faith for Mr Aaron Kharivhe to, in a letter dated the 24 January 2015, advise Kopano to “use internal remedies provided for in Section 96 of the MPRDA (as amended if they so wish), knowing that he will improperly exploits the appeal system that normally fails to function in instances where he has not complied with the Regulation 74 of the MPRDA Regulations.
80. This gap in the system is open to dishonest exploitation by Regional Managers, and the RM of DMR: Limpopo Region is reportedly notorious in this regard. The loophole is not only a breeding ground for corruption but prejudices the poor who do not have resources to approach courts for a

mandamus and pray that the RM be compelled to comply with Regulation 74. Needless to say, this is a prohibitively costly exercise for the Mokopane indigent community, which unlike the Bengwenyama community are unluckily not having a well-resourced strategic partner to fund its litigation matters.

81. So it is hollow to strongly or lightly deny that the RM is ever ready to give Ivanplats an improper advantage.

- **Failure to adjudicate notice in terms of Section 47**

82. Notwithstanding lack of clarity whether or not section 47 of the MPRDA cannot be evoked at the instance of a third party but only at the prerogative of the RM, my experience is that the RM has in three instances, from 2007, failed to voluntarily and within reasonable time adjudicate and provided results of such adjudication after I gave him notice in terms of the section.

83. The instances are the notices filed in:

    83.1. September 2007 against a company called Rhinoplats Resources, which submitted incorrect, inaccurate and misleading information in respect of its prospecting right in Bakenberg;

    83.2. October 2011 against a company called Vanmag, which submitted incorrect and/or misleading information for the purpose of application for conversion of old order mining right and thereby breached a material precondition for conversion;

    83.3. In February 2012 against a company called Ferrum Crescent, in which Mr Aaron Kharivhe intervened resulting in a settlement of 3% in the 26% BBBEE shareholding in favour of Bakenberg community but which Mr Aaron Kharivhe failed to enforce by instructing Ferrum Crescent to transfer the 3% equity in terms of section 11 of the MPRDA; and

    83.4. In October 2013 against Ivanplats, which submitted incorrect, inaccurate and/or misleading information regarding minerals that are encompassed by the prospecting right and by stipulating in the EMP approved for the conversion application that there are “no graveyards or old houses or sites of historic significant within 1km of the area”.

84. Regarding the issue of I km buffer zone, attention is drawn that Mr Aaron Kharivhe in the letter dated 23 January 2015 had no quall as a referee to enter the boxing ring in defence of Ivanplats when he wrote - very much like Mr Pieter Smit - that “there is no basis for the proposed 1kilometre and it is rather highly impractical under these specific circumstance”.

85. It is not in his place to make such a remark. This makes him conflicted and it is thus doubtful if he was objective in refusing to suspend Ivanplats mining operations on this and other grounds Kopano submitted in its representation in terms of section 93 of the MPRDA.

86. Noting that a buffer zone is a material term and condition of a mining right and/or approved EMP and that full EIA approval process is obligatory to amend a material condition of an EMP, we submit that it is a serious breach

on the part of Mr Aaron Kharivhe not to take serious and act appropriately against a report of violation of approved EMP.

87. Attention is drawn to the following:

87.1. That because Ivanplats has not conducted any HIA for the prospecting phase, the 1km buffer zone could not be validly amended. For validity Ivanplats had to consult with the community pertaining to amendment of the buffer zone subsequent to which SAHRA had to provide formal comments, recommendations and final approval in terms of section 38(8) of the NHRA. Enquiries with relevant SAHRA officials as well as search of the SAHRA SARIS database revealed no formal correspondences between Ivanplats and the SAHRA regarding amendment of the buffer zone.

Given that the HIA was not undertaken, it could not be established if Ivanplats specifically sought amendment of the 1km buffer zone and what the DMR's assumed the status of the buffer zone was during the bulk sampling prospecting operation phase and prior to approving the 100m stipulated in the HIA undertaken for the mining right application.

It is noted that Ivanplats through Mr Pieter Smit is making reference in the response to the appeal against the mining right that on the 26 July 2013 the SAHRA suggested a buffer zone distance. We note in this regard only that the correspondence was not an official response in terms of section 38(8) of the NHRA, and that the official who made the suggestion (Ms Itumeleng Masiteng) feels tricked and abused by Ivanplats and its consultants by misrepresenting the suggestion as an official comment in terms of section 38(8) of the NHRA. It is noted that according her explanation, the administrative practise within the SAHRA is that issuance of comments in terms of section 38(8) of the NHRA is centralized and the function is performed from head-office in Cape Town.

What is significant to note is that:

- The letter is merely an enquiry and it elicited a response that is not official in terms of administrative practise and as such does not constitutes an official recommendation of a specific distance by the SAHRA, noting that not an exact buffer zone distance was provided; and
- That the official's could not set a buffer zone distance which is not an outcome of consultation with the community in compliance with section 38(3) of the NHRA?

It is noted that Mr Pieter Smit ignored or omitted to specifically respond to our contentions about the 1km buffer zone.

