

MOSIRELETSI WA SETŠHABA • MOŠIRELETŠI WA SETŠHABA  
MUSIRHELELI WA VANHU • MUTSIRELEDZI WA TSHITSHAYHA  
OPENBARE BESKERMER • UMKHUSELI WOLUNTU • UMWIKELI WOMPHEKATHU  
UMVIKELI WEMPHAKATSI • UMWIKELI WESITJHABA

**NATIONAL OFFICE**

Private Bag X677 Pretoria 0001 • Hillcrest Office Park, 175 Lunnon Street, Hillcrest, 0083  
Tel: (012) 366 7000 Fax: (012) 362 3473

**Please quote this reference in your reply: Report No. 16 of 2010/11**  
**Your reference:**

21 July 2010

Mr N S Kibi  
67 Klipplaat Street  
QUEENSTOWN  
6320

Dear Mr Kibi

**REPORT NO. 16 of 2010/11: REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994**

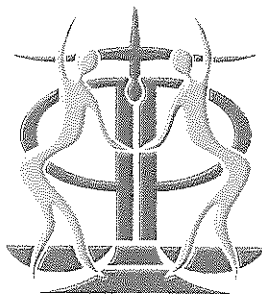
Please be advised that the investigation into your complaint has been concluded.

A report on the matter is attached hereto for your information.

Best wishes

**ADV T N MADONSELA**  
**PUBLIC PROTECTOR**  
**OF THE REPUBLIC OF SOUTH AFRICA**

20/08/2010



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**Please quote this reference in your reply. Report No. 16 of 2010/11**  
**Your reference:**

21 July 2010

The Hon. Minister: Ms Susan Shabangu  
Department of Mineral Resources  
Mineral Centre  
234 Visagie Street  
PRETORIA  
0001

Dear Ms Shabangu

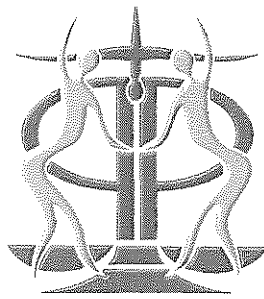
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Attached hereto is my report on an investigation into the alleged irregular issuing of a mining permit to Elitheni Coal Mine by the Department of Mineral Resources in the Eastern Cape Province for your attention.

Best wishes

**ADV T N MADONSELA  
PUBLIC PROTECTOR  
OF THE REPUBLIC OF SOUTH AFRICA**

20/08/2010



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Tel: (012) 366 7000 Fax: (012) 362 3473

**Please quote this reference in your reply: Report No. 16 of 2010/11**  
**Your reference:**

21 July 2010

Ms Thandiwe Biyela  
Regional Manager: Eastern Cape  
Department of Mineral Resources  
Private Bag X 6076  
PORT ELIZABETH  
6000

Dear Ms Biyela

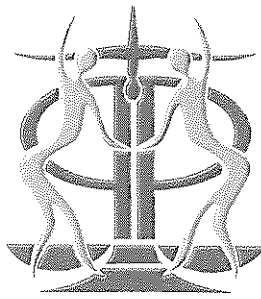
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Best wishes

**ADV T N MADONSELA**  
**PUBLIC PROTECTOR**  
**OF THE REPUBLIC OF SOUTH AFRICA**

20/08/2010



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Tel: (012) 366 7000 Fax: (012) 362 3473

**Please quote this reference in your reply: Report No. 16 of 2010/11  
Your reference:**

**Enquiries: Mr Molose  
Tel: 040-635 1286/7**

21 July 2010

Adv Sandile Nongxina  
The Director General  
Department of Mineral Resources  
Mineral Centre  
234 Visagie Street  
PRETORIA  
0001

Dear Adv Nongxina

**REPORT NO. 16 of 2010/11: REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994**

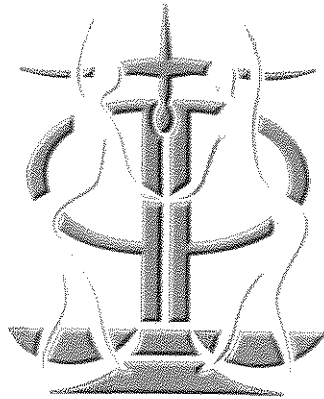
Attached hereto is my report on an investigation into the alleged irregular issuing of a mining permit to Elitheni Coal Mine by the Department of Mineral Resources in the Eastern Cape Province for your attention.

