IN THE MARIKANA COMMISSION OF INQUIRY
SITTING IN CENTURION

WRITTEN SUBMISSIONS
OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION
REGARDING “PHASE TWO”

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PART ONE:

INTRODUCTION AND SCOPE OF THESE SUBMISSIONS
SECTION 1: INTRODUCTION

1.1.1 The Marikana Commission of Inquiry (‘the Commission’) made a procedural ruling on 8 November 2012 that divided its Inquiry into two phases:

   a. “Phase One” that focussed on the events of 9-18 August 2012 at Marikana (and the immediate causes of those events); and

   b. “Phase Two” in which the surrounding socio-economic circumstances present at Marikana, which contributed to and provided the broader context to the tragic events of August 2012, were to be considered by the Commission (the underlying causes of the events).

1.1.2 The latter were referred to throughout the Commission proceedings as “Phase Two issues” and we adopt this terminology in these submissions as useful shorthand, while cognisant that the procedural ruling that created Phase Two was withdrawn by the Commission in its final hearing days on 25 August 2014.

1.1.3 The SAHRC anticipates that Lonmin will make submissions that the withdrawal of this procedural ruling prejudiced it before the Commission, and may even submit that this prejudice somehow eliminates the Commission’s ability to engage with Phase Two issues. In that event, the SAHRC will make responsive submissions in its replying submissions. Suffice to state here, that Lonmin cannot benefit from the deficient process followed by the Commission; all the more so where that, under Phase Two, which was canvassed during the Commission’s hearings reveals non-compliance by Lonmin with its various legal, regulatory and contractual obligations to its host community.

1.1.4 The Phase Two issues address and encompass the broader issues raised in paragraphs 1.1 (Lonmin), 1.3 (the Association of Mineworkers and
Construction Union – ‘AMCU’), 1.4 (the National Union of Mineworkers – ‘NUM”) and 1.5 (the Department of Mineral Resources - ‘DMR’ and other government departments) of the Commission’s Terms of Reference.

1.1.5 Most recently, on 23 January 2014, the Commission itself produced the following extensive list of issues expected to be addressed in Phase Two:

a. The composition of the strikers/protestors:

   i. Were there non-miners and if so, from what constituencies were they drawn?

   ii. Was there any significant representation of miners who were not rock drill operators (‘RDOs’)?

   iii. To what extent were the strikers employed through labour brokers?

   iv. To what extent were the strikers/protestors AMCU members, NUM members, or non-unionised workers?

b. The lived experience of RDOs:

   i. Conditions of work for RDOs at Lonmin’s Marikana Mine;

   ii. Living arrangements for the RDOs at Lonmin’s Marikana Mine; and

   iii. Training and career pathing for RDOs at Lonmin’s Marikana Mine, including educational opportunities available to them to enable them to qualify as certified miners.

c. Housing and services:

   i. The inadequacy of housing and services in Marikana;

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1 Items in italics are the matters on which the Commission wished to receive information, and which it would likely refer to other bodies, the remainder are the matters which the Commission sought to address during its hearings.
ii. The responsibilities in this regard of:

1. Lonmin (see also 13.1 below); and


iii. What funding has been made available for these purposes?

iv. What housing and service have been provided, by whom, and at what cost?

d. Migrant labour:

i. The continued dependence of the mining industry on migrancy;

ii. The social costs of migrancy;

iii. The financial burden to migrants of dual households;

iv. The social costs to Pondoland and Lesotho if migrancy were to be phased out and the responsibilities in this regard of:

1. Government; and

2. The mining industry.

e. The stratification of the mining labour force:

i. The distinctions between miners and RDOs;

ii. The distinction between employees who are hired through labour brokers, and those who are hired directly by the mining company / Lonmin;

iii. The extent to which union representation bridges or overcomes these distinctions.
f. The impact of events at Impala Platinum (‘Implats’):
   i. Divisions between RDOs and the union leadership;
   ii. The success of the strike outside collective bargaining structures;
   iii. Violent conflict between NUM and AMCU; and
   iv. Violent conflict between the South African Police Service (‘SAPS’) and RDOs and the burning of the Freedom Park Police Station.

g. NUM and AMCU:
   i. The history of conflict in the Rustenburg Platinum industry;
   ii. The extent to which NUM and AMCU exercised control over their membership in this conflict;
   iii. The social composition of the respective membership and leadership; and
   iv. The relationship of Lonmin with NUM and AMCU respectively.

