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# Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project

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*South African Institute of International Affairs*

*African perspectives. Global insights.*

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## ABSTRACT

The international minerals industry faces challenges from communities who are increasingly vocal about the potential environmental and social degradation of mining activities, as well as their right to decide on local development strategies that best suit their needs. The case of the Xolobeni Mineral Sands Project in the Eastern Cape highlights some of the issues faced by governments, mining companies and communities in dealing with mining-related proposals. The paper reviews these issues within the context of a dispute that took place among the local community of AmaDiba, an Australian mining company and the Department of Mineral Resources. It examines the problems faced by communities where proposed or functioning mining operations have the potential to threaten the livelihoods of people. The case shows that communities have the capacity to challenge externally imposed development strategies effectively, by making their otherwise marginalised voices heard. Questions of how mineral development policy is drafted and implemented in the future are raised, including the extent to which communities have the right to block mining projects in their residential areas. Mineral rights are vested in the state for the benefit of the country as a whole. This gives the state the right to be the final arbiter for mineral development in the country. However, this right comes with the responsibility of ensuring that community voices are heard and considered in the decision-making process. The state needs to play a balancing act when it comes to mineral exploitation, where the needs of the national economy are balanced carefully with those of local economies.

## ABOUT THE AUTHOR

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## ABBREVIATIONS AND ACRONYMS

ACC	AmaDiba Crisis Committee
Accoda Trust	AmaDiba Coastal Communities Development Association Trust
AUD	Australian dollars
BBSEE	broad-based socio-economic empowerment
BEE	black economic empowerment
DRDLR	Department of Rural Development and Land Reform
DMR	Department of Mineral Resources
DWEA	Department of Water and Environmental Affairs
EIA	environmental impact assessment
FPIC	free, prior and informed consent
HDSA	historically disadvantaged South African
ILO	International Labour Organization
LRC	Legal Resource Centre
MMSD	Mining, Minerals and Sustainable Development
MOU	memorandum of understanding
MPRDA	Mineral and Petroleum Resources Development Act (of 2002)
MRC	Mineral Commodities Limited
NEMA	National Environmental Management Act (of 1998)
NGO	non-governmental organisation
PondoCROP	Pondo Community Resources Optimisation Programme
RBM	Richards Bay Minerals
SAHRC	South African Human Rights Commission
SWC	Sustaining the Wild Coast
TEM	Transworld Energy and Minerals
UNCED	United Nations Conference on Environment and Development
UNDP	United Nations Development Programme
WWF	World Wide Fund for Nature
XolCo	Xolobeni Empowerment Company
ZAR	South African rand

## INTRODUCTION

The years 2003 to 2008 witnessed community conflict over mining in the AmaDiba area of the Eastern Cape. This was a result of the government's decision to license a mining initiative of an Australian mining company through its South African subsidiary. Conflict emanated from two claims by community members. The first was that the government supported the mining initiative as the best route for development in the area. The majority of community members, however, favoured a continuation of a grassroots ecotourism business, which had at the time been in operation for several years. The second was that the community, as interested and affected parties, had not been consulted adequately in the run-up to the government's decision to grant the mining rights. The community unrest that resulted from these claims forced the then Minister of Minerals and Energy, Buyelwa Sonjica, to put the mining rights on hold, pending further consultation.

Almost three years later in 2011 the matter was finally decided. The new Minister of Mineral Resources, Susan Shabangu, withdrew the mining rights on the basis of outstanding environmental issues that the mining company had failed to address at the time the mining rights were awarded. Minister Shabangu sent a brief to the Legal Resources Centre (LRC), as representatives of the AmaDiba Crisis Committee (ACC),<sup>1</sup> notifying them of the decision. This was signed on 17 May 2011 but only received by the ACC on 6 June 2011. In the brief the minister also expressed her satisfaction that the mining company had fulfilled the legal requirements for community consultation. She gave the mining company 90 days from the date of the brief to address environmental issues, after which she would reconsider the mining option. The basis of the minister's decision and the 90-day grace period given to the mining company raise concerns. One of these is her acceptance of the community consultation process as adequate. This ignores the documented evidence of a lack of participation and consultation, which was identified by the community and confirmed by the South African Human Rights Commission (SAHRC).

Following this decision, and the mining company's failure to address the environmental issues identified by the minister in the stipulated timeframe, it appears that the lengthy Xolobeni Mineral Sands Project saga has been resolved, and that the AmaDiba community, after years of struggle and advocacy, has won. Preliminary indications are that the community has celebrated a victory of the people against an imposition by the government and the private sector. The ACC has spoken of lessons learnt, and there has been talk of reviving AmaDiba Adventures. This was an ecotourism venture operating along the AmaDiba coastline, which became defunct following the submission of the mining application.

The case of the Xolobeni Mineral Sands Project highlights some of the issues faced by governments, mining companies and communities in dealing with mining-related proposals. Firstly, the Department of Mineral Resources (DMR), formerly Minerals and Energy, and the Department of Water and Environmental Affairs (DWEA), formerly Environmental Affairs and Tourism, found themselves on opposing sides of the mining proposal, with the former department granting the mineral rights despite the latter's documented opposition. This highlights the concern over whether the legislation governing both departments might be ambiguous or even contradictory. Secondly, the community identified the issue of inadequate community consultation. They claimed that

the mining company had failed to ensure that all interested and affected parties were given a voice. In 2008 the government granted the mining rights without ensuring that the requisite consultation had taken place. Thirdly, the case highlighted the shortcomings of black economic empowerment (BEE) legislation, which encouraged the formation of a local company, the Xolobeni Empowerment Company (XolCo). XolCo was established in 2003 for the sole purpose of acting as an empowerment partner to Australian-based Mineral Commodities Limited (MRC) and its wholly owned South African subsidiary, Transworld Energy and Minerals (TEM). According to the ACC, XolCo misused its BEE status in falsely purporting to be representative of the community.

The paper reviews these issues within the context of the past conflict in AmaDiba. It has three objectives. The first is to understand the challenges faced by communities where proposed or functioning mining operations have the potential to threaten the livelihoods of people. The second is to show that communities have the capacity to challenge externally imposed development strategies effectively, by making their otherwise marginalised voices heard. The third objective, and perhaps the most ambitious, is to highlight the changes needed in how mineral development policy is drafted and implemented in the future.

