

Mandates of the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; and the Special Rapporteur on extrajudicial, summary or arbitrary executions

REFERENCE:
AL OTH 82/2020

9 December 2020

Dear Mr. du Preez,

We have the honour to address you in our capacities as Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; and Special Rapporteur on extrajudicial, summary or arbitrary executions, pursuant to Human Rights Council resolutions 43/16, 37/8, 44/5.

We are independent human rights experts appointed and mandated by the United Nations Human Rights Council to report and advise on human rights issues from a thematic or country-specific perspective. We are part of the special procedures system of the United Nations, which has 56 thematic and country mandates on a broad range of human rights issues. We are sending this letter under the communications procedure of the Special Procedures of the United Nations Human Rights Council to seek clarification on information we have received. Special Procedures mechanisms can intervene directly with Governments and other stakeholders (including companies) on allegations of abuses of human rights that come within their mandates by means of letters, which include urgent appeals, allegation letters, and other communications. The intervention may relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process involves sending a letter to the concerned actors identifying the facts of the allegation, applicable international human rights norms and standards, the concerns and questions of the mandate-holder(s), and a request for follow-up action. Communications may deal with individual cases, general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of draft or existing legislation, policy or practice considered not to be fully compatible with international human rights standards.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the assassination of woman human rights defender, Ms. Fikile Ntshangase, an environmental and land rights leader opposing the expansion of a coal mine in the region of KwaZulu-Natal.**

Ms. Fikile Ntshangase was a land and environmental woman human rights defender and Vice-Chairperson of a sub-committee of the Mfolozi Community Environmental Justice Organisation (MCEJO), a long-standing environmental organization challenging the mining rights and expansion of a coal mine in Somkhele, in the region of KwaZulu-Natal. She was publicly outspoken about the mine's damages to the livelihoods of local communities and advocated for proper consultation and compensation for the use of their lands.

According to the information received:

Tandele Coal Mining Limited (hereinafter “Tendele”) is a local subsidiary of Johannesburg-based Peptim Limited, which owns and operates a coal mine in Somkhele, in KwaZulu-Natal, since 1997. The company has been looking to expand to areas allegedly covered by their mining rights in the past years.

Since the beginning of 2016, there has been growing opposition against the coal mine by the residents in Somkhele. This opposition has, among other things, taken the form of peaceful marches, which have each ended with a Memorandum of Grievances presented to relevant authorities and stakeholders, such as The Cooperative Governance and Traditional Affairs (COGTA), the mine management and the Department of Mineral Resources.

Local communities and MCEJO have appealed the mine’s expansion out of fear that the mining venture would lead to their forced eviction and threaten their livelihoods. The first appeal aimed to ban the company from operating until they appropriately complied with the National Environmental Management Act, which regulates environmental governance. The communities lost this appeal in August 2018 and were granted leave to appeal to the Supreme Court of Appeals in 2019. The second appeal (SCA 1105/2019) was heard on 3 November 2020, however the judgement is reserved. The local communities have also filed appeal 82865/18 to the North Gauteng High Court, which aims to review the mining right that Tendele was granted in 2016 for a further expansion of 222km², and which will allegedly relocate families, many of which have lived there for generations. The appeal is due to be heard in March 2021.

In the last months, the local community has noticed tension over the proposed expansion of Tendele’s operations. Reportedly, when members of the community have resisted the attempts to relocate them, mine management have sent letters to all its employees and subcontractors, depicting members of the community as those “who are fighting to close down the mine”, and forewarned that their future bonuses are unlikely to be paid due to lack of income. Furthermore, the company’s employees allegedly delivered letters to locals with intimidating messages such as “it is regrettable that your households’ are holding the mine, its 1,500 employees and many families that have signed contracts and indeed the entire Community to ransom”. Other members of the community have received death threats from unknown numbers through text messages.

On 7 June 2020, the human rights defender received at least two calls in the early morning threatening her to death. She denounced these calls to the local police.

On 7 September 2020, representatives of Tendele approached members of the local community with an agreement to withdraw the current court cases in relation to existing and future mining operations. The agreement was signed by 7 members of MCEJO, purporting to act on behalf of the organization, and Tendele’s CEO. Ms. Ntshangase reportedly refused sign it and warned other members of the organization of the risks of doing so.

On 15 October 2020, a group of aggressors allegedly disrupted an organizational meeting that members of MCEJO, including Ms. Ntshangase were holding. A community member recognized one of the aggressors as a gunman.

On 22 October 2020 at about 18:30, three gunmen allegedly arrived to Ms. Ntshangase's house in the west of Mtubatuba, near the coal mine, where she lives with her 11-year old grandson. They allegedly forced themselves into the home and shot her 6 times, killing her in the act.

