WHERE PUBLIC-SECTOR ACCOUNTABILITY MEETS PRIVATE-SECTOR ACCOUNTABILITY IN MINING

LESSONS ON TRANSPARENCY FROM MARIKANA

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1. Introduction

After the death of 44 people in Marikana in August 2012, during a week of violence that involved employees of Lonmin Plc, the South African Police Service and Lonmin Plc security officials, the South African government commissioned an inquiry to examine Lonmin's policy, procedure, practices and conduct relating to its employees and organised labour. Among several questions the Inquiry was intended to determine was whether, by act or omission, Lonmin directly or indirectly caused loss of life or harm to persons or property during the violence of August 2012.[1] One of the major issues before the Commission, headed by Judge Farlam, was Lonmin's failure to implement its social and labour plan and the contributory role this played in the Marikana crisis. This Inquiry raised the long-standing question of corporate accountability and the role of the state, which calls for further reflection on how the relationship between these two actors can prevent further tragedies in South Africa.

2. Lonmin's and the state's abdication of their statutory duties

South African law provides that, in converting old-order mining rights into new rights under the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), extractive companies must submit a social and labour plan (SLP) for the duration of a mining right to the Department of Mineral Resources ('the Department').[2] Lonmin's subsidiary companies, East Platinum Ltd and West Platinum Ltd, had their plans approved in 2006. The SLPs provided that Lonmin would convert existing hostels into housing units and would build an additional 5 500 houses for its migrant employees.[3] These housing obligations were to be fulfilled by 2011, a year before the Marikana tragedy took place. Between 2006 and 2011, Lonmin completed only three show houses.[4]

At its first annual general meeting after the tragedy, the Chairperson of Lonmin acknowledged that the events leading up to the tragedy showed a breakdown of trust between the company and its workers.[5] Despite this admission, however, during the Commission of Inquiry, Lonmin attempted to

1 Proclamation no. 50 of 2012 published in *Government Gazette* no. 35680 of 12 September 2012.

2 Section 25(2)(f) & (h) of the Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA).

3 Marikana Commission of Inquiry, 'Report on matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana, in the North West province' ('Marikana Report'), p. 526.

4 Marikana Report, p. 535.

5 Marikana Report, p. 528.

The provisions of the MPRDA make SLPs legally binding upon approval. Subsequently, SLPs may only be varied by written consent of the Department. Section 47 of the MPRDA allows the Minister of Mineral Resources to suspend or cancel rights where they breach any material term or condition of a mining right.

reinterpret its housing obligations by claiming at one point that the 'performance of its housing obligations could not be examined without an examination of the responsibility and performance of local authorities in the area [with regard to the provision of] housing'.[6] At another point, Lonmin claimed that its role was not to construct houses, but 'to broker an interaction between [its] employees and private financial institutions in terms of which employees would be able to obtain mortgage bonds to build their own houses'.[7]

At the Commission of Inquiry, Lonmin attempted to restrict the scope of its statutory SLP obligations, despite its admission in its sustainable-development report and previous sustainable-development report that it had a financial commitment of R665 million in respect of housing construction and that failure to meet the obligation concerned could lead to the withdrawal of its mining licences.[8]

The provisions of the MPRDA make SLPs legally binding upon approval. Subsequently, SLPs may only be varied by written consent of the Department.[9] Section 47 of the MPRDA allows the Minister of Mineral Resources to suspend or cancel rights where they breach any material term or condition of a mining right. Prior to its attempt to vary its obligation at the Commission of Inquiry, Lonmin had unilaterally varied its housing obligations in its 2009 SLP report by changing the construction target for the first three years of its SLP from 3 200 houses to three.[10] This report also provided that any further housing construction would be based on 'a contingent obligation to build houses only for workers who could obtain mortgages, and then only when at least 50 applicants with approved home loans approached' the company.[11]

When the Department eventually learnt of Lonmin's unilateral repudiation, it rejected this and continued to hold Lonmin responsible for its SLP obligations. The Commission of Inquiry found that Lonmin's 'failure to comply with its housing obligations created an environment conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct'.[12]

However, in defence of its actions, Lonmin asked in one of its post-Farlam reports: 'Where does the role and responsibility of the company begin and end and where does the role and responsibility of government begin and end?'[13] Certain considerations are necessary to answer this question.