## THE SETTING

The AmaDiba area is situated in the northern part of the Wild Coast, south of Port Edward and north of East London. It lies within the greater Mpondoland, a rural area spanning approximately 1 880 kilometres. Mpondoland falls within the Mbizana Local Municipality, which forms part of the OR Tambo District Municipality. AmaDiba is home to the amaMpondo people, who speak IsiMpondo, a mixture of isiXhosa and isiZulu. Mpondoland is presided over by King Mampondomise Sigcau and administered by traditional authorities in association with local government, which has been led by the African National Congress since 1994.<sup>2</sup> It is rich in flora, fauna and ecological reserves. In 2004 the DWEA declared the 90-kilometre stretch from Mzamba River in the north to Mzimvuba River in the south (AmaDiba falls within this area) the Pondoland Marine Protected Area. This was done in terms of the National Environmental Management: Protected Areas Act of 2003, whose purpose is to protect rare species and conserve areas that are ecologically viable and representative of the country's biodiversity.<sup>3</sup> The inland area is also known as the Pondoland Centre of Endemism and is a biodiversity hotspot owing to its combination of tropical and temperate ecosystems.<sup>4</sup> The land on which the mine was proposed is occupied by local communities as communal land held in trust by the Department of Rural Development and Land Reform (DRDLR), formerly Land Affairs.

OR Tambo is home to 1.8 million people, of whom 280 000 reside in Mbizana. Over 90% of OR Tambo residents live in rural areas, with 68% of the economically active population unemployed. Only 21 719 people have a matriculation certificate, with 4 789 holding a tertiary qualification. An estimated 72.2% live in poverty, compared with the country's average of 42.9%. The human development index is 0.42, compared with the country's average of 0.60. AmaDiba, as with the greater OR Tambo District, is characterised by high unemployment, poor education levels and a rural population primarily dependent on agriculture, animal herding for sustenance, remittances and pensions.<sup>5</sup>

Between 2000 and 2004, the main business in the area was an award-winning ecotourism venture called AmaDiba Adventures, which the EU supported with a grant of South African rand (ZAR) 80 million. This was a continuation of a project initiated in 1997 by a regional non-governmental organisation (NGO) called the Pondo Community Resources Optimisation Programme (PondoCROP), in association with the AmaDiba Coastal Communities Development Association Trust (Accoda Trust). The Eastern Cape DWEA also supported the project.<sup>6</sup> AmaDiba Adventures comprised horse and hiking trails, with campsites catering for overnight stays.

Within the same period, MRC began prospecting for minerals in the AmaDiba coastal area and confirmed deposits towards the end of 2002. In 2003 XolCo, MRC/TEM's BEE partner, was formed and a BEE deal was signed. The AmaDiba community owned and operated the ecotourism business venture, and was responsible for its planning, implementation and monitoring. This management took place through the Accoda Trust, in association with PondoCROP and two other NGOs, the Triple Trust Organisation and the World Wide Fund for Nature (WWF). The EU's primary aims for funding the project were to promote environmental awareness and protection; to capacitate the communities through skills and business training; and to promote local economic development.<sup>7</sup> The ecotourism business ended in the mid-2000s amid claims of financial mismanagement, misappropriation of funds and accusations that certain people in the Accoda Trust were purposefully making it appear a failure to promote the mining interests. These claims arose from a financial report commissioned by the EU.<sup>8</sup>

AmaDiba Adventures was hailed as one of the first functional community-based projects of its kind in South Africa. However, caution should be exercised against overstating the measure of success that the initiative achieved. At the time of its operation, many community members claimed that the benefits of the ecotourism business could not be seen on the ground. They also claimed that the Accoda Trust lacked transparency in documenting how the proceeds from the initiative were redistributed into the community.<sup>9</sup> Despite these allegations, the ACC, some of whose members were part of Accoda Trust, maintains that AmaDiba Adventures was a successful, environmentally friendly, grassroots business that directly benefited the community through the redistribution of profits. Although this reported mismanagement could cast a shadow over the possible revival of the ecotourism business, there has already been international interest in reviving green development initiatives in the area. A week after Minister Shabangu announced that the mining rights had been revoked, the Eastern Cape DWEA signed a memorandum of understanding (MOU) with the United Nations Development Programme (UNDP). The MOU will allow the UNDP to embark on a scoping exercise for a five-year partnership to develop the Wild Coast along environmentally friendly lines.<sup>10</sup>

At the time of the proposal, in March 2007, the mining initiative was envisaged along the 22-kilometre coastal stretch (1.5 kilometres inland), from the Mzamba River in the north to the Mthentu River in the south. The area falls within the Pondoland Marine Protected Area. Potentially, mining operations would directly affect five villages covering 3 300 hectares of land. These were Sigidi, Mdatya, Mtulana, Kwanyana and Mthentu.<sup>11</sup> MRC/TEM conducted a detailed drilling programme, and concluded that the 22-kilometre stretch contains about 9 million tonnes of ilmenite. This makes it the tenth-largest deposit of its kind and one of the largest undeveloped mineral sands resources in the world. Ilmenite is an iron titanium oxide and the primary ore of titanium. It is used in

the manufacturing of titanium dioxide for paints, and titanium itself is used in a wide variety of products including metal parts for vehicles and aircraft, sporting equipment and artificial human joints.<sup>12</sup> Initial estimates by MRC/TEM showed that the mine would have a lifespan of 22 years, create 557 permanent jobs and would eventually be worth \$500 billion.<sup>13</sup> However, Sustaining the Wild Coast (SWC), an NGO working with the ACC in advocating against the mining initiative, refuted the number of jobs to be created. Their estimate was in the region of 250 direct, permanent jobs. The rest, SWC argued, would be created through proposed mineral beneficiation industries such as the mineral separation and smelting plants, which were later abandoned by MRC/TEM.<sup>14</sup>

### MINERAL COMMODITIES LIMITED OPERATIONS

MRC is a Perth-based Australian resources company involved in heavy minerals mining, and corporate investments in various companies listed on the Australian Stock Exchange. Since 2002 MRC has conducted two projects in South Africa. The first was the Xolobeni Mineral Sands Project and the second the Tormin Mineral Sands Project (the Tormin Project), located 400 kilometres north of Cape Town along the West Coast. With regards to the Tormin Project, in 2007 MRC applied to mine rutile and zircon through its other South African subsidiary, Mineral Sands Resources Pty Ltd, with Morodi Mining Resources Pty Ltd (Morodi) acting as the BEE partner. This BEE partnership was in keeping with the requirements put forward by the Mineral and Petroleum Resources Development Act (MPRDA) of 2002 and the Mining Charter of the same year.<sup>15</sup> According to MRC, the agreement with Morodi was later terminated and a BEE partnership was subsequently entered into with XolCo, which was also its partner for the Xolobeni Mineral Sands Project. At the end of 2010, MRC announced that save for a few 'outstanding regulatory matters' the Tormin Project was on the verge of commencing operations.<sup>16</sup> However, in March 2011 it reported that Morodi had launched an appeal with the DMR requesting that the mining rights be set aside.<sup>17</sup> By the end of June 2011, MRC was still waiting for the department to decide on whether mining operations could commence.