While we do not wish to prejudge the accuracy of these allegations, we would like to express grave concern at the assassination of Ms. Ntshangase, which appears to be related to her role opposing the extension of the Somkhele coal mine, her legitimate human rights work in the protection of the rights of the her community, and the exercise of her right to freedom of expression in opposition to the mining operations in the area.

We also remain concerned at the chilling effect that these attacks might have on other human rights defenders and their legitimate work protecting their land and livelihoods. Threats and intimidation discourage them from exercising their rights for fear that State and non-State actors may further harass them.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information about the human rights due diligence policies and processes put in place by your company to identify, prevent, mitigate and remedy adverse human rights impacts of your activities, in line with the UN Guiding Principles on Business and Human Rights.
3. Please provide information about specific due diligence or impact assessment measures taken by your company in Somkele. In particular, please highlight how your company conducted meaningful consultation with affected stakeholders before and after the establishment of the mining project. Please indicate whether any steps were taken to engage in dialogue with affected communities to avoid negative social, cultural and environmental impacts, including by seeking their free, prior and informed consent for the project on their lands.
4. Please provide information about measures taken by your company so far to provide for effective remedy (including compensation) to the villagers who might have been impacted by the mine.

5. Please provide information on steps taken by your company to establish operational-level grievance mechanisms to address adverse human rights impacts caused by your company throughout your operations.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please be informed that a similar letter on the same subject has been sent to the Government of South Africa.

Please accept, Excellency, the assurances of our highest consideration.

Mary Lawlor
Special Rapporteur on the situation of human rights defenders

David R. Boyd
Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Agnes Callamard
Special Rapporteur on extrajudicial, summary or arbitrary executions

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to remind your company of its responsibilities under the Guiding Principles on Business and Human Rights (A/HRC/17/31). The Guiding Principles have established themselves as the authoritative global standard for business to prevent and address negative business-related impacts on human rights. The responsibility to respect human rights is a global standard of conduct applicable to all businesses, wherever they operate. It exists independently of the ability and/or willingness of States to meet their own human rights obligations and does not diminish those obligations. It is an additional responsibility to that of complying with national laws and regulations protecting human rights.

“The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts”. (Guiding Principle 13).

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute. (Guiding Principle 15)

In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships [...] meaningful consultation with potentially affected groups and other relevant stakeholders (Guiding Principle 18).

Also, Principle 22 provides that "Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes". "Establishing grievance mechanisms at the operational level for those potentially affected by business activities can be an effective means of redress provided they meet certain requirements listed in Principle 31 (Commentary on Guiding Principle 22).

The Guiding Principles also recognise the important and valuable role played by independent civil society organisations and human rights defenders. In particular, Principle 18 underlines the essential role of civil society and human rights defenders in helping to identify potential adverse business-related human rights impacts. The Commentary to Principle 26 underlines how States, in order to ensure access to remedy, should make sure that the legitimate activities of human rights defenders are not obstructed.

We would like to recall the thematic report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (ref. A/HRC/32/45) which discusses the obligation of States to protect individuals against human rights abuses by companies that they own or control. In particular, we would like to highlight the following conclusions and recommendations: “All businesses, whether public or wholly private, have a responsibility to respect human rights. This responsibility is distinct from, but complementary to, the State's duty to protect against human rights abuses by business enterprises.”

Furthermore, we would like to recall articles 9 and 12 (2) of Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (A/RES/53/144, adopted on 9 December 1998), also known as the UN Declaration on Human Rights Defenders. These articles provide that for the purpose of promoting and protecting human rights and fundamental freedoms, everyone whose rights or freedoms are allegedly violated has the right to complain to and have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial authority established by law and to obtain from such an authority a decision, in accordance with law, providing redress where there has been a violation of that person's rights or freedoms; and that the State shall take all necessary measures to ensure the protection of anyone facing violence, threats, discrimination, or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration.

Finally, the Framework Principles on Human Rights and the Environment, presented to the Human Rights Council in March 2018 (A/HRC/37/59) set out basic obligations of States under human rights law as they relate to the enjoyment of a safe, clean, healthy and sustainable environment. The commentary of Principle 12 provides that “In accordance with the Guiding Principles on Business and Human Rights, the responsibility of business enterprises to respect human rights includes the responsibility to avoid causing or contributing to adverse human rights impacts through environmental harm, to address such impacts when they occur and to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships. Businesses should comply with all applicable environmental laws, issue clear policy commitments to meet their responsibility to respect human rights through environmental protection, implement human rights due diligence processes (including human rights impact assessments) to identify, prevent, mitigate and account for how they address their environmental impacts on human rights, and enable the remediation of any adverse environmental human rights impacts they cause or to which they contribute.”