

Shell judgment underscores need for clarity in public consultation

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On 1 September 2022, the Eastern Cape Judge President Selby Mbenenge handed down a landmark judgement which cements the importance of public consultation in South Africa – and the potentially catastrophic consequences of improper consultation on businesses. The ruling was deservedly welcomed in local and international media as an important victory for rural communities, informal rights holders, and public interest groups alike, but it also underscores the need for legal certainty when it comes to public consultation.

Shell Exploration and Production South Africa B.V. and two associated entities (together, "Shell") intended to begin a [seismic survey off the Wild Coast](#) in accordance with an exploration right that was granted in 2014.

Shell's proposed venture raised the ire of thousands of South Africans, who had concerns about the survey's impact on the Wild Coast's rich and diverse marine life. Previously in December 2021, the court granted an interim interdict against Shell's activities. As a result of the new ruling, the Minister of Mineral Resources and Energy's decision to grant Shell was reviewed and set aside.

Judge Mbenenge's ruling is an important precedent in three respects – the importance of consultation, the need for a risk-averse approach to environmental issues, and the justiciability (i.e. legal enforce-ability) of spiritual beliefs and traditions.

Cases such as *Bengwenyama*, *Maledu* and *Xolobeni* have emphasised that consultation must be more than a tick-box exercise – it must be meaningful, culturally appropriate, consensus oriented, and inclusive. Corporations cannot consult with monarchs or tribal authorities to the exclusion of affected communities themselves. Notices must be in the languages spoken by the affected communities and must be delivered through means which will effectively reach the communities and enable them to participate meaningfully in the consultation. Judge Mbenenge was scathing in his criticism of Shell's top-down approach, and described it as "a thing of the past which finds no space in a constitutional democracy".

This ruling has also reinforced the need for a conservative and risk-averse approach to environmental issues, and emphasised the importance of sustainable development and considerations of climate change, following on important precedents such as *Fuel Retailers* and *Earthlife*.

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Finally, the Shell saga also vindicated the justiciability of the constitutional rights to culture, religion and language, and as such protected the diverse customary practices and spiritual beliefs of South Africa's communities. In December, Judge Bloem said that

"[what] this case is about is to show that had Shell consulted with the applicant communities, it would have been informed of those practices and beliefs and would have then considered, with the applicant communities, the measures to be taken to mitigate against the possible infringement of those practices and beliefs."

These remarks ring with sombre mindfulness of South Africa's past of epistemic violence. Judge Mbenenge reverently described them as "*timeless in their force and application.*" Courts have historically been hesitant to afford these kinds of rights strong legal protection. This ruling represents a clear precedent that such beliefs and practices are worthy of legal protection, and that a decision-maker must give due consideration to them before making a decision that may infringe on them. Where infringement is unavoidable, mitigative steps must be taken to ameliorate the degree of infringement.

These principles have now become crystallised in our law – and certainly, this is an important and valuable jurisprudence. It is aligned with our constitutional values of openness, transparency and accountability, and gives effect to the constitutional right to lawful, reasonable and procedurally fair administrative action. The judgment should be welcomed for its potential to ensure that development happens sustainably and responsibly, and with respect for the human dignity of the communities that it affects.

However (and without detracting from the observations above) when one considers the judgment from a different angle, the following questions arise – when, exactly, has a corporation consulted sufficient stakeholders? Who, precisely, must it consult, and who can it reasonably exclude from consultation? Is there a cut-off period before it can be accepted that a mining right has been validly granted? What other corporations and mining rights are at risk of judicial review?

Shell did in fact embark on a public consultation process. It conducted analyses of interested and affected stakeholders, met with representatives from various groups, commissioned three separate newspaper advertisements, held publicly accessible workshops, and was ultimately met with the approval of the Minister. And, according to Shell, it did all that was required of it in terms of the already existing regulations governing public consultation.

All of these observations support the conclusion that our mining laws must be reconsidered to reflect the jurisprudence that has been developed by our courts. It is desirable for both the mining industry and the communities it affects that we have certainty about what is legally required in terms of consultation.

This will yield twin benefits – corporates will budget to ensure compliance and lessen the risk of legal intervention down the line, and communities will be able to benefit from clearly defined rights, without a court having to vindicate those rights after a long and expensive litigation process.



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