

23 September 2014

To: THE MARIKANA COMMISSION OF INQUIRY  
c/o THE SECRETARY OF THE COMMISSION  
Momentum Building  
Cnr Prinsloo and Pretorius Streets  
PRETORIA  
Service effected by email: [phsetati@justice.gov.za](mailto:phsetati@justice.gov.za)

The Evidence Leaders: care of Kameshni Pillay [advkpillay@gmail.com](mailto:advkpillay@gmail.com)  
Dr Kally Forrest [<mailto:kallyforrest@telkomsa.net>]

Dear Sir / Madam

**Phase 2: Preliminary Report dated 15 August 2014 and land ownership of Wonderkop farm**

1. We refer to the preliminary report of 15 August, our submission on land ownership of the farm Wonderkop dated 30 July 2014, and your email of 31 July 2014.
2. We are instructed by Mr David Ramohanwe, a member of the Wonderkop and Bapo communities and chair of the Wonderkop Land Claim Committee, the Wonderkop Land Claim Committee Ms Susan James, a member of the Segwaelane and Bapo communities and Mr Lesego Kgobane, a member of the Bapong Community and its Skoolplaats section; and the Bapo communities ("our clients"). Mr Ramohanwe is a former local government councillor.
3. Your report refers to the farm Wonderkop and the ownership of land in the following contexts:
  - a. 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. [32]
  - b. In the formal settlement, also known as Emzini ('real home'), local government had provided services including roads, water, sewerage, built houses and electricity.
  - c. Its informal settlement, where most migrant workers lived with their families known as Enkaneni by isiXhosa speakers and Inkaneng ('take by force') 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. [32]

- d. 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 local government in the former and by tribal authorities in the latter. [33]
  - e. The Rustenburg municipality complained that up until 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, in the absence of state ownership of land, local and provincial authorities could not provide housing or proper services. [33]
  - f. The Madibeng municipality in its turn was frustrated in its attempts to provide services in Inkaneng because, again, the land did not belong to the state but to the Bapo ba Mogale tribal authority who resented mine workers illegally occupying its land and was not willing to pay for the provision of services. [33]
  - g. In Wonderkop [formal section] in 2007 under a rural electrification programme about 900 households were electrified. Eskom provided electricity and some houses have electricity and some not. [38]
  - h. The rapid population expansion had put heavy pressure on services, severely curtailing the quality of life for both locals and migrant mine workers. Water was a constant issue. [42]
  - i. Lack of land, constraints with regard to land availability and delays in township proclamation and opening of township registers are raised as reasons for the lack of housing and services delivery by Lonmin and local authorities.
4. Our clients wish to bring the following to your attention:
- a) the farm Wonderkop is formally registered in the name of a government official or office in its capacity as trustee for a community. It does not "belong to" a tribal authority or traditional authority. Our submission elaborates on the ownership of the property which is the subject matter of a claim under the Restitution of Land Rights Act.
  - b) Township establishment including in situ upgrading of informal settlements on private land, state land and land held in trust is governed by provincial planning law and national planning laws including the Less Formal Township Establishment Act and, at the time of the first 5 year Lonmin housing programme in terms of Lonmin's statutory SLP undertakings and its own CSR promises, the Development Facilitation Act. Both the LFTEA and the DFA provide for upgrading of infrastructure, provision of services and provisional ownership on both private and public land.
  - c) The provision of municipal services in Wonderkop and Inkaneng is and was not dependent on the ownership of the land.

- d) Township establishment, the opening of township registers and the transfer of ownership, or provisional ownership as defined in the DFA, of individual residential sites to occupiers on both private and public land are not constrained by the statutory regime.
  - e) Both Lonmin and the relevant local authority appear to be under the misapprehension that the Bapo traditional authority has a veto over any land development on the farm Wonderkop. In terms of statute law, and more specifically the Restitution of Land Rights Act of 1994 and the Interim Protection of Informal Land Rights Act of 1998, the Wonderkop Community must be consulted and its permission and that of affected rights holders must be sought for land development to proceed.
5. Our submission makes inter alia the following points:
- a) The farm Wonderkop is owned by “the Minister of Native Affairs for the Union of South Africa in trust for the Bapo Tribe under Chief FILIUS MOGALE, his successors or assigns”, but the 1926 title deed, the policies and laws do not recognise, formally or in practice, the rights and interests of the Wonderkop Community. The Wonderkop Community is the rightful owner of the land and its minerals, but the Community is not recognised as such because the farm falls under the jurisdiction of the Bapo Ba Mogale Traditional Authority by operation of law.
  - b) The status of the land, regarded politically and legally as “tribal land”, has a profound impact on the municipal and social services afforded to residents on the land, and infrastructure development. Historically and currently residents are afforded substandard services and development support.
  - c) Lonmin relies on housing in informal settlements and backyard shacks for its workers, whether they are permanent, established, local, migrant workers or contract workers.<sup>1</sup> It can do so because of the vicinity of “tribal” land, and the Wonderkop Community bears the brunt of this reliance. The non recognition of the property rights of the Wonderkop Community contributes to such a lack of housing, social and municipal services and other insecurities causing social strife.
  - d) The land claims by the Wonderkop Land Claim Committee on the farm Wonderkop are being ignored and in effect stifled by Lonmin. Lonmin, in its documents discovered and referred to the Commission under the heading “Land Claims”, provided a list of land claims on its land. Wonderkop is listed with the following annotation: “we do not own this land but this dispute has been referred to court”. An investigation by the Land Claims Commission and the Land Claims Court could result in an order that the Wonderkop Community has a right to restitution of its

