

Human Rights Commission visit to Xolobeni, Wild Coast.

The following report was released by the SA Human Rights Commission on 29 October 2007 as an interim assessment of the issues arising from a complaint alleging gross violation of human rights by proponents of the Xolobeni Mineral Sands Venture.

XOLOBENI VISIT

5 SEPTEMBER 2007

Introduction and background

The visit to the Xolobeni area of Bizana in the Eastern Cape by a delegation from the South African Human Rights Commission (The Commission) on 05-07 September 2007 was in response to a complaint lodged by Mr John Clarke, a social worker, on behalf of the Amadiba Crisis Committee. The committee was elected by the community of Xolobeni who are opposed to the proposed mining of titanium in the area. The proposed mining development is initiated by an Australian company Mineral Resources Limited (MRC) through its SA subsidiary Transworld Energy Minerals (TEM) and in conjunction with a Xolobeni Community Empowerment Company (PTY) Ltd (Xolco).

The proposed mining development started on / about 1996 when TME was granted a prospecting license with which it could mine titanium deposits on the dunes in the area. From inception the proposed mining came under heavy criticisms from the Community and prompted divisions among those who were pro mining and those pro eco-tourism. Eco-Tourism project started around 1998 and it was reported to have failed due to the division within the community and the intimidation of those who supported the project. The almost defunct Eco-tourism project was funded by European Union and it had the support of Minister of Tourism and Environmental Affairs and well as the then Eastern Cape Premier. It is alleged that the challenge against the mining development is based on the fact that the Mining company, despite the

uncertainty around the Eco-tourism, went ahead with its plan to engage in the mining development even though that had the possibility of thwarting the resuscitation of the Eco-tourism project.

Another bone of contention within the community is around how Xolco is constituted. The community has been under the impression that since Xolco is a community empowerment company it should be representative of the community and benefit all affected communities. Since that is unfortunately not the case the community finds it unacceptable

With the above background in mind the complaint presented by the complainant is broadly around lack of consultation by the Mining company regarding the development and the fact that the land on which the development is planned is on communal land for which the community should have given consent. Further, there are allegations that individual rights of the community have been violated in the following instances:

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1. Human Dignity (Section 10). The right to have the inherent dignity of persons respected and protected, in that;
 - a. *persons perceived to be opposed to the mining proposal have been defamed by slanderous rumours and insinuations.*
 - b. *persons have been unfairly suspended, dismissed and forced to resign from employment because of their opposition to mining and efforts to make a success of eco-tourism enterprise.*
2. Freedom of expression (Section 16). The right to freedom of expression, including freedom of the press and media, in that;
 - a. *agents of the mining company on several occasions sought to prevent or restrict journalists from freely canvassing opinion, obtaining information and reporting on or filming community meetings;*
 - b. *residents have been prevented from freely seeking media coverage and from independently contacting and disclosing to journalists their concerns and misgivings about the mining proposal.*
3. Assembly, demonstration, picket and petition (Section 17). The right, peacefully and unarmed, to assemble and present petitions, in that;
 - a. *Mr Zamile Qunya and Mrs Kapa, Executive Mayor of the OR Tambo District Municipality sought to prevent a delegation of the Amadiba Crisis Committee from petitioning Their Majesties King and Queen Sigcau of the Qaukeni Great Place, for advice and support for the ACC in its program of action to expose the manipulation and cooption of residents by the mining agents;*

