

**An investigation into
transformation within the South
African Mining Sector, with
particular reference to the
regulatory framework and
mechanisms in which mining
firms operate: A case study on
Lonmin Plc.**

By Grant Malcolm Edmond

Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the MPhil (Public Law) in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

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Abstract

Transformation is undoubtedly a moral imperative. It primarily relates to the eradication of past discriminatory practices and the establishment of a society founded upon equality and justice. Unfortunately transformation has become a buzz word that is used in academic literature, legislation and the media in a variety of content. This research will focus on the mining sector, given the importance of the sector to the South African economy and the slow progress that the sector has made in advancing transformation.

This dissertation sets out to better understand the term transformation through an extensive analysis of the current framework in which mining forms operate. This includes non-legislative and legislative documents.

The research will take the form of a case study that focuses on Lonmin Plc. It will first conduct an extensive review of the literature and the transformation framework that applies. Secondly, the research will bring the case study into a current reality by interviewing individual miners, community leaders and Lonmin representatives. These interviews will be semi-structured, whereby an interview guide will form the base of the discussion. The goal of these interviews is to view the current transformation framework in light of the lived experiences of individuals.

The interview data will be analyzed using a thematic analysis approach, initially coding the interview manuscripts and ultimately collating these codes into themes which will be discussed in detail.

The research will focus on a Black Economic Empowerment deal that was concluded between Lonmin and the Bapo Community. The is intended to highlight some of the complexities surrounding Black Economic Empowerment deals in practice.

The research found that the main components of transformation, as illustrated by the literature and the interviews, are the creation of better working conditions for miners, the skills development of Historically Disadvantaged South Africans, the adoption of preferential procurement policies by Lonmin Plc and the conducting of proper engagement processes between mining companies and mining communities.

In addition, various shortcomings of Black Economic Empowerment were identified, the most notable being the creation of a wealthy elite black class rather than the empowerment of a broad range of previously disadvantaged individuals. Other issues identified included the shortcomings of traditional governance structures and the legislation that governs them; the lack of proper enforcement mechanisms created by the Mineral and Petroleum Resources Development Act and the Mining Charter and the problems that arise when empowerment focuses too intensely on direct equity ownership.

Finally, the research identified numerous potential areas for future research, including: Studies on the best practices of community engagement in South Africa, a comprehensive law reform surrounding transformation, investigative studies on policies that determine transformation on a macro-level, and studies on possibly divesting from the primary resource sector, looking for ways to create value in other sectors.

“The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.” – **Former Chief Justice Pius Langa on transformation**

List of abbreviations and acronyms

ANC	African National Congress
ANCYL	African National Congress Youth League
ANCYL	African National Congress Youth League
B-BBEE	Broad-Based Black Economic Empowerment
BEE	Black Economic Empowerment
CEO	Chief Executive Officer
CLS	Centre for Law and Society
COSATU	Congress of South African Trade Unions
CSI	Corporate Social Investment
CSR	Corporate Social Responsibility
DMR	Department of Mineral Resources
DTI	Department of Trade and Industry
EPL	Eastern Platinum Limited
ESOP	Employee Share Ownership Programs
ExCo	Executive Committee
GDP	Gross Domestic Product
GLC	Greater Lonmin Community
HDSA	Historically Disadvantaged South Africans
ICCM	International Council on Mining and Metals
JSE	Johannesburg Stock Exchange
King III	King Code on Corporate Governance for South Africa 2009
Lonmin	Lonmin Plc
LRC	Legal Resource Centre
MOI	Memorandum of Incorporation
MQA	Mining Qualifications Agency
NGO	Non-government organisation
NUM	National Union of Mineworkers

PGM	Platinum Group Metals
RDP	Reconstruction and Development Programme
SADC	South African Development Community
SETA	Sector Training and Education Authority
SLP	Social and Labour Plan
TA	Tribal Authority
The Bapo Community	Bapo ba Mogale Community
UCT	University of Cape Town
UN	United Nations
WPL	Western Platinum Limited

List of laws, regulations, codes and reports

Laws

The Bantu Authorities Act of 1951

The Broad-Based Black Empowerment Act 53 of 2003

The Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry 2010

The Constitution of the Republic of South Africa Act 108 of 1996

The Employment Equity Act 55 of 1998

The Labour Relations Act 66 of 1995

The Mineral and Petroleum Resources Development Act 28 of 2002

The Mineral and Petroleum Resources Royalty Act 28 of 2008

The North West Traditional Leadership and Governance Act 2 of 2005

The Preferential Procurement Policy Framework Act 5 of 2000

The Promotion of Access to Information Act 2 of 2000

The Restitution of Land Rights Act 22 of 1994

The Skills Development Act 97 of 1998

The Skills Development Levy Act 9 of 1999

The Traditional Leadership and Governance Framework Act 41 of 2003

Codes

Broad-Based Black Economic Empowerment Codes of Good Practice 2013

Government Gazette

Scorecard for the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry

Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry

Reports, Principles, Frameworks (not issued by the state)

The Global Reporting Initiative Principles

The International Council on Mining and Metals

The King Code on Corporate Governance for South Africa 2009

The United Nations Global Compact Ten Principles

UN Charter of Economic Rights and Duties of States

Table of Contents

Chapter 1.....	3
The importance of the mining sector	5
Background to the research question.....	6
Chapter 2.....	9
Research Statement	9
Relevance of the research project – shortcomings in the existing literature and research approaches.....	9
Additional benefits of the research project.....	11
Research Objectives	12
Methodology and Research Design.....	13
Suitability of the research	14
Chapter 3.....	18
Literature Review - Transformation in Mining: Regulations, Policies and Controversies.....	18
The purpose of the review	18
Towards a definition of transformation.....	18
The concept of equality and its influence on transformation	19
Mapping the Transformation Framework.....	23
Review of local legislative sources of authority	23
The Constitution of South Africa.....	23
Mineral and Petroleum Resources Development Act (MPRDA).....	24
The Mineral and Petroleum Resources Royalty Act 28 of 2008	29
Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry 2010.....	30
The shift from BEE to B-BBEE	34
Legislative uncertainty surrounding transformation	35
Employment Equity Act 55 of 1998	37
Labour Relations Act 66 of 1995	37
Skills Development Act 97 of 1998	39
The Skills Development Levy Act 9 of 1999	39
The Preferential Procurement Policy Framework Act 5 of 2000.....	40
Announcements, Tablings and Committee Reports	41

Review of local and international non-legislative authority	42
King III Report on Governance for South Africa 2009	42
Sustainability Reporting	45
The Global Reporting Initiative	49
The United Nations Global Compact Ten Principles	53
The International Council on Mining and Metals	53
Corporate Social Responsibility.....	54
The importance of the mining sector revisited	55
Chapter 4.....	57
A Case Study - Lonmin Plc	57
Overview of Lonmin Plc	57
Recent media attention	58
The Lonmin-Bapo deal – a story of conflict, misaligned expectations and discontent	59
Chapter 5.....	64
Collection of Field Data - Views on Transformation	64
The need for sensitivity towards current affairs.....	64
Methodology and Research Design.....	66
Interviewees	66
Sampling and Limitations	66
The use of a gatekeeper - background, concerns and practicalities	69
Administration of the interviews	71
Confidentiality.....	73
Analysing the interviews	73
Chapter 6.....	75
Making sense of the research findings.....	75
Crony capitalism.....	76
Direct ownership in BEE deals.....	78
Legal flaws in the MPRDA and the Mining Charter.....	80
Corporate Social Responsibility, the Shortcomings of Voluntary Frameworks, and Superficial Transformation.....	81
The use of litigation as a means of promoting and protecting transformation	83
Poor consultation between mining firms and mining communities	84

Towards a broader view on transformation – divesting from an anti-transformative industry	86
The importance of consultative processes in negotiating deals – The Lonmin-Bapo Deal	88
Traditional government structures	90
Problems with capitalism as a system of production	93
Barriers to transformation: merely a perception or reality?	95
Misaligned goals or misaligned timelines?	97
Chapter 7.....	98
Where to from here?.....	98
Concluding remarks.....	98
Limitations of the Research.....	99
Opportunities for further research	101
References.....	102

Chapter 1

Introduction - Transformation and Mining in South Africa

In South Africa it has become commonly accepted that there is a need to rectify the injustices of the past. Part of this rectification must involve the transformation of inequality within our society. South Africa is ranked as the 4th most unequal country in the world, with a GINI coefficient of 62.5. The legacy of colonialism and apartheid remain in present day South Africa.

The scope of this dissertation will be the mining sector. The importance of this sector to the South African economy is alone justification for analysis.¹

Furthermore, the mining sector is haunted by an awful past and has experienced some of the worst effects of apartheid.² These effects still remain, with the industry being plagued with poverty, health issues, low literacy levels, inadequate housing conditions and unsafe working conditions³. The mining sector provides a clear illustration of the racial discrimination that existed during the apartheid era. For example, in 1946 the pay differential between white and black miners was 12:1. Underpaid African miners were at the centre of commentary surrounding mines and led to First⁴, referring to the Chamber of Mines, stating that: 'There is no

¹ See below for the importance of the mining sector in South Africa.

² Peter Leon, 'Whither the South African Mining Industry,' *J. Energy & Nat. Resources L.* 30 (2012): 8.

³ Department of Minerals, 'Mining Charter Impact Assessment Report 2009' (Department of Minerals, October 2009), 154,

http://www.gov.za/sites/www.gov.za/files/Mining_Charter_Impact.pdf.

⁴ Ruth was a well-recognised journalist and activist during the apartheid era.

industry of the size and prosperity of this that has managed its cheap labour policy so successfully [as the mining industry]⁵.

Despite various transformation initiatives, the mining sector is still considered a focus area as, when compared with other industries, it is considered to have made slow progress relating to employment equity, primarily due to the structural barriers from apartheid that are yet to be overcome.⁶ Some authors however, have held that the mining sector is progressing adequately in meeting its transformation objectives. Four of the main reasons that lead one to believe that it is not progressing are; ineffective objectives of legislation, unrealistic and overly burdensome targets of the Mining Charter, a decreased enrolment rate in mining related qualifications as well as inconsistencies between the various legislation, Acts and Codes.⁷

The mining industry has historically been infamous for its exclusive focus on profitability and mineral exploitation as well as for having complete disregard for any social and environmental responsibility. It was only after the enactment of the Constitution in 1996 that social imperatives received any attention.⁸ The importance of this sector is discussed briefly below.

⁵ 'Marikana Massacre 16 August 2012 | South African History Online,' accessed May 18, 2015, <http://www.sahistory.org.za/article/marikana-massacre-16-august-2012>.

⁶ *Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry*, 1.

⁷ N.V. Moraka and M. Jansen van Rensburg, "Transformation in the South African Mining Industry - Looking beyond the Employment Equity Scorecard," *Journal of the Southern African Institute of Mining and Metallurgy* 115, no. 8 (August 2015): 671–672, doi:10.17159/2411-9717/2015/v115n8a2.

⁸ Henk Kloppers and Willemien du Plessis, 'Corporate Social Responsibility, Legislative Reforms and Mining in South Africa,' *J. Energy Nat. Resources L.* 26, no. 91 (2008): 92.

The importance of the mining sector

South Africa is the world's leading producer of platinum and has the world's largest natural reserves of gold, platinum-group metals, chrome ore and manganese ore. It has the world's second-largest reserves of zirconium, vanadium and titanium. Roughly one third of the market capitalisation of the Johannesburg Stock Exchange (JSE) is made up by the mining sector. The sector directly employs over 500 000 people and employs over 500 000 additional people who are indirectly involved in mining related activities⁹. The mining sector, although constituting less of South Africa's Gross Domestic Product (GDP) than in the 1970s, still contributes a significant 8.3 per cent (2013) of nominal GDP and the last quarter of 2014 saw 15.2 per cent growth in the industry.^{10 11}

The impact that apartheid had on the mining sector, as well as the sector's importance to the South African population necessitates that transformation be a central area for concern among academics, government, businesses, NGOs and in fact every South African citizen. The researcher trusts that this contribution to the existing body of research will in some way move us further along the transformation path towards a non-racial and equal society.

The next section further explores the background to the topic.

⁹ Chamber of Mines of South Africa, 'Facts & Figures 2013/2014' (Johannesburg: Chamber of Mines of South Africa, 2014), 8, 14,
https://commondatastorage.googleapis.com/comsa/f_f_2014_final.pdf.

¹⁰ Ibid., 3.

¹¹ Statistics South Africa, 'GDP Q4 2014' (Statistics South Africa, 2015),
http://www.statssa.gov.za/publications/P0441/GDP_Fourth_Quarter_2014_Presentation.pdf.

Background to the Research Question

This research topic is the result of a conversation between the researcher and Brendan Boyle from the Centre for Law and Society (CLS) at the University of Cape Town (UCT). The CLS, through community engagement, became aware of a Black Economic Empowerment (BEE) transaction that took place between a certain community and a mine and sought to investigate this transaction further to ensure that it was in the best interests of the community.¹² The researcher has used this project as an opportunity to look at the broader principle that drives the transaction, namely transformation within the mining sector, and to then incorporate the mine and the community into a case study.

The researcher appreciates the opportunity to work with the CLS and to explore the pertinent issue of transformation. It is submitted that this investigation will contribute to the overall understanding of transformation and that it will assist in the meaningful direction of efforts to assist transformation in the future. The intention is to be able to make a contribution to the literature on mining sector transformation and in so doing, provide research that will inform the transformative efforts of individuals, corporates and the state so that South Africa can move closer to attaining the Constitutional goal of equality.

This research sets out **‘to investigate transformation in the mining sector, with particular reference to the regulatory frameworks and mechanisms in which**

¹² The mine being Lonmin Plc and the community being the Bapo ba Mogale Community

mining firms operate.' The case study will focus on one of the world's largest platinum group metals mining firms, namely Lonmin Plc.¹³

The research will focus exclusively on Lonmin's operations in South Africa and the small sample of interviews will be focused exclusively on the Bapo ba Mogale community ('The Bapo Community').

The literature review will focus both on literature (consisting primarily of legal documents, policy frameworks and academic literature) that addresses transformation directly as well as other literature to the extent that it indirectly applies to mining or is specifically targeted at mining firms.

The main effort by the legislature and the executive to realise transformation has been through Black Economic Empowerment (BEE). Internationally, empowerment strategies are usually termed employment equity or affirmative action and broadly entail active measures implemented by the state to empower a group of previously disadvantaged individuals.¹⁴ BEE includes employment equity but is not limited thereto, and transformation is not identical to either BEE or employment equity - 'Transformation does not commence and conclude with BEE – rather, it starts with a change of perceptions and attitudes'¹⁵. It is therefore narrow to only consider BEE in a review of transformation as there is other relevant legislation that seeks to address the issue of transformation without making reference to BEE, but rather to the Constitution or the values therein.

¹³ For an overview of Lonmin see page 46.

¹⁴ Lourens Swart, "Affirmative Action and BEE : Are They Unique to South Africa?," *Management Today*, May 2006, 48.

¹⁵ R. G. Duffett, I. C. Van der Heever, and D. Bell, 'Black Economic Empowerment Progress in the Advertising Industry in Cape Town: Challenges and Benefits,' *Southern African Business Review* 13, no. 3 (2009): 87.

Transformation is also considered important in other countries where there is no BEE requirement, thereby introducing the idea that transformation within the mining sector may also be driven by something else. In these cases, the principle that drives transformation is sometimes, but not always, referred to as Corporate Social Responsibility (CSR)^{16 17 18}. This research project will therefore also address other drivers of transformation that may have an existing or potential impact on transformation within the mining sector.

¹⁶ This is not to say that BEE and CSR make up the whole of transformation – they are merely components thereof.

¹⁷ Economic Commission for Africa, 'Minerals and Africa's Development' (Minerals and Africa's Development: Economic Commission for Africa, November 2011), 83, http://www.africaminingvision.org/amv_resources/AMV/ISG%20Report_eng.pdf.

¹⁸ Henk Kloppers and Willemien du Plessis, 'Corporate Social Responsibility, Legislative Reforms and Mining in South Africa,' *J. Energy Nat. Resources L.* 26 (2008): 91.

Chapter 2

Research Statement

'to investigate transformation in the mining sector, with particular reference to the regulatory frameworks and mechanisms in which mining firms operate.'

The case study will focus on one of the world's largest platinum group metals mining firms, namely Lonmin Plc.

Relevance of the research project – shortcomings in the existing literature and research approaches

Transformation is an imperative in our society and there has been much written on the subject. The majority of existing literature fails, however, to take a holistic approach towards transformation in the mining sector. The term holistic as it is used in this dissertation refers to an approach that is framed broadly and open-mindedly to include many possible factors that could influence transformation. In addition, it refers to a balanced approach, one that does not favour more powerful actors over the less powerful ones. Contrary to this however, the existing focus is almost exclusively on powerful players in the sector such as government, corporates and large NGOs. The literature is lacking in that there is no voice from individual miners. Where such information does exist, it is often only quantitative data, which while extremely useful in determining whether or not certain metrics are changing (eg an increase or decrease in mine-worker's wages); it does not

accurately capture the rich descriptive nature of an experience that is felt by the individual.¹⁹

There is a need for a holistic approach that contrasts the expectations and experiences of both the mine-workers and the mining firm within the context of the transformation framework that exists. This is not to say that these two groups, mine-workers and mining firms are homogeneous, and it is expected that the experiences and expectations within each group, not only between the two groups, will differ. Nonetheless, the juxtaposition of the summarised views from both groups will prove valuable in identifying misaligned expectations.

While this research paper cannot address all of the shortcomings in existing literature, nor can it expect to offer the necessitated holistic research that is ultimately required, it will serve as a preliminary investigation that will hopefully pave the way for future research to engage more thoroughly with the topic. By engaging with transformation in the mining sector in a small way, and by identifying some of the key issues and some problems, the research paper aims to identify various aspects required to be addressed by future research.

The existing literature is further limited by the fact that it considers transformation in the mining sector primarily, if not exclusively, in terms of BEE²⁰. It fails to take into account other influences on transformation that are driven by the firm, the

¹⁹ See for example: Olusola O. Ololade and Harold J. Annegarn, 'Contrasting Community and Corporate Perceptions of Sustainability: A Case Study within the Platinum Mining Region of South Africa,' *Resources Policy* 38, no. 4 (December 2013): 568–76, doi:10.1016/j.resourpol.2013.09.005.

²⁰ See for example: A. Fauconnier and B. Mathur-Helm, 'Black Economic Empowerment in the South African Mining Industry: A Case Study of Exxaro Limited,' *South African Journal of Business Management* 39, no. 4 (2008): 1–14; Adam Habib and Kristina Bentley, *Racial Redress and Citizenship in South Africa* (Cape Town: HSRC Press, 2008).

employees or the broader global mining market, all of which can be independent of domestic government policy or legislation.