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<sup>1</sup> “There is in fact reason to believe that the overwhelming majority of Lonmin’s 28,230 established employees (2012) stay in informal settlements or in township shacks. As for the additional 8,300 contract workers, for which accommodation Lonmin takes no responsibility, their residence in informal settlements is almost given by definition. According to a very well-placed source, Lonmin estimates that it provides acceptable accommodation for about 5,000 out of over 28,000 established employees. The estimate was conceded at a meeting with different stakeholders in November 2012.” Coping with Unsustainability, Policy Gap 7 Lonmin 2003 – 2012, The Bench Marks Foundation October 2013

land rights and its old order mineral rights, which can be translated into a restitution package to the Wonderkop Community which may include:

- a. the restoration of land and ownership to certain parts of Wonderkop;
- b. the award of alternative land in lieu of restoration of those parts of the farm that cannot be restored;
- c. compensation for loss of land use;
- d. compensation for loss of proceeds of mining as a result of the dispossession of its old order mining rights;
- e. participation in future proceeds of mining in the form of royalties or equity as part of the new order mining rights.

In the circumstances any conversion of royalties to the Bapo emanating from the dispossessed old order mining rights, should be subject to the resolution of the land claims.

- e) Lonmin makes much of its "respect for traditional rights of indigenous peoples." This is listed as one of Lonmin's main commitments in its EMPR of 2005,<sup>2</sup> which is a condition to its mining right issued under the MPRDA. Its sustainability reports published before and after the events of August 2012 pledge its adherence to prescripts of the IMMC and the UN Global Compact Reporting requirements relating to participation by local communities.<sup>3</sup> The 2009 report<sup>4</sup> quotes its Safety and Sustainable Development Policy and commitment to: "respecting and valuing the fundamental human rights, cultural heritage and indigenous traditions of our employees, communities and other stakeholders where we operate." It glibly reports that in 2009 "no incidents of non compliance against indigenous people were formally lodged against the company." On page 91 it ticks MM11 box "identifying local communities' land and customary rights including those of indigenous peoples and grievance mechanisms used to resolve any disputes." We urge the Commission to encourage Lonmin to report on its relationship with the Wonderkop Community and its land in accordance with the public commitments made by Lonmin.
- f) The rights of citizens and legitimate land owners must now be recognised. If this is not done, and a) the exploitation of human rights and property rights remains part of the foundation of the mining of Wonderkop land, and b) the Community of Wonderkop continues to bear the impacts of the violation of their social and environmental rights, then social strife will continue.

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[http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/0/3401E47B5EBFDE96852576BA000E291A/\\$File/West%20PIatnm%20Mine%20EMPR%20Chap%206.pdf](http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/0/3401E47B5EBFDE96852576BA000E291A/$File/West%20PIatnm%20Mine%20EMPR%20Chap%206.pdf)

<sup>3</sup> Reporting publicly our sustainable development performance in accordance with the ICMM Sustainable Development Framework and utilising the guidance of the Global Reporting Initiative Sustainability Reporting Guidelines. [2008]

[https://www.lonmin.com/sustainable\\_development/safety\\_sustainable\\_development\\_policy.aspx](https://www.lonmin.com/sustainable_development/safety_sustainable_development_policy.aspx)

<sup>4</sup> <https://www.unglobalcompact.org/system/attachments/982/original/COP.pdf?1262614235>

6. In your preliminary report of 15 August 2014 you state that the Commissioners will not be asked to make any findings on the basis of the eventual comprehensive report but they will be requested to forward it to the President together with their report so that the government departments and agencies that are ultimately tasked to investigate all the issues that were to be traversed in Phase 2 can have the benefit of the research that was conducted by the Commission in this regard. The comprehensive Phase 2 report will be circulated to the parties so that they can respond to its contents if any of the relevant government departments and agencies propose to rely on it.
7. In the circumstances and in the light of the statements in your preliminary report of 15 August, we request that you consider our submission for the purposes of the preparation of the comprehensive report and that you motivate for the following recommendations by the Commission:
  - a) The Chief Land Claims Commission must report on land claims to the Wonderkop Community, the Wonderkop Land Claims Committee, the President and the Minister of Rural Development and Land Affairs,
    - a. within 2 months of this Commission's report on steps taken to process the land claims to the farm Wonderkop in terms of sections 2 and 3 of the Restitution of Land Rights Act; and
    - b. every 6 months thereafter on progress to finalise any claims.
  - b) Lonmin and the Madibeng Local Municipality must report on integrated township establishment and the provision of municipal and other services in the residential areas on the farms Middelkraal and Wonderkop to the Wonderkop Community and the Nkaneng section thereof, the President and the Department of Human Settlements.
8. Lonmin will not and should not object to a recommendation by the Commission in the above terms. In its 2013 sustainable development report<sup>5</sup> it undertook to report against human rights indicators and invited the monitoring thereof in the following terms:

*Avoiding infringing the human rights of others and addressing any adverse impacts in which we are involved are at the heart of how we do business. However, we currently lack a formalised response to the Principles [UNGPs] and intend to make an appropriate policy commitment, undertake due diligence to assess actual and potential human rights impacts (whether direct or indirect) and act upon the findings of that review, track the effectiveness of our responses and communicate this in future years' reporting.*

9. Our submission dated 30 July 2014, SUBMISSION OF THE WONDERKOP LAND CLAIM COMMITTEE IN RESPECT OF THE FARM WONDERKOP, is attached in support of our request.

10. We shall be pleased to clarify any aspect of our submission should you so desire.

Yours faithfully

**LEGAL RESOURCES CENTRE**

R.R.



Per: Henk Smith