Noting that it is in contravention or non-compliance with section 38(8) read with section 38(3) of the NHRA for the DMR to approve an EMP without proof that the community was consulted pertaining to impact on heritage resources and without ensuring that the SAHRA had the opportunity to comment and make recommendations on a specific aspect of impact on heritage resources, it is submitted that Mr Aaron Kharivhe in August 2013 approved the application for amendment of the EMP whilst the 1km buffer zone was not amended;

87.2. Similarly and for the same reasons advanced above, he ought not approved the 100m buffer zone Ivanplats submitted in the HIA report attached to the EMPr, noting that the LEDET in the environmental authorisation made a finding that the SAHRA “is yet to make a decision regarding the management of heritage resources and archaeological features observed on site”.

We note that in terms of section 40 of the MPRDA the Minister of MPRDA ought not to approve EMP without having considered comments by other departments that are also mandated to manage the environment. Given that in an email dated the 16 September 2014 sent to Minister Ramatlhodi and which was copied to Mr Aaron Kharivhe and Mr Joel Raphela, Mr Aaron Kharivhe was made aware of the environmental authorisation by the LEDET and based on comments negative comment such as the one above and the one relating to disapproval of TSF 1, he ought not have approved the EMP;

87.3. Because the validity of the 1km buffer zone was still in force and not practically vitiated before the 31 May 2014 when the prospecting right lapsed and was therefore theoretically valid until the mining EMP was approved in October 2014, the following consequences endures:

87.3.1. As on the 30 May 2014, Ivanplats was in contravention of the EMP and thus provisions of the MPRD. As such it was unlawful and misleading for Mr Aaron Kharivhe to recommend that the Minister grant mining right in contravention of section 23(g) grants Ivanplats a mining right; and

87.3.2. Sustainable development of the project will remain elusive for as long as in our mind the mining right was unlawfully granted and that government officials failed to intervene in order to level the playing field. Mr Aaron Kharivhe should know better that we will never tire continuing to attack.

88. We reserve the right to in future and under appropriate circumstances pursue the notice in terms of section 47 for any of the breaches stipulated in the clause Cancellation or Suspension in the mining right, in that Ivanplats has:

88.1. Submitted the following inaccurate, incorrect and/or misleading information:

88.1.1. In the HIA report, that no heritage resources were identified in the area for the five landfill sites;

88.1.2. In the documents supporting amendment of location of TSF, the consultant (Tshikovha) falsely state to have not only consulted the SAHRA but also submitted a motivation for selection of Rietfontein as location of TSF. We could not find the SAHRA response and/or comment on the consultation or motivation and whether or not it required further mitigation studies be undertaken. It is noted that Tshikovha refused to avail to us correspondences in this regard and it was difficult for us to deliberate on this matter in the appeal lodged against the amendment. All Tshikovha was prepared to say was that they called the officials of the SAHRA whom I provided details about. I pointed out to Tshikovha that a telephone call does not constitute accepted standard of consultation in the mining context, as articulated in the Bengwenyama Judgment;

88.1.3. In the HIA report Ivanplats claim that the Operational Area cannot be relocated because "other viable options were fatally flawed due to potential resource sterilization and proximity of flood plain". Besides pointing out that the SAHRA was not satisfied with this statement as not a true representation of the Project Area, it is noted that subsequent to this statement the SAHRA persisted in requiring Ivanplats to provide a proper motivation.

For our part we are also not happy with the statement because based on not having provided with information or sufficient information we do not know what Ivanplats is talking about by "resource sterilization" and "proximity of flood plain", owing to the fact that Ivanplats has failed to consult with us subsequent to the SAHRA commenting that a proper motivation be provided. For example, which areas manifest risk of resource sterilization and flood plain?

All we know is that Ivanplats never bothered to meaningfully and honestly search for viable option but simply decided it would go with the area it prefers regardless of prohibitive environmental condition, which Ivanplats apparently believe it can be addressed through giving Mr John Dombo briefcases filled with raw Canadian dollars.

88.2. Breach of material term and condition of the mining right, relating to election of community representatives for the BBBEE transaction, its

form and substance, which we allege is a fronting practise because Ivanplats lied about proper consultations with the majority community members. It is a lie because such consultation is prescribed in terms of the IPILRA, as Mr Aaron Kharivhe instructively informed Ivanplats on the 15 February 2012.

- **Lack of enforcement of section 5(4)(c) of the MPRDA**

89. On the 1 December 2014 Kopano lodge a representation requesting Mr Aaron Kharivhe to evoke section 93 of the MPRDA, suspending mining operations on account that Ivanplats failed to comply with section 5(4)(c) of the Act. The section provides that Ivanplats must consult with the landowner or lawful occupiers of the land in question, following giving of written notification. Ivanplats has on the 7 November 2014 given Kopano a written notice.
90. Upon noticing that the notification does not mention date for consultation with the community, on the 10 November 2014 Kopano responded to the notification letter warning Ivanplats that access to the communal land will be denied owing to Ivanplats refusal to comply with procedural and substantive provisions of the IPILRA as a prerequisite to commencement with mining operations.
91. So although in the representation focus was on the substantive component of section 5(4)(c) of the MPRDA, an emphasis herein made is adequacy and appropriateness of consultation with the occupiers at this phase of the project. The emphasis is made in the context of refusal during the prospecting phase by Ivanplats, supported by officials of DMR and DRDLR, that provisions of the IPILRA is required to be complied with only after the mining right was granted. It is on record that we fiercely opposed this stance.
92. As it were, Ivanplats in collusion with officials of the DMR and DRDLR shifted the goal post in that to date, a year later, provisions of the IPILRA are not complied with and both the departments are refusing to enforce compliance.
93. A further emphasis is the argument advanced by Kopano that because both the MPRDA and the NEMA does not prescribe the manner of consultation whereas the IPILRA does in this case as per constitutionally-backed ministerial decree, the IPILRA overrides both the MPRDA and the NEMA when it comes to the manner of holding consultation and public participation meetings with communal land owners. Notwithstanding, co-operative governance between officials of the DMR and the DRDLR given that their departments have concurrent jurisdiction over statutory access to communal and state land unlike if the land is privately owned based on a formal title deed.
94. As argued in this text that because the power of formal disposal of rights in communal land vests in the Minister of DLA, by operation of law the Minister established a departmental policy committee which on the 20 November 1997 approved a ministerial standard directive called “Interim Procedures

