

TRANSWORLD ENERGY AND MINERALS RESOURCES - XOLOBENI

Importance:	<p>On the face of it, this case is a success story in that the internal appeal submitted by the AmaDiba Crisis Committee against the granting of a mining right on the Wild Coast was recently withdrawn by the Minister.</p> <p>This success must, however, be qualified by two important caveats: Firstly, the withdrawal of the mining right on the part of the Minister is technically an interim decision, and the door has still been left open to the mining company to address environmental concerns raised by the national and provincial departments responsible for the environment. On the basis of their recommendation the Minister will then make a 'final determination. Secondly, the Minister found that both the delegation of authority and the public participation process were sound but does not provide clear reasons for this that address the concerns raised in the appeal. She also failed to deal with all the grounds of appeal, particularly the all-important absolute prohibition against commercial mining in a marine protected area.</p> <p>Further, the delay on the part of the Minister in reaching a decision on the appeal (almost three years) was highly prejudicial to the AmaDiba community. While the appeal was being decided they were unable to make any use of the land in question. Prior to the grant of the licence an important eco-tourism project was underway in the area but efforts to further the project had since been unsuccessful. The harmony within the community had also suffered as conflicts emerged between the proponents of the mining initiative and those who favoured the eco-tourism project as a means to develop the region.</p>
Facts:	<p>On 29 March 2007 Transworld Energy and Minerals Resources (SA) (Pty) Limited (TEM) (a subsidiary of Mineral Commodities Limited, a company listed on the Australian stock exchange. Xolobeni Empowerment Company (Pty) LTd (XolCo), the empowerment partner, held a 26% stake in the company) applied for a mining right to the (then) Department of Minerals and Energy (DME) in respect of the Kwanyana Block of the Xolobeni tenement area. (The tenement area was a larger stretch of land divided into five distinct blocks. The Xolobeni block comprised 30% of the total area. TEM held a prospecting right over the remaining blocks). The final EIA/EMP was submitted in December 2007. On 14 July 2008 the Director-General of the DME granted the mining right to TEM. It was anticipated that the Environmental Management Programme would be approved on 31 October 2008. The licence was to mine sands containing some 139 million tones of titanium-bearing minerals, including ilmenite, zircon, leucoxene, and rutile.</p> <p>The Xolobeni area had been the traditional homeland of the AmaDiba people for centuries. It has been identified as having an exceptionally high conservation status and the second-most species-rich floristic region in Southern Africa. The area was deemed to be communal land in terms of s 2 of the Communal Land Rights Act 11 of 2004. The AmaDiba Crisis Committee (ACC) was formed on 25 June 2007 under the auspices of the tribal authority as a response to the permanent and significant changes to the traditional way of life of the AmaDiba which would be brought about by the project (see para 9 of the appeal).</p> <p>The Amadiba Crisis Committee was not notified of the granting of the</p>

