



Land, Environment and Development Project
LEGAL ASSISTANCE CENTRE

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Community involvement in decision-making processes related to the oil and gas sector

A transcript of the presentation made by
Corinna van Wyk of the Legal Assistance Centre
at the **Namibia Oil and Gas Conference** hosted by
the Hanns Seidel Foundation in August 2023



In our race for progress we cannot forget that sustainable development is not about technological advancement only. A balance is necessary.

Sustainable development is about nurturing, protecting and levelling the core of progress, being our natural resources and their custodians, without which and whom development cannot occur. **Co-existence is imperative to sustainable development.**

This presentation reflects specifically on whether Namibia's local communities and indigenous peoples feature in the discussions and decision-making surrounding the energy boom that the country is facing.

Case study in South Africa: "Protecting Our Coastline"



In 2021, Shell Exploration and Production South Africa ("Shell") announced that it would commence with seismic surveys to assess oil and gas prospects off the coastline of some 6000 square kilometres between Port St Johns and Morgan Bay in South Africa.

The communities filed an urgent interdict to stop the surveys. Shell was operating on a "farmout agreement" with Impact Africa.¹

¹ A contractual agreement with an owner who holds a working interest in an oil and gas lease to assign all or part of that interest to another party in exchange for fulfilling contractually specified conditions.

There is a long history here. In short, Impact Africa obtained its first exploration rights in 2014 under the Mineral and Petroleum Resources Development Act 28 of 2002.² No environmental impact assessment was undertaken, and no environmental authority was granted under the National Environmental Management Act of South Africa.

A renewal of exploration rights was granted in 2017 on the same conditions, and in 2021 Impact Africa submitted environmental audits without reflecting any scientific research on the harmful impacts of seismic testing. It was granted another two-year exploration right essentially based on inadequate consideration of the environmental impact.

In December 2021, the communities of St Johns and Kei Mouth brought an urgent interdict to stop all activities conducted under the exploration right until a review application had been heard. The review application was premised on three allegations:

Shell did not have the necessary authorisation under the National Environmental Management Act to lawfully undertake seismic exploration activities.

Shell failed to properly consult with the affected communities and stakeholders.

The seismic survey violates rights protected by the Constitution, including spiritual, heritage and cultural rights.

The Court granted an interim interdict in favour of the community. The matter was argued in June 2022 and judgement was reserved.

*An **interim interdict** means that the conduct complained about must cease until a final judgement is given.*

The effect is that Shell has not been able to exercise exploration rights since 2021, hence all possible detrimental environmental effects are being kept at bay at least until such time as the court makes a pronouncement.



² Mineral and Petroleum Resources Development Act 28 of 2002.

Case study in Namibia: “Protecting Our Forests”



In the Namibian case study, the Ncumcara Community Forest presented an appeal to the Minister of Environment and Tourism after the Environmental Commissioner issued an Environmental Clearance Certificate (ECC) to Reconnaissance Energy Africa (“Recon Africa”). Ncumcara further requested a cessation of Recon Africa’s activities until the appeal was finalised, given that there had been numerous objections from interested and affected parties. No response was forthcoming.

To ensure that no environmental damage was done in the interim, the Community Forest brought an urgent interdict against Recon Africa in the High Court of Namibia. Unlike the case study in South Africa, the **High Court found that there was no imminent danger**, and that there was no urgency in the matter – dismissing the urgent application to stay activities. The judgement stated that the applicants should have rather applied to the Court to make an order to compel the Minister to take a decision on the appeal currently before him. The clients were left with no option but to await the outcome of the appeal before the Minister, which was heard only in April 2023, and **no judgment has been delivered as yet**. In the meantime Recon Africa was permitted to continue its activities, and even a second renewal of the ECC was granted for wells other than those reflected in the original application. The community was not given a fair and timeous opportunity to raise its concerns, and when it did so, it was too late for all practical purposes. The damage had been done.

“Despite submissions made, in particular around the lack of public consultation and the inadequacies of the environmental impact assessment undertaken in the first application, the Environmental Commissioner failed to consider such and granted the amendment of the ECC 0091.”