In 2010 MRC reported a net loss of Australian dollars (AUD) 1.6 million, following net losses of AUD 643,000 and AUD 1.5 million for the 2009 and 2008 financial years respectively.<sup>18</sup> MRC's poor performance over the last few years raised concerns about its ability to proceed with mining operations in the Xolobeni Mineral Sands Project. These claims were strengthened by MRC's need to issue 18 million ordinary shares to fund the initial stages of the Tormin Project, which have yet to commence.<sup>19</sup>

### THE XOLOBENI MINERAL SANDS PROJECT

The seeds for the Xolobeni Mineral Sands Project were sown in 1996 when MRC/TEM researched the possibility of mining in the AmaDiba area. At the time, TEM held an old order prospecting right in the area. In February 2002 TEM renewed the prospecting permit, which remained valid until 2004. Mineral deposits were confirmed as early as 2002 and five years later, in March 2007, MRC formally applied for mining rights through its South African subsidiary TEM.<sup>20</sup> In an attempt to prevent the DMR from considering

the application, the ACC lodged a complaint with the SAHRC. After investigating the matter, the SAHRC released a report in October 2007. The report concluded that community consultation about the project had been insufficient; the community had not been informed adequately about the effects of mining, one of the requirements for effective consultation and participation; the DMR and the DWEA were ‘not on the same page’ about the mining proposal; there were perceptions within the community that only a few would benefit from the mine; and that a ‘vast majority’ of the community was against the mine.<sup>21</sup> Despite the SAHRC’s findings, almost a year later on 14 July 2008 the director-general of the DMR granted the mining rights to MRC/TEM for the Kwanyana Block, one of the blocks for which they had applied. The Kwanyana Block represented 30% of the area originally prospected and 46% of the entire deposit amount. The date on which the agreement would be signed was set for 31 October 2008.<sup>22</sup>

Immediately after the DMR granted the mineral rights, the community accused MRC/TEM and the department of insufficient consultation with interested and affected parties in the decision-making process. The community also expressed their fears over land dispossession, the removal of their gravesites and the loss of livelihood strategies as a result of mining operations. Despite their protestations, in August 2008 Minister Sonjica visited the area and met community members to announce that the mining rights had been awarded. Community members used the meeting as a platform to share their opposition to the mine. In response, the minister claimed to have been unaware of the issues surrounding community consultation.<sup>23</sup> In September 2008 the ACC, through its legal representative the LRC, launched an appeal with the DMR requesting a review of the decision. The appeal was drafted in terms of two legislative provisions. These were the provision for sufficient and reasonable consultation under the MPRDA of 2002 and the provision for environmental protection under the National Environmental Management Act (NEMA) of 1998. The ACC’s appeal was based on the belief that the director-general of the DMR had granted the mining rights without having the authority to do so; the concern that the mining development would result in environmental degradation in the Pondoland Marine Protected Area; a ‘fatally flawed’ community consultation process; a ‘deficient’ environmental impact assessment (EIA) that did not investigate alternative land uses and lacked key environmental reports; and the absence of a community resolution supporting the mining initiative.<sup>24</sup> The minister subsequently put the mining rights on hold pending further consultation with the interested and affected parties.

A year passed with no decisive action in any direction. In September 2009 the LRC submitted two expert reports to the department. One of these stated that Australia had banned the heavy mineral sands mining proposed in Xolobeni owing, among other reasons, to its devastating effect on the environment.<sup>25</sup> In early 2010 the DMR requested that the Minerals and Mining Development Board set up a task team to investigate the issues highlighted in the ACC’s appeal. The team released the Holomisa Report in March 2010, concluding that there were outstanding consultation, environmental and project feasibility issues. It recommended that a decision on the mine could only be taken after these issues had been addressed by an interdepartmental committee. The DMR only released the report publically in January 2011.<sup>26</sup> Throughout this time the ACC remained anxious about the outcome of the minister’s decision on the appeal. The threat of the mine and pending decision prohibited any other development initiatives on the AmaDiba coastal stretch.

After increased pressure from the ACC to decide on the matter, in February 2011 Minister Shabangu requested 30 days (ending on 25 March 2011) to reach a decision. In March 2011 she requested a further 30-day extension (ending on 25 April), citing the high workload of the department and the complexity of the case. On 20 April 2011, the DMR sent a letter to the LRC in Grahamstown requesting more time owing to the April public holidays. At the beginning of June the ACC – through its advisor, consultant social worker, John GI Clarke – submitted a complaint to the Public Protector owing to the minister's failure to decide on the issue.<sup>27</sup> On 6 June 2011, the LRC received a brief from the department advising that Minister Shabangu had decided to withdraw the mining rights owing to 'several outstanding environmental issues'. The brief stated that she was satisfied that MRC/TEM had taken 'all reasonable steps to consult with interested and affected parties', and that the director-general of the DMR had taken the decision to grant the mineral rights in 2008 legally, based on the minister's delegation. Crucially, the brief gave MRC/TEM 90 days from the date of the brief to address the outstanding issues. The minister's granting of such a grace period suggests that she did not base her decision to withdraw the mining rights on the community's opposition to the project but rather on regulatory matters that MRC/TEM failed to address. This indicates that although the mine did not go ahead in the end, the community's opinion was deemed not important enough to be considered in the making of the final decision. It also suggests that the mine could have gone ahead had MRC/TEM addressed these outstanding issues.

## CASES OF COMMUNITY RESISTANCE TO MINING

The issues highlighted by the Xolobeni Mineral Sands Project are by no means unique. Both within the country and internationally there are examples of the same challenges in cases in which mining has been proposed as the preferred development path. Such cases are gaining prominence in international development discourse, which is moving towards the promotion of good governance in the natural resources sector. The importance of this global shift is underpinned by the recognition that mineral resources, when governed optimally, have the potential to uplift the often-depressed economies of developing countries and thereby contribute positively to economic growth and human development.

The central role of mineral resources in South Africa's economic growth has placed mining-related activities high on the government's agenda. In the last few decades the global trend has been to view mineral development within a sustainable development framework that considers the protection of natural environments as integral to the developmental agenda. Locally the often-adverse environmental effects of mineral resources exploitation have encouraged local community resistance to mining initiatives. In South Africa and abroad there are numerous examples of community resistance to mining. Often such resistance has been based on local communities being sidelined in the decision-making process; the potential environmental destruction caused by mining activities; and the threat such exploitation poses to livelihood strategies and land tenure. At times communities have successfully prevented mineral rights from being granted or exercised. At other times they have been less successful. However, even in unsuccessful cases, their opposition has resulted in a public outcry that has highlighted community rights and sustainable development arguments. Regardless of their success, these cases

of community resistance have shown that communities, otherwise seen as insignificant players who are unable to effectively challenge the state, do have the capacity to lobby for sustainable, environmentally friendly development.

