

# IN THE MARIKANA COMMISSION OF INQUIRY

[HELD AT CENTURION]

---

## WRITTEN SUBMISSIONS OF THE BAPO BA MOGALE COMMUNITY

---

### INTRODUCTION

1. These written submissions serve to address issues raised by the evidence leaders in its preliminary report of Phase 2 dated 15 August 2014. The Commission initially envisaged to conduct the inquiry in two phases. This is no longer the case.
2. Phase 2 *“was intended to investigate the underlying causes that contributed to the Marikana events in August 2012 which resulted in the deaths of 44 people”*<sup>1</sup> and *“was tasked with examining whether, and if so how, the State, Lonmin Plc and other parties contributed to creating an environment which contributed to the violence and deaths”*.<sup>2</sup>
3. At the end of April 2014 the President limited the terms of reference of the Commission and precluded the examination of *“[t]he role played by the Department of Mineral Resources or any government department or agency in*

---

<sup>1</sup> See: Preliminary report, p 2

<sup>2</sup> See: Preliminary report. p 2

*relation to the incident and whether this was appropriate in the circumstances and consistent with their duties and obligations according to the law”.*<sup>3</sup>

4. Save for cross-examining a police witness the Bapo Ba Mogale did not cross-examine any other witnesses or lead any witnesses in Phase 1. It was always intended that it would participate in Phase 2 therefore these submissions is of relevance to Phase 2 only.
5. The preliminary report suggests that it was decided that the aforementioned matters could be best investigated at a later stage by the relevant government department and agencies. A comprehensive report, which we have not yet received, as well as the parties responses thereto would be submitted to the President together with the Commission’s report.
6. In these submissions we address the following:
  - 6.1. Lonmin’s failure to comply with its housing obligations;
  - 6.2. the transfer of the obligation of the State to the Bapo Ba Mogale to provide housing;
  - 6.3. the adverse socio-economic consequences created by the informal settlements as a result of Lonmin’s failure to comply with its housing obligations;

---

<sup>3</sup> See: Preliminary report, p 2

### **LONMIN'S FAILURE TO COMPLY WITH ITS HOUSING OBLIGATIONS**

7. The majority of Lonmin's workforce and their families reside on the property of the Bapo Ba Mogale, such as Wonderkop, Inkaneng and Segwaelane.
  
8. Except for Segwaelane, which is a semi-urban village, the rest of the occupied land of the Bapo Ba Mogale is undeveloped. Informal settlements have been established thereon. The majority of the residents in the informal settlements are migrant workers. Migrant workers appears to have migrated from elsewhere in South Africa and other SADC countries. The majority of migrant workers are from the Eastern Cape Province and Northwest Province.
  
9. Lonmin pays royalties to Bapo Ba Mogale to mine on its property. Lonmin's Social and Labour Plans<sup>4</sup> ("SLP") contained in its application for the conversion of old order mining rights to new order mining rights<sup>5</sup> "*were designed, in part, to address the housing needs of Lonmin's migrant workers*".

---

<sup>4</sup> See: Preliminary report, p 52

<sup>5</sup> held by Eastern Platinum Ltd and Western Platinum Ltd

10. In 2012 Lonmin's workforce comprised<sup>6</sup> of 28 230 permanent employees and 8 293 contracted workers<sup>7</sup>. During this period migrant workers accounted for between 60% and 70% of Lonmin's workforce<sup>8</sup>.
11. The preliminary report suggests that "*the bulk of Lonmin's migrant workers either live in "unacceptable single sex hostel accommodation on Lonmin property or in shacks in informal settlements like Inkaneng which do not have access to proper municipal services"*".<sup>9</sup>
12. The report makes the following important statements:<sup>10</sup>

*"The settlement patterns of workers had changed since 1994 from living in mine hostels, especially migrants, to a more diversified pattern in which most lived outside the mine in informal settlements, RDP houses, backyard shacks and villages. This meant that workers had to commute to work every day. However for the majority who lived in informal settlements, getting to work was relative easy as settlements were located outside the mine. Workers assembled at a pick-up point where mine busses arrived to transport them to shafts, a journey of between 15 – 30 minutes depending on which shaft."*  
**(emphasis added)**

and

*"In 2012 the majority of Lonmin workers resided in Wonderkop, a residential area within Marikana. The Wonderkop settlement was divided into formal and informal settlements. In the formal settlement, also known as Emzini ... local government had provided services including roads, water, sewerage,*

