

Submission by the Centre for Applied Legal Studies

to

The Committee on the Covenant for Economic, Social and Cultural Rights

regarding

South Africa's Compliance with the Covenant

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Louis Snyman

Direct Tel: +2711 717 8629

Email: Louis.Snyman@wits.ac.za

Palesa Madi

Direct Tel: +2711 717 8614

Email: Palesa.Madi@wits.ac.za

Lubabalo Mabhenxa

Direct Tel: +2711 717 8651

Email: Lubabalo.Mabhenxa@wits.ac.za

Robert Krause

Direct Tel: +2711 717 8615

Email: Robert.Krause@wits.ac.za

1



TABLE OF CONTENTS

1. Introduction.....	3
2. Article 7(b) Gender.....	5
3. Article 11 The Right to Housing.....	6
4. Recommendations.....	9



1. INTRODUCTION

1.1. About the Centre for Applied Legal Studies

- 1.1.1. The Centre for Applied Legal Studies ("CALS") welcomes the opportunity to make submissions in the form of this shadow/parallel report on Initial reports of States Parties, South Africa.
- 1.1.2. CALS is a human rights organisation and registered law clinic based at the School of Law at the University of the Witwatersrand, South Africa. Its vision is a socially and economically just country where human rights are promoted, respected, protected and fulfilled by the state, corporations, individuals and other repositories of power.
- 1.1.3. CALS seeks to actualise its vision by challenging the structural nature of poverty and inequality, the global dynamics that sustain it and the repositories of power that perpetuate it.
- 1.1.4 Due to the intersectional nature of the issues covered by the covenant, this submission is a collaboration between CALS' rule of law and environmental justice programmes.
- 1.1.4 CALS operates across a range of human rights issues: basic services, business and human rights, environmental justice, gender and the rule of law. The rule of law is the cornerstone of any constitutional democracy, ensuring that no-one is above the law and everyone is guaranteed fundamental human rights. The Rule of Law Programme aims to protect the systems of democracy, challenge structural violence, protect civil and political rights, and challenge discrimination against people living in poverty.
- 1.1.5. The Environmental Justice Programme takes a human-centred approach, focusing on how impacts on the environment are also impacts on people. Currently, most development in South Africa takes place in a manner that is not only unsustainable but also unfair. Those living in poverty largely bear the burden of the environmental degradation, while the benefits go to investors and corporate actors. CALS aims to change the behaviour of both the corporate actors that make use of natural resources, and the state which regulates this process. Our focus remains on the mining



sector, which is a major contributor to economic growth in the country, but which is also responsible for much environmental harm as well as the exploitation of mine workers and communities affected by their operations.

1.1.6. This report will look specifically at the failure of the state to protect in specific areas and make recommendations thereof.

1.2. CALS' Submission in brief: Gender and the relationship between the extractives industry and government

1.2.1. Though, as stated in South Africa's report, many of the obligations of the obligations in terms of the International Covenant for Economic, Social and Cultural Rights ("ICESCR") are already contained in the Constitution of the Republic of South Africa, 1996 and that there has been legislation enacted to comply with the obligations. This is however only technical compliance that ignores how people interact with the existing laws to realise, or fail to realise, their rights.

1.2.2. This shadow report will focus narrowly on the failure of the state as a regulator to protect women and vulnerable communities who are affected by mining activities. The shadow report will, further, look at South Africa's unique relationship with mining and the obligations that flow there from and recommend that the state needs to do more. In the first instance, the state has failed to recognise the specific vulnerabilities of women. For example, in the Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry, 2002 (Mining), the state provided for a quota that would increase the presence of women working in mining, without concrete measures to address their particular needs and vulnerabilities. Although this was left out of successive iterations of that charter, its legacy was an increase in the presence of women within mines. This has left them susceptible to gender based violence, sexual harassment and rape and none of the legal instruments identified in South Africa's report in terms of article 16 and 17 of the ICESCR ("State Parties report") adequately deals with these.

1.2.3. Secondly, we will look at specific obligations that the extractives industry has towards communities and how the failure to adequately



monitor compliance with these obligations impacts the rights that state parties are meant to protect in terms of ICESCR.