6 Marikana Report, p. 524.
7 Marikana Report, p. 528.
8 Marikana Report, p. 534.
9 Section 47 of the MPRDA.
10 Marikana Report, p. 534.
11 Marikana Report, p. 535.
12 Marikana Report, p. 542.
13 Lonmin's Human Settlements Programme, 'Addressing the critical shortage of affordable housing for our employees.' Available at: http://www.lonmin-farlam.com/images/pdfs/factsheet_housing-accommodation_28-06-15.pdf.

There are several reasons for this state of affairs, that encompass: gaps in regulation; the need for an increased role by the state in enforcing compliance; the importance of third-party oversight in holding the state and corporations accountable for their obligations; and the lack of transparency, where intended beneficiaries have no access to the documents in which the ostensible benefit is detailed.

3. When corporate accountability fails and state oversight is lacking

The incredible discovery of the failure of Lonmin's subsidiaries to comply with their SLPs, thereby constituting a unilateral repudiation of statutory obligations, would most likely have gone unnoticed and continued to go unsanctioned[14] had the Marikana events not occurred. There are several reasons for this state of affairs that encompasses: gaps in regulation; the need for an increased role by the state in enforcing compliance; the importance of third-party oversight in holding the state and corporations accountable for their obligations; and the lack of transparency, where intended beneficiaries have no access to the documents in which the ostensible benefit is detailed.

Firstly, Lonmin's variation of its housing obligations in its SLPs was a breach of the material term of its mining right. Despite this provision and the lack of public knowledge[15] that Lonmin had decided to breach its obligations and would continue to violate the terms of its SLP, the Department failed to suspend or cancel Lonmin's mining rights. Such action on the part of the Department has not been without precedent. In 2011, the Department temporarily cancelled Central Rand Gold's mining right because it failed to comply with its SLP plans, but then faced public pressure from corporate backers for 'drastic' measures such as licensing suspensions and cancellations not to be undertaken because of the potentially negative effect on investor confidence.[16] Similar pressure is being exerted in a dispute currently before the Johannesburg High Court, in which the South African Chamber of Mines is requesting the court to determine, in effect, whether shareholders' rights should trump transformation objectives prescribed in the statutory Mining Charter, the objectives of which form the basis of the objectives of SLPs.[17] As a result of these pressures, the Department has resorted to threatening the use of its powers of sanction, rather than ever enforcing compliance.

Secondly, public access to SLPs remains limited. Companies are not required to make their SLPs publicly available and access can only be obtained through the Promotion of Access to Information Act 2 of 2000 (PAIA). In an ongoing research project being conducted by the Centre for Applied Legal Studies (CALS), the accessibility of 50 SLPs is being tested through submission of requests for information under PAIA. The CALS confirms that nearly half of the responses received from extractive companies denied access and that the Department only agreed to grant access after protracted negotiations. The CALS project report indicated that the Department was open to dialogue and that the walls of secrecy are not impregnable.[18] However, the report cautions that

14 The applicable sanctions will be suspension or revocation of the mining licence.

15 Lonmin had published in its 2009 SLP report the decision to change its housing commitments from 3 200 to three by 2009, but this fact was not widely known, since this information had only been made available in its SLP report to the Department, which would not have been easily accessible by the beneficiaries of the housing commitments.

16 See: http://www.bdlive.co.za/opinion/2016/02/15/the-steps-sa-must-take-to-rejuvenate-mining-industry.

17 This dispute relates to the decision by the Department to make the transfer of 26% ownership equity in extractive companies permanent and not available for resale as currently applicable; see: http://www.bdlive.co.za/business/mining/2016/03/11/court-to-decide-whether-redressing-racial-inequality-trumps-shareholder-rights.

18 CALS, 'Environmental Justice Programme: Social and Labour Plan Project' Final report to Open Society Foundation of South Africa, 2016 (copy on file with the author).

This severe lack of access, which is not assisted by the high cost of using PAIA, objectifies SLP beneficiaries, who have a primary interest in the content of these documents.

