Sherrie Nixon

Data Submitted (UTC 11): 5/11/2024 12:52:10 AM
First name: Sherrie
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Organization:
Title:
Comments: Hello, I am very worried about South 32 Hermosa Project for many reasons as it's impact on the environment animals plants trees and water will be drastically affected. I have researched S32 behaviors at other sites they own with great alarm. They have been fined in Austrelia for taking water without a liscence, as well as polluting it. In Columbia at Cerro Matoso S32 owns the mine that has heavily polluted the enviroment and local peoples filed and won a class action suit, but S32 appealed it to the Supreme Court to get it overturned resulting in the sickend people only getting access to medical treatment by S32 clinics. On Groot Eylandt in the Au Northern Territory the people have Manganese in their Hair and Fingernails, and the wild animals tested by the University living near the S32 Manganese mine GEMCO have been found to have Mn in their brains and testes.
There has been no follow up on the testing oh local people living near the mine.
I will attach documents and studies relating to some of the above concerns that will bring light on how S32 has conducted themselves in relation to environmental and human rights violations.

I hope to add a few more Docs. Very important ones.
IM HAVING TROUBLE UPLOADING SOME OF THE DOCUMENTS SUPPORTING MU CONCERNS.

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA40/17

In the matter between:

SOLIDARITY	**First Appellant**
JM JOUBERT	**Second Appellant**
and	
ARMAMENTS CORPORATION OF SOUTH AFRICA (SCO) LTD	**First Respondent**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Second Respondent**
WILLEM KOEKEMOER N.O.	**Third Respondent**

Heard: **21 August 2018**

Delivered: **27 November 2018**

Coram: Phatshoane ADJP, Davis JA and Murphy AJA

Summary: Review of arbitration awards – employer's policies provide that members or employees may not be enrolled, appointed or promoted, receive a commission or be retained as members or employees unless they had been issued with the appropriate or provisional grade of security clearance by the Intelligence Division. Employee's service terminated in that he was denied all grades of security clearance.

Held: that s37 of the Defence Act makes it a prerequisite for an employee to be issued with an appropriate grade of security clearance in order to be retained in its employ. Further - that it is axiomatic that employee's termination of service was based on supervening impossibility of performance which constituted a form of incapacity to fulfil the attendant contractual obligations.

The court finding - that a fair procedure as set out in s39 read with s41 of the Defence Act and Clauses 5.12.1 and 5.15 of employer's Security Clearance Practice A-Prac-2033 was designed to create a platform where the grounds and reasons for the refusal, downgrading or withdrawal of security clearance would be provided to an aggrieved employee so as to afford such an employee a reasonable opportunity to present information, make representations and/or statements to the Review Board regarding the decision to, *inter alia*, refuse the security clearance. Substantive fairness of the decision to terminate under s 37(2) could not have been determined in the absence of reasons for the decision not to grant the security clearance. The termination letter was issued before employer had finally established that it had become permanently and objectively impossible for employee to be retained in its service. In other words, the incapacity had not yet been determined to be of a permanent nature that warranted the employee's dismissal.

As far as relief is concerned, the court held - that reinstatement was impracticable as employee did not hold the relevant security clearance certificate. Further holding that - what was a temporary supervening impossibility of performance become permanent because the review of the decision to deny the employee all grades of security clearance came to naught. The Court concluding - that the maximum compensation was an appropriate relief.

Labour Court's judgment was set aside and the appeal upheld with costs.

JUDGMENT

PHATSHOANE ADJP

[1] This appeal lies against part of the judgment and order of the Labour Court (*per* Whitcher J) reviewing and setting aside the arbitration award (GATW534-13) dated 24 August 2013 issued by Commissioner W Koekemoer ("the commissioner"), the third respondent, under the auspices of the Commission for Conciliation Mediation and Arbitration ("the CCMA"), the second

respondent; substituting it with an order that the dismissal of Mr Jacobus Martinus Joubert ("Mr Joubert"), the second appellant, was substantively fair and that Armaments Corporation of South Africa (SCO) Ltd ("Armscor"), the first respondent, pays Mr Joubert eight months compensation on the basis that his dismissal was procedurally unfair. The present appeal is with leave of the Labour Court. Its judgment has since been reported as *Armaments Corporation of SA (SOC) Ltd v Commission for Conciliation, Mediation & Arbitration and Others* (2016) 37 ILJ 1127 (LC).

[2] Mr Joubert was in the employ of Armscor for more than three decades, since 01 July 1981, throughout which he obtained the requisite security clearance certificates, appropriate to his position, from the Intelligence Division of the South African National Defence Force ("SANDF"). On 23 October 2006 he was issued with a grade "*Secret*" security clearance certificate which expired on 11 September 2011. In accordance with Armscor's Security Practice Mr Joubert submitted an application to renew his security clearance certificate to Armscor's Personnel Evaluation Division ("APED") on 26 September 2011. For the period 11 September 2011 to 26 November 2012 Mr Joubert held a security clearance certificate classified as "*Confidential*". Thereafter, for reasons never explained to him or to Armscor the vetting panel of the Intelligence Division of the SANDF refused to grant him all grades of security clearance, let alone at the highest level he previously enjoyed.

[3] Armscor's conditions of employment provide that an appointment of an employee to its staff establishment is subject to "obtaining and maintaining" of an applicable security clearance. Those "who fail to qualify for any grade of security clearance as a result of a negative vetting content will be dismissed or their contract of employment terminated."[1] Significantly, s 37(2) of the Defence Act, 42 of 2002 ("the Defence Act"), which is central to this litigation provides:

> '(2) A member or employee contemplated in subsection (1) *(a)* may not be enrolled, appointed or promoted, receive a commission or be retained as a

[1] This is set out in para 6.6.1 of Armscor Conditions of Employment, A-Prac-2021, issue 11 and para 5.5.1 of Armscor Security Clearance Practice, A-Prac-2033, Issue 3.

> member or employee, unless such member or employee has been issued with the appropriate or provisional grade of security clearance by the Intelligence Division.' (My emphasis)

[4] On 07 December 2012 APED addressed a letter to Mr Dawie Griesel, acting general manager, Acquisition Department, informing him of the outcome of Mr Joubert's application for security clearance; bringing to his attention certain provision of Armscor policies; and further requesting him to convey a message of the results of the vetting process to Mr Joubert. On 18 December 2012 Mr Griesel addressed a letter of termination to Mr Joubert in these terms:

> 'In terms of para 6.6.1 of the Armscor Conditions of Employment Practice, A-Prac-2021[2] and further in terms of paragraph 5.5.1 of Armscor Security Clearance Practice, A-Prac-2033,[3] an appointment and employment of an employee are subject to obtaining and maintaining of an applicable security clearance.
>
> Furthermore, in terms of paragraph 5.15.2.4 of A-Prac-2033, *persons who fail to qualify for any grade of security clearance as a result of negative vetting content will be dismissed or their contract of employment terminated*. You are hereby informed that you have been refused all grades of security clearance. Consequently, your contract of employment is terminated with immediate effect.
>
> You are further advised of your right to appeal within 30 days from the date of this letter, the decision to refuse you all grades of security clearance should you so wish, by personally requesting a review of the clearance by lodging a written request via APED to the Personnel Security Review Board (PSRB).'

[5] The aforesaid letter effectively terminated, with immediate effect, Mr Joubert's services with Armscor on 18 December 2012. Having been advised of his

[2] A-Prac-2012 stipulates: "The appointment and employment of an employee are subject to obtaining and maintaining of an applicable security clearance, and the employee must, on request, properly complete all the necessary forms which may be provided."

[3] A-Prac-2033 provides: "an appointment in Armscor is subject to obtaining and retaining a security clearance in relation to the security classification of the information to be accessed."

right to review the decision to refuse him all grades of security clearance he pursued that course.

[6] On 20 December 2012 Solidarity, the first appellant, a trade union acting on behalf of Mr Joubert, directed a letter to Armscor recording that: Mr Joubert had not received reasons for the refusal of his security clearance; he had not been afforded any opportunity to state his case in response to the refusal; and that Armscor did not follow any pre-dismissal process in terminating his services. Solidarity demanded that reasons be provided to Mr Joubert to enable him to formulate a reply or representations to the negative vetting content. It further put Armscor on terms to reply by 04 January 2013. On the next day, 21 December 2012, Mr Joubert wrote a letter to APED in the same vein.

[7] By means of a letter dated 07 January 2013 Mr Joubert lodged an urgent revision of his security clearance with APED.[4] Following this, correspondence was exchanged between the parties but no reasons were forthcoming for the refusal of any of the grades of security clearance by the Intelligence Division. His application for the review or revision remained pending with no end in sight.

[8] In the end, Mr Joubert referred an unfair dismissal dispute to the CCMA for conciliation and arbitration. At arbitration the parties agreed that the matter would be determined by way of exchange of written heads of argument. The only evidence that was led was that of Mr Joubert in respect of his employment status and earnings post his dismissal.

[9] The commissioner, in his assessment of the evidence and argument, was of the view that the provisions of the Labour Relations Act, 66 of 1995 ("the LRA") had to be interpreted "*by casting the net wide to draw employees into protection of the LRA*" so as to conform with the right to fair labour practice as expressed in s23 of the Constitution.[5] He rejected Armscor's argument that it did not dismiss Mr Joubert in that the termination of his services came about

[4] This is referred to on the record as a review at times an appeal.
[5] The Constitution of the Republic of South Africa Act, 108 of 1996.

by the operation of the law, viz s37(2) of the Defence Act. He further rejected its contention that it had no discretion in the matter but to terminate Mr Joubert's services.