Best wishes

**ADV T.N. MADONSELA  
PUBLIC PROTECTOR  
OF THE REPUBLIC OF SOUTH AFRICA**

20/08/2010

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION  
182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH  
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1994**



**PUBLIC PROTECTOR  
SOUTH AFRICA**

**REPORT NO. 16 OF 2010/11**

**REPORT ON AN INVESTIGATION INTO THE ALLEGED IRREGULAR ISSUING OF  
A MINING PERMIT TO ELITHENI COAL MINE BY THE DEPARTMENT OF MINERAL  
RESOURCES IN THE EASTERN CAPE PROVINCE**

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## Executive Summary

- (i) The Public Protector investigated a complaint lodged by Mr Ntsikelelo Kibi on behalf of the Guba Community Trust (the Complainants) which allegedly represents the 35 villages affected by the mining operation. Their complaint is in connection with the alleged irregular issuing of a mining permit to Elitheni Coal (PTY) Ltd (Elitheni Coal) to mine coal from their communal land, by the Regional Manager: Department of Mineral Resources.
- (ii) The Complainants alleged that:-
  - (a) Elitheni Coal sidelined the community trust and instead established close ties with the Emalahleni Local Municipality (the Municipality) and that the crucial decisions to use the community land, were taken without consulting the affected communities.
  - (b) The Municipality agreed to a 3% share that was to be given to the community whereas the company had initially offered the community a 35% share holding.
  - (c) The Municipality was working hard to dissolve the Guba Community Trust which was an authentic community trust, with a view to establish a new one to be led by the Municipality.
  - (d) The Municipality was not transparent with regard to a sum of R1 000 000 received from the Department of Economic Affairs for social facilitation
  - (e) The Municipality issued a mining permit before the community resolution was taken as to the use of their land and whilst the environmental impact study was still in progress.
- (iii) It was found that:

- (a) The 35% share that was to be given to the Guba Community Trust was subject to acquisition of funding of the latter from the state to buy shares from Elitheni Coal, but that could not materialise as the Trust's application for funding was unsuccessful;
- (b) The Regional Manager of the Department of Mineral Resources was in full compliance with the requirements of the applicable legal framework as indicated above, when the mining rights application from Elitheni Coal was processed;
- (c) The Emalahleni Municipality has not misdirected itself in ensuring that any economic development within its jurisdiction, benefits the entire community;
- (d) The coal mining is supported by all and sundry; and
- (e) The allegations are neither legally defensible nor factually supportable, and the complaint is therefore not well founded.



## **REPORT ON AN INVESTIGATION INTO THE ALLEGED IRREGULAR ISSUING OF A MINING PERMIT TO ELITHENI COAL MINE BY THE DEPARTMENT OF MINERAL RESOURCES IN THE EASTERN CAPE PROVINCE**

### **1. INTRODUCTION**

- 1.1 The report is submitted to Mr N S Kibi who represents the Guba Community Trust.
- 1.2 This report is also submitted to the Hon. Minister of Mineral Resources, the Director General for the Department of Mineral Resources, the Regional Manager for the Department of Mineral Resources, Eastern Cape Province, and the Mayor, Emalahleni Municipality in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.3 It relates to an investigation into allegations of the irregular issuing of a mining permit to Elitheni Coal (PTY) Ltd (Elitheni Coal) by the Department of Mineral Resources' Eastern Cape Provincial Office.

### **2. THE COMPLAINT**

- 2.1 On 5 May 2008 the Public Protector received a complaint lodged by Mr N S Kibi on behalf of the Guba Community Trust (the Complainants) which allegedly represents the 35 villages that are directly affected by Elitheni Coal's mining operations.
- 2.2 The Complainants alleged that:-
  - 2.2.1 Elitheni Coal deliberately excluded the Guba Community Trust, and instead established close ties with the Emalahleni Local Municipality (the Municipality)

and that a crucial decision to use the communal land was taken without consulting the affected communities.

- 2.2.2 The Municipality agreed to a 3% share which was to be given to the community, even though the company had initially offered the community a 35% share holding.
- 2.2.3 The Municipality is attempting to dissolve the Guba Community Trust which is allegedly the authentic community trust, with a view to establish a new trust that is to be led by the Municipality.
- 2.2.4 The Municipality was not transparent with regard to how a sum of R1 000 000 received from the Department of Economic Affairs for social facilitation was utilised.
- 2.2.5 The Municipality issued a mining license before the community resolution regarding the usage of the land was taken by the affected communities, and also whilst the environmental impact study was still in progress.

### **3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT**

- 3.1 In terms of section 182 of the Constitution, the Public Protector has the power to investigate any conduct in state affairs or in the public administration in any sphere of government that is suspected to be improper or to result in any impropriety or prejudice.
- 3.2 The additional powers of the Public Protector to investigate such conduct are provided for in the Public Protector Act.
- 3.3 The matter complained about falls within the jurisdiction of the Public Protector.