---

<sup>6</sup> See: Preliminary report, p 5

<sup>7</sup> With a total workforce of 36 523

<sup>8</sup> See: Preliminary report, p 6

<sup>9</sup> See: Preliminary report, p 52

<sup>10</sup> See: Preliminary report, p 18

*built houses and electricity. Its informal settlement, where most migrant workers lived with their families known as Enkaneni by isiXhosa speakers and Inkaneng ... by seTswana speakers, was divided into three areas: the old site where a small amount of infra-structure existed, semi-old and the new site with each progressively reflecting fewer services. Mineworkers had occupied this land illegally as it belong to the Bapo Ba Mogale tribal authority to whom Lonmin paid royalties and who viewed migrants as temporary dwellers making it unnecessary for it to provide permanent services. The geography of Wonderkop closely resembled apartheid homelands with most Batswana living separately from the amaXhosa migrants. This separation translated into differentiated services provided by the local government in the former and tribal authorities in the latter.” (emphasis added) 31 of 1996<sup>11</sup>*

13. According to the report Lonmin consistently failed to reach its targets to convert hostels and build houses as contemplated by its SLP. We discuss the targets hereunder.

## **2007 FINANCIAL YEAR**

14. In the 2007 financial year Lonmin’s target was the conversion of 25 hostels and the construction of 700 houses.
15. By the end of the financial year it had not built any houses or converted any hostels. The reason advanced by Lonmin was that<sup>12</sup>:

*“Whilst financing model (sic) has been agreed, the planned completion of 700 houses has not been achieved due to a number of barriers which are being addressed. Conversion of hostels targeted at 25 for the year is running behind*

---

<sup>11</sup> See: Preliminary report, p 32

<sup>12</sup> See: Preliminary report, p 32

*schedule and currently 29 are in progress and should be completed by March 2008.*<sup>13</sup>

## **2008 FINANCIAL YEAR**

16. By the end of the 2008 financial year, Lonmin's cumulative target was the conversion of 48 hostels and the construction of 2 000 houses. It only converted 29 hostels and did not build any houses. This failure to meet its targets was blamed on delays in the "*proclamation of areas*", presumably the proclamation of townships. It also blamed the depressed economy as an additional reason for not reaching its targets.

## **2009 FINANCIAL YEAR**

17. The target for the 2009 financial year was the conversion of 22 hostels (for a cumulative figure of 70 conversions from 2007 to 2009) and the construction of another 1 200 houses (for cumulative figure of 3 200 houses built from 2007 to 2009).
18. Lonmin only built three show houses and converted no hostels.
19. At that stage it was behind its own targets by 3 197 houses and 48 hostel conversions.

---

<sup>13</sup> See: Preliminary report, p 53

## **2010 FINANCIAL YEAR**

20. By the end of the 2010 financial year, Lonmin ought to have constructed 4 400 houses and converted 92 hostels.
21. However, in that financial year it built no houses and converted only 5 hostel blocks<sup>14</sup>. In 2010 Lonmin unilaterally repudiated the housing and hostel conversion obligations it had assumed in its SLP.
22. This repudiation was unacceptable to the then Department of Minerals and Resources (“DMR”). On 30 August 2010 the DMR called for<sup>15</sup> *“the reasons for the non-implementation and a plan to implement the following projects ... housing provisions, coupled with remedial measures”*
23. Lonmin did not implement a new human settlement strategy *“to facilitate decent affordable accommodation for [their] employees”* in the 2011 financial year.

## **2011 FINANCIAL YEAR**

24. No houses were built in the 2011 financial year. However, 26 hostels were converted. This amounted to total of 60 hostel conversions over the period 2007 to 2011. Lonmin was supposed to convert 114 hostels over this period.

---

<sup>14</sup> leaving it with 4 397 houses and 59 hostel conversions behind its target.