Additional benefits of the research project

The Lonmin-Bapo deal was concluded in 2014 and there is still much debate in the media surrounding its validity²¹. The fact that this debate is ongoing suggests that there is a great opportunity to use the deal as a platform to start the process of uncovering what each party is experiencing and their broader expectations.

In addition, organisations that work to promote the rights of the vulnerable regard mining as an area where successful transformation frameworks can be applied and generalised to other similar extractive industries such as fishing and agriculture.²²

The mining industry is still crippled by the effects of apartheid. One of the main reasons for the introduction of the Mineral and Petroleum Resources Development Act (MPRDA) is the fact that the mining industry has been very slow in making progress towards transformation²³. The mining sector is a considerably important sector of the economy and affects the lives of millions of South Africans. For this reason this dissertation sets out to address the pertinent issue of transformation within the mining sector.

The interview process is guided by the time and financial restraints that exist, and therefore a substantial, prolonged interview process would not be possible. This research will therefore set out to interview a few Lonmin miners, an executive from

²¹ See my analysis of the Lonmin-Bapo deal on pages 55-59 for more information on the media surrounding the deal.

²² Martisa, 'Collaborative Research Workshop' (Cape Town, April 24, 2015).

²³ South African Government News Agency, 'Reviewed Mining Charter Launched | SA News,' 2010, <http://www.sanews.gov.za/south-africa/reviewed-mining-charter-launched>.

Lonmin responsible for transformation, and a few key community leaders. The research is therefore exploratory in nature, and the goal is that the few voices that are heard in the interviews shed light on some of the practical implications of the legislation, as well to as guide future researchers by identifying key issues relating to transformation. The primary source of information for this research is a review of policy documents and legislation, and the interviews are a small addition to the research allowing for a ground-up view to the research inquiry.

Research objectives

The research project will address the research question by:

- i) Outlining the framework that governs transformation in the mining sector; including the relevant state policies, legislation and codes;
- ii) Describing trends in the objectives of the policies and legislation;
- iii) Critically analysing the existing literature related to mining and transformation in South Africa, including BEE and CSR;
- iv) Placing the Lonmin-Bapo deal in the context of the literature and the interview data;
- v) Obtaining an exploratory, ground-up view of the various expectations and experiences of transformation by Lonmin Plc and Lonmin miners through a small sample of interviews ;
- vi) Relating these experiences back to the documents that govern transformation of the mining sector, and

vii) Suggesting, if applicable, areas for further research which have arisen due to the data gathered through the literature review and the interview process.

The research aims to provide a starting point, and by no means a complete account, to a holistic descriptive account of a mining firm and its miners with the intention of better informing the drafters of state policy and legislation. This will hopefully enable them to create legislation and policies that better meet the needs of the persons that such documents govern.

Methodology and Research Design

The research methodology will be qualitative in nature. The first step towards exploring the research question involves a critical review of the existing literature – the primary data source. This will place the concept of transformation in context as well as identify any important issues that need to be addressed during the interviews. The secondary data source will be semi-structured interviews which will be held with Lonmin Plc, Lonmin miners and community leaders in the Bapo region.²⁴

Although there are broad terms that are commonly used to describe different interview techniques, most interviews will be a combination of the techniques and will not fit neatly into any one description. There are also different ways of interpreting each type of interview and definitions will differ per source. It is

²⁴ The interview research design is explained in more detail in Chapter 5.

therefore deemed appropriate to define the term 'semi-structured interview', in the context of this study, as having the following characteristics²⁵:

- 'The interviewer and respondents engage in a formal interview.
- The interviewer develops and uses an 'interview guide.' This is a list of questions and topics that need to be covered during the conversation, usually in a particular order.
- The interviewer follows the guide, but is able to follow topical trajectories in the conversation that may stray from the guide when he or she feels this is appropriate.'

Suitability of the research

The case study will look at Lonmin and the Bapo community. Interviews are widely used as part of case study research^{26 27}. They will be well suited to this research as they provide a rich source of information that can be used to build a case. The interview format will make it possible for the interviewees to reflect upon their answers, and reason in response to the questions in a way that is usually more reflective of their true perceptions on transformation when compared with other techniques such as polls, surveys or questionnaires²⁸. In order to ensure that the interviews provide the abovementioned benefits, they were carefully planned and

²⁵ D Cohen and B Crabtree, 'Qualitative Research Guidelines Project,' *Robert Wood Johnson Foundation*, July 2006.

²⁶ Michael Quinn Patton, 'Qualitative Research,' in *Encyclopaedia of Statistics in Behavioural Science* (John Wiley & Sons, Ltd, 2005), <http://onlinelibrary.wiley.com/doi/10.1002/0470013192.bsa514/abstract>.

²⁷ Jennifer Rowley, 'Using Case Studies in Research,' *Management Research News* 25, no. 1 (2002): 17.

²⁸ Bjarte Folkestad, 'Analysing Interview Data,' 2008, 1, 2, http://eurospheres.org/files/2010/08/Eurosphere_Working_Paper_13_Folkestad.pdf.

thought through. The questions were formulated to ensure clarity and responsiveness, and were reviewed by several researchers with experience in conducting interviews. The interviews will be used firstly to test the expected outcomes and perceptions of the interviewees, and secondly to develop and identify new understandings revealed by the interviewees. For example, the investigation will test the expectation that Lonmin did not have proper consultation with the community members (as is the current media perception)²⁹, and, given that the questionnaire will serve as a guide in the interview (ie a semi-structured interview), the interviewer will be able to stray from the guide if the interviewee starts uncovering new insights that the interviewer was previously unaware of. In addition, if unexpected answers are given then the interviewer will be able to ask the interviewees to elaborate on their answers in order to obtain a thorough understanding.

It is crucial to define the unit of analysis when conducting case study research³⁰.

This is not always easy as the boundaries of a case may not be clear cut. It is however still useful to define the boundaries as clearly as possible to ensure that the research will in fact answer the research question, as well as ensure that the research is conducted efficiently and timeously. The unit of analysis in this project will be the mining industry as a whole, with a specific focus (a sub-unit of analysis) on Lonmin.³¹ The research therefore aims to develop an understanding of

²⁹ Brendan Boyle, 'North West Community Takes on Lonmin | Custom Contested,' accessed May 19, 2015, <http://www.customcontested.co.za/north-west-community-takes-lonmin/>.

³⁰ Rowley, 'Using Case Studies in Research,' 19.

³¹ Lonmin here refers to Lonmin Plc and the Greater Lonmin Community.

transformation from the specific unit of Lonmin and place this within the context of the mining industry to create a picture of transformation within the mining sector.

Using semi-structured interviews will not only allow for a comparison between miners' answers, but will also allow for the interviewer to use discretion as to what follow-up questions may be asked. Given that there is only one interviewer (the researcher), it is possible to compare the interview results from the various interviews as there is a lower risk of discretion (and hence more uniformity in interpretation) as there would be had there been multiple interviewers. Ensuring that there is a basic list of questions that must be covered will also ensure the best use of time, given that the researcher will have to travel a far distance to the community and therefore cannot extend the interviews over a considerable time period.

To ensure the validity of the research findings, the research design and analysis will make use of triangulation. This is one of the strengths of using a case study as it makes it possible to gather information from multiple sources (for example company documents, legislation, impact assessment reports, regulatory releases, circulars, interviews etc) and compare the information in order to corroborate the findings.³² The use of the term triangulation as used here, refers more to crystallisation as described by Richardson, to mean: '...the central imaginary is the crystal, which combines symmetry and substance with an infinite variety of shapes, substances, transmutations, multi-dimensionalities and angles of approach.'³³ This allows for a more flexible approach than traditional triangulation and means that

³² Rowley, 'Using Case Studies in Research,' 23.

³³ Norman Denzin K et al., 'A Method of Inquiry,' in *The Sage Handbook of Qualitative Research*, 3rd ed. (London: Sage Publications, 2011), 968.

the literature review and the interviews will be used as complementary sources of information, as opposed to competing research perspectives.

Chapter 3

Literature Review - Transformation in Mining: Regulations, Policies and Controversies

The purpose of the review

The purpose of this review is to contextualise the concept of transformation within the existing body of literature. This will include a survey of academic literature surrounding transformation as well as an outline of the appropriate legislation and policy frameworks within which the concept is situated. The review will then focus on the case of Lonmin and specifically outline the issues and debates that were identified in the literature dealing with the Lonmin-Bapo deal. The review will start by exploring local legislation and then move to other relevant local policies and frameworks, and finally it will give an overview of international law and other international frameworks that are relevant to the discussion of transformation in the context of mining.

Towards a definition of transformation

Broadly speaking transformation involves moving from one state of affairs to another. In the context of this research report, transformation refers to ‘...the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.’³⁴ Transformation is not static, and it is certainly not removed from circumstances. Rather it is dynamic and context specific. Deciding

³⁴ Law runs in the family. De Rebus, December 2014:9 [2014] DEREBUS 230.

what the content of transformation is therefore requires an evaluation of what transformation would require in a particular context.

Transformation has political, social, economic and legal aspects. Given the oppressive legal system of apartheid, a drastic reformation of the law was required. This reform required the transformation of existing law such that it would reflect the new Constitutional values.³⁵ This legislative reform is one of the primary mechanisms through which the state has sought to effect transformation in the mining sector.

The concept of equality and its influence on transformation

The concept of equality is somewhat abstract and its precise definition is highly disputed³⁶. It is however accepted that it is a driving principle behind transformation.³⁷ For example, one author describes the relationship as follows: '...in South Africa, the value and the right of substantive equality are both central to ideas of social and economic 'transformation' and the role of the law in achieving this.'³⁸ It is against the backdrop of apartheid that the notion of equality becomes even more important. The need to eradicate decades of injustice and to establish an equal society has become a priority. The value of equality is linked to, and should therefore be viewed in light of, the values of freedom and human dignity³⁹.

³⁵ Dennis Davis, 'Transformation: The Constitutional Promise and Reality,' *South African Journal on Human Rights: Constitution-Making as a Learning Process* 26, no. 1 (2010): 1.

³⁶ William M. Wiecek, 'Emergence of Equality as a Constitutional Value: The First Century,' *Chi.-Kent L. Rev.* 82 (2007): 233.

³⁷ Sandra Liebenberg and Beth Goldblatt, 'The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution,' *South African Journal on Human Rights: Substantive Equality: Special Issue 2* 23 (2007): 337.

³⁸ Catherine Albertyn, 'Substantive Equality and Transformation in South Africa,' *South African Journal on Human Rights: Substantive Equality: Special Issue 2* 23 (2007): 254.

³⁹ See the preamble, s1, s9 and s39 (1).

This research report will not seek to equate equality with transformation but will accept that transformation is largely driven by the desire for an equal society. It will therefore stay clear of the abstract debates surrounding equality and will derive its meaning from the Constitution and any legislation that makes reference to it.

The provisions of the Constitution that are relevant for this discussion are reproduced below:

S1 - The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

S3 - The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

S9(2) - Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

In terms of s7(2), the executive has the Constitutional duty to 'respect, protect, promote and fulfil' the rights in the Bill of Rights. Section 1 entrenches equality as one of the founding Constitutional values. This value is then expressed as a right in Section 9 which prohibits discrimination and promotes equality and unity. As will become evident through the review of literature on transformation, there is also a consistent referral to the Section 9 equality right that is contained in the

Constitution by the legislation, charters and codes that surround the mining industry as the foundation upon which the documents are based.⁴⁰

The Constitution therefore provides for the realisation of equality and this value is what drives the call for transformation within our nation. In the South African mining context, the goal of equality has primarily been framed through the notion of transformation - transforming the industry from one characterised by inequality to one founded on the principle of equality.

This research intends to develop a definition of transformation that is informed not only by the literature, but also by the expectations and experiences of a mining firm and of the miners that will be interviewed. It is, however, valuable to have a preliminary definition of transformation constructed from the literature. The preamble to the Constitution envisions itself as a bridge from the old apartheid era to a new democratic society. In doing so it moves (or put differently, it transforms) us by attempting to:

‘Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person;’

⁴⁰ See the Mining Charter (2007 and 2010 amended) and the MPRDA.

De Vos⁴¹ describes transformation as a ‘a radical vision...[that] envisages a complete transformation of the legal system as well as a dismantling of the structures which still help to perpetuate the disgraceful racial and gender inequality in our society and continues to subjugate the majority of South Africans – both economically and socially.’⁴²

This description by De Vos captures the essence of the term transformation as it will be used in this research report. Many authors have attempted to draw out various specificities and nuances in their definitions but the essence of transformation conforms to the above. Transformation is moving South Africa from where it currently is to where it should be, from a position of inequality and injustice to that of equality and justice. The challenge of defining transformation is revisited in Chapter 6: making sense of the research findings, where the responses from the interviewees are considered.

In order to effect this transformation, the state has created various legislative and policy frameworks aimed at addressing transformation. In addition, various local and global organisations have developed influential principles on a firm’s role in transformation. These will now be discussed below.

⁴¹ De Vos is a lecturer at the University of Cape Town who is a well-known and influential writer on Constitutional Law matters.

⁴² ‘What Do We Talk about When We Talk about ‘transformation’? » Constitutionally Speaking,’ accessed December 15, 2015, <http://constitutionallyspeaking.co.za/what-do-we-talk-about-when-we-talk-about-transformation-2/>.

Mapping the Transformation Framework

What follows in this section is a review of key pieces of legislation and other social policies. They were selected because of their relevance to the mining sector and transformation, because of certain current debates and controversies that are attached to them and because of their prevalence in the literature surrounding transformation within the mining context.

Review of local legislative sources of authority

The Constitution of South Africa

The Constitution is the founding document of South Africa. It is the source of all law and authority and no power can be exercised or law enforced that is not consistent with it.

The previous section has already discussed equality in the Constitution and its influence on transformation. In addition, the Constitution incorporates numerous justiciable socio-economic rights that place a duty on the state, and may also bind relationships between citizens of South Africa where applicable.

For example:

Section 26(1) provides that 'Everyone has the right to have access to adequate housing'.

Section 27(1) provides that 'Everyone has the right to have access to -

- health care services, including reproductive health care;
- sufficient food and water; and

- social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.'

Section 29 provides that 'Everyone has the right -

- b) to a basic education, including adult basic education;'

The government therefore has an obligation to ensure that these rights are being realised, and their realisation will result in transformation.⁴³ The state's approach to realising these rights will often be tailored to a specific industry, such as its focus on eliminating all same-sex hostels by 2014.⁴⁴

Mineral and Petroleum Resources Development Act (MPRDA)

The MPRDA came into effect in 2004 and it saw a drastic shift in the ownership of mineral rights from private hands to the state. Prior to the MPRDA, mining rights vested in individuals and companies, and the Act effectively cancelled these 'old order' rights and replaced them with 'new-order' rights.⁴⁵ These new order rights must be applied for by existing and prospective mining firms.⁴⁶ This means that the state now effectively controls all natural resources, in line with the UN Charter of Economic Rights and Duties of States.⁴⁷ The UN Charter states that 'every State has and shall freely exercise full permanent sovereignty, including possession, use and

⁴³ These rights are limited to the extent that they require progressive realisation.

⁴⁴ See discussion under: 'Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry 2010 for more detail.'

⁴⁵ Paul Sorensen, 'Legislative Transformation of South African Mining since 1994: What Progress?,' *International Journal of Environmental Studies* 68, no. 2 (April 2011): 174, doi:10.1080/00207233.2010.542314.

⁴⁶ Ibid.

⁴⁷ 'A/RES/29/3281 - Charter of Economic Rights and Duties of States - UN Documents: Gathering a Body of Global Agreements,' accessed December 10, 2015, <http://www.un-documents.net/a29r3281.htm>.

disposal, over all its wealth, natural resources and economic activities'.⁴⁸ An important consideration however is how miners and community members have reacted towards this shift in ownership. Who do the mining rights rightfully belong to – the state, the community or the mining employees?

The Act deals with the specificities relating to mining rights, but importantly it also deals comprehensively with the transformation of the mining sector. It derives its foundation from the ANC's Mineral and Energy policy document from 1990 and the Freedom Charter of 1995.^{49 50}

The preamble to the Act is a strong example of the Act's commitment to transform the mining sector. It recognises the need to promote and uplift rural communities affected by mining, reaffirms the state's commitment to ensure that there is equitable access to the country's minerals, remains committed to eliminating discriminatory practices in the industry and to consider the state's obligation under the Constitution to take legislative and other measures to redress the results of past racial discrimination.

Section 2 sets out nine objects of the Act, four of which bear mentioning here because of their relation to transformation:

- (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and

⁴⁸ Ibid. Article 2.

⁴⁹ 'Draft Mineral and Energy Policy,' *African National Congress*, accessed May 23, 2015, <http://www.anc.org.za/show.php?id=253>.

⁵⁰ 'Towards the Transfer of Mineral Wealth to the Ownership of the People as a Whole: A Perspective on Nationalisation of Mines,' *African National Congress Youth League*, August 2010, <http://www.ancyl.org.za/show.php?id=5502>.

petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;

(f) promote employment and advance the social and economic welfare of all South Africans;

(h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and

(i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.

The above objectives all appear to centre on the MPRDA's primary objective of accelerating BEE within the mining industry.

Broad-Based Black Economic Empowerment (B-BBEE) is defined in the Act to mean a social or economic strategy, plan, principle, approach or act which is aimed at redressing the results of past or present discrimination, transforming the mining industry so as to assist with the ownership, participation, control by historically disadvantaged people in the industry, as well as to develop the communities affected by the mining operations. It also provides for the socio-economic development of all HDSA by the proceeds (ie profits) of such operations.

This is a comprehensive definition of B-BBEE and it centres on the transformation of the mining sector. Importantly it includes the communities, and not merely the employees of mines, in its transformation goal. To focus on merely employees

would have been a too narrow approach, and would have failed to recognise that mining operations have a long lasting impact on the communities within which they operate.⁵¹ This was reiterated in the interviews, where one of the community members remarked that ‘that the entire community should be the beneficiaries of transformation and not solely the mine employees.’

Section 100 of the Act deals specifically with transformation in the minerals industry and requires a housing and living conditions standard to be developed, a code of good practice for the industry to be developed and the publication of a mining charter that addresses the objectives of the Constitution.⁵² The Constitutional objective includes the need to redress historical, social and economic inequalities by allowing historically disadvantaged South Africans (HDSAs) to enter and benefit from the mining sector.

One of the significant requirements of the Act is for all mining firms to have 26 per cent of their equity held by HDSAs by 1 May 2014. This is a controversial aspect of the Act as it often results in the wealth of the firm being distributed to a few select individuals, a critique of BEE generally.⁵³ This is expressed by the ANCYL in a document that argues for the nationalisation of the mines. They argue: ‘The weakness with South Africa's share model [being the MPRDA's 26 per cent shareholding requirement] is that it benefits few individuals (sic) instead of large communities and the people as a whole. Whilst the intention to integrate historically disadvantaged individuals into mining is noble, it should not be pursued

⁵¹ Kloppers and du Plessis, “Corporate Social Responsibility, Legislative Reforms and Mining in South Africa,” 94.