h. Collective bargaining – to be referred to NEDLAC:
   i. The extent to which majoritarianism contributed to the events under investigation;
   ii. The specific collective bargaining arrangements at Lonmin prior to August 2012;
   iii. The impact of Lonmin’s direct negotiations with workers

i. Issues of violence:
   i. The culture of violence in industrial disputes in South Africa;
ii. Traditional weapons;

iii. Traditional healers and violence;

iv. The SAPS and violence; and

v. Mine security and violence.

j. Financial issues

i. The competitiveness of RDO wages paid by Lonmin prior to the strike action/protest;

ii. The affordability of the increases paid by Lonmin and those demanded by the RDOs; and

iii. The financial capacity of Lonmin to provide decent work and living conditions for its employees.

k. Lending and debt collection:

i. The extent to which strikers were indebted and subject to deductions from their wages;

ii. The problems which arise from unregulated debt and unregulated or unlawful debt collection processes;

iii. The responsibilities (if any) in this regard, of:

1. Government;

2. Employers, including Lonmin; and

3. Unions, including NUM and AMCU

iv. Whether, and if so to what extent, the legal provisions relating to garnishee orders should be amended.

l. Issues between the Bapo ba Mogale community and royal family and Lonmin:
i. The relationship between the Bapo Community and the mineworkers;

v. Community entitlement to benefits of mining conducted on communal land; and

vi. Payment of royalties into the “D” Account, and accountability for the use of the money.

m. Lonmin’s obligations:

i. The extent to which Lonmin complied with its social obligations under

   1. The social and labour plan (‘SLP’) applicable to its mining right; and

   2. The Mining Charter

ii. The extent to which DMR took appropriate steps in relation to any non-compliance; and

iii. Educational obligations of Lonmin, and its performance in this regard.

1.1.6 In July 2014, the President deleted paragraph 1.5 from the Commission’s Terms of Reference. This is regrettable for at least two reasons:

a. Government (at all three levels of national, provincial and local) is often the partner of those other actors named in the Terms of Reference and therefore should work in conjunction with them, to address the socio-economic challenges faced by mine-affected communities. In this instance, it includes those communities located at Marikana, as well as the further labour-sending communities;

b. To scrutinise those actors, without also considering the role played by the relevant government actors, necessarily results in an incomplete
and, therefore, unhelpful picture of events; responsibilities; roles; functions; and possible avenues for redress.

i. For example, the State’s obligations to provide housing, water and sanitation infrastructure dovetail with the obligations assumed by Lonmin in terms of its SLPS as a condition of its license to operate, which in turn is a right granted and which should be subject to oversight and monitoring by the DMR;

ii. The deletion of paragraph 1.5 of the Terms of Reference requires the Commission to myopically focus on certain aspects of this polycentric framework of entities with relevant and material responsibilities, ignoring other relevant roleplayers and stakeholders. This is undesirable and hampers the Commission’s ability to fully and meaningfully address the socio-economic circumstances of the victims of Marikana.

c. Secondly, the utility of any recommendations that the Commission makes to the President is limited and reduced since it is now outside of the Commission’s mandate to address systemic governmental failures and deficiencies revealed by the Commission’s investigation.

d. As a result, much will remain to be investigated and scrutinised if the material conditions experienced by those mine-affected communities are to be comprehensively and satisfactorily addressed.

e. Notwithstanding this limitation, the SAHRC submits that the Commission is well placed to make recommendations to the President that would have a material and beneficial impact on the lived experience of these communities.
Section 1.2: The scope of these submissions

1.2.1 The SAHRC therefore participated in Phase Two of the Commission in two ways, which determine to the scope of these written submissions:

a. First, in fulfilment of its mandate and brief to monitor proceedings within the Commission, the SAHRC expressed its concerns regarding the de-prioritisation of Phase Two within the Commission’s proceedings; and

b. Second, the SAHRC made submissions regarding the SLP system in general, Lonmin’s compliance with its SLP obligations in particular and proposed a Business and Human Rights framework within which the Commission could consider these questions.

1.2.2 These two areas of work are addressed in turn below.
PART TWO:

THE COMMISSION’S APPROACH TO “PHASE 2”
SECTION 1: THE CREATION OF “PHASE TWO” AND ITS CONSEQUENCES

2.1.1 The SAHRC does not criticise the Commission for the procedural ruling that divided its proceedings into Phase One and Phase Two.

   a. The range of issues raised for investigation by the Commission, given its wide-ranging Terms of Reference, was vast, complex, technical and fact-intensive.

   b. Thus the approach taken by the Commission – to divide its focus and time between the immediate causes of the tragic deaths of 44 people in August 2012, and, to group together the underlying causes for investigation – was a commendable approach. There were various procedural challenges that inevitably arose with respect to evidence management and hearing time as a result of the division.

   c. In theory, this should have enabled targeted investigation and interrogation of the Phase Two issues, without compromising the rigour of the Commissions’ consideration of any of the issues before it, whether comprising Phase One or Phase Two issues.