- b. *That at the above meeting and also at a meeting at Baleni Tribal authority(04/07/2007) and the Mgungundlovu Tribal authority(18/06/2007) Zamile Madiba Qunya actively attempted to omit mining from the agenda in order to prevent the community from voicing their rejection of mining*
4. Freedom of trade, occupation and profession (Section 22). The right of people to choose their trade, occupation or profession freely, in that;
- a. *Zamile Qunya and Bashin Qunya have deliberately orchestrated the progressive decline of the once successful nature based tourism initiative Amadiba Adventures, so as to advance dune mining as the only feasible source of income for residents, thereby depriving residents of livelihoods and occupations as trail guides, horse breeders, food producers, cooks and hosts.*
- b. *The same, together with Mrs Kapa Executive Mayor of OR Tambo District Municipality have deliberately worked to obstruct agreement being reached between Wilderness Safari's, Accoda Trust and Mntentu community for the mutually profitable operation of the Mntentu Lodge and hutted camp. A series of meetings were held in the community at which residents were misled and misinformed that Wilderness Safaris would displace people and bring in wild animals.*
5. Environment (Section 24). The right to an environment that is not harmful to peoples health and wellbeing, and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development, in that;
- a. *The mining rights applicants have not sought local permission and encouraged full participation from local residents in developing the mining proposal.*
- b. *The proposed dune mining scheme cannot be justified as it is in complete variance with recommended land usage contained in the Strategic Environmental Assessment and Wild Coast Regional Spatial Development framework compiled by the inter-governmental and multi-stakeholder forum the Wild Coast Conservation and Sustainable Development Project, that local, provincial and national government authorities have adopted;*
- c. *The proposed dune mining operation and the associated impacts on eco-system services will cause pollution and ecological degradation that, according to existing scientific methods and knowledge is presently not possible to prevent or mitigate and therefore the proposed operations will increase the risk of extinction of many endemic species of plants in the area and the reduction of the considerable biodiversity in the area;*
- d. *The minerals present in the dunes are non-renewable resources that presently have no national or international strategic value to add in enhancing ecologically sustainable development either locally or globally, and therefore the only justification for their extraction is for*

short term commercial gain from the sale of the minerals insofar as international mineral commodities market prices remain favourable.

- e. The cost borne by the environment and local residents of the mining and smelter operation are not justified by the limited social and economic benefits that are anticipated. The comparison between the socio-economic development benefits that nature-based tourism development will yield, compared with that of the mining proposal, shows that in terms of return on capital investment, sustainable jobs created and dependence on non-renewable resources, dune mining is a wasting industry that is considerably more expensive, technologically intensive, environmentally destructive and non-sustainable.*
- f. dune mining constitutes a fatal risk factor to eco-tourism prospects, in that the two economic activities are fundamentally incompatible, as evidenced by the negative impact that the mere threat of mining has already had on the viability of nature-based tourism in the same geographic area. The prospect of successfully reviving nature based tourism is greatly complicated if dune mining is even remotely considered.*
- g. The viability of the primary livelihood, subsistence agriculture, will be unduly affected by dust fall out and the increasing risk to irrigation from declining ground water sources.*
- h. The considerable energy requirements for the smelter and mineral separation plant cannot be justified in the context of the ongoing national energy crisis and the need to limit and carbon based energy generation due to the considerable threats posed by global climate changes induced by human exploitation of energy sources that emit greenhouse gases into the upper atmosphere.*
- i. The construction of a very costly smelter in order to process the minerals into usable products will result in induced pressure for mineral deposits in other ecologically sensitive coastal dunes areas to be mined to provide feedstock. The Xolobeni deposits will be exhausted within only 22 years, and if the smelter is constructed future generations can reasonably be expected to be unfairly burdened with the prospect of sustaining the operation of the smelter with the sole justification of providing a positive return on capital invested, rather than providing for their own development needs.*
- j. The changes in land use that will result from dune mining will irreversibly damage the applicants' sense of place that is closely associated with the unspoiled character and traditional use of the land. This will interfere with their right to wellbeing.*

6. Property (Section 25). No one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property.

Property rights have been violated in that;

- a. During the prospecting stage the mining company undertook activities on communally owned land and erected a weather station and installed dust monitoring equipment to monitor baseline dust levels, without a communal land rights resolution being passed to give permission for*

such activities and without a full and honest explanation of the proposed activities, or the purpose, terms and benefits of a mining exploration lease.