[10] The commissioner was of the view that Armscor could have placed Mr Joubert on suspension or considered alternative sanctions short of dismissal. He found that Armscor opted to terminate Mr Joubert's services by merely issuing a notice to that effect without providing reasons for the termination of employment as envisaged in s188 of the LRA. The commissioner reasoned that Armscor was required to decide on a fair reason for the dismissal and to act in accordance with the procedures laid down in the LRA.

[11] The commissioner found that Armscor did not prove a fair reason for the dismissal and concluded that Mr Joubert's dismissal was both substantively and procedurally unfair. He reinstated him retrospectively on the same terms and conditions of employment that applied prior to his dismissal, with back-pay equivalent to his nine months' remuneration in the amount of R737 280.00

[12] Dissatisfied with the outcome of the arbitration process Armscor lodged a review application with the Labour Court contending, as it were, that the commissioner's decision, on the substantive and procedural fairness of the dismissal and the relief granted, was one that a reasonable decision-maker could not have reached.

[13] The review required the consideration of the substantive fairness of the dismissal and relief awarded by the commissioner. Armscor conceded the procedural unfairness of the dismissal and consequently it did not require any determination.

[14] The Labour Court found that the commissioner failed to consider Armscor's alternative defence that Mr Joubert had been dismissed for incapacity. In the premises, the commissioner did not consider the material facts and submissions placed before him and accordingly committed a material irregularity. The Court found that incapacity was the correct categorisation of the basis for Mr Joubert's dismissal. As support for its conclusion the Court

invoked the following passage from Brassey *Commentary on the Labour Relations Act* at para A8-76 which was approved by this Court in *Samancor Tubatse Ferrochrome v Metal & Engineering Industries Bargaining Council & Others:*[6]

> 'Incapacity may be permanent or temporary and may have either a partial or a complete impact on the employee's ability to perform the job. The Code of Good Practice: Dismissal conceives of incapacity as ill-health or injury but it can take other forms. Imprisonment and military call-up, for instance, incapacitates the employee from performing his obligations under the contract. The dismissal of an employee in pursuance of a closed shop is for incapacity; so is one that results from a legal prohibition on employment.'

[15] The Court *a quo* held that Mr Joubert's dismissal was fair because it resulted from a legal prohibition on further employment brought about by s37(2) of the Defence Act and the corresponding Armscor's internal policies. The Court found the injunction (that employees who fail to qualify for any grade of security clearance as a result of a negative vetting outcome will be discharged from their services) to be patently fair and reasonable. The Court was of the view that failure to consider these legal issues resulted in the commissioner producing an unreasonable outcome on the substantive fairness of the dismissal.

[16] In respect of the contention that it was premature to dismiss Mr Joubert, absent a finding that it had become permanently and objectively impossible for Mr Joubert to be retained in his position, the Court agreed with Armscor that Mr Joubert could not be deployed elsewhere because his security clearance was removed in its entirety. Further, that it would be unreasonable to expect Armscor to keep a high earning employee in its employ with no work to perform pending the review process, the duration of which was unknown to Armscor.

[17] The Labour Court found the commissioner's award, insofar as it reinstated Mr Joubert, to be incompetent and unsustainable because the commissioner failed to bring his mind to bear on the fundamental aspect that in law a party

[6] (2010) 31 ILJ 1838 (LAC) at 1842B-C para 10.

cannot enforce a contract that is in contravention of a statutory provision, in this case s37(2) of the Defence Act.

[18] As already alluded to, the Court concluded that the dismissal was substantively fair. In view of the fact that Armscor conceded that the dismissal was procedurally unfair, the Court upheld the commissioner's award in that respect. It found an award of eight-months compensation to be just and equitable, regard being had to Mr Joubert's 31 years of service with Armscor and the abrupt manner in which Armscor set about terminating his services without following the pre-dismissal procedural steps.

[19] Before us Solidarity and Mr Joubert (the appellants) contended that:

19.1 The Labour Court erred in finding that Armscor relied on the provisions of the Defence Act in terminating Mr Joubert's employment. It was argued that, on the contrary, Armscor relied on its own policies in laying down the basis for termination of employment and in terminating Mr Joubert's employment. It did not rely on the operation of the law, in particular s37(2) of the Defence Act, as a motivation for the termination.

19.2 The Labour Court held that the commissioner erred in not accepting submissions concerning the alleged incapacity of Mr Joubert. The Court ought to have held that the commissioner correctly applied the law by refusing to allow Armscor to rely on the alternative reason for dismissal not communicated to Mr Joubert at the time of his dismissal as the basis for termination.

19.3 The Labour Court ignored the principle enunciated in *Fidelity Cash Management Services v CCMA (Fidelity Cash Management Services)*[7] that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for the dismissal which the employer gave at the time of the dismissal.

19.4 The Court failed to record the relationship between the procedural unfairness of Armscor's decision and the substantive basis for the

[7] [2008] 3 BLLR 197 (LAC) at para 32.

termination of employment. The procedural fairness, that is, refusing to provide reasons for the failed security clearance and declining to allow Mr Joubert to complete the review of the adverse security clearance, created the substantive basis for the dismissal that the Judge in the Court *a quo* relied on.

19.5 The Court ought to have taken into account that in Armscor's policies provision is made for requesting a revision of security status and that clause 5.12.1 of Armscor's Security Clearance Practice treats the denial of Security clearance, in the first round, as conditional so that the legal impediment to employment had not been finally determined.

19.6 The Court ought to have considered s39(3) of the Defence Act which provides that: *"No security clearance or specific grade of security clearance may be refused, downgraded or withdrawn without the member or employee who will be affected thereby being afforded reasonable opportunity to present information regarding such matter*" and further s 39(2)(a) which stipulates that: *"…(T)he Secretary for Defence must, in writing, furnish every member or employee whose security clearance or particular grade of security clearance has been refused, downgraded or withdrawn with the grounds and reasons for such refusal, downgrading or withdrawal*."

19.7 The Court failed to appreciate that determination of security clearance under the Defence Act is not a unilateral exercise during which clearance can be denied, without reasons, in the absence of representation by a person potentially adversely affected by the decision. Lastly,

19.8 The Labour Court erred in the application of the review test. The conclusion reached by the commissioner, it was argued, is one that a reasonable commissioner could have reached.

[20] Mr Myburg SC, for Armscor, contended that properly construed, the policy provisions relied upon by Armscor in dismissing Mr Joubert equated to him being incapacitated. He argued that this is not a case of an employer

dismissing an employee on one ground and seeking to defend the decision on a different ground. Therefore, the *Fidelity Cash Management Services* principle relied upon by the appellants, he argued, finds no application in this case. He further contended that the absence of reasons for the decision could not be laid at the door of Armscor. It was the decision not the reasons therefor that caused Mr Joubert to be incapacitated. He further argued that the appellants' reliance on para 5.15.2.1 of Armscor Security Clearance Practice which provides for a right to request "a revision" of the security clearance decision cannot assist them because when para 5.15 is read in its entirety it is clear that the dismissal of an employee who fails to qualify for any grade of security clearance is not subject to the outcome of the revision process by PSRB.

[21] Mr Myburg further argued that s37(2) operated so as to render continued employment of Mr Joubert by Armscor unlawful. Insofar as s37(2) provides that an employee of Armscor "*may not*" be retained as an employee *"unless [he/she] has been issued with the appropriate...grade of security clearance by the Intelligence Division",* cognisance must be taken that the words "*may not*" in this context are not permissive but peremptory. The policies of Armscor adopt this form of interpretation. Furthermore, he argued that s39 which provides for, *inter alia*, an opportunity to present information; to be provided with reasons; and to review negative decision, was misplaced because it applies to a "*member or employee*". A "*member or employee*" in the definition section of the Defence Act did not cover the employees of Armscor, it was contended.

Analysis

[22] This appeal lies, in the main, against the substantive fairness of Mr Joubert's dismissal. It remains to be considered whether the loss by Mr Joubert of all levels of security clearance triggered impossibility of performance. Put differently, whether the termination of Mr Joubert's services by Armscor was actuated by reasons of his incapacity. If the answer to the question is in the affirmative then it has to be established whether the incapacity was temporary

or permanent, and therefore, warranting being visited with a sanction of dismissal.

[23] The CCMA's awards are reviewed on the grounds of, *inter alia*, unreasonableness. The test is whether the decision reached by the commissioner is one that a reasonable decision-maker could not have reached.[8]

[24] In his work *Workplace Law*,[9] Mr John Grogan posits, correctly in my view, that incapacity need not arise from illness or injury. Employees may be dismissed for incapacity arising from any condition that prevents them from performing their work. In other words, incapacity may give rise to a species of impossibility of performance.

[25] The following remarks in *National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others*[10] are pertinent to this case:

> 'While ordinary principles of contract permit a contracting party to terminate the contract if the other party becomes unable to perform, that is not the end of the matter in the case of employment. The question that still remains in such cases is whether it was fair in the circumstances for the employer to exercise that election. In making that assessment the fact that the employee is not at fault is clearly a consideration that might and should properly be brought to account.'

[26] In terms of s37(1) (a) of the Defence Act the Minister of Defence may prescribe different grades of security clearance to be issued by the Intelligence Division for various categories of members, the employees of Department of Defence and employees of Armscor. In terms of s37(2) those members or employees may not be enrolled, appointed or promoted, receive a commission or *be retained as members or employees, unless they had been issued with the appropriate or provisional grade of security clearance by the Intelligence Division*. Section 37(4) provides that the Intelligence Division must, on the instruction of the Secretary for Defence, determine whether any

[8] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC)
[9] Workplace Law John Grogan- 12th Ed, 2017, ch 14-p 287.
[10] (2011) 32 ILJ 1618 (SCA) at 1623 para 12.

security clearance or a specific grade of security clearance should be issued to any member or employee concerned.

