

MASSACRE AT MARIKANA

Michael Power & Manson Gwanyanya

- *A failure of oversight and the need for direct community involvement* •

ABSTRACT

This paper assesses the findings of the Marikana Commission of Inquiry against Lonmin – the mining company at the centre of a wage dispute that led to the deaths of 34 protesting mineworkers in South Africa’s platinum belt – and the South African Department of Mineral Resources (DMR), particularly in relation to: (1) Lonmin’s failure to provide adequate housing to mineworkers; (2) DMR’s failure to exercise appropriate oversight over Lonmin; (3) how Lonmin and the DMR helped create an environment conducive to the massacre; and (4) how little will change without direct community involvement and oversight.

KEYWORDS

Marikana | South Africa | Department of Mineral Resources | South African Police Service | Lonmin

1 • Introduction

On 16 August 2012, 34 protesting mineworkers were shot and killed by members of the South African Police Service (SAPS) near a *koppie*¹ in Marikana,² located in South Africa's North West Province. A further 79 mineworkers were injured and 259 were arrested. The mineworkers, employed to mine platinum at Lonmin's Marikana operations,³ were protesting against Lonmin for a "living wage" of R12,500 per month (approx. \$930). During the week preceding the shootings, 10 people were killed, including two private security guards and two police officers.

The Commission of Inquiry (Marikana Commission) that was appointed by South African President Jacob Zuma following the massacre found, among other things, 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."⁴

This paper assesses the findings made against Lonmin by the Marikana Commission, particularly in relation to Lonmin's failure to provide adequate housing to mineworkers in terms of its Social and Labour Plan (SLP), and considers the DMR's failure to exercise its legal oversight obligations over Lonmin. It argues that this may be an additional component of the so called "toxic collusion between the State and capital"⁵ argued at the Marikana Commission and it was one of the primary contributing factors that led to the wage dispute and subsequent Marikana Massacre. This paper concludes by arguing that despite the continuing public outrage, neither Lonmin nor the DMR have substantially redressed these systematic failures and, as a result, direct community involvement and oversight is necessary to avoid future fatalities.

2 • SLPs & findings relating to Lonmin and the DMR

In its terms of reference, the Marikana Commission was tasked to determine "whether [Lonmin] by act or omission, created an environment which was conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct".⁶ The original terms of reference also required the Marikana Commission to investigate the role played by the DMR and determine whether it had acted in terms of its legal obligations.⁷ This obligation was, however, removed from the Marikana Commission's updated terms of reference published on 5 May 2014 and deferred for consideration to "a later stage".⁸

In its report, published on 26 June 2015, the Marikana Commission devotes a full chapter to Lonmin's conduct – ultimately finding that Lonmin was responsible for creating tensions within its workforce, which led to the wage dispute and contributed to the resultant massacre. The Marikana Commission found that Lonmin's responsibility was, primarily, as a result of its failure to implement its housing obligations in terms of its SLP.

What is an SLP?

“SLPs can be viewed as part of a broader project aimed at addressing the legacy of colonialism and apartheid.”⁹ In terms of the 2010 Revised Social and Labour Plan Guidelines (SLP Guidelines), published in terms of South Africa’s Mineral and Petroleum Resources and Development Act 28 of 2002 (MPRDA), SLPs “require applicants for mining and production rights to develop and implement comprehensive Human Resources Development Programmes, Mine Community Development Plans, Housing and Living Conditions Plans, Employment Equity Plans, and processes to save jobs and manage downscaling and/or closure” in South Africa’s extractives industry.¹⁰ Importantly, SLPs are legally required for the exercise of mining rights.

Lonmin’s implementation of its SLP at Marikana

Lonmin’s Marikana operations predated the enactment of the MPRDA. As a result, in order for Lonmin to convert its old-order mining rights in respect of the Marikana Mine to mining rights compliant with the MPRDA, it had to have a SLP approved by the DMR.¹¹ In terms of its proposed SLP, Lonmin committed itself to “phasing out all existing single sex hostel accommodation, converting most existing hostels into bachelor or family units and building an additional 5,500 houses for their migrant employees.”¹² In 2006, the DMR approved Lonmin’s proposed SLP and, as a result, it became legally binding on Lonmin. It is worth noting that an SLP can only be amended with the written consent of the DMR, which, in the case of Lonmin, was never given or sought.¹³

According to the findings of the Marikana Commission, following the conversion of its mining rights, Lonmin defaulted consistently in the performance of its SLP obligations, particularly in relation to housing:

- By the end of the 2009 financial year, Lonmin had built only 3 “show houses” of the proposed 3,200 houses it had undertaken to build in the first three years of its 2006 SLP. It had also only converted 29 of the 70 proposed hostels.¹⁴
- By 16 August 2012, Lonmin had built only 3 of the proposed 5,500 houses it had undertaken to build by September 2011 in terms of its 2009 SLP.¹⁵
- It was common knowledge that large numbers of Lonmin workers lived in “truly appalling” squalid informal settlements surrounding the Lonmin mine shafts, lacking basic social services.¹⁶

In justification of its conduct, Lonmin argued that as a result of the 2008 financial crisis, it could not afford to construct houses for its employees, and, contrary to its legal obligations, its employees did not want to purchase houses. However, Lonmin’s justification in relation to the 2008 financial crisis was considered implausible by the Marikana Commission as a result of it having paid \$607 million in dividends to its shareholders between 2007 and 2011, with the estimated cost of its proposed housing project totalling only R665 million (approx. \$65 million).¹⁷

As a result, the Marikana Commission found that that Lonmin's failure to comply with its housing obligations helped create an environment conducive to the massacre.¹⁸ This finding was ultimately corroborated by Lonmin's appointed representative at the Marikana Commission who, in cross-examination, conceded that:

[T]he board and executive of Lonmin understood that the tragic events at Marikana were linked to that [housing] shortage.¹⁹

The oversight role of the DMR

Following the 5 May 2014 amendments to the terms of reference of the Marikana Commission, the Commission was no longer mandated to enquire into the role played by the DMR. However, in its findings, the Commission states that:

- 1. Lonmin's failure to comply with the housing obligations under the SLPs should be drawn to the attention of the [DMR], which should take steps to enforce performance of these obligations by Lonmin.²⁰*
- 2. In view of the fact that the Commission has found that Lonmin did not comply with housing obligations in the SLPs...it is recommended that the topics dealt with in the deleted paragraph [of the amended terms of reference], in particular the apparent failure by the [DMR] adequately to monitor Lonmin's implementation of its housing obligations should be investigated.²¹*

Despite the findings made against Lonmin by the Marikana Commission, the DMR is mandated in terms of the MPRDA to play an oversight role and, where necessary, suspend or terminate mining rights where non-compliance with an SLP is established. At no stage between 2006 and the massacre did the DMR adequately exercise this oversight function, despite clear violations by Lonmin of its SLP obligations. As discussed below, the DMR continues to threaten Lonmin with legal sanctions but – 11 years since Lonmin's submitted its 2006 SLP – it is yet to act.

3 • The exploitation of natural resources and human rights standards

The Marikana Commission found that it is generally accepted that the wage dispute at Marikana, led by migrant labourers,²² and the subsequent killing of the protesting mineworkers was, in part, as a result of deplorable living conditions and the lack of basic services in the Marikana community. A large number of Lonmin's employees lived and still live in squalid informal settlements surrounding Lonmin mine, despite domestic and international obligations on Lonmin and the DMR to ensure compliance with human rights standards. The call for a "living wage" of R12,500 that initiated the wage dispute should not be viewed

only in monetary terms, but also as a call for better living conditions, an abandonment of the *status quo*, and a demand to be treated in a humane and dignified manner.

Domestically, the right to adequate housing is provided for in South Africa's Bill of Rights.²³ In terms of South Africa's Companies Act,²⁴ and the MPRDA, Lonmin has a duty to ensure that in its operations it promotes compliance with the Bill of Rights as provided for in the Constitution. The Constitution and the MPRDA further require the DMR to exercise oversight over mining operations. International standards such as the United Nations (UN) Guiding Principles of Business and Human Rights (UN Guiding Principles) and various other international and regional human rights treaties,²⁵ which South Africa is party to, provide for the right to adequate housing, and dignity. The UN Guiding Principles, in particular, urge companies to have in place a "human rights due diligence process to identify, prevent, mitigate and where necessary redress human rights abuses connected to their operations."²⁶

Through the testimony of its appointed representatives at the Marikana Commission, Lonmin was well aware of the prevailing living conditions and housing shortages in Marikana, as was the DMR. The South African government blatantly failed to enforce the law by holding Lonmin accountable for their failure to implement their SLPs and the human rights violations that stemmed from the failure to uphold its obligations in terms of its SLPs. More so, the failure to hold Lonmin accountable undermines the objectives of South Africa's Mining Charter, which seeks to promote equitable access to the nation's mineral resources to all the people of South Africa as well as to the socio economic welfare of mining communities and labor sending areas, amongst other things.

