



Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo





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FOREWORD

The relationship between South Africa, South African communities, and mining is admittedly a complex relationship which has evolved over a substantial period of time. Where the existing vulnerabilities of communities have not been adequately addressed, adding business, and extractive industries in this instance, to the landscape may in fact exacerbate these vulnerabilities and bring inequalities starkly into focus. Consequently, a number of issues raised by affected communities or observed by the South African Human Rights Commission (“SAHRC”) during this investigation are symptomatic of systemic inequalities in addition to possible institutional problems in the relocation processes undertaken.

By placing this report in context, the SAHRC acknowledges the specifically situated and lived experiences of communities in communal land tenure and aspires to confirm their human dignity as one of the core values entrenched in the Bill of Rights. The SAHRC further aims to fulfil its mandate through contributing this constructive analysis of the way flaws in processes may result in potential human rights violations. The SAHRC makes general and specific recommendations in acknowledgement of the complexity of the specific factual context, the technical processes involved as well as the myriad of stakeholder relationships and interests.

These are not simple tasks, nor are the analyses and recommendations made in this report simplistic. The SAHRC has emphasised elsewhere, and wishes to reiterate, that the impact of the activities of business upon communities changes and develops much like peoples’ lives evolve. The impact of business can therefore not always be determined at one point in time like a snapshot, but is often more accurately reflected over a period of time. It is consequently imperative that business continue to monitor the impact of its activities, whether positive or negative. This is a recommendation which aims to counter minimalistic legal compliance by business, promote the contextualisation of the activities of business, and the recognition of the impact of actions beyond a fixed point in time.

I would like to thank all stakeholders and specifically the affected communities for their active engagement with the SAHRC during the course of this investigation. In applying a rights-based approach the SAHRC emphasises active and meaningful participation in processes as a means of empowerment and an essential element of a participatory democracy. The SAHRC acknowledges the collaborative efforts of staff at national and provincial offices, including Sello Hatang, Christine Jesseman, Jo Mdhlela, Jeffrey Nkuna, Mankese Thema, Elelwani Muthivhi and Kleinbooi Matsetela.

Let us continue to work towards making our Constitution an everyday reality, and every action an expression of its values and a confirmation of our own commitment as reflected in the human dignity of others.



Jody Kollapen
Chairperson, South African Human Rights Commission



EXECUTIVE SUMMARY



The investigation initiated by the South African Human Rights Commission (“SAHRC”) at the end of March 2008 was intended to focus on the **broad human rights context** surrounding the resettlement process undertaken by Anglo Platinum’s Potgietersrust Platinums Limited (“PPL”) Mine near Mokopane, Limpopo. The basis for further investigation was informed in part by the ActionAid report entitled *Precious metals; The impact of Anglo Platinum on poor communities in Limpopo, South Africa* which was launched at Human Rights House in March 2008.

In its search for clarity the SAHRC engaged with a broad range of stakeholders to better understand the key relationships and interplay between PPL and the affected communities surrounding this mine in Limpopo. The **role of the SAHRC** in this context has been to conduct its own investigations, formulate observations, and from this assert progressive recommendations to overcome what has been seen as an impasse between certain communities and PPL in undertaking its resettlement programme.

There is a view among some stakeholders that the majority of community members identified for relocation have successfully relocated and this must be acknowledged in the context of the following analysis. However, it is necessary to emphasise that physical relocation in itself is not a barometer for determining the success of the relocation of a community, but merely one factor. Consequently, one of the SAHRC’s primary objectives in this investigation has been to **identify and reduce vulnerability**. From this preliminary analysis key vulnerabilities exist both within communities resisting relocation, but in many ways more acutely within communities not included as part of the relocation process but affected by the operation of the PPL and located within the surrounding area.

The overriding challenge that the SAHRC has recognised during this investigation is the almost total **disintegration of trust in the relocation process**. This is a product of a dislocation between many community members and the multi stakeholder institutions undertaking the relocation including the Section 21 (“s21”) companies, the Mapela Tribal Authority (“MTA”), the Mogalakwena Municipality (“the Municipality”) and PPL as a result of a perceived lack of agency among affected communities to either challenge the resettlement, provide input on its planning, affect its progress or lodge complaints against its process. This dislocation has created a perception in some elements of the community that organisations set up to consult and seek consent, and to deliver community concerns to the relocation sponsors are not working on behalf of the community, but on behalf of PPL, the relocation project sponsors. This dislocation is evident not just through community testimonial, but through visible and structural divisions which have developed within the communities, but most clearly through members of the communities refusing to relocate.

Whether or not this perception is based on fact becomes almost irrelevant. In the eyes of those resisting relocation and others within affected communities it has become the reality upon which decisions are made, and action is taken. Such perceptions will not be altered and lost trust will not be regained by producing documentation of past processes, or through refuting claims upon which this perception is based. The fundamental observation made by the SAHRC is the need for companies to move **beyond legal compliance** and push for the development of processes and institutional structures which actually identify and manage the multitude of risks associated with resettlement. The current impasse can only be breached and trust regained through meaningful,




open and multi stakeholder engagement. The SAHRC makes both general and specific multi stakeholder recommendations in this regard. These recommendations go beyond engagement and towards active participation by communities.

Resettlement projects necessitate the collaboration of a wide range of stakeholders to both manage the process, and to undertake technically specific tasks such as construction and town planning. While the technical capabilities of some contractors to undertake their specific task has been overtly demonstrated through the documentation, particularly those project managers, architects and environmental experts, the **technical capabilities** and capacity of other stakeholders to undertake their specific tasks has been far less obvious, in particular the capacity of s21 companies to undertake community consultation and the Mogalakwena Municipality to provide the services agreed to in the Service Level Agreements to the relocated communities.

These **stakeholders were designed into the relocation process** at the point at which the process was being planned. However, assessment does not appear to have been undertaken at this point to gauge the capacity of these stakeholders to fulfil their key functions. As a result **capacity shortfalls were not identified** until the process was underway and the dislocation identified above had already begun. Such capacity shortfalls amongst these stakeholders to fulfil various functions in the relocation therefore had and still has the potential to undermine the process and inhibit PPL from achieving the key principle of relocation - that having made attempts to avoid or minimise relocation, relocated communities should be left with the same if not with an improved quality of life and livelihood.

Project sponsors must invariably delegate out key processes of the relocation processes to contractors and community institutions. However, it seems that during the relocation process, PPL also successfully **delegated responsibility** for various processes as well. Although PPL retained the role of project management and thereby remained engaged with the relocation process, various relationships were developed by which legal responsibility for many issues relating to the community consent and consultation were delegated out through the creation of s21 companies. By delegating legal responsibility for these processes PPL also effectively delegated accountability as project managers for the success of aspects of a relocation process necessitated by their own mining activities.

The disintegration of trust amongst affected communities was initiated and exacerbated through a perception that grievances raised within the community were not being addressed. Without **an effective grievance mechanism** perceptions are created that community concerns are of little value thus effectively dislocating communities being resettled from the resettlement process. The community has a variety of mediums through which it is able to air grievances, including submissions to the Mapela Tribal Authority, through the s21 companies, and to PPL itself, although anecdotally on an *ad hoc* basis. As the project sponsors and therefore as the stakeholder with greatest responsibility, PPL should have ensured that it established a grievance mechanism which created a direct link between affected individuals and the project sponsor to ensure that interests were protected. After engagement with PPL the SAHRC is still unclear as to the existence of such an instrument. In the absence of information on the institutional source, the SAHRC was compelled to make an assessment based on its own observations. Community protests, episodes of direct action, the appointment of external legal representation, and ensuing legal action, submissions to local and national media and close liaison with civil society organisations has been described



as community “forum shopping”. However, it is perhaps the clearest indication that either the affected community were unable to access grievance redress through PPL or that there was no grievance mechanism instituted in the first place.


The perceived removal of agency amongst affected communities to determine the progress of their own resettlement appears to have translated into a mistrust of all stakeholders engaged with PPL on the relocation including the Mapela Tribal Authority. The SAHRC recognises the importance of **traditional leadership structures** and is therefore concerned about the divisions created by the relocation process between some affected communities and certain of their traditional leaders. The relocation has forced into the open a fragile interplay between traditional leadership structures, traditional customs of land allocation and individual rights, in particular land rights. The SAHRC is concerned that the fragile balance by which communities have existed in communion under the authority of the traditional authority has been damaged through the relocation process.

Various **civil society organisations** are currently working to mitigate the risks posed to affected communities by the relocation. The SAHRC is concerned about the lack of acknowledgement that Anglo Platinum has granted this important work and the lack of emphasis placed upon the importance of the active involvement of civil society in working together to empower communities. A related concern is the tangible tensions which exist between civil society organisations seen to be acting on behalf of communities resisting relocation or aspects thereof and Anglo Platinum.

The scope of this investigation extends beyond those communities included in the relocation process. **Broadening the scope** to enable a characterisation of the whole human rights context within the area of the PPL mine, surrounding communities not being relocated but nevertheless affected by the PPL mine activity have also been included. It has been observed that these communities also face dislocation from the multi stakeholder relationships being developed between PPL and the Mapela Tribal Authority, the Mogalakwena Municipality and the s21 companies. In many ways, standing outside the scope of the resettlement many of these communities are even more dislocated than those being subjected to the relocation process. The SAHRC acknowledges that PPL have undertaken a series of environmental impact assessments to gauge and mitigate the potential risks posed to local communities as a result of operational activity. However, the SAHRC is concerned that the negative impacts of the mine are not being adequately addressed in these communities. Subject to the same lack of grievance redress there is a greater risk that these communities could be hit hardest by the possible negative impacts of mining activities.

It is not within the **SAHRC’s capacity or mandate** to conduct an in depth technical audit of Anglo Platinum’s activities in general or relocation projects in particular. However, one of the primary constructive roles of the SAHRC can be to communicate and create a bridge between the lived experiences of individuals and communities, the vocabulary of human rights and accountability, while avoiding possible interpretations of minimalistic compliance by juristic persons such as Anglo Platinum.

Issues of **technical and minimalistic compliance** may be raised by various stakeholders, but the facts remain: there is significant tension amongst affected communities; there is significant tension between Anglo Platinum and elements of affected communities; there is significant tension between various civil society organisations and Anglo Platinum; there is significant tension



between elements of affected communities and certain traditional leadership structures, s21 companies, municipalities and the police. Most importantly, there are apparent vulnerabilities amongst affected communities which need to be addressed.

THE REPORT

Through its investigations the SAHRC has concentrated on initially identifying issues of **immediate harm** facing the affected communities. It has furthermore undertaken an analysis of the multi **stakeholder relationships** developed to undertake the relocation. Issues which have the potential to manifest into human rights violations have been used as indicators or symptoms to highlight potentially systemic institutional problems in the relocation process and as such can be linked as the source of alleged existing or potential human rights violations. It is the opinion of the SAHRC that these **institutional flaws** are symptomatic of a **compliance based rather than a risk mitigation** approach to the resettlement process sponsored by PPL, with specific reference to mitigation of the risk of **exacerbation of existing vulnerabilities** of affected communities and potential human rights violations.

Using this structure, the SAHRC hopes that this report will comprise a constructive analysis of the way flaws within institutional processes can manifest into potential human rights violations and thereby offer a meaningful insight into how such potential violations may be prevented in the future.

This report details and analyses each issue in turn as follows:

- » specific **observations** for each issue;
- » **explanations** for each issue;
- » the **regulatory framework** applicable to the specific issue ranging from the **human rights context, to domestic legislation and international best practice**;
- » the actions that have been taken to address the issue, or which are pending are outlined; and
- » for each issue the SAHRC has asserted multi stakeholder based **recommendations**.

SUMMARY OF RECOMMENDATIONS

Both general and specific recommendations are made by the SAHRC in the report. Firstly, the general recommendations are summarised below. Secondly, the specific recommendations are numerous, detailed and specific to sources, symptoms, communities and stakeholders. Although a summary of these specific recommendations is provided below out of necessity, it is advisable to read the SAHRC's detailed specific recommendations within their factual context in the report itself.

It is further imperative that the SAHRC's **specific observations** or concerns which are provided at the beginning of each section in the report be read, as these naturally inform the recommendations made.



GENERAL RECOMMENDATIONS

1. Assist communities in understanding their rights and how to access them

A lack of grievance redress is a major theme emerging from the findings in this report. Institutional mechanisms that communities can access within the company are dealt with in the body of the report.

However, it is also crucial that individuals and individual communities are able to gain a better understanding of their human rights and how they are able to access them. One of the resounding findings of this report is that communities did not voice their concerns early enough in the process. To this end it is important to bear in mind the SAHRC's mandate to address individual complaints from affected people who believe that their human rights have been violated.

The SAHRC recommends that it would be of great benefit to affected communities if a **general education programme is conducted in all affected communities** in South Africa who have been subjected to relocation, but ideally amongst communities prior to any resettlement consultations. This education programme would have several objectives, including: human rights awareness; knowledge of all rights and obligations arising from any proposed or existing resettlement processes; knowledge of all processes including grievance redress mechanisms. It is suggested that **experienced specialist consultants** can be contracted to develop this programme, and that they take into account work undertaken by, and the experience of, existing role players such as the International Finance Corporation ("IFC") and the World Bank. This should further be undertaken in conjunction with the SAHRC. This initiative could be **funded by voluntary contributions from extractive industry companies** operating in South Africa who have, will, or may undertake such community relocations in pursuit of mineral wealth. The implementation of this education programme should be established as the norm. This programme should also be revisited and revised annually.

2. Assist companies in moving beyond a compliance based approach to resettlement

As is demonstrated in the report, an imperative has been created for companies to move beyond legalistic compliance when undertaking resettlement due to the risk of human rights violations and the exacerbation of existing vulnerabilities. Countless examples internationally have indicated that compliance with current domestic legislation is insufficient in mitigating the potential risks associated with resettlement. Companies need to move beyond compliance based approaches, particularly in the following areas:

- » Consultation;
- » Achievement of free, prior and informed consent; and
- » Grievance redress processes.

The SAHRC recommends that a general human rights audit becomes a recommended standard practice for all extractive industry and other companies undertaking the resettlement of affected



communities. Companies need to move beyond compliance based planning and activities in order to limit the exacerbation of existing vulnerabilities and potential human rights violations.