<sup>15</sup> This was done in terms of Section 93 of the Mineral and Petroleum Resources Development Act, 28 of 2002

## 2012 FINANCIAL YEAR

25. The preliminary report suggests that no additional houses were built in 2012 or 2013. Lonmin's draft 2013 SLP close out report is the source of this assumption.
26. It is also reported that a total of 84 hostel blocks had been converted by the end of 2012 financial year and predicated that by the end of December 2013 that a total of 108 hostel blocks would have been converted with another 20 to be converted in the 2014 financial year.
27. The last 20 conversions included the 15 Middelkraal hostel blocks which the SLPs had decided not to convert because they were too far away from any other settlements.<sup>16</sup>
28. The evidence leaders suggest that *"Lonmin cannot be held 'solely responsible for the deplorable state of housing in which its migrant workforce resides' and that '[t]he provision of decent housing in the Marikana area is primarily a government responsibility."*<sup>17</sup>
29. We respectfully concur with the aforementioned suggestion by the evidence leaders. We deal with this aspect later hereunder.

---

<sup>16</sup> See: Preliminary report, p 56

<sup>17</sup> See: Preliminary report, p 56

**THE TRANSFER OF THE STATE'S OBLIGATION TO PROVIDE HOUSING TO THE  
BAPO BA MOGALE TO PROVIDE HOUSING**

30. The preliminary report notes <sup>18</sup> that the rapid population expansion put severe strain on service delivery with the concomitant result that the quality of life of the “*both local and migrant mine workers*” are negatively affected. One of the socio-economic obligations of the state highlighted in the preliminary report is the lack of water resources. Although the issue of water resources does not strictly fall under this heading, we briefly intend to deal therewith because it is closely related to the right to housing.
31. The reason for the lack of adequate water is blamed on municipal budgetary constraints. The report contains the following remarks by the Director: Infrastructure and Technical Services of the Madibeng Municipality:

*“Marikana falls under two local municipalities, Rustenburg in the west and Madibeng in the east both within the greater Bojanala district municipality. Some informal settlements fall under Rustenburg but the majority belong to Madibeng including all of Inkaneng. The administration of the town by two different municipalities had contributed to the lack of service delivery and they provided only the absolute basics. The Rustenburg municipality complained that up to 2012 it was unable to provide services as most of the land surrounding informal settlements was owned by Lonmin. Attempts to access or buy land to lay sewerage and water pipes were often frustrated by Lonmin who wished to keep the land vacant for future mining. In addition the absence of state ownership of the land, local and provincial authorities could not provide housing or proper services. The Madibeng municipality in its (sic) turn was frustrated in its attempts to provide services in Inkaneng*

---

<sup>18</sup> See: Preliminary report, p 42

*because the land again did not belong to the state but to the Bapo Ba Mogale tribal authority who resented mine workers illegally occupying its land and not willing to pay for the provision of services.<sup>19</sup> “*

and

*“On the question of funding we have very little money. Our budget basically covers running and maintenance costs. We get our allocation from the National Treasury which is then allocated by the provincial COPTA (Co-Operative Governance & Traditional Affairs) to the local COPTA. We have a total budget of R 220 million for capital budget but to budget alone for Inkaneng over 140 hectares electrify, provide water and sanitation for 1 500 households would cost R95 million and we have to cover 36 wards! We just can't do it alone. The municipality, the mine sector, the traditional authorities and beneficiaries themselves must pay to maintain and to extend services<sup>20</sup>.”*

32. Although it is the State's obligation to provide housing, the Bapo Ba Mogale has *de facto* assumed the responsibility in that the most migrant workers occupy its land illegally.

## **HOUSING**

33. Section 26 of the Constitution of the Republic of South Africa, 1996 (*“the Constitution”*) deals with the right to housing and provides as follows:

*“(1) Everyone has the right to have access to adequate housing.*

---

<sup>19</sup> See: Preliminary report, p 33

<sup>20</sup> See: Preliminary report, p43

(2) *The state must take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of this right.*

(3) *No one may be evicted from their home or have their home demolished, without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions”*

34. In **SOOBRAMONEY V THE MINISTER OF HEALTH (KWA-ZULU NATAL) 1998 (1) SA 765 (CC) AT PARAGRAPH [11 ]**, the Constitutional Court had an opportunity to interpret section 26 and 27 of the Constitution and commented as follows:

*“[11] What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, healthcare, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that they have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which s 27(3) must be construed.”*

35. Currie et al<sup>21</sup> argues that the aforementioned passage *“suggests that the positive dimension of the socio-economic rights is ‘realised’ or fulfilled through state action ‘progressively’ over a period of time.”*. They further argued *“the fact that the full realisation of the rights can only be achieved progressively does not alter the obligation on the state to take those steps that are within its power immediately and other steps as soon as possible”*.