2. Article 7 (b) Gender

- 2.1. In terms of article 7(b) of the ICESCR everyone has the right to safe and healthy working conditions. We would contend that this includes the right to be free from sexual harassment and rape. The State Parties report states that the Employment Equity Act 55 of 1998, Code of Good Practice on the Handling of Sexual Harassment and the Labour Relations Act 66 of 1995¹ present an adequate range of instruments that deal with the scourge of gender discrimination in its various forms.

- 2.2. In South Africa the extractive industry is governed by the Mineral Petroleum and Resources Development Act 28 of 2002 (“MPRDA”). In terms of s100 (2) the minister is required to draft a mining charter that provides for the redressing of social and economic inequalities as stated in the Constitution. The first mining charter of 2004 provided a global target of 10% representation of women in 5 years.

- 2.3. With the obligation to include women comes a concomitant obligation to provide for their safety. Women are particularly at risk in this environment as the one piece overalls need to all be completely removed in order to urinate.² They are often vastly outnumbered by men in closed quarters. There is a culture of silence in these communities where if women disclose abuse both their employment and social standing is at risk. Employment and their social standing in mining communities and there is a fear that disclosure may affect both³ and this contributes to a culture of secrecy around the case. While many people are from rural areas, they live in this community for the majority of the year; they will have built up social structures and networks of support that they may not want to alienate.

¹ Consideration reports submitted by States Parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, South Africa E/C.12/ZAF/1

² A Benya *Women in mining: occupational culture and gendered identities in the making* PhD Thesis, August 2016 at 194.

³ *Bothma vs Els* (CCT 21/09) [2009] ZACC 27 at para 47; *Levenstein and Others vs Estate of the Late Sydney Frankel and Others* 2018 (8) BCLR 921 (CC) at para 56



2.4. The laws listed by the state party present acceptable mechanisms to address sexual harassment after it has occurred and even good remedies where an employer ignores sexual harassment⁴ The problem with this is twofold. The first is that this accepts disclosure of sexual violence and sexual harassment as the norm for victims⁵, and the second is that it is an *ex post facto* remedy to the problem. At the point of all those remedies, the infringement has already occurred. This not to say that they are not good to have in place.

2.5. Our submission is that there should be preventative measures in place to curb violence against women and promote real gender equity. These measures will need to include material resources, mechanisms and initiatives that enable a culture conducive to women's advancement and safety. For example, uniforms designed for women should be legally required at all mining operations. Companies must be required to ensure that the management of shifts is done so that women are not left isolated and vulnerable. Quotas can only achieve their transformative objectives if they are accompanied by practical requirements addressing the barriers impacting women in mining. South Africa already recognises that differently placed individuals may have their own unique vulnerabilities which are why it regulates the rights and eviction of farm workers differently from the general position⁶.

3. Article 11 The right to housing

Housing

3.1. The State Party's report states that primary responsibility for housing, in terms of the Housing Act 107 of 1997, lies with municipalities and that it is facilitated by provincial and national government⁷. The municipality in charge of allocation of housing must ensure that there are services, access to roads and transport⁸.

⁴ Ntsabo vs Real Security CC 2004 BLLR 58 (LC)

⁵ Supra note 4

⁶ Extension of Security of Tenure Act and not the Prevention of Illegal Evictions and Unlawful Occupations Act

⁷ Consideration reports submitted by States Parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, South Africa E/C.12/ZAF/1 at para 98