2.1.2 As a result, the SAHRC repeatedly cautioned against and expressed its concern to the Commission that this division of its proceedings should not result in the de-prioritisation and disregard for the extremely significant and important Phase Two issues.

   a. The Commission was mandated to investigate all of the causes of the tragedy at Marikana. And we use the term “tragedy” to refer to both the catastrophic outcome of the policing operation, as well as the living conditions experienced by that community, in 2012 and still today;
b. The Commission was the first real opportunity for South Africa to grapple with all of these issues and engage in an exercise of self-critical reflection and dialogue, aimed at achieving a deeper understanding of the systemic failures to blame for these conditions. Thereafter, the hope was that the Commission would address robust recommendations to the President as to concrete steps that could be taken to improve the conditions of those most affected. It was hoped that such recommendations may not be limited to the mining operation at Marikana, by Lonmin, but could also find application in similarly situated mining communities across South Africa.

2.1.3 Unfortunately, the SAHRC’s gravest concerns turned out to be well founded and came to pass.

a. First, the SAHRC repeatedly assured the Commission that it was committed to participating in Phase Two and was firm in its commitment to assist the Commission in its investigation of the systemic long-term causes of the conflict at Marikana and the importance thereof.

i. Indeed, the SAHRC requested detailed discovery from Lonmin, the DMR, the Madibeng and Rustenburg Local Municipalities and the Bapo Ba Mogale, commencing in January 2013, and again in April and May 2014. Limited discovery was forthcoming, and the Commission unfortunately did not compel full, or even meaningful, compliance with these requests; and

ii. When discovery was made, at the end of July and beginning of August 2014, this was simply too late for any satisfactory consideration of that discovery by the experts retained by the
SAHRC, given the Commission’s timeframes for submissions on Phase Two.

b. Phase Two seemingly was relegated to a quartet of seminars where academic discussion took place, without penetrating interrogation of the specific circumstances prevailing at Marikana. These produced an evidentiary basis of very limited weight for the Commission to consider. Moreover, these seminars did not provide a meaningful voice to those most affected and otherwise voiceless - the residents of Marikana.

c. Within the Commission’s own hearings, two aspects of the handling of Phase Two particularly troubled the SAHRC:

i. First, discovery was not vigorously pursued by the Commission: -

1. As set out above, repeated requests for rulings or the exercise of the Commission’s powers to compel the production of responsive documents were fruitless. As a result, Lonmin and the government departments of which discovery was requested (long before the deletion of paragraph 1.5 of the Terms of Reference) either delayed unreasonably or largely failed to produce responsive documents and evidence that would have been of significant assistance to the Commission if it were to investigate Phase Two issues with the same intensity as it did Phase One issues, as it was required to do.
ii. Second, the extremely limited amount of hearing time devoted to Phase Two issues was woefully insufficient to permit proper investigation by the Commission:

1. On the one hand, the limitation of hearing time devoted to Phase Two issues meant that nothing more than a cursory, superficial, generalised and abstracted survey of these questions was possible.

2. But, on the other hand, confirmed the need for proper investigation of these questions. Once the proverbial surface was scratched, it was clear that deeper probing was (and still is) required and necessary, but impossible within the Commission. More questions, but few answers were the only result by the conclusion of the Commission’s hearings.

d. In sum, Phase Two was a failed and missed opportunity to consider these critical questions for our society.

e. However, this failure still could yield precisely the sort of investigation of and engagement with these issues that was required: the Commission could recommend to the President that a further process be initiated in which government; communities; mines; trade unions; traditional leaders; employees; and local business are all required to participate fully so as to truly investigate the underlying causes of the dire living conditions experienced, dubious corporate governance exercised, the unresponsive workplace democracy evident and the inadequate service delivery experienced on a daily basis in mine-affected communities, across South Africa.
f. This could be expanded beyond Lonmin’s operations at Marikana to include the Platinum Belt more generally, or even expanded still further to include other mine-affected regions.

g. This is the primary recommendation proposed by the SAHRC to the Commission.

h. We turn next to recapitulate the four submissions made by the SAHRC, albeit that these were extremely limited in scope and utility due to the procedural challenges set out above.

i. Thereafter, we set out the recommendations proposed by the SAHRC.
PART THREE:

THE SAHRC’S SUBMISSIONS TO THE COMMISSION (SSSS8 series)
SECTION 1: SAHRC SUBMISSIONS REGARDING THE SOCIAL AND LABOUR PLAN SYSTEM

1.1.1 The first submission provided by the SAHRC to the Commission was an expert report prepared by MTS, a consultancy engaged in the preparation and scrutiny of SLPs, entitled “The Problems of the Social and Labour Plan ‘System’ within the Mining Sector in South Africa.”