Governing Land Development Decisions Which Requires The Consent Of The Minister Of Land Affairs As Nominal Owner Of The Land" which prescribes an interim procedures on the basis of which access to and occupation of the land will be controlled on account of approval of majority of informal land rights holders and ministerial consent.

95. In the context of the above argument Kopano contends that this statutory access prevails over the statutory access granted in terms of section 5(4)(c) of the 2002 Act and any subsequent provisions including section 5A of the 2008 Amended Act.

96. Kopano argues that section 5(4)(c) of the MPRDA must be read with section 25(2)(d) of the Act as well as Element 2.6. Mine Communities Development of the Revised Mining Charter. Section 25(2)(d) of the Act provides that the mineral rights holder must comply with any other relevant law. IPILRA is relevant law in terms of:

    96.1. the ministerial co-operative governance agreement established by operation of law that was announced by the ministries of DLA and DME on the day the MPRDA was enacted, the 10 October 2002; and

    96.2. Schedule II of the NEMA, which recognises the DRDLR as a national department that has environmental management function.

97. The Mine Communities Development Element of the Revised Mining Charter requires that, in keeping with the principles of the social license to operate, stakeholders (including the DMR and mining companies) must invest in ethnographic community consultative and collaborative processes prior to implementation or development of mining projects.

98. Based on obligation in terms of provisions of the PAJA to consider taking into account all relevant factors, in a letter dated the 23 January 2014 Mr Aaron Kharivhe misdirected himself by on face value accepting that "Ivanplats vehemently denied the allegations" made by Kopano that Ivanplats violated provisions of section 5(4) of the MPRDA. From this disposition of readily dismissing complaints by the community whilst readily accepting submissions by Ivanplats apparently without applying his mind, is a basic betrayal of oath of his office as RM. One finds it difficult not to suspect his conduct as one of an official that is incompetent, conflicted or corrupt.

99. In the cited letter, Mr Aaron Kharivhe apparently accepts as evidence of consultation "attached documents which were purportedly shared with the interested and affected parties". It is noted that in brackets he add "in particular the communities".

100. In analysing the paragraph one wonders if Mr Aaron Kharivhe wants to be taken serious by this standard of response. Given that the 2010 Bengwenyama Constitution Court judgment matter concerns the DMR: Limpopo Region, how can the RM who was at the centre of the judgment still consider sharing of documents consultation?

101. Further disappointing if not strange, how can the RM accept submission of consultation with the "interested and affected parties" when the

consultation is regarding section 5(4)(c) of the Act? Consultation in terms of section 5(4)(c) of the Act is meant only for landowners or lawful occupiers of the land, not the interested and affected parties.

102. It is noted that Ivanplats through Mr Pieter Smit states in response to an appeal that Ivanplats did not have to hold consultations following the notification letter because this is not required by section 5A of the MPRDAA (2008). He holds that "section 5(4)(c) is based on non-existent legislation".

103. It seems as Mr Aaron Kharivhe got wind of Mr Pieter Smit's statement and apparently got sold to it, noting that in the meeting of the 3 December 2015 he offered this explanation as reason for declining to issue directive in terms of section 93 of the Act. So according to him now, there is no contravention because section 5(4)(c) is non-existent.

104. Mr Aaron Kharivhe appeared to be at a loss to explain why, if section 5 (of the 2002 MPRDA) is non-existent, it is stipulated in the mining right he executed on the 4 November 2014?

105. It is noted that at the meeting of the 4 December 2014 held at the boardroom of the DRDLR: Polokwane that notwithstanding insisting by officials Mr Makhalo Pitsi and Mr Mukwevhu of the DMR that Section 5A is in force and thus no consultations are required, the Chief Director of provincial DRDLR sent an official called Mr Victor Madubanya to undertake site inspection in order to verify alleged unlawful occupation of communal land by Ivanplats for the purpose of conducting a mining development. This is submitted as proof that provisions the DRDLR's take is that the provisions of the IPILRA overrides the statutory access granted in terms of the MPRDA.

106. Prior to responding to the letter and reckoning that Ivanplats must had made an error if it thought that it gave the notice in terms of section 5A of the MPRDAA (2008), Kopano made enquiries with officials of Mineral Regulation division at the DMR: Limpopo Region. A unanimous agreement could not be reached whether or not section 5A is in force and that section 5(4)(c) is not applicable any longer.

