

## THE RIGHT TO SAY NO! WHAT DOES IT MEAN?

### WHERE DOES THE POWER COME FROM?

- 1 The right and power to say NO! come from the struggles of communities on the ground. It is born when a community stands up and says that we have the final say about our land. It takes root when we take responsibility for our futures. The right depends on the power of our community and our members.
- 2 The right is also derived from our Constitution. The Constitution listens to local living customary law of communities, the African Charter of Peoples' Rights and international law. Also the acts of parliament must be followed, but the constitutional rights of people must be respected.
- 3 Even our cabinet recognises the right when it wants to. On 21 November 2018 the Cabinet issued a statement:

*5.1. Cabinet welcomes the Constitutional Court judgment which ruled that the Minerals and Petroleum Resources Development Act, [MPRDA 2002] which governs the awarding of mining rights, must be read concurrently with the Interim Protection of Informal Land Rights Act, [IPILRA of 1996], which protects vulnerable land rights.*

*5.2. The victory of the Lesetlheng community in North West signals a start to the recognition of land rights of which South Africa's historically oppressed people had been deprived for generations. Where mining impacts on settlements, families and communities, **people directly affected by mining must consent to any changes affecting their land rights.***

<https://www.gov.za/speeches/statement-cabinet-meeting-21-november-2018-22-nov-2018-0000-0>

- 4 On 22 November 2018 the Xolobeni community also won a historic court case which made it clear that the directly affected households and their community must not only be consulted, but must also consent to mining, before the Minister can grant a mining right on communal land. The Court noted that the community has close connections to its communal land, and that the livelihoods of the affected households would be destroyed if the mining right is granted.

### WHAT DOES IPILRA SAY?

- 5 IPILRA is clear on the **process**:
  - a. First, the processes of decision making of local living customary law and its structures must be followed, including information, time for all questions and answers must be given, so that there can be free prior and informed consent or refusal;
  - b. Second, the processes of IPILRA and its delegated guidelines must be followed, including:
    - i. detailed information about any proposed projects and their impacts, and all contracts so that the implications are understood. More information and reports about impacts can be demanded;
    - ii. decisions by affected households,
    - iii. meetings with minority groupings, and finally
    - iv. a meeting of the community made up of affected rights holders and households.

All of this must happen under the supervision of the department of Rural Development and Land reform, and there must be a formal appointment.

- c. Third, the resolution at the meeting where a majority vote is taken, must be in a prescribed format:
    - i. It must state the number and list all the affected rights holders and households, and state the affected rights;
    - ii. It must state the number of attendees and there must be an attendance register;
    - iii. The resolution must be clear and understandable to show free, prior and informed consent;
    - iv. It must have copies of any contracts and reports attached;
    - v. It must provide details about benefits, compensation, timetables and show how any contracts will be enforced.
  - d. Fourth, the reports by the official are important, form part of the resolution and must be public. The decision making process must be fully recorded. The record must show all the documents available, all the negotiation meetings and what was discussed and decided, and all the views expressed including the views and proposals of all groupings.
- 6 IPILRA is clear about who are **rights holders**:
- a. Rights holders are persons and members of households who are actually using the land and have use rights;
  - b. We also hold rights under local living customary law, authorised by our own structures which we ourselves choose.
- 7 We say that IPILRA is clear about who is **the community**:
- a. Our community is defined by local living customary law as meant by IPILRA, not by any Bantustan laws or municipality laws, or any minister of mineral resources;
  - b. Our community is made up of rights holders;
  - c. Our community leadership is from the structure that we, the rights holders agree to, not just any structure that the minister or the mayor decide upon.

**This is new!**

- 8 The Constitutional Court said that the MPRDA is not more important than local customary law and IPILRA. The Cabinet agreed. The Xolobeni judgment said that the consent of the affected households and the consent of their community must come before any mining right is given by the Minister.
- 9 If any mayor or minister or king or chief try to say that their structures can make decisions about mining and projects, then a community can stand up for its rights.
- 10 The right to say NO! means that our communities have to power to say yes to development we choose.