1.1.2 This expert report provided:

a. A broad overview of the wider legislative context since 2004, thereby situating the legislative and regulatory framework provided by the Mineral and Petroleum Resources Act (MPRDA), 2002, that underpins the SLP system. This overview provided the context to the MPRDA’s objectives with regards to the SLP system, which determines the response from MTS as to whether these objectives, or the legislative intent, of the SLP legislation are clear, applicable, realistic and realised in practice;

b. An overview of the SLP regulatory framework, situated within the broader MPRDA legislative framework, together with an overview of the contents of an ideal SLP that fully complied with the legislative intent expressed in these two frameworks;

c. The roles and responsibilities allocated by this SLP framework between different roleplayers and stakeholders, and the interactions required by the SLP system between these parties, as well as their resulting interdependence to ensure the successful implementation of an SLP;
d. The evident failures of the SLP system and the respective role-players and stakeholders within that framework, drawing on case studies and MTS’ experience of that system since its inception;

e. The consequences of these failures and the accountability of the various role-players within the SLP system; and

f. Recommendations for the reform of the SLP system to address these failures and deficiencies.

1.1.3 It is these recommendations that the SAHRC proposed to the Commission for adoption in the final part of these submissions. In the interests of brevity, we do not replicate here what is set out in the MTS report, and the Commission is respectfully referred thereto for the analytical and evidentiary basis of the proposed recommendations.
SECTION 2: A QUALITATIVE AND QUANTITATIVE ASSESSMENT OF LONMIN’S SOCIAL AND LABOUR PLANS

2.1.1 The second submission by the SAHRC on Phase Two was a qualitative and quantitative assessment of Lonmin’s SLP and its compliance with the legislative and regulatory obligations imposed by the frameworks described in the MTS report on the SLP system.

2.1.2 This assessment unavoidably was hampered by the limited discovery received and proposed a far more in-depth assessment upon receipt by the Commission of the necessary material and relevant information from both Lonmin and the DMR.

2.1.3 However, regardless of this limitation, the assessment identified the following issues, which, we submit, should be the subject of further investigation as they are evident in Lonmin’s SLP compliance, as well as more broadly in the SLP system:

a. Responsiveness –

i. The content of an SLP may not be responsive to the actual needs of workers and communities, as a result of inadequate consultation with both communities and local government.

b. Accountability –

i. The frequent failure by mining companies to comply with their SLP obligations is unaddressed given the attendant failure of the State, through the DMR primarily, to monitor and enforce compliance with SLP obligations, as well as ensuring the necessary government co-operation and co-ordination
required to successfully implement projects identified as part of an SLP.

ii. The failures in the reporting regime to the DMR were also described. These include:

1. Inconsistency in the quality of the information contained in reports;
2. Inconsistency in the form of the reports (undermining the ability of the DMR to exercise oversight);
3. Inadequate information provided in reports making compliance with targets difficult to ascertain;
4. Shifting classifications of deliverables, or unilateral revisions of targets, both make monitoring and evaluating compliance difficult; and
5. A failure to record expressly whether revisions have been approved by the DMR or are unilateral by the mining-rights holder (without apparent consequences in the case of the latter).

iii. Similarly, the lack of accountability to the mine-affected communities is evident and often the result of a lack of reporting transparency by the mining-rights holder to these communities during the life of a particular SLP.

c. Planning –

i. The lack of sound planning was evident from the assessment of Lonmin’s SLPs. For example, projects proposed and included in an SLP fail due to circumstances that should have been ascertained during the planning stage. No revision of the SLP follows. Adequate feasibility studies and community
consultation were identified as necessary improvements to this aspect of the SLP system.

d. *Alignment* –

i. The evident lack of alignment between an SLP and the host of government departments engaged in service delivery resulted in poor implementation of SLP commitments. Local economic and infrastructural development priorities would need to reinforce and enable compliance with the SLP. Coordination of resources between these different entities often failed, resulting in poor or no delivery of an SLP commitment.

e. *Clarity in design* –

i. Certain defects in the legislative framework result in these challenges. For example, the lack of express provisions to address the co-ordination of state and private resources seemingly results in a confusion regarding respective responsibilities, often with the consequence that little or no practical development occurs within the mine-affected community.