3. Assist companies in understanding the human rights implications of their behaviour and operation within their sphere of impact

This report has tried to demonstrate how social and environmental issues surrounding the operation of a mine may lead to human rights violations. Although not conferring broad obligations on the part of the company to promote, protect and respect the human rights of all individuals within its area of operations, the allegations directed at Anglo Platinum should demonstrate the reputational and financial risks of not engaging with potential human rights impacts. In many cases, mitigating human rights risk necessitates an additional layer of analysis as part of any normal risk assessment and mitigation process. However, the important issue is that in future Anglo Platinum should be able to use human rights rhetoric and additional contextual analysis to better understand how social impact issues can evolve into potential human rights violations.

In considering the human rights implications of the activities of a company, it is also necessary to cast the net wider and consider the cumulative impact of the actions of several companies upon one affected community. The SAHRC recommends that as a standard practice a general forum be established of which all mining companies in the relevant area, whether operating under mining right or prospecting, be members. Additional members should include a representative of the relevant municipality and the Premier’s Office, the Department of Minerals and Energy, the Department of Land Affairs, the Department of Environmental Affairs and Tourism, the Tribal Authority as well as members of affected communities as proposed in the report, as an addition to the Resettlement Committee.

Business engagement with human rights is an evolving field. The SAHRC has referred in the report to the role that Anglo Platinum’s parent company Anglo American is playing in this discourse.

This report, however, demonstrates that one of the most crucial issues at play is the need for not single but multi stakeholder engagement to address alleged and potential future human rights violations at the hands of corporate actors. The United Nations Special Representative to the Secretary General, John Ruggie, iterates this in the model that he created to broker a way across the impasse maintaining that:

“there is no single silver bullet solution to the institutional misalignment in the business and human rights domain. Instead all social actors – States, businesses, and civil society – must learn to do things differently. But those things must cohere and become cumulative...”¹.

The SAHRC therefore recommends that PPL make efforts to engage in broader multi- stakeholder engagement, particularly with civil society organisations which they may misguidedly place themselves in opposition to, to manage their potential human rights impacts.



¹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights* (7 April 2008, A/HRC/8/5).



SPECIFIC RECOMMENDATIONS

A. The symptoms

Urgent and short term matters:

1. Water



- » A bilateral engagement is developed between PPL and the Mogalakwena Municipality to ensure the continued access to water for all communities, both those that have relocated and those that are resisting relocation. Access to water must not depend on the community decision to relocate.
- » PPL engage with the Mogalakwena Municipality to better understand their ability to undertake the services provided for under the relevant Service Level Agreements.
- » The water deliveries be made regularly and reliably and be made known to communities so that their own individual water usage can be planned and self regulated. This is not only necessary but also empowering.
- » The recommended actions for the way forward referred to in the IGS Report be discussed with all stakeholders, most importantly with affected communities, and that Anglo Platinum, the Municipality and the affected communities discuss and agree as to whether and how such measures can be implemented.
- » The outstanding matters in the IGS Report be clarified and the complete investigation of all the water resources be undertaken as proposed in order to seek a more holistic solution within the area.

2. Sanitation

- » PPL continues to make the process as participatory as possible and keeps affected members of the community updated on all stages of the development process.
- » Affected community members continue to report sanitation problems to PPL and take steps to learn how to use sanitation systems to ensure that they function effectively.
- » The Mogalakwena Municipality be engaged by PPL where the choice of sanitary system impacts upon the services which are required to be delivered by the Municipality and in order to determine the compatibility of the chosen system with municipal systems as well as the capacity of the Municipality to carry out the services requested.

3. Environment (including mine blasting)

- » PPL demonstrate its ability to constantly monitor the impacts of mining activities on surrounding communities and illustrate how this monitoring is used in conjunction with the grievance redress mechanism to ensure that any potentially negative impacts of the mine both from PPL's and the community's perspective are addressed promptly.
- » PPL implement a process by which all community members are moved from the area during blasting to not only appease the potentially real risk posed to individuals from the blasting itself, but to address the perception of that risk felt in many communities in the area. Moving the community members at Ga-Chaba during the blasting would also ensure that those



community members no longer feel isolated from the protection, which PPL are demonstrably awarding members of surrounding communities.

- » PPL adhere to the Anglo Platinum commitment “to prevent or minimise adverse impacts arising from the Group’s operations.”²
- » PPL inform the communities as to their long term plans for mining in the area. It is an apparent commercial reality that mining is undertaken in phases which are determined at various points in time. However, the very real and disruptive impact of this phasing of activities on communities and the accompanying uncertainty with which these communities live must also be realised and addressed.

4. Electricity

- » Stakeholders need to obtain a clear understanding of the needs of communities in terms of electricity. Both PPL and Mogalakwena Municipality should engage in bilateral discussions to ensure that the needs of the most vulnerable are being met.

5. Grave removals


- » In addition to the list of all graves relocated from the Sekuruwe area already provided to the SAHRC, that the accompanying consent forms signed by the next-of-kin or mandated representatives of those next-of-kin also be provided.
- » The community members of Sekuruwe present to PPL and SAHRA a list of graves which it believes to have been moved without consent.
- » PPL engage with civil society organisations defending the interests of the community over this issue.
- » PPL audit the practices of its appointed undertaker.
- » PPL consult sufficiently with the broader Sekuruwe community to more accurately determine the ages of the graves.
- » Further information be provided by PPL concerning the precise nature of consultation between PPL and the affected communities relating to the removal of graves.
- » It be determined what processes are undertaken by Anglo Platinum or their subcontractors to ascertain the heritage status of graves.
- » It be determined whether communities were informed by Anglo Platinum or their subcontractors of any right to refuse consent to grave removal.
- » Grave sites be accurately mapped and removed graves accurately identified.
- » PPL continue to cooperate fully with SAHRA in any future enquires in this regard and communicate this openly to the community.
- » PPL engage with the community at Ga-Chaba to better explain by what processes graves were relocated.

6. Agricultural land and food security

- » The issue of access to agricultural land be recognised within the context of subsistence farming and food security as well as being part of the culture of the affected communities.



² Anglo Platinum, “Environmental Impacts”, <http://www.angloplatinum.com/> [accessed 29 July 2008].

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- » At the time of consultation with affected communities, that it be more clearly and properly explained that there will or may be the possibility of a time delay between PPL's appropriation of agricultural land for mining purposes and the provision to communities of replacement agricultural land. This includes not only the provision of compensation, but the determination of the impact on food security of the affected communities given the traditional and partial reliance on subsistence farming and limited access to commercial food sources.
 - » Taking into account the traditional and partial reliance on subsistence farming and the nature of traditional communal living, that Anglo Platinum more broadly consider adherence to IFC Performance Standard 5 which requires the compensation of economically displaced persons who do not have legally recognisable claims to land.
 - » Matters related to agricultural land should be included in a land rights clarification to be undertaken with the affected communities prior to any relocation process.

7. Compensation

- » PPL further engage with affected communities to clarify and outline the non-financial benefits of relocation.
- » The SAHRC's recommendations above regarding agriculture and food security are of equal application to the specific question of compensation.
- » See further the SAHRC's general recommendations concerning community consultation.

8. Transportation of children to school

- » PPL meet with the Municipality to determine what transportation will be provided for all children of all ages in households yet to relocate and those resistant to relocation. This is not simply a municipal responsibility and Anglo Platinum must take responsibility for the long term consequences of relocation, including the effects upon communities refusing to relocate. The Municipality may not be in a position financially, or as regards capacity, to provide for such transportation. The relocation would then have the effect of inhibiting those children's access to education if municipal resources are diverted to the new villages. Anglo Platinum should not divorce itself from these consequences or from the responsibility of determining and implementing sustainable solutions.
- » Ultimately, there should be a realisation that there is a danger that the vulnerable are being negatively impacted upon by the relocation negotiation process. Removing transport links for children will negatively impact key stakeholder groups that in fact have no real agency in the relocation decision making process. This therefore has the potential to exacerbate vulnerabilities both in the short and long term.

9. Concrete batch plant

- » PPL provide information to all key stakeholders indicating that remediation of the land is complete and its future intended use.
- » Such plants in future be dismantled and removed directly after their being decommissioned, including the removal of cement dust and aggregate stockpiles, and that there should be a rehabilitation of the land.



Medium to long term issues:

- » The recommendations made by the SAHRC in this report concerning the obtaining of free prior informed consent of affected communities apply equally to State undertakings. This recommendation remains despite the legislative standard being one of “consultation” by the mining company, and is again an attempt to move beyond compliance.
- » The Department of Minerals and Energy (“DME”) should clearly state what its criteria are for meeting the required standard of “consultation” by the applicant mining company with the affected community. This will further empower the affected community to assert their rights during the process as opposed to objecting to a process after the fact.
- » The Department of Land affairs (“DLA”) should engage affected communities on the nature of land rights at the outset of any resettlement negotiation process so as to avoid confusion and uncertainties. This lands rights clarification will provide certainty for communities concerning their informal rights to land.
- » The SAHRC engage further with the DME, DLA and the Department of Environmental Affairs and Tourism.

Relationships:

1. Delegation of decision making, consultation and process management to s21 companies


- » Reference is made to the observations in the report and the recommendations concerning consultation in paragraph B.4 below.

2. The role and responsibilities of the Mogalakwena Municipality

- » The s21 companies, PPL and Mogalakwena Municipality revisit the Service Level Agreements (“SLAs”) signed in 2004 and assess whether the Mogalakwena Municipality has the capacity to undertake the level of service provision outlined in the agreements.
- » PPL continue to share responsibility for service provision until these agreements have been revisited and continue to share this responsibility if it transpires that the Mogalakwena Municipality is unable to fulfil these agreements.
- » The Municipality be included as a stakeholder in all relevant engagements from the outset of any discussions concerning resettlement. The Municipality should therefore be recognised as a critical stakeholder with whom ongoing engagement is essential.
- » The ability of the Municipality to deliver upon the SLAs should be periodically reviewed through ongoing and open engagement between the Municipality and PPL.

3. Sensitive community relationships: the Mapela Tribal Authority

- » The MTA submit its response to allegations presented in the ActionAid report within an agreed time frame.
- » The MTA call an extraordinary meeting of traditional leadership structures to discuss and clarify all aspects relevant to the resettlement processes.
- » There be a recognition of the possibility of tension between individual and community interest and that a clear and transparent grievance procedure be put in place to deal with this.

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- » One of the items on the agenda be the transparent interaction between the MTA, PPL and the s21 companies, and how to put this into practice to the satisfaction of affected communities.
 - » The Mogalakwena Municipality be kept informed of relevant developments and interactions.
 - » There be explicit recognition of all Indunas, including those who are opposed to the relocation, aspects thereof or specific processes. In other words, there should be room for disagreement and the necessary mechanisms in place to deal with dissent and resolve disputes.

4. Sensitive community relationships: the South African Police Service

- » The SAPS proactively engage with affected communities to develop their trust relationship.
- » The SAPS investigate all complaints of misconduct by members of the SAPS and provide its findings to the SAHRC.
- » PPL initiate community dialogues with the SAPS.
- » The SAHRC's Polokwane office in Limpopo initiates a programme of education to better enable individuals to seek redress for alleged dissatisfaction with SAPS services and alleged police abuse, to empower community members and avoid community members taking the law into their own hands.

B. The sources: institutional processes

1. Process documentation (including reporting)

- » The progression from a compliance based approach to resettlement to embracing a proactive risk mitigation approach through pre-emptive planning and documentation in line with the latest World Bank and IFC guidelines and standards. This incorporates a substantive, comprehensive stand alone Resettlement Action Plan ("RAP"). This further requires that planning and consultation with communities take place in order not to undermine community perceptions as to their own agency in the process. Communities should ultimately be empowered to actively participate in processes that affect them, have certainty as to possible outcomes, processes and grievance redress mechanisms.

2. Monitoring

- » PPL provides the SAHRC with all documentary evidence in relation to the monitoring process.
- » PPL adheres to international best practice as in the report in monitoring the progress of the relocation process.
- » PPL link monitoring and grievance redress mechanisms to create a better understanding of how the relocation process is progressing and better allow PPL to make timely interventions to address issues emerging throughout the relocation process.

3. Grievance redress

- » A grievance redress process is a fundamental vehicle for individual community members to voice concerns over the relocation and thereby endowing them with agency within the process. Through an understanding of traditional and customary practice, and in the knowledge that community members have sought grievance redress elsewhere, the SAHRC recommends that PPL provide clarity for the community on the mechanism created for community members to access grievance redress.



- » A grievance mechanism is a key mechanism by which project sponsors are able to monitor the progress of the relocation process. The SAHRC therefore recommends that grievance mechanisms are meaningfully employed to ensure PPL is aware of developing issues which have the potential to disrupt the relocation process and thereby significantly impact upon the human rights of affected communities.
- » As project sponsors, the SAHRC recommends that PPL needs to recognise its unique position in the web of relationships between stakeholders to address specific concerns on the relocation process. It therefore should seek to clarify its responsibility for grievance redress as distinct from that of other institutions such as the MTA and the Mogalakwena Municipality.
- » The SAHRC recommends formal and transparent lines of communication are installed between the MTA and Mogalakwena Municipality and PPL to ensure that all relocation and mining related community grievances are delivered to the project sponsor.
- » In developing and evaluating non-judicial grievance mechanisms the SAHRC recommends regard be had to the concept of “rights compatibility” of grievance mechanisms in process and substance. Developing such a set of principles and guiding points was the focus of a project of the Kennedy School of Government’s Corporate Social Responsibility Initiative, Harvard University.³ The core principles of rights compatibility in process “require that processes affecting the lives, well-being and dignity of individuals and groups should be based on inclusion, participation, empowerment, transparency and attention to vulnerable people. They also demand that any grievance process be fundamentally fair.”⁴ Furthermore, the grievance mechanism must be rights compatible in substance. This requires that “complaints are addressed in a manner that reflects and respects human rights, including, crucially, the right to an effective remedy”.⁵

4. Consultation

- » A representative community consultation committee should have been formulated at the start of the process which allowed for representation from all major stakeholders. This type of representation was only developed late in the process during the latter half of 2007 when community protest against the relocation process and developing conflict between the MDC and the s21 companies prompted the creation of the Task Team.

This view has been validated by the s21 companies and the MDC.

The Task Team has since disbanded and the SAHRC recommends that all stakeholders engage in developing a new relocation committee, which includes representation from all affected stakeholders to ensure meaningful and thorough representation in the process.

- » The SAHRC recommends reference to international guidance through the following IFC publications:⁶




³ Corporate Social Responsibility Initiative, Kennedy School of Government, Harvard University, *Rights Compatible Mechanisms: A Guidance Tool for Companies and their Stakeholders* (January 2008).

⁴ *Ibid*, p7.

⁵ *Idem*, p8.