107. Without desiring to delve into details we note that operation of the entire 2008 Amended Act is suspended, based on section 11 of the Interpretation of Statutes Act.

- **Failure to act in terms of section 93**

108. The failure to act in terms of section 93 to non-compliances complained about in June 2015 are a sequel to non-compliances reported on the 1 December 2014 but which were not adequately dealt with by Mr Aaron Kharivhe and the provincial Office of the Public Protector. The first complaint relates to non-compliance with the term of the mining right. The second complaint relates to contravention of the approved EMP.

  - Term of Mining Right

109. Although the matter of Ivanplats' contravention of the term of the mining right was raised at the ADR hearing held by provincial Office of the Public Protector, this was not as fervently pursued as the case of contravention of Condition 5.4 of the letter granting the mining right. One of the reasons for this is that we viewed the quantified 1km or 100m buffer zone as an easier item to objectively pursue.

110. On the other hand, we viewed the phrasing of the term of mining right to be amenable to different interpretations that are technical in nature and so we avoided tackling this topic. The interpretation was made more complicated by the phrasing of the term of the mining right in the mining right executed on the 4 November 2014. It appears as if the latter phrasing varied or amended the former phrasing (found in the letter of grant).

111. The topic was tackled at the meeting of the 3 December 2015 and further in the remarks written and submitted subsequent to the meeting. I do not intend repeating the remarks but need only highlight an aspect and then make a request.

112. At paragraph 143 of Ivanplats' response to the appeal against granting of environmental authorisation on the 27 June 2014 by the LEDET, it is conceded that given that the mining right excludes the geographical area that Ivanplats calls Operation Area and which it has fenced-off subsequent to the execution of the mining right on the 4 November 2014, the mining right "may, in due course, be subject to an application for amendment of the mining right in terms of the MPRDA".

113. Our argument is if the correct interpretation, as was advanced at the meeting, is that the mining right exclude mining within a graveyard or on top of a grave, then the question of amendment does not arise as this would not be legally competent. An amendment can only be levelled at the area of operation, which would now be freed from existence of graveyards owing to these having been relocated.

114. The difficulty of legal validity to operate in this geographical space is further appreciated by Mr Pieter Smit, Ivanplats' lawyer, at paragraph 147. He generally agrees with the "difficulties it (Ivanplats) would face in developing the Platreef Project subject to condition 5.4 on the letter of grant in relation to the mining right". He ends the paragraph by repeating the amendment suggestion.

115. It must be noted that Mr Pieter Smit made the above remarks before the mining right was executed and before Ivanplats in contravention of this term of the mining right commenced with mining operations in this prohibited geographical area. So Ivanplats is now put in a bare denial and baseless defence position

116. We request that the DG seek clarity on the meaning and implication of the term of mining right, and order suspension of mining operations in this area if contravention if found.

- Contravention of approved EMP

117. Based on a report Mr Aaron Kharivhe must have received from an environmental management inspector in his office about the site inspection conducted on the 10 June 2015 that by this date Ivanplats has failed to remedy contravention of EMP following a compliance directive he issued on the 24 December 2014, Mr Aaron Kharivhe ought have suspended mining operations based only on the ground of failure to remedy a contravention.

118. Further, based on:

118.1. the GPR Survey findings showing anomalies at two spots that are indicative of graves;

118.2. noting that Ivanplats has consistently denied existence of graves within the box-cut; and

118.3. the NEMA environmental management principle requiring that risk-averse and cautious approach be adopted

Mr Aaron Kharivhe ought to also have found secured reason to suspend operations. The suspension therefore would serve at this juncture to close the gap of knowledge of the area from the perspective of what Ivanplats knows and what members of the community know, as well as to objectively resolve the dispute between Ivanplats and members of the community concerned with graves that are allegedly existing within the box-cut.

119. It needs to be pointed out that there is a dispute between members of the community as represented by Kopano, MIACC and other structures on the one hand and Ivanplats on the other hand, that Ivanplats has during the prospecting when failed to consult with the community regarding management and mitigation of impact on heritage resources that potentially will be impacted by the construction of the 20ha concrete-walled box-cut. This includes failure to openly and transparently engage the community around identification of site for the construction, and this gave rise to the suspicion and accusation that Ivanplats deliberately did not want to involve the community because it knew there would be issues around presence of graves at the preferred site for construction of the box-cut.

120. During the EIA process undertaken to support application for bulk sampling, emphasis was placed on amending the EMP in order to allow sinking of a shaft for improving knowledge of mineral resources and less emphasis was placed on improving knowledge of heritage resources that would potentially be impacted by the construction of the shaft. This is evident from the fact that HIA report was not developed for the construction.

121. Because of the above, Mr Aaron Kharivhe ought to have had heighten sense of responsibility regarding obtaining findings of the GPR Survey. It is noted that he at the meeting of the 3 December 2015 denied having seen or heard of the findings even though these were available from 13 July 2015. We do not believe it is true and in the circumstances find it unacceptable for him

not to have given the findings a keen follow-up interest. It is for this reason that we accuse Mr Aaron Kharivhe of at least negligent of duty warranting vigilance about the site given that Ivanplats failed to obtain indigenous knowledge of heritage resources within the construction site.