---

<sup>21</sup> *The Bill of Rights Hand Book* (6<sup>th</sup> edition), Currie and de Waal at p 580

36. In **CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY V BLUE MOONLIGHT PROPERTIES 39 PTY (LTD) 2012 (2) SA 104 (CC) AT [74]: 2012 (2) BCLR 150 (CC)**, the Constitutional Court in examining the City's defence that it did not have adequate resources to provide housing found that:

*"It is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations."*

37. In **MAZIBUKO V THE CITY OF JOHANNESBURG 2010 (4) SA 1 (CC) AT [67]**, the Constitutional Court in examining whether governments social programmes are reasonable formulated the following approach:

*"[67] Thus the positive obligations imposed upon the government by the social and economic rights in our Constitution will be enforced by our courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From Grootboom it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions as described in Treatment Action Campaign (No 2) , the court may order that those be removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised." (emphasis added)*

38. The municipalities' excuse that they do not have the necessary budget to fulfil the socio-economic rights is, with respect, untenable. The authorities referred to above clearly suggest that there is an obligation on the municipalities to ensure the progressive realisation of socio-economic rights. The municipalities has clearly failed to do so.

### **Allotment of land**

39. The report suggests that in Inkaneng the South African National Civic Organisation ("SANCO")<sup>22</sup> provided migrant workers with a stamped document "*permitting them to live in the area and to access a few local services*".
40. In Wonderkop people reside in different accommodation such as hostels, RDP houses and shacks in the informal and formal settlements. The most populated was the informal settlement because it was cheaper and could accommodate woman partners unlike the single sex hostels. Family units provided by Lonmin were limited and workers found them expensive.<sup>23</sup>
41. Traditionally and culturally a traditional ruler has the power to control land and to allot portions thereof to members of his community. Allottees acquire a right to benefit – in other words, a right to exploit what has been allocated. The same pattern of powers and rights are replicated in the

---

<sup>22</sup> See: Preliminary report, p 41. This is appears to be a contravention of section 3(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998.

<sup>23</sup> See: Preliminary report, p 38

context of the ward and the family, all of which is controlled by the head of the unit, who is obliged to allot it to individual applicants.<sup>24</sup>

42. Every member of a ward has access to its common natural resources, in particular to pasture, but also to wood<sup>25</sup> (for building or fuel), grass and reeds (for thatching and weaving), clay (for pottery), and edible fruits and plants. Similarly, natural resources of water are available to all members of the unit.<sup>26</sup>
43. The freedom to use common resources is subject to the local ruler's power to regulate access, if and when this becomes necessary in the interest of the community as a whole. To preserve a diminishing supply of timber, for example, the felling of trees may be prohibited indefinitely or for a specific period. Customary law gives traditional authorities all the power they need to protect the environment and there is ample evidence to show that they have reacted swiftly when resources were in danger of running out.<sup>27</sup>
44. Traditional authorities have a general power to order landholders, and occasionally even whole communities, to relinquish the land they were allotted. The reasons for issuing such removal orders may be grouped into two categories. Under the first, the power is exercised for the general public purpose, which would include situations where land was needed for public works, the soil was exhausted, or the holder had more land than was

---

<sup>24</sup> See: Bennett, *Human Rights and African Customary Law* (1995), p 133

<sup>25</sup> See: Preliminary report, p 37. The report states that no reliable source of energy exists. People fetch wood from even further afield, and most use candles, paraffin lamps and primus stoves

<sup>26</sup> See: Bennett (*supra*), p 134

<sup>27</sup> See: Bennett (*supra*), p 134

necessary for his subsistence. In all but the last case the dispossessed landholder would be compensated with land elsewhere in the realm.