⁶ Available at http://www.ifc.org/ifcext/sustainability.nsf/Content/Publications_GoodPractice_StakeholderEngagement [accessed on 29 July 2008].



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- "Stakeholder engagement: A good practice guidance for companies doing business in emerging markets"; and
 - "Doing better business through effective public consultation: A good practice manual".

5. Achievement of consent (beyond a fixed point in time)

- » The SAHRC recommends that community members vocalise dissent earlier in the process to ensure that complaints are heard in time for effective action to be taken.
- » The SAHRC recommends that PPL acknowledges the flaws identified in the achievement of the consent process and engages with all stakeholders including resistant community members in working through any stalemate.
- » The SAHRC recommends that Anglo Platinum move beyond a compliance based approach in undertaking community consultation and achieving community consent and in future seek to achieve free, prior and informed consent as a key risk mitigation strategy.



Abbreviations

CLOs	Community Liaison Officers
Constitution	Constitution of the Republic of South Africa Act, 108 of 1996
DEAT	Department of Environmental Affairs and Tourism
DLA	Department of Land Affairs
DME	Department of Minerals and Energy
DWAf	Department of Water Affairs
EIA	Environmental Impact Assessment
EMP	Environmental Management Plan
EMPR	Environmental Management Programme Report
IFC	International Finance Corporation
IGS	Summary Report: A groundwater review at Anglo Platinum's RPM-Mogalkwena Section to determine if the mining activities are the cause of the elevated nitrates in the Ga-Molekana and Old Ga-Pila communities
KHL Attorneys	Knowles Husain Lindsay Inc Attorneys
MDC	Motlhotlo Development Committee
MPRDA	Mineral and Petroleum Resources Development Act, 28 of 2002
MRRC	Motlhotlo Relocation Resistance Committee
MTA	Mapela Tribal Authority
Municipality	Mogalakwena Municipality
PAP	Project Affected Person
PPL	Potgietersrust Platinums Limited
PPRust	Potgietersrust Platinums Rustenburg
PS	Performance Standard
RAP	Resettlement Action Plan
RDP	Reconstruction and Development Programme
SAHRA	South African Heritage Resources Agency
SAHRC	South African Human Rights Commission
s21 company	Section 21 Company
SLAs	Service Level Agreements
TLB	tractor-loader-backhoe
WBG	World Bank Group
World Bank BP	World Bank Procedure
World Bank OP	World Bank Operating Procedure



Important Notes

Where photographs were taken of individuals, permission was sought prior to taking the photographs.

The specific documentary sources cited vary and include public documents; documents provided freely and openly to the SAHRC; documents cited for confirmatory purposes; and specific factual quotations or excerpts from communications to the SAHRC. The SAHRC was provided with and in certain instances had sight of records to which formal legal protections governing disclosure exist. These protections have been respected in the compilation of this report. No privileged or confidential content has been divulged. Legal protections which apply to specific records therefore continue to apply to them specifically. Such records cannot be accessed from the SAHRC.

This investigation is ongoing. Therefore it should be noted that if information was submitted to the SAHRC or otherwise made available to the SAHRC after the date of submission of the final draft of this report for printing, such information will not be reflected in the report.

The SAHRC specifically requests that submissions made in response to this investigation are guided not by defending specific actions or positions but by the spirit in which this investigation was undertaken, to address vulnerability, to protect and promote the human rights of affected communities and move towards breaching the current impasse within the relocation process.

1. HUMAN RIGHTS IN CONTEXT	1
1.1 Mandate of the SAHRC: protect, respect and promote human rights	2
1.2 The investigation.....	2
2. INTRODUCTION AND BACKGROUND.....	5
2.1 Initiation of the investigation	6
2.1.1 Background information on the mining industry in Limpopo.....	6
2.1.2 ActionAid report launch and BBC coverage.....	7
2.1.3 Anglo Platinum response	7
2.2 Process of the investigation.....	7
2.2.1 Engagement of stakeholders	8
2.2.2 Sources of information	8
2.2.3 Overview of site visits	10
3. FACTUAL REPORT OF ENGAGEMENT AND SITE VISITS	11
3.1 Site Visit 1: 3 – 4 April 2008 – Initial fact finding	12
3.2 Site Visit 2: 10 – 11 July 2008 – Follow up visit	12
4. KEY INFORMATION POINTS FOR CLARIFICATION	14
4.1 Anglo Platinum Ltd	15
4.2 Anglo American Plc.....	16
4.3 Affected communities.....	16
4.3.1 Motlhotlo	16
4.4 Other affected communities	17
4.4.1 Ga-Chaba	17
4.4.2 Old Ga-Pila.....	18
4.4.3 Sekuruwe.....	18
4.4.4 Ga-Molekane.....	19
4.5 Initial consultation	19
4.6 Key stakeholders	20
4.6.1 Section 21 Companies (“s21 companies”)	20
4.6.2 Motlhotlo Development Committee (“MDC”).....	21
4.6.3 Motlhotlo Relocation Resistance Committee (“MRRC”)	22
4.6.4 Mogalakwena Municipality.....	22
4.6.5 Mapela Tribal Authority.....	23
4.6.6 Community liaison officers (“CLOs”)	23
4.6.7 Operational team (“The Ops Team”)	23
4.6.8 The Task Team.....	24
4.6.9 Project management and professional consultants.....	26
4.7 Matters sub judice.....	26
4.8 Issue analysis.....	27
5. THE SYMPTOMS.....	28
5.1 Urgent and short term matters	29
5.1.1 Water	29

5.1.1.1 Observations.....	29
5.1.1.2 Explanations.....	29
5.1.1.2.1 Motlhotlo.....	29
5.1.1.2.2 New Motlhotlo village (Armoede and Rooibokfontein)	31
5.1.1.2.3 Old Ga-Pila.....	31
5.1.1.2.4 Ga-Molekane	31
5.1.1.3 Regulatory framework	32
5.1.1.4 Steps already taken to address the issue.....	34
5.1.1.5 Recommendations	35
5.1.1.5.1 Motlhotlo.....	35
5.1.1.5.2 Ga-Molekane	35
5.1.1.5.3 General	35
5.1.2 Sanitation	36
5.1.2.1 Observations.....	36
5.1.2.1.1 New Motlhotlo village (Rooibokfontein and Armoede)	36
5.1.2.2 Explanation	36
5.1.2.3 Regulatory framework	36
5.1.2.4 Steps already taken to address the issue.....	37
5.1.2.5 Recommendations	38
5.1.3 Environment (including mine blasting)	38
5.1.3.1 Observations.....	38
5.1.3.2 Explanation	38
5.1.3.2.1 Ga-Chaba	38
5.1.3.2.2 Motlhotlo.....	39
5.1.3.3 Regulatory framework	39
5.1.3.4 Steps already taken.....	40
5.1.3.5 Recommendations	41
5.1.4 Electricity	42
5.1.4.1 Observations.....	42
5.1.4.2 Explanation	42
5.1.4.2.1 Old Ga-Pila.....	42
5.1.4.3 Regulatory framework	42
5.1.4.4 Steps taken so far.....	43
5.1.4.5 Recommendations	43
5.1.5 Grave removals.....	43
5.1.5.1 Observations.....	43
5.1.5.2 Explanation	43
5.1.5.2.1 Motlhotlo.....	43
5.1.5.2.2 Ga-Chaba	44
5.1.5.2.3 Sekuruwe	44
5.1.5.3 Regulatory framework	45
5.1.5.4 Steps already taken to address the issue.....	45
5.1.5.5 Recommendations	46
5.1.5.5.1 Sekuruwe	46
5.1.5.5.2 Ga-Chaba and Motlhotlo	46

5.1.6	Agricultural land and food security.....	47
5.1.6.1	Observations.....	47
5.1.6.2	Explanation	47
5.1.6.2.1	Motlhotlo.....	47
5.1.6.2.2	Ga-Chaba	49
5.1.6.2.3	Old Ga-Pila.....	50
5.1.6.2.4	Sekuruwe	50
5.1.6.3	Regulatory framework	50
5.1.6.4	Steps already taken to address the issue.....	52
5.1.6.5	Recommendations	52
5.1.7	Compensation	52
5.1.7.1	Observations.....	52
5.1.7.2	Explanation	53
5.1.7.3	Regulatory framework	54
5.1.7.4	Steps already taken to address the issue.....	55
5.1.7.5	Recommendations	55
5.1.8	Transportation of children to school.....	55
5.1.8.1	Observations.....	55
5.1.8.2	Explanation	56
5.1.8.3	Regulatory framework	56
5.1.8.4	Steps already taken to address the issue.....	56
5.1.8.5	Recommendations	57
5.1.9	Concrete batch plant	57
5.1.9.1	Observations.....	57
5.1.9.2	Explanation	57
5.1.9.3	Regulatory framework	58
5.1.9.4	Steps already taken to address the issue.....	58
5.1.9.5	Recommendations	58
5.2	Medium to long term issues	59
5.2.1	National government departments.....	59
5.2.1.1	Observations.....	59
5.2.1.2	Explanation	59
5.2.1.3	Regulatory framework	59
5.2.1.4	Steps already taken to address the issue.....	60
5.2.1.5	Recommendations	60
5.3	Relationships	60
5.3.1	Delegation of decision making, consultation and process management to s21 companies	61
5.3.1.1	Observations.....	61
5.3.1.2	Explanation	62
5.3.1.2.1	s21 companies as a vehicle for consultation.....	62
5.3.1.2.2	Perceptions of the s21 companies.....	62
5.3.1.3	Regulatory framework	62
5.3.1.4	Steps already taken to address the issue.....	62
5.3.1.5	Recommendations	63

5.3.2	The role and responsibilities of the Mogalakwena Municipality	63
5.3.2.1	Observations.....	63
5.3.2.2	Explanation	63
5.3.2.3	Regulatory framework	66
5.3.2.4	Steps taken so far.....	66
5.3.2.5	Recommendations	67
5.3.3	Sensitive community relationships: The Mapela Tribal Authority (“MTA”).....	67
5.3.3.1	Observations.....	67
5.3.3.2	Explanation	67
5.3.3.2.1	Ga-Chaba	67
5.3.3.2.2	Old Ga-Pila.....	68
5.3.3.2.3	Sekuruwe	68
5.3.3.3	Regulatory framework	69
5.3.3.4	Steps already taken to address the issue.....	69
5.3.3.5	Recommendations	69
5.3.4	Sensitive community relationships: The South African Police Service (“SAPS”) ..	70
5.3.4.1	Observations.....	70
5.3.4.2	Explanation	70
5.3.4.2.1	Old Ga-Pila.....	70
5.3.4.2.2	Ga-Chaba	70
5.3.4.2.3	Sekuruwe	70
5.3.4.2.4	Motlhotlo.....	70
5.3.4.3	Regulatory framework	72
5.3.4.4	Steps taken so far.....	72
5.3.4.5	Recommendations	73
6.	THE SOURCES: INSTITUTIONAL PROCESSES	74
6.1	Process documentation (including reporting).....	75
6.1.1	Observations.....	75
6.1.2	Explanation	75
6.1.3	Links to potential human rights violations	77
6.1.4	Regulatory framework	77
6.1.5	Steps already taken to address the issue.....	78
6.1.6	Recommendations	78
6.2	Monitoring	79
6.2.1	Observations.....	79
6.2.2	Explanation	79
6.2.3	Regulatory framework	79
6.2.4	Steps already taken to address the issue.....	79
6.2.5	Recommendations	80
6.3	Grievance redress	80
6.3.1	Observations.....	80
6.3.2	Explanation	81
6.3.3	Regulatory framework	82
6.3.4	Steps already taken to address the issue.....	82
6.3.5	Recommendations	83

6.4	Consultation	83
6.4.1	Observations.....	83
6.4.2	Explanation	84
6.4.3	Regulatory framework	86
6.4.4	Steps already taken to address the issue.....	87
6.4.5	Recommendations	88
6.5	Achievement of consent (beyond a single fixed point in time)	88
6.5.1	Observations.....	88
6.5.2	Explanation	89
6.5.3	Regulatory framework	89
6.5.4	Steps already taken to address the issue.....	90
6.5.5	Recommendations	90
7.	CONCLUSION.....	91
7.1	Assist communities in understanding their rights and how to access them.....	92
7.2	Assist companies in moving beyond a compliance based approach to resettlement...	92
7.3	Assist companies in understanding the human rights implications of their behaviour and operation within their sphere of impact.....	93
7.4	Community and legal representatives' input on what could have been done differently.....	94
	Annexure 1	95
	Annexure 2	96



CHAPTER 1

.....

*HUMAN RIGHTS
IN CONTEXT*



1.1 Mandate of the SAHRC: protect, respect and promote human rights

Established under Chapter 9 of the Constitution of the Republic of South Africa Act, 108 of 1996, (“the Constitution”) the South African Human Rights Commission is a national institution established to entrench constitutional democracy through the promotion and protection of human rights. As such the SAHRC is mandated to:

- » Promote respect for human rights and a culture of human rights;
- » Promote the protection, development and attainment of human rights; and
- » Monitor and assess the observance of human rights in South Africa.

The Constitution also sets out the powers attributed to the SAHRC necessary for it to undertake its function including the powers to:

- » Investigate and to report on the observance of human rights;
- » Take steps to secure appropriate redress where human rights have been violated;
- » Carry out research; and
- » Educate.

The South African Human Rights Commission Act, 54 of 1994, confers further powers, duties and functions on the SAHRC. These include the power to conduct an investigation into any alleged violation of human rights, to call any person to appear before it and produce to it all articles and documents required in terms of the investigation.

Chapter 2 of the Constitution contains the Bill of Rights which “enshrines the rights of all people in our country and affirms the

democratic values of human dignity, equality and freedom.”⁷ Unique to South Africa, the Bill of Rights also applies horizontally between private actors. Section 8(4) provides that juristic persons (i.e. companies) can be the holders of rights to the extent that the nature of the right permits. However, section 8(2) provides that juristic persons are also the bearers of obligations and are bound by the provisions of the Bill of Rights “if, and to the extent that, it is applicable, taking into account the nature of any duty imposed by the right.” In the case of the project sponsor to a relocation process, there are a variety of obligations, detailed below, which the company could have a duty to bear. Generally, the SAHRC does not consider the human rights obligations of juristic persons as entrenched in the Bill of Rights to exist to the same extent as the obligations of the State. However, the horizontal operation of the Bill of Rights is clear.