122. He cannot be said not to know that Mrs Nkosazana Machete had given an undertaking that joint administrative actions by the DMR and the SAHRA would be taken if the GPR Survey findings indicates anomalies in any of the eight (8) spots pointed out.

123. In fact, in an email dated the 7 June 2015 titled 'Comment on Site Inspection' which he was copied, Mr Aaron Kharivhe ought to have established that:

123.1. The re-emphasized lack of indigenous knowledge is blamed for Ivanplats discovery of graves previously unknown, which not only involve graves that now require non-invasive technology to detect because they are inconspicuous owing to clearing of vegetation that occurred when the box-cut was for constructed but also graves that are conspicuous like those found in the Moasi burial ground;

123.2. The discovery of other conspicuous graves as pointed out during the site inspection highlights the risk of ignoring a call that Ivanplats be instructed to call public participation meetings and engage entities with specialist knowledge of area in order to get more information about existence of heritage resources in the area;

123.3. a proactive and preventative stance rather that a reactionary and damage control stance is what is required to manage and mitigate potential negative impact on heritage resources. This cannot be left to Ivanplats to voluntary do, as the mandate of local representatives of Ivanplats is at this stage to focus on costs reduction, presumably even at the cost of degradation of the environment; and

123.4. Given that contraventions found during the site inspection of the 10 June 2015 does not only involve discovery of graves previously unknown but also failure to remedy contraventions following the compliance directive he issued in December 2014, the responsibility to issue administrative order suspending operations is not only to be carried by the SAHRA. Mr Aaron Kharivhe was obliged to take out his own and in the circumstances had to be keenly interested in the steps taken by the SAHRA and not pretend that he is a spectator in the process.

124. Mr Aaron Kharivhe statement that since the GPR Survey was undertaken on the 5 July 2015 he never became aware of the findings of the survey is strange given that he reported took over the investigation matter from the environmental management inspector that conducted the site inspection.

125. We submit that Mr Aaron Kharivhe pretence that he was a spectator in the process must if fact be seen not only as negligence of duty of care in

terms of the section 28 of the NEMA but also an unlawful act from the perspective the Prevention and Combating of Corrupt Activities Act. Noting that the DG is in terms of section 34 of this Act obliged to report suspicion of corrupt activities, we hereby call upon the DG to do so. This is on the basis of the following serious omission that are all clearly calculated to give Ivanplats an improper advantage:

125.1. As just stated, omission to suspend operations upon finding that Ivanplats has, six months later to end of July 2015, failed to remedy contravention following the directive issued in December 2014;

125.2. More than a month after GPR survey findings were released, he omitted to ensure that the joint undertaking given by his official and the official of the SAHRA to community members who attended the site inspection that the operations would be suspended as soon as preliminary results anomalies indicative of existence of graves;

125.3. In accordance with the duty of care prescribed by section 28 of the NEMA read with the duty imposed by the corrupt activities Act, he omitted to report to the SAPS discovery and violation of burial grounds and graves belonging to the Moasi and Mphoshi families, as well as contravention of the duty of care relating to the six months failure to remedy the contravention and to immediately cease operations once the GPR Survey findings were released. This would accords with the undertaking the inspection team gave the community members who attended the site inspection;

125.4. Omission to comply with constitutional duty to properly investigate the following complaints lodged by Kopano:

125.4.1. on the 1 December 2014, that Ivanplats has failed to comply with sections 5(4)(c), 2(h) and section 54 of the MPRDA; and

125.4.2. on the 11 December 2014, that there is suspected irregularities regarding addition and/or subtraction of minerals into the prospecting and mining rights of Ivanplats. And, that this indicates speculative conduct that is contrary to legislative provision to ensure security of tenure and regulatory requirements to during the conversion application mention specific terms minerals which were encompassed by the old order right.

- **Failure to investigate complaint about alleged BEE fronting practise**

126. This failure is linked, in the first place, to the failure or refusal by Mr Aaron Kharivhe to specifically investigate the relevancy and currency of the co-operative governance agreement that the ministries of DME and DLA entered into and which necessitated its reporting in the websites of respective ministries on the 10 October 2002, the day the MPRDA was enacted.

127. Kopano requested the above investigation upon learning from research done by Dr Gavin Capps that this ministerial co-operative governance agreement was inconsistently applied by officials of the DMR. This made

Kopano suspect that new generation officials of the DMR may even not being made aware of its existence and are thus not knowledgeable about its applicability during application for mineral rights if such application relates to a land in which the formal power of disposal of the land rights vests with the Minister of DRDLR.

128. It should be noted that the agreement was entered into in the context that the IPILRA, which came into force in 1996, was enacted as a comprehensive and protective legislation relative to informal land rights that included governance and regulation of disposal of land for commercial purposes. In line with both the land and mineral White Papers of the late 1990's, the occupiers of communal and state land were promised consultation and participation in decisions to dispose of these two national assets particularly if the disposal affects them directly.