⁵² These have indeed been developed and are discussed below.

⁵³ For more on the narrow reach of BEE as a limitation see the discussion under ‘limitations of BEE’.

at the expense of the entire population and communities. The principle should forever be people sharing in the country's wealth.⁵⁴

In terms of the MPRDA, all mining firms are required to compile a social and labour plan (SLP), and they must indicate how and when they will achieve their targets before they can apply for new or renewal mining rights. The objectives of the SLPs, as set out in the Revised SLP Guidelines, are to:

- (a) Promote economic growth and mineral and petroleum resources development in the Republic (Section 2 (e) of the MPRDA);
- (b) Promote employment and advance the social and economic welfare of all South Africans (Section 2 (f) of the MPRDA);
- (c) Ensure that holders of mining or production rights contribute towards the socio-economic development of the areas in which they are operating as well as the areas from which the majority of the workforce is sourced (Section 2 (i) of the MPRDA, and the Charter); and
- (d) To utilize and expand the existing skills base for the empowerment of HDSA and to serve the community.

Objectives (a) and (b) are aimed at South Africans as a whole, and objectives (c) and (d) relate specifically to empowering HDSAs and mining communities.

While the above objectives appear noble, there is however much uncertainty surrounding these social and labour plans. For example, there is no requirement for these SLPs to be made public, which severely reduces the accountability of these

⁵⁴ "Towards the Transfer of Mineral Wealth to the Ownership of the People as a Whole: A Perspective on Nationalisation of Mines."

plans.⁵⁵The CLS has, however, managed to obtain SLPs through PAIA applications⁵⁶ and mining firms are required, in terms of the SLP Guidelines, to submit an annual report to the Director General of the Department of Mineral Resources, detailing the progress made towards their SLPs. The perception in the literature and the interviews however is that there are no monitoring or evaluation processes for the SLPs, making their enforceability questionable.⁵⁷ Given that companies such as Lonmin have compiled these extensive plans, what is the perception of miners and mining communities towards them, knowing that they are not enforceable in law? This was indeed a point of concern raised by the miners and community members during the interviews and is explored further in Chapter 6.

The Mineral and Petroleum Resources Royalty Act 28 of 2008

The purpose of the Act is 'To impose a royalty on the transfer of mineral resources and to provide for matters connected therewith.' The Act provides for the royalty to be collected at a national level (via the National Revenue Fund).⁵⁸ The rate of the royalty is calculated in accordance with Section 3, ie on a variable scale that depends on the mine's profitability.

There has not been much debate or commentary surrounding this Act, but where there is, it is for the most part positive: 'The receipt of royalty from the transfer of mineral resources to an extractor is aimed at compensating States for their

⁵⁵ Louis Snyman, "Do Social and Labour Plans Belong to Communities?" (Mining Indaba, Cape Town, February 8, 2016), <http://altminingindaba.co.za/wp-content/uploads/2016/02/Do-Social-and-Labour-Plans-Belong-to-Communities-Louis-Snyman-CALS.pdf>.

⁵⁶ Centre for Law and Society, UCT, 'Contradictions in Legislation on Mining and Its Community Benefits,' February 2015, 4, http://www.cls.uct.ac.za/usr/lrg/downloads/MiningandCommunityBenefits_Factsheet_Final_Feb2015.pdf.

⁵⁷ Snyman, "Do Social and Labour Plans Belong to Communities?"

⁵⁸ Section 2

irreplaceable, non-renewable resources, for sustainable investment and development with a view of improving the economic well-being of the nation.⁵⁹ The view therefore is that natural resources belong to the state and mining firms must compensate the state for them.

Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry 2010

The Charter was first published in 2002 to give effect to the requirement to establish a Charter in terms of the MPRDA. Its vision was 'to create an industry that will proudly reflect the promise of a non-racial South Africa.'

Part of the Mining Charter's preamble stated that it recognised 'The imperative of redressing historical and social inequalities as stated by the Constitution of the Republic of South Africa, in inter alia section 9 on equality (and unfair discrimination) in the Bill of Rights'. This indicates furthermore that the backdrop to the Charter is transformation and that the driving force behind this transformation is the right to equality as set out in our Constitution.

In September 2010 however, the Minister for Mineral Resources published an amended Charter stating that: 'The observations are that growth in the mining industry has left much to be desired and transformation within the sector has been disappointingly slow'⁶⁰. The poor transformation evidenced by the sector therefore led to a revised Mining Charter⁶¹. The new Charter places emphasis on a 26 per cent

⁵⁹ Praise Oluwatomisin Oshokoya, 'The New South African Mineral Royalty Formulae. Will All Miners Become Refiners? Platinum Case Study' 2013, 28, <http://mobile.wiredspace.wits.ac.za/handle/10539/12391>.

⁶⁰ South African Government News Agency, 'Reviewed Mining Charter Launched | SA News.'

⁶¹ Department of Mineral Resources, *Amendment of The Broad-Based Socio-Economic Empowerment Charter for The South African Mining and Minerals Industry*, 33573, 2010.

equity shareholding by HDSA in mining firms (previously the target was a 15% holding by 2007) as well as providing for the complete elimination of mining hostels by 2014. Despite this requirement, a report compiled by a delegation of the Portfolio Committee on Mineral Resources indicates that Lonmin has still not complied with this hostel requirement.⁶²

The preamble to the Charter remains largely the same, with the justification for transformation remaining the equality clause in s9 of the Constitution. The vision is now: 'to facilitate sustainable transformation, growth and development of the mining industry.'

The Mining Charter comprises of 9 elements:

- Ownership

Ownership is identified as being a key factor in enabling HDSAs to integrate into the mainstream economy. Firms must achieve a 26 per cent ownership holding by HDSAs by 2014.

- Procurement and Enterprise Development

This element focuses on procuring goods and services from HDSAs, and in particular, those individuals that are situated locally with respect to the mine. See below under 'Preferential Procurement Policy Framework Act' for the specific targets.

- Beneficiation

Beneficiation is an important aspect of the Charter and is discussed in more detail in the subsequent chapter. The Department of

⁶² Republic of South Africa, *Announcements, Tablings and Committee Reports, 23-2015, 2015.*

Mineral Resources describes beneficiation as ‘...one of the major drivers in advancing the empowerment of historically disadvantaged communities in South Africa’ and acknowledges that part of its role is the ‘...development of new entrepreneurs in large and small mining industries.’ It refers to the ‘transformation of a primary material (produced by mining and extraction processes) to a more finished product, which has a higher export sales value.’⁶³

- Employment Equity

The Charter recognises the importance of representation across all positions of the mining firms. It therefore requires a minimum of 40 per cent demographic representation by HSDAs across: Executive Management, Senior Management, Core and Critical Skills, Middle Management and Junior Management levels by 2014.

- Human Resource Development

This element reiterates what is already legislated in the Skills Development Levy Act, and provides a target of 5 per cent of annual payroll for 2014 (compared to the legislated amount of 1 per cent per the Skills Development Levy Act).

- Mine Community Development

The Charter states that ‘Mine communities form an integral part of mining development, there has to be meaningful contribution towards community development, both in terms of size and impact, in keeping with the principles of the social license to operate.’ Here

⁶³ ‘Beneficiation Economics,’ accessed December 16, 2015, <http://www.dmr.gov.za/beneficiation-economics.html>.

we see the establishment in law that mines must ensure that they are cognisant of their need for a social licence to operate. It provides that mining firms must engage and consult with the community prior to implementing mining projects, as well as that the mining firms must ensure that they are investing in community development.

- Housing and Living Conditions

The first piece of legislation to provide for the improvement of housing conditions of miners was the MPRDA in 2002, but it failed to provide specific guidelines to enable accountability and effective implementation, and hence the Charter, in 2010, focused on outlining specific requirements in relation to housing. The Charter provides for the improvement of the living conditions of miners, specifically requiring firms to:

- Convert or upgrade hostels into family units by 2014;
- Attain the occupancy rate of one person per room by 2014;
- Facilitate home ownership options for all mine employees in consultation with organised labour by 2014.

- Sustainable Development and Growth of the Mining Industry

The Charter recognises the need for a long term view of mining operations that takes into account the sustainability of the natural environment as well as the health and safety of the miners and the mining community.

- Reporting (Monitoring and Evaluation)

All mining firms are required to report annually (in terms of Section 2.9 of the Charter and Section 28(2)(c) of the MPRDA) on their compliance with the Mining Charters requirements.

The Mining Charter provides that firms are to be evaluated on their progress on the Charter's nine elements, as discussed above, based on a scorecard. The Mining Charter scorecard is attached as Appendix 1.

The shift from BEE to B-BBEE

BEE was initially focused at transferring ownership of previously white-owned companies to black individuals.⁶⁴ However, this policy resulted in only a few wealthy black individuals benefiting from equity ownership, and therefore the government shifted to a Broad-Based Black Economic Empowerment strategy in 2003.⁶⁵ To provide an example of the narrow results achieved by BEE in its original form, 60 per cent of the BEE deals that took place in 2003 empowered only two individuals.⁶⁶ The new B-BBEE strategy now evaluates firms not only on the transfer of equity ownership, but on 7 pillars which include:

- 1) Ownership
- 2) Management representation
- 3) Skills development
- 4) Employment equity

⁶⁴ Ndapwilapo Selma Shimutwikeni, "BEE Policy and Mining: The Challenges" (Unpublished), 2, accessed September 12, 2015, www.dundee.ac.uk/~fcepmlp%2Fgateway%2Ffiles.php%3Ffile%3Dcepmlp_car14_96_416904158.pdf&usg=AFQjCNEqoBSSNHUvexnIZiEsFOaZpkXqfQ&bvm=bv.109395566,d.d24.

⁶⁵ Ibid., 3.

⁶⁶ Fauconnier and Mathur-Helm, 'Black Economic Empowerment in the South African Mining Industry,' 2.

- 5) Preferential procurement
- 6) Enterprise development, and
- 7) Corporate social investment

The new B-BBEE approach therefore incorporates various aspects that are necessary to realise transformation within South Africa. This does however raise the question as to whether the new approach to empowerment has been more effective at reaching a broader range of beneficiaries than the old, ownership-focused approach?

Legislative uncertainty surrounding transformation

There remains uncertainty about two considerations of the MPRDA and the Mining Charter. Firstly, whether the 26 per cent ownership is a once off goal or if a mining firm will continually have to rebalance their equity shareholders as and when HDSAs sell their shares to non-HDSAs. The Minister of Mines, Ngoako Ramatlhod, has stated that he will leave it up to the High Court to decide on the correct interpretation⁶⁷. This uncertainty is a shortcoming of the Charter, BEE legislation and the MPRDA, and is discussed in more detail in Chapter 6.

Secondly, the Department of Trade and Industry (DTI), announced in a notice on the 7 May 2015 that broad-based empowerment schemes and employee share schemes will no longer result in the same BEE points as individual share ownership.

Ramatlhodi has stated that he will work closely with the DTI to ensure that their

⁶⁷ Liesel Peyper, 'Mining Charter 'Silent' on Crucial Ownership Issue,' *MiningMx*, January 4, 2015, <http://www.miningmx.com/page/news/markets/1650804-Mining-charter-silent-on-crucial-ownership-issue#.VWC78UYyIsl>.

efforts are aligned⁶⁸. This announcement has been criticised by many prominent business leaders, lawyers and BEE verification agencies for promoting an elite black upper class rather than empowering the people who are the truly disadvantaged.⁶⁹

⁷⁰ It is also contended that the announcement is not valid due to the fact that the correct legal process required in order to amend the Codes was not followed.⁷¹ The announcement by the DTI does however require one to ask why they would promote direct ownership over indirect ownership, such as share schemes? Could this rash announcement be evidence of a long held frustration towards elaborate share schemes that fail to actually empower black employees and communities? This type of controversy must be borne in mind when reading the research findings from the interviews and literature review.

The DTI has subsequently withdrawn its notice and thereby indicated that it no longer intends to pursue the amendment to the Codes⁷². Despite the correction by the DTI, these actions create uncertainty, indicating disunion among prominent government officials who are responsible for implementing transformation policies. It also indicates the speed at which legislation could be changed. Such a change would have had drastic effects on mining firms and would have rendered them non-compliant with this new BEE requirement.

⁶⁸ Liesel Peyper, 'SA to Align BEE Mining Laws with DTI Codes,' *MiningMx*, July 5, 2015, <http://www.miningmx.com/page/news/markets/1651459-SA-to-align-BEE-mining-laws-with-DTI-codes#.VWC8i0Yylsm>.

⁶⁹ Including Nedbank's Chairman Reuel Khoza; the leader of the Democratic Alliance Mmusi Maimane;

⁷⁰ 'This Is Not How You Grow Industrialists - Reuel Khoza,' *Sunday Times*, accessed May 27, 2015, <http://www.timeslive.co.za/sundaytimes/business/2015/05/24/This-is-not-how-you-grow-industrialists---Reuel-Khoza>.

⁷¹ 'Broad Based' Gets Dumped from BEE Codes,' *Fin24*, accessed May 23, 2015, <http://www.fin24.com/Economy/Broad-based-gets-dumped-from-BEE-codes-20150510>.

⁷² Government Gazette, *General Notice 444, 38799*, vol. 599, 2015, 6.

Employment Equity Act 55 of 1998

The Act recognises in its preamble that there is a constitutional right to equality. It furthermore recognises this right as part of the motivation behind the enactment of the Act, and therefore aims to:

- Redress the effects of discrimination through employment equity practices, and
- Eliminate unfair discrimination in employment

Chapter 3 of the Act specifically addresses affirmative action measures and places a duty on an employer to implement measures targeted at people from designated groups designed to promote employment equity.⁷³ In accordance with the Act, Lonmin sets employment equity targets every 5 years and reports on them annually in its Sustainable Development Report. In 2015 for example, the company noted a significant improvement in the number of women in management positions, with the proportion increasing from 35.8 per cent in 2013 to 37.8 per cent in 2014.⁷⁴

Labour Relations Act 66 of 1995

Another mechanism that is used in South Africa to promote transformation is the structured organisation of labour. This is primarily achieved through Trade Unions that represent the workers interests to the employers.

Section 4(1) of the Labour Relations Act⁷⁵ provides that 'every employee has the right-

⁷³ Section 1 of the Act provides that a designated group includes black people, women and people with disabilities and black people means Africans, Coloureds and Indians.

⁷⁴ Lonmin Plc, 'Sustainable Development Report 2014,' 2014, 45.

⁷⁵ Act 66 of 1995.

- (a) to participate in forming a trade union or federation of trade unions; and
- (b) to join a trade union, subject to its constitution.'

The National Union of Mineworkers (NUM) seeks to transform the mining industry by attempting to 'increase wages, upgrade workers' skills and stabilize the workforce through improved living conditions.'⁷⁶ This is done through collective bargaining (per Chapter 3 of the Act) and striking (per Chapter 4 of the Act). The Union has a strong voice given that it can mobilise mine workers to engage in walk outs or to disrupt production.⁷⁷ The mines have attempted to avoid this threat by contracting and subcontracting mining work to firms that are not bound by collective agreements.⁷⁸ Unions are primarily used by employees as a mechanism to increase wages, but have also proved effective at addressing 'improvements in allowances, employee share ownership programs (ESOPs) that are part of the BBEEE program, company subsidies for medical schemes (insurance), improving pension programs, access to antiretrovirals as well as protecting trade union rights'.⁷⁹

Trade unions were referred to by both the miners and the mining firm during the interviews and Mr Nkhoma, the Lonmin representative, stated that the trade unions play a role in transformation, although 'they must not forget that they are there to

⁷⁶ Suzanne Dansereau, 'Comparing Dueling Approaches to the Transformation of South African Mining: Corporate Social Responsibility or Labour Restructuring?', *TRAVAIL, Capital et Société* 43, no. 1 (2010): 65, http://www.lcs-tcs.com/pdfs/43_1/dansereau.pdf.

⁷⁷ *Ibid.*, 83.

⁷⁸ 'Assessment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry' (Department of Mineral Resources, May 2015), 83, <http://www.dmr.gov.za/publications/summary/262-mining-charter-assessment-report-2015/6710-assessment-of-the-broad-based-socio-economic-empowerment-for-the-south-african-mining-industrymining-charter-may-2015.html>.

⁷⁹ Dansereau, 'Comparing Dueling Approaches to the Transformation of South African Mining,' 84.

facilitate engagement between workers and employers, and not to run the company.’ Only one miner made reference to the role that trade unions can play in transformation, and stated that their role is that of an intermediary between the mining firm and the employees, thereby underscoring Lonmin’s view.

Skills Development Act 97 of 1998

The Act states as its main purpose (with other objectives) - ‘to improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education’⁸⁰. It established a new framework for skills development that saw the creation of sector-specific guidelines, with each sector being organised by a Sector Training and Education Authority (SETA). Lonmin benchmarks its education and skills initiatives against the guidelines set forth by the Mining Qualifications Agency, an industry specific organisation under the umbrella of the SETA.⁸¹

The Skills Development Levy Act 9 of 1999

The Act is pursuant to the Skills Development Act, and imposes a levy on companies in order to fund the SETA programmes. The Mining Qualifications Authority is the SETA relevant to the study of Lonmin, and it runs the skills development programmes for the mining and minerals sector in South Africa. The MQA establishes that its first strategic objective is to ‘Support transformation of the sector through skills development.’⁸² Furthermore, it notes that the principle driving force behind the Act is the Mining Charter and reports on its contribution

⁸⁰ Section 2(1)(e)

⁸¹ Lonmin Plc, “Sustainable Development Report 2014,” 45.

⁸² ‘MQA Annual Report 2015’ (Mining Qualifications Authority, 2015), 1, <http://www.mqa.org.za/sites/default/files/MQA%20Annual%20Report%202015.pdf>.

towards the 9 objectives of the Mining Charter.⁸³ The MQA initiated a number of projects aimed at transforming the mining sector, for example, a maths and science support programme aimed at HDSAs in rural mining communities, accommodating 1037 learners in 2015.⁸⁴

Both the Skills Development Act and the Skills Development Levy Act are intended to play a crucial role in transforming the mining sector. HDSAs were denied equal education and skills opportunities in the past, and it is therefore imperative that transformation includes the provision of education and skills to rectify past inequities.