1.2 The investigation

In March 2008, international NGO ActionAid released a report entitled “Precious Metal: The impact of Anglo Platinum on poor communities in Limpopo, South Africa.” Launched at Human Rights House, ActionAid called for the SAHRC to undertake a full investigation into a series of allegations of human rights violations made against the relocation process undertaken by Anglo Platinum at its PPL mine near Mokopane in the Limpopo Province. The SAHRC asserted that the matter was a key priority and committed to undertake a full investigation not only into the allegations presented by the ActionAid report but into the full human rights context surrounding the whole relocation process in accordance with the mandate of the SAHRC. Broadening the scope of the investigation is in line with the role of the SAHRC as not only a reactive but also a proactive institution mandated



⁷ Section 7(1).

with the authority to initiate independent investigations.⁸

This investigation was undertaken through collaboration between delegations from the national office in Johannesburg and the provincial office in Polokwane, Limpopo. The SAHRC has established offices in all provinces to ensure that its services are widely accessible, and to enable the SAHRC to gain local knowledge and understanding to better address localised concerns and specific lived experiences.

Companies such as Anglo Platinum are well versed in undertaking both environmental and social impact assessments. However, the international community is beginning to assess the actions of companies against a human rights framework. This report therefore seeks to assist companies, including Anglo Platinum, to better understand how environmental and social issues can impact on the ability of local communities to assert their human rights and can exacerbate existing vulnerabilities.

The SAHRC has sought to constructively engage with all stakeholders when undertaking its investigations in an attempt to build sustainable solutions rather than assert isolated judgements. In this way the SAHRC deals with issues which it is investigating in the context of the specific allegation to create practical and sustainable solutions.

The need to address allegations and look at the wider human rights context in a timely manner has meant that the overriding focus of the investigation has been on the interplay between business and local communities. In this respect the SAHRC acknowledges that greater focus is needed on the role of and

the relationships with the Mogalakwena Municipality and Mapela Tribal Authority. The SAHRC also recognises the need for further analysis of the nature and content of communal land tenure itself. However, it is not the role of the SAHRC to attempt to untangle issues surrounding the division of responsibility for the provision of services between the mine and the local municipality, or to mediate in helping each stakeholder better understand the limits of these responsibilities. What is more specific to the SAHRC's mandate is why there was such a tangle in the first place and how this impacts upon the human rights of local communities.

Observations and findings derived from its investigations seek to look beyond a legalistic conception of human rights violations in trying to understand the source of these violations. The SAHRC hopes that through its approach of linking potential symptoms of human rights violations to institutional source problems that it will engender a deeper and more constructive understanding of the failures and successes in the project and create learning to prevent such potential violations occurring in the future.

In seeking practical and durable multi stakeholder oriented solutions the SAHRC asserts specific and practical recommendations developed out of its observations and findings. The SAHRC seeks to outline the role of each stakeholder in undertaking these recommendations and where applicable expands upon the potential role of the SAHRC itself.

This report is essentially an investigation into the interplay between key stakeholders, the relationships that were developed between these stakeholders and the institutions created to support those relationships. Investigating



⁸ Complaints of alleged human rights violations in the Burgersfort area have been lodged with the Limpopo office of the SAHRC based in Polokwane. Although this report does not specifically deal with these complaints, there are generic issues which are common concerns to many communities in areas where mining is undertaken, but specific factual contexts may differ.

alleged human rights violations necessitates an analysis of the lives of those communities whose rights have been affected. In undertaking this investigation the SAHRC is clearly aware that although more than a snap shot, a time limited investigation will at best only be able to capture a reflection of a few months in a constantly evolving situation. Having acknowledged this shortcoming and the role of the SAHRC to monitor human rights and receive specific complaints, as well as following up on the specific recommendations made in the report, the SAHRC's engagement with the issues raised in this report will not end with its publication. The SAHRC acknowledges that the need to

submit its initial findings in a timely manner has meant that a full understanding of the complexities of all the issues surrounding this investigation may not have been achieved. The SAHRC welcomes submissions to clarify any of the observations and recommendations made in this report. However, the SAHRC specifically requests that submissions made in response to this investigation are guided not by defending specific actions or positions but by the spirit in which this investigation was undertaken, to address vulnerability, to protect and promote the human rights of affected communities and move towards breaching the current impasse within the relocation process.

CHAPTER 2

.....

INTRODUCTION AND BACKGROUND



2.1 Initiation of the investigation

2.1.1 Background information on the mining industry in Limpopo

Limpopo is South Africa's most Northern province bordering both Mozambique to the east and Zimbabwe to the north. The principal ethnic groups in the province are the Northern Sotho followed by the Tsonga and the Venda people, and it has the fourth largest provincial population in South Africa. Polokwane is the capital of the province.

Unemployment in Limpopo at 36.1% is the highest in South Africa. Furthermore the number of households under the poverty line established at R800 per month is 36.4%, lower than the national average.⁹

Limpopo is rich in mineral deposits including platinum, iron ore, chromium high and middle grade coking coal, diamonds and copper. Mining contributes to over one fifth of the provincial economy.¹⁰ Figures released by the Minerals Bureau in 2002 assert that the mining sector employs around 49 000 people in Limpopo.¹¹ However, the steady expansion of the platinum market suggests that this number will have increased within the last 8 years.

South Africa houses approximately 90% of the world's platinum resources; a commodity purported to be integral to the production of about 20% of all consumer goods globally. Furthermore over one third of all platinum supplied to the international markets each year is used in the production of emission controlling

catalytic convertors.¹² The significance of the industry for the global economy can therefore not be underestimated not least in terms of its environmental potential. The significance of the platinum and therefore the mining sector in South Africa must equally not be underestimated as it supplies over 80% of the world's platinum. Domestically the mining industry is South Africa's largest employer with approximately 460 000 direct employees and a further 400 000 employed within the mining supply chain.¹³

The fixed geological nature of mining allied to the significance of the industry within the South African domestic context means that resettling communities situated over or in proximity to mineral resources is often inevitable. Most global domestic legal systems allow provisions of eminent domain whereby a state has the authority to forcibly appropriate private land for a public use having paid market value compensation for all assets seized. The alternative to this process is the development of negotiated settlements with affected peoples. It must be iterated that Anglo Platinum has made it clear that "(it) does not...start from a position of relying upon the use of powers (of appropriation/ eminent domain) but rather seeks to negotiate with communities to obtain their agreement on fair collective and individual compensation."¹⁴ There are countless examples of relocation both in South Africa and globally. Such processes are regulated by both domestic legal systems and international best practice. The International Finance Corporation ("IFC") (the private sector arm of the World Bank) provides recommended guidance for relocation within

⁹ <http://www.sehd.org.za/limpopo.html> [accessed on 26 July 2008].

¹⁰ <http://www.southafrica.info/about/geography/limpopo.htm> [accessed on 26 July 2008].

¹¹ <http://www.southafrica-newyork.net/consulate/provinces/limpopo.htm> [accessed on 26 July 2008].

¹² <http://www.louisianagold.com/platfact.htm> [accessed on 26 July 2008].

¹³ <http://www.southafrica.info/business/economy/sectors/mining.htm> [accessed on 26 July 2008].

¹⁴ Anglo Platinum's response to the ActionAid allegations, *The Facts*, p4 (first edition March 2008). (hereinafter referred to as "*The Facts*"). See the second edition (April 2008) at http://www.angloplatinum.com/investor_media /im_ latest_news/Anglo_ActionAid.pdf.

its Performance Standards and most specifically Performance Standard 5 on Land Acquisition and Involuntary Relocation. The Standard recommends that where possible involuntary relocation should be avoided or minimised. Where this is impossible it recommends that appropriate measures are planned and implemented to mitigate the adverse impacts on displaced persons and host communities.¹⁵

The issue of relocation often highlights the difficult interplay between community welfare and national economic growth. In its rebuttal to the allegations made by ActionAid, Anglo Platinum states that “natural resources... generate significant economic benefits for the nation as well as new economic and social opportunities for local people.”¹⁶

The SAHRC acknowledges the significance of the mining industry and more specifically the platinum industry as a chief employer and one of the drivers of the South African economy. It also acknowledges the global and domestic experience of relocation within the mining industry. It is important to state that although the SAHRC has, with regard to this report focused its investigation primarily on one company and a handful of communities affected by relocation, it acknowledges this wider context in assessing the broader significance and learning from this individual case.

2.1.2 ActionAid report launch and BBC coverage

ActionAid launched a report entitled *Precious Metal: The impact of Anglo Platinum on poor communities in Limpopo, South Africa*

at Human Rights House, the SAHRC National Office, in March 2008. This report contained a number of allegations of human rights violations committed during the relocation of the communities at Motlhotlo, undertaken to allow for the Potgietersrust Platinums Rustenburg (“PPRust”) North Expansion Project of the Anglo Platinum Potgietersrust Platinums Limited (“PPL”) in Limpopo. As part of the recommendations made within the report ActionAid requested that the SAHRC “conduct an investigation into the alleged violations of economic, social and cultural rights highlighted in the report – in particular the rights to food and water”.¹⁷

In close anticipation of the publication of this report, BBC Radio 4’s “File on 4” broadcast a programme entitled “Who pays the price of platinum” on 25 March 2008. The report echoed allegations made within the ActionAid report and allowed for a response to be made by representatives from Anglo Platinum.¹⁸

2.1.3 Anglo Platinum response

Anglo Platinum submitted a response to the ActionAid report in March 2008 welcoming the opportunity for the SAHRC to undertake a full investigation into the presented allegations. Anglo Platinum maintained that it took the allegations made by ActionAid seriously and pledged to attempt to correct all factual inaccuracies with all stakeholders.¹⁹

2.2 Process of the investigation

As highlighted above the SAHRC is mandated to not only investigate received complaints, but



¹⁵ International Finance Corporation, Performance Standard 5, “Land Acquisition and Involuntary Resettlement”.
¹⁶ *The Facts*, p4.

¹⁷ *Precious Metal: The impact of Anglo Platinum on poor communities in Limpopo, South Africa* (March 2008), p50.
¹⁸ BBC Radio, File on 4, “Who pays the price of platinum”, http://news.bbc.co.uk/2/hi/programmes/file_on_4/7305335.stm [accessed on 29 March 2008].
¹⁹ Anglo Platinum Media Release, http://www.angloplatinum.com/def_main.asp?ld=press/display.asp&ld2=184&Related=true [accessed on 29 July 2008].

also initiate its own investigations. Receiving the allegations made within ActionAid report the SAHRC commissioned an investigation not only into these specific allegations but the wider issues surrounding the relocation process undertaken by Anglo Platinum at its PPL mine in Limpopo.

2.2.1 Engagement of stakeholders

In its investigation the key activity first undertaken by the SAHRC was the identification and then the engagement of all key stakeholders.

The SAHRC mapped all key stakeholders through an initial documentation analysis using the sources of information outlined below and through the initial fact finding mission to the sites undertaken on 3 – 4 of April 2008. See annexure 1 for a full list of identified stakeholders.

The SAHRC maintained constant contact with Anglo Platinum through email, telephonically, in meetings and correspondence. Initially correspondence was directed to the project manager. The SAHRC then met with Anglo Platinum company representatives and their legal representative Knowles Husain Lindsay Inc Attorneys (“KHL Attorneys”) on 21 April 2008. On 13 May 2008 the SAHRC requested key information and a list of documentation from Anglo Platinum through KHL Attorneys. This information was provided to the SAHRC by Anglo Platinum under cover dated 6 June 2008. Thereafter the SAHRC compiled a gap analysis against its original request and submitted a request for further information and documentation to address gaps, clarify specific points and obtain information on new and developing issues. This request was directed to KHL Attorneys on 25 July 2008 and the response from KHL Attorneys was dated 8 August 2008.

The SAHRC maintained contact with affected communities during site visits, telephonically and through civil society organisations.

The SAHRC initiated and maintained contact with other key stakeholders through site visits, telephonically and via email correspondence, including the MTA, the Mogalakwena Municipality (“the Municipality”), s21 companies and their legal representative Bhadrish Daya Attorneys.

Details of these engagements are included in the following section.

2.2.2 Sources of information

In undertaking its investigation the SAHRC used a wide but inexhaustible list of information sources, ranging from local level community meetings to broader engagement at national level conferences. The detail of specific sources is outlined here:

Site visits and community meetings

The SAHRC undertook two separate site visits to the PPL mine and surrounding communities in the Mokopane area during which time it gathered information and sought specific community perspectives and input through:

- » Meetings with individuals and specific communities including communities, and some consolidated groups of communities, at Old Ga-Pila, Sterkwater, Armoede, Sekuruwe, Ga-Chaba and Ga-Puka;
- » Meetings with various community structures including the Motlhotlo Relocation Resistance Committee (“MRRC”), the Motlhotlo Development Committee (“MDC”) and various Section 21 (“s21”) companies;
- » Meetings with PPL project management;
- » Meetings with the Mapela Tribal Authority (“MTA”);

- » Gathering of significant community documentation such as memorandums and key correspondence;
- » Inspection of resettlement sites and residual communities; and
- » Taking of photographs.

Information and documentation

The SAHRC received relevant documentation from key stakeholders on request and in some cases pre-emptively. This documentation has informed much of the factual content of the report, and also the ongoing engagement with key stakeholders by raising further questions and further points for clarification. The SAHRC has addressed specific information requests to various stakeholders with further requests for clarification and additional information where necessary. These stakeholders include:

- » Anglo Platinum: the SAHRC addressed several requests for information, clarifications and additional information and compiled a list of documentation requests for Anglo Platinum which was responded to via Anglo platinum's legal representative KHL Attorneys. The specific dates are set out in paragraph 2.2.1 above;
- » s21 companies and Bhadrish Daya Attorneys: the SAHRC addressed a request for information concerning the s21 companies which it directed through the s21 companies' legal representative, Bhadrish Daya Attorneys. This specifically refers to the Ga-Pila, Ga-Puka, Ga-Sekhoalelo s21 companies and the Minerals Committee. This supplemented the documentation pre-emptively provided by Bhadrish Daya Attorneys at the time of initiation of the investigation, in April 2008, to provide background information and inform of *sub judice* matters pertaining to the relocation. The later request for additional information and clarification was dated 25 July and the response received was dated 31 July 2008;
- » MTA: the SAHRC twice requested, in person, the official response of the Mapela Tribal Authority to the allegations made in the ActionAid report. These requests were made on 3 April and 10 July 2008. On 23 September 2008 the Kgoshigadi Langa wrote a letter to the SAHRC indicating that the Traditional Council had not as yet completed its promised report in response to the alleged human rights violations in the ActionAid report Precious Metals and requested further time to prepare their report. No response substantive response had been received by the SAHRC at the time of drafting of the report; and
- » The Municipality: the SAHRC addressed a request for information to the Municipality on 25 July 2008. No written response has been received to date, but information was obtained telephonically on 14 August 2008 from the Municipal Manager Mr Makobe.