2.1.4 As a result, certain proposals were made to improve the SLP system arising from the assessment of Lonmin’s compliance with its obligations, which could be included in SLP-related recommendations by the Commission, addressed below.
SECTION 3: THE LEGAL FRAMEWORK FOR A BUSINESS AND HUMAN RIGHTS APPROACH TO CORPORATE ACCOUNTABILITY

3.1.1 The applicable framework for assessing corporate accountability within Business and Human Rights approach was set out and described in the third submission by the SAHRC on Phase Two.

3.1.2 This framework includes:

   a. Legal (both international and domestic);

   b. Regulatory; and

   c. Advocacy-based instruments (such as Guiding Principles), all of which were described in detail in the submission.

3.1.3 Together, these create the framework through which the Commission should evaluate Lonmin’s conduct as relevant to its Marikana operations.

3.1.4 At its core, a Business and Human Rights (‘BHR’) approach seeks to hold companies accountable for their impact on human rights issues. It arises from the recognition that corporate entities have an important role to play in socio-economic development and poverty alleviation, as well as an obligation to conduct their business in a sustainable, responsible manner. This obligation has two components to it:

   a. A positive duty carried by corporations to enhance human-rights and the material conditions of communities affected by their activities; and

   b. A negative duty to abstain from causing harm or obstructing interventions aimed at achieving the realisation of human rights.
3.1.5 This approach is not novel, but enjoys a long history. Several international and regional human rights instruments (canvassed in detail in the submission) establish the responsibilities of corporations towards the realisation of human rights.

3.1.6 In sum, this submissions proposed a BHR framework for the Commission’s use in evaluating Lonmin’s conduct under paragraph 1.1 of the Terms of Reference.
SECTION 4: THE CALS-NMAP-HIHRC FILM

4.1.1 The final submission by the SAHRC on Phase Two was a short documentary film on the lived experience of the women of Marikana, produced in conjunction with CALS, the New Media Advocacy Project ('N-MAP), New York and the Harvard International Human Rights Clinic.

4.1.2 That short film vividly captures the appalling conditions in which the community most closely affected by Lonmin’s mining operations live, and confirms the urgent need for an intervention to understand and address the underlying causes for these living conditions to be recommended by the Commission.

4.1.3 It is to these recommendations that we now turn.
PART FOUR:

RECOMMENDATIONS
SECTION 1: RECOMMENDATIONS

1.1.1 In light of the failure by the Commission to sufficiently and satisfactorily investigate the Phase Two issues, the first recommendation proposed by the SAHRC is that the Commission recommend that the President **convene a task team / working group** to undertake a full investigation of the underlying causes of the dire living conditions evident in mine-affected communities.

   a. This task team is assisted by the Commission’s identification of Phase Two issues, which should form the subject matter of its investigation; and

   b. This task team must require participation in this investigation from the relevant government departments (including the DMR, as well as the other departments jointly responsible for service delivery such as Human Settlements, Health, Water, Education and Public Works) at all levels of government (national, provincial and local) in order to ensure its success;

   c. In addition, communities, mining rights-holders, trade unions, traditional leaders, employees and local business must all participate in its work; and

   d. Finally, the involvement of human rights-based organisations and civil society, as well as experts in the full range of Phase Two issues, should be required and facilitated.

1.1.2 The second recommendation proposed by the SAHRC is for the **DMR to undertake a strategic and detailed review of the deficiencies and failures of the SLP system** identified during the Commission’s work, and to propose amendments, revisions or new initiatives to improve compliance with the legal and regulatory framework that establishes the SLP system.
1.1.3 Third, the DMR should be directed to investigate Lonmin’s compliance with its SLP commitments, and ensure full and proper enforcement of its SLP obligations.

1.1.4 Fourth, and finally, the SAHRC submits that consideration should be given to allocating funds towards the development of the infrastructure of the communities of Marikana. The communities of Marikana have suffered disproportionately from the violence that occurred in the week of 9 – 16 August 2012. While compensation to the families of the immediate victims as well as the injured and arrested will go some way to alleviating the extreme hardship in which those communities find themselves, the SAHRC submits that community-wide development is necessary to genuinely assist those communities in their economic and psychological recovery. We submit that a recommendation should be made that those funds are borne by Lonmin in conjunction with the State.