'access is possible but it is an elite form of access, available only to those with time, resources and relationship-building know-how'.[19]

It is highly unlikely that beneficiaries of SLPs requesting access to SLPs without the support of lawyers and other public-interest organisations would have made this much progress.[20] This severe lack of access, which is not assisted by the high cost of using PAIA, objectifies SLP beneficiaries, who have a primary interest in the content of these documents.

Thirdly, the lack of community participation in the development of SLPs and the failure of regulations to give communities oversight status during the implementation of SLPs stunt the possibility of a framework of accountability developing between corporates and host communities. There is no duty on companies to consult communities in the design of SLPs. In addition, in terms of the law, only workers are required to know the detail of SLPs and affected communities are excluded.[21] Without a statutory requirement for SLPs to involve the intended beneficiaries, it is not surprising that there is a breakdown of trust among mining companies, their employees and affected communities.

Fourthly, Regulation 46 of the MPRDA requires SLPs to provide financial information on the implementation of the approved SLP alongside an undertaking by the holder of the mining right to comply with the plan. Despite this provision, Lonmin continued to make the argument to its shareholders that their dip in revenue made its financial commitments to the SLP impossible.[22] While this assertion was factually incorrect,[23] it also displays a gap in regulation: from the perspective of the Department, what financial guarantee is required to ensure that SLP requirements are complied with? And what should happen when financial setbacks occur?

The fifth point relates to the lack of transparency on the part of the Department and other oversight authorities in relation to the availability of licensing data. The Minister of Mineral Resources has acknowledged that lack of access to licencing data evokes suspicion of the licencing regime and has confirmed that the status of licencing applications for mining and exploration would be available online for public access in 2016.[24] However, this public availability excludes the conditions attached to the licences to enable public scrutiny to drive implementation.[25] The Department has created a Mineral Resources Administration System where the public can view the locality of applications, rights and permits made or held in terms of the MPRDA.[26]

A penultimate issue relates to the dire lack of administrative and institutional capacity within the Department. The Minister of Mineral Resources has also admitted that allegations of corruption and incompetence have been levelled against the Department, and has committed to addressing these

19 See note 18.

20 See: http://www.bdlive.co.za/opinion/2016/02/18/mining-plans-ignore-affected-people.

21 Regulation 46 of the MPRDA.

22 Marikana Report, p. 534.

23 Marikana Report, p. 538.

24 See: http://www.internationalresourcejournal.com/features/january11_features/mine_regulations_changing_in_south_africa.html.

25 However, the environmental regulations now require a holder of an environmental authorisation to load it on its website.

26 See: http://portal.samradonline.co.za/forms/login.aspx?ReturnUrl=%2fdefault.aspx.

A final issue relates to the current lack of proactive disclosure and the importance of such disclosure for building trust.

concerns.[27] Lonmin's attempt to reinterpret its SLP obligations is a form of creative compliance, which requires a strong institutional mechanism to support an equally strong enforcement regime. As stated earlier, Lonmin could have complied with its housing obligations despite the financial pressures, and it requires the state to firmly enforce these obligations without creating additional pressures on the industry.

A final issue relates to the current lack of proactive disclosure and the importance of such disclosure for building trust. Since the release of the Farlam report post-Marikana, Lonmin has begun to proactively release a series of succinct reports online on its community spending on different transformation projects.[28] These reports are presented to look like voluntary corporate social responsibility spending as opposed to mandatory SLP commitments. Whether these reports are accurate is unknown, and it would require third-party oversight and audit to verify the accuracy of the information released. What is further unknown is the extent to which these online reports are communicated in an accessible format and language to Lonmin's stakeholders, who, in general, do not have online access. This begs the question: For whom are these reports intended? Despite the public release of these reports, some of Lonmin's information relating to SLPs remains buried inside its annual report that members of affected communities or employees might be unable to access. For instance, Lonmin indicated in its 2015 Annual Report that it intended to seek the Minister's permission to amend its SLP.[29] This information, including the extent of amendment, needs to be made available in a more accessible form to SLP beneficiaries.