Correspondence

The SAHRC has had ongoing email and telephone contact with the following stakeholders through which it has been able to gather information on the key issues highlighted below:

- » Representatives of PPL and Anglo Platinum;
- » Representatives of affected communities;
- » Legal representation for specific parties such as the s21 companies, Anglo Platinum and the representatives of affected communities; and
- » Telephonic and e-mail correspondence with NGOs active in the area on this investigation and related mining concerns, including ActionAid, Jubilee South Africa and the Bench Marks Foundation. The Bench Marks Foundation has been involved in research on mining related concerns in Africa and has also published various reports, one of

which includes perspectives on platinum mining in Limpopo.²⁰

Meetings

In addition to constant telephonic and email communication the SAHRC formally engaged Anglo Platinum during a meeting at Human Rights House on 21 April 2008 at which time the parameters of the investigation were discussed, contact initiated, the role of the SAHRC clarified and methods of communication formalised. Pursuant to this meeting Anglo Platinum requested that all correspondence and information requests be directed through its legal representatives KHL Attorneys.

National conferences

Members of the SAHRC delegation elicited information on the broader context of mining in South Africa through attendance and interaction at the:

- » SAHRC Conference on Human Rights and Business: Business, Development and Poverty, March 2008;
- » Jubilee South Africa/ ActionAid Conference entitled "The Extractives Industry in South Africa, A Force for Development?", April 2008; and
- » The Bench Marks Foundation International Conference, June 2008.

Media

The SAHRC has also been aware of the need to keep up to date with all media coverage of the investigation. Acknowledging the powerful perceptions promulgated by the media, the SAHRC has monitored the type of information in the public domain to better understand the likely perceptions of the process by all stakeholders and where necessary take steps to address these perceptions.

2.2.3 Overview of site visits

The SAHRC undertook two separate site visits to the PPL mine and surrounding communities after the initiation of the investigation. The first visit took place on 3 – 4 April 2008 and the second from 10 – 11 July both lead by a delegation made up of representatives from the national and Limpopo provincial offices of the SAHRC.

The initial visit was a fact finding exercise to establish issues of immediate concern and address these to Anglo Platinum, identify key stakeholders, meet affected communities and developing a methodology and plan of action for taking the investigation forward.

The purpose of the second site visit was to visit previously unvisited communities and sites, follow up on issues identified from a desk based document analysis and the previous site visit and meet key stakeholder groups.

.....

²⁰ The Bench Marks Foundation, *The Policy Gap (2): Review of the Corporate Social Responsibility Programmes of the Platinum (Limpopo), Gold and uranium Mining (North West, Gauteng), and Coal (Mpumalanga) Sectors in South Africa* (June 2008).

CHAPTER 3

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*FACTUAL REPORT OF ENGAGEMENT
AND SITE VISITS*



3.1 Site Visit 1: 3 – 4 April 2008 – Initial fact finding

It was decided by the SAHRC that the first intervention would be an initial fact finding mission and site visit to take place on 3 to 4 April 2008. The purpose of this visit was to visit:

- » PPL mining sites of Anglo Platinum;
- » Surrounding communities;
- » Residual communities; and
- » Relocated communities.

The focus of the initial trip was to:

- » Make initial contact with various stakeholders and identify further stakeholders;
- » Assess the scope of the operation for drafting the project plan in going forward with the investigation;
- » Determine urgent alleged human rights violations;
- » Identify and raise urgent matters with Anglo Platinum immediately; and
- » Identify other matters to be addressed in due course.

During the two day visit the SAHRC delegation visited the following sites:

- » PPL mine;
- » Rooibokfontein;
- » Armoede;
- » Sterkwater;
- » Motlhotlo (Ga-Puka and Ga-Sekhaolelo residual communities);
- » Old Ga-Pila; and
- » Ga-Chaba.

The SAHRC delegation had intended to visit other sites in Motlhotlo and Ga-Molekane but had insufficient time due to unforeseen circumstances, namely the blockading of roads, allegedly by community members.

The specific stakeholders consulted, some in depth, others addressed as a group with a view to returning, and some spontaneous community encounters include:

- » Community members (Old Ga-Pila, Sterkwater, Motlhotlo, Ga-Chaba and certain Indunas);
- » Motlhotlo Relocation Resistance Committee (“MRRC”);
- » s21 company members (various company representatives were present at the Anglo Platinum project office in Armoede);
- » Motlhotlo Development Committee (“MDC”);
- » Jubilee South Africa community workers;
- » The Minerals Committee (a committee comprising community members who work together with Anglo Platinum and focus on issues such as fixing cracks in houses and other structural matters);
- » The Mapela Tribal Authority (Goshigadi Langa); and
- » PPL Relocation Project Manager Greg Morris and other PPL employees.

3.2 Site Visit 2: 10 – 11 July 2008 – Follow up visit

The initial site visit and ensuing interaction with all stakeholders, the collection of documentation and follow up on key issues created greater clarity on the key priorities and routes of inquiry for the SAHRC investigation.

It was agreed that a follow up visit to the site would facilitate the process. The purpose of this follow up visit was to:

- » Visit previously unvisited sites;
- » Follow up and find clarification on key issues of concern; and
- » Consult with key stakeholder groups.

During the two day visit the SAHRC delegation visited the following sites:

- » Ga-Chaba and Skimming (a mine employee camp close to Ga-Chaba);
- » Mošate/ Mapela Tribal Authority;
- » Old Ga-Pila;

- » Ga-Molekane;
- » Motlhotlo;
- » Sekuruwe; and
- » PPL project offices at Armoede.

The specific stakeholders consulted include:

- » Ga-Chaba Land Committee and community;
- » Mapela Tribal Authority;
- » Residual community at Old Ga-Pila;
- » Some members of the MRRC at Motlhotlo;
- » Sekuruwe community;
- » Motlhotlo s21 companies; and
- » MDC.

Fig 1 IFC Definition of Displacement²¹**Physical displacement**

Actual physical relocation of people resulting in a loss of shelter, productive assets or access to productive assets (such as land, water and forests).

Economic displacement

Results from an action that interrupts or eliminates people's access to productive assets without physically relocating the people themselves.

Involuntary relocation

Relocation is considered involuntary when affected individuals or communities do not have the rights to refuse land acquisition that results in displacement. This can occur in cases of: Lawful expropriation or restrictions on land use based on eminent domain; and Negotiated settlements in which the buyer can resort to expropriation or impose legal restrictions on land use if negotiations with the seller fail.

4.1 Anglo Platinum Ltd

Anglo Platinum Ltd is a majority owned subsidiary (76.53%) of Anglo American Plc. It is the world leading producer of platinum metals and solely operates in South Africa with exploration projects in Zimbabwe, Canada, Russia, Brazil, and China.

Anglo Platinum has published an overt human rights statement on its website which asserts that:

"South Africa is a signatory to the Universal Declaration of Human Rights, which is in turn reflected in the country's constitution. Anglo Platinum has incorporated human rights principles into its code of ethics and business principles which apply to all our operations

including projects in Zimbabwe and exploration in China."²²

Furthermore Anglo Platinum maintains that:

"[It] has established a new dedicated community engagement structure to deal with community issues effectively. The new structure is tasked with managing community issues in an integrated manner that recognises that community development is not a cost but an investment. Clearly, it is important to have a community engagement approach which is proactive and partnership-orientated rather than paternalistic and reactive. As a result there have been significant changes in approach and attitude in engagements between communities and Anglo Platinum. The approach with municipalities and other relevant stakeholders has also been transformed from a sporadic one to one that builds relationships that are enduringly beneficial and developmental. The availability and management of data involving communities has also been improved, resulting in swift turnaround in terms of decision-

²¹ International Finance Corporation, Performance Standard 5, "Land Acquisition and Involuntary Resettlement".

²² Anglo Platinum, "Human Rights" <http://www.angloplatinum.com/> [accessed on 29 July 2008].

making as well as reacting to problems in the communities.”²³

4.2 Anglo American Plc

Anglo American is the parent company of Anglo Platinum and one of the world’s major diversified mining groups with a global reach. Like its subsidiary Anglo Platinum, Anglo American has an overt human rights statement on its website which maintains that:

“Human rights are not just an abstract principle. They should also be part of everyday commercial and industrial practice. That’s why for Anglo American, the safeguarding of human rights is increasingly becoming a condition for doing business. Backing this up are binding and enforceable contractual obligations.”²⁴

Furthermore, Anglo American is working to ensure that its’ security staff are trained in the Voluntary Principles on Security and Human Rights. It maintains that in South Africa Anglo American funded the development of a policing and human rights course for the national police service.

Anglo American is also heavily involved in the global debates surrounding business engagement with human rights and supports the work currently being undertaken by the UN Secretary General’s Special Representative on Business and Human Rights, John Ruggie. Anglo American also works closely with the International Council on Mining and Metals through which they are currently supporting multi-stakeholder processes on indigenous peoples’ rights and artisanal mining.²⁵

²³ Anglo Platinum, “Society” <http://www.angloplatinum.com/> [accessed on 29 July 2008].

²⁴ Anglo American, “Human Rights” <http://www.angloamerican.co.uk/aa/development/society/humanrights/> [accessed on 29 July 2008].

²⁵ Anglo American, “Human Rights” <http://www.angloamerican.co.uk/aa/development/society/humanrights/> [accessed on 29 July 2008].

4.3 Affected communities

4.3.1 Motlhotlo

The PPL’s PPRust mine was opened in September 1993 having relocated Ga-Pila village to allow for the establishment of the mine. The PPRust North Expansion Project saw the expansion of this mining operation and development of a new pit and plant to the north of the existing mine on the Overysel and Zwartfontein farms. The villages of Ga-Puka and Ga-Sekhaolelo (Motlhotlo) are located adjacent to the sites designated for this new pit and plant.



View of the PPL mine from Ga-Puka



Transport corridor through the PPL mine from Motlhotlo

Relocation of the communities at Motlhotlo was deemed necessary after an assessment of the potentially negative impacts from the expansion of the mine. Noise generated by the blasting at the mine site was expected to exceed World Bank Guidelines, dust pollution was expected to increase, there was a high risk that blast vibrations would damage houses due to their poor build quality and there was a potential for the dewatering of the open pit to pollute adjacent ground water. Furthermore the areas of Motlhotlo were deemed the only possible location for the dumping of waste rock.²⁶

The community of Ga-Puka was therefore to be relocated to host sites at Rooibokfontein and the community of Ga-Sekhaolelo was to be relocated to host sites at Armoede.

The Environmental Impact Assessment (“EIA”) undertaken by consultancy firm SRK as contracted by PPL estimated that 414 households in Ga-Puka and 428 households in Ga-Sekhaolelo would be affected by the relocation. The report estimated the average household size in each community to be between 6 and 7 persons creating an estimated population size of the two communities to be 5,709. Although a small percentage of the residents within these communities are employed at the PPL the majority work on commercial farms in the area or are engaged in subsistence farming. The farms Zwartfontein and Overysel upon which these villages are located are registered in the name of the Langa Tribe and as such are Tribal Land as contemplated under section 1 of the Upgrading of Land Tenure Rights Act, 112 of 1991. Each village is lead by a headman who is in turn a member of the Tribal Council under Kgoshigadi Langa.²⁷

²⁶ Founding affidavit of Malose Johannes Masubelele, at annexure JM 14, being the “draft social survey” of 2002, and para 22, *Malose Johannes Masubelele et al v. Potgietersrust Platinums Ltd et al* (Case No. 13499/06, TPD) (hereinafter referred to as “Masubelele v. PPL”).

²⁷ *Ibid.*

Relocation was started at a delayed date of 11 July 2007.

4.4 Other affected communities

There are several other villages within close proximity to the mine, which are not demarked for relocation, but are nonetheless affected by the impacts of the mine. These were identified as part of the Environmental Impact Assessment process undertaken by consultant group SRK as contracted by PPL to include Ga-Chaba and Sekuruwe. Since undertaking initial site visits and documentary reviews, the SAHRC has identified a need to include analysis of the potential human rights impact on the village of Ga-Molekane, and the residual community at Old Ga-Pila (subject to relocation process during the initial mine development).²⁸

4.4.1 Ga-Chaba

The community at Ga-Chaba, though demonstrably affected by mine activities, is not subject to relocation. It was alleged, and refuted, that the community lost agricultural land. However, it should be determined to what extent the community has been subjected to economic displacement and as such should be party to the strictures of livelihood replacement processes. PPL have implemented key management controls to mitigate potentially negative environmental impacts on the community.

PPL maintain that during the first phase of the mine expansion the community at Ga-Chaba will not be negatively affected to the extent that relocation will become necessary.

²⁸ SRK Consulting, Scoping Report, p1.

4 KEY INFORMATION POINTS FOR CLARIFICATION

Management controls have been implemented within the community to mitigate the risk of negative impacts as a result of the nearby mine dump. As the mine expansion moves into phase 2 it is as yet unknown how these impacts will develop and whether or not they will develop to the extent that the community members at Ga-Chaba will have to be relocated.



Meeting with the Ga-Chaba community in July 2008

4.4.2 Old Ga-Pila

The community at what is now Old Ga-Pila was subject to relocation to the host site at Sterkwater during the initial development of the PPL mine. The community maintain that there are approximately 28 families (out of 999) that have refused to relocate to Sterkwater. PPL, however, asserts that there are 14 families remaining inside the lease area. The sentiment amongst the resistant community is that they will not relocate to Sterkwater under any circumstances, citing adamant refusal to leave the land of their ancestors. PPL have assured the community that there are currently sufficient empty houses at Sterkwater designated for the residual community. The SAHRC communicated with Anglo Platinum to clarify this. Anglo

Platinum indicated that the vacant houses are “adequate and appropriate” and “compensate for loss of property”.²⁹



Meeting with the Old Ga-Pila community in April 2008



Meeting with the Old Ga-Pila community in July 2008

4.4.3 Sekuruwe

The community at Sekuruwe is not subject to relocation. However, mine activities have led to the loss of agricultural land within the community and therefore led to the loss of economic livelihoods. As such these negative impacts should have been included in the livelihood restoration process instituted by PPL. Reference was made in the Commission’s July 2008 site visit by the Sekuruwe community

²⁹ Anglo Platinum response of 8 August 2008, at para 8.1.

to agreements concerning replacement agricultural land.

4.4.4 Ga-Molekane

The Community at Ga-Molekane is not subject to the relocation process or impact mitigation processes instituted by PPL. However, in the recently published ActionAid report, serious allegations were made about the quality of water feeding two schools and one community tap within the village. As such the community was included as part of the SAHRC investigation.



