



Media statement by the Bench Marks Foundation

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## Ground-breaking court case to impact South African mining communities

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### FOR IMMEDIATE RELEASE

In a ground-breaking case, a South African court will hear on Monday that the only way to mitigate the impact of mining is through ensuring that communities have the right to say 'no' to mining.

This is the crux of an argument that will be presented in the North Gauteng High Court on Monday 23 April by the Executive Director of the Bench Marks Foundation, Mr John Capel.

This is widely regarded as a test case, and its finding could set a precedent that will impact on mining communities throughout the country.

Capel's argument is part of an affidavit submitted as the primary support for an application by community members to oppose attempts to mine titanium on their land in Xolobeni on the Wild Coast in the Eastern Cape.

He notes that this is the first test case in a court to give the right of communities to say no to mining. "If won it will set a precedence," he adds.

The historic application is being brought against the Minister of Mineral Resources and senior officials in the Department of Mineral Resources, the Minister of Rural Development and Land Reform, and Transworld Energy and Mineral Resources (SA) Pty Ltd.

The court case is a crucial landmark in long struggle of opposition to mining by the community which goes back at least to 2008 when a mining licence was first issued by later retracted when it was found that no consultation had taken place with the community.

Capel's affidavit continues: "While mining can provide benefits, communities are vulnerable to grievous harm that often outweighs any gains.

"The Bench Marks Foundation has therefore come to believe that communities should be empowered to determine whether mining should occur on their land. This would enable communities to decide whether mining should occur, and to level the playing field for communities to negotiate the terms of mining, relocation and compensation should it be embraced.

"For this right to be meaningful, communities' decisions should be made without political pressure on the basis of full information on the costs of the proposed mining, including alternative development paths," Capel's affidavit argues.

"The Foundation therefore associates itself with the international movement to require free, prior and informed consent (FPIC) before extractive activities occur on community land," he said.

Capel notes that there is a lack of clarity on whether FPIC is required under South Africa mining law. This has seen mining companies flagrantly disregarding this principle.

Since 2007 to now, Bench Marks has produced 12 Policy Gap studies on mining in the last 11 years, all of which point to the harmful effects of mining. These impacts include destroyed local economies, where people lose access to their land, way of life, subsistence farming, only to suffer health impacts, and in many cases 'forced' removals, leaving

communities worse off than before mining. Communities on whose land mines want to operate must have the right to say no. As the 129<sup>th</sup> applicant after all the community members, we hope that the court will agree with our submission, said Capel.

“The Foundation believes that the declaratory relief sought by the applicants is urgently required, not just for the Umgungundlovu community, but across South Africa.”

Bench Marks Foundation was launched in 2001 and has a long history of supporting communities in respect of mining activities. Its expert research is highly regarded and strengthens communities to engage on a more level footing with corporations and governments.

In the affidavit, Capel outlined two case studies – that of the Mothlothlo community some 45 kilometres north of Mokopane, Limpopo, and Kopano in Limpopo province.

From these case studies, Capel noted that mining rights are being granted to companies that make no effort to comply with the Interim Protection of Informal Rights to Land Act (IPIRLA), that mining commences without this compliance, and that it commences despite pending appeals and in the face of requests for the suspension of mining rights, pending the adjudication of appeals.

He also notes that the case studies establish the principle that consent on a piecemeal, individualistic basis is insufficient.

Referring to the Mothlothlo case study, Capel says: “It is clear that no members of the community were forcibly removed from their homes. It may be argued that this means that all persons who relocated ‘consented’ to their relocation. But this is clearly inadequate as agreement to relocate was generated through immense pressure including the loss of agricultural land, social disarticulation through the relocation of neighbours, and other factors.

“For consent to be meaningful, it must be required after full information is provided and free of coercion, including the coercion that comes with the commencement of mining activities,” the affidavit notes.

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Bench Marks Foundation is an independent non-governmental organisation mandated by churches to monitor the practices of multi-national corporations to

- ensure they respect human rights;
- protect the environment;
- ensure that profit-making is not done at the expense of other interest groups; and
- ensure that those most negatively impacted upon are heard, protected and accommodated within the business plans of the corporations.

The Foundation was launched in 2001 by the Rt Rev Dr Jo Seoka who chairs the organisation and by member churches of the SACC.

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