129. It should further be noted that because the IPILRA was meant to be an interim measure until a more permanent legislation is enacted, regulations were never promulgated for the Act. The Minister and the department used directives to regulate the Act. Such directives are arguably not significantly dissimilar to any other delegated legislation. (Mr Henk Smit, 2015)

130. In addition to refusing conducting the above-mentioned investigation and despite provision of section 19(2)(d) and section 39 that both provides for compliance by an applicant with any other relevant law "during granting of mining right", Mr Aaron Kharivhe sided with Ivanplats when the latter refused to comply with procedural and substantive provisions of the IPILRA.

131. We note that Mr Aaron Kharivhe was also obliged by provisions of the PAJA to take into account request by concerned members of the community to consider IPILRA as relevant law during application stages. Note section 24O of the NEMA as well in this regard.

132. Further, Mr Aaron Kharivhe disregarded call by Kopano that he should view the request also in the context of the Constitution and our courts directives that living customary law be applied where it is required to apply. We pointed out to him that the IPILRA explicitly recognises living customary law.

133. It is also noting that Mr Aaron Kharivhe has on the 15 February 2012 instructed Ivanplats in terms of section 93 of the MPRDA to conduct democratic elections of community representatives who will be mandated to **"deal with all matters"** (my emphasis) relating to the Ivanplats project. However, clearly still bent on giving Ivanplats improper advantage, he at the meeting of the 3 December 2015 denied that the elections were in respect of all matters but only for negotiating compensation in terms of section 54 of the MPRDA.

134. Attention is drawn to the fact that the elections process that was subsequently initiated in 2012 following the 15 February 2012 compliant directive, involved several provincial government departments including the office of the Premier, as well as the IEC. A lot of resources were obviously

spent to bring all the parties together. Notwithstanding and from how I understood Mr Aaron Kharivhe to be saying, it does not matter if different community representatives are similarly elected for different aspects of the projects such as BEE, SLP, SLA and SUA (surface lease use under SPLUMA).

135. We thus submit that if Mr Aaron Kharivhe can guarantee us that he will issue a directive forcing Ivanplats to bear the costs of duplication suggested above, then we will withdraw our case against him that he failed to act on our complaint that Ivanplats failed to remedy contravention following the 15 February 2012 compliance directive that one community representatives be elected to deal all matters. In June 2013 Ivanplats conducted elections of community representatives for the BBBEE transaction, arguing against Kopano assertion that the 15 February 2012 directive required that only one authorised community representative body mandated to deal with all aspect of the Ivanplats project be elected.

136. Despite being complained to that the elections held on the 13 – 15 June 2014 contravened several provisions of the MPRDA (e.g. submitting misleading information by alleging it is the community that convened the elections and requested participation of officials of DRDLR and that of Ernst & Young Auditors when in fact it was Kgoshi and Ivanplats who did all these – see email of the 3 June 2014), that the RM directed Ivanplats to conduct the elections (which the RM denied, correctly so because that would be unlawful) within strictly imposed deadlines that made adequate and proper consultations extremely difficult as well as that election fraud was alleged, Mr Aaron Kharivhe failed to act on the complaint. This enabled Ivanplats to establish a community representative body trust advisory council (TAC) that deals only with one aspect of the development, namely BBBEE. This is set create a problem when resolution for the 10% free-rider shareholding is taken.

137. Because this representative body (TAC) is seen as an extension of Ivanplats in that they were elected not in the presence of the DRDLR but in the presence of Ivanplats and aligned Ernst & Young firm, it can rest be assured that the body will not be mandated to control and manage the 10% free-rider shareholding. It is will be illegal in terms of the 15 February directive for them to control and manage the remaining 10% shareholding. Besides, community resolutions are set to be taken on the TAC and the remaining 10% of the 20% shareholding. Resolutions that includes that the remaining 10% be off-set for beneficiation projects that aligns with the bigger regional plan will be proposed.

138. The community will and must enter into this transaction free of debt. This will usher the new South Africa we all wish for and are entitled to by operation of law as 'decreed' in terms of the ministerial co-operation governance agreement mentioned.

139. Mr Aaron Kharivhe stands in front of and against the wishes and entitlements of this strong 120 000 traditional community members. [Stats

provided by Ivanplats in numerous publications]. He should and must be eliminated from and as a joker in the pack of the constitutional system many unselfishly died for.

Summary

140. This call for investigation is and should be seen as part of the war for salvation of the integrity of a legitimate and good governance system that is constitutionally established to protect three of the key national assets (land; mineral; heritage/cultural) that are found in Mokopane and which are at risk of being selfishly exploited by a foreign company that is improperly allowed to do so centrally by Mr Aaron Kharivhe and his associates including Mr Vinesh Devchander.

141. The two assists Ivanplats to loot and degrade the national estates by conceiving, planning, devising and implementing in an organised fashion a web of intricate illicit transactions, being enabled to do so as part of the system that is meant to protect and to promote, not to selfishly exploit, vulnerable traditional community members that are promised by the Constitution to be the ultimate beneficiaries of transformation of the mining industry.