View of part of Ga-Molekane from the Langalibalele School

4.5 Initial consultation

Motlhotlo's traditional leader Kgoshigadi Langa was approached in 1998 regarding the expansion of the mine and the relocation of the Motlhotlo communities. This information was allegedly passed to the community through their headmen.³⁰

Communities were initially consulted about the proposed plans for the mine and the Relocation Committees formed in 1998. The Professional Team to undertake the relocation process was appointed in 2002 at which point it began engagement with the Relocation Committee.

The Community met with the Professional Team to discuss Site Selection in May 2002.

During the EIA process Public Participation Meetings through Key Stakeholder Workshops were held on 20 September 2002. As part of the Social Impact Assessment 12 focus group discussions were held during 2002.

Community resolutions deposing the community of their rights to the land were passed on 13 October 2002 (Land Rights Holders' Community Resolution).

Relocation and donation agreements (one on one agreements) were signed off on 17 July 2005.

The various types of consultation undertaken during the Project Implementation included the following:

- » Monthly Progress and Technical Meetings between s21 companies and the Professional Team;
- » Bi-weekly meetings between the Community Legal Advisors and s21 companies;
- » Community Meetings between s21 companies and the community;
- » Meetings with Professional Team, s21 companies and the community;
- » One on one sign-off processes between the Project Team and the Homeowners;

³⁰ Founding affidavit of Malose Johannes Masubelele, at para 41, *Masubelele v. PPL*.

- » Homeowners' inspections during construction; and
- » Project newsletters reporting on Project progress and issues.³¹

4.6 Key stakeholders

4.6.1 Section 21 companies ("s21 companies")

In October 1998 Indunas of the Ga-Puka and Ga-Sekhaolelo communities received a request from the senior traditional leader, Kgoshigadi Atalia Langa to elect two steering committees (one for each community) comprised of 10 people to deal with the relocation of the Motlhotlo village. Both Indunas issued public notices inviting the community to undertake these elections. As a result of these elections several meetings were then held between the two steering committees and the Kgoshigadi and during the following month of November the Kgoshigadi convened a meeting with the whole Motlhotlo community to outline the proposed plans for relocation. After some months had passed it was agreed that a legal representative should be appointed to represent the needs of the communities. The two steering committees appointed Bhadrish Daya Attorneys. At this point the steering committees became two separate relocation committees.

In 2001 several meetings were held between the two community relocation committees and PPL to discuss the commencement of the relocation process. It was at this point agreed that a team of consultants be appointed to initiate the process. Throughout these meetings feedback on outcomes was delivered back into the community. In May 2001 the two relocation committees began the process of appointing consultants including Focus/ Hararo

Project management. The project managers then assisted the relocation committees in the appointment of all consultants.

In terms of section 2(1) of the Interim Protection of Informal Land Rights Act, 31 of 1996, no person may be deprived of any informal right to land without his or her consent. Therefore the project managers and relocation committees started a process to prepare for the adoption of community resolutions. Community meetings were held during which community members were informed of the need to adopt a community resolution. Notices to this effect and announcing the details of community meetings were posted in the Sowetan and Capricorn Voice Newspapers, and broadcast on Radio Thobela. Furthermore public notices were widely distributed and posted in shops, clinics, churches, the MTA offices, police stations and in the offices of the Indunas. The purpose of the community resolutions was to gain community consent to relocate to previously identified and agreed land. At these two meetings dated 18 October 2002 the community resolutions were passed.

The community resolutions not only indicated the consent of the majority to relocate but also identified the broad conditions for relocation, namely:

- » PPL mine will build each household a brick house;
- » PPL mine will conduct individual household compensatory package analysis to be paid out to each household;
- » PPL will purchase compensatory land for the community;
- » PPL will carry the responsibility of relocating community graves;
- » The community undertakes to open a new community Trust account; and

³¹ See the founding affidavit of Malose Johannes Masubele, *idem*.

- » A social responsibility plan was to be drawn up by the PPL mine incorporating the above.

The two relocation committees purport to represent the community in terms of the relocation agreements signed with Anglo Platinum. They were allegedly incorporated on legal advice given by a legal representative to the communities and the s21 companies in May 2003. The purpose of both s21 companies was the “relocation management and cultural and social development of Ga-Puka and Ga-Sekhaolelo village in the Mapela Tribal Authority”. The two s21 companies were then renamed the Ga-Puka Relocation and Development Association and the Ga-Sekhaolelo Relocation and Development Association. Bhadrish Daya Attorneys acts as the legal representative to the s21 companies and instructs counsel where necessary.³²

As indicated above, the SAHRC sought various clarifications from Bhadrish Daya Attorneys. In their reply dated 31 August 2008 they indicated that some of the information provided is privileged communication between attorney and client and that other information relates to matters *sub judice*. Bhadrish Daya Attorneys did, however, confirm the following:

- » The s21 companies were established on the basis of specific advice given to the communities by legal representatives;
- » Vehicles such as Communal Property Associations (“CPA”)³³ and others were comprehensively explained to the community. It is the view of Bhadrish Daya Attorneys that “the Section 21 Companies is the best vehicle for the project of this nature and not the CPA or any other legal

entity”. The reasoning behind this view was not elaborated upon in the response;³⁴

- » This decision was taken by “the entire community”;³⁵
- » Bhadrish Daya Attorneys “represents not only the section 21 companies but the entire community of Ga-Puka and Ga-Sekhaolelo”;³⁶
- » The interaction between the s21 companies and the Department of Land Affairs is considered privileged;³⁷

There have been serious claims from members of the resistant community at Motlhotlo that the nominated members of the s21 companies were not elected to their position. Although this has been consistently refuted a perception exists that the s21 companies are not democratically elected institutions.

4.6.2 Motlhotlo Development Committee (“MDC”)

The MDC was formed by community members united over perceived problems in the relocation process, the s21 companies and the relocation agreements. In March 2007 the Independent Electoral Committee (“IEC”) monitored the independent election of members of the MDC to the MDC steering committee ensuring that the committee had democratic legitimacy in representing the views of its members.

The purportedly democratically elected MDC steering committee later failed to achieve endorsement from the Kgoshigadi (Mapela Tribal Authority) detailed in correspondence which maintained that:

“As the Tribal Authority we would like to inform you that we received correspondence

.....

.....

³² Answering affidavit of Lesetja Frans Moshabi, at paras 5-11, *idem* (for all paras above).

³³ See Communal Property Associations Act, 28 of 1996.

³⁴ Bhadrish Daya Attorneys response to request for information by SAHRC, 31 July 2008, at para 5.2 (hereinafter referred to as “Bhadrish Daya Attorneys response of 31 July 2008”).

³⁵ *Idem*, at para 5.4.

³⁶ *Idem*, at para 5.6;

³⁷ *Idem*, at para 5.10.

from two communities regarding their preference for leadership succession for the Development Committee....It was indicated in the two letters that both communities would prefer to continue with the current leadership of the Section 21 Committee and its legal representatives, rather than choosing a new committee altogether.”³⁸

The MDC is currently still in existence although they are not recognised as the democratically elected representatives of the community. They are instead considered by the MTA, PPL and the s21 companies to be a ‘breakaway or splinter group’ comprising members of the community.

4.6.3 Motlhotlo Relocation Resistance Committee (“MRRC”)

The MRRC is a splinter group of the MDC whose members have resisted relocation from Motlhotlo.



Meeting with the MRRC in April 2008

4.6.4 Mogalakwena Municipality

The Mogalakwena Municipality is located in the west of the Limpopo province within the Waterberg District Municipality. 2001 estimates assert that there are around 300,000 people currently living in the municipal region. The Municipal Council is made up of 63 Councillors, the majority of whom represent the African National Congress party. The Municipality houses 163 villages, 2 townships, 1 town and 4 farm areas which amount to a total of 170 settlements in 32 wards. Furthermore the rural areas of the municipality are under the control of 9 traditional leaders.³⁹

The Mogalakwena Municipality was established in 2000 after the integration of various municipalities and councils that had been previously serving the area. The Mogalakwena Municipality asserts its vision statement as:

- » Providing and maintaining affordable services to communities;
- » Promoting social and economic development;
- » Ensuring the efficient utilization of all available resources; and
- » Ensuring that there is effective community participation in the provision of municipal services.⁴⁰

³⁸ Translated hand written correspondence (date not legible) between the Mapela Tribal Authority and the MDC.

³⁹ Mogalakwena Municipality, 2008/ 2009 Integrated Development Plan (hereinafter “IDP”).

⁴⁰ Mogalakwena Municipality, http://www.mogalakwena.gov.za/index.php?page=vision_mission [accessed on 26 July 2008].

Fig 2 Ward Councillors for each affected community

Ward/ Councillor	Village
1 Mr C M Mashalane	Sterkwater
2 Ms N R Thema	
3 Ms K R Chokoe	
13 Mr M J Mampane	Sekuruwe
	Motlhotlo (Ga – Puka and Ga – Sekhaolelo)
	Rooibokfontein
14 Ms M S Sethoga	Ga-Chaba
	Skimming
15 Mr M A Mphela	Sterkwater – Ga-Pila
16 Mr L P Maloba	Ga-Molekane ⁴¹
17 Mr T A Kgaphola	
18 L G Mokale	

4.6.5 Mapela Tribal Authority

The SAHRC delegation was granted an audience with the Kgoshigadi Langa at the Tribal Authority during their first site visit on 3 April 2008. The SAHRC delegation requested the written response of the Tribal Authority to the allegations made in the ActionAid report. The Kgoshigadi agreed to make this response available within two weeks. The Polokwane Office of the SAHRC followed up on this undertaking but no response was received from the Tribal Authority. On its second site visit the SAHRC delegation returned to the Tribal Authority on 10 July 2008. Again an undertaking was given to provide the written response. Save for the request for further time to draft a formal response, dated 23 September 2008, no substantive response has as yet been received by the SAHRC from the Tribal Authority.

4.6.6 Community liaison officers (“CLOs”)

Two CLOs from each village (4 in total) were appointed on a full time basis to ensure

communication and resolution of issues and disputes between the Community and the Construction Contractors and the Project Management. As opposed to the s21 companies who provide high level project oversight, the CLOs were intended to manage specific and localised community issues.

Clarifications sought by the SAHRC from Anglo Platinum stated the following:⁴²

- » The 4 CLOs were nominated by the Communities and then appointed by the s21 companies;
- » The CLOs are remunerated by Anglo Platinum for their services;
- » The CLOs represent the Communities;
- » The main responsibility of the CLOs is to “liaise between the Community and other stakeholders and most importantly to bring issues to the attention of Project Managers and Construction Contractors”;⁴³ and
- » CLOs also report daily to stakeholders and liaise with the local municipality and the Tribal Authority.

Of the four CLO officers it is not clear how many if any are members of a s21 company. Bhadrish Daya Attorneys indicated in response to this question posed by the SAHRC that “there are currently four CLOs”⁴⁴ but it is not clear whether this means that there are four CLOs or whether all four are members of a s21 company.

4.6.7 Operational team (“The Ops Team”)

Seven members of each village (14 members in total) were appointed to the Ops Team which works to execute most of the activities that involve Community members, for

.....

⁴¹ Mogalakwena Municipality, IDP.

.....

⁴² Anglo Platinum response of 8 August 2008, at para 16.

⁴³ *Idem*, at para 16.7.

⁴⁴ Bhadrish Daya Attorneys response of 31 July 2008, at para 5.13. a.

example arranging and facilitating community members to inspect the new site. The Ops Team works under the instruction of the Project Management and the CLOs.

4.6.8 The Task Team

The relocation of the communities at Motlhotlo was due to commence at the end of May 2007. At this time the relocation process was met with resistance and protest from some members of the community unhappy with some aspects of the relocation process. This faction of the community was united as the Motlhotlo Development Committee specifically concerned over the then current structures

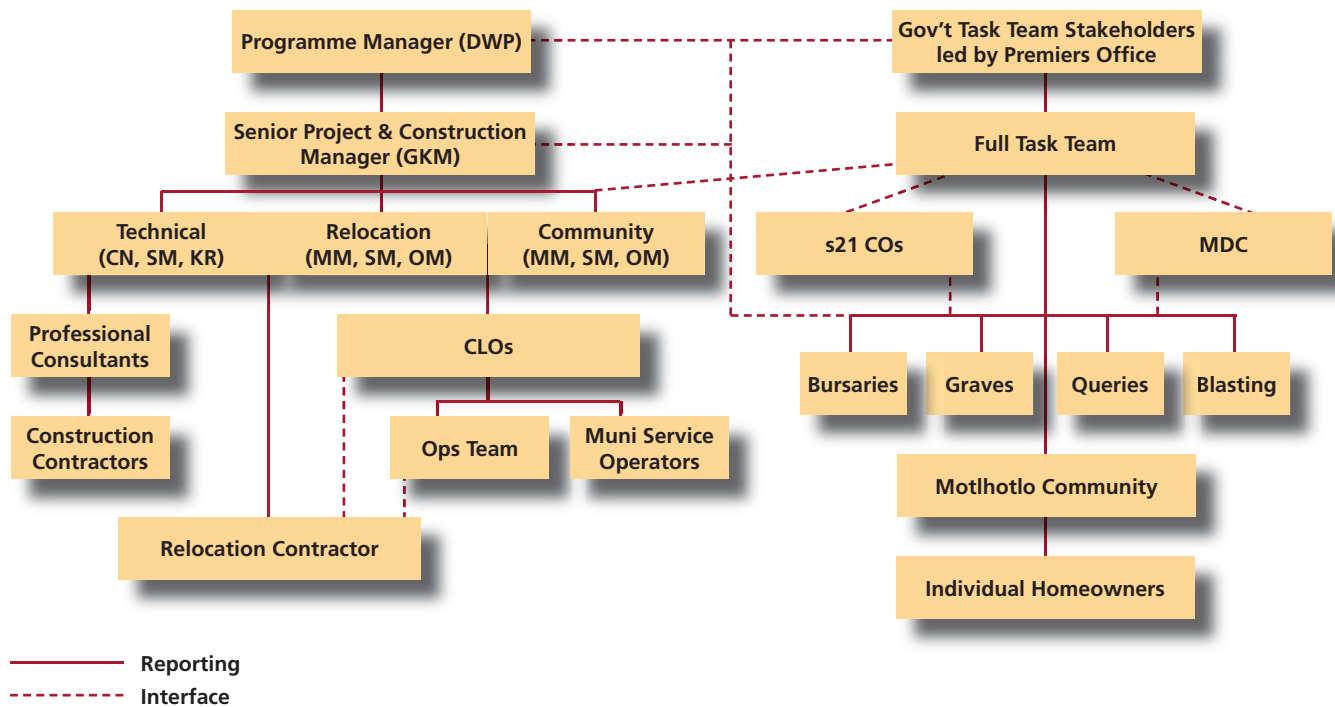
of community leadership formed as the s21 companies, and other perceived problems in the relocation process itself.

