

AMNESTY INTERNATIONAL PUBLIC STATEMENT

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South Africa: Authorities must protect coastal community's right to consent to future mining on their land

Amnesty International strongly condemns the failure of the Minister of Mineral Resources, Gwede Mantashe, to allow an effective voice to the Indigenous Amadiba community at a meeting held on the 16 January 2019. The meeting was part of ongoing consultations that the Department of Mineral Resources (DMR) initiated regarding proposed mining in the area.

As part of the meeting's proceedings, the contested local traditional leader, King Sigcau, claimed that the Amadiba land belongs to him, and that mining will take place there. The King thereby effectively sought to exclude anyone else from the affected community, including women, youth who were at the meeting, from participating in decision-making on the future of mining on their land.

During a Question and Answer Session a man who claimed to be an Amadiba Crisis Committee (ACC) member, claimed that the ACC want mining. Since this view does not represent the views of the ACC who oppose mining, a commotion then ensued. The purported ACC supporter's comments drew wide disapproval from community members present, resulting in the Minister bringing the meeting to a premature closing. Nonhle Mbuthuma, the ACC spokesperson, pleaded with him not to close the meeting, and asked which village the purported ACC supporter came from in Amadiba. Minister Mantashe ignored the question, however and exited the marquee.

Amnesty International is alarmed by the Minister's misrepresentation of the Amadiba Crisis Committee (ACC) as having interrupted the meeting. In effect, the Minister's actions disregarded affected community members who wanted to share their views on proposed mining in Amadiba, including environmental human rights defender Nonhle Mbuthuma, the spokesperson of the ACC. The government effectively excluded the community from the purported consultations.

Before bringing the meeting to a premature end, Minister Mantashe said that he agreed with a landmark November 2018 High Court ruling, which ruled that he must obtain the full and informed consent of the community as the holder of rights on land prior to granting any mining right to the mining company, TEM.¹ However, he went on to announce his plan to conduct a survey from house to house in the area, to solicit the views of community members affected by the proposed mining project. He stated that if, through this survey, the majority of the community agrees to the proposed mining, his Ministry would issue the mining licence. Importantly, the right to free, prior, informed consent is a collective right which "cannot be

¹ High Court of South Africa, Gauteng Division, Pretoria. Case number 73768/2016. Judgement. 22 November 2018. Order, paras 84(1-2).

held or exercised by individual members of an indigenous community.”² Consent must be obtained through consultations “in good faith with the indigenous peoples concerned through their own representative institutions”.³ The government’s plan to undertake a house-to-house survey is therefore illegitimate and inconsistent with its response to the High Court ruling.

On 13 December 2018 the DMR filed an application for leave to appeal the November 2018 High Court ruling.

The South African authorities are obliged to comply with the general rule of international law, that extractive projects should not take place within Indigenous territories without their free, prior and informed consent (FPIC).⁴ South Africa is a signatory to the International Convention on the Elimination of all forms of Racial Discrimination⁵ and as such must ensure that no decisions directly relating to the rights and interests of Indigenous peoples are taken without their informed consent.⁶

Minster Mantashe’s handling of proceedings at the meeting in Amadiba, and King Sigcau’s stance, are evidence of an intention to pass over the community’s objection to mining, and to sideline the ACC, which is the community’s chosen representative for consultations. Amnesty International’s position, therefore, is that the meeting did not constitute meaningful consultation and effective participation in any way. Instead, it was simply a semblance of consultation.

Amnesty International calls on the South African authorities to respect and protect the Amadiba coastal community’s rights to effective participation on any future mining activities in their land. Amnesty International also calls on the South African authorities to drop its appeal against the court order of 22 November 2018, which correctly interpreted South Africa’s international law obligations.

Background:

The Amadiba coastal traditional community is an Indigenous community with communal rights to prime pristine coastal land in South Africa’s Eastern Cape province. The community currently comprising at least 600 people have lived in five villages on this land for centuries. An Australian mining company, Transworld Energy and Mineral Resources (SA) Pty LTD (TEM) and the Department of Mineral Resources (DMR) want to mine this land’s titanium-rich sands. The community do not want the mining company and the government to mine their ancestral land, citing potential loss of their homes, livelihoods and cultural heritage, among others. The community founded the Amadiba Crisis Committee (ACC) to unite people across the five villages in Amadiba that will be affected by the proposed mining. Sikhosiphi ‘Bazooka’ Rhadebe, a land and environmental rights defender and former chairperson of the ACC, was shot dead on 22 March 2016. To date, no one has been held accountable for his murder.

² United Nations, General Assembly, Human Rights Council. A/HRC/39/62. Free, prior, Informed Consent: A Human rights-based approach. Study by the Expert Mechanism on the Rights of Indigenous Peoples. 10 August 2018. Para 13,

³ United Nations Declaration on the Rights of Indigenous Peoples, General Assembly Resolution 61/295 (13 September 2007), Art. 19.

⁴ United Nations General Assembly. A/HRC/24/41 Report of the Special Rapporteur on the Rights of Indigenous Peoples James Anaya: extractive industries and indigenous peoples. 24th session. Human Rights Council. 1 July 2013. Para 27.

⁵ South Africa signed the International Convention on the Elimination of all forms of Racial Discrimination (CERD) in 1994 and ratified this convention in 1998.

⁶ United Nations. 51st session (1997). General recommendation 23 on the rights of indigenous peoples.

On 23 April 2018, the ACC brought a court challenge against the DMR and the mining company TEM, after the Minister of Mineral Resources granted the mining licence without the community's consent.

Although the Mineral and Petroleum Resources Development Act (MPRDA) and the IPILRA appear to be in conflict regarding the requirements of *consultation* and *consent*, in the High Court ruling of November 2018, Judge Basson concluded that the “MPRDA and the Interim Protection of Informal Land Rights Act (IPILRA) must be read together.” He added that the affected community “may not be deprived of their land without their consent.”⁷ The preamble of the MPRDA acknowledges that “South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof.”⁸

The MPRDA entitles the State, and no longer the common law owner of the land to be the custodian of all mineral resources, which belong to the nation.⁹ The MPRDA includes a procedural requirement of consultation when applying for a mineral right.¹⁰ Part of the consultation process is that a mining company must provide landowners with all the necessary information for them to be able to make an informed decision about proposed mining.¹¹

The South African Constitution recognizes the need to redress inequalities of Apartheid South Africa regarding unequal access to land and security of tenure.¹² In line with this, the IPILRA aims to protect “certain rights to and interests in land which are not otherwise adequately protected by law”.¹³ The IPILRA focuses on protecting communities' informal rights in land and provides that “no person may be deprived of any informal right to land without his or her consent”.¹⁴

Amnesty International was in Amadiba on 16 January 2019 to observe the meeting.

⁷ Para 83 of Case number 73768/2016, 22 November 2018, High Court of South Africa, Pretoria.

⁸ Mineral and Petroleum Resources Development Act (28 of 2002)

⁹ Section 3 of the MPRDA

¹⁰ Section 22(4) of the MPRDA

¹¹ Section 16(4)(b) of the MPRDA as quoted in the 22 November 2018 High Court judgement para 66.

¹² Constitution of South Africa. Section 25(6)

¹³ Short title of IPILRA (Act 31 of 1996).

¹⁴ Section 2(1) of the IPILRA