The Preferential Procurement Policy Framework Act 5 of 2000

The Act states that its purpose is ‘to give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution; and to provide for matters connected therewith.’ The Act therefore establishes a preferential point system to be used in determining the allocation of tenders by the state. The point system is designed to prefer suppliers that are HDSAs or firms that are contributing to transformation by implementing BEE policies. The Act itself does not impose an obligation on mining firms to engage in preferential procurement (although other legislation does, see the Mining Charter’s requirements below), but it does encourage mining firms to be compliant with B-BBEE in order that they may receive tenders from the government.

⁸³ Ibid., 17.

⁸⁴ Ibid., 39.

Lonmin has an internal preferential procurement system which prefers suppliers who are from the Greater Lonmin Community and companies who are empowered in terms of B-BBEE. The Mining Charter provides targets for preferential procurement and sets them at 70 per cent for services, 50 per cent for consumable goods and 40 per cent for capital goods.⁸⁵ Lonmin's progress was 67 per cent for capital goods and consumable goods and 68 per cent for services, thereby far exceeding the minimum thresholds set by the Charter, and positively evidencing a commitment by the firm towards transformation initiatives.⁸⁶ It must be said however that statistics do not always accurately capture the lived experiences of transformation by the beneficiaries. These statistics should therefore be borne in mind and juxtaposed with the experiences by beneficiaries when interpreting the research findings, both from the interviews and the review of literature.

Announcements, Tablings and Committee Reports

In the state's announcements, tablings and committee reports (ie primarily reports that are produced by portfolio committees) dated Tuesday, 10 March 2015, it is stated that: 'Transformation is perhaps the central issue for the mining sector.

There is a need to change the industry so that real benefits flow to the people of South Africa and not to the historically empowered.' This emphasises the state's continued commitment to transformation as well as its maintained understanding that there is still a great need to provide for and monitor transformation, specifically within the mining sector. One must however ask to what extent the findings in these reports inform current and future policy making by the legislature?

⁸⁵ Section 2.2 Mining Charter.

⁸⁶ Lonmin Plc, 'Sustainable Development Report 2014,' 74.

The report then goes on to address many of the issues that must be overcome in order to start seeing the effective implementation of transformative measures: 'Many mines have now complied with the minimum standard of 26 per cent ownership of mines. Although such should be viewed as a basic requirement, subject to further improvement. The efforts to include HDSAs in senior positions, in management and in ownership need to gather more momentum.'⁸⁷

This sentiment is in line with the discussion based on King III⁸⁸, that it is no longer adequate for a company to merely comply with the minimum legal requirements, but rather to embrace transformation as a foundational value of the company upon which both its strategy and governance are based. This is addressed and elaborated on in the following section.

Review of local and international non-legislative authority

*King III Report on Governance for South Africa 2009*⁸⁹

The Report is the main source of guidance for corporate governance in South Africa. It is the third report of its kind, with King I being the first report and in force from 1994 until 2002, King II in force from 2002 until 2009, and King III in force from 2009 until present. It is a requirement that any company listed on the Johannesburg Stock Exchange (JSE) comply with the framework set out by King III and therefore it also applies to Lonmin. One of the concerns that were raised by the UCT Ethics Committee in relation to this research report⁹⁰ was that the research did not focus

⁸⁷ Republic of South Africa, *Announcements, Tablings and Committee Reports*, 898.

⁸⁸ See next section for a detailed explanation of this Report

⁸⁹ Institute of Directors in Southern Africa, 'King Code of Governance for South Africa' (Institute of Directors in Southern Africa, 2009).

⁹⁰ Report here referring to this dissertation and not to King III.

on BEE. The researcher notes that this research will critically review BEE as it is the major body of legislation that governs the mining sector's legal responsibility for transformation. Regard however will also be had for other frameworks, such as King III, when investigating the research question as they too form part of the framework in which companies must operate, and such a review will help to develop a broader understanding transformation.

Principle 1.1 states that: The board should provide effective leadership based on an ethical foundation.

The application of this principle is then explained further in paragraph 32 which states: 'Currently, **the connection between sustainability and BEE is not fully understood**. It is, therefore, underdeveloped which leads to a dissociation of the two. There is, however, a significant opportunity to clarify and institutionalise the linkage between sustainability and BEE, namely, the growing movement among international investors – including many of the largest institutional investors – of recognising the role of sustainability considerations in investment. Using this opportunity would in all likelihood, engender greater confidence among investors in companies' **social transformation** efforts in South Africa'. [Emphasis by the researcher].

This reiterates the need for a broader approach to transformation within South Africa. The need for transformation stems from the injustices of the past.

Transformative efforts therefore cannot be viewed in isolation but must rather be viewed as a comprehensive whole, implemented by individuals, corporates and the state, to move South Africa closer towards being a nation founded on equality. This

idea, of transformation and social responsibility being linked and carried out by various actors, is echoed in Lonmin Plc's Chairman's letter in its Annual Report and Accounts 2014: 'Part of our success will rest on...matters of **social responsibility**...We are fortunate too, that our actions have the power to transform lives for the better...and we can play our part in the wider, **ongoing transformation of South Africa, working with government communities and other entities**'⁹¹.

[Emphasis by the researcher].

Further principles relevant to transformation include:

Principle 1.2

- **Social transformation and redress from apartheid are important** and should be integrated within the broader transition to sustainability. Integrating sustainability and social transformation in a strategic and coherent manner will **give rise to greater opportunities, efficiencies, and benefits, for both the company and society**. [Emphasis by the researcher].

Paragraph 29

- Responsible **corporate citizenship** should manifest in tangible and reportable programmes and results. **In South Africa, corporate citizenship includes, among others, responsibilities outlined in the Bill of Rights of the Constitution, and issues relating to transformation,** human capital, human rights, the environment, social capital, safety and health. [Emphasis by the researcher].

⁹¹ Lonmin Plc, 'Lonmin Annual Report and Accounts,' 2014, 7, 8.

These principles from King III illustrate how a company is required to view transformation in a broader sense and to incorporate it with sustainability. There is a global movement towards companies being required to operate as ‘responsible corporate citizens’, which requires that they incorporate various social, environmental, economic and legal considerations into their business practices to ensure that they are operating sustainably with regard to a broader set of stakeholders.^{92 93} It is therefore not possible for a company to look solely at compliance with legal obligations (such as meeting the minimum requirements of BEE legislation), but rather to adopt as part of their overarching strategy, a commitment to contribute to society through social entrepreneurship.⁹⁴

Sustainability Reporting

According to the Global Reporting Initiative, “ ‘sustainability reporting’ is a broad term considered synonymous with others used to describe reporting on economic, environmental, and social impacts (eg, triple bottom line, corporate responsibility reporting etc).⁹⁵

In accordance with the above principle, Lonmin publishes an annual Sustainable Development Report that ‘...provides information about Lonmin’s sustainable

⁹² Jane Nelson, ‘Corporate Citizenship in a Global Context,’ *Corporate Social Responsibility Initiative*, Working Paper 13, Working Paper 13 (May 2005): 2.

⁹³ World Economic Forum, ‘Emerging Best Practices of Chinese Globalizers The Corporate Global Citizenship Challenge’ (World Economic Forum, 2012), 4, 5, http://www3.weforum.org/docs/WEF_EmergingBestPracticesChineseGlobalizers_IndustryAgenda_2012.pdf.

⁹⁴ Kloppers and du Plessis, ‘Corporate Social Responsibility, Legislative Reforms and Mining in South Africa,’ 95.

⁹⁵ ‘Global Reporting Initiative 3: Mining and Metals Sector Supplement’ (Amsterdam: Global Reporting Initiative, 2011), 8, <https://www.globalreporting.org/standards/g4/Pages/default.aspx>.

development policies, practices and performance and should be read in conjunction with the 2014 Annual Report and Accounts, and supplementary reports...⁹⁶

There are numerous global principle frameworks that seek to govern reporting and/or the operations of companies. These frameworks are not legislation (although some form part of International Customary Law) but there is a global shift towards sustainability and accountability that places pressure on firms to adopt the principles and to report on their progress towards achieving them.⁹⁷ Lonmin for example mentions numerous times in its Sustainable Development Report that there is a requirement for a mining firm to have a social licence to operate in a given community.⁹⁸ In other words, the company is recognising that it only operates in a community because that community has agreed to it being there. In their Sustainable Development Report, transformation through social and economic development is listed as one of the key focus areas in order to maintain their social licence to operate.⁹⁹ The company also refers to itself as a corporate citizen which is 'sustainability reporting' language.¹⁰⁰ In order to measure progress towards meeting this focus area, the company lists 8 Key Performance Indicators:

1. Rand value spent on Social and Labour Plan projects;
2. Number of community members receiving bursaries;

⁹⁶ 'Lonmin Sustainability Development Report' (Lonmin Plc, 2014), 2, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0C CIQFjAA&url=https%3A%2F%2Fwww.lonmin.com%2Fdownloads%2Fmedia_centre%2Fnews%2Fpress%2F2014%2FLonmin_SDR_2014_Final.pdf&ei=djlgVfeyAebC7gadnIDYBQ&usg=AFQjCNHxhp9PA_dWbo1c6BleR_N_TMJ_iA&sig2=UtTQjtYbzlhFTGuMQIFTxA&bvm=bv.93990622,d.ZGU.

⁹⁷ Ibid., 3.

⁹⁸ Ibid., 21,26,27,61–77.

⁹⁹ Ibid., 26.

¹⁰⁰ Ibid., 72.

3. Number of community members on the university preparedness programme and technical preparedness programme;
4. Number of community members receiving ABET training;
5. Number of community members receiving mining skills and portable skills training;
6. Number of infrastructure projects completed;
7. Number of local suppliers receiving training and/or contracts from Lonmin;
and
8. Procurement spend on BEE entities.

The mining firm also states that this social licence to operate is part of its strategic alignment with the various legislation and frameworks under which it operates.

These include the United Nations Global Compact Principles 1 and 2 and the International Council on Mining and Metals Principles 9 and 10. The report then links this social licence concept to a reporting requirement under the Global Reporting Initiative (GRI), with the most important being the GRI requirements under 'local communities.'¹⁰¹

The social licence to operate includes some indicators as to what community development involves:

- 'Alleviate poverty and unemployment
- Enable communities to participate in decision making to achieve greater long-term control over their lives and development thereof

¹⁰¹ Ibid., 26.

- Ensure communities are resourceful, skilled and able to take full advantage of economic opportunities
- Enable community businesses to become a business partner of choice and contribute to the growth of Lonmin¹⁰²

Transformation through social and economic development is highlighted as having an effect on the company's social licence to operate. This therefore gives insight into the content of transformation as viewed by Lonmin. The company furthermore emphasises 'ownership' and 'procurement' as key focal points in 'accelerating the participation of HDSAs in the mainstream economy.'¹⁰³

The Sustainable Development Report includes a section dedicated to transformation and empowerment. It describes transformation as important firstly because transformation is necessary to the business itself and secondly because transformation is part of the requirements of the Mining Charter. Lonmin's transformation initiatives focus mainly on increasing the number of HDSAs in management level employment. The company furthermore seeks to create an environment that is open to women, and lists an improved maternity leave policy as an initiative that seeks to do so.¹⁰⁴

Companies listed on the JSE Limited's stock exchange (hereafter the JSE) are required to adhere to the King III Code of Corporate Governance, which requires the compilation of an integrated report. There is no requirement however for these

¹⁰² Ibid., 66.

¹⁰³ Ibid., 73.

¹⁰⁴ Ibid., 43.

firms to adhere to any standards of sustainability reporting.¹⁰⁵ According to research compiled on the mining firms in the JSE's top 40 companies, such firms have improved their adherence to the GRI's framework (see the next section for a detailed overview of this Framework).¹⁰⁶

For both 2010 and 2011, Lonmin reported on all 52 core elements and 11 sector specifics as required by sustainability reporting.¹⁰⁷ This is better than many competitor mining firms, given that 4 companies did not report on any industry specific requirements at all.¹⁰⁸

The Global Reporting Initiative

The Global Reporting Initiative (hereafter: GRI) is an organisation that provides a framework for companies (as well as other organisations) in order to '...communicate the impact of business on critical sustainability issues such as climate change, human rights, corruption and many others.'¹⁰⁹ It highlights social justice as an integral part of the long term sustainability of a company.¹¹⁰ The guidelines for reporting are divided into 3 main categories (Economic, Environmental and Social), and the elements of the Social category that are

¹⁰⁵ Adorita Tertia Hindley, 'Integrated Reporting Compliance with the Global Reporting Initiative Framework: An Analysis of the South African Mining Industry' (North-West University, 2012), 1, <http://dspace.nwu.ac.za/handle/10394/8701>.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid., 1254.

¹⁰⁸ Ibid.

¹⁰⁹ 'About GRI,' accessed November 30, 2015, <https://www.globalreporting.org/Information/about-gri/Pages/default.aspx>.

¹¹⁰ 'Global Reporting Initiative 4: Reporting Principles and Standard Disclosures' (Amsterdam: Global Reporting Initiative, 2013), 3, <https://www.globalreporting.org/standards/g4/Pages/default.aspx>.

relevant to this research are: Diversity and Equal Opportunity¹¹¹, Equal Remuneration for Women and Men, Indigenous Rights and Local Communities.¹¹²

The GRI's guide provides comprehensive references for each subcategory to the relevant International Law. The Local Communities element is founded on the Organisation for Economic Co-operation and Development (OECD) and the United Nations Global Compact Ten Principles (UNGC).¹¹³

These elements each have their own specific disclosure requirements; the most pertinent to transformation are listed below:

Diversity and Equal Opportunity	the percentage of employees per employee category in each of the following diversity categories: <ul style="list-style-type: none">- Gender- Age group: under 30 years old, 30-50 years old, over 50 years old- Minority groups- Other indicators of diversity where relevant¹¹⁴
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Equal Remuneration for Women and Men	The ratio of the basic salary and remuneration of women to men for each
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¹¹¹ G4-LA12

¹¹² 'Global Reporting Initiative 4: Reporting Principles and Standard Disclosures,' 9.

¹¹³ Lonmin Plc. Signed the UNGC on 22 August 2008 a participant.

¹¹⁴ 'Global Reporting Initiative 4: Reporting Principles and Standard Disclosures,' 68.

employee category, by significant locations of operation.¹¹⁵

Non-discrimination

Any remediation plans being implemented.¹¹⁶

Local communities

- Local community development programs based on local communities' needs
- Broad based local community consultation committees and processes that include vulnerable groups
- Social impact assessments, including gender impact assessments, based on participatory processes¹¹⁷

Additional disclosures

In addition, the GRI also provides for specific reporting guidelines for 'operations with significant actual and potential negative impacts on local communities'. For example:

'

¹¹⁵ Ibid.

¹¹⁶ "Global Reporting Initiative 4: Reporting Principles and Standard Disclosures," 72.

¹¹⁷ Ibid., 76.

- The location of the operations
- The significant actual and potential negative impacts of operations¹¹⁸

The Mining and Metals Sector specific guidelines provide for clarity of specific terms, additional commentary and guidance.

It specifically provides that a firm must:

‘Report on any policies relating to community consultation and support (including free, prior and informed consent), and settings where such dialogues are required by company policy and where they are not.’¹¹⁹

It also provides further guidance on the GRIs Indigenous Rights category, requiring firms to disclose the:

‘Total number of operations taking place in or adjacent to Indigenous Peoples’ territories, and number and percentage of operations or sites where there are formal agreements with indigenous peoples’ communities.’¹²⁰

‘Number and description of significant disputes relating to land use, customary rights of local communities and Indigenous peoples.’¹²¹

¹¹⁸ Ibid.

¹¹⁹ ‘Global Reporting Initiative 3: Mining and Metals Sector Supplement,’ 37.

¹²⁰ Ibid., 38.

¹²¹ Ibid., 40.

The United Nations Global Compact Ten Principles

These Principles are developed by the UN and are considered: ‘A call to companies to align strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals.’¹²²

The two principles relevant to transformation are:

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights¹²³, and

Principle 6: The elimination of discrimination in respect of employment and occupation.¹²⁴

Lonmin is a participating member of the UNGC and they specifically refer to the two principles above in their Sustainability Report as justification for their commitment to transformation. This is a voluntary initiative that Lonmin has joined, requiring the mining firm to take a pledge to align its operations with those outlined in the UNGC, as well as to report on them annually. There is however no mechanism for enforcement and one therefore has to question the impact that joining such an initiative will have on Lonmin’s commitment to transformation?

The International Council on Mining and Metals

The International Council on Mining and Metals (hereafter the ICMM) is an international membership organisation of which Lonmin is a member. Membership

¹²² ‘The Ten Principles | UN Global Compact,’ accessed November 30, 2015, <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

¹²³ ‘Principle 1 | UN Global Compact,’ 1, accessed November 30, 2015, <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1>.

¹²⁴ ‘Principle 6 | UN Global Compact,’ accessed November 30, 2015, <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-6>.

at the ICMM requires a firm (1) to commit to and implement its 10 principles for sustainable development, (2) to report on its adherence to the 10 principles, in accordance with GRI guidelines, and (3) to ensure that its reporting is assured by an independent 3rd party. The ICMM provides specific requirements for reporting for its members and it furthermore requires member firms to integrate its 10 principles into their corporate policies.¹²⁵

The two principles of the ICMM that are most relevant to transformation, and which are referred to in Lonmin's Sustainability Report are:

Principle 2: 'Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities.'¹²⁶

Principle 9: 'Contribute to the social, economic and institutional development of the communities in which we operate.'

Both of these principles underscore the necessity of including communities in transformation initiatives rather than focusing narrowly only on mining employees.

Corporate Social Responsibility

Mining firms paid little attention to CSR during the apartheid era as South Africa was distanced from the international community and the general movement towards corporate citizenship that was taking place there. The new democracy brought along with it pressure from the international community to conform to international best practices, one of which being CSR. For example, the JSE

¹²⁵ 'ICMM | Our Work • Sustainable Development Framework • 10 Principles,' accessed November 30, 2015, <https://www.icmm.com/our-work/sustainable-development-framework/10-principles>.

¹²⁶ Ibid.

introduced a voluntary mechanism to disclose adherence with CSR principles.¹²⁷

CSR is defined by the European Commission as an 'essentially a concept whereby companies decide voluntarily to contribute to a better society'.¹²⁸

Many government policies and a significant amount of legislation reflect a commitment to CSR and use the same CSR language as the World Bank and the International Finance Corporation.¹²⁹ Therefore despite CSR being voluntary, much of the transformation that takes place as a result of legislative measures, appears to be influenced by trends in CSR.

The importance of the mining sector revisited

The historical importance of the mining sector to the South African economy is considerable. Over the last 15 years though the industry has slowed in growth, and from October 2001 to October 2011, mine production had fallen 12.7 per cent year on year.¹³⁰ South Africa has also declined in its ranking on the Policy Potential Index for the attractiveness of potential mining investments, dropping from 28 out of 47 jurisdictions in 2002/2003 to 67 out of 79 in 2010/2011.¹³¹ [Despite this decline, the sector remains meaningful to the South African economy, in that it accounts for '5.3 per cent of South Africa's GDP and provides employment to some 500,000 workers directly, and a further 500,000 indirectly.'¹³²] Part of the decline in the mining sector can be attributed to poor regulatory certainty, with the MPRDA and the

¹²⁷ Kloppers and du Plessis, 'Corporate Social Responsibility, Legislative Reforms and Mining in South Africa,' 93.