[27] In the letter of termination of service, referred to earlier, Mr Joubert was informed that he had been refused all grades of security clearance by the Intelligence Division and consequently that his contract of employment was terminated with immediate effect. The argument by Armscor that the dismissal of Mr Joubert was actuated by incapacity is not new. As correctly found by the Court a quo, it was one of the issues the commissioner was enjoined to determine.[11] As more fully appearing on the Pre-arbitration minutes amongst issues that had to be considered by the commissioner was whether: *"(T)he true reason for dismissal falls within the definition of 'incapacity' as contemplated in the LRA. Further, whether the reason for dismissal had to be "classified as being due to incapacity."*

[28] There can be no question that s37 of the Defence Act makes it a prerequisite for an employee of Armscor to be issued with an appropriate grade of security clearance in order to be retained in its employ. The policies relied upon by Armscor,[12] in effecting termination in this case, have the same import. They also have their genesis in s37 of the Defence Act. The argument by Ms Engelbrecht, for Solidarity and Mr Joubert, that Armscor did not rely on s37(2) of the Defence Act, as a motivation for the termination of employment but on its employment policies, is therefore unmeritorious. It is axiomatic that Mr Joubert's termination of service was based on supervening impossibility of performance. This constituted a form of incapacity to fulfil the attendant contractual obligations. As correctly found by the Court *a quo* Mr Joubert's inability to perform his services, due to the legal impediment imposed by s37 of the Defence Act and Armscor's corresponding employment policies, falls squarely within the ambit of a dismissal based on capacity. However, this is not the end of the enquiry.

[11] See Pre-Arbitration Minutes (Vol 3 page220) under the heading "Disputed Facts" at para 3.9.
[12] The policies are quoted at fn 2 and 3 *supra*. The relevant clauses are: 6.6.1 of Armscor Conditions of Employment A-Prac-2021, Issue 11; 5.5.1 and 5.15.2.4 of Armscor Security Clearance Practice, A-Prac-2033, Issue 3.

[29] Section 39(1) of the Defence Act requires the Secretary for Defence to give written notice to every member or employee in respect of whom a determination, of whether any security clearance or a specific grade of security clearance should be issued, has been made by the intelligence Division as envisaged in s37(4). The Secretary is further required, in terms of s39(2), to furnish in writing to every member or employee, whose security clearance or particular grade of security clearance has been refused, downgraded or withdrawn, the grounds and reasons for such refusal, downgrading or withdrawal. Very importantly, in terms of s39(3) no security clearance or specific grade of security clearance may be refused, downgraded or withdrawn *without the member or employee* "*who will be affected thereby being afforded reasonable opportunity to present information regarding such matter*." Section 39(4)(a) provides that the member or employee concerned may, within 14 days after receipt of the grounds and reasons from the Secretary of Defence referred to above, lodge a written objection against the refusal, downgrading or withdrawal, as the case may be, with the Secretary for Defence and further furnish the Secretary with such written representations, statements and documents as the member or employee deems necessary for a review by the Personnel Security Review Board ("the PSRB").

[30] The argument by Armscor that s39 of the Defence Act did not apply to its employees because they were not "*members or employees*" as defined in the Defence Act is devoid of substance. The Secretary of Defence is charged with the responsibility of giving notice of security clearance or refusal thereof to "*every member or employee*" contemplated in s37(4). The "*members or employees"* contemplated in 37(4) includes the employees of Armscor.[13]

[31] The PSRB is established by the Minister of Defence in terms of s40 of the Defence Act. The board is obliged to review any objection against the refusal, downgrading or withdrawal of security clearance, as the case may be, referred to it in terms of section 39(4)*(c).*[14] It is further imbued with the power to confirm the determination of security clearance made by the Intelligence

[13] See s 37(1)(a) of the Defence Act.
[14] See s 41 (1) of the Defence Act.

Division or to set it aside and substitute it as contemplated in s41(2) of the Defence Act.

[32] So far it is clear that the condition precedent introduced by s37(2), to the effect that an employee may not be retained in the services of Armscor unless he/she had been issued with the appropriate or provisional grade of security clearance, cannot be implemented independently of ss 39 and 41 of the Defence Act, particularly in circumstances where an employee has lodged an objection against the negative vetting outcome as in this case. What Armscor did, on the basis of its policies which are founded on s37(2), was to terminate Mr Joubert's services with immediate effect for reasons that he had been refused all grades of security clearance. This notwithstanding, Mr Joubert was advised of his right to "appeal" the decision within 30 days from the date of receipt of the notice of termination.

[33] Clause 5.12.1 of Armscor Security Clearance Practice, A-Prac-2033, issue 3 Provides:

> 'Any person who regards himself /herself as having been wronged in the **conditional** issuing, downgrading or **denial of a security clearance**, **has the right** to apply for revision of his/her security status by the PSRB. An application for such an appeal to the PSRB must be made personally and submitted via APED within 60 days after notification of the clearance decision to the requesting body.'

[34] An employee's right to apply for revision of the decision in respect of the grade of security clearance by the Intelligence Division is repeated in Clause 5.15. of A-Prac-2033, issue 3, which provides in part:

> '5.15.1 In the event of a clearance refusal, the requesting body will be informed immediately whether a lower grade of clearance was issued or all grades of clearance refused. Reason(s) for the refusal will not be disclosed in order to maintain confidentiality regarding the person concerned or references consulted.
>
> 5.15.2 Course of action then lies within the following options:
>
> 5.15.2.1 The person concerned may, within 30 days of notification by his/her manager, exercise his/her right to request a revision of the

clearance decision by personally lodging a written request, via APED to the PSRB, for revision...'

[35] The argument by Armscor that Mr Joubert was disqualified from lodging an objection in terms of its Security Clearance Practice because he was denied all grades of security clearance cannot be sustained for two reasons. First, Armscor itself extended an invitation to Mr Joubert to file an objection if he wished to do so. Second, Clause 5.12.2 of Armscor's Security Clearance Practice-A-Prac-2033 sets out only two categories of persons who are disqualified to lodge an objection. This includes: persons who had been refused security clearance during the recruitment process and whose appointment had not yet been confirmed prior to the denial of a security clearance; and the independent contractors, who tender to work on defence projects. Mr Joubert did not fall into any of the two categories and was therefore entitled to lodge an objection.

[36] Ms Engelbrecht argued that the aforesaid clause 5.12.1, to the extent that it provides that: *"Any person who regards himself /herself as having been wronged in the* ***conditional*** *issuing, downgrading or* ***denial of a security clearance****,* ***has the right*** *to apply for revision of his/her security status by the PSR,"* treats the denial of security clearance in the first round, before review of the decision, as conditional. The net effect of this, she contended, is that the legal impediment had not been finally determined. In countering this submission, Armscor contended that reliance on para 5.12.1 of the policy cannot avail the appellants because it provides for an employee having the right to apply to the PSRB for revision of "the conditional issuing, downgrading or denial of security". The word "conditional", it was argued, relates only to "the conditional issuing of security clearance" and not "denial of security clearance". The denial of security clearance to Mr Joubert was not conditional, the argument continued.

[37] As I see it, nothing turns on the argument that denial of all grades of security clearance by the Intelligence Division was conditional pending the review of the decision. What is crucial here is that there rested an obligation on the PSRB to review any objection referred to it in terms of section 39 (4)*(c).* The

difficulty with this case is that PSRB never reviewed the decision of the Intelligence Division which refused Mr Joubert all grades of security clearance and, worse, the reason(s) for the refusal of all the grades of security clearance remains unexplained.

[38] A fair procedure as set out in s39 read with s41 of the Defence Act and Clauses 5.12.1 and 5.15 of Armscor Security Clearance Practice A-Prac-2033 was designed to create a platform where the grounds and reasons for the refusal, downgrading or withdrawal of security clearance would be provided to an aggrieved employee so as to afford such an employee a reasonable opportunity to present information, make representations and/or statements to the PSRB regarding the decision to, *inter alia*, refuse the security clearance. The grounds or reasons for the refusal of a grade of security clearance are, in my view, fundamental to the establishment of the substantive basis of a dismissal contemplated in s37(2) of the Defence Act. In other words, substantive fairness of the decision to terminate under s 37(2) could not have been determined in the absence of reasons for the decision not to grant the security clearance.

[39] The procedure laid down in s39 of the Defence Act must precede the final adjudication of the review of the decision refusing the security clearance by PSRB. In my view, if the final determination has not been made, then the substantive reason for the dismissal under section 37(2) has not been determined. In this case the termination letter was issued before Armscor had finally established that it had become permanently and objectively impossible for Mr Joubert to be retained in its service. It follows that, at the time of issuing the letter of termination, the incapacity had not yet been determined to be of a permanent nature that warranted Mr Joubert's dismissal. It was only once the review process had been completed, and resulted in the confirmation of the decision of the Intelligence Division, that it could be said that Mr Joubert's incapacity had become permanent.

[40] It is common cause that two of Armscor's employees were allowed or retained in its service without the requisite security clearance certificates. In the final analysis, there could never have been any rationality to the decision by

Armscor to terminate the employment of Mr Joubert prematurely and prior to the determination of the review. The conclusion is irresistible that the dismissal was substantively unfair.