- b. A mining rights application has now been submitted to DME that if approved will lead to considerable disruption to homesteads in the mining tenement area, and require resettlement of homesteads and the loss of crop-fields and grazing pastures to the open cast pit mining operation. Residents living near access roads will be expected to tolerate heavy vehicles loaded with mineral sands, travelling back and forth from the separating plant on a continual basis over 22 years, creating dust plumes, noise and increased risk to the safety of pedestrians, livestock and other road users. No communal land rights resolution has been taken by the affected communities to permit this intrusion, and no negotiations have taken place to determine just and equitable financial compensation and material reparation for affected residents should the mining licence be approved.*

7. Access to information (Section 32). Everyone has the right of access to any information held by the state, and any information that is held by another that is required for the exercise or protection of any rights.

This right has been violated in that

- a. Affected residents have requested of Mr Zamile Qunya and Mr Maxwell Boqwana documentation relating to the formation, history and financial status of the Xolobeni Community Empowerment Company (Pty) Ltd, that was established as a BBE partner with TEM/MRC, in 2003, with Qunya and Boqwana as the only two known directors. The requested information has not been made available, and instead efforts have been made to 'cover their tracks' by resigning as directors and simultaneously co-opting respectable community members as directors, and opening a new bank account so as to prevent new directors from scrutinising past financial records.*
- b. A recently negotiated shareholding agreement between MRC/TEM and Xolco directors has not been openly shared with the constituency that are supposedly the sole beneficiaries of the 26% share in profits that the dune mining venture hopes to yield, despite repeated calls for this to be disclosed. Further, no information has been disclosed as to how the contingent liability of US\$ 18 million associated with the shareholding will be financed and on what terms.*
- c. The new Xolco directors are unable to provide satisfactory explanations of the above to their claimed constituency of beneficiaries, and it is suspected that their own rights of access to information that enables them to discharge their fiduciary responsibility as company directors is also being violated."*

The mandate of the Commission:

The Commission is a constitutional body tasked with promoting respect for human rights and a culture of human rights, promoting the protection, development and attainment of human rights and the monitoring and assessment of the observance of human rights in the Republic. In discharging this broad mandate the Commission, among other things, investigates complaints of allegations of human rights violation.

Upon receipt of the complaint from the Amadiba Crisis Committee the Commission conducted an investigation into the alleged human rights violations by the mining company. This it would achieve through consultative meetings with various stakeholders and collecting of all the information relevant to the investigation. The point of this exercise would be to ensure that the Commission is apprised of all the issues at stake and would thereafter be in a position to decide on the appropriate intervention it would embark upon to put this matter to rest and/or advise the complainants of the best necessary intervention to resolve this impasse.

Processes undertaken by the Commission:

In conducting its investigation the Commission held numerous consultative meetings with the complainants. One of such meetings was one held on 11 July 2007 at the Commission's Head office where an undertaking was made that assistance would be provided in all possible ways to see to it that the matter was at the very least resolved. Another consultative meeting was held on 02 August 2007 wherein an undertaking was made by the Commission to visit the affected communities by attending a meeting/s that take place at the Qaukeni Great Place on a weekly basis, this was to be the meeting scheduled for 16 August 2007. Before this meeting could take place the Commission was notified by the complainants that a meeting would be held on 09 August 2007 instead. Since there was short notification of this meeting, the Commission could unfortunately not attend. It however received a report from the complaints of the deliberations at the said meeting and the outcome thereof. At the meeting of 09 August 2007 it became clear that there was still

a need for further consultations with the community as they have had very few opportunities for an open discussion around the crisis within their community. A follow up meeting was then scheduled for 05-07 September 2007 at Umgungundlovu Great Place and this meeting the Commission attended. Senior members of the Commission¹ attended the meeting in order to get first hand information from the community affected by the proposed mining development.

Deliberations at the meeting of 05 September 2007:²

Although Xolco and Amadiba Crisis Committee had approached the King requesting his intervention in the matter, participants present acknowledged upfront the existence of the impasse and the fact that the affected parties and/or stakeholders have reached a deadlock regarding the mining development. They however acknowledged the desire of everyone involved to have the crisis resolved and the finding of a lasting solution to the problem.³

In her opening address the Executive Mayor of the OR Tambo District Municipality applauded the holding of the meeting as she regarded it as a step in the right direction in finding a solution to the problem. She emphasised to the participants the need not to view the meeting as a court of law but rather as a forum that is aimed at listening to the views of the affected parties.