In the late 1980s, a sand mining and minerals processing company called Richards Bay Minerals (RBM), which is part of the international mining group Rio Tinto, began prospecting for minerals in the sand dunes of St Lucia (now known as Isimangaliso), Richards Bay. In 1989 RBM formally applied to mine titanium on 1 436 hectares of Lake St Lucia's eastern shores. In support of the application, the company released an EIA that led to an outcry within the community to be affected by mining operations, as well as across the country. Conservationists and NGOs assisted the community in mounting an opposition to the mining initiative. The opposition culminated in a national petition with almost 300 000 signatures, including that of former president, Nelson Mandela.<sup>28</sup> The community opposed the EIA and mine on the basis that mining operations would lead to environmental degradation in an area rich in biodiversity and ideal for ecotourism. They also claimed that the community had been marginalised in the EIA process, and because of this, had been unable to share its views on the mining. Initially the government had argued that both mining and ecotourism could operate alongside each other, much like in the Xolobeni Mineral Sands Project. However, as the public outcry intensified the government appointed a review panel and launched its own EIA to investigate the costs and benefits that mining would have in relation to ecotourism in the area. In 1993 based on this EIA, which was hailed at the time as the most transparent in South Africa to date, the review panel advised the government against the proposed mining initiative. Only in 1996 did the (post-apartheid) government officially declare that mining would not proceed in the area. In 1999 the Greater St Lucia Wetland Park became the first South African World Heritage site.<sup>29</sup>

Similar incidents of community resistance to mineral exploitation were seen in Latin America in the 1990s and 2000s. Communities in the mineral-rich countries of the continent opposed mining initiatives seen as detrimental to their environment and livelihoods. Costa Rica provides a telling example of such resistance. The mining of gold along the mineral-rich Gold Belt, mainly by Canadian mining companies, has led to sustained public outcry. The main reasons behind this opposition have been that local communities have not been able to participate in development initiatives and that the use of sodium cyanide in the processing of metals leads to deforestation and pollution, especially of water resources. Communities have also shared fears of mining resulting in loss of livelihoods, local cultures, land and an established way of life. In most cases Costa Rica's government has proceeded to award mineral rights. However, public opposition to the detrimental effects of mining operations has galvanised support for communities and organisations working towards greater environmental conservation in the country.<sup>30</sup>

Similarly, in 2005 a referendum was held in Sipacapa, Guatemala, to test community opinions on the expansion of the Marlin Project owned by Goldcorp Inc, one of Canada's largest gold producers. The outcome of the referendum showed that the community was opposed overwhelmingly to the mining proposal. The International Finance Corporation of the World Bank partially funded the Marlin Project, which currently operates in the San Miguel Ixtahuacán District. The community resisted this expansion with claims that local farmers had been marginalised in the development initiative. The referendum was based on Convention 169 of the International Labour Organization (ILO) of 1989. This is a

legally binding provision that allows 'indigenous and tribal' communities within signatory countries to decide on whether they support a development initiative.<sup>31</sup> Convention 169 promotes the inclusion and decision-making capacity of these communities in development initiatives through a rigorous process of consultation and participation. Costa Rica is a signatory to this convention, whereas South Africa is not. Yet again, the opposition to this mining project centred on the adverse environmental effects that operations would have on the local environment in Sipacapa.

In the Cotacachi County of Ecuador, the Intag community successfully waged a struggle against two successive mining companies that sought to mine copper in an area rich in biodiversity. In what became known as the Junin Project, Japanese mining company Bishimetals began prospecting for copper in the 1990s. In anticipation of commencing operations, the company built a provisional mining camp. The community soon learnt of the environmental and social impacts the mining would have, such as cyanide contamination of their water sources, and having to endure forced relocations. In response the community mobilised in opposition to the mine. In 1997 when residents realised that their objections were being ignored, they burnt down the camp built by Bishimetals. As a result Bishimetals left, forfeiting its rights.

In the early 2000s, Canadian mining company Ascendant Copper Corporation sought to mine copper in the same area. At the time, an ecotourism venture was operating in the proposed mining area. Although some in the community supported the mining initiatives, the majority did not. This difference in opinion contributed to social upheaval, violent confrontations, a constant sense of uncertainty and deep divisions among community members. The majority opposed the development on the grounds that it would lead to environmental degradation in the wilderness area, deforestation, forced removals and a substantial change to their way of life. They accused the company of trying to buy support by promising people jobs and feigning interest in the community's economic and social development. Unlike the Junin Project, this time (in 2008) Ecuador's government supported the community. It claimed that the company had failed to consult the residents, a provision stipulated in Article 88 of the country's constitution. The government also rejected the company's EIA on the basis that mining would in fact lead to environmental degradation. The government's stance was a result of new draft mining legislation, which allowed for the mineral concessions to revert back to the government. Unable to proceed with mining operations, Ascendant Copper was also forced to abandon the project. In the aftermath of the government's decision and the mining company's withdrawal, the Intag community celebrated a victory over mining for the second time.<sup>32</sup>

Chile and Argentina have also been the sites of community protests against mining initiatives. In one case communities opposed the proposal of the Pascua Lama gold and silver mining project by another Canadian mining giant, Barrick Gold. Here, opposition was centred around the location of the mineral reserves underneath glaciers that were crucial to the water supplies of local communities situated on the border between the two countries. Communities claimed that extraction would pollute and/or destroy their water resources. The Pascua Lama gold and silver mining project necessitated an international agreement between Chile and Argentina for sharing of the economic benefits, given that the mineral resources straddle both countries.<sup>33</sup> Despite the opposition based on environmental grounds, the two governments have allowed construction to commence on the Pascua Lama mine. Operations are scheduled to begin in 2013. The communities

failed to stop the mining rights being awarded as a result of the support given by the respective governments to mineral exploitation in their countries.

Much like the Xolobeni Mineral Sands Project, these cases illustrate the lengths to which governments will go to ensure mineral exploitation in their countries. They also highlight the struggles of communities and conservation organisations to secure guarantees for the protection of natural environments, and the consultation of local communities who stand to be affected by development initiatives.

## THE XOLOBENI MINERAL SANDS PROJECT: ISSUE AREAS

The community's resistance to the Xolobeni Mineral Sands Project is one example in a history of the Mpondo people's opposition to what they perceive as externally imposed development policies.<sup>34</sup> The last five decades have been characterised by three distinct periods of resistance, arising from two primary concerns. These were a lack of community consultation and participation, leading to the view that government and business sought to impose development initiatives on the community; and a fear that proposed development would lead to the loss of land and livelihoods.