¹²⁸ *Ibid.*, 95.

¹²⁹ Dansereau, 'Comparing Dueling Approaches to the Transformation of South African Mining,' 65.

¹³⁰ Leon, 'Whither the South African Mining Industry,' 7.

¹³¹ *Ibid.*

¹³² *Ibid.*, 6.

Mining Charter being described as ‘...fraught with vague and ambiguous provisions...’¹³³

The Act and the Charter have also been criticized for poor transformation in the industry. The state has indicated that it will investigate reforming the penalty provisions for non-compliance in order to promote timeous transformation.¹³⁴ It is hard to establish the exact nature of compliance with the transformation requirements of the Charter as the information available is contradictory. For example, the Chamber of Mines stated in 2011 that black ownership was 28 per cent, whereas the Department of Mineral Resources stated that the figure was in fact 8.9 per cent.¹³⁵

The importance of the mining sector has been restated above as it must provide the platform from which one interprets Lonmin’s efforts towards transformation, the perceptions of the miners and community members that are interviewed, as well as the debates surrounding the urgency of transforming the industry that will be introduced in the research findings chapter.¹³⁶

¹³³ Ibid., 13.

¹³⁴ Ibid., 17.

¹³⁵ Ibid.

¹³⁶ See chapter 6.

Chapter 4

A Case Study - Lonmin Plc

Overview of Lonmin Plc

Lonmin Plc is a mining firm that is dually listed on the London Stock Exchange as well as the Johannesburg Stock Exchange and the firm has a market capitalisation of \$1.2 billion. They are the third largest producer of platinum globally, and the main use of the company's outputs is for autocatalysis in motor vehicles. The company has a vertically integrated business model and aims to discover, extract, refine and market Platinum Group Metals (PGM), which includes platinum, palladium, gold, rhodium, ruthenium and iridium. Their operations are based in the North West, Limpopo and Gauteng provinces of South Africa and their head offices are in Johannesburg and London^{137 138}.

This research report will focus on their operations in the North West and specifically on the Bapo ba Mogale community, which comprises the Segwaelane, Wonderkop and the Bapong communities. Lonmin refers to its operations in this area as its Marikana operations and it refers to the communities within a 15 km radius of these operations as the Greater Lonmin Community (hereafter the GLC)¹³⁹. Lonmin's ability to impact individuals and communities is considerable given that there are an estimated 186 000 people living in the GLC¹⁴⁰.

¹³⁷ Lonmin Plc, 'About Us,' *Lonmin*, May 2014, https://www.lonmin.com/about_us/default.aspx.

¹³⁸ Lonmin Plc, 'Current Operations,' *Lonmin*, May 2014, https://www.lonmin.com/our_business/Current_operations.aspx.com/about_us/default.aspx.

¹³⁹ See Appendix 2 for a map of Lonmin's Marikana operations

¹⁴⁰ Lonmin Plc, 'Sustainable Development Report 2014,' 4.

Recent media attention

In 2014 Lonmin underwent severe pressure as they endured the effects of a five month long strike, during which there was hardly any output¹⁴¹. The strike attracted worldwide media attention due to the 'Marikana shooting' which led to the deaths of 44 people with more than 70 people being injured and approximately 250 people being arrested. The shooting attracted much attention due to the fact that it was the single most lethal use of force by the police against civilians since the 1960 Sharpeville Massacre. The striking miners were unhappy with their wages and were demanding a pay rise to a minimum wage of R12 500 per month. A settlement was reached for a 22 per cent pay raise, a one-off payment of R2 000, and an agreement that the miners would return to work by 20 September 2014.^{142 143} This event has received much attention and has been the subject of a Commission of Inquiry (The Farlam Inquiry)¹⁴⁴.

In order to gain an understanding of the debates, controversies and effects surrounding transformation within the context of the Lonmin Community, this research project will focus on a recent event that is also gaining media attention. The following section will discuss a deal that Lonmin has concluded with the Bapo Community (hereafter the Lonmin-Bapo deal) in order to effect transformation.

¹⁴¹ Lonmin Plc, 'Lonmin Annual Report and Accounts,' 32.

¹⁴² 'Marikana Massacre 16 August 2012 | South African History Online.'

¹⁴³ 'Marikana Wage Agreement Signed,' *South Africa Info*, September 19, 2012, <http://www.southafrica.info/news/marikana-190912.htm#.VWDCekYylsm>.

¹⁴⁴ At the time of writing this report was yet to be released.

The Lonmin-Bapo deal – a story of conflict, misaligned expectations and discontent

Part of Lonmin's mining operations are in the Bapo community, which consists of about 35 000 people.¹⁴⁵ The community were entitled to a 12 per cent royalty of Lonmin's taxable profits from platinum that was mined from Western Platinum Limited (WPL) and Eastern Platinum Limited (EPL) (subsidiaries of Lonmin) due to the fact that the community leased the land to WPL for mining.¹⁴⁶ The MPRDA effectively severed all mineral rights from the land and vested these rights in the state. However, the mineral royalty held by the community was protected under s11 of the MPRDA and continued to have effect even subsequent to the introduction of the MPRDA. The mineral royalty would now be known as an 'old order' mining right.

The MPRDA sets out a requirement that 26 per cent of the equity of a mining firm must be held by Historically Disadvantaged South Africans (HDSA) by 2014. Lonmin therefore completed a deal whereby they converted the royalty (the old order mining right) into equity shares in order to ensure that they had a 26 per cent black shareholding by the end of 2014.

The deal has come under much scrutiny and has been rejected by many as an unfair deal that only seeks to benefit Lonmin.

A Johannesburg based attorney, Hugh Eiser, who represents the community in social litigation against the state and other corporate entities, remarks that the deal is illegal as it is in contravention of the Restitution of Land Rights Act 22 of 1994 to

¹⁴⁵ Lonmin Plc, 'Current Operations.'

¹⁴⁶ Lonmin Plc, 'Lonmin Circular - Bapo BEE Deal,' August 14, 2014, 7, https://www.lonmin.com/downloads/media_centre/news/press/2014/2014_GM_Circular_-_Bapo_BEE_Transaction.pdf.

transact on land that is under claim, which is the case with the Wonderkop Bapo farm. He further indicated that the people from the community are financially illiterate and therefore do not understand the substance of the deal that has been concluded. According to Eiser, the Bapo community has barely benefited from Lonmin's Black Economic Empowerment initiatives in the past, with the empowerment going to three politically well-connected individuals who have no involvement with the community.^{147 148}

The sentiment of Lonmin towards the deal can clearly be seen through the comments made by its executive's management. At a meeting between state representatives and Lonmin, Molebatsi, who is the Vice President of Lonmin, said that what distinguishes Lonmin as different is that they are focusing on giving every employee a voice through greater direct engagement. She then added that the Bapo ba Mogale deal has had a positive impact.¹⁴⁹

The Office of the Kgosi (the office of the tribal chief) who was responsible for representing the community in the deal has promoted the deal and stated through its Facebook page that it is 'ecstatic to announce this great milestone and achievement'¹⁵⁰.

¹⁴⁷ B Boyle, 'On the Record with Hugh Eiser and Brendan Boyle,' *South African Crime Quarterly* 49, no. 1 (October 22, 2014): 66, doi:10.4314/sacq.v49i1.6.

¹⁴⁸ The most notable being Cyril Ramaphosa,

¹⁴⁹ Republic of South Africa, *Announcements, Tablings and Committee Reports*, 364.

¹⁵⁰ Brendan Boyle, 'Bapo Ba Mogale Community Loses out in Lonmin Deal | Groundup,' 2014, http://groundup.org.za/article/bapo-ba-mogale-community-loses-out-lonmin-deal_2502.

The Bapo ba Mogale Liaison Committee, a community organisation aimed at promoting the interests of the community, has been distributing pamphlets that call for the community to reject the deal on the basis that there was no proper consultation¹⁵¹. According to a member of the committee, Abbey Mafate, they don't reject the deal altogether, and hold that it may be a great deal for the community, but would like to see proper consultation between Lonmin and the community before the deal is concluded. They have also called on the Legal Resources Centre to represent them in applying for a review of the deal¹⁵².

The deal stems from a lease agreement that was concluded in 1969 and it has far reaching implications. It therefore cannot be considered in isolation. Part of the controversy surrounding the agreement is the fact that the royalties that have been paid by Lonmin into a trust account (known as the D-Account) have gone missing. A meeting was recently held in the North West Province between the state and Lonmin in order to evaluate the progress made by the firm in respect of transformation. This meeting considered the controversy relating to the D-Account, from which over a billion rand has gone missing. The committee noted further that the account has also not been audited in the last 20 years.^{153 154}

In the state's announcements, tablings and committee report, dated 10 March 2015, a delegate of the Portfolio Committee for the Department of Mineral Resources set out a report on the progress made by mines in the North West

¹⁵¹ See Appendix 5.

¹⁵² Boyle, 'North West Community Takes on Lonmin | Custom Contested.'

¹⁵³ See next paragraph for details of meeting.

¹⁵⁴ Republic of South Africa, *Announcements, Tablings and Committee Reports*, 33.

Province towards transformation. One of the findings of the report is that there should be further investigation by the state into the exchange of mineral rights for equity shares. 'One concern of this trend, which exposes communities and community trusts to the risks of shareholders, which may be used by mining companies not to allow communities to share in the real benefits from mining, but simply allow the company to claim 26 per cent HDSA shareholding the company is required to have under the Mining Charter.'¹⁵⁵

The exposure that the deal creates for the beneficiaries to movements in the equity market is a serious concern.¹⁵⁶ Since the deal was concluded, the share price of Lonmin has fallen more than a quarter, which means that the community now has an equity shareholding on the London Stock Exchange, as of 3 December 2014¹⁵⁷, worth R150 million less than it paid for them. There are some individuals who argue that the equity deal is in the best interest of the community as even if Lonmin were to cease mining in Marikana, the Bapo Community will still have an equity stake in its operations, which would not be the case if the community was only entitled to a royalty from profits¹⁵⁸.

According to the Legal Resource Centre's (LRC) land claim submission in the Marikana Commission of Inquiry, the Mining Charter requires a mining firm to ask itself the three following questions, which it should use to evaluate its

¹⁵⁵ Republic of South Africa, *Announcements, Tablings and Committee Reports*, 33.

¹⁵⁶ Note that this exposure did not exist with the previous royalty that the community was receiving.

¹⁵⁷ The share price has continued to fall and, as at 14/12/15, was trading at £0.90.

¹⁵⁸ Setumo Stone, 'BDlive - Print Article,' 2014, <http://www.bdlive.co.za/business/mining/2014/12/18/lonmin-stake-too-small-for-some-in-bapo-ba-mogale-deal?service=print>.

transformation efforts and which will be used by the state to evaluate the firm's progress¹⁵⁹:

- a) Did the company consider the profiles of relevant communities, and identify credible leaders of the communities?
- b) Did the company consult with such leaders prior to the implementation of projects?
- c) Did the company consult with the leaders to identify projects within the needs analysis and prioritise such projects?

When deals are concluded however, it would appear that firms are interpreting the above use of the word 'communities' to mean only tribal authorities¹⁶⁰ (TAs), and that consulting with only the TAs is sufficient¹⁶¹. The LRC argues that this has allowed for a lack of transparency leading up to the deal and an overall poor engagement process between Lonmin and the community. This is further illustrated by the fact that when this deal was in the process of being concluded, the Wonderkop community only became aware of it through a newspaper article and a pamphlet that is seen by the community as a 'one page flyer with a short agenda and a short one explanation of the "swap" ¹⁶².

¹⁵⁹ Legal Resources Centre, 'Submission of The Wonderklip Land Claim Committee,' July 30, 2014, 14, <http://www.lrc.org.za/law-policy-reform/3272-submissions-wonderkop-land-claims-farlam-commission-of-inquiry>.

¹⁶⁰ Leaders who act on behalf of a community in terms of the Traditional Leadership and Governance Framework Act 41 of 2003

¹⁶¹ Republic of South Africa, *Announcements, Tablings and Committee Reports*, 14.

¹⁶² Legal Resources Centre, 'Submission of The Wonderklip Land Claim Committee,' 14.

Chapter 5

Collection of Field Data - Views on Transformation

The need for sensitivity towards current affairs

Lonmin has been under immense pressure as a result of the Marikana shootings as well as the impact of the 2012 strike. Furthermore, the after-effects of the shooting may still linger among the workers, the trade unions and the police. The researcher therefore understands the need to be sensitive to the circumstances in which the interviews are to take place. The UCT Ethics Committee raised a concern that the research did not focus sufficiently on the Marikana Shootings. The researcher however holds that it would be incredibly narrow if all research on mines, mine workers, transformation or Lonmin from 16 August 2012 onwards focused solely on the Marikana massacre. Indeed such focus would look only to the effect or outcome, without giving due attention to the possible causes. Such approach would erroneously look at one specific reaction which could actually be the end result of many sentiments, actions, experiences, expectations and views over the last 30 years. Much of the background to the Marikana killings relate to political and economic factors which this research does not intend on exploring. Furthermore, the issue of transformation is a pertinent one in South Africa and is worthy of pursuing in its own right. It is possible that transformation may well be an underlying factor in the Marikana strikes. It is, however, not sound to treat the Marikana killings as the starting point in a discourse on transformation. Transformation and the views of the mining firms, trade unions and miners thereon are the starting point.

The Marikana massacre may be a factor that is raised by the interviewees, and therefore the question was asked at the end of each interview (in order to allow the interviewee the opportunity to raise the issue first, rather than for it to be raised on prompting) as to what extent the massacre has formed their views expressed throughout the interview, and if there are any specific comments that they would like to be noted relating to the Marikana incident. This will allow them to determine the extent to which it plays a role in their answer to questions such as ‘What do you understand by the concept of transformation?’¹⁶³

The researcher is also aware of the social and political context within which these interviews were conducted (for example, the volatility in the platinum industry, recent strike action, etc). It is submitted that these current issues increase the need for exploratory research to be conducted in order for us to better understand them. In light of this, the researcher maintained an attitude of awareness and sensitivity to these issues as the interviews were conducted. The interviews, as well as the post-interview data analysis, were approached mindful of the context within which the research was conducted, and this sensitivity continues to be maintained throughout the research project.

¹⁶³ See Chapter 6 for an analysis of the research findings.

Methodology and Research Design

Interviewees

Sampling and Limitations

The following 8 people were interviewed:

Interviewee	Name	Function	Race	Gender
Interviewee One	Mr. Happy Nkhoma	Head of Stakeholder Relations and Public Affairs	Black	Male
Interviewee Two	Anonymous	Miner	Black	Male
Interviewee Three	Anonymous	Miner	Black	Male
Interviewee Four	Anonymous	Miner	Black	Male
Interviewee Five	Anonymous	Miner	Black	Male
Interviewee Six	Anonymous	Lonmin BEE supplier	Black	Male
Interviewee Seven	Anonymous	Community leader	Black	Male
Interviewee Eight	Anonymous	Community leader	Black	Male

Part of the ethical considerations that were raised by the UCT Ethics Committee related to the use of a small sample and its ability to provide representativeness.

The interviews however are intended to provide rich qualitative data and representation therefore cannot be understood as one would understand it in a quantitative context. In addition, the interviews are intended to provide a secondary data source supported by the literature review (the primary data source) and the voices of the miners are intended to provide examples of how the issues of transformation play out in practice. This approach is acceptable given the fact that

the research is not intended to make inferences about the population as a whole, but rather to obtain insights into transformation from an exploratory standpoint. The small interview sample is therefore concerned not with representativeness, but with the depth of the knowledge and the perceptions of the interviewees.¹⁶⁴

One limitation of the research may therefore be the scope of the interviews. Given that conducting interviews is expensive, and that there is a set time period in which to complete them, it will not be possible to interview every representative of Lonmin or every miner at each of their mines. Interviewing an entire population is hardly ever possible, and the use of a sample will introduce an element of sampling risk. Typically this risk is increased as the sample size as a percentage of the population is reduced.

The research will however be limited to the extent that one is not able to draw generalisations about miners, mining firms and community members' expectations and experiences of transformation – this would require an extensive study that includes an adequate proportion of the population, as well as a study that expanded across the entire mining sector.

It is therefore imperative to understand that the interviews are by no means expected to provide a complete picture of all miners' views or of all mining firms' views on transformation. The interviews are a secondary source of information which is expected to provide some context from the findings of the literature review. The interviews were also conducted with the aim of obtaining insight into various issues that relate to transformation that may have been missed during the

¹⁶⁴ Ololade and Annegarn, 'Contrasting Community and Corporate Perceptions of Sustainability,' 571.

literature review. The research is therefore exploratory in nature and the hope is that the interviews will be a platform by which the individual voices of a small number of people affected by transformation can be heard. This is intended to supplement the research with an element of individuality. The research is therefore based on a phenomenological epistemology whereby the interviews will help paint a picture of the lived experiences of transformation as experienced by a few individuals. This paradigm will be well suited to a case study on transformation by Lonmin Plc as it will place the case in the context of individual experiences. It is hoped and intended that the interviews will also uncover further areas for research. Self-reported data may also contribute to the limitations of the research. With particular reference to the Lonmin-Bapo deal, there is minimal existing research or verified data that can be used as a reference point for verification of the interviewees responses. The deal is recent and only once the current litigation process is over will there be more clarity as to the facts of the matter. The research therefore strays from drawing concrete conclusions and rather attempts to contrast the experience of the deal by the miners, community members and that of Lonmin. In addition, none of the interviewee's first language was English. Despite the fact that the majority were able to easily understand the questions, as well as it being easy for the interviewer to understand their answers, their responses and the interviewer's understanding may have been impeded by the language barrier. It was also not possible to interview any female community members or miners. It was requested that the interview candidates be both male and female, but the gatekeeper stated that he had not managed to organise any female candidates.

This limits the research in that it is male-centric and may not address adequately the concerns of female miners or female community leaders. The industry too remains male dominated and per Lonmin's 2014 Sustainability Report women constitute a mere 8.18 per cent of the company's workforce with 5.35 per cent of the core operations employees being women.¹⁶⁵

The use of a gatekeeper - background, concerns and practicalities

A community member (The General Secretary for the Bapo Liaison Committee) was asked to organise four miners and four community members to be interviewed. He is an important gatekeeper in this project and his role as an interlocutor will be important to the research. Contact was made with him via email and thereafter via telephone and he expressed that he is willing to help with the research. He is excited about the opportunity for miners to have their voices heard around the issues of transformation.