– **Corinna van Wyk**, Coordinator of the LAC Land, Environment and Development Project³

³ <https://www.observer24.com.na/recon-disputes-lacs-claim-about-zero-public-consultations>.

There should be no need, nor any desire, to exclude the local communities in matters that concern them directly, especially if the project is intended to enhance sustainable development, which should be the Government's prerogative and desire. The **UN Declaration on the Rights of Indigenous Peoples**, which Namibia voted in favour of, speaks of indigenous peoples' right to own land and natural resources that they have traditionally occupied and used – a right denied in pre-independent Namibia. The Declaration's emphasis is on obtaining the indigenous peoples' **consent** in *all* matters relating to such land and resources. What is required is **Free, Prior and Informed Consent (FPIC)**.

The UN Declaration on the Rights of Indigenous Peoples ...

- » recognises the rights of indigenous people to the lands, territories and resources which they have traditionally owned, occupied or used;
- » holds that any decision regarding these lands, territories and resources requires **free, prior and informed consent** by the rights holders;
- » requires consultation and meaningful participation in all aspects of a project, from initial assessment and planning to monitoring and closure, without any form of coercion; and
- » requires full and accurate disclosure of information about the proposed developments in an accessible and understandable form before any agreement is given.

Free, prior and informed consent entails a continuous process as from the moment a project idea is born until the implementation process has been completed, and the local community should be an integral part of the entire process. The community should be prepared for and educated about the project – not only the project's good prospects but also the risks, the mitigating factors, the possible alternative ways to achieve the same or even better results, the costs, and how the project will affect them and their livelihoods. Consent should only be given after a sufficient period of time has been granted to the community for discussing the interaction of the project with their customs and practices, and for making an informed decision. FPIC is a process; it is not simply a meeting of 50 people where the Traditional Authority is represented by only 5 people and the other participants are ministerial officials and company representatives.

Ensuring *meaningful participation* and engagement of local communities is essential for addressing their concerns, safeguarding their rights, and maximising the benefits of the sector.

**Why is meaningful participation necessary?
*If a community feels protected, it will protect its project.***

NO ONE PROTECTS A THING BETTER THAN ITS OWNER.

Transparency, accountability and legitimacy are a direct reflection on the initiator of the project. There are no good reasons for hiding the objectives of a project, its distribution of proceeds, or the degree of environmental harm sustained at any point in time. If a project keeps the community and government at bay, then we have the responsibility to bear the repercussions that go hand in hand with exploration activities (e.g. environmental damage). As the law currently stands, the communities do not have the full picture, yet they feel the impact.

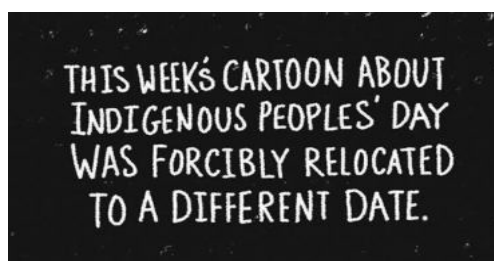
Community involvement

COMMUNITY INVOLVEMENT in decision-making is important because it:

- » fosters transparency, accountability and legitimacy in the sector; and
- » helps to address social and environmental concerns and ensure equitable distribution.

COMMUNITY INVOLVEMENT is currently flawed because:

- » sufficient information about a project is not forthcoming;
- » a once-off “consultative” meeting does not allow for meaningful dialogue; and
- » Traditional Authorities, who *do not* constitute community members, are consulted in lieu of community members, and benefit to the exclusion of community members.

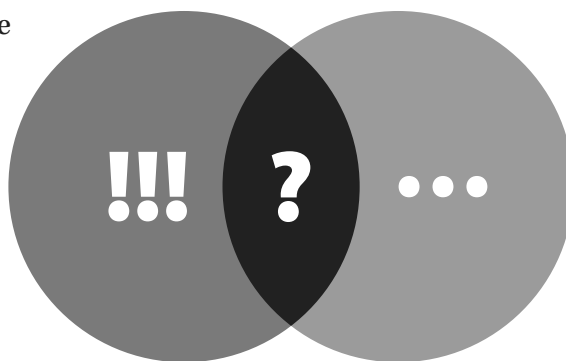


The Supreme Court in the 2019 *Kashela* matter⁴ confirmed that **communal land rights** should be granted the same considerations as **commercial land rights**. The rights holder is to benefit from any agreement that relates to the use of that land and its natural resources.