#### **4. THE INVESTIGATION**

The investigation was conducted in terms of sections 6 and 7 of the Public Protector Act, and it comprised the following:-

##### **4.1 Perusal and consideration of the Mineral and Petroleum Resources Development Act, 2002**

- 4.1.1 Section 10(1)(a) and (b) respectively provides that within 14 days after accepting the application lodged in terms of section 16, 22 or 27, the Regional Manager must in a prescribed manner, make known that an application for prospecting right, mining right or mining permit has been received in respect of the land in question and call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice.
- 4.1.2 Section 10(2) provides that, if there is an objection to the application, the Regional Manager must refer the objection to the Regional Mining Development and Environmental Committee to consider the objection, and advise the Minister thereon.
- 4.1.3 If the Regional Manager accepts the application, he/she must, in terms of the provisions of section 22(4)(a) and (b), within 14 days from the date of acceptance, notify the applicant in writing to conduct an environmental impact assessment and submit the environmental management programme for approval in terms of section 39, and notify and consult with interested and affected parties within 180 days from the date of notice.
- 4.1.4 Section 27(1)(b) provides that a mining permit may only be issued if the mining area in question does not exceed 1.5 hectares in extent.

4.1.5 Section 27(3)(b) provides that the Regional Manager must accept an application for a mining permit if no other person holds a prospecting right, mining right or mining permit or retention permit for the same mineral and land.

4.1.6 In terms of section 40(1) and (2), the Minister must when considering an environmental management programme in terms of section 39, consult with any government department which administers any law relating to matters affecting the environment and must request the head of a department being consulted, in writing, to submit the comments of that department within 60 days from the date of the request.

#### **4.2 Perusal and consideration of Communal Land Rights Act, 2004**

4.2.1 Section 37 provides that despite the other provisions of this Act and the provisions of any other law, no law must prohibit a municipality from providing services and development of infrastructure, and from performing its constitutional functions on communal land, however held or owned.

#### **4.3 Perusal and consideration of minutes of the various consultation meetings with the affected communities of the entire Emalahleni Municipal Area**

4.3.1 From the minutes it is clear that Elitheni Coal started consultations with the affected parties as early as 1999 and such consultations are still continuing to date.

4.3.2 The minutes indicate that the affected communities attended those meetings in their numbers.

4.3.3 The Guba Community Trust was participating in those community consultative meetings.

4.3.4 The minutes indicate that Guba Community Trust had, because of its objection to the composition of the Multi Stakeholder Forum, withdrew its participation from the forum, alleging that the forum was unnecessarily extended to include communities that were not directly affected.

4.3.5 It emerged from the minutes that the Municipality was mandated to lead the process of the formation of a new trust that was to benefit all the communities under the jurisdiction of the Municipality because Guba Community Trust was established exclusively for Guba Hoek. The community of Guba Hoek refuted the notion that they had a hand in the formation of the trust as Mr Kibi and his group claims.

#### **4.4 Consideration of the Environmental Management Programme**

4.4.1 Public review meetings of the Environmental Management Programme were held at various strategic venues to provide interested and affected parties with the opportunity to verify whether issues raised through the environmental process have been captured and adequately considered, to provide interested and affected parties with an opportunity to raise any additional issues or concerns, to provide a summary of the potential environmental impacts and benefits associated with the project and to present a summary of the environmental objectives and goals for the management of the environmental impacts during all phases of the project.

4.4.2 Strategic venues referred to in par. 4.4.1 included, Indwe Community Hall (Indwe), Bomplaas Community Hall (Indwe), Mike Huna Community Hall (Dordrecht), Sosebenza High School (Mhlanga Village), Inkundla ka Head man Mayekiso (Guba Hoek Valley) and Lady Frere Town Hall (Lady Frere).

4.4.3 The traditional leaders and Guba Community Trust members, namely, Messrs Kibi, Makatesi, Menziwa and Madywabe participated in some of those meetings and all their concerns were addressed.

**4.5 Perusal and consideration of correspondence from the Traditional Council of Emachubeni**

4.5.1 The head of Machubeni Traditional Council, Chief Vulindlela declared his unwavering support for the mining operation on 11 November 2008.

**4.6 Meeting with the delegation from the Guba Community Trust**

4.6.1 The meeting was held on 10 September 2009 at the Department of Agriculture's offices at Lady Frere. The delegation from Guba Community Trust was led by Mr Kibi accompanied by Mr Nofemele, Mr Sokoyi and Ms Tyilani who were introduced as trustees by Mr Kibi. The purpose of the meeting was to afford the delegation an opportunity to make some additional submissions, if any, as the investigator was to compile a report on the matter.

4.6.2 During the meeting, no additional submissions were made by the delegation, save for reiterating the allegations already contained in the complaint. It however appeared that they were of the view that the Municipality as well as the traditional leaders were colluding with Elitheni Coal in sidelining the Guba Community Trust.