This history dates back to 1959 at the start of the Mpondo Revolt, at a time when apartheid legislation classified the area as a 'native reserve'. The community effectively resisted the 'betterment policies' proposed by government through tribal authorities. This resistance was based on the accusation that traditional leaders had been co-opted by the government and paid to impose a scheme that would lead to loss of land, and thus livelihood strategies.<sup>35</sup> In the late 1970s to early 1980s, the community resisted the imposition of a development strategy called the Bizana Sugar Project. Again, resistance to this initiative was based on two contentions. The government had failed to consult the community before planning the development strategy; and the community feared they would lose their land as a result of the initiative.<sup>36</sup> More recently, in 1999 the South African Pulp and Paper Industries proposed an initiative to plant gum trees as a way of bringing income into the area. The community was divided on whether to accept or reject the proposal. Some went ahead and planted the trees on their properties. Others opposed the project on the grounds that it was planned without the requisite community consultation; that it would occupy land used for animal grazing; and that it would use up water reserves needed for farming, consumption and livestock.<sup>37</sup>

Two common features run through the three cases. Firstly, the community felt that the development initiatives were proposed to them after they had already been planned and decided elsewhere. Crucially, the community believed that any development initiative proposed without due participation and consultation was tantamount to imposition of the will of the government and/or private business. Secondly, the community had always depended on land for survival; using it for settlement, agriculture, animal grazing, gathering plants used in traditional medicines, and more recently ecotourism. The concern here was that the loss of land would result inevitably in a loss of livelihood strategies. Opposition to the Xolobeni Mineral Sands Project was also based on these concerns. The project also highlights other important issues that require elaboration.

### **Ambiguous legislation concerning environmental matters**

Two main government departments are involved in the project. The DMR holds custodianship of mineral rights and has the final decision on the mining venture. The DWEA concerns itself with environmental conservation, promotes sustainable development and ensures the protection of the environment for use by future generations. A third department, the DRDLR, holds the affected communal land in trust on behalf of the community. In theory it has an important role to play in deciding land-use strategies of communal land in consultation with affected communities. However, in the case of the Xolobeni Mineral Sands Project, the department has been conspicuously absent.

The principles of environmental protection and sustainable development are stressed in the Constitution of the Republic of South Africa of 1996; NEMA of 1998; the MPRDA of 2002; the Mining Charter of 2002 as amended in 2010; and the National Environmental Management: Protected Areas Act of 2003. The importance of considering the legal position on environmental issues in South Africa is that the AmaDiba community's opposition to the mining initiative was based on the environmental degradation that the mining activities would cause, and the resulting loss of livelihoods. Had the community been adequately consulted, those opposed to the mine would have been able to communicate their concerns about the adverse effects that the mining would have had on their environment and livelihood strategies, the protection and sustainability of which is guaranteed by law. According to section 24 of the constitution:<sup>38</sup>

Everyone has the right

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
  - (i) prevent pollution and ecological degradation;
  - (ii) promote conservation; and
  - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Similarly, Chapter 2 of the MPRDA stipulates the following:<sup>39</sup>

- (2) The objects of this Act are to —
  - (h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.

Chapter 1 of NEMA states that:<sup>40</sup>

- (3) Development must be socially, environmentally and economically sustainable.
- (4)(a) Sustainable development requires the consideration of all relevant factors including the following:
  - (i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;

- (ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
- (iii) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied.

The Mining Charter, although not geared specifically towards environmental issues, also recognises the need for environmental protection through sustainable development initiatives. One of its core elements ('Elements of the Mining Charter 2.8') encourages development that is in line with the principles of the constitutional provision for 'ecological, sustainable development and use of natural resources'.<sup>41</sup> These pieces of legislation provide for development that takes into account the importance of managing the environment in such a way that it can be used by present and future generations. The ACC used these legal provisions in its appeal to the DMR opposing the mining initiative. It argued that the law provides for environmental protection and sustainable development. Had due process been followed regarding community consultation and participation, the community would have had an opportunity to inform the DMR and MRC/TEM of their reasons for not supporting the mining initiative in the area.

South African laws on environmental protection are in keeping with international trends that place environmental protection and sustainability at the forefront of development. In June 1992 the United Nations Conference on Environment and Development (UNCED) stipulated that development and environmental protection were indivisible, and that the pursuit of development necessarily had to consider issues of environmental conservation. The conference produced the Rio Declaration on Environment and Development (the Rio Declaration) which stated that human beings are central to sustainable development and have a right to live in harmony with their environment. In accordance with the UN Charter and the principles of international laws, the Rio Declaration also acknowledged that states enjoy sovereign rights over mineral resources within their territories. This recognition notwithstanding, it unequivocally stated that all mining must be done in accordance with the principles of environmental conservation and sustainability.<sup>42</sup> The Rio Declaration was subsequently upheld by the 2002 Johannesburg Declaration of the World Summit on Sustainable Development.

In recognition of the above, the DMR is charged with the responsibility of awarding mineral rights provided that the principles of environmental protection and management, as stipulated in the MRDPA and NEMA, are adhered to.<sup>43</sup> Both the DMR and the DWEA clearly support environmental protection through their relevant legal provisions. However, in 2007 it became apparent that the two departments had adopted opposing views to the mining initiative for the Xolobeni Mineral Sands Project. The DWEA opposed the mine based on the resulting environmental degradation and the failure of MRC/TEM to address this issue. The DMR supported the application, citing its job creation capacity and economic contribution as necessary and desirable. Although the DMR is also governed by legislation (the MPRDA) that compels it to ensure that prospective mining companies address environmental issues adequately, it proceeded to award the mineral rights in the absence of such considerations by MRC/TEM. That the DMR was able to approve the mineral rights despite the DWEA's opposition reflects shortcomings in the environmental protection legislation related to mining initiatives.

There is thus a lack of clarity as to which department has veto rights when two departments differ in opinion on the environmental effects of mining activities. However, in the case of the Xolobeni Mineral Sands Project, it appears that the DMR might enjoy jurisdiction over environmental factors in mining-related proposals. At the very least, in considering mining applications, the DMR has the capacity to disregard the opposition of the DWEA. However, in such cases environmental policy and mining policy are not absolute, and are thus open to interpretation. Each case has its own nuances, which influence how environmental concerns are considered against the economic contributions of mineral development. The Xolobeni Mineral Sands Project highlights the DMR's capacity to put the needs of the national economy, as it sees them, ahead of the community's right to environmental protection and consultation.

The DMR's ability to veto the environmental concerns of the DWEA introduces a major challenge to environmental protection. The extraction of mineral resources involves interaction with and exploitation of the natural environment. The mining proposal, at the time of application and acceptance, directly threatened the existing ecotourism initiative that operated along the coastal area. Had the mining development gone through, it would have damaged the natural environment irrevocably and removed any possibility of future ecotourism initiatives. This is because the coastal area on which the mine was proposed was the same land used for the AmaDiba Adventures ecotourism business. This fact was established several years ago by the ACC, contrary to the claims made by the government that the two initiatives could operate simultaneously. It is problematic that the department deciding on whether mining proposals are approved is the same department with the leeway to veto environmental concerns associated with such proposals. This case shows that the DMR can approve mining proposals without ensuring that interested and affected parties are given the opportunity to present their views. Buyelwa Sonjica, the former Minister of Minerals and Energy, used this legal gap to approve the mineral rights in 2008. Minister Shabangu's overturning of the decision in May 2011 indicates that the basis for awarding the mineral rights was not sound. There is little doubt though that had the community acquiesced to the 2008 decision, the illegally awarded mining rights would still be in place.