Regrettably, as a recent Amnesty International report²⁷ correctly states, the current state of affairs for the mineworkers in Marikana remains fundamentally unchanged, despite the events of 2012, the findings of the Marikana Commission, and South Africa's legislative framework. In December 2016, South Africa's Presidency issued a progress work on the implementation of the recommendations of the Marikana Commission. Notably, it indicates that following a DMR inspection on 25 June 2015:

- Lonmin has completed the conversion of all of its hostels.
- Lonmin's revised 2014 SLP is "broad and without clear timelines on building houses and Lonmin has been directed... to revise this plan to address the living and housing conditions of mineworkers."
- Lonmin's revised 2014 SLP proposes the construction of infill apartments to replace the outstanding 5,500 houses that Lonmin committed to building.
- "A compliant housing plan will be requested from Lonmin, failing which immediate action in terms of suspension or cancellation of the mining right will be taken."²⁸

By 7 October 2016, the last known DMR inspection, 100 family units and 225 bachelor units had been built by Lonmin, a far cry from the 5,500 houses proposed in its 2006 SLP.

Despite the findings of these inspections and Lonmin's culture of non-compliance, it continues to mine.

4 • “Toxic Collusion” and the persistence of the *status quo*

One of the primary arguments made at the Marikana Commission, particularly by the legal representatives of the victims, was that there had been a “toxic collusion” between the state, primarily the SAPS, and Lonmin in an attempt to end the wage dispute. This collusion, it was argued, went beyond acceptable legal limits and was “*causal of the massacre and unlawful*”.²⁹ In relation to the so-called collusion between the SAPS and Lonmin, the Commission rejected the argument. However, the question of “toxic collusion” when applied to the relationship between Lonmin and the DMR was not directly considered.

The failing by the DMR to regulate Lonmin, particularly in relation to the implementation of its SLPs, and the failure of Lonmin, and its shareholders, to self-regulate is self-evident. The questions that remain is why did the DMR fail to act, why have state officials not been held accountable for their oversight failures, and how does Lonmin continue to mine?

Furthermore, the reasons why paragraph 1.5 of the original Terms of Reference, which initially enjoined the Commission to “investigate whether the role played by the [DMR] was appropriate in the circumstances, and consistent with their duties and obligations according to law” was subsequently deleted has not been sufficiently explained.³⁰ As a result of the amendment, the Commission was unable to make any direct findings on collusion, or otherwise, as the Commission was no longer mandated to investigate the role played by the DMR, or any other department or agency in relation to the massacre. Whether toxic collusion existed or the DMR, absent any collusion, failed to hold Lonmin accountable through its inaction remains formally undecided. Either way, the *status quo* persists for the people of Marikana.

5 • Conclusion

The Marikana Massacre has been compared to the Sharpeville and Soweto uprisings of 1960 and 1976, in which Apartheid police killed people protesting against the Apartheid system. In Marikana, 18 years after South Africa transitioned to a democratic state, people protested against the indignity of the living conditions imposed by a mining company, over which the state exercised oversight. Both pre- and post-Apartheid the police reacted with live ammunition. After Marikana, Lonmin has continued to default on its obligations, as has the DMR.³¹

Since the massacre, promises to alleviate the socio-economic conditions in Marikana have been made by the state and Lonmin. However, little if anything has been done to substantially address these issues. At the core of this inaction, is the blatant failure by the state to enforce its policies and legislation governing mining in South Africa. However, the public outcry and continued civil society and political pressure as a result of the Marikana Massacre and the state’s inaction in the extractives industry have had some positive effect. The massacre has led to renewed public calls for wide-spread reform in the extractives industry in South

Africa; it has led to the establishment of a new political party – the Economic Freedom Fighters – in South Africa’s party political space; the Association of Mineworkers and Construction Union – a labour union established shortly before the massacre – continues to challenge the dominance of the National Union of Mineworkers in both the gold and platinum mining sectors; and public order policing practices in South Africa are subject to a comprehensive review as a result of the continuing work of the Marikana Panel of Experts, established as a result of the report of the Marikana Commission. Importantly, Marikana has, in many ways, become a political symbol for the need for change, amidst state apathy.

Reform in South Africa’s mining sector still needs greater attention and Marikana has made it patently clear that additional checks and balances are needed in the extractives industry. Despite state inaction, mining companies need to ensure that their Corporate Social Responsibilities initiatives and, in particular, strategies for managing labour relations and their SLP obligations are met. Most importantly, the extractives industry, and the state, must put mining affected communities first. The extent to which communities are integrated into mining ventures is central to securing tangible socio-economic benefits for the host communities,³² and will allow necessary community oversight over mineral extraction and living conditions, with or without adequate state or civil society engagement. The struggle for accountability in South Africa’s extractives industry must be community-led. Communities, with vested interests, are best placed to ensure accountability: as an addition to, or in the event of the failure of, state oversight mechanisms.