45. Under the second category the purpose for issuing removal orders is to penalise landholders who committed offences. The ostensible reason made is to preserve the peace, but the underlying motive is often to put down political dissidents who persistently flouts the ruler's authority. The dispossessed holder may lose his right altogether, a drastic punishment amounting to expulsion from the nation. Usually no compensation is paid for whatever improvements were made to the land. At most an offender is allowed to dismantle buildings and to harvest the crops standing in the fields.
46. The Interim Protection of Informal Land Rights Act, 31 of 1996 (*"IPLRA"*) seeks to preserve the position of customary law explained above. Section 2(2) of IPLRA provides that where land is held on a communal basis, as in this case, a person may be deprived of such land or right in land in accordance with the custom and usage of that community.
47. Section 2(4) of IPLRA provides that for the purpose of section 2, the custom in usage of a community, shall be deemed to include the principal that a decision to dispose of any such right may only be taken by a majority of the holders of such rights, present or represented at a meeting. The meeting must be convened for the purposes of considering such disposal and sufficient notice must be given.

48. The communal land which has been invaded by the migrant workers, and on which informal settlements have been built, infringes the community's rights to exploit the land as allotted by the traditional leader. The tribal authority is helpless to enforce the customary law because of the large number of migrants in these informal settlements.
49. The government has over the years done nothing to provide housing and other basic services to the migrant workers. It has equally done nothing to protect the rights of the Bapo Ba Mogale. It has failed to provide adequate housing to an increasing informal community on land elsewhere.
50. It is unreasonable to expect the Bapo Ba Mogale to bear the government's obligation to provide the occupiers with accommodation. Large scale land invasions threatens the rights of the Bapo Ba Mogale and has serious implications for stability and peace. The failure by the state to act in an appropriate manner means that the Bapo Ba Mogale are unable to look to the State and its organs to protect them from invasions of their property, a recipe for anarchy.<sup>28</sup>

**ADVERSE SOCIO-ECONOMIC CONSEQUENCES CREATED BY INFORMAL SETTLEMENTS**

51. It is common cause that the migrant workers are not members of the Bapo Ba Mogale. Accordingly, they do not fall under the jurisdiction of the chief

---

<sup>28</sup> See: **President of RSA v Modderklip Boerdery (Pty) Ltd** 2005 (5) SA 3 (CC) at para [45], p 22E-G

who, together with the tribal council, is responsible for the implementation and enforcement of customs.

52. As already indicated there is several conduct complained of which is punishable in terms of the customary laws such as having sex with unmarried woman, fighting and abuse of resources.

53. The obvious consequences of the establishment of informal settlements and influx of migrants onto the territory of the Bapo Ba Mogale is explained in the preliminary report. For instance the report highlights the following:

- lack of basic bulk infrastructure such as water and electricity;
- lack of proper roads and access to the informal settlements;
- increase in crime;
- decrease in the moral fabric and standards. For example alcohol abuse and abuse against women and children;
- the unemployment levels averages on 75% in the area. In Segwaelane migrants outnumber the local Bapo Ba Mogale by a ratio of 20:1;

54. The report records that:

*“The presence of large numbers of migrants has had deep social impacts. Locals remarked on an increase in drugs, drunkenness and abuse in their villages. The imbalance between migrants with wages and locals without found expression in the transactional sex with school girls and young woman and the break-up of local marriages. For the local residents the only source of money was mineworker’s rent and this often meant bringing social problems into their backyards.”<sup>29</sup>*

55. Ordinarily the chief together with the tribal council, would be able to discipline members of his community. But because the migrant workers are not subject to his jurisdiction, customary laws cannot be enforced against non-Bapo Bo Mogale members.

## **CONCLUSION**

56. We submit that it is evident that Lonmin’s presence and failure to provide adequate housing has caused:

- 56.1. the unlawful invasion and occupation of the land of the Bapo Ba Mogale;

---

<sup>29</sup> See: Preliminary report, p 42

- 56.2. the high unemployment levels have caused *“in both informal settlements and once peaceful rural villages [the multiplication of] social ills [such as] drugs, alcohol, violence and crime...”*<sup>30</sup>
57. We submit that the relevant government agencies and/or municipality should as a matter of urgency establish a formal township which addresses the violation of the socio-economic rights contained in the preliminary report.
58. We further suggest that a mining indaba be convened were all the stakeholders, including traditional leaders, can discuss the the implications of the events of August 2012 to avoid similar bloodshed.

**E S KGAKA ATTORNEYS**

3 November 2014

---

<sup>30</sup> See: Preliminary report, p 46