Given these highlighted issues, how then can the public and private sector be brought closer together to ensure accountability within the extractive industry?

4. What can be done: Transparency at the heart of reform

During the Marikana Commission of Inquiry, Lonmin representatives argued that the company's failure to build 5 500 houses would have had no effect on the tragedy, because it employed 28 000 employees.[30] At the heart of Lonmin's argument was a failure to recognise that its breach of its SLP commitments played a contributory role in the breakdown of trust between the company and its employees. Lonmin failed to see that, had it honoured its commitments, its employees would have been more trusting of the company's ability to take care of their needs.

The role and responsibilities of companies begin when they display a genuine commitment to comply with state laws and regulations. Mining companies need to respect their licensing conditions and need to change an industry culture that only pays lip service to transformation objectives. The new mining order in South Africa is premised on the constitutional principles that aim to give effect to 'the State's custodianship of the nation's mineral and petroleum resources and to promote equitable access to the nation's mineral and petroleum resources [for] all the people of South

27 See: http://www.internationalresourcejournal.com/features/january11_features/mine_regulations_changing_in_south_africa.html.

28 See www.lonmin-farlam.com.

29 Lonmin 2015 Annual Report, p. 51.

30 Marikana Report, p. 539.

To implement these, a strong political will on the part of government leaders is needed in order for the state to fulfil its role as the custodian of natural resources on behalf of all South Africans. When we begin to achieve these, we can begin to slowly develop positive legacies from the tragedy of Marikana.

Africa.'[31] This is only possible where the private sector accepts its responsibility for ensuring that exploitation of the country's mineral resources will always be conditional on the social and economic welfare of all South Africans.

As a result, the state and private sector should work together as partners, and the private sector should resist attempts to frustrate the oversight and enforcement role of the state. Both the public and private sector should recognise their role as custodians on behalf of the people and should therefore make SLPs proactively accessible.

In addition, mining laws should ensure the participation of all mining stakeholders in the design of SLPs. These stakeholders should be included in oversight and enforcement responsibilities and should be consulted not only during the design of SLPs, but also throughout the lifetime of an SLP, and, in addition, when an amendment is sought.

The state and the private sector should also publish licensing data, conditions and commitments, and the measures to be adopted to guarantee the implementation of these commitments, in order to earn the trust of the public. This would require an audit of the current licences in existence and that all data be made publicly available to the extent that only highly sensitive commercial information can be protected.[32]

This will require strengthening the capacity of the Department of Mineral Resources to adequately carry out its monitoring and enforcement functions. It will also require statutory amendments that will mandate the proactive disclosure of information with enough detail on what must be publicly published, including the means of verifiability and the various modes of public availability to prevent exclusion of access for any group of people. To implement these, a strong political will on the part of government leaders is needed in order for the state to fulfil its role as the custodian of natural resources on behalf of all South Africans. When we begin to achieve these, we can begin to slowly develop positive legacies from the tragedy of Marikana.

31 Section 2(b) & (c) of the MPRDA.

32 The Centre for Environmental Rights submitted a total of 67 requests to the Department between 2010 and 2014; in that period, 32 requests were denied, with the most common ground of refusal used by the Department being section 36(1) of PAIA, which mandates the protection of the commercial information of third parties. This PAIA provision requires a narrow interpretation by the law to ensure that the objectives of PAIA are complied with. (Centre for Environmental Rights, 'Money Talks: Commercial interests and transparency in environmental governance', 2014, pp. 7–8.). The new financial-provision regulations under the National Environmental Management Act 107 of 1998 also require the new financial provisions to be audited.

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About the series (briefing papers)

The Open Society Foundation for South Africa periodically commissions research papers on topics related to our portfolio on *Promoting Extractive Sector Transparency and Accountability*. This publication forms part of a series of three briefing papers commissioned in 2016 on select topics related to transparency, disclosure practices and accountability in South Africa's extractive sector.

The series focuses on the role of transparency in sustainable mineral development, the intersection between public and private sector accountability in mining, and reflections on enhancing government's capacity to address non-disclosure in the mining industry.

We hope that the series is a useful knowledge resource for the work of our grantees, our partners and the many mine-affected communities in South Africa.

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