External stakeholders intervened to attempt to address these issues, and create resolution. These included Municipal Officials and Councillors, the Premier's Office and the National Council of Provinces. Through their mediation the s21 companies and the MDC agreed to establish a Task Team which would be made up of representatives from each faction as well as external stakeholders and would aim to address the perceived problems which the MDC had with the relocation process.⁴⁵

.....

⁴⁵ "Notes from Task Team meeting Aug 2007 Confidential" received from Anglo Platinum. Note: this structure and the following information concerning the Task Team was communicated feely and openly to the SAHRC for the first time at the Project Office at Armoede. It was thereafter described by various stakeholders including community sources. No content has been divulged from the documentation which had not been provided freely and openly, which was not already commonly known within the relevant communities and which had not been openly discussed by various stakeholders. Any privilege applying to such communication in the circumstances did not apply. The document is acknowledged for confirmatory purposes and no privileged or confidential content has been divulged. The document continues to constitute legally protected information and is therefore not in the public domain.

Fig 3 The Project Management and Community Leadership Structure after the formation of the Task Team⁴⁶



The ultimate aim of the Task Team was to resolve issues identified and concerns noted by the MDC in the relocation process in moving the process forward.

The short term objectives of the Task Team were the following:

- » Grave compensation and process explanation;
- » Ploughing fields compensation and process explanation;
- » Blasting compensation and process explanation;
- » Crack remediation;
- » Legal representatives;
- » Legal agreements – provision and explanation;
- » Incomplete structure compensation;
- » Joint venture agreement with construction contractor;

- » Construction and relocation sequence and programme;
- » Snagging process and green file / building plan queries;
- » Process of achieving financial compensation; and
- » Land for land / areas.

The long term objectives of the Task Team were the following:

- » Settling-in allowance;
- » Village infrastructure; and
- » Shares / equity in mine.⁴⁷

Several questions for clarification concerning the Task Team were also directed by the SAHRC to the Mogalakwena Municipality. These included the role and responsibility of the Municipality within the Task Team. Although no written response was received from the

⁴⁶ "Notes from Task Team meeting Aug 2007 Confidential" received from Anglo Platinum.

⁴⁷ "Notes from Task Team meeting Aug 2007 Confidential" received from Anglo Platinum.

Municipality, telephonic discussions with the Municipal Manager of the Mogalakwena Municipality indicated that role of the Municipality was limited.⁴⁸

4.6.9 Project management and professional consultants

The Project Managers are mandated to manage every aspect of the relocation project to ensure that the project is delivered in accordance with the agreements signed between the community and PPL. Professional consultants have been appointed under the Project Managers to provide technical expertise required to successfully deliver on these signed agreements. These include the following:

- » Grave removals: Tshepho Funerals Undertakers;
- » Focus Project Management/Hararo PM joint venture (formation and constitution of the relocation committees for Motlhotlo had been undertaken prior to the appointment of the project managers);
- » Village construction: contract awarded to Group-5 Housing in joint venture with the community on 5 September 2005;
- » Architect: TPC in joint venture with Prism Architects;
- » Civil and structural engineers: P D Naidoo and Associates in joint venture with Tri-M;
- » Town planners: Maxim Planning Solutions in joint venture with Mahapa and Associates;
- » Electrical engineers: Lufuno Mphaphuli and Associates in joint venture with Eksteen and Le Roux;
- » Land surveyors: Maesela professional land surveyors;
- » Quantity surveyors: Turner and Townsend in joint venture with BA Hassim; and
- » EIA: Wates, Meiring and Barnard and Golder Associates Africa (Ptd) Limited.

⁴⁸ Telephonic discussion between Ms C Jesseman of the SAHRC and Mr Makobe, the Municipal Manager of the Mogalakwena Municipality on 14 August 2008.

4.7 Matters *sub judice*

It is important to note that there are a variety of issues which are being dealt with through legal proceedings before the High Court of South Africa (Transvaal Provincial Division). *Malose Johannes Masubelele et al v. Potgietersrust Platinums Ltd et al* (Case No. 13499/06, TPD) deals with three key issues:

- » The allegation that community resolutions undertaken at Motlhotlo on 18 October 2002 do not comply with the requirements set out in the Interim Protection of Informal Land Rights Act and as such do not constitute a lawful decision on the part of each of the communities to dispose of the communities informal rights to the land nor do the resolutions amount to a lawful and binding agreement between the community and the mine;
- » The allegation that community resolutions detailed above do not amount to consent on the part of any individual applicant to be deprived of his or her informal rights to land; and
- » The allegation by the Applicants that many members of the community were denied the right to negotiate the terms of their relocation or to have the terms determined by arbitration.

The SAHRC is, therefore, unable to comment on the legality of the abovementioned matters before the Court. However, within its mandate, the SAHRC is concerned with matters beyond legal compliance in attempting to understand the root cause of alleged human rights violations and the human rights context of what has developed into legal issues, however, they may be decided by the Courts.

4.8 Issue analysis

Issues have been separated into

The Symptoms

- » Urgent and short term matters: highlighting issues that could present immediate harm to affected communities and as such pose potential human rights violations and therefore need to be addressed with urgency. These issues have been used as indicators for more systemic institutional and relationship based issues; and
- » Medium term matters: also used as indicators but need to be addressed in the more medium term.

The Sources

- » Institutional processes: focusing on systemic process based issues; and
- » Relationships: focusing on relationship based issues.

Throughout this report each issue will be analysed according to a uniform structure as detailed below.

Fig 4 Structure for analysing issues

- » **Observations**
 - This will detail the issue of potential concern which has been identified
- » **Explanation**
 - This will detail how the information on the observations were gathered
- » **Regulatory framework**
 - Human rights context – reference to specific right, which may have been affected
 - Domestic legal context – reference to specific SA legislation potentially affected
 - Norms and standards – reference to international best practice, company policy
- » **Steps already taken to address the issue (if applicable)**
 - To also include outstanding issues yet to be addressed
- » **Recommendations**
 - This will detail recommendations made in the context of the investigation and outline practical next steps
 - This will reference
 - * International best practice, company policy
 - * Domestic best practice
 - * Role of the SAHRC if appropriate in carrying out these recommendations
 - * Detail which stakeholders are involved (company, community, civil society, NGOs, MTA, MM)

Relevant photographs were taken by the SAHRC and inserted to illustrate key points. Where photographs were taken of individuals, permission was sought prior to taking the photographs.

5.1 Urgent and short term matters

In trying to gain a better understanding of the sources of potential human rights violations, the SAHRC first made an assessment of issues, which posed short term and immediate harm to affected communities. These issues were identified as aforesaid during initial and follow up site visits and through documentation analysis. The SAHRC then analysed these issues as **symptoms** which in conjunction with an analysis of key stakeholder relationships indicated more systemic institutional problems. By identifying these institutional **source** problems, the SAHRC believes they can be directly linked to the potential human rights violations presented in this initial chapter as well as having the potential to cause additional human rights violations.

The SAHRC hopes through this approach of linking potential human rights symptoms to institutional source problems that it will engender a deeper and more constructive understanding of the failures and successes in the project and create learning to prevent such potential violations emerging in the future.

Issues investigated included:

- » lack of potable water;
- » lack of adequate sanitation;
- » lack of access to electricity;
- » environmental pollution;
- » insufficient agricultural land to sustain subsistence therefore threatening food security;
- » negative perceptions over the award of compensation;
- » limited access to education; and
- » potential lack of cultural sensitivity during grave relocation.

5.1.1 Water

5.1.1.1 Observations

The SAHRC is concerned over the perceptions of poor quality and quantity of water supplied by both PPL and the Municipality at Motlhotlo and Old Ga-Pila.

The SAHRC is concerned at how allegations of poor water quality within the village of Ga-Molekane will be addressed by both the Mogalakwena Municipality and PPL.

5.1.1.2 Explanations

5.1.1.2.1 *Motlhotlo*

During the initial site visit to Motlhotlo, residual communities raised concerns over the durability and quality of water supplies.

Potable water

The community at Motlhotlo had originally abstracted water from 3 boreholes, 2 powered by Eskom electricity and one by windmill. Recent PPL mine expansion has meant that one of the Eskom powered boreholes has been absorbed by the mine area; however, PPL has assured access to the community, though this does not appear to have been taken up. Additional information provided by PPL contradicted this by asserting that the borehole within the concession was dismantled in November/ December 2007 having little yield. PPL maintain that the second borehole is still operational and has a yield of 2.85l/s. Anecdotal evidence suggests that the windmill borehole is not operational, and that there is at present no running water in the community. In a recent communication for the purposes of clarification a member of the MRRC again confirmed that two boreholes are within the

fence of the PPL mine and that the windmill is not functioning. This was then verified on site by delegates of the SAHRC on 23 September 2008.

The SAHRC requested further clarification from Anglo Platinum as to whether and how the community is informed about their access to the two remaining Department of Water Affairs Boreholes. Anglo Platinum responded that these boreholes are outside the perimeter fence of PPL and to "the best of [Anglo Platinum's]... knowledge the community is aware that such boreholes are accessible to them."⁴⁹ This does not, however, speak to the functionality of the boreholes as raised in the paragraph above. This requires further investigation.

Despite asserting that the operation of these boreholes for the residual community at Motlhotlo is the responsibility of the Municipality, PPL has been providing the community with additional potable water at 2 814 litres per month for the 145 households yet to relocate, which equates to 19.4 litres per household per month.⁵⁰ Community members interviewed stated that potable water is delivered three times per week. The Municipality is committed to providing 6 000 litres per month free of charge; however, evidence to assert that this is occurring has not been ascertained. Community members assert that there are insufficient water supplies, and the commitment made by PPL to provide potable water is not being consistently fulfilled.

There is a perception amongst the residual community in Old Motlhotlo that the water delivered by PPL is not clean and that PPL in collaboration with the local municipality have

⁴⁹ KHL Attorneys, Anglo Platinum response to request for information by SAHRC, 8 August 2008, at para 4.4 (hereinafter referred to as "Anglo Platinum response of 8 August 2008").

⁵⁰ Communication with Resettlement Project Manager, 7 April 2008.

cut supplies to force people to resettle. To exacerbate this situation community members further claimed that a mobile clinic originally provided by PPL has since been disbanded. In response to a request for further clarification Anglo Platinum stated that a "new permanent clinic has been constructed at the new Motlhotlo Village and has been operational since June 2008", and directed the SAHRC to the Department of Health concerning any mobile clinic which may still be provided by them in the Old Motlhotlo.⁵¹

During the site visit to Motlhotlo on 10 July 2008, community members queried the process by which a member of the s21 company must sign for the delivery of potable water despite the fact that he or she is never present in the community.

Upon request by the SAHRC, Anglo Platinum has provided copies of various signed receipts for water.⁵² It is not clear from some of the signatures who the appropriate signatory is and this requires further clarification by the community. Some receipts refer to the number of "loads", but there is no verification of the amount of water delivered beyond this description. Anglo Platinum also provided a schedule of water deliveries from 24/05/08 to 09/06/08.⁵³ It appears from this schedule that water deliveries are not always regular and therefore not predictable, with a number of loads being given on occasion. Furthermore, Seritarita School received only one delivery of water during this period according to this schedule, on 04/06/08, and Podile Primary School received its first delivery of water during this period on 09/06/08. There may be a myriad of explanations for the aforementioned and while this requires clarification, it also serves to illustrate that schedules representing samples

⁵¹ Anglo Platinum response of 8 August 2008, at para 11.2.

⁵² Anglo Platinum response of 8 August 2008, Annexure A.

⁵³ *Ibid.*

provide exactly that – a sample neither proving all relevant allegations nor necessarily refuting them.

In a recent communication for the purposes of confirmation a member of the MRRC indicated that one of two members of the MRRC now sign for water deliveries and that they make arrangements for another member of the community to sign for the receipt of water if they are not available.

5.1.1.2.2 New Motlhotlo village (Armoede and Rooibokfontein)

There is insufficient information available to the SAHRC concerning the quality and quantity of water at the relocated sites.

5.1.1.2.3 Old Ga-Pila

During consultation with the residual community at Old Ga-Pila on 10 July 2008, community members raised serious concerns over their access to potable water. Traditionally the community had access to water from a local reservoir which has since been buried by the mine dump. Community members further claim that boreholes have been removed by the development of the mine. Since this time the community maintain that Anglo Platinum has supplied potable water to both the primary school and the secondary school as requested by the Mogalakwena Municipality.

Lonmin, also active in the area, have installed wind generated water pumps in the Old Ga-Pila village, however, without wind they are rendered useless.

Anglo Platinum maintains that they have never been responsible for providing water to the

Old Ga-Pila village either before or after the relocation. Anglo Platinum maintains that this has always been the function and responsibility of the Municipality. They further maintain that recently the Municipality has brought in water to the surrounding areas.⁵⁴

The SAHRC is concerned over a potential lack of capacity within the Mogalakwena Municipality to provide potable water to the community.

Further clarification is required from the Mogalakwena Municipality as to whether there is a sustained and adequate supply of water to the community as well as the quality of the water. In response to clarification sought by the SAHRC, Anglo Platinum confirmed that this was the responsibility of the Mogalakwena Municipality but that it understood that “the community is drawing drinking water from a borehole in order to meet their household needs.”⁵⁵

5.1.1.2.4 Ga-Molekane

In late 2007 ActionAid, commissioned an independent water expert to conduct sampling in, amongst other places, Ga-Molekane village at the primary school, the secondary school and at the community drinking tap. The sampling found that water at these sites was unfit for human consumption. ActionAid maintain that “high levels of nitrate detected at a primary school at one of the primary schools in one of the villages originate from blasting and other activities at the neighbouring platinum mine”.⁵⁶

Anglo Platinum has rejected this claim, maintaining that “from our own sampling conducted...we confirm that elevated levels of nitrate exist at Langalilbalele High School

⁵⁴ Anglo Platinum response to urgent/ short term matters, 25 April 2008.

⁵⁵ Anglo Platinum response of 8 August 2008, at para 8.2.

⁵⁶ *Precious Metal; The impact of Anglo Platinum on poor communities in Limpopo, South Africa* (March 2008), p18.