[41] While it is true that the dismissal came about as a result of the legal impediment brought about by s 37(2), the Court *a quo* erred in holding that such a dismissal was fair without assessing the impact of s39 on the substantive fairness thereof. In *Head of Department of Education v Mofokeng and Others,*[15] this Court held that the reviewing court must consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. Mere errors of fact or law may not be adequate to vitiate the award. Although the commissioner did not devote his attention to what the correct categorisation of the dismissal could have been on the available material before him, his conclusion, although inelegantly put, that Armscor was required to prove a fair reason for the dismissal and to afford Mr Joubert a fair hearing is unassailable.

[42] On the question of relief, as correctly found by the Court *a quo*, an award of reinstatement was not legally competent. This is so for the following reasons:

42.1 First, Mr Joubert did not hold the relevant security clearance certificate and was therefore disqualified to hold the position of senior manager (technical) that he held at the time of his dismissal. In these circumstances reinstatement would not be reasonably practicable in terms of section 193(2)(c) of the LRA. In *Maepe v Commission for Conciliation, Mediation & Arbitration and Another,*[16] this Court made this instructive illustration: If the evidence before an arbitrator or the Labour Court in an unfair dismissal dispute between A and B, where A who had been employed by B as a driver, established that his driver's licence was withdrawn after his dismissal with the result that he could no longer drive lawfully, it would definitely be “reasonably impracticable” within the meaning of that phrase in s193(2)*(c)* for the

[15] (2015) 36 ILJ 2802 (LAC) at 2812D-G paras 31-32.
[16] (2008) 29 ILJ 2189 (LAC) at 2201A-B para 18.

employer to reinstate him/her because in such a case the employer would not be able to require the employee to perform his duties without requiring the employee to commit a criminal offence. Mr Joubert's position is analogous.

42.2 Second, what was a temporary supervening impossibility of performance has become permanent because the review of the decision to deny Mr Joubert all grades of security clearance came to naught.

[43] The Court *a quo* cannot be faulted in concluding that the commissioner committed a reviewable irregularity by reinstating Mr Joubert into Armscor's employ. The remedy available to Mr Joubert, under these circumstances, is that of compensation. Regard being had to the egregious manner in respect of which his termination was effected, without providing a fair reason and following due process, the maximum compensation allowed in terms of s194(1) of the LRA is justified.

[44] Armscor did not challenge a costs order that was made against it in respect of the aborted review that was instituted under Case No: JR 1510/13. There can be no reason to upset the order of the Court *a quo* in respect of those costs. Concerning the costs in respect of this appeal, Mr Myburg argued that this is not a case where a costs order was called for. Ms Engelbrecht urged that costs follow the result. Having had regard to the requirements of law and fairness, I am inclined to award costs. In the result, I make the following order.

Order

1. The appeal is upheld with costs;

2. The order of the Court *a quo* is set aside and substituted with the following:

"1. The dismissal of Mr Jacobus Martinus Joubert, the fourth respondent, was substantively and procedurally unfair;

2. The Armaments Corporation of South Africa (SOC) Ltd (Armscor), the applicant, is ordered to pay Mr Jacobus Martinus Joubert, the fourth respondent, compensation equivalent to his 12 (twelve) months' salary;

3. There is no order as to costs in respect of the review application filed under Case No: JR 1961/13;

4. Armscor is ordered to pay Solidarity and Mr Jacobus Martinus Joubert's, the third and fourth respondent's, costs in respect of the review application instituted under Case No: JR 1510/13.

_____

MV Phatshoane

Acting Deputy Judge President - The Labour Appeal Court

Davis JA and Murphy AJA concur in the judgment of Phatshoane ADJP

APPEARANCES:

FOR THE APPELLANTS:	Adv MJ Engelbrecht Instructed by Serfontein Viljoen & Swart Attorneys
FOR THE FIRST RESPONDENT:	Adv A Myburgh SC

Instructed by Bowman Gilfillan Attorneys

S32 Au health study

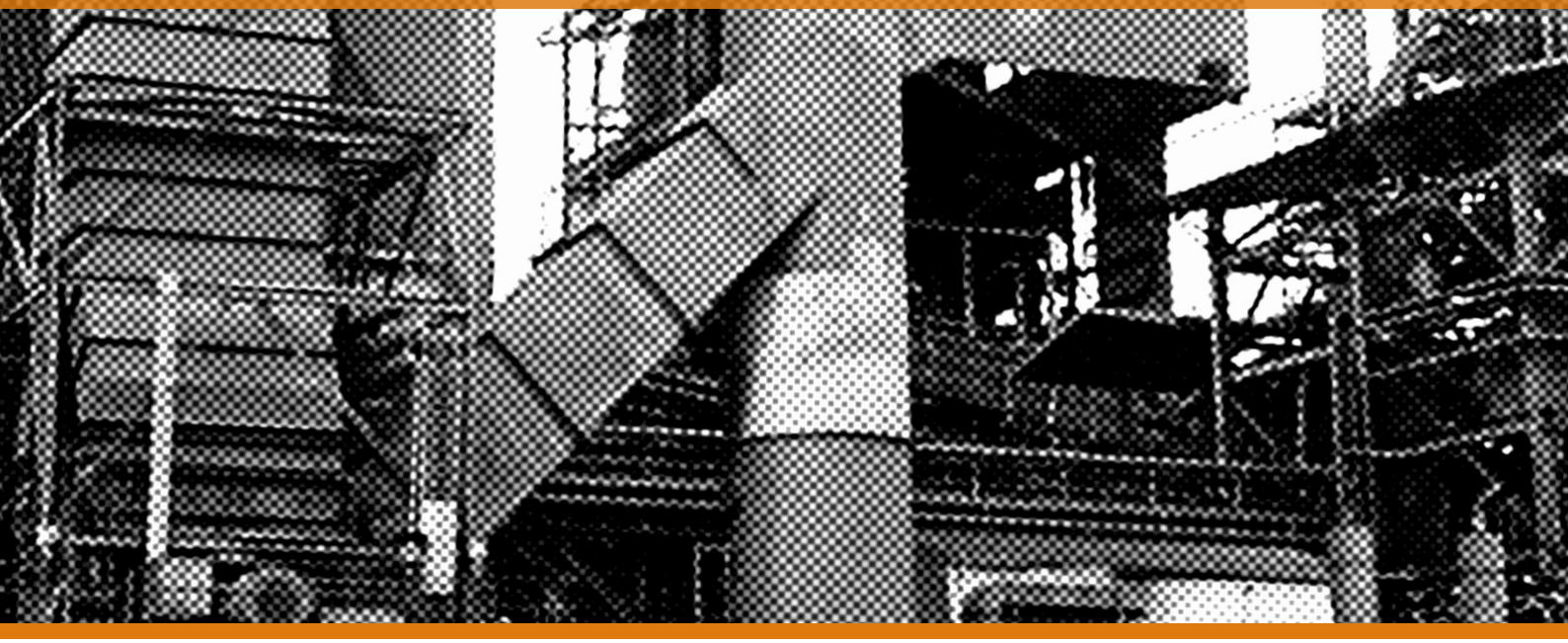
https://www.abc.net.au/news/2023-02-15/groote-eylandt-manganese-mine-dust-fears/101969728?fbclid=IwAR0dXJ8Vffrbq_wcqZjvibn75WxgPPsSCoTP32ULn-pfLdB_oyMeENTI6vM

CASE STUDY

POLITICS & SOCIETY

THE CASE OF CERRO MATOSO, COLOMBIA

WHY ENVIRONMENTAL DUE DILIGENCE MATTERS IN MINERAL SUPPLY CHAINS



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GERMANWATCH

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Brief Summary

The Colombian extraction project of Cerro Matoso is situated in the south of the department of Córdoba. The region is considered the most critical in terms of human rights violations during the internal armed conflict in Colombia. The local communities accuse BHP Group and South 32 (which demerged from BHP in 2015) of contributing to the aggravation of their living conditions. The mine has lacked proper environmental conservation measures for decades, leading to the pollution of water, soil and air with toxins that have devastating consequences for the health of the population. Environmental governance and institutional accountability in this conflict and post-conflict setting is weak.

The study points to the difficulties of holding companies responsible for health damages in the population that are linked to environmental pollution caused by companies. The Cerro Matoso case was heard by the Constitutional Court of Colombia. Here, conflicting assessments were made about the cause-effect relationship between human health, environmental damage and mining activities. Due to the difficulty in establishing a clear link between the damage to health and past corporate activities, the compensation payments initially ordered by the court were subsequently annulled. Further, the environmental licence and defined measures were so unspecific that it was not possible to make Cerro Matoso responsible for the environmental damage it caused.

Better preventive environmental protection by Cerro Matoso might have avoided serious human rights violations in the neighboring communities. A corresponding environmental approach should therefore also be anchored in corporate due diligence obligations. It is important to design environmental due diligence requirements in such a way, that they define concrete and environmental specific obligations for corporates along their value chains. This would make it clear to companies which measures and responsibilities they must take to protect the environment. In the event of damage, it would thus be possible to determine the responsibility of companies in relation to their level of disregard of environmental due diligence. Compared to a solely human rights approach, environment-related due diligence would make complicated procedures for determining the cause-effect relationship between corporate activity, environmental damage and health impact could obsolete.

