BALENI and 128 Others v. Department of Mineral Resources and 6 Others
Case No: 73768/2016
Case Update

- On 23 April through 25 April 2018, the legal representatives of members of the Umgungundlovu community will be in court to defend their right to decide if mining occurs on their land.
- For many years, requests have been made to mine in the area, but most recently, in 2015, the Australian mining company, Transworld Energy and Mineral Resources ("TEM"), requested permission from the Department of Mineral Resources ("DMR") to mine along the Wild Coast under the Xolobeni Mineral Sands Project. The applicants in the case are families who have used and lived on the land where mining by TEM would occur and where for generations the community has grazed animals, farmed, and fished – relying on the local land and water to survive. Yet, the government and TEM have not properly consulted with the community about the request to mine and have not listened to the applicants' repeated statements that mining cannot occur on their land. The requests to mine have made it more difficult for the community to pursue alternative development and also caused intense division and violence in the community. Then, in June of 2017, the Department of Mineral Resources decided to stop all approvals of mining requests for 18 months -- but this temporary moratorium was never a solution to the problems caused by the mining application process.
- The applicants' petition demands that the government recognize that the community must freely consent to mining on their land before permission to mine can be given to a company like TEM. Since 2008, the Amadiba Crisis Committee has been working with the LRC to uphold the community's rights over the land. Initially, the LRC filed appeals with the Department of Mineral Resources to object to mining requests and later were forced to file an interdict calling for an order to stop the threats and assaults made against community members who opposed the mining project. The latest phase of the legal battle, however, is over the community's power to consent or withhold consent for development on their land.
- At the hearing, the advocates will be discussing legal protections under two statutes: the Interim Protection of Informal Land Rights Act (IPILRA) and the Mineral and Petroleum Resources Development Act (MPRDA). These statutes were passed to address discrimination and restore land and resources to communities who were denied their human rights under colonialism and apartheid. IPILRA provides legal protection for traditional communities to control their land according to their customary law -- even if they are not legal owners under the common law. IPILRA provides additional protections to customary communities, such as the right to consent to projects that affect their land, because of their special connections to the land and also because they have been especially vulnerable to abuse by government and private actors who refuse to recognize the community's land rights.
- Under the statutes, TEM must both consult with a customary community and seek its consent before TEM can be given permission to mine. The only way the government can give permission to mine without the community's consent is through the separate process of expropriation. In contrast, the government and TEM argue that the Umgungundlovu community's consent to mining is not required under the law because the MPRDA statute gives the State ownership of sub-surface minerals and allows a company to mine even if a landowner under the common law does not consent. However, the applicants' attorneys will explain how the rules for customary communities and common-law landowners are not the same, and the MPRDA statute does not take away a customary community's rights under the IPILRA statute. When the government is deciding whether to give permission to mine for minerals on the land of customary communities, the customary community has rights both under Section 2(1) of IPILRA, which requires community consent before their land rights are affected, in addition to protections under Sections 10 & 22 of the MPRDA, which require consultation with the

community as part of the mining approval process. These requirements are necessary to uphold the rights to culture, property, and a healthy environment that are guaranteed by the Constitution.

- Moreover, the community's power to refuse a mining project is clearly supported by international law on indigenous people's rights. Under international law, which the South African government must follow, indigenous peoples like the customary community in Umgungundlovu, must give "free, prior, and informed consent" before the government approves a mining project that affects the community and its lands. This means that a community, after being given full information on a development project and without outside pressure, can make a real choice about whether to consent to the project. This choice is made according to the community's decision-making customs and includes the right to say, "No!"
- The applicants have lived on the land in Umgungundlovu for centuries – each generation has relied on the land to survive and to carry on the traditions and customs of their ancestors. They face the possibility that mining will displace them from their homes, destroy their livelihoods, and further tear their community apart. Defending their customary rights, the advocates will ask the Court for the following things. First, a court order that the community's consent is required by IPILRA before TEM can mine. Second, a declaration by the court that the community's customary law requires decisions to be taken by consensus and that compensation must be set and paid before any company is given permission to mine. Without these protections, the MPRDA would be unconstitutional and contrary to international law.

For more information and to find out about the court case, phone

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