Of crucial concern here is how government legislation has contributed to the confusion and ambiguous positions of the state departments in the Xolobeni Mineral Sands Project. A further concern is how legislation did not ensure that the community was given a platform to communicate its environmental concerns. Although there are provisions to ensure development takes place in an environmentally friendly manner, there is leeway for the DMR to approve initiatives that do not adhere to this principle. Owing to their respective portfolios, inevitably there will be instances when the DMR and the DWEA find themselves on opposite sides of mineral development initiatives. In such cases measures should be in place to ensure that the voice of the community is not lost in interdepartmental disagreements. The author proposes that the benchmark for any decision taken should be the opinions of interested and affected parties. These opinions should be obtained through a transparent and informed consultation process. Crucially, if a similar conflict is to be avoided in the future, clarity is needed on how environmental concerns are to be addressed practically, while ensuring that the views of the communities to be affected by mining activities are explored fully and taken into consideration in decision-making processes.

## Participation and consultation

The paper defines participation as the exchange of ideas, views, preferences and information in a joint decision-making forum. It involves the intended beneficiaries, in this case the AmaDiba Community, in decision-making, implementation, monitoring and evaluation, as well as sharing in the benefits of programmes and projects. The Rio Declaration reaffirms the importance of participatory decision-making by compelling all UN member states to commit to involving communities in development that will affect their environments. It also stipulates that governments should ensure that communities have all the information necessary for effective participation in decision-making.<sup>44</sup> The paper defines consultation as investigating people's opinions through a process in which intended beneficiaries and prospective developers sit down and thrash out proposals. These opinions are then considered in the planning stages of development projects.<sup>45</sup> The principles of consultation and participation are supported by the Constitution of 1996, NEMA of 1998 and the MPRDA of 2002. Chapter 4 of the MPRDA addresses the need for consultation with interested and affected parties, while the 'Definitions' section identifies the participation of historically disadvantaged persons as one of the ways in which the mining industry can be transformed.<sup>46</sup>

The international best practice Framework for Responsible Mining, under the auspices of the Centre for Public Participation and the World Resources Institute, recognises that in mining-related activities local communities are inherent 'holders of rights' but are also 'involuntary bearers of risks'.<sup>47</sup> As such, the social risks intrinsic to mineral development compel mining companies to engage local communities in participatory and consultative processes through all stages of the mining process. This procedure ensures that mining companies can only commence activities once they have attained a 'social licence' to do so. Further, mining companies should not continue operations if their baseline studies do not uphold human rights, even if national governments themselves do not uphold them.<sup>48</sup> Although this is the ideal, according to the Mining, Minerals and Sustainable Development (MMSD) Project, in reality governments and communities often find themselves on different sides of the debate when it comes to mineral exploitation.<sup>49</sup> Governments see their sovereign rights over countries' mineral resources as the departure point when considering mineral rights applications. Local communities view their right to decide on land-use strategies as inalienable. Communities base their view on traditional land rights, which see the people as having the right to decide on development strategies that will affect their land. Governments use Western-based formal laws to place decision-making authority in their hands. Using legislation, they can then proceed in such a manner that the opinions of the communities to be affected by mining activities are not seen as central to the decision-making process. Because communities believe they have the right to decide on land-use strategies, an abrogation of the right of local communities to consultation and participation in development has the potential to result in conflict.<sup>50</sup> The Xolobeni Mineral Sands Project exemplifies this recognition.

The recognition of conflict potential is important to this case. A central issue was the community's accusation that MRC/TEM had failed to consult with and ensure the participation of all interested and affected parties in the decision-making process. In fact, XolCo, acting on behalf of MRC/TEM, was accused repeatedly of preventing legitimate consultation by orchestrating manipulated consent through co-optation, threats,

intimidation and even bribery. One of the central figures making such accusations was a former XolCo director, who subsequently resigned.<sup>51</sup> Further, the community accused the DMR of awarding the mineral rights without ensuring that the legislation providing for consultation and participation was adhered to. This led to the view that the government had imposed the mining development on the AmaDiba community, who overwhelmingly did not support it. A minority group in the community who supported the mining development allegedly tried to coerce other community members to do so as well. These factors initiated the conflict between 2003 and 2008.

Another factor contributing to the conflict in AmaDiba was the presence of two opposing groups, the ACC and XolCo, who each purported to be representative of the community. It later emerged through public demonstrations and public opinion that the former was more representative than the latter. However, the concept of who makes up a community is difficult to fathom and presents its own challenges. This is especially true when issues of representation and power come into play. In attempting to overcome such challenges, the MPRDA defines a community as 'a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law'.<sup>52</sup>

NEMA and the Mining Charter also define a community along similar lines. Although this definition may appear straight forward, in reality the situation is often different. It may provide direction on the issue of who can be called a community member, but it does not address the issue of how community consultation should take place, and how a consensus on a given matter should be reached within a given community. It appears that this is left to the community itself to determine, perhaps through traditional laws or other similar rules. Leaving consensus issues to the community, and the process of consultation to the mining companies without mechanisms to ensure that due process is followed, appears not to be the best option. This is because it has the potential to open the process of consultation up for manipulation, and also creates a space that allows for the formation of companies such as XolCo.

Tensions in AmaDiba dissipated in the latter part of 2008 after former Minister Sonjica put the mineral rights on hold owing to claims of insufficient consultation by the community. She promised to remedy the situation with consultative talks with the community and traditional authorities. Although this did not happen, the current minister, Susan Shabangu, reached the decision that MRC/TEM had taken 'all reasonable steps' to consult the community. Given the centrality of community consultation in planning development, the conclusion reached by Minister Shabangu that consultation was sufficient, despite evidence to the contrary, is alarming. It raises the question of how the current minister could have reached this conclusion, given that her predecessor admitted a flawed consultation process in 2008. Minister Shabangu's decision is also a concern because it clouds the fundamental issue of a flawed consultation process, as identified by the ACC and the SAHRC. The evidence contradicting her finding included a video in which a former XolCo director admitted that the company was not representative of the general opinion in the community. The former director also disclosed that the BEE company had embarked on a campaign of manipulated consent while refusing to disclose the exact details of how the community would benefit from the BEE deal.<sup>53</sup> Furthermore, that the consultation process as it was followed by MRC/TEM was seen as adequate by the DMR as the final decision-maker for mineral development, has grave implications for

similar cases in the future. The possibility exists that minimum, inadequate and flawed consultation processes, seen as such even by the SAHRC, may be considered as sufficient for future proposals. This is surely indicative of a lack of commitment to consultation at government level.