Content

1 Quick Facts

Mining details and background information	Operator is Cerro Matoso S.A., subsidiary of Australian company South 32. The latter demerged from the BHP Group in 2015, one of the world's largest resources companies. The mine is one of the largest ferronickel production plants in the world with an area of approx. 84,989 hectares.1 In operation since 1960, the concession was first extended until 2029 and then until 2044, despite protests from the local population and claims of inadequate environmental management of the mining site. South 32 exports its mining products to over 18 countries. South 32 generates 2% of its revenues from Germany.[2] In 2019, Germany was the fourth largest importer of nickel in the world.[3]
Operation in a context of conflict and human rights violations	Operation takes place in a context of conflict and weak environmental governance: In the area surrounding the mine, various forms of violence against the civilian population occurred more frequently, with selective killings, massacres, disappearances, abductions and displaced persons. This situation continues today – since the implementation of the Colombian peace agreements in 2016, 37 social leaders have been murdered in Cordoba and more than 200 threats have been reported. In the course of 2020, murders, including of minors, by criminal organisations, displaced persons and a push for territorial control among paramilitary groups have continued to be registered. More than 3,000 members of the army, police, navy and air force are deployed in southern Cordoba. In this kind of (post-) conflict context, public environmental governance is weak. Environmental destruction by the mining company has led to health-related human rights violations. Until 2018, the mining operation has lacked arrangements for consultation, participation and complaint mechanisms for affected communities and other stakeholders.
Documented environmental damages	Beginning October 2012, the Comptroller General's Office contested the validity of Cerro Matoso's environmental license, since it did neither delineate the exploitation area, nor did it define measures for mitigation and environmental compensation. Considerable amounts of carcinogenic heavy metals, polycyclic aromatic hydrocarbons and a variety of complex oxides were detected in the atmosphere; polluting water sources and leading to a loss in biodiversity.

[1] Cinep (2014). Córdoba la tierra y el territorio. Aportes para el debate. [Cordoba the land and the territory. Contributions to the debate]. Available at https://www.cinep.org.co/publicaciones/PDFS/7.Cordoba.pdf (accessed 4 September 2020)

[2] South 32 (2015): Making a Difference from the Ground Up. Roadshow Presentation. Available at https://www.bhp.com/-/media/bhp/documents/investors/reports/2015/150317_south32roadshowpresentation.pdf (accessed 27 November 2020)

[3] Statista (2020): The world's leading importers of nickel and nickel products in 2019, by country. Available at: https://www.statista.com/statistics/1116992/global-nickel-imports-by-country/ (accessed 27 November 2020)

	The local population suffers from serious health damages, which expert reports have linked to the contamination of the environment.
Peculiarity of the case	The case was heard by the Constitutional Court of Colombia. Although South 32 was first ordered to pay reparations and compensation, parts of the ruling were subsequently annulled. South 32 appealed the ruling by doubting the cause-effect relationship between human health damages, environmental pollution and past and present business activities of Cerro Matoso.

2 Background and History of the Cerro Matoso Mine

2.1 Mining operations in the midst of armed conflict

The department of Cordoba is considered an ecologically very valuable region. Bordered by the Sinu and San Jorge rivers, it is home to the protected area known as the Paramillo National Natural Park. However, Cerro Matoso – one of the largest open-pit ferronickel mines in the world – operates in its southern area. In the same region, the National Government has granted 60 valid mining permits and is processing 180 applications for exploitation. Between 2012 and 2018, Cerro Matoso exported ferronickel to 18 countries.[4] However, this wealth of mining activity does not translate into a greater well-being for the population; on the contrary, in the last years, this region has become a space contested by illegal armed actors who seek to appropriate the lands of rural communities, as denounced by the local inhabitants.[5]

For more than 20 years, the inhabitants of the San Jorge river basin have suffered one of the highest levels of human rights violations during the internal armed conflict in Colombia. Targeted killings, massacres, forced disappearances, abductions and individual and mass displacements[6] have been on the agenda and, despite the fact that more than three thousand army, police, navy and air force troops patrol this area[7], the Ombudsman's Office issued 11 early warnings for three of these municipalities between 2016 and 2020. According to the Cordobexia Foundation, since the implementation of the Colombian Peace process, 37 social leaders have been killed in Córdoba and more than

[4] Cerro Matoso sigue en deuda con los Zenúes [Cerro Matoso still indebted to the Zenú]. Available at: https://www.eltiempo.com/datos/cerro-matoso-en-deuda-con-los-zenues-352258 (accessed 7 October 2020)

[5] Consolidación del extractivismo en el Sur de Córdoba: Afectaciones sobre el derecho a la tierra y el territorio. [Consolidation of Extractivism in Southern Córdoba: Effects on the Right to Land and Territory] Available at: https://www.pas.org.co/consolidacion-extractivismo-cordoba (accessed 4 December 2020)

[6] Cinep (2014). Córdoba la tierra y el territorio. Aportes para el debate. Available at: https://www.cinep.org.co/publicaciones/PDFS/7.Cordoba.pdf (accessed 4 September 2020)

[7] Nueva masacre en Córdoba, esta vez atribuida al Clan del Golfo, deja tres muertos [Another massacre in Cordoba, this time attributed to the Gulf Clan, leaves three dead]. Available at: https://www.elespectador.com/noticias/judicial/se-registra-la-segunda-masacre-en-cordoba-en-menos-de-una-semana/ (accessed 1st October 2020)

200 threats have been reported.[8] Information from PAS indicates that 52% belonged to a Communal Action Board, 48% held or had executive positions within it, 71% were in turn members of a regional organisation and 67% were also members of national social organisations which demanded compliance with what was agreed in the Peace Agreement.[9]

2.2 The role of companies in the Colombian conflict

The armed conflict of Colombia has a background of economic interests, in which the armed groups' financing sources are linked to their control over natural resources. Together with the state's inability to manage these resources equitably and effectively, this has led to an exacerbation of violence, land dispossession, forced displacement of communities, and the destruction and pollution of the environment, among others.[10]

The United Nations and the OECD have recognised that business-related human rights violations often occur in areas affected by armed conflict and other situations of systematic and/or widespread violence.[11] The situation in the south of Cordoba is no exception. Companies like Cerro Matoso are aware that they operate in a risky area.

An important fact to bear in mind is that there are 20 special energy battalions in Colombia securing the economic infrastructure of major hydrocarbon, energy and mining projects. The purpose of these units is not to provide public safety but to safeguard foreign investment.[12] One of these battalions is in charge of the security of Cerro Matoso.[13]

There is no evidence of Cerro Matoso S.A. direct involvement in conflict structures and activities. Nevertheless, the militarization of corporate operations turns the mining company into an indirect actor in a non-transparent conflict. In Colombia, energy battalions have been repeatedly associated with serious human rights violations, including rapes and extrajudicial executions of people who opposed mining projects. Researchers and human rights activist have stated that

[8] Liderar en medio de la guerra, Situación de defensores y defensoras de Derechos Humanos en Córdoba [Leading in the midst of war, Situation of Human Rights Defenders in Córdoba]. Accessed 4 September 2020. Available at: https://www.pas.org.co/liderar-en-guerra

[9] Pensamiento y Acción Social -PAS. Proteger los Defensores Colectivos de Derechos Humanos un desafío para las Políticas Públicas [Thought and Social Action -PAS. Protecting Collective Human Rights Defenders is a challenge for Public Policies]. Available at www.pas.org.co (from 10 December 2020 onwards)

[10] Lavaux, S. (2007): Natural Resources and Conflict in Colombia: Complex Dynamics, Narrow Relationships. In: Canada's Journal of Global Policy Analysis. Vol. 62 (1), p. 19-30

[11] OECD (2016): OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. Available at: https://www.oecd.org/corporate/mne/mining.htm (accessed 4 December 2020)

[12] Massé, F. And Camargo, J. (2012): Actores Armados Ilegales y Sector Extractivo en Colombia. Available at: https://www.procuraduria.gov.co/iemp/media/file/Actores_armados_ilegales_sector_extractivo%20Fr%C3%A9d%C3%A9ric%20Mass%C3%A9.pdf (accessed 17 November 2020)

[13] MINDEFENSA: El Sector Defensa comprometido – Infraestructura: una oportunidad para otros sectores. Available at http://proyectos.andi.com.co/Documents/CEE/Colombia%20Genera%202015/Viernes/JoseJavierPerez.pdf (accessed 17 November 2020)

> *"even though these military units are deployed in areas where the conflict with the guerrilla insurgency has been most serious, which is the argument used by the government for their existence, the key goal is the defense of the transnational companies against the legitimate territorial rights of indigenous, farming and Afro-Colombian communities. This activity provokes major social conflicts, massacres and forced displacements directly related to the invasive policy, much of it carried out in collusion with the army, paramilitaries and companies."*[14]

The internal conflict has left its mark on Colombia; weak governance structures lead to inadequate regulation and profound weaknesses in the protection of human rights. Weak regulations give companies also enormous flexibility in (not) implementing environmental protection measures, which can fuel conflicts still further, as is the case for Cerro Matoso.

It is well known that mining, and particularly open-pit operations, cause significant impact and damage to territories, communities, the environment and people's health. After 40 years of operations at Cerro Matoso and almost 60 years of nickel exploitation in the area, the result is that the development of business activity has left aside important environmental measures that would have limited – in part – the scenario that the communities are currently facing.

2.3 History of the Cerro Matoso mine

1963	The former Ministry of Mines and Petroleum and the Richmond Petroleum Company of Colombia sign a contract for the exploitation of nickel and other minerals.
1971	The company Empresa Colombiana de Níquel S.A. Econíquel controls the operation.
1980	The rights are assigned to the company Cerro Matoso S.A., owned by the multinational BHP Group (previously BHP Billiton).[15]
1999	The national government grants Cerro Matoso S.A. the right to exploit the concession areas until 2029.[16]
2012	The right to operate is further extended until 2044. • The local communities lodge a complaint that the environmental licence needs to be re-processed by Cerro Matoso, because the contracts had been modified and because the environmental impact would increase.[17] • However, the mine continues to operate without renewing the environmental licence. • This complaint is followed by a court case, brought before the Constitutional Court in 2017.