Various concerns were raised by the UCT Ethics Committee in relation to the use of a gatekeeper, his impact on the interview results, and the potential for conflict between him and the interviewees. The gatekeeper was however engaged in order to play an intermediary role in organising the interviews. The gatekeeper was a contact of UCT's Centre of Law and Society (CLS) and provided an essential means of communicating with miners and community members in order to schedule and administer the interviews. He is well known in the community and was born and raised in the area. The gatekeeper was briefed multiple times before the interviews as to the purpose of the research and as to his responsibility in relation to them. He

¹⁶⁵ 'Lonmin Sustainability Development Report,' 45.

has worked with the CLS multiple times and has effectively scheduled many meetings between researchers and the community. The risk of conflict or tension between the interviewees and the gatekeeper is therefore low, given that the gatekeeper interacts with the community and frequently acts on their behalf. The majority of the miners and community members that he arranged to attend the interviews were acquainted with him and it was accepted that they have already indicated a level of trust towards him given their willingness to accept the interviews.

Participants were presented with an informed consent form and the interviews only proceed once the form was signed and understood by the participant.¹⁶⁶ It was anticipated that the miners may not be accustomed to signing documents and that they may not be sufficiently literate to understand the form. The form was explained to them to ensure that they understood its contents, and they were also given the option of proceeding with the interview without signing the consent form, but rather by giving verbal consent. The form was also explained in Setswana by the gatekeeper.

In order for a miner or community leader to meet the criteria to be interviewed they must be South African (as the majority of the transformation legislation limits transformative efforts to South Africans) and they must have worked at Lonmin for at least a year (to ensure that they are sufficiently familiar with the company and the mining community). It was agreed with the community member (identified above) that he arrange interviews with miners who are able to communicate in

¹⁶⁶ See Appendices 5 and 6.

English. The gatekeeper knew all of the interviewees except one. He knew the miners and other community members from the area and asked them to participate in the interviews. One of the community members was not approached by the gatekeeper, but rather asked the gatekeeper to be involved once he had heard that the research was taking place. The interview questions were also translated into Setswana, and in one of the interviews it was required that the gatekeeper read the questions in Setswana to provide the miner with greater clarity as to what the questions were asking.

Administration of the interviews

The interviews were conducted personally by the researcher. Throughout the research process he worked alongside Brandon Boyle from UCT's Centre for Law and Society (CLS) who is conducting research with the Bapo Community and Lonmin. The Centre has existing contacts with community leaders and provided an opportunity for the researcher to gain access to the community in order to conduct the interviews. The relationship between the CLS and the community members is good, and it was a reasonable expectation that if the researcher was to be seen as a part of their team then he could expect a willingness to take part in the interviews by the miners.

The interviews took place in various locations. The interview with Lonmin took place at their head office in Johannesburg, most of the miners and community members were interviewed at their houses, one miner was interviewed at a community hall during a community meeting and one miner was interviewed on a sidewalk in Marikana.

Most of the interviews took place without many challenges. One of the interviews (not listed above) did not take place as the interviewee, upon seeing that the researcher was white, no longer wanted to be interviewed. This is according to the gatekeeper who was in communication with the miner. During one of the interviews that took place at a miner's house, it was mentioned that it was not safe for the interviewer to be in the community at night as the community will think that the researcher is trying to collude with the community. The interviewee then expressed concern given that a previous researcher was harassed by some of the community members. Interestingly, there were various cars belonging to the traditional council's private security that were parked opposite the house where the interview took place, which according to the interviewee also raised concerns for the safety of the researcher.

The researcher noted that during the 3 days in which the research was conducted he was the only white person in the community. The researcher also notes with anguish the deplorable living conditions that existed in the community as well as in the Marikana mining town. It is therefore imperative that the dynamics of the community be borne in mind when interpreting the interviewees' responses.

Although no conclusion can be drawn after the 3 day research process, it is interesting to note that the racial living barriers that were created during apartheid still appear to be clear even after more than two decades of living in a new democratic era.

Confidentiality

The confidentiality of the interviewees will be assured by not disclosing their names in the research, nor will any information be disclosed that could be used to identify them. This allowed the interviewees to engage freely in the interviews without any potential conflict that could occur if Lonmin, or their fellow employees, were able to identify individuals responsible for certain comments. As the interviews were conducted face-to-face and recorded using a tape recorder, total anonymity will not be possible.

All of the interviews were recorded and detailed interview notes were taken. These interviews were then professionally transcribed. The interviews were conducted face-to-face in order to eliminate bias against anyone not connected via a telephone or Wi-Fi who may otherwise have been a potential interview candidate.

Analysing the interviews

A latent thematic analysis was then performed, with the goal of uncovering underlying ideas, patterns and themes in the transcripts. The general themes that were broached in the interviews included:

- Defining transformation in the interviewees own terms
- Challenges and barriers to transformation
- Engagement between Lonmin, miners and community members
- The perceptions of Lonmin, miners and community members towards the Lonmin-Bapo Deal
- Defining the role, if any, of the employer, employee and others in transformation

The following is a list of codes that were used for the analysis in order to identify themes:

- Information relating to Lonmin-Bapo deal
- References to the Marikana strike or massacre
- References to legislation related to transformation
- Information on traditional governance structures
- Definitions or components of transformation
- References to BEE being too narrow in its reach
- References to migrant labour
- References to trade unions and their role in transformation

The codes were adapted throughout the analytical process. There was a list of initial preliminary codes covering what might be expected to be found in the transcripts.

The transcripts were then read and reread and comments were made thereon.

Next, the preliminary list of codes was revised and the coding was marked on the transcript itself. Following a further reading of the transcript, themes were compiled that were considered relevant to the research question and research objectives. In doing this it was found necessary to combine certain codes which were better viewed as an overall theme. Throughout the whole process, extensive use was made of interview notes to supplement the information on the transcripts. Chapter 6 contains a discussion of the most pertinent themes that were uncovered during the thematic process.

Chapter 6

Making sense of the research findings

One of the key research objectives was to better understand what is meant by the term transformation. From the literature and the interviews it became clear that the focus of this term is to eradicate the effects of past discriminatory practices that existed during apartheid, as well as to empower previously disadvantaged individuals. The legislation as well as the interviews all highlight the importance of:

Creating better working conditions for miners; and eradicating the racial divide between various levels of employment, for example, undoing the past practices that resulted in all black miners being junior miners and all management being white. This is primarily done by way of access to training at Lonmin, preferential employment and provision of bursaries to HDSAs.

There were mixed responses among the interviewees as to what constitutes transformation. One miner believed that transformation involves people who were once disadvantaged (like black communities), being given 'fair chances and fair opportunities.' He stated that this involved neither in the disadvantaged individuals being 'pushed' nor in them being 'spoon fed'. Another miner believed that it involved the 'equitable distribution of wealth.'

Mr. Nkhoma described transformation as: 'The process of changing from one state to another of any element, whether it's a physical element or whether it's an institution or whether it's an individual.' According to him, this involves changing the historical practices that used to exist in the mining industry, such as poor

working conditions, mining hostels, migrant labour and it furthermore involves allowing sufficient time for transformation to occur.

Although varied, the responses above reiterate many of the themes that were uncovered during the literature review, including the elimination of mining hostels, the improvement of miners' working conditions, the time required for the deep inequality caused by apartheid to be undone, the concept of empowerment and the distribution of wealth. It therefore appears evident from the research findings that transformation cannot be reduced to a single strategy or goal but is rather a multi-faceted and complex issue, requiring a broad and inclusive definition in order to achieve the abovementioned objectives.

Key themes that were identified during the research are now discussed in more detail below.

Crony Capitalism

All of the miners and community leaders, at different stages during the interview, and un-prompted by the interviewer, alluded to the fact that BEE is benefiting the politically-connected, ANC-affiliated elite. This is precisely the reason why BEE was reformed and renamed B-BBEE - but it appears as if B-BBEE is failing in this regard as well.

B-BBEE has been criticised for still only advancing the interests of a few, often well connected individuals.¹⁶⁷ For example, Mbeki has termed BEE 'crony capitalism' because of its tendency to benefit a small elite minority.¹⁶⁸ The HDSAs most in need

¹⁶⁷ See for example the discussion of crony capitalism in: Anthea Jeffery, *Bee: Helping or Hurting?* (Tafelberg, 2014).

¹⁶⁸ Sorensen, 'Legislative Transformation of South African Mining since 1994,' 182.

of empowerment, being miners and the mining community members are 'little better off than before and are still under-represented in the industrialised society they have inherited except as unskilled and semi-skilled labour.'¹⁶⁹ The Congress of South African Trade Unions (COSATU) proposed a complete reformation of BEE in 2010, given that it was based 'on the view that empowerment means giving millions of rands (sic) worth of shares to a few individuals, while they leave the overwhelming black majority as disempowered as ever. Instead of making a rich elite minority even richer, BEE should benefit the workers, including the unemployed and poor communities'.¹⁷⁰

This failure of BEE can be noted from the BEE deals that were concluded in the mining sector between 2004 and 2008, where only 7 per cent related to direct employee share schemes and only 10 per cent involved community schemes.¹⁷¹

This results in the broader black mining community remaining unaffected by transformation, with the majority of the deals taking place with well-connected individuals. According to one of the miners who was interviewed, 'the ANC will only look after its friends and family', thereby reiterating the stigma that is associated with BEE in relation to cronyism.

This was highlighted in the Mining Charter's Assessment Report of 2015, stating that BEE ownership was concentrated in a 'handful of Black beneficiaries, dubbed the "usual suspects" ' which is contrary to the 'spirit and aspirations of both the

¹⁶⁹ Ibid.

¹⁷⁰ Leon, 'Whither the South African Mining Industry,' 18.

¹⁷¹ Ibid.

Freedom Charter and Mining Charter.¹⁷² This sentiment is echoed by NUM, who have criticised the Mining Charter for its lack of transformation and its tendency to create a 'black capitalist class'.¹⁷³

In the interviews it was specifically noted by the miners that one of the chief barriers to transformation is 'selfish people who look after their own interests' and the current ANC vice-president Cyril Ramaphosa was cited as an example of this. The interviewees held that it was only Ramaphosa's 'connections' (presumably with the ANC) that led to him receiving shares from Lonmin. According to them, he is not a member of the community and therefore is not entitled to any shares in the mine. Despite this criticism however, BEE has promoted some aspects of transformation, for example by enabling various black owned business to participate meaningfully in the mining sector.¹⁷⁴

Direct ownership in BEE deals

BEE ownership deals have been heavily criticised for not providing real cash flows to their beneficiaries. Typically, a trust is set up on behalf of a community or workers, and a loan is extended to the trust for the purpose of purchasing shares in the mining firm.¹⁷⁵ The problem is that the assets (shares) held on behalf of the BEE beneficiaries equal the liabilities (loans) assumed by them, leaving them in a zero equity position. The shares (and therefore the BEE beneficiaries) are however

¹⁷² 'Assessment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry,' 12.

¹⁷³ Dansereau, 'Comparing Dueling Approaches to the Transformation of South African Mining,' 82.

¹⁷⁴ Ndapwilapo Selma Shimutwikeni, "BEE Policy and Mining: The Challenges," 4.

¹⁷⁵ Darryl Levitt, 'Structuring Black Economic Empowerment (BEE) Transactions in the Mining Sector in South Africa,' *Fasken Martineau DuMoulin LLP*, 2005, 6, http://www.fasken.com/files/Publication/cd8f59fd-32de-40ec-a0eb-097e9e1e6058/Presentation/PublicationAttachment/eee36622-49ea-457b-8321-ac0264296d69/STRUCTURING_BEE_TRANSACTIONS.PDF.

subject to market risk, meaning that the BEE beneficiaries could end up in a negative equity position if the share price falls. Any dividends from the shares are normally used to make repayments on the loan. This is explained in the Mining Charters Assessment Report of 2015 as follows: 'Limited progress has been made...in terms of meaningful economic participation of HDSAs. The trickle flow of benefits that ought not only to service the loan, but also include cash-flow directly to a combination of beneficiaries, is vastly limited.'¹⁷⁶

This trend in ownership deals has resulted in a move to value BEE ownership interests by measuring the 'economic benefit to HSDA', which is defined in the Assessment Report as '...the current value of HSDA shareholding minus the outstanding loan balance plus dividends paid to HSDA beneficiaries.'¹⁷⁷

The Mining Charter Assessment Report of 2009 also identified the above as a challenge to the BEE ownership deals and further listed the following as being particularly inhibiting towards transformation¹⁷⁸:

- Conspicuous lack of transfer of ownership into black hands;
- Access to funding;
- Indebtedness of HDSAs in transactions;
- Limited flow of dividends to HSDA partners to service the loan; and
- Onerous conditions and financially cumbersome structures of BEE deals.

¹⁷⁶ 'Assessment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry,' ii.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid., 15.

This sentiment was underscored by the responses from the interviewees who stressed their dissatisfaction with being told that they have been given shares in Lonmin, but that they did not have actual shares to evidence this. This response is as a result of the distance that many elaborate share schemes create between the company giving up the equity and the BEE beneficiaries. Rather than being given shares that are in the name of each individual miner or community member, these shares, as in the Lonmin-Bapo deal, are placed into a trust to be administered on behalf of the beneficiaries. Direct ownership would allow for the beneficiaries to better understand the actual percentage holding that they have in Lonmin, as noted by them in the interviews.

Legal flaws in the MPRDA and the Mining Charter

The requirements of the Mining Charter have been described as ‘vague and unquantifiable’, making it difficult to monitor and evaluate the firms’ progress towards the Charter’s requirements.¹⁷⁹ Despite the Charter’s requirements for 26 per cent equity to be transferred to HDSAs, only 5.27 per cent of mining equity is held by blacks.¹⁸⁰ Furthermore, the MPRDA lacks effective enforcement mechanisms, and is silent on the enforcement of Social and Labour Plans. The Act remains silent as to whether these SLPs must continue after mine closure or not. Transformation cannot only be expected when the mine is in operation as mining operations have long lasting effects on mining communities and as such this is a lamentable oversight by the legislature.¹⁸¹

¹⁷⁹ Sorensen, ‘Legislative Transformation of South African Mining since 1994,’ 1833.

¹⁸⁰ Ibid., 185.

¹⁸¹ Kloppers and du Plessis, “Corporate Social Responsibility, Legislative Reforms and Mining in South Africa,” 94.

The interviewees also stressed the flaws of the legislation governing the mining sector in that they felt that it does not provide adequately for the monitoring and evaluation of Lonmin's performance towards transformation. They held further 'that the government does not perform proper audits relating to transformation at the mine' and two of the miners remarked that 'there are insufficient mechanisms to ensure that Lonmin is complying with transformation targets.' Indeed a lack of compliance mechanisms was identified by the miners as a critical barrier to the achievement of transformation. These concerns were even extended to the relationship between the mining laws governing Lonmin and their applicability to subcontractors, with one interviewee noting that 'subcontractors are not subject to the same health and safety requirements as Lonmin employees.' This may well be a concern founded on genuine flaws in the MPRDA and Mining Charter and the state should therefore respond by reviewing these laws to ensure that they provide for appropriate monitoring and enforcement mechanisms, in particular with respect to Lonmin's SLP.

Corporate Social Responsibility, the Shortcomings of Voluntary Frameworks, and Superficial Transformation

Corporate Social Responsibility has been criticized for being ineffective. It has certainly aided in the transformation of the mining sector, but it has been overshadowed by the legislative efforts of the state at achieving transformation. The primary reason being that CSR is, for the most part, voluntary whereas effective, timeous transformation requires mandatory requirements imposed on mining firms. Mining firms continue to find ways to avoid social imperatives by, for example, shifting to contract workers to avoid being bound by collective bargaining

agreements.¹⁸² The shortcomings of voluntary measures can also be seen from the increasing need for communities and workers to engage in litigation in order to claim and/or protect their rights.¹⁸³ Organised labour mechanisms such as Trade Unions have been very effective in mandating transformation from mining firms, especially in ‘the three pillars that historically structured its organization of production – low wages, low skill levels and the migrant workforce.’¹⁸⁴

Counter to this however, is the view that transformation may in fact take place to a greater extent if companies and the state were to understand social responsibility as a moral imperative rather than a mere legislative requirement. Instead of trying to find the easiest way to meet legislative requirements, companies should voluntarily commit to embrace CSR, which would then require them to ask the question ‘What would CSR (or transformation) require in this context?’, rather than ‘What is the minimum requirement that must be met per the law?’

Effectively, this means that mining firms should be using the legal requirements for transformation as a base, but should be aiming to effect transformation in so far as possible in their context.¹⁸⁵ This appears to be the view in the South African Draft Codes of Good Practice on Broad-Based Black Economic Empowerment, which defines Corporate Social Investment as: ‘...an enterprise's contributions to society and community that are extraneous to its regular business activities’.¹⁸⁶

¹⁸² Dansereau, ‘Comparing Dueling Approaches to the Transformation of South African Mining,’ 90.

¹⁸³ *Ibid.*, 91.

¹⁸⁴ *Ibid.*, 90.

¹⁸⁵ Kloppers and du Plessis, ‘Corporate Social Responsibility, Legislative Reforms and Mining in South Africa,’ 95.

¹⁸⁶ *Ibid.*

Nonetheless, legislation remains an important driver of CSR, and can be an effective mechanism to ensure that companies are participating in CSR.¹⁸⁷

The miners that were interviewed seemed to be of the opinion that there were superficial efforts that were directed at merely pretending to engage in transformation, but in actual fact the mining firms were only ticking the legal boxes. One miner put it thus: 'Lonmin should not engage in superficial transformation, such as whether the miners can have a cattle kraal at a hostel, but implement real policies.' And transformation should not be 'a nice work for mining licence applications', but that there should be commitment by leadership to implementation. Contrary to these concerns however, Mr Nkhoma believes that Lonmin is 'not window dressing, but committed to transformation in a real way.'

The use of litigation as a means of promoting and protecting transformation

Litigation is another powerful means by which transformation is brought about in the mining industry. However it is usually considered a last resort given the length of time that a court process may take, as well as the exorbitant costs involved.¹⁸⁸

This is typically not a suitable mechanism for a HDSA to make use of, unless supported or represented by an NGO or on a pro bono basis.¹⁸⁹ The Bapo ba Mogale community is one of the traditional communities that have had to resort to litigation in order to claim land or compensation.¹⁹⁰ Despite the difficulties attached

¹⁸⁷ Kloppers and du Plessis, "Corporate Social Responsibility, Legislative Reforms and Mining in South Africa," 95.

¹⁸⁸ Bentley K. & Calland, R. 2013. Access to Information and Socio-Economic Rights: A Theory of Change in Practice, in Langford M., Cousins B., Dugard J., & Madlingozi T. (Eds), Socio-Economic Rights in South Africa. Cambridge University Press, at page 342.