It is possible to conclude from the DMR's approach to the Xolobeni Mineral Sands Project that even in cases in which the community consultation process is undisputed, the department is not compelled to decide in line with the consensus reached by the community. This recognition is based on the department's refusal to revoke the mining rights based on the AmaDiba community's overwhelming opposition to the mine, despite having evidence to this effect. This raises the issue of the extent to which the DMR is required to take the opinions of local communities into consideration when deciding on mineral rights. Had MRC/TEM fulfilled the environmental requirements, the mineral rights could have been awarded regardless of the community's dissent. Surely the legal requirement of community consultation should ensure that the DMR considers the opinions of local communities when decisions on mining rights are taken. If their opinions are not considered this legal provision becomes a mere formality, rather than a guarantor of community rights to consultation and participation.

Admittedly the issue of mineral development and consultation is difficult to navigate. This is because the DMR has the responsibility of considering the country's overall national economic development, while taking into consideration the views of local communities as interested and affected parties. Regardless of the direction that the government may wish to take, legislation clearly requires any prospective mining company to consult with affected communities, and stipulates that all decisions in this regard must be taken with such consultation requirements having been fulfilled. The case shows that when government and local communities hold opposing views to mineral exploitation, the DMR has the capacity to push its agenda through regardless of the wishes of intended beneficiaries. The extent to which the DMR takes the views of interested and affected parties into consideration when making its final decision is negligible. This indicates that more clarity is needed on how consultation should take place.

In attempting to address these concerns, some guidance could be provided by the principle of free, prior and informed consent (FPIC), an international protocol related to development initiatives and how they affect indigenous people.<sup>54</sup> In the context of mining the FPIC means consent from affected communities must be obtained in a manner that is free from manipulation and coercion; that it must be obtained prior to government awarding mineral rights to third parties; and that this consent must be informed through a process of participation and consultation based on full disclosure on all aspects of the proposed mining initiative. Should there be community consensus on the awarding of mineral rights, the FPIC proposes that the terms and conditions of the mining initiative are then set by all parties concerned and become binding upon agreement. This principle is based on the recognition that indigenous people have a right to decide on the development that they feel best suits their needs. It is crucial to ensuring that companies operate with a social licence in their mining initiatives.<sup>55</sup>

The FPIC introduces its own challenges to the governance of mineral resources. One such challenge is the argument that it interferes with the government's sovereignty over a country's resources. However, this is not necessarily true. Were South Africa to adopt the FPIC, the government would retain its sovereignty over minerals but exercise

it with the primary consideration that communities retain their right to have a say in development matters. Furthermore, the FPIC could be used as a guiding principle, rather than as a blueprint. Government would thus have the leeway to act decisively in cases in which certain mitigating circumstances require it to do so. The FPIC has the potential to introduce a workable alternative to the current governance of resources in South Africa and elsewhere, which currently allows the state to use its custodianship of mineral rights to impose its will on local communities. This principle is also supported by the ILO Convention 169 on indigenous people's rights to consultation and participation in deciding the development paths that best suit their needs.

### **The Xolobeni Empowerment Company and the black economic empowerment deal**

The concept of BEE emerged in the early 1990s. It was seen as one of the measures through which the government could address the socio-economic imbalances created by the apartheid regime. The vision was that BEE would address these disparities by increasing the shareholding of black South Africans in private enterprise. In this way, the economic opportunities of historically disadvantaged South Africans (HDSAs) would be enhanced.<sup>56</sup> With time it emerged that BEE, as conceptualised and applied in the mid-to-late 1990s, was narrow and benefited too few people. To address this the government began to encourage a move towards broad-based socio-economic empowerment (BBSEE), which called for greater distributional measures for society in general, rather than mere transfers of shares or ownership to individuals. To this end the MPRDA stipulated in its preamble the recognition of the imbalances created by racial discrimination in the past, and the need for redress. The MPRDA committed to transforming the mining industry in a bid to ensure the socio-economic development of HDSAs. Accordingly, it stipulated that for a company to be awarded mineral rights, it must have empowerment status.<sup>57</sup> The Mining Charter, drafted in accordance with section 100(2)(a) of the MPRDA and section 9 of the Constitution, also committed itself to BBSEE. It specified, among other conditions, that 26% of the mining industry should be black-owned; the importance of developing local communities around mines; and the sustainable development and growth of the mining industry.<sup>58</sup>

These legal provisions have contributed positively to ensuring that people previously excluded from the country's economic power are now included. Unfortunately, they have also led to 'fronting', which occurs when empowerment deals are entered into for the sole purpose of ensuring that companies are in good standing when it comes to the awarding of mineral rights. These provisions have also resulted in people setting up companies falsely purporting to represent segments of the population who are supposed to be direct beneficiaries of mining activities. This defeats the very purpose of BBSEE legislation, and instead creates a small class of affluent individuals without ensuring the redistribution of economic gains.<sup>59</sup>

It is within this framework that XolCo was formed in 2003. Its sole purpose was to act as the empowerment partner of TEM. However, with the broader BBSEE debate taking place in the media and in policy circles, there were concerns over the formation and future operation of the company. In accordance with an agreement reached by TEM/XolCo in 2003, and provisions stipulated in the Mining Charter, XolCo would have had a 26% share (at a cost of \$18 million) in the mine. The purchase of the shares would be financed through XolCo taking a loan from MRC and its shareholders. Dividends would

then be paid to the existing shareholders first on a preferential basis. XolCo's dividends from mining operations would be used to repay the loan, and only after this repayment (or a certain portion thereof) would dividend payments accrue to XolCo.<sup>60</sup>

From the time of its formation XolCo presented itself as a company that represented the AmaDiba community's interest in the mining venture. The company even submitted a petition to the DMR alleging that it had been signed by supporters of the venture. The petition was discredited later as fraudulent after it emerged that some of the names and signatures were of deceased community members or people who denied having signed it. XolCo was also accused of co-opting community leaders to become directors (although not on official company documents), and attempting to coerce and then later, to manipulate and threaten community members into supporting the mining initiative. This was done in order to buttress XolCo's claim of being representative of the community.<sup>61</sup> The company portrayed itself as a channel for the redistribution of the community's share of the proceeds from mining operations. The ACC and some of the new directors, appointed after a number of the previous directors had stepped down, repeatedly requested XolCo documentation to prove its community credentials and to show how redistribution would occur, but these were not forthcoming. The ACC and community members vigorously refuted all claims of XolCo being representative of the AmaDiba community. They alleged that XolCo was only representative of a few community members who were seeking to gain personal wealth from the mining initiative.<sup>62</sup> They argued that XolCo was a private company formed outside of community structures or tribal authority. The ACC claimed that even if XolCo was representative of the community, the nature of the subscription agreement entered into with MRC/TEM meant that financial benefit from the mining operation would have taken several years to materialise, only after the loan for purchasing the shares had been partially or fully repaid. This was unacceptable, given the state of poverty in the community and the need for a sustainable development initiative that would have an earlier benefit on the local economy.

