

Next stop in Sishen saga is the Concourt

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THE DEPARTMENT of Mineral Resources and Imperial Crown Trading (ICT) have lodged their application to appeal judgments by the high court and Supreme Court of Appeal, which granted a 100 percent exclusive right over Sishen mine to Sishen Iron Ore Company (SIOC).

The Constitutional Court will decide on September 3 whether to hear the appeal.

A 21.4 percent mining right over Sishen was held by ArcelorMittal South Africa, a local subsidiary of the global steel giant, with SIOC holding the remaining 78.6 percent. SIOC now holds 100 percent of the right at Sishen after the court judgments.

ArcelorMittal SA lost its right after it failed to convert its old-order mining right to a new-order right by April 30, 2009 – as required by the Mineral and Petroleum Resources Development Act.

The department awarded ICT the 21.4 percent prospecting right in 2009, but later the high court ruled that ICT should not have been awarded the prospecting rights. SIOC became the exclusive mining right holder at Sishen as from May 2009.

The case between the State and SIOC, a subsidiary of Kumba Iron Ore, lies at the heart of transformation in the mining industry.

In papers lodged on Wednesday, the State argued that “transformation is a matter of high constitutional principle”. It also said that SIOC’s application was limited to the conversion of its 78.6 percent share.

It said ArcelorMittal SA’s “21.4 percent right continued to exist from the date of the conversion of the order share until April 30, 2009. There is nothing semantic about the proposition that 78.6 percent cannot suddenly be conjured into 100 percent.”

ArcelorMittal SA benefited from a supply agreement with SIOC, which meant iron ore was supplied at cost plus 3 percent. After ArcelorMittal SA failed to convert its mining right, Kumba insisted that the agreement had ceased to exist. The dispute has been referred to arbitration.

In its submission to the Constitutional Court in July, SIOC argued that the decision by the Supreme Court of Appeals to uphold SIOC’s mining right was in line with the objectives of the Mineral and Petroleum Resources Development Act.

SIOC insisted that granting the 21.4 percent mining right to ICT would have no merits as it did not have the capacity to mine at Sishen. “The granting of the right will therefore not promote employment, economic growth, social welfare or development of mineral resources as contemplated by section 2 of the [act].”

ICT’s directors include Gugu Mtshali, who is reported to be the girlfriend of Deputy President Kgalema Motlanthe; Archie Luhlabo, a former member of the Mineworkers Investment Company; and Phemelo Sehunelo, Kimberley’s former municipal manager.

Ronnie Mendelow, a lawyer for ICT, pointed out that a successful appeal to the Constitutional Court did not mean that ICT would get the 21.4 percent share. “Any person could then apply for that 21.4 percent in that mining right should the Constitutional Court uphold the appeal,” Mendelow said.

The appeal is based on a Constitutional Court judgment in a case between Agri South Africa and the minister of minerals and energy.