4.6.3 The view was held that the Municipality was extending the trust to include villages which were not directly affected by the proposed mining operations.

4.6.4 It became clear that the Guba Community Trust, represented by the delegation had disadvantaged themselves by withdrawing their participation in the Multi Stakeholders Forum as they were still arguing that the appointment of Mr Mazizi Msutu as social facilitator was unacceptable to them. They wanted to appoint their own facilitator and wanted Elitheni Coal to cover the expenses. They were completely ignorant of the fact that social facilitation was being conducted by a company called Simo Consulting.

#### **4.7 Meeting with the Mayor of the Emalahleni Municipality**

- 4.7.1 From the meeting held with Mr Jordan who represents the Municipality in the Multi Stakeholder Forum the following emerged:-
- 4.7.2 The new Trust that is fully representative has been established;
- 4.7.3 The initial 35% share holding that was to be allocated to the Guba Community Trust could not materialise because the application for funding from the State was not approved;
- 4.7.4 The Emalahleni community was adequately consulted;
- 4.7.5 The mining project is highly supported by all the communities and their traditional leaders; and
- 4.7.6 Guba Community Trust is not representing the interests of the community, but personal interests of its members.

#### **5. EVALUATION OF FACTS AND EVIDENCE**

- 5.1 Based on both oral and documentary evidence received from the stakeholders during the investigation, it is apparent that the dissatisfaction on the part of the Complainants is *inter alia* triggered by the non-recognition of the Guba Community Trust as authentic representative of the Emalahleni community by Elitheni Coal, the Municipality and its entire community;
- 5.2 From the documentary evidence, e.g. minutes and oral evidence obtained from stakeholders it appears that both the Department and Elitheni Coal have complied with all the requirements of the applicable legislation, regarding

- consultation of the affected communities and relevant departments when processing a mining application;
- 5.3 The Complainants are ignorant of the fact that the land and the minerals in it are State owned and does not belong to the community that occupies the land;
- 5.4 The Complainants are ignorant of the fact that section 37 of the Communal Land Rights Act, 2004, provides that despite the other provisions of this Act and the provisions of any other law, no law must prohibit a municipality from providing services and development of infrastructure and from performing its constitutional functions on communal land however held or owned;
- 5.5 The public review meetings of the Environmental Management Programme were held at various strategic venues to provide interested and affected parties with the opportunity to verify whether issues raised through the environmental process have been captured and adequately considered, to provide interested and affected parties with an opportunity to raise any additional issues or concerns, to provide a summary of the potential environmental impacts and benefits associated with the project and to present a summary of the environmental objectives and goals for the management of the environmental impacts during all phases of the project. This renders the allegation by the Complainants, that a permit was issued whilst the environmental study was still in process, factually unsupportable and as such baseless;
- 5.6 The 3% share holding that the company gives the community is free and the 35% share holding the Complainant refers to, was to be given to the Guba Community Trust but since its application for funding from government was turned down, the company endeavoured to obtain funding overseas and as a result the company disregarded the Guba Community Trust as a prospective shareholder;

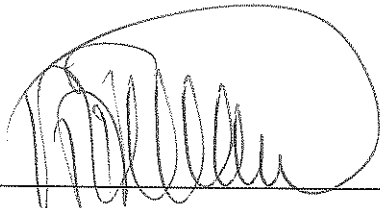


- 5.7 The R1 000 000.00 donated by the Department of Economic Affairs is being used specifically for the purpose it was made available for, i.e. social facilitation and is properly accounted for;
- 5.8 From the evidence obtained both orally and documentary there is no indication that the Municipality had any intention of dissolving the Guba Community Trust, precisely as it has no powers to do so, instead, the formation by the Municipality of a new trust was mandated by the Multi Stakeholder Forum which represented all the Emalahleni Communities; and
- 5.9 The record of attendance of meetings and deliberations confirms beyond any doubt that the opening of the mine in that area is supported by the majority of the community members including the Municipality and the traditional leaders.

## **6. FINDINGS**

- 6.1 The Regional Manager of the Department of Mineral Resources was, as indicated above, in full compliance with the requirements of the applicable legal framework when it processed the mining permit application from the Elitheni Coal;
- 6.2 The Municipality has not misdirected itself in ensuring that any economic development within its jurisdiction benefits the entire community;

- 6.3 The coal mining activities are supported by all and sundry at Emalahleni, and
- 6.4 The allegations are neither legally defensible nor factually supportable; the complaint is therefore not well founded.



**ADV T N MADONSELA**

**PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA**

**DATE:** 21 July 2010

Assisted by: Z Molose, Investigator Eastern Cape Provincial office