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What is consultation?

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Mining companies required to consult with communities

Mining is one of the major contributors to the national economy.

The issue of mining companies being required to consult with communities remains a contentious issue in South Africa – with an increasing number of court judgments weighing in on the legal implications of consultation. The media has also written extensively, covering the various issues that communities within proximity of mining operations continue to raise and face.

Perhaps there ought to not necessarily be a tension between communities and the mining industry. The legal framework certainly attempts to factor in the role of communities, on the one hand and the mining industry, on the other.

Mineral and Petroleum Resources Development Act

As a starting point, the Mineral and Petroleum Resources Development Act, 2002 – which is the primary legislation regulating the mining industry in South Africa – defines a "community" as "*a group of historically disadvantaged persons with interest and rights in a particular area of land on which members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affected by the mining on land occupied by such members or part of the community*". This is a broad definition of what is a community for purposes of the MPRDA – which not only includes communities who have or exercise communal rights, but also communities who are directly affected by the mining on the land.

Section 10 of the MPRDA requires the Regional Manager, within 14 days of accepting a mining right, prospecting right or mining permit, to make it known that such application has been accepted in respect of the land in question and call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice.

Furthermore, in terms of sections 16, 22 and 27 of the MPRDA, applicants for mining rights, prospecting rights and mining permits are required to consult with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports.

The Environmental Impact Assessment Regulations

The Environmental Impact Assessment Regulations, 2014 also provide for a public participation process as part of the application for an environmental authorisation – which is now required for all mining and prospecting operations. Regulation 3(8) of the EIA Regulations states that this public participation process must be conducted for a period of at least 30 days. The public participation process must provide interested and affected persons with access to all information that pertains to the application – unless such information is confidential or protected by law. During the public participation process, comments must be received and responded to by the applicant for a mining right, prospecting right or mining permit.

Communities are also afforded a preferent right in terms of section 104 of the MPRDA to prospect or mine in respect of any mineral and land which is registered or to be registered in the name of the community concerned. In this regard, the Act states that the Minister of Mineral Resources and Energy must grant this preferent mining or prospecting right to the community where the mining project will contribute towards the development and social upliftment of the community.

In the Constitutional Court case ***Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others***, the court interpreted what consultation (as envisaged in the MPRDA) entails. The Court held that the purpose of the notification and consultation must be related to the

impact that the granting of the mining or prospecting right will have on the landowner or lawful occupier. This consultation should provide the landowner or lawful occupier with the necessary information on everything that is to be done so that they can make an informed decision in relation to the representations being made. The Court then held that the consultation process must:

- inform the landowner in writing that the application has been accepted;
- inform the landowner in sufficient detail of what the mining or prospecting operations will entail on the land;
- consult with the landowner with a view to reach agreement in regard to the impact of the proposed mining or prospecting operations; and
- submit the result of the consultation process to the DMRE within 30 days of receiving notification to consult.

In the past three years, we have seen further developments in regard to this requirement by mining companies to consult with communities. Perhaps most notably, is the court judgment in the ***Baleni and Others v Minister of Mineral Resources and Others***, which sought to interpret the provisions of the Interim Protection of Informal Land Rights Act, 1996 (the "**IPILRA**").

While the MPRDA merely requires "consultation" to be undertaken with the community, the IPILRA requires the "consent" of holders of informal land rights to be obtained prior to their being deprived of the property. Recognising that many informal land rights are not held individually but communally, section 2(2) of IPILRA requires communal consent. The Xolobeni community in this case contended that the grant of the mining right to the mining company constitutes a "deprivation" which triggers the requirement for consent. In this case, the Court was satisfied that the granting of the mining right indeed amounted to deprivation as the mining operations would interfere substantially with the communities' agricultural activities and general way of life.

The Court therefore held that the IPILRA requires consent of holders of informal land rights to be obtained prior to the granting of a mining right in respect of the relevant land.

Similarly, in the case ***Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another***, the members of the Lesetlheng Village Community were holders of informal land rights under the IPILRA and contended that they were not properly consulted before the mining right was granted, before the surface lease agreement was signed or before mining commenced.

In this case, the Constitutional Court had to consider whether the community had consented to being deprived of their informal land rights or interests in the land in question. The Court stated that given the invasive nature of a mining right (and mining operations), there can be no denying that when exercising its rights, the mining right holders would intrude the rights of the owner of the land to which the mining right relates. Furthermore, the existence of the mining right (which is a limited real right in terms of section 5 of the MPRDA) does not extinguish the right of a landowner or lawful occupier of the land in question. Accordingly, the Court held that the mining company ought to have complied with the provisions of IPILRA and sought the consent of the community prior to obtaining the mining right.

The message from the courts regarding the involvement of communities in the mining projects and the extent of consultation with mining communities is **clear** – an extensive public participation (or consultation) process is required and insofar as communities are holders of informal land rights, their consent must be obtained prior to the grant of the prospecting right or mining right.

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