	<p>mining right, and only became aware of this after a notice was listed on the Australian stock exchange – almost three weeks after the right was granted. An unsatisfactory exchange of correspondence subsequently took place between the ACC and various officials of the DME, which culminated in the latter affirming that the mining right had been granted and that the ACC could lodge an appeal, but still failing to provide the ACC with the record of its decision.</p> <p>The appeal was submitted on 2 September 2008. The ACC also requested that the mining right be suspended until the finalization of the appeal, arguing that if mining was allowed to begin, it would harm the environmental and other aspects of the area and render nugatory any favourable decision obtained on appeal. Additionally, TEM had not obtained the requisite authorizations in terms of the National Environmental Management Act 107 of 1998 (NEMA) and could therefore not begin operating on 31 October 2008 (the envisaged date of approval of the EMP).</p> <p>In February 2010, the Minerals and Mining Development Board (which advises the Minister of Mineral Resources), appointed a committee headed by Phatekile Holomisa to receive documentation from affected parties and compile a report on the situation. The report was not made available to either the ACC or TEM, as the DMR regarded it as an interim report which did not contain any firm recommendations on the merit or demerit of the appeals.</p> <p>More than a year after the Holomisa Report, the Minister of Mineral Resources appointed a task team to hear oral presentations by parties affected by the proposed mine in Xolobeni, which conducted hearings from 16 to 18 February 2011 at the DMR’s regional office.</p> <p>Due to the lengthy delay in making a decision, the ACC submitted a complaint to the Public Protector.</p> <p>On 6 June 2011 the Minister issued a letter notifying the affected parties that she had upheld the appeal. The letter states that while she was satisfied that the power to grant the mining right had been duly delegated to the Director-General of Mineral Resources in terms of s 103 of the Act (no reasons are provided for this position), and while she was also satisfied that TEM took all reasonable steps to consult with interested and affected parties (again, no reasons are provided for this position), her basis for withdrawal of the right was that the decision to taken at a stage ‘when several environmental issues were outstanding as per a directive from the Regional Manager Eastern Cape Region’ to TEM dated 4 June 2008. TEM was accordingly directed to address the issues raised by the Regional Manager of the Eastern Cape Region, as well as those raised by DEAT in a letter dated 20 December 2007, within a period of 90 days of 6 June 2011. The Regional Manager: Eastern Cape Region was directed to submit a recommendation to the Minister after re-evaluation of the information submitted by TEM.</p>
Forum:	Administrative appeal to the D-G/Minister of the Department of Minerals in terms of s 96 of the MPRDA.
Issues:	<p>The ACC’s appeal against the granting of the mining right was based on the following five grounds:</p> <ul style="list-style-type: none"> • The decision was taken by an authority not authorized to grant mining rights and was accordingly <i>ultra vires</i> the MPRDA and void. • The mining right could not in fact be lawfully granted because:

	<ul style="list-style-type: none"> • The Xolobeni area is part of a Marine Protected Area where commercial prospecting and mining <i>cannot take place at all</i> (s 9(c) read with s 48(1) of the Protected Areas Act 57 of 2003). Specifically, the area fell within the Pondoland Marine Protected Area in terms of s 43 of the Marine Living Resources Act 18 of 1998. • The Xolobeni area had also been declared a protected area in terms of Transkei Decree 9 (Environmental Conservation) of 1982. Accordingly, in terms of s 48(1) of the Protected Areas Act commercial mining or prospecting could only take place with the written permission of the Minister of Environmental Affairs and the Minister responsible for Minerals and Energy. • The Xolobeni area lay on land that is being used for public purposes or is reserved in terms of another law (under s 48(1)(c) of the MPRDA) • No Community Resolution had been passed authorizing mining on the land. In this regard the Department of Land Affairs had advised the community that mining could only take place if the AmaDiba community had passed such a resolution that also set out the compensation payable to the community. • The public consultation process mandated by the MPRDA was fatally flawed in that there was insufficient notice of the public meetings, members of the Xolobeni traditional authority and community were not properly consulted, inaccurate or incomplete information was provided to the community (in particular the true number of people who would need to be relocated was not disclosed, nor the literacy requirement for obtaining a job at TEM), the issue of compensation for violation of a number of the community's rights was not addressed, and that XolCo did not represent the interests of the community. • The DME failed to properly consult in that it ought to have given the Xolobeni community a hearing before it granted the right, and it failed to have due regard to the view of the Department of Environmental Affairs and Tourism. • TEM's EIA/EMP was deficient in a number of respects in that it failed to provide a number of key reports, including baseline reports; it failed to consider and assess alternative land uses; and it failed to indicate how the concerns of the community had been addressed.
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Paper Trail:

Document	Author /Originator	Date
Appeal against grant of mining right	Amadiba Crisis Committee	2 September 2008
Letter notifying DME of additional affidavits from Amadiba Crisis Committee	LRC	23 September 2009
Letter referring DME to two expert reports regarding Xolobeni Minerals Sands Project	LRC	28 September 2009
Further grounds of review and reply to submissions from TEM and Xolco	Amadiba Crisis Committee	14 August 2009

Parliamentary question re Xolobeni Mining Project	Mr IO Davidson (DA)	18 February 2011
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Press releases and the Minister's letter withdrawing the mining licence can be obtained on the website of the Legal Resources Centre.