142. As herein alleged, the web of intricate illicit transactions involves:

142.1. Calculated abuse of position of authority and forbearance from investigating the validity and currency of the co-operative governance agreement entered into by ministries of the DME and DLA, meant to be an empowering instrument which although it originating in the apartheid era, it was transformed in the late 1990's and by operation of law made to apply to the MPRDA. Apartheid-era officials of the DME who still held onto formal and informal relationships with mining companies that did not want the instrument to be alive and practised, targeted it for erosion into oblivion by systemically suppressing its common use in order to give mining companies improper advantage over occupiers of former homelands. Mr Aaron Kharivhe is suspected of being more advertently and less inadvertently giving this improper advantage to mining companies that are plotting and conspiring to selfishly keep the occupiers on crumps and in an eternal debt by perpetuating illicit schemes that includes fronting practise,

142.2. Meticulous appointment of delegates to serve in acting chairpersons capacities in the RMDEC oral representation hearings of objection against Ivanplats' application for mining right. The brief of the foot soldiers is to procedurally and substantively flout the rules, get a kickback and be protected if things go wrong.

An example of flouted procedural rules is a recommendation for the Minister to grant mining right without first establishing the veracity of

allegations that Ivanplats has failed to comply with provisions of section 38(8) of the NHRA, which prohibits granting of mining right and approval of environmental authorisation prior to Ivanplats having consulted with the community and other interested parties pertaining generally to management and mitigation of heritage resources and specifically with comments and recommendations of the SAHRA.

Cited in this text are failures to provide proper motivations for selection of Operation Area and of TSF at Magongoa ploughing and grazing space and the farm Rietfontein respectively. Consequences of these failures are that the SAHRA refrained from giving a definite stamp of approval for development at these locations. Notwithstanding, Mr Vinesh Devchander and Mr Aaron Kharivhe abused positions of authority by recommending granting of mining right and approval of EMP in conflict with the procedural rule.

An example of flouting substantive rule is a recommendation for the Minister to grant mining right despite evidence adduced that Ivanplats has contravened relevant provisions of the MPRDA during the prospecting phase.

Cited cases include: (i) failure to comply with provisions of IPILRA relating to consultations with the community, noting that Mr Aaron Kharivhe has on the 15 February 2012 in fact expressly instructed, in terms of section 93, that Ivanplats comply with consultation requirements of the DRDLR; (ii) Additionally, the DRDLR on the 8 May 2014 instructed Ivanplats, in terms of interim procedures prescribed under the IPILRA, to sponsor democratic elections of community representatives; (iii) complaint by Kopano that Ivanplats is contravening the requirements of the approved Environmental Management Plan relating to buffer zone between distance (irrespective of the dispute whether the one in force is 1km or 25m or 50m or 100m) of prospecting activities and burial grounds or graves, as well as (iv) relating to lack of authorisation from LEDET and the SAHRA for construction of a site that 20ha or more, clearing of vegetation and construct access roads for bulk sampling operations, which act is contrary to the integrated environmental management principle stipulated in section 38 of the MPRDA. It is noted that contravention of section 38(1)(c) is criminalized by the MPRDA.

Regarding compliance with IPILRA (required in terms of section 19(2)(d) of the MPRDA), during the weekend of the 23 May 2014, Ivanplats sponsored elections of community representatives contrary to some of the specific aspects of the 15 February 2012 instructions (e.g.

the neutral venue principle; mandate that the representatives must deal with **all aspects** of the proposed development, not just one aspect of the development) and the agreement of the 8 May 2014 (e.g. banning Kgoshi L. V. Kekana from convening elections for community representatives; accommodation of the 10% free-rider principle).

Kopano's submission at the RMDEC is that because of the above-mentioned contravention of provisions of the MPRDA, it is unlawful in terms of section 23(g) of the MPRDA to recommend granting of mining right and approval of the mining EMP.

142.3. A general violation of provisions of the PAJA by Mr Vinesh Devchander and Mr Aaron Kharivhe, especially failure to respond timely to and take appropriate actions on concerns and/or objections raised by Kopano.

Examples cited include that Mr Vinesh Devchander failed to revert to us as he undertook to do so regarding request that disputes with Ivanplats be resolved prior to recommendation to grant the mining right is made. Substantively this is a dishonest act which brings out the question of legality of his actions, function of RMDEC on the day and mandate of the Mineral and Mining Development Board (section 58(1)(a)(iv) of the MPRDA). Relating to contravention of section 58(1)(a)(iv), we allege that Ivanplats is guilty impropriety by having paid a top dollar, as evidenced by the rain-water harvesting contract subsequently awarded to the chairman of RMDEC on the day, for influencing the decision to disregard the request Kopano made that dispute relating to applicability of IPILRA as relevant law be resolved prior to oral representation of the objection against mining right.

Another example is failure on the part of Mr Aaron Kharivhe to timely respond (before the mining right is granted) to request to investigate the validity and currency of the co-operative governance agreement entered into between the ministries of the DLA and DME, as reported on the 10 October 2002. For the several cases of lack of timely response, Kopano lodged a complaint with the provincial Office of the Public Protector. Mr Aaron Kharivhe defied this process.

142.4. Mr Aaron Kharivhe' moves to safeguard the illicit gain by ensuring lack of enforcement against a myriad of contraventions as well as the failure by Ivanplats to remedy contravention following compliance directives.

