22 November 2018

South Africa: ICJ welcomes landmark judgment on free and informed consent of communities prior to the award of mining rights

The ICJ welcomes the landmark decision by the North Gauteng High Court in the *Duduzile Baleni and 128 Others v Minister of Mineral Resources* in which the Court affirmed the principle of free, prior and informed consent in relation to mining activities.

On Thursday the 22nd of November 2018, the Court declared that the Minister of Mineral Resources cannot grant a license to any mining company without first obtaining the full and informed consent of the affected community.

It concluded: "The applicants in this matter [have] the right to decide what happens with their land. As such they may not be deprived by their land without their consent. Where the land is held on a communal basis - as in this matter - the community must be placed in a position to consider the proposed deprivation and be allowed to take a communal decision in terms of their custom and community on whether they consent or not to a proposal to dispose of their rights to their land."

"This decision is a positive step towards protecting the rights of vulnerable communities from the excesses of States in the benefit of corporations. Informed consent from affected communities is vital for economic activities to bring development that enriches the lives of the communities where the companies operate," said Arnold Tsunga, ICJ Africa Regional Programme Director.

"The ICJ will continue to support the community through its cooperation with Ms. Nonhle Mbuthuma of the Amadiba Crisis Committee. We regard the community as Human Rights Defenders who are fighting to protect their internationally recognized economic, social and cultural rights," he added.

The ICJ calls on the South African government to respect the judgment which conforms with the requirements of South African legislation, the South African Constitution, judgments of the Constitutional Court of South Africa and international human rights law.

Contact

Arnold Tsunga, Director of the ICJ Africa Regional Programme, m: +263 77 728 3248,
e: arnold.tsunga(a)icj.org

Background

An Australian mining company, Transworld Energy and Mineral Resources (TEM) applied for a mining license from the Minister of Mineral Resources to conduct open cast mining in the Xolobeni area in Eastern Cape, South Africa. The consent of the UMgungundlovu community which lives in and in close proximity to the targeted area was never sought. As a result, there was a vicious land dispute in the area as some of the community members resisted the establishment of the mining activities.

The Applicants in the matter are members of the UMgungundlovu community who hold informal title to the land in dispute in terms of the Interim Protection of Informal Land Rights Act (IPLRA). They fear that mining activities of TEM "will not only bring about a physical displacement from their homes, but will lead to an economic displacement of the community and bring about a complete destruction of their cultural way of life".

The affected community members "are related by blood or by marriage and have lived in this area for generations" and that "overwhelming majority of these families have family graves in the area and are considered to be essential sites for family and community rituals." Overall, the Court rightly acknowledged that land "according to this community's

customary law, accrues to persons by virtue of them being members of the Umgungundlovu community" and "inextricable and integral part of this community's way of life".

The community therefore took the land dispute before the High Court arguing that a decision to approve mining operations by the Minister was unlawful. It argued that approval of TEM's mining projects on their land should only be done if and when the community has been furnished with detailed, accurate information regarding the proposed mining activities; the affected community members have been offered fair, just and adequate compensation; *and* the community has on this basis consented to such activities. The community relied on section 2(1) of IPLRA as the primary legal basis for their assertions that their consent was required before any mining activities could be allowed to take place. It also relied on various principles of international human rights law.

The Government respondents argued that no such consent was required as the Minerals and Petroleum Resources Development Act merely requires (MPRDA) that the communities be *consulted*, a requirement it suggested creates a lower burden on the state than free, prior and informed consent.

Judgment of the High Court

The Court affirmed that the MPRDA and IPLRA are not in conflict. Acknowledging that historical injustices, including racialized land dispossession, form part the interpretative context of both laws, the Court indicated that the laws must be interpreted together and in light of the South African Constitution and international human rights law principles.

Following precedent set in a judgment handed down earlier this year by the Constitutional Court of South Africa in *Maledu*, the Court stated that the laws "have in common that they were enacted to redress our history of economic and territorial dispossession and marginalisation in the form of colonisation and apartheid". Therefore, it held that because "both acts seek to restore land and resources to Black people who were the victims of historical discrimination: they must therefore … be read together."

Interpreting IPILRA's requirement, the Court also drew on international law indicating that "granting special protection to these communities by requiring consent as oppose to mere consultation is in accordance with international law". To bolster this view, it cited decisions of the African Commission on Human and People's Rights in the case between *Centre for Minority Rights Development and Minority Rights Group v Kenya*; the decision by the Human Rights Committee in the case of *Angela Poma Poma v Peru*; and General Recommendation No. 23 of the Committee on the Elimination of Racial Discrimination relating to "Indigenous Peoples".

The Court's order

In light of its reasoning, the Court declared that the Minister of Mineral Resources did not have the authority to grant TEM mining rights... The Minister of Mineral Resources was therefore ordered "to obtain the full and informed consent of the Applicants and the Umgungundlovu Community, as holder of rights in land, prior to granting any mining right" to TEM.

The way forward

At this point it remains unclear whether the Minister of Mineral Resources will seek to appeal this decision to the Supreme Court of Appeal or the South African Constitutional Court.

Read also

The judgment of the High Court is available here.
The South African Constitution is available here.

The recent judgment of the South African Constitutional Court in *Maledu* is available here.

The Interim Protection of Informal Land Rights Act 31 of 1996 is available here.

The Minerals and Petroleum Resources Development Act 28 of 2002 is available here.

General Comment 23 of the Committee on the Elimination of Racial Discrimination is available here.

The decision of the African Commission in *Centre for Minority Rights Development and Minority Rights Group v Kenya* is available here.

The decision of the Human Rights Committee in *Angela Poma Poma v Peru* is available here.