14 Gisbert, T. and Pinto, M. J. (2014): Colombia: Militarisation serving extraction. Available at: https://wri-irg.org/en/story/2014/colombia-militarisation-serving-extraction#sdfootnote4sym (accessed 4 December 2020)

15 Listed on the Australian and New York stock exchanges.

16 Corte Constitucional de Colombia, Sentencia T-733/17, available at https://www.corteconstitucional.gov.co/relatoria/2017/t-733-17.htm (accessed 17 November 2020)

17 Cerro Matoso sigue en deuda con los Zenúes [Cerro Matoso still indebted to the Zenú]. Available at https://www.eltiempo.com/datos/cerro-matoso-en-deuda-con-los-zenues-352258 (accessed 7 October 2020)

2015	Spin-off process: South 32 now controls the operation.[18] This multinational • is listed on the Australian stock exchange, • carries out extraction and/or production activities of different minerals in Australia, South America and South Africa at a global level • managed its marketing out of Singapore with support offices in London, South Africa, and Australia
2017-2018	The Constitutional Court rules Cerro Matoso guilty for violating of the fundamental rights of the local population. However, after an appeal of Cerro Matoso, the ruling is annulled in important parts, because (among others) Cerro Matoso challenges the assumed chain of effect between the mining operations and health damages.
Important detail	The company obtained an environmental licence in 1981, which since then has not been updates and is thus not in line with environmental regulation as defined in Law 99 of 1993. The Comptroller General's Office considered the license invalid from October 2012 on, as it did neither delineate exploitation areas nor define measures to mitigate or to compensate for environmental damage.

3 Uncontrolled environmental pollution

3.1 Toxic air pollution and water contamination

The mining operation is placed in the centre of the Alto San Jorge Zenú Reservation. With the construction of thirteen furnaces (185 metres long and 6 metres in diameter) in 1980, "the inhabitants of the municipalities near the mine began to notice a drastic change in their surroundings, feeling the negative impacts on their land, the environment, their water sources and their health".[19] Ferronickel is extracted from open pit mines, where the material is melted in furnaces at high temperatures. Therefore, depending on the conditions of the deposit, considerable quantities of fine dust, heavy metals, metallic nickel, polycyclic aromatic hydrocarbons and a variety of complex oxides are released into the atmosphere. All these compounds, with the exception of metallic nickel, are classified as carcinogenic to humans by the International Agency for Cancer Research. [20] *The Ministry of Environment and Sustainable Development* has indicated that "ferronickel production activity is

[18] BHP Billiton Latest News: South32 Demerger Implemented (25 May 2015). Available at https://web.archive.org/web/20151101014400/http://www.bhpbilliton.com/investors/news/south32-demerger-implemented (accessed 17 November 2020)

[19] Fallo sobre Cerro Matoso muestra a Corte dividida por indemnizaciones [Ruling on Cerro Matoso shows Court divided over compensation]. Available at: https://www.eltiempo.com/justicia/cortes/se-cae-reparacion-a-victimas-de-cerro-matoso-271100 (accessed 8 September 2020)

[20] Corte Constitucional de Colombia, Sentencia T-733/17, available at https://www.corteconstitucional.gov.co/relatoria/2017/t-733-17.html (accessed 17 November 2020)

likely to generate emissions of toxic substances of environmental and public health interest into the air". However, Colombia does not have regulations establishing maximum permissible levels of nickel extraction, nor methods of measurement. [21]

In addition, Cerro Matoso has water concessions for its production process and receives both surface water and groundwater supply at high volumes (over 230 l/s) without any evidence of water-use efficiency and water-saving programmes in the administrative acts of the concession. Compensation is limited to the planting of one hundred trees regardless of the flow rate granted to the company. It has discharge permits to discard wastewater and runoff in volumes of over 108 l/s to the Uré and the San Jorge rivers, as well as emissions permits for the 13 chimneys that correspond to the ferronickel process. This international emissions permit is not based on current environmental regulations, and according to the administrative act, the permit is provisional. [22]

The *Attorney General's Office* pointed out that the water coming from the mine, rainwater and in general waste and industrial water, is disposed of in a dump that discharges into the El Tigre river. The Health Secretary of the Puerto Libertador municipality confirms that it "receives environmental pollution from the Cerro Matoso mine". The *Ombudsman's Office* explains that " clouds of dust and slag [...] are going to the communities", and different kinds of environmental damage occur (for example, contamination of water sources such as the San Jorge and Uré rivers, via the Uré and Tigre streams). Species such as herons have disappeared and fish stocks are decreasing; there have been losses of flora and fauna, trees have suffered from pollution, food production has decreased, and there is a danger of food shortages for the affected communities. [23]

Cerro Matoso lacks a monitoring network of hydrometeorological variables that would allow for the adjustment of the models of flow patterns of water sources located within the mine's direct area of influence, as well as atmospheric indicators. The environmental compliance reports presented by Cerro Matoso to the environmental authorities do not include evaluations of the indicators in long-term historical series, which is an important aspect when analysing the cumulative impacts caused by the mine. [24] The affected communities have demanded the Ministry of the Environment to corroborate the impacts caused by Cerro Matoso and to establish environmental management policies and plans for the area. Communities have further demanded the government to transparently define compensatory measures and mandatory environmental investments to the company, in order compensate for past damages and to mitigate further harm.

[21] Ibid.

[22] Ramírez. N. (2019). Logística de exportación de Escoria de ferroníquel producida por la empresa Cerro Matoso a Estados Unidos [Export logistics of ferronickel slag produced by the company Cerro Matoso to the United States]. Montería: Universidad de Córdoba.

[23] Corte Constitucional de Colombia, Sentencia T-733/17, available at https://www.corteconstitucional.gov.co/relatoria/2017/t-733-17.html (accessed 17 November 2020)

[24] Ibid.

3.2 Contradictory environmental regulation

The environmental controls of the Cerro Matoso mine are headed by two environmental authorities, the *Corporación de Los Valles del Sinú y San Jorge* (CVS) and the *Agencia Nacional de Licencias Ambientales* (ANLA). However, CVS's role is obsolete, as it does not have the equipment to verify the environmental reports submitted by the company. According to reports from the *Comptroller General of the Republic*, Cerro Matoso lacks a valid environmental licence since 2012, as the outdated license does neither define the limits of exploitation, nor mitigation measures and environmental compensations. [25] Furthermore, the mine has an environmental management tool dating from 1981, which for 25 years (between 1981 and 2006) was not supervised by the Colombian government and was not adapted to the current mining operation. The National Mining Agency (ANM), however, disagreed with the assessment made by the *Comptroller General of the Republic*, arguing that the environmental license of Cerro Matoso was still valid. There is thus uncertainty about the environmental legal basis of the mining operation but definitely a weak implementation of the minimum standards. [26]

However, the true environmental damage is even greater when looking at the indirect environmental costs of the mining project. The mining project is supplied with energy from the Hidroituango dam. The mine consumes more electricity than the nearby city of Barranquilla (with more than one million habitants). The construction of the dam has contributed to massive and well-documented environmental damage and human rights abuses. German companies supported the construction technically and financially.[27]

Cerro Matoso has recognised that the impacts on forestry are irreversible, due to expansive slag deposits[28]. However, considering that the concession is scheduled to last until 2044, it is worth noting that the company apparently does not have conservation measures to recover the environmental damage existing in operation zone. Assessments and monitoring results by the company on water and air parameters do not exist or are not public.

The only measure taken in response to this worrying situation has simply been to address the damages by staggered planting of native trees, in a ratio of 10 trees planted for every tree felled.[29] This type of decision is left to the discretion of the company and there is no authority in Colombia, either at the regional or national level that would call for a progression towards ecological restoration plans including restoration of forest covers and biodiversity conservation programmes or the like. In the absence of national regulations, effective and proper due diligence by international companies significantly addresses and prevent some of these damages.

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[25] Cerro Matoso sigue en deuda con los Zenúes [Cerro Matoso still indebted to the Zenú]. Available at https://www.eltiempo.com/datos/cerro-matoso-en-deuda-con-los-zenues-352258 (accessed 7 October 2020)

[26] Morelo, G. and Castillejo, S. (2019). The Zenú village surrounded by a mine. Available at: https://tierraderesistentes.com/en/index.php/2020/03/25/el-pueblo-zenu-acorralado-por-el-desarrollo-minero/ (accessed 27 November 2020)

[27] Grieger, F. (2020): Kolumbiens Palast der Tränen. Available at: https://www.berliner-zeitung.de/wirtschaft-verantwortung/rio-cauca-in-kolumbien-palast-der-traenen-li.5167 (accessed 4 December 2020)

[28] South 32: Reporte de Sostenibilidad (2018), p. 90, available at http://www.cerromatoso.com.co/media/ReporteSostenibilidad2018CMSA.pdf (accessed 4 December 2020)

[29] Ibid.

4 The challenge of holding companies accountable for health damages caused by environmental pollution

4.1 Constitutional court ruling confirms human rights violations and enforces remedies

There are nine indigenous communities located in the impact area of the Cerro Matoso mine project.[30] However, the company claims that when operation started, communities were not recognised as indigenous (official recognition was granted in 1999). According to the company, this is why consultations and negotiations with these communities were not held in the past, but started from 2018 onwards by order of the Constitutional Court.