A strong view was presented by a community representative who stated that the majority in the community were against the mining development. This

¹ The Commission's delegation to the meeting comprised of Dr Zonke Majodina (Deputy Chairperson), Commissioner Tom Manthata, Adv Kaya Zweni (Head of Programme- Legal Service) and Mr Gcinikhaya Dudeni also of the Legal Services Programme. The participation of the Commission was applauded by the participants and it was clarified as a fact finding mission to determine how it can contribute to ensuring that the mining development issue was successfully resolved.

² Besides the Commission's delegation the meeting was also attended by a high powered delegation from the area. The people who attended include: The King and Queen Sigcawu; The Executive Mayors of Bizana Local Municipality (Mr Twabu) and OR Tambo District Municipality (Ms Capa); Xolco; the Amadiba Crisis Committee; Ex-Miners Workers Union; Department of Land Affairs and Mr. John Clarke.

³ This commitment came after a heated debate on the continuation of that meeting. Some participants objected vehemently to the holding of the meeting unless there was a commitment to reaching an appropriate agreement.

view was supported by many who also held the view that the planned development was not conducive to the environment. A representative for the Ex Miners Union elaborated on this position by confirming that their organisation had information at its disposal which they can use to prove the destruction that the mining causes to the environment. The opposite view was that of Xolco, the community empowerment company. Xolco's position was a plea to the affected parties that the development was for their own benefit.

Besides the views held by the two groups it was clear that some concerns were to some extent common to all the parties. These concerns are as follows:

- * Lack of consultation with the community, the King and the Chief of the area by the mining company;
- * Lack of understanding by the community of the pros and cons of the proposed development;
- * Lack of knowledge by the community of the impact of the mining development on the environment; and
- * The issues of the communal land that would be used for the development.

Commission's concluding observations

1. The community of Xolobeni and the King's house have not been adequately consulted and informed about the proposed mining development.
2. There is general lack of understanding of the community's rights and responsibilities with regards to the proposed mining. Further the community is not knowledgeable about the effect that the development will have on their lives, such as the consequences of the pollution on the lives of those living in the immediate areas around the mining development.

3. That it is not clear whether the community of Xolobeni is in general not opposed to development except that they are concerned about a number of issues including the environmental impact that the development will have on their lives.
4. That the Departments of Mineral and Energy and that of Tourism and Environmental Development are not on the same page about the development of Xolobeni community.
5. Perceptions exist that only a few are likely to benefit from the proposed mining, particularly, those who want it to go ahead.
6. There is concern by the Department of Minerals and Energy on whether the stakeholders are participating at the consultative meetings in good faith.
7. Although the community has little or no information about the mining development a vast majority of people within the community are against the proposed development.

Recommendations

- Ø The SAHRC to make an intervention in terms of which it will facilitate a meeting for all relevant government departments, for example, Department of Minerals and Energy, Dept of Land Affairs, Dept of Water and Environmental Affairs and Eastern Cape Premier's Office.
- Ø The SAHRC to determine whether the necessary legal processes have so far been followed regarding the Mining application as prescribed by Mineral and Petroleum Resources Development Act, 28 of 2000 as well as the Mining Charter.
- Ø The Commission to undertake all the identified interventions in consultation with the King and the Queen of Amampondo. The meetings to be convened under the auspices of the Royal House.
- Ø Education intervention by the Commission:
 - A workshop to be conducted for the community on their rights and responsibilities.

- The community needs to be informed of the advantages and disadvantages of the development and the impact that it will have on their lives.
- The interim impact assessment study to be workshopped so that the affected parties are made aware of its content and implications (both short and long term).

The Commission has developed a project proposal to facilitate the implementation of the recommendations stated above.

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