The formation of XolCo and its claims of representing the community highlight the challenges of what process consultation should take and how community consensus should be reached. It also shows the unintended consequences of BBSEE legislation, which promotes local empowerment but seemingly fails to ensure that the companies formed within this framework are legitimate. BBSEE aims to improve the economic circumstances of the previously disadvantaged. Crucially, this must be done with the consent of intended beneficiaries. The fact that in this case this law was used to form a company that would enrich a few community members is indicative of its shortcomings. It demonstrates the need for mechanisms to keep such companies in check by ensuring that they are formed within the parameters of the law, in consultation with intended beneficiaries. In cases in which the majority of the community is opposed to a mining proposal, even if a company is formed in accordance with the law, any BBSEE deal entered into risks being regarded as illegitimate, and possibly reached through co-optation.

## CONCLUSION

Currently the international minerals industry faces major challenges from communities who are increasingly vocal about the potential environmental and social degradation

of mining activities, as well as their right to decide on local development strategies that best suit their needs. The issues highlighted by these community movements are supported by the global recognition that mineral exploitation, environmental protection and sustainable development are inextricably linked. It appears that international mining companies can no longer operate as locally unaccountable exploiters of mineral resources in business deals that allow the bulk of the wealth generated from their activities to be directly repatriated to other countries. Local communities – supported by international conservation organisations, laws and protocols – are finding their voice and communicating their resistance to initiatives that may dispossess them of their land and livelihoods, while resulting in negligible benefits for their local economies. This international trend is apparent in South Africa where communities, unwilling to be exploited by mining companies with the compliance of government, are standing up increasingly for their rights.

South African mining legislation attempts to play a dual role. On the one hand, it recognises the contribution of the minerals industry to the country's economic growth. To this end it seeks to promote mineral exploitation as a means of attaining national economic development. On the other, it concedes the importance of consultation and participation of local communities in matters pertaining to their local economic development, particularly in mining-related proposals. When one looks at how policy plays itself out in reality, the picture is complex. Historically the government has favoured mineral exploitation owing to its potential macro-economic contributions. The case of the Xolobeni Mineral Sands Project fell squarely within this established framework. In July 2008 the DMR approved a mining right which by all indications should never have been approved. Because of the public outcry that followed, and the failure of MRC/TEM to account for environmental concerns, the department was forced to rescind its decision in May 2011. However, the local community action group was dissatisfied with Minister Shabangu's reasons for the withdrawal. It is true that MRC/TEM had not addressed the environmental issues highlighted by the DWEA. Even on its own this was reason enough for the withdrawal. However, the minister's declaration of satisfaction with the process of community consultation, despite all the evidence to the contrary, is surprising. The AmaDiba residents, who engaged the DMR in a three-year struggle to have their voices heard, are unlikely to accept this outcome. Although the 90-day grace period given to MRC/TEM to address outstanding issues has ended without the company doing so, it is possible to interpret the minister's findings as indicative of the DMR regarding the interests of MRC/TEM, XolCo and the potential contribution of this project to the national fiscus as more important than the rights and opinions of the AmaDiba community as interested and affected parties.

The case of the Xolobeni Mineral Sands Project raises deep concerns for communities who face similar challenges in the future. Although many in the AmaDiba community are overjoyed at the withdrawal of the mineral rights, some community members have raised concerns about the minister's finding on consultation issues.<sup>63</sup> For this reason the case presents a fundamental lesson for future policy in South Africa. Although it is internationally accepted that the state has sovereignty over all mineral and petroleum rights in the country and is the custodian thereof, the case has shown that some limitations are needed. If the people who will be affected by the state's decision on these rights should be protected from arbitrary decision-making that could adversely affect their

environments and social existence, then three considerations are necessary. The first is that mining companies should seek to obtain a 'social licence' that will allow them to proceed with mining activities in the country. The social licence should emanate from the communities that mining operations will affect. As suggested, such a licence could be obtained through the FPIC protocol. This principle, supported by the ILO's Convention 169, places the consultation and participation of indigenous communities at the forefront of local development initiatives. Its provisions can limit the state's power to impose development strategies seen as ideal for the national economy onto local economies. The FPIC can also ensure that mining companies enjoy the support of local communities in their activities. This would enable communities to benefit in three distinct ways. They can guarantee that their voices are heard in decisions on development paths that best suit their needs; they have the capacity to negotiate terms through which their local economies can directly benefit from mining; and they can ensure that their natural environment is maintained for use by current and future generations.

The second consideration is the need for clarity as to which department has the right to veto environmental concerns related to mining applications. If the government wants the DMR to have this right, then this should be made clear in legislation, albeit at the risk of similar conflicts in the future. However, if the DWEA is to exercise this right, which the author proposes, then this should also be provided for in law. Capacitating the DWEA in this way will help to ensure that the DMR cannot repeat its arbitrary actions of 2008. Should such clarity be deemed overly prescriptive, then there needs to be a legal mechanism compelling both departments to consult with interested and affected parties regarding their opinions on environmental issues. The outcome of this consultation process should be factored into any decision taken. In this way the people who derive their livelihoods from the potentially affected land will have the right to have a meaningful contribution to mining proposals.

The third consideration is that the government needs to review BBSEE legislation. Despite the 2010 amendments to the Mining Charter, provisions for the socio-economic empowerment of previously disadvantaged citizens are still being distorted at a local level. Companies are being formed purportedly to represent groups they in fact do not represent. Empowerment contracts are signed with over-eager empowerment partners who either are unaware that they are being used for fronting or who are complicit in such actions. Empowerment deals need to be scrutinised closely to confirm their credibility. Admittedly, the government has recognised this shortcoming. However, the relevant public, private and civic society stakeholders need to move faster to protect those who are supposed to be beneficiaries of, but instead fall victim to, the very legislation that is meant to improve their economic circumstances. Ensuring genuine community consultation will help to mitigate this problem. Where companies are formed to represent the community, all parties concerned should be given a chance to weigh in on the formation and future operations of such a company. The mandate for the company should emanate directly from within a given community.

The policy question that this case raises is the extent to which communities have the right to block mining projects in their residential areas. Mineral rights are vested in the state for the benefit of the country as a whole. This gives the state the right to be the final arbiter for mineral development in the country. However, this right comes with the responsibility of ensuring that community voices are heard and considered in the

decision-making process. The state needs to play a balancing act when it comes to mineral exploitation, where the needs of the national economy are balanced carefully with those of local economies. Mining companies should be required to obtain a social licence for mining operations to proceed. Such a licence should be obtained through a process of thorough community consultation where all interested and affected parties are given a voice in local development initiatives that potentially have an impact on their land and livelihood strategies. In this way the community rights will be guaranteed, and similar conflicts can be avoided in the future.

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