The company demanded that the indigenous communities, in order to be valid interlocutors, should constitute themselves as a Reservation ["*Resguardo*"] before the Ministry of the Interior. This led to the Resguardo Zenú of the Alto San Jorge beginning the process of constitution in 1996 – 18 years later, in 2014, it was recognised as such by the Ministry. During this process, 48 members of the community were killed (between 2004 and 2015), ten of which were local land rights leaders seeking to establish the Reservation.[31]

In 2013, the communities submitted two guardianships or "*tutelas*"[32], in which they warned of the proliferation of cancer, skin diseases and the increase in miscarriages in their communities, demanding protection of their fundamental rights to health, a safe environment and prior consultation. The Constitutional Court, in Ruling T-733/17[33], ruled to:

Company level	a.	order the company to issue a new environmental licence, based on the obligations assumed in the previous consultation, which includes mechanisms to correct the environmental impacts of its operations until the estimated time of completion, ensuring the health of people, as well as the protection of the environment;

[30] According to the 2015 Census of the Directorate of Indigenous, Roma and Minority Affairs of the Ministry of the Interior, Colombia, cited in Corte Constitucional de Colombia, Sentencia T-733/17, available at https://www.corteconstitucional.gov.co/relatoria/2017/t-733-17.htm (accessed 17 November 2020)

[31] Cerro Matoso sigue en deuda con los Zenúes [Cerro Matoso still indebted to the Zenú]. Available at: https://www.eltiempo.com/datos/cerro-matoso-en-deuda-con-los-zenues-352258 (accessed 7 October 2020)

[32] A mechanism enshrined in the Political Constitution of Colombia in Article 86, which seeks to protect the fundamental rights of individuals when any of these are violated by acts, facts or omissions of any public authority.

[33] Corte Constitucional de Colombia, Sentencia T-733/17, available at https://www.corteconstitucional.gov.co/relatoria/2017/t-733-17.htm (accessed 17 November 2020)

	b.	**order Cerro Matoso to provide comprehensive and permanent health care to people registered in the Ministry of Interior's census, as well as to communities, for diseases related to the company's extraction operations;**
	c.	order Cerro Matoso to pay for the damages caused to the members of the communities;
	d.	order Cerro Matoso to finance and put into operation a Special Ethnic Development Fund for the reparation and compensation of victims from a collective and ethnic perspective for the damage caused from decades of mining,
State and company level	e.	protect the fundamental rights of ethnic communities to prior consultation, health and the enjoyment of a safe environment;
	f.	order that prior consultation be carried out, in which measures of environmental protection, mitigation and compensation are established with respect to the damages that could be caused by the on-going extraction work by Cerro Matoso;
State level	g.	order the Ministry of Health and Social Protection to set up a health brigade to conduct medical assessments of the communities and build their epidemiological profile;
	h.	order the Ministry of Environment and Sustainable Development to regulate the concentration limit values for water and air, with regard to the chemical substances iron and nickel, to adjust the regulatory instruments where applicable in accordance with the standards of the World Health Organization; and
	i.	order that administrative adjustments are adopted to ensure strict and effective environmental control over extraction activities of Cerro Matoso and compliance with the mitigation, prevention and compensation measures agreed to in the consultation process. It also includes specific protection strategies aimed at decontaminating the ecosystem (air, soil and water bodies); adopting technical methods to prevent the lifting and dispersion of particulate material; restoring the Caño Zaimo water basin; restoring the productive capacity of the affected land; recovering the landscape; and isolating the mining complex by means of artificial and/or natural barriers.

4.2 Annulation of compensations, setback for human rights

This ruling by the Constitutional Court was of great importance as it allowed the National Institute of Legal Medicine and Forensic Sciences to take 1,147 blood samples and record the percentages of mining-related diseases in these samples, which established a correlation between the proximity of the mine and the manifestation of diseases.[34]

However, after the results of the study were made public, South 32 challenged results and requested the annulment of the orders, arguing it had not failed to comply with its environmental management of the mine. [35] It underlined its argumentation by the following:

> *The Court misinterpreted the medical report issued by the Colombian Institute of Legal Medicine, which clearly and unequivocally stated that it is not conclusive, since a relationship of direct causality was not established between the impact found in the population and the Cerro Matoso operation.* [36]

The case was reopened and the judges reassessed the orders based on the medical report and Cerro Matoso's environmental documents. The compensation payments were at the centre of debate and became finally annulled. According to the court and the company, the medical study did not allow systemic conclusions to be drawn about the cause and effect relationship of the mining operation and the environmental impact on the one hand and the health effects on the other hand.

Colombia lacks clear thresholds and regulation on toxic iron and nickel emissions that – together with uncertainties about the validity of the environmental license among the competent authorities – further complicated the legal assessment and made it even more difficult to held Cerro Matoso liable for environmental damage and the resulting health issues.

The court annulated those parts of its ruling in 2018 that made Cerro Matoso S:A liable for the damages caused to the communities. This decision included the annulation of the obligation to create an ethno-development fund for the reparation and compensation of the victims. However, it is important to note that judges reaffirmed those orders that obliges Cerro Matoso S.A. to provide ongoing health care to community members and to submit to a new consultative environmental licensing process.[37]

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[34] Ibid.

[35] Fallo sobre Cerro Matoso muestra a Corte dividida por indemnizaciones [Ruling on Cerro Matoso shows Court divided over compensation]. Available at: https://www.eltiempo.com/justicia/cortes/se-cae-reparacion-a-victimas-de-cerro-matoso-271100 (accessed 8 September 2020)

[36] Morelo, G. and Castillejo, S. (2019). The Zenú village surrounded by a mine. Available at: https://tierraderesistentes.com/en/index.php/2020/03/25/el-pueblo-zenu-acorralado-por-el-desarrollo-minero/ (accessed 27 November 2020)

[37] Ibid.

Nevertheless, the decision runs counter to the aspirations of the affected communities that have linked the annulation of the compensation payments to allegations of corruption. Current investigations against Cerro Matoso indicate that these accusations are likely. The mining company is accused of tax evasion and bribing representatives of the mining authority.[38]

According to Cerro Matoso, its communication channels maintain a permanent dialogue with its stakeholders and those affected by its business activities, which is in sharp contrast to the claims and lawsuits discussed above. In its sustainability reports of 2018 and 2019, the company refers to the court ruling. In 2019, it reports that it compiled a new environmental impact study as a re-requisite to renew the environmental licence and handed it in to the ANLA; that until the end of 2019 no-one requested the health services that the company had to provide according to the sentence and which were offered through the IPS Panzenú Foundation. Accordingly to its report, it also finished the process of "prior" consultation with eight affected communities, declaring that a follow-up committee is in place as a mechanism to verify the company's compliance with the agreements resulting from the consultations (such as, for example, an environmental monitoring programme).[39] During the "prior" consultations, indigenous and Afro-Colombian spokespersons criticised that at least two of the representatives of the company and the participating state institutions had worked for both of them, creating a conflict of interest.[40]

4.3 Environmental due diligence as an approach to prevent human rights violations

The case illustrates the difficulties to hold holding corporations accountable for health damages caused by an environmental pollution that is directly linked to their business activities. Communities and civil society organisation have claimed that contamination of water, soil and air has been the result of insufficient environmental protection measures by the mining company.[41] However, it has been difficult, from a legal perspective, to hold Cerro Matoso liable for health damages caused by cumulative processes of environmental contamination. Since environmental governance is weak (both regulation and implementation) in countries that suffer from (post-) conflicts, environmental

[38] Valora Analitik (2020): Millonario proceso de responsabilidad fiscal en mina de níquel de Cerro Matoso en Colombia. Available at: https://www.valoraanalitik.com/2020/02/18/millonario-proceso-de-responsabilidad-fiscal-en-mina-de-niquel-de-cerro-matoso-en-colombia/ (accessed 4 December 2020)

[39] South 32 Cerro Matoso: Reporte de sostenibilidad 2019, p. 26, available at http://www.cerromatoso.com.co/media/ReporteDeSostenibilidad_2019_CMSA.pdf (accessed 4 December 2020)

[40] El tiempo (23 April 2019): The Zenú village surrounded by a mine (by Ginna Morelo and Sara Castillejo), available at https://tierraderesistentes.com/en/index.php/2020/03/25/el-pueblo-zenu-acorralado-por-el-desarrollo-minero/ (accessed 4 December 2020). See also the documentary with English subtitles: https://www.eltiempo.com/datos/indigenas-zenu-acorralados-por-la-mineria-en-cordoba-352240

[41] Morelo, G. and Castillejo, S. (2019). The Zenú village surrounded by a mine. Available at: https://tierraderesistentes.com/en/index.php/2020/03/25/el-pueblo-zenu-acorralado-por-el-desarrollo-minero/ (accessed 27 November 2020)

concerns must play a more important role in due diligence measures of companies. Buyers of minerals along the supply chain should push their producers to implement environmental mitigation and compensation measures to avoid negative health impacts to the communities.

Due Diligence regulations that push for preventive environmental action along supply chains, could be crucial to avoid health damages and human rights violations caused by environmental contamination. An environmental due diligence approach should refer to environmental monitoring and management measures, e.g. including references to emission thresholds, while companies need to demonstrate their compliance or check for compliance of their business partners. Environmental due diligence could therefore be a suitable instrument to avoid complicated approaches of mapping the cause-effect relationships between corporate action, environmental damage and its impact on humans. In case of non-compliance with environmental protection measures and monitoring, it could be sufficient for affected people to prove that environmental damage has occurred from corporate activities that ignored environmental due diligence requirements, rather than having to determine and demonstrate the causality to the resulting human rights violations.