Almost 80% of the residents of Lüderitz rely on fishing for their livelihood. Offshore oil exploration activities will certainly have an impact on the marine life and subsequently on the fishing industry, thereby impacting their means of income. This will in turn impact their ability to access socio-economic services such as health and education. This is not tenable.

Information should be provided in a language that the local community knows and understands. Project-related notices and applications usually have to be advertised in newspapers, but rural communities:

- » do not have daily access to newspapers; or
- » may not be adequately familiar with the language of the accessible newspapers; and
- » do not necessarily have the expert knowledge to understand the information provided.



⁴ *Agnes Kahimbi Kashela v Katima Mulilo Town Council 7 Others* (SA15-2017) [2018] NASC (16 November 2018).

There is thus a duty to take responsibility for this communication by investing in educating local communities. Before any activities are confirmed, it should be clear that the communities have been meaningfully engaged with long in advance. Furthermore, respect for cultural differences and manners of communication must be observed and practised.

Benefits of community involvement

- » Increased local ownership and support for projects
- » Enhanced social license to operate for companies
- » Improved project design and mitigation of social and environmental impacts
- » Socio-economic development and empowerment of communities

Legal framework

All these efforts must provide a platform where the voices of communities are heard and they are given fair and reasonable time to respond and enforce their rights.

At present it is only the **Environmental Management Act** (and **Regulations**) that encourage public participation, and they do so only at the initial stage of a project, and when the application for an Environmental Clearance Certificate (ECC) is made. Any other participation is possible only by lodging an appeal against the Environmental Commissioner's decision to grant the ECC, and then by taking that decision to the courts. As noted herein in outlining the Namibian case study, this process is completely flawed due to the lack of a regulatory framework that prescribes timelines for applications to be heard. This leaves the Minister with too much discretion. Because it is an administrative function, the baseline is for decisions to be made within a reasonable time, but "reasonable" remains a relative term, subject to an individual's interpretation.

In essence, the legal framework should support the local communities in addressing concerns relating to their right to land and natural resources. This includes the right to raise concerns about environmental degradation.

Sustainable development

How to 'tie the knot' between local communities and sustainable development goals?

- » Communities must be a part of the project from the very beginning.
- » Communities must own the idea as much as the implementers do.
- » Communities need to share in the benefits and liabilities.
- » They should have recourse should they be neglected or excluded.
- » They should be recognised as the legitimate owners of the land and its structures.

Sustainable development should be a win-win situation: no one should be left behind.

Strategies for enhancing community involvement

- » Ensure continuous engagement with community members *throughout* the project lifecycle.
- » Provide capacity-building opportunities and technical assistance to the communities.
- » Establish platforms for dialogue, consultation and negotiation.
- » Encourage the formation of community-based organisations and foster participation in these.
- » Create an enabling environment for the communities to easily access the courts without rigid rules and threats of costs.

Recommendations

Government should ensure that the legal and policy frameworks facilitate community involvement for the purpose it is meant to serve, rather than treat this issue as a mere ticking of the box exercise.

Monitoring and evaluation is not only a scientific issue, in the sense that a problem is probably felt and known by a community long before it can be tested, but if community members have no platform to raise their concerns without fear of harm or intimidation or victimisation, knowledge alone will not solve the matter. They should be able to report a concern easily and effectively.

Civil society organisations should more efficiently advocate for community rights and facilitate community participation.

Communities should actively engage and organise themselves to effectively voice their concerns and aspirations.

The establishment of an environmental court should be considered as a way to deal speedily and effectively with environmental-impact issues.

Public participation is not another 'to do' on the list of requirements laid down by the EMA. It is an ongoing process from the beginning to the end of a project, and although the law currently requires only the bare minimum, there is nothing preventing projects from implementing best practices and standards that confirm public participation as an integral component of the full operation of any project. The community(ies) must be included from the very start until the end thereof. *This is the only way that we can ensure inclusive development in Namibia!*

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