Hopefully, the legacy of the Marikana Massacre – over time – will play a central role in empowering mining-affected communities and act a case study for the failures of corporate accountability and state oversight. In the interim, the struggle for accountability at Marikana, and in South Africa’s extractives industry, must continue.

NOTES

1 • A “koppie” is a South African noun denoting a small hill in a generally flat area.

2 • Marikana is located in South Africa’s platinum belt, which produces around 80 per cent of the world’s platinum supply.

3 • Alongside Anglo American Platinum (Amplats) and Impala Platinum (Implats), Lonmin is the third largest platinum producer in South Africa, and the fourth largest platinum producer in the world.

4 • “Marikana Report,” Marikana Commission of Inquiry, June 26, 2015, page 542.

5 • Marikana Commission of Inquiry, days 1-3, page 18, transcript.

6 • “Marikana Report,” 2015, 522.

7 • *Ibid*, 523.

8 • *Ibid*, 554-5.

9 • “The Social and Labour Plan Series, Phase 1: System Design and Trends Analysis Report,” Centre for Applied Legal Studies, March 2016, page 23, accessed May 28, 2017, <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/>

cals/documents/programmes/environment/resources/Social%20and%20Labour%20Plans%20First%20Report%20Trends%20and%20Analysis%2030%20March%202016.pdf.

10 • “Revised Social and Labour Plan Guidelines,” Department of Mineral Resources, October 2010, page 2, accessed May 28, 2017, <http://cer.org.za/wp-content/uploads/2013/03/SLP-guidelines-2010.pdf>.

11 • Section 23(1)(e) and 25(2)(f) and (h) of the MPRDA.

12 • “Marikana Report,” 2015, 526.

13 • According to the Revised Social and Labour Plan guidelines, 2010 a SLP may not be amended or varied without the consent of the Minister after the granting of the mining or production right to which the SLP pertains. See further the “Marikana Report,” 2015, 527.

14 • *Ibid*, 534-5.

15 • *Ibid*, 527.

16 • *Ibid*.

17 • *Ibid*, 539.

18 • *Ibid*, 542.

19 • *Ibid*, 527-8.

20 • *Ibid*, 554-5.

21 • *Ibid*, 555.

22 • See page 7 for an overview of South Africa’s migrant labour: “Smoke and Mirrors: Lonmin’s Failure to Address Housing Conditions at Marikana, South Africa,” Amnesty International, August 2016, accessed May 28, 2017, [https://](https://www.amnesty.org.nz/sites/default/files/AMNESTYLONMINREPORTFINAL11082016.pdf)

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23 • “Republic of South Africa Constitution,” South Africa, sec. 26, 1996, accessed May 28, 2017, <http://www.gov.za/sites/www.gov.za/files/images/a108-96.pdf>.

24 • “Companies Act 71 of 2008,” South Africa, sec. 7, 2008, accessed May 28, 2017, <http://www.justice.gov.za/legislation/acts/2008-071amended.pdf>.

25 • South Africa is party to the International Covenant of Economic, Social and Cultural Rights and the African Charter on Human and People’s Rights, which speak to the right to adequate housing.

26 • “Smoke and Mirrors,” August 2016, 4.

27 • *Ibid*, 12.

28 • Jacob Zuma, “Marikana: A Progress Report on Farlam’s Recommendations – Jacob Zuma.” PoliticsWeb, December 11, 2016, accessed May 28, 2017, <http://www.politicsweb.co.za/news-and-analysis/marikana-a-progress-report-on-farlams-recommendati>.

29 • “Marikana Report,” 2015, 505.

30 • “Proclamation 30 of 2014,” *National Gazette* 587, no. 37611 (May 5, 2014); deleted subparagraph 1.5 from the Original Terms of Reference, amongst other things.

31 • “Smoke and Mirrors,” August 2016, 45-51.

32 • Manson Gwanyanya, “The South African Companies Act and the Realisation of Corporate Social Responsibilities,” PER 18, no. 1 (2015): 3106.

**MICHAEL POWER** – *South Africa*

Michael Power is an Attorney of the High Court of South Africa, practising at the Legal Resources Centre, South Africa (LRC). He was a member of the LRC's legal team which represented a family of one of the victims at the Marikana Commission of Inquiry. He writes in his personal capacity.

email: mike.power@outlook.com

**MANSON GWANYANYA** – *South Africa*

Manson Gwanyanya is a Candidate Attorney at the Legal Resources Centre, South Africa (LRC), practising in the LRC's Open and Accountability focus area. He is currently assisting a family of one of the victims of the Marikana Massacre with a civil claim for damages against South Africa's Minister of Police. He writes in his personal capacity.

email: mansongwanyanya@gmail.com

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