Lonmin case shows how hard it is to hold mines to account

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In February, the North West High Court rejected the application from the Mining Forum of South Africa, representing the Bapo-Ba-Mogale community, to declare the minister responsible for mineral resources in breach of his statutory obligation to hold Lonmin to account for not complying with its Social and Labour Plan.

The Marikana Inquiry criticised Lonmin for its failure to deliver 5,500 houses it committed to building as part of its Social and Labour Plan. Photo: Nathan Geffen

This application was the latest in a battle between Lonmin and the host communities of its Marikana operations that has raged at least since the promulgation of the Minerals and Petroleum Resources Development Act and its regulations in 2004.

Lonmin applied for the conversion of its old mining rights over a part of the Bapo-ba-Mogale land that year, and was required to submit a Social and Labour Plan (SLP). These plans are required with any application for a mining right and should describe the company's plans to stimulate local economic development, develop skills and create employment and, crucially, to address the housing needs of its employees.

Even though these SLPs are designed to address the needs of the local host community and mitigate the impact of an influx of labour, these community members often have no idea what promises the mining companies have made to improve their lives. Companies long argued that the SLPs contained sensitive commercial information and therefore couldn't be disclosed. Communities countered that they had no way of holding mining companies to account if they didn't know what they had committed to doing.

Need for social and labour plans to be made public

But after the massacre at Marikana in 2012, the link between the failure of Lonmin to comply with its SLP and build the 5,500 houses it had promised and the tensions that erupted during the strike could no longer be ignored. The Marikana Inquiry called for Lonmin's SLP to be produced. When asked about its failure to build the promised houses (of which only three were finished), a representative of the mining company denied that the promise was ever for Lonmin to build those houses. Rather, he argued, the company merely promised to "facilitate the building of these houses" by finding money elsewhere. Lonmin simply ran out of money and could not implement its plans – nor could it find partners to bankroll their efforts.

Following the exposure of these failures through the Marikana Inquiry, communities have mobilised with increasing success to push for the release of SLPs at least to the intended beneficiaries. Recently, the Department of Mineral Resources has conceded the importance of publicly revealing these documents. In terms of the 2018 Mining Charter, every mine will be required to make its SLP available.

So the Bapo-ba-Mogale community had a copy of the latest SLP that Lonmin submitted for the period 2013–2018. As previously reported in *Groundup*, the community, through the Mining Forum of South Africa, approached the North West High Court in 2018 with the complaint that Lonmin was again not complying with its SLP obligations.

Lonmin, in reply, told the Court that while it may not have complied with the SLP precisely as it was set out, it had spent a substantial amount of money "on upliftment programmes" and other BEE projects and therefore could not be accused of attempting to escape its SLP responsibilities. As at the Marikana Commission of Inquiry, Lonmin argued that its financial position was not nearly as strong as projected at the time of the creation of the SLP and therefore it was not able to comply with all the commitments made.

Getting away with non-compliance

The difficulty for mining-affected communities aggrieved by the non-compliance with SLPs is that they are not able to hold the company to account directly. The mining company's legal obligation to comply with the SLP is towards the minister as the authority granting the mining right, not towards the beneficiaries of the SLP. So communities are dependent on the minister to take action against a company that shirks its responsibility.

In September 2016, following the damning findings by the Marikana Inquiry, the Department of Mineral Resources (DMR) admitted to Parliament that it had failed in its statutory obligation to hold Lonmin to account for never implementing its first SLP and building only three out the promised 5,500 houses. But by then, Lonmin was already three years into its next five-year SLP and community members were already up in arms about Lonmin's non-compliance with its further obligations.

After a meeting between the community and the DMR in July 2017, the DMR performed an SLP audit on Lonmin in August 2017 and found that, according to the High Court, "Lonmin had failed to meet its targets in respect of, amongst others, the Human Resources Development Programme and that Lonmin was behind schedule with regard to the implementation of the Local Economic Development Programme".

The DMR issued a notice to suspend Lonmin's mining activities with immediate effect in November 2017, directing the company to provide a plan by 5 December 2017 showing how, despite its stated financial difficulties, it planned to remedy its failure to implement the SLP. After a few unsuccessful attempts to comply, Lonmin produced a revised action plan and amended SLP by the end of January 2018 and the suspension notice was withdrawn.

The Mining Forum was dissatisfied by these actions. They contended the DMR fell short of taking positive steps to make Lonmin implement its SLP. the The Mining Forum approached the High Court for an order declaring that the Minister was in breach of his statutory obligations. It also asked the court to interdict a proposed transaction between Lonmin and Sibanye-Stillwater whereby Lonmin may be ceding its mining right to Sibanye without finalising the implementation of its SLP.

The court found that the community's real complaint was not that DMR did not take action, as it clearly did, but that it was unhappy with the action taken, namely DMR's decision to withdraw the suspension notice. The court held that the community should have attacked that decision using the correct legal mechanisms to do so. As a result, the challenge to DMR was dismissed. The court also dismissed the community's attempt to interdict the SIbanye-Stillwater transaction on the basis that the community produced insufficient evidence to show that the proposed transaction would have any impact on the implementation of the SLP.

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