An example is failure to suspend operations after receiving a report in June 2015 that Ivanplats has failed to remedy contravention of the compliance directive issued in December 2014. Again, failure to at least in terms of PAJA enforce compliance with the directive issued on the 15 February 2012 after he received in July 2014 a report that

Ivanplats is conducting elections contrary to provisions of this directive; and

142.5. Playing ignorance or doing cover-up, at the meeting of the 3 December 2015, for having being part of issuance of a joint instruction to Ivanplats to accommodate the 10% free-rider equity and the promise made by Mr Aaron Kharivhe's delegate (Mr Makhalo Pitsi) to assist and ensure that Ivanplats facilitates the taking of community resolution for the equity, which resolution would enable ring-fencing and transfer of the free-rider equity in terms of section 11 of the MPRDA. We suspect that he is trying to make Mr Makhalo Pitsi a fall guy.

143. Violation of our right to fair and equitable administrative justice is of grave concern to all members of the community who are materially affected by the violation or those who have legitimate expectation for this justice to prevail.

144. Mr Aaron Kharivhe further violated our constitutional right to an environment that is safe from degradation, especially failing to adhere to section 24O(1)(b)(vi) of the NEMA, which provides that the Minister must take into account all relevant factors including information contained in reports, comments, representations and any document required in terms of the NEMA.[It is noted that Chapter 5 of the NEMA is incorporated into the MPRDA by section 38(1)(a) of the MPRDA].

In so failing, the following provisions in White Papers were eroded:

144.1. The Land Reform White Paper of October 1996, which promised consultation and community participation in all decisions concerning development on communal; and following this mode

144.2. The Mineral and Mining White Paper of 1998, which provided that licensing must allow for state determined royalty to the rights holder and surface rental to the owner [para 1.3.6.2]

145. For the above contravention and violations relating to alleged corrupt activities and fronting practices, it is noted that our laws places a duty on the DG as accounting officer to report knowledge or suspicion of corrupt activities and fronting practises. Failure to comply with this duty to report is an offence.

146. Further, we express concern and apprehension of interference by Mr Aaron Kharivhe and his alleged partner in crime Mr Vinesh Devchander. We request the DG to assure us that this will proactively be prevented and/or managed.

147. A more constructive parting shot is to tell what we are about. We are about asserting robustly, vociferously and aggressively but lawfully the following rights and interests:

147.1. Right to pursue our constitutional entitlements as informal land rights holders, as provided by operation of law that vested the Minister of DLA as trustee with the powers to –

147.1.1. Enter into co-operative governance agreement reported on the 10 October 2002, which we allege that the erstwhile officials of the DME conspired to have it eroded into oblivion for the current crop of officials of the DMR and DRDLR not to know about and/or use, noting that since 2013 Mr Aaron Kharivhe failed or refused to establish the veracity of its existence as well as relevancy and currency relative to MPRDA.

We assert that the ministerial consent is meant to supplement or reinforce the interplay between the IPILRA and the MPRDA during mineral rights application stages, if the Minister is nominal owner and trustee of the land in question. Comprehensive application of IPILRA must be appreciated and this includes control of land use (re-zoning) and land occupation as well as environmental management;

147.1.2. Formally dispose of rights in land including the right to development and to self-determine, subject to prescribed procedural ("Interim Procedures") and substantive rights (royalty/free-rider equity; surface rental) that guarantees the right to consultations, public participation, negotiations and hierarchical decision-making pursuant to majority approval by the rights holders, as well as guaranteed right to economic development via, critically, a non-negotiable and ring-fenced minimum 10% free-rider equity; and

147.1.3. Negotiate compensation for loss of informal land rights through forced displacements, including displacement of national heritage resources. Noting that "every generation has a moral responsibility to act as trustee of the national heritage for succeeding generation". (Section 5(1)(b) of the NHRA) The identification, assessment and management of heritage resources of South Africa must contribute to social and economic development". (Section 5(7)(d) of the NHRA). For such negotiation engagements, we demand recognition of our decision-making system, which is characterised by layered decision-making process (family, household, clan, sub-village and village levels) rather than a system that centralises power in traditional leadership institutions.

148. In the circumstances, we therefore demand that the refusal by Ivanplats and the failure by officials of the DMR and DRDLR to recognise our constitutionally guaranteed procedural and substantive rights, as well as our interests, must come to an end now.

Yours truly,

....

Aubrey Langa

ADDEDUM

THE CO-OPERATIVE GOVERNANCE AGREEMENT, 10 OCTOBER 2002

"If land is involved which was previously owned by the disbanded South African Development Trust (SADT) or held in trust for a tribe or community, the Department of Land Affairs is approached by DME. DME and Land Affairs also agreed that the latter will consult with the Provinces and the occupiers of such land or the tribe or community when they are approached to comment on application for prospecting or mining right. The **wishes** of the Provinces and the occupiers **are taken into consideration before any decision** (emphasis added) concerning such land is taken by the Minister of Mineral and Energy or his delegate. **Only after** a final decision has been taken and conditions have been embodied in a contract, **the required permit will be issued** (emphasis added) by the Director: Mineral Development concerned"

POLICY DIRECTIVES

"In terms of policy directives of the DLA, communities with insecure tenure in the former homelands were treated as the putative owners of the land that they occupy. When the land occupied by such a community was subject to a mining right, the DLA had to enter into a tripartite agreement with the relevant mining company and the community, in terms of which the community could obtain and negotiate benefits. These could include equity and/or royalty arrangements".