¹⁸⁹ Ibid.

¹⁹⁰ Dansereau, 'Comparing Dueling Approaches to the Transformation of South African Mining,' 78.

to litigation, the interviewees made it clear that they will 'take Lonmin on' and that they are determined to pursue their end through the courts.

The fact that the Constitution contains justiciable socio-economic rights is of great importance to transformation. Socio-economic rights and the issues surrounding complex concepts (for example the meaning of the word reasonable in Sections 24, 25, 26, 27, 29, 32, 33 and 36, or the concept of progressive realisation) have been the subject of much academic debate in South Africa, and are beyond the scope of this research. The fact remains however that black individuals were deprived of basic rights during apartheid, and the inclusion of these rights in the Bill of Rights promises that these rights will, at some stage, be realised. In order to ensure that they are realised, and that the government and mining firms are promoting their realisation, litigation will remain a key mechanism in ensuring that real transformation (in this case, transformation that is broad based and not 'crony-based', that is clearly defined in law with effective implementation mechanisms and that goes beyond the minimum legal requirements to incorporate transformation into the corporate culture) is taking place.

Poor consultation between mining firms and mining communities

A major problem with transformation in the mining sector has been establishing proper consultation processes with the local communities in which the mines operate.¹⁹¹ Many mines have commenced with transformation initiatives aimed at uplifting the communities, but unfortunately they have failed to consult with the community prior to the implementation of these initiatives. The difficulties that

¹⁹¹ Kloppers and du Plessis, "Corporate Social Responsibility, Legislative Reforms and Mining in South Africa," 116.

may arise thereafter include: that the transformation initiatives may not be well received by the community, that the community may not take any form of ownership over the initiative, that the initiatives do not properly address the needs of the community and that the implementation of the initiatives may be inadequate.

Furthermore, even when a mining firm does start the necessary consultation process, consultation with a local community can be a complicated process. Many mining communities have community leaders and traditional governance structures that must be understood in order to effectively implement an initiative in the community.¹⁹² There are considerable power struggles that exist within communities and these consultation processes often expose these tensions. Mr Nkhoma expressed this in the interview and stated that ‘there had been 10 to 12 years of fights between traditional leadership as to which is the rightful ‘house’ to run the community. It was therefore hard to engage with the leadership as it was always changing.’

In order to be effective, consultation should not only take place in one static stage of a transformation initiative, but rather it should be a continuous process from the development stage to the implementation and the monitoring stages of the initiative.¹⁹³ One miner expressed dissatisfaction with the role that management is playing in that they do not get proper feedback as to whether their transformation initiatives are actually working. He believed that management ‘just hear [about transformation] from Lonmin people.’ As already mentioned, he stated further that

¹⁹² *Ibid.*, 117.

¹⁹³ *Ibid.*, 118.

transformation should not be ‘a nice work for mining licence applications’, but that there should be commitment by leadership to implementation.

A continuous engagement process, ie one that follows an initiative from conception and design to implementation and review, will help to ensure that the transformation initiatives that are implemented by mining firms are really addressing the real needs of a community, and not merely their perceived needs. It will also aid in creating community buy-in for projects and therefore increase the impact that they have in effectively transforming the community. This was stressed as being a crucial aspect of an employer’s role in transformation by Mr Nkhoma, who stated that ‘the employer must create an enabling environment for engagement between the employer and the employee.’

Towards a broader view on transformation – divesting from an anti-transformative industry

Interestingly, Mr Nkhoma raised the point that he believes that we cannot continue to focus on transformation in a ‘micro-cosmic’ way. In other words, we cannot view transformation at Lonmin in isolation, but must rather view it as part of the entire transformation process that is happening in all industries in South Africa, and the rest of the world. His proposal goes further to say that in fact South Africa may need to divest itself from being a primary producer of minerals, as that in itself is anti-transformative to the extent that it removes value from South Africa and generates value for importers. He also alluded to beneficiation as being a key component of transformation. This echoes the requirement of the BEE scorecard that a firm should engage in beneficiation. The mining industry has been

notoriously slow in implementing transformation. It may well be that it is the structure of the industry that lends itself to exploitation and profit driven motives more than many other industries. This may also have been a reason that the industry suffered from racial dominance more than other industries during apartheid.

An interesting theme that was mentioned by Mr Nkhoma is that perhaps the South African mining industry itself is anti-transformative, ie that the industry is structurally predisposed to that which is opposite to transformation objectives. The nature of mining operations in South Africa is such that our country's natural resources are extracted and then exported to other nations who then process the raw materials. South Africa imports these materials back in their processed form, at a higher price of course. According to Govender 'Almost 80% of what is procured as material to produce products is derived from the South African mining industry. However, output from mining is generally exported as raw material and processed in a foreign country, which South Africa then imports as finished products.'¹⁹⁴

This is precisely the challenge that the Mining Charter attempts to address in Section 2.3: Beneficiation. For the purpose of the Charter, beneficiation is defined as '...the transformation of a mineral (or a combination of minerals) to a higher value product, which can either be consumed locally or exported...' The mining industry has seen significant value add by downstream beneficiation with the growth of the mining equipment, manufacturing and minerals processing

¹⁹⁴ 'Manufacturing in the Mining Industry Can Yield Economic Growth,' accessed December 9, 2015, <http://www.miningweekly.com/article/manufacturing-in-the-mining-industry-can-yeild-economic-growth-2014-06-27-1>.

industries. According to Kaplan¹⁹⁵ however, South Africa's proficiency in mining may not equate to proficiency in the processing of raw materials through beneficiation and this must be borne in mind when considering the practicalities of beneficiation. The beneficiation sector already contributes considerably to the South African economy and in 2009 it accounted for 100 000 jobs and R157bn primary sales to the domestic market.¹⁹⁶

It could be such that it is time for the country to move towards industries that will expedite transformation in South Africa.¹⁹⁷ This would not however be a quick and easy process, given that the mining sector is of paramount importance to the South African economy at present.

The importance of consultative processes in negotiating deals – The Lonmin-Bapo Deal

The community and Lonmin employees are clearly aggrieved by the deal. The news reports, the ongoing litigation to that end and the responses from the interviewees all demonstrate this. It may not be the entire community, indeed some of the community members, even if only the traditional council, are in favour of the deal.

But the fact that there are enough members to mobilise the Legal Resources Centre, and then a major South African legal firm to represent them in their litigation indicates that there may indeed be some merit to their concerns.

Furthermore, the controversy surrounding this deal appears to relate mainly to the consultation process, and not necessarily to the actual deal. Most of the miners and

¹⁹⁵ A professor of business government relations at the University of Cape Town.

¹⁹⁶ Ben Turok, 'Beneficiation and Value Chains : The Interface between Mining and Manufacturing : Beneficiation & Value Addition,' *New Agenda: South African Journal of Social and Economic Policy* 55 (2014): 46–47.

¹⁹⁷ This could include industries like tourism and technology as alluded to by Mr Nkhoma.

community leaders (in fact, all but one) agreed that it is possible that the deal is beneficial to the community, but added that they have not been able to evaluate this given the allegedly flawed negotiation process.

As a starting point, all of the miners and community members held that no engagement had taken place. These interviewees stated that there was a door-to-door campaign that took place, but that it was flawed. They allege that the people administering the campaign were ill-equipped to do so and that they were not familiar with the deal and therefore could not provide information on the terms of the deal.

After the door-to-door campaign, there was a mass community meeting where the deal was voted on and approved. According to the interviewees, this voting process was also flawed as:

- The majority of the people at the meeting were not from the community,
- The meeting was held during a weekday when the miners and most of the community were at work, and therefore could not attend the meeting,
- At the meeting, there was no thorough presentation of the deal - no information was given on the terms of the deal that would have allowed the community to make an informed decision,
- The community was not able to compare what they were giving up with what they were receiving, and
- There were concerns about the Kgosi's ability to call a meeting on a matter such as this deal, rather than the traditional council.

These responses raise a concern relating to the traditional governance structures that exist in the Bapo Community as well as their ability to effectively represent the community in transformation deals.

Traditional government structures

As already noted, mining firms tend to understand their obligation to engage with mining communities to only extend to the tribal authorities. This was echoed by the process described by Mr Nkhoma, where Lonmin engaged primarily with the traditional council of Bapo ba Mogale.

There is however currently uncertainty surrounding the authority of tribal authorities. These structures are recognised under the Traditional Leadership and Governance Framework Act 41 of 2003 (hereafter: the Framework Act). In terms of this Act, any tribal authorities in existence at the time of the transition to democracy (and recognised in terms of the Bantu Authorities Act of 1951), will remain in existence provided that certain requirements as to their constituency are met. Traditional councils were given until September 2011, in terms of the Amended Act, to comply with these requirements. Research indicates that many Councils have not complied with the above requirements, but the Act does not give guidance as to what their legal status is if they have not yet complied. Each province is entitled to publish its own provincial Act governing traditional councils. The one of interest for the purpose of this research is that of the North West Province, given that this is where Lonmin's operations are. The North West Traditional Leadership and Governance Act 2 of 2005 specifically provides that

these structures will continue to exist until replaced by newly constituted ones in terms of the Framework Act.

The case law relating to traditional councils is also unclear, with the three main cases all resulting in conflicting judgements.¹⁹⁸

The UCT Centre for Law and Society has indicated that a Circular was published by the North West provincial government in 2011 'warning traditional councils that they do not have the legal authority to enter into transactions and valid contracts.'¹⁹⁹ ²⁰⁰ It therefore becomes important to verify whether the engagement process with the Bapo community was sufficient given that the majority of the negotiation took place between Lonmin and the traditional council.

The traditional council of Bapo ba Mogale has been involved in conflict for a long period of time.²⁰¹ This was acknowledged by Mr. Nkhoma in his interview. For example, the Chief Kgosi, Bob Mogale, attempted to take control of the community's assets, but was prohibited from doing so in a high court judgement.

The judge stated that only the traditional council should have control over the community's assets.²⁰² The reason that this is such an important issue to determine is that in terms of the Framework Act, any money paid to the community should be held in a trust account, and administered by the tribal authority on behalf of the

¹⁹⁸ See: *Mogale v Maakane and Others* (1106/2010) [2010] ZANWHC 18; *Traditional Authority of the Bapo Ba Mogale Community v Kenoshi and Another* (31876/10) [2010] ZAGPPHC 72; *Maakane and Others v Premier of the North-West Province and Others* (2715/2010) [2011] ZANWHC 29 and *Pilane and Another v Pheto and Others* (582/2011) [2011] ZANWHC 63

¹⁹⁹ Centre for Law and Society, UCT, 'Questioning the Legal Status of Tadtional Councils in South Africa,' August 2013, 6, http://www.cls.uct.ac.za/usr/lrg/downloads/CLS_TCstatus_Factsheet_Aug2013.pdf.

²⁰⁰ M De Souza, 'Justice and Legitimacy Hindered by Uncertainty: The Legal Status of Traditional Councils in North West Province,' *South African Crime Quarterly* 49, no. 1 (October 22, 2014): 50, doi:10.4314/sacq.v49i1.4.

²⁰¹ Boyle, 'On the Record with Hugh Eiser and Brendan Boyle,' 66.

²⁰² *Ibid.*

community. The royalties paid by Lonmin to the Bapo ba Mogale community were therefore paid into the trust account of the traditional council. Because of numerous complaints against the chief, the North West government appointed various administrators (external to the traditional council) to administer the funds.²⁰³

It is imperative that the legal status of these councils be determined and widely understood. In practice, 'traditional councils are considered to be, and dealt with as community representatives in respect of development initiatives, service delivery agreements with local municipalities and mining deals.'²⁰⁴ The traditional councils are able to inhibit transformation if they do not correctly administer the funds paid by mining firms for the benefit of the community.

Despite the flaws that are implicit in these traditional governance structures, the community still understood them to play an important role. For example, two miners and two community members stressed the roles that the local tribal council and the chief should play in transformation. They then went on to describe how the consultation process between Lonmin and the community should have taken place:

'First a proposal should have been submitted to the Chief and the traditional council, who would have engaged with the headmen, and then presented the proposal to the community. Only after the community had understood the proposal would they have given their inputs. Thereafter a mass meeting

²⁰³ Ibid.

²⁰⁴ Centre for Law and Society, UCT, 'Questioning the Legal Status of Tadtional Councils in South Africa,' 1.

should have been called where the community could vote on the proposed deal.'

Rather than dismissing the tribal council completely as a result of its inefficiency, they believed that it had an active role to play in leading the community. They then went on to express their dissatisfaction at the current performance of their (the traditional council's) duties. One miner stated that 'the traditional leaders should be highly skilled but at the moment they are not skilled at all.' Another community member stated that the traditional council is not constituted by the kind of people who should be holding office: 'The current members actually come from the Heidelberg area and not the Bapong area.'

Traditional Governance structures therefore are not without their challenges. Nevertheless, the solution does not appear to completely dismiss their ability to effectively lead a community, but rather to ensure that the legislation effectively provides for a suitable framework in which they can lead, whilst protecting the community from exploitation.

Problems with capitalism as a system of production

It appeared that some of the issues raised by the miners and community leaders are in fact concerns with capitalism. As Mr Nkhoma pointed out, the fact that miners are paid less than the executive management of a firm is 'a fact of capitalism' and not a failure on the part of transformation. In elaboration, he stated that 'one cannot expect an engineer to get paid the same as a rock-shoveller in a capitalist system'.

In South Africa however we cannot end the discussion there. To the extent that a mining employee's paygrade is correlated with race - transformation is required. There is no problem (given that one accepts the basic tenets of a capitalist system for the purposes of this research) with management earning more than lower level mining employees. It is only when the split between management and lower level employees is clearly divided upon race lines, as in South Africa because of the apartheid regime, that there is a problem that must be addressed. According to Mr Nkhoma, it is important to look at paying all employees an 'equitable income', when considering the requirements of transformation. He did not define the term 'equitable' as he used it, but presumably it implies paying a wage that is equal across race groups.

Mr Nkhoma also highlighted the imposition of a requirement for a firm to give shares to employees as contra to a capitalist system. He remarked that the firm must be entitled to decide how it operates. This is however only half the truth. It cannot be justifiable in a democratic society for a firm to operate in an unrestricted manner. Indeed the legislature, executive and judiciary must impose restrictions on a firm in order to ensure the achievement of Constitutional values. This includes limiting the freedom of Lonmin by imposing transformative requirements by which it must abide – with the goal of furthering equality and justice in South Africa. The extent of such restrictions however, as well as their exact nature and form, is somewhat subjective and open to debate.

Interestingly, despite their numerous concerns that appeared to be objections against capitalism, the interviewees (all miners, all but one community member and

Mr Nkhoma) did not believe that nationalisation was the solution. All of the miners rejected nationalisation of the mines as a feasible alternative, with one stating that 'the government is corrupt and cannot be trusted'. Mr Nkhoma dismissed nationalisation stating that 'nationalisation is not important as it will not help with transformation.' This is unsurprisingly opposite to the ANCYL's call (see the literature review in Chapter 3) for nationalisation, evidencing that the interviewees did not place as much confidence in the political leaders as the leaders placed in themselves.

Barriers to transformation: merely a perception or reality?

It is difficult to determine the exact truth when dealing with various parties' views on a particular deal or set of circumstances. According to the review of literature, and the small sample of interviewees, Lonmin, miners and community leaders have differed in their responses to various aspects of transformation. To what extent did consultation take place between Lonmin and the Bapo community? Did Cyril Ramaphosa really receive his share of Lonmin's equity by way of political connections? Are contracted and sub-contracted workers really subjected to lower safety standards than full-time Lonmin employees? Unfortunately a conclusion cannot be drawn at this stage. The importance of promoting transformation in the mining sector cannot however be downplayed. Furthermore, the difficulty in establishing the truth cannot negate the necessity of doing so. The researcher trusts that the concerns of these miners and community leaders will be investigated further, whether by future researchers or by Lonmin themselves. There is a need to comprehensively evaluate the effectiveness and genuineness of the transformation initiatives of mining companies, including, but not limited to Lonmin.

In addition, there were serious allegations of racist practices that were advanced by two of the miners. Both of them remarked that there are discriminatory pay structures that exist at Lonmin, where black workers are paid less than white workers for the same positions. One inference that can be drawn from Mr. Nkhoma is that it takes time to train black workers and for them to gain the necessary experience. This time delay is in contrast with what he described as 'unrealistic urgency' on the part of the miners for transformation to occur. This may result in white and black workers with the same title being paid different salaries given the fact that their levels of experience differ. It could however also be that the racist structures are not perceived and are in fact real, in which case serious action would be required by Lonmin management to ensure the eradication of these practices and the prevention of their reoccurrence.

One miner, when asked about what he particularly enjoys and does not enjoy about his job, stated that he also believed that 'there is a large gap (in salary) between white managers and black managers creating a racial imbalance' and that 'black miners were paid less than white miners for the same positions.' How can the mining industry move forward along the path of transformation if serious allegations such as this one remain? Lonmin should effectively communicate its remuneration policies such that any perceived differences are either identified as being untrue, or that they are ended.

Misaligned goals or misaligned timelines

It appears from the research that much of the tension between mining firms and miners is not necessarily that they hold different views on transformation, but that they have differing views on an appropriate timeline for transformation to occur. There is a definite need for transformation to balance short term and long term initiatives. In the long term, transformation must completely eradicate the effects of apartheid. In the short term however, it is necessary to ensure, in so far as possible, that HDSAs alive now are benefiting from transformation initiatives. This was identified by one of the miners who were interviewed, in reference to the Lonmin Bapo share deal. He stated that 'the shares must be supplemented with cash to create a balance between long term and short term income.' There is therefore a requirement for mining firms such as Lonmin to balance the needs of HDSA miners and community members with long term projects that, while not benefiting HDSAs today, may well contribute meaningfully to the complete transformation of the sector in the future.

Chapter 7

Where to from here?

Concluding remarks

This research set out to investigate aspects of transformation within the mining sector. In order to do this it surveyed academic literature, government policy, legislation and company reports to outline the framework in which transformation occurs. This must lead to a definition of transformation that encompasses rectifying the effects of apartheid in order to move the industry towards one that is built on justice, fairness and democracy. It found that transformation occurs because of voluntary (for example CSR) and involuntary motives (for example the Mining Charter).

Much of the discourse that was analysed looked at transformation through the lens of BEE, but it is important to understand that BEE is only a mechanism through which a transformed industry can be achieved, and it is not the end point. BEE has been the state's primary mechanism for driving transformation, and it has been effective in achieving some transformation in the mining industry. For example, mining hostels have or are being replaced with accommodation that provides for family structures and preferential employment opportunities have led to black employees in all rungs of the mining company, not least the CEO. In addition, preferential procurement has enabled many black businesses to establish themselves among a previously white dominated supply chain.