⁸ Ibid read with s9 of the Housing Act



- 3.2. In South Africa, any person seeking to apply for a mining right must have provided financially and otherwise for a social and labour plan (“SLP”)⁹. In addition, anyone who applies to renew their mining right, must demonstrate, their compliance with their SLP¹⁰. SLP’s have the objective of promoting employment and the advancement of economic welfare, contributing to transformation of the mining industry and ensuring that holders of mining rights contribute towards the socio economic development of the areas in which they are operating in¹¹. What is important is that the undertakings and projects in SLPs are compulsory legal obligations and not charity or voluntary corporate social investment (CSI) projects. Furthermore, SLPs confer obligations on the mining rights holder. While this is not expressly stated in the governing legislation, the transformative purpose of SLPs means that should be read as conferring corresponding entitlements to communities and employees.
- 3.3. Some categories of project that need to be present in all SLPs include skills development and training for employees and communities; local economic development consisting of infrastructure/service projects and income generating projects; and measures to address housing and living conditions. All of these projects, to be successful require participation by beneficiaries and the co-ordination of organs of state.
- 3.4. In all the above mentioned categories of SLPs there are deeply ingrained systemic problems that hinder the realisation of the intended objectives of development for communities and workers. One of the most severe examples, highlighted following the Marikana massacre is the failure to fulfil housing commitments.¹²
- 3.5. An SLP must include measures to address the living conditions of employees¹³. The problem here is that this often happens in disjointed

⁹ S23(1)(e) of the MPRDA

¹⁰ S24(3)(c) of the MPRDA

¹¹ Regulation 41 of the Regulations of the Mineral and Petroleum Resources Development Act

¹² See the Marikana Commission of Inquiry Report on Matters of Public, National and International Concern Arising out of tragic incidents at Lonmin Mine in Marikana, North West Province, GG38978, Gen 699, 10 July 2015.

¹³ Regulation 46(c) 41 of the Regulations of the Mineral and Petroleum Resources Development Act



ways. There is often no alignment between municipal development plans and the SLP. This often results in delays and not reaching targets. Further what is built is not always connected to bulk infrastructure¹⁴. This is a missed opportunity because the Housing Act allows for municipalities to work at varying levels with developers to provide housing¹⁵ and this partnership would ensure that when housing provided, it fits into the municipal design and plan for expansion.

- 3.6. Sometimes the problem is so severe that none are built at all¹⁶. This has been based on claims by mining companies of having no access to money to fulfil these obligations, regardless of these being binding obligations that they are expected to report the level of compliance yearly¹⁷. Even where it is true that there is no money or a reduced amount of money for the fulfilment of social labour plan obligations, the legal responsibility would then rest on the company to amend its SLP accordingly in line with Section 102 of the MPRDA and regulation 44. Without such an amendment, the company is acting unlawfully and can be subject to compliance notices and even termination of the mining right.
- 3.7. The Department of Mineral Resources, and in particular the Minister of Mineral Resources, has the obligation as the regulator to monitor compliance and to levy punishments where there is no compliance which may include suspension of mining rights accordance with the set out procedure¹⁸. The failure to hold companies accountable for their non-compliance with their legally binding SLP commitments represents a failure by the Department of Mineral Resources to protect the rights of the communities involved, some of which are contained in ICESCR.
- 3.8. It should be underscored that the South African Constitution confers powers and responsibilities on government, and local government in

¹⁴ Centre for Applied Legal Studies, The Social and Labour Plans Series Phase 1: System Design. Trends and Analysis, March 2016 at page 73 <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/environment/resources/Social%20and%20Labour%20Plans%20First%20Report%20Trends%20and%20Analysis%2030%20March%202016.pdf>

¹⁵ S9(2)(a) of the Housing Act

¹⁶ <https://mg.co.za/article/2017-12-08-00-ramaphosa-money-or-the-workers-1>

¹⁷ Regulation 45

¹⁸ S47 of the MPRDA



particular, for the fulfilment of local economic development and service delivery.¹⁹ Moreover the Constitution contains socio-economic rights including to access to housing; healthcare, food water and social security.²⁰ The SLP system should therefore be viewed as conferring public law obligations on mining companies which impact the fulfilment of fundamental Constitutional rights. Therefore government in discharging its obligation to protect, promote and advance the rights in the Constitution is required to use its powers of compliance monitoring and enforcement to ensure mining companies meet their SLP obligations.

4. RECOMMENDATIONS

- 4.1. Measures to protect women where they are working in mines as discussed above.

- 4.2. There should be more stringent compliance mechanisms where the mining industry is concerned. This is an industry that inherits public law obligations to direct fulfil the rights in ICESCR and the failure to monitor their compliance with those obligations is to not to fulfil the states obligations.

¹⁹ References the constitutional provisions.

²⁰ Sections 26 and 27 of the Constitution, respectively.