5 Conclusions for environmental due diligence

>>Recommendations for International and national environmental due diligence legislation

As the present case shows, the internal conflict has left its mark on Colombia; weak governance structures and corruption contribute to inadequate regulation and profound weaknesses in the protection of human rights and the environment. Weak regulations give companies enormous flexibility in (not) implementing environmental protection measures, which can fuel conflicts even further, as is the case for Cerro Matoso. Corporate due diligences should therefore be seen as an important approach to counteract possible regulatory weaknesses in producing countries. In this context, the UN Guiding Principles for business and human rights acknowledge the responsibility of companies to respect human rights also along their transnational business activities and urge states to enforce compliance with the principles also along transnational relationships. However, most countries have not (yet) integrated the UN Guiding Principles into national legislation.

It is the duty of all states to hold their companies accountable for human rights violation, especially when those companies operate in countries with conflicts and weak governance. South 32 and BHP are based in Australia and Great Britain. These countries have strong capacities to implement legislation and to establish reliable governance structures to ensure compliance of their nationally registered companies with the UN Guiding Principles. Therefore, it is important that the UN Guiding principles are efficiently implemented in national legislation and that companies are required to implement due diligence measures for their procurement practices.

However, the UN Guiding principles address environmental damage only if it leads to human rights violations that are directly linked to specific corporate activities. As this case study shows, human rights violations are often connected to slow processes of environmental deterioration and occur as a consequence of cumulative events and causes. In contrast, environmental due diligence would start earlier and should define obligations to act for companies along the supply chain with the aim of preventing environmental degradation, beyond potential impacts on humans. It is therefore particularly important to establish an explicit environmental reference within due diligence laws. Moreover, it could be useful to establish sector specific requirements and references for due diligence measures.[42] The OECD Guidelines for Multinational Enterprises (2011) and the OECD Guidance on Responsible Business Conduct (2018) are already pointing the way forward, but require more detailed and sector-specific approaches within binding regulation.

The mining and extractive industries, in particular, are risk sectors for the occurrence of human rights violations and environmental destruction in international supply chains. Therefore, it is welcome that the German governmenthas committed itself to initiate an international process to specify environmental due diligence requirements and measures for the mining sector. Even if these guidelines will only have a voluntary character, it could be a first step into the right direction.[43] Special consideration should be given to the definition of thresholds for chemical emissions, as well as the necessary monitoring systems required. Moreover, the guidelines should have an overview of the best available technic, mining-specific protective measures and define requirements for renaturation concepts for the closure phase. Most important the drafting process has to involve civil society perspectives from the supply countries.

Crucial is that environmental due diligence does not remain a guidance and that concrete duties for corporation derive from a binding legislations. Therefore, it is very welcome that the European Council recently agreed that Europe needs to work on a Human Rights and Environmental Due Diligence Legislation and also EU Commissioner for Justice, Didier Reynders, announced such a regulation to be presented in early 2021. It is key that the draft the European Commission will include civil liability.

Another important point is, that the current EU regulation on conflict minerals focusing on 3TG (tin, tungsten, tantalum and gold), which comes into force in 2021, is far too simplified. Ferronickel, while not being covered by the conflict minerals regulation, can play a role in violent conflict. Thus, it is important that in the course of a revision in2021, more minerals will be incorporated into the scope of the regulation.

[42] Verheyen, R. (2020): Ein deutsches Lieferkettengesetz. Echte Chance für den Umweltschutz. Stellungnahme mit Schwerpunkt auf materiellen Sorgfaltspflichten und Umsetzung am Beispiel besonders gefährlicher Chemikaliengruppen (Textilindustrie). Available at: https://www.greenpeace.de/sites/www.greenpeace.de/files/publications/s03111-greenpeace-lieferkettengesetz-stellungnahme-20200818.pdf (accessed 27 November 2020)

[43] German Ministry for Economy (2020). Die deutsche Rohstoffstrategie. Available at: https://www.bmwi.de/Redaktion/DE/Publikationen/Industrie/rohstoffstrategie-der-bundesregierung.html (accessed 27 November 2020)

>> What companies need to consider in Environmental Due Diligence

In the case of Cerro Matoso, operator have lacked an updated environmental license for years and compliance with environmental regulations was inadequately monitored by state authorities. Because of lacking environmental management and conservation measures, the mining operations have polluted the environment with toxic substances over decades resulting in serious health damages in the neighbouring communities. Early environmental management and the taking of preventive measures could have prevented human rights violations.[44]

Therefore, also from a human rights perspective, due diligence should include a more preventive approach towards environmental concerns by embedding measures aimed at preventing environmental damage from occurring. As outlined in this paper, we understand environmental due diligence to be such a preventive approach, but one that needs further concretization both legally (as outlined above) and from an implementation perspective. In the following, we would like to present first possible starting points for the implementation of an environmental due dilligence in companies.

Risk assessment: Purchaser should asses the most relevant environmental risks along their supply chains. For supply relationships with high environmental risk potentials, such as direct or indirect business relationships with mining companies, further assessment is crucial to develop appropriate measures. These analyses have to take into account the perspectives of those affected, for example through an assessment of documented complaints or through an exchange with local civil society organisations or other representatives.

Measures to avoid or to compensate for environmental damage: National and international purchasers of mining products need to oblige their suppliers to provide concepts and documentation of environmental and social management plans and push for their implementation. They need to evaluate how these management plans assess, prevent, and mitigate (potential) damages of mining operations. An environmental due diligence should verify that government permits are not only valid but that corresponding conservation measures are in line with international standards (for example in terms of emission thresholds) .

Since 2001, the European environmental management system EMAS already includes a corresponding supply chain approach to address indirect environmental impacts that arise from business relationships.[45] Environmental managements systems are a good starting point for environmental due

[44] Morelo, G. and Castillejo, S. (2019). The Zenú village surrounded by a mine. Available at: https://tierraderesistentes.com/en/index.php/2020/03/25/el-pueblo-zenu-acorralado-por-el-desarrollo-minero/ (accessed 27 November 2020)

[45] Henn, EV, and Jahn, J. (2020): Rechtsgutachten zur Ausgestaltung einer umweltbezogenen Sorgfaltspflicht in einem Lieferkettengesetz. Available at: https://lieferkettengesetz.de/wp-content/uploads/2020/07/lieferkettengesetz_rechtsgutachten_umwelt.pdf

diligence but need to be more closely intertwined with the risk approach of human rights due diligence.[46]

As, German companies import 5,400 t of ferro-nickel fromCerro Matoso[47], a central criterion for potential and future buyers of Cerro Matoso should be an evaluation of the implementation process of the restoration and health measures as defined in the court ruling[48].

Stakeholder engagement: In the case of Cerro Matoso, until 2018 there has been no consultation or exchange of information with stakeholders, although they have actively and vehemently called for an exchange with the company and participation in decision-making processes, as stated in this document. Only the court ruling and the associated orders to carry out appropriate consultations have changed the situation in recent years. However, it is not yet possible to assess the effectiveness of these measures at this time.

Thus, buyers should take action to ensure that the rights of the communities affected by the mine are respected and protected. To this end, it is essential that the mining company has conducted verifiable and documented consultations with all stakeholders and has disclosed all information about the known and anticipated impacts of the project in an understandable manner. Effective complaint mechanisms need to be in place to enable communities to communicate complaints about (environmental) damages to buyers and to improve stakeholder engagement.

6 Conclusions for duties of the Colombian state

As far as the duty of the Colombian State is concerned, there is a need to create a law that establishes the maximum levels of emissions in the extraction of ferronickel. With regard to corporate environmental accountability, the Colombian authorities should generally implement a stricter process and a more effective system of monitoring mines. Given that the damages caused by Cerro Matoso involve environmental and atmospheric pollution, it is necessary to review its balance in terms of greenhouse gas production, water consumption, measures to prevent pollution, production of waste or residues, and set it in relation to the necessary compensation and benefits for people affected and/or displaced by the mining activity. This includes the implementation of real programmes that generate livelihoods for affected communities, protection and conservation of biodiversity, and improvement of the natural habitat. Companies such as Cerro Matoso should be required to publicly announce and evaluate their mitigation measures; this information should be

[46] Schwerf et al. (2020): Umweltbezogene und menschenrechtliche Sorgfaltspflichten als Ansatz zur Stärkung einer nachhaltigen Unternehmensführung. Available at: https://www.umweltbundesamt.de/publikationen/sorgfaltspflichten-nachhaltige-unternehmensfuehrung (accessed 27 November 2020) [47] Chatham House (2020): Resource Trade Earth. Data Available at https://resourcetrade.earth/ (accessed 27 November 2020

[47] Chatham House (2020): Resource Trade Earth. Data Available at https://resourcetrade.earth/ (accessed 27 November 2020

[48] German Industry imports 44% of its ferro –nickel from Colombia. As there only is one ferro-nickel mine in Colombia the ferro-nickel has to be from this mine.

available and known to the communities, beyond their sustainability reports. There should be greater transparency and disclosure of what the company is exploiting and marketing.

Ultimately, this case highlights the need to implement environmental policies in the context of mine closure. Colombian authorities should demand a mine closure plan from Cerro Matoso for the next 24 years that includes the assessment, mitigation and compensation of social and ecological damages caused and the restitution of human rights violated to the surrounding communities and victims of the mining operation. It should also establish the company's responsibility for the renaturation of the mining area. A permanent evaluation of the environmental management system used should be carried out, ensuring the involvement of impact groups, consultation with local communities on how the mine closure should be carried out and, consequently, establishing the responsibilities of the company, with the highest international standards on this matter.

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