BEE has not, however, been without its flaws. The most notable flaw, as mentioned by the interviewees and is evident in the literature, is that BEE has been far too narrow in relation to the scope of its beneficiaries. An initiative that is meant to empower all HDSAs has unfortunately been used by some to advance their own self-seeking purposes.

It would not be appropriate to draw recommendations on the basis of this modest exploratory enquiry at this stage. Rather, recommendations take the form of further research areas that this research has highlighted for the potential role that they could play in transforming the mining industry. It is recommended that government, mining firms, and other relevant organisations review the concerns raised by the miners and community leaders with the aim of identifying potential action areas where they can implement change to ensure that transformation is occurring as it should.

Limitations of the Research

As with all research, this case study has limitations. Much of the limitations related to the research have already been discussed in detail throughout the research report, particularly in Chapter 2: Methodology and Research Design and Chapter 5: Methodology and Research Design. Additional limitations are discussed briefly below.

Semi-structured interviews will always have an element of judgement in them. Given that the researcher is able to guide the conversation and use the questions as a framework rather than a strict agenda, not every interview will be the same. This risk must therefore be mitigated by (1) interpreting the research results in light of

the fact that not every interview was structured the same, and (2) ensuring that the interviewer is sufficiently trained to reduce bias and promote uniformity where possible. For the purposes of this research project, this was in the form of informal training (eg studying journal articles on interviews) and formal training (through research methods courses and consultation with experienced researchers).

The interviews consisted of a very small sample of miners and community members. The use of a small sample however does not necessarily detract from the credibility of the findings provided that the sample size is large enough to move towards saturation in the respondents answers. That is, when there are sufficient respondents that the majority of themes and constructs (of transformation) have been captured by the sample²⁰⁵. The interviews in this case were able to highlight most of the key issues surrounding transformation that were identified in the literature review as well as to provide insight into the outworking of various aspects of transformation related legislation in practice. The sampling risk is further mitigated by the fact that the interviews were in-depth and the interviewees were knowledgeable in relation to the questions, yielding rich qualitative data.

The interviews and literature review will therefore, despite potential drawbacks, contribute meaningfully to the development of a valid case study.

²⁰⁵ *Ibid.*, 513.

Opportunities for further research

This dissertation set out to embark on an investigation that is far from over. The interviewees raised very pertinent issues relating to the current transformation process that require further research. The literature too, highlighted areas where existing research has failed to provide sufficient answers. These are listed below:

- Resolving the legal issues surrounding Social and Labour Plans: their force in law, requirements for firms to make them public, compliance mechanisms and monitoring responsibilities;
- Studies on the best practices of community engagement in South Africa;
- A comprehensive law reform surrounding transformation, specifically in order to align all legislation to ensure cohesion;
- Investigative studies on policies that determine transformation not only on a micro level (industry or sector level), but on a macro scale for the entire country;
- Studies on possibly divesting from the primary resource sector, looking for ways to create value in other sectors;
- Studies on the effects that beneficiation would have on the mining sector: its performance, transformation and sustainability;
- Studies on traditional forms of government and how they impact on transformation, specifically focusing on the Bapo community and the issues that have occurred between the community and tribal leaders; and
- Studies that investigate potential mechanisms for ensuring that B-BBEE reaches a broad range of HDSAs, and not only a small elite.

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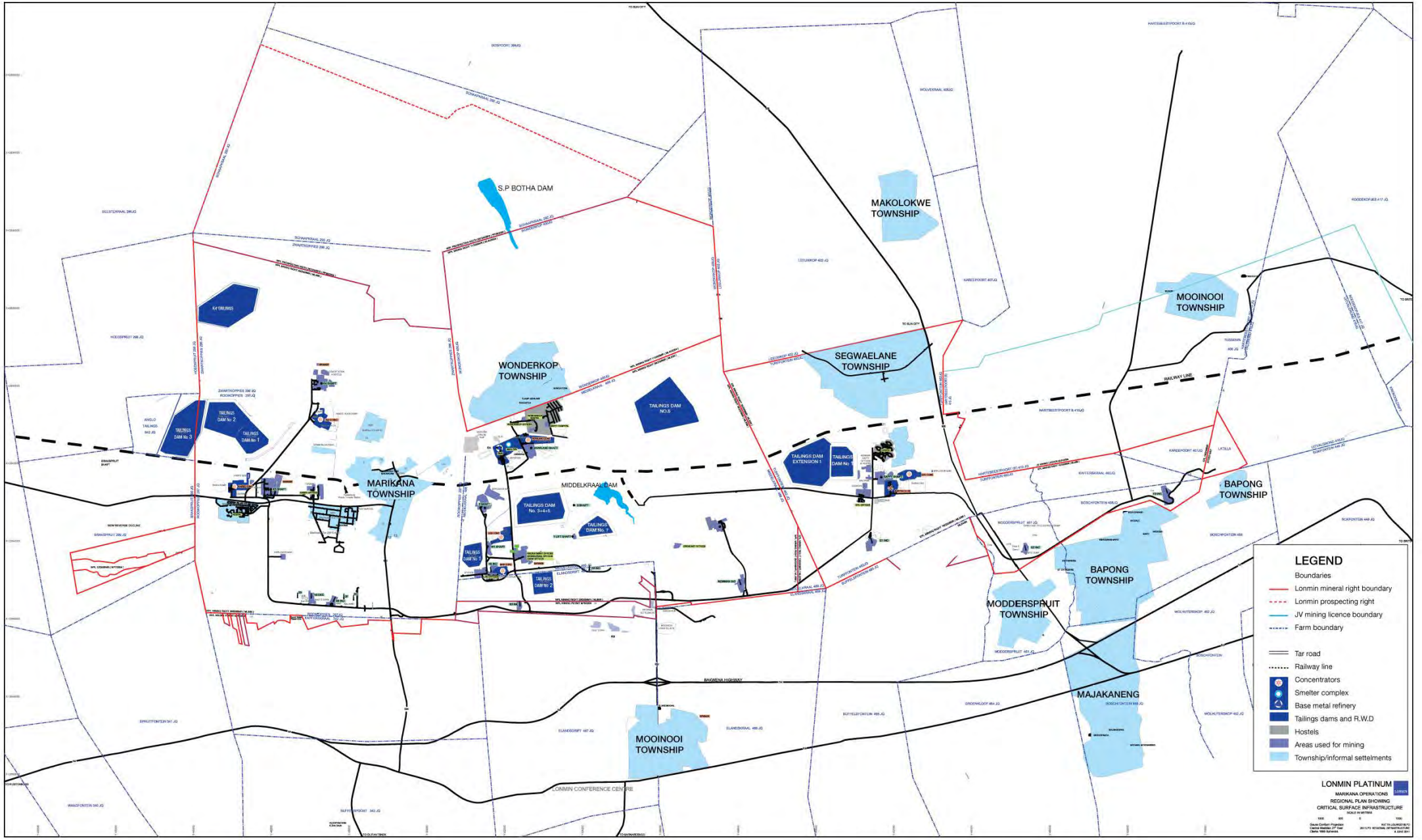
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Appendix 2: Map of Marikana



Issues to be addressed in interviews

- 1) Name, Surname, Age
- 1) Are you married and do you have any children?
 - a. Where do they live, what are their occupations?
- 2) How did you find yourself working in the mining sector?
- 3) Anything else that you think is important that you would like to tell me about your background?
- 4) How long have you worked at Lonmin?
- 5) What do you know about Lonmin the company?
 - a. Head office in Joburg
 - b. Parent company in UK
 - c. Financial difficulties
 - d. 3rd largest platinum producer
- 6) What does a typical work day look like for you?
 - a. Working hours? Tasks? Travel to and from work?
- 7) What do you particularly enjoy or not enjoy from your work?
- 8) Depending on how long employee has worked at Lonmin:
 - a. Have you noticed a change in your working conditions since you started working here?
- 9) How well do you know community leader?
- 10) What is transformation?
 - a. (Possible follow up probes if interviewee is not able to elaborate on their views of transformation. What does the word transformation mean to you? What do you understand by the term? Does it mean: better wages, better conditions of service overall, workers become shareholders, workers share in the profits of the company, nationalisation of the mines, closing the income gap between managers and workers, involving workers in all aspects of decision making of the company?)
- 11) What is the role of an employee in transformation?
- 12) What is the role of an employer in transformation?
- 13) Are there any other parties that share in the responsibility for transformation?
 - a. Trade Unions?
 - b. Government?
 - c. General Public?
- 14) Where does an employer's role to engage in transformation stem from?
- 15) What are some of the measures that Lonmin has put in place to promote transformation?
- 16) What are some of the practical measures that an employer could reasonably put in place in order to promote transformation?
- 17) What barriers may exist that would prevent the achievement of these measures?
 - a. Why might the efforts of an employer to achieve transformation not be effective?
 - i. Lack of resources
 - ii. Lack of will to implement

Appendix 3: Interview Guide – Miners and Community Members

- iii. Not understanding the goal of transformation clearly enough
- 18) Lonmin concluded a deal whereby the existing royalty rights of the miners were swapped for equity shares in Lonmin. What were the engagement processes implemented by Lonmin with respect to the new deal?
- a. Explain deal if necessary:
 - i. How could Lonmin engage better with its employees in the future?
 - ii. Are you happy with the terms of the new deal? (Scale of 0 - 10, with 0 being completely unhappy and 10 being completely happy) (Question for miners)
 - iii. Describe what you specifically like or do not like about the deal (Question for miners)
 - iv. Did they explain the advantages and disadvantages to you of choosing to accept the new offer? (Yes, no or yes but not in detail) (Question for miners)
 - v. Did you feel that you understood the offer well enough to make a decision? (Question for miners)
- 19) Given that this deal has already been concluded, what can be done to ensure that it is implemented effectively?
- 20) If not brought up by the interviewee:
- a. To what extent has Marikana impacted your views/answers to the above questions?
- 21) Is there anything else that you would like to mention in relation to transformation within the mining sector?

Issues to be addressed in interviews

- 1) Name, Surname, Age
- 1) Are you married and do you have any children?
 - a. Where do they live, what are their occupations?
- 2) Describe the career path that led to your current position?
- 3) Is there anything else that you think is important that you would like to tell me about your background?
- 4) How long have you worked at Lonmin?
- 5) What does a typical work day look like for you?
 - a. Working hours? Tasks? Travel to and from work?
- 6) What do you particularly enjoy or not enjoy about your work?
- 7) Depending on how long employee has worked at Lonmin:
 - a. Have you noticed a change in your working conditions since you started working here?
- 8) What is transformation?
 - a. Note that this question (and the following questions) are deliberately broad. The goal is for you to independently form a view without being influenced. Please be as detailed in your response as possible.
 - b. (Possible follow up probes if interviewee is not able to elaborate on their views of transformation. What does the word transformation mean to you? What do you understand by the term? Does it mean: better wages, better conditions of service overall, workers become shareholders, workers share in the profits of the company, nationalisation of the mines, closing the income gap between managers and workers, involving workers in all aspects of decision making of the company?)
- 9) What is the role of an employee in transformation?
- 10) What is the role of an employer in transformation?
- 11) Are there any other parties that share in the responsibility for transformation?
 - a. Trade Unions?
 - b. Government?
 - c. General Public?
- 12) Where does an employer's role to engage in transformation stem from?
- 13) What are some of the measures that Lonmin has put in place to promote transformation?
- 14) What are some of the other practical measures that an employer could reasonably put in place in order to promote transformation?
- 15) What barriers may exist that would prevent the achievement of these measures?
 - a. Why might the efforts of an employer to achieve transformation not be effective?
 - i. Lack of resources
 - ii. Lack of will to implement
 - iii. Not understanding the goal of transformation clearly enough

Appendix 4: Interview Guide – Lonmin

- 16) Lonmin concluded a deal whereby the existing royalty rights of the miners were swapped for equity shares in Lonmin. What were the engagement processes implemented by Lonmin with respect to the new deal?
- a. Explain deal if necessary:
 - i. How could Lonmin engage better with its employees in the future?
 - ii. Explain how Lonmin has been transparent in the process of concluding this deal?
 1. Is it possible to access the documents upon which the deal's terms were based (in particular, the calculation of equity shares to be given to the miners)?
 2. If not, why does Lonmin believe that it is better not to disclose this information?
 - iii. Are you happy with the terms of the deal? Explain. (Scale of 0 - 10, with 0 being completely unhappy and 10 being completely happy)
 - iv. Describe what you specifically like or do not like about the deal.
 - v. Did Lonmin explain the advantages and disadvantages to the miners of choosing to accept the new offer?
 - vi. Do you feel that the miners understood the offer well enough to make a decision?
- 17) Given that this deal has already been concluded, what can be done to ensure that it is implemented effectively?
- 18) Is there anything else that you would like to mention in relation to Lonmin and its role in transformation within the mining sector?

What the deal says

- The Bapo ba Mogale must give up their right to receive royalties;
- The Bapo ba Mogale must give Lonmin their 7.5% share in the Pandora joint venture with Lonmin, Anglo American and Mvelaphanda Resources;
- The Bapo ba Mogale must let Lonmin use the surface of their land for mining purposes;
- The Bapo ba Mogale must keep their Lonmin shares for 10 years and cannot sell them or use them as surety for any loan or other business;
- Lonmin must give the Bapo ba Mogale 13 million shares in Lonmin Plc, which were worth R564-million on the date of the Bapo vote. By 3 November 2014, the value of the shares had fallen to R398-million;
- Any dividend earned on these shares will go to the community;
- Lonmin will set up a Local Economic Development Trust and lend that trust the money to buy almost one percent of Eastern Platinum and Western Platinum, the mines operating on Bapo farms. Dividends from these shares in the two companies will go to the trust and if they do not bring in at least R5-million a year, Lonmin will make up the difference;
- Lonmin will pay R20-million a year for the first five years of the contract to cover the management and administration of the Bapo ba Mogale community. They are not required to use this money for the development of the community;
- Lonmin will give the Bapo ba Mogale tenders worth R200-million over the first 18 months of the contract.

NOT THE SAME THING

**The Bapo ba Mogale have a mining royalty because Lonmin mines beneath the land they have owned for generations.*

**Lonmin has to achieve 26% BEE ownership by the end of 2014 because South Africa is committed to eradicate the effects of colonialism and apartheid.*

THE LONMIN-BAPO DEAL

**We have one chance to get
it right!**

**We want a deal with Lonmin. But we want a good deal.
We want an honest deal, a fair share, an open negotiation.**

**The Bapo ba Mogale Liaison Committee and concerned members
of the community are asking for your support to reverse the
approval of the Lonmin-Bapo deal discussed at the meeting in
Segwaelane on July 29, 2014.**

**When the deal was presented on July 29, it was worth R664-
million in shares and in cash. Now, just three months later,
Lonmin's share price has dropped by a quarter.**

This pamphlet is produced by the Bapo ba Mogale Liaison Committee for the information of the Bapo ba Mogale community of North West Province. For more information or to contact the committee:

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You can also follow us on Facebook

We, concerned members of the Bapo ba Mogale traditional community, have written to Lonmin Plc, owners of the platinum mines that operate on our lands, and to the Ministers of Minerals and Energy and Rural Development, to object to the finalisation of a deal converting the Bapo's 45-year-old right to 12% of the pre-tax profit from mining on its land into a 2.4% shareholding in the London-based company.

But the ministers went ahead and signed the deal, which leaves the community no option but to seek a court review of the processes leading to its adoption. The decision to ask for a delay in the finalisation of the deal was not taken lightly. It was supported by at least 2000 members of the community, who signed a petition rejecting the deal on its current terms.

The Bapo ba Mogale deserve to own a share of the mines under our feet, but this must be based on a deal that is negotiated with our community in an open and transparent manner. It cannot be based on agreements known only to a small elite who stand to benefit from the first profits while community members are refused information on how it will work.

The letter to Lonmin did not say the Bapo don't want a deal: it called for a proper, legal and transparent contract with all the details known to all the people who will be affected by it.

The letter was written by the Legal Resources Centre on instructions from a Liaison Committee made up of elected representatives of the Segwaelane, Wonderkop and Bapo communities. It said the meeting on 29 July claimed to have approved agreements with Lonmin, the Minister of Mineral Resources and the Minister of Rural Development and Land Reform.

The letter said the so-called agreement was described in 10 documents listed in the "*Resolution of the Bapo Ba Mogale Traditional Community*". The resolution was allegedly passed at the abovementioned meeting at Segwaelane on 29 July 2014.

These 10 agreements are called: *Framework Agreement; Relationship Agreement; Notarial Royalty Payment Agreement with Annexure A; Notarial Lease Agreement with Annexure B; BMC Sale of Shares Agreement; Donations Agreement; Subscription Agreement; Procurement Framework Agreement; Local Economic Development Trust Deed; and Lonplats Sale of Shares Agreement.*

We said in the letter that the decision to enter into these agreements was unlawful because the meeting constituted on 29 July 2014 did not have authority or a mandate to make such a decision on behalf of the entire community.

People at the meeting on 29 July were asked to approve a resolution that said they had seen the 10 agreements and had them explained. Anyone who was there knows that this did not happen. The agreements were not shown to members of the community. They were not explained in the speeches. They are still secret.

In the letter, the community members asked for copies of all the agreements as well as others referred to at the meeting and the reports prepared by Nedbank and lawyers Norton Rose. This has so far been refused.

The letter also asked for the minutes of the meeting of 29 July 2014 and the report of the government official appointed to oversee the community meeting under the Interim Protection of Informal Land Rights Act 31 of 1996. These are all documents that should have been available to every member of the community well before they were asked to vote to accept the terms of the many agreements they describe.

The letter to Lonmin demanded a promise not to sign, ratify or implement any of the agreements or to take any steps towards their implementation. Lonmin refused to give that promise or to make the documents available. In fact, the Bapo Community Trust that will manage the development funds has already been set up with two senior Lonmin executives as the only trustees.

All this means the community members will now have to ask a court of law to review the conduct of the meeting and the alleged approval of the agreements.

The Bapo ba Mogale deserve and are entitled to a profitable agreement concerning the mining of the platinum under their land.

- **They have a right to know who will manage the agreement.**
- **They have a right to know how the value of the agreement was calculated.**
- **They have a right to know who will benefit from it.**
- **They have a right to know how they will benefit from it.**
- **They have a right to know when they will benefit from it.**

None of these things is known now. As things stand, it could be 10 years before the majority of members of the Bapo ba Mogale community see a cent from the deal that Lonmin Plc is trying to push through.

The Segwaelane, Wonderkop and Bapo Communities are not trying to stop the Lonmin deal with the Bapo ba Mogale. They are trying to make sure it is a good deal and that it is fair.

They are trying to make sure it is the BEST deal this community could hope for after generations of exclusion from the profits of the world's richest platinum resource.