(Ga-Molekane). Existing scientific evidence suggests that the most likely possible source of the nitrate pollution identified is pit latrines at the school, which are located too close to the borehole.⁵⁷ PPL thereafter commissioned a geo-hydrological assessment which as above has indicated that the mine is not the source of the pollution. Techniques for assessment have included geo-hydrological modelling and the interpretation of expanded Durav and Stiff diagrams. PPL were, however, keen to exhaust all relevant testing methodologies and have therefore commissioned the Institute for Geo-hydrological Studies at the University of the Free State, in conjunction with the US Geo-hydrological Survey to extract water samples and to conduct their own assessment and models including isotopic testing, the latter of which were expected to provide the most reliable results. In the interim PPL is providing drinking water to the Mogalakwena Municipality to supply to the schools and the community for which it is covering all costs.⁵⁸

Anglo Platinum has further asserted that in terms of the Water Services Act, the Mogalakwena Municipality are responsible for water testing and water quality. PPL maintains that it is interacting with the Municipality on an ongoing basis. A meeting between PPL, the Municipality and ActionAid was planned for 10 April 2008 to discuss the process going forward. One allegation levelled asserts that when community representatives asked to attend the meeting was disbanded. No new meeting appears to have been planned, nor have plans been outlined as to the outcome of the water testing in terms of responsibility.

Both the Mogalakwena Municipality and PPL are undertaking independent samples from the same sample points referred to in ActionAid’s report.

⁵⁷ *The Facts*, p1.
⁵⁸ KHL Attorneys, Anglo Platinum response to request for information by SAHRC, 6 June 2008, at para 9 (hereinafter referred to as “Anglo Platinum response of 6 June 2008”).

5.1.1.3 Regulatory framework

Human Rights Context: the South African Constitution

Section 24 *“Everyone has the right –*
 (a) *to an environment that is not harmful to their health or wellbeing; and*
 (b) *to have the environment protected, for the benefit of present and future generations...”*

Section 27 (1) *“Everyone has the right to have access to -*
 ...*(b) Sufficient food and water...”*

Access to potable water is fundamental to the sustainability of a community. If such access is inhibited in any way it could present serious health risks and undermine the ability of the community to subsist on the land. If access to water in this case is either denied, or not supported, there is a risk that section 27 could be violated.

International human rights context

Article 14(2)(h) of the Convention on the Elimination of all Forms of Discrimination Against Women⁵⁹ – *“States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right... (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”*

Article 24(2)(c) of the Convention on the Rights of the Child⁶⁰ - *“2. States Parties shall pursue full*

⁵⁹ G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force 3 September 1981.
⁶⁰ G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 2 September 1990.



implementation of this right and, in particular, shall take appropriate measures...(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution..."

Article 14(2)(c) of the African Charter on the Rights and Welfare of the Child⁶¹ – “ States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures...(c) to ensure the provision of adequate nutrition and safe drinking water...” Article 11 of the International Covenant on Economic, Social and Cultural Rights⁶² concerning food, housing and living conditions – “(1) The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent. (2) The States Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and

utilization of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.”

General Comment 15 of the United Nations Committee on Economic, Social and Cultural Rights on the Right to Water⁶³ – “the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living”.

Programme of Action of the 1994 Cairo, Conference on Population and Development, Principle 2 – “Countries should ensure that all individuals are given the opportunity to make the most of their potential. They have the right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and sanitation.”⁶⁴

The Habitat Agenda, adopted in the framework of the Second United Nations Conference on Human Settlements (Habitat II) held in Istanbul in 1996, Principle 11 – “Everyone has the right to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, water and sanitation, and to the continuous improvement of living conditions.”⁶⁵

Domestic legislation

Water Services Act, 108 of 1997

Preamble – “RECOGNISING the rights of access to basic water supply and basic sanitation necessary to ensure sufficient water and an environment not harmful to health or well-

⁶¹ OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

⁶² G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976.

⁶³ UN doc.E/C.12/2002/11(2003).

⁶⁴ Available at: http://www.unfpa.org/icpd/icpd_poa.htm.

⁶⁵ The Habitat Agenda Goals and Principles, Commitments and the Global Plan of Action, available at: <http://www.unhabitat.org/content.asp?ID=1176&catid=10&typeid=24&subMenuId=0>.

being... ACKNOWLEDGING that although municipalities have authority to administer water supply services and sanitation services, all spheres of Government have a duty, within the limits of physical and financial feasibility, to work towards this object..”

Section 11 – *Duty to provide access to water services: “(1) Every water services authority has a duty to all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services.”*

Chapter VIII – *Monitoring and Intervention*

5.1.1.4 Steps already taken to address the issue

In response to the SAHRC’s request for further clarifications Anglo Platinum stated the following:

- » The Mine Manager is in contact with the Municipality and the Safety, Health and Environmental Manager is responsible for surface and ground water sampling. Anglo Platinum is also engaged with the Department of Water Affairs and Forestry (“DWAF”);⁶⁶
- » The isotope results of the tests conducted by the Institute for Groundwater Studies would be made available to the SAHRC after discussion thereof within the first three weeks of August 2008 with the Municipality, DWAF and the communities concerned. This report is discussed further below.⁶⁷

A representative of the Municipality indicated the following telephonically:

.....

⁶⁶ Anglo Platinum response of 8 August 2008, at para 4.2.

⁶⁷ *Ibid.*

- » That it has undertaken extensive borehole drilling in the Ga-Molekane area and that it will provide the SAHRC with the relevant documentation (not as yet received at time of report writing);⁶⁸ and
- » The Municipality did not indicate when an attempt would be made to reconvene the meeting between the stakeholders and Anglo Platinum indicated that it is up to the Municipality to reconvene the meeting.⁶⁹

On 4 September 2008 the SAHRC received the “Summary Report: A groundwater review at Anglo Platinum’s RPM-Mogalkwena Section to determine if the mining activities are the cause of the elevated nitrates in the Ga-Molekana and Old Ga-Pila communities” from Anglo Platinum.⁷⁰ It was not stated whether this IGS Report has been disseminated amongst and discussed with stakeholders including the affected communities. The IGS Report contains complex analysis which needs to be explained to stakeholders and the offer was made by Anglo Platinum for the IGS scientists to provide this explanation to the SAHRC. It is hoped that this offer will be extended to other stakeholders and especially the affected communities.

Numerous conclusions were drawn in the report, which further states that there are outstanding questions, the results still need to be finalised “together with recommended actions for the way forward.”⁷¹ In drawing a comparison with the ActionAid water testing undertaken, the IGS Report states the following:

“...data shows that the elevated nitrates in Ga-Molekana are not due to contamination from mining explosives (activities). The comparison also suggests that at (Old) Ga-Pila, there are

.....

⁶⁸ Telephonic discussion between Ms C Jesseman of the SAHRC and Mr Makobe of the Municipality on 14 August 2008.

⁶⁹ Anglo Platinum response of 8 August 2008, at para 4.3.

⁷⁰ B. Usher and J. Pretorius, Institute for Groundwater Studies, University of the Free State (August 2008) (hereinafter referred to as “the IGS Report”).

⁷¹ *Ibid.*, p15.

many other potential sources of nitrate but that mining activities could be contributing to unacceptable water quality around the Ga-Pila seep. Further assessments should be done to investigate this.

From the field work, it was observed that there are several other sources of water for use by the community. The sources observed included several hand pumps on boreholes within private properties, rainwater tanks, water tanks filled with mobile water tankers and a reticulation system with standpipes of reconstruction and development programme (RDP) standards. It is suggested to assess the overall quality of the water resources available to the community, a complete investigation of all these resources be made. Such an investigation did, however, not fall within the brief of this study."

Anglo Platinum further reiterates in the covering letter accompanying the IGS Report that "[m]ost nitrate pollution of groundwater in the area is caused by factors commonly associated with long-term agricultural and grazing activity and sustained human habitation which pre-date platinum mining operations."

5.1.1.5 Recommendations

5.1.1.5.1 Motlhotlo

The SAHRC recommends that:

- » The community nominates specific individuals who may alternately, depending upon their availability, sign to verify the delivery of potable water to the community.

5.1.1.5.2 Ga-Molekane

The SAHRC recommends that:

- » All parties concerned with the water testing at Ga-Molekane should dispense with discussions on the responsibility for water

provision and create bilateral engagement to create a way forward to ensure that the communities at Ga-Molekane are not deprived of potable water in the longer term.

- » The outcome of water quality tests conducted by the Institute for Groundwater Studies should be disseminated to all stakeholders as well as the SAHRC for further consideration.

5.1.1.5.3 General

The SAHRC recommends that:

- » Bilateral engagements should be developed between PPL and the Mogalakwena Municipality to ensure the continued access to water for all communities, both those that have relocated and those that are resisting relocation. Access to water must not depend on the community decision to relocate.
- » PPL should engage with the Mogalakwena Municipality to better understand their ability to undertake the services provided for under the relevant Service Level Agreements.
- » The water deliveries be made regularly and reliably and be made known to communities so that their own individual water usage can be planned and self regulated. This is not only necessary but also empowering.
- » The recommended actions for the way forward referred to in the IGS Report be discussed with all stakeholders, most importantly with affected communities, and that Anglo Platinum, the Municipality and the affected communities discuss and agree as to whether and how such measures can be implemented.
- » The outstanding matters in the IGS Report be clarified and the complete investigation of all the water resources be undertaken as proposed in order to seek a more holistic solution within the area as a whole.

5.1.2 Sanitation

5.1.2.1 Observations

5.1.2.1.1 *New Motlhotlo village (Rooibokfontein and Armoede)*

Resettled communities at the host sites of Rooibokfontein and Armoede were provided with Enviroloops which community members claim do not function properly, creating potential sanitation and health risks.

5.1.2.2 Explanation

The community at Rooibokfontein and Armoede relocation sites have been provided with Enviroloops. Both water availability and soil conditions preclude waterborne sewerage and conventional dry on site sanitation systems such as ventilated pit latrines. Enviroloops were therefore chosen as the standard for sanitation provision in the new communities. The Enviroloo is a dry sanitation system which does not use chemicals for treatment. They are meant to be odourless and do not attract flies thereby preventing the spread of disease. Furthermore the system purports not to allow for seepage into groundwater preventing potential groundwater pollution.

During the initial site visit dated the 3 – 4 April 2008 the SAHRC delegation observed portable toilets being used indicating problems with these Enviroloops.

The PPL relocation project manager Greg Morris maintained that there had been issues surrounding the functioning of the Enviroloops, but PPL indicated that they are currently working with the supplier to address these. Community members complain that the toilets become dirty and smell offensive in the absence of a water flush system or an unobstructed passage for waste causing both nuisance and potential health problems.



Enviroloops lining the street in Rooibokfontein

5.1.2.3 Regulatory framework

Human Rights context: the South African Constitution

See paragraph 5.1.1.3 above as some international human rights instruments deal with water, sanitation, housing and living environment.

Section 26 (1) *“Everyone has the right to have access to adequate housing.”*

Section 24 *“Everyone has the right - (a) to an environment that is not harmful to their health or well being...”*

The sanitary and health implications of this issue have the potential to affect these two key rights enshrined in the Bill of Rights. Progressive means are being taken by PPL to sustainably address the issue, however, and if resolution is achieved in a timely manner then the likelihood of any violation is slim.

Domestic legislation

See paragraph 5.1.1.3 above as sanitation is also dealt with under the Water Services Act, 108 of 1997.

5.1.2.4 Steps already taken to address the issue

PPL have taken several steps to address this problem:

- » Instruction to households on how to clean the toilet bowl;
- » Employment of community members to clean toilet bowls and conveyors thoroughly; and
- » Emptying of toilet containers using a vacuum pump (“honey sucker”).

There have furthermore been several counts of mechanical failure of the flush mechanism and or toilet conveyor. CLOs are currently recording all failure incidents and the suppliers are working on toilet modifications.

In the meantime PPL is sponsoring a “honey sucker” process to empty and clean some of the fuller units. The portable toilets were therefore being used as an interim measure only.⁷²

In response to queries raised over the efficacy and safety of the Envirolaos Anglo Platinum has asserted that various alternative solutions to what they maintain are both real and perceived problems with Envirolaos have been investigated over the last few months. They maintain that the more viable of these alternative solutions have been implemented on the site to test their effectiveness as well as the community’s level of acceptance and preference.

They maintain that meetings were recently held with the MDC and also the s21 companies to discuss the alternative solutions and to obtain feedback from the community. Current indications are that the community is split as

to what the preferred solution would be and a poll is currently being organised amongst all homeowners. They reiterated that the chemical toilets were a temporary back-up solution pending the finalisation of a more permanent solution.

They further maintained that it was intended that the Envirolaos would be upgraded to a full water-borne sewage system as soon as additional bulk water was made available in the area. PPL further maintain that they are bearing the cost of cleaning of these toilets.

Alternatives included changing the Envirolao into a contained pit type toilet in case the community refuse to accept the Envirolao system.

In response to the SAHRC’s request for further clarifications Anglo Platinum stated the following:

- » A poll of homeowners concerning this issue was conducted between 30 June 2008 and 8 July 2008;⁷³ and
- » 66% of the homeowners polled in Ga-Sekhaolelo were in favour of increased servicing of the Envirolaos as opposed to conversion to pit latrines. This will be implemented in Ga-Sekhaolelo within “the coming weeks” and the community in Ga-Puka would also be engaged further within this period (the response being dated 8 August 2008).⁷⁴

However, the SAHRC requested information from the Municipality as to how various services are delivered, including sewage.⁷⁵

The Municipality indicated the following telephonically:

⁷² Anglo Platinum response of 6 June 2008, at para 14.

⁷³ Anglo Platinum response of 8 August 2008, at para 6.1.

⁷⁴ *Idem*, at paras 6. and 6.3.

⁷⁵ SAHRC request to Mogalakwena Municipality, 25 July 2008.

- » That the sewage produced by the Envirolloos is not compatible with the sewage of the Municipality;
- » The sewage can also not be taken to the Municipal dumping site;
- » That the Municipality were aware that similar problems had been experienced elsewhere with the Envirolloos; and
- » That the Municipality would provide the SAHRC with their technical report to explain the above (not as yet received at time of report writing).⁷⁶

5.1.2.5 Recommendations

The SAHRC recommends that:

- » PPL continues to make the process as participatory as possible and keeps affected members of the community updated on all stages of the development process.
- » Affected community members continue to report sanitation problems to PPL and take steps to learn how to use sanitation systems to ensure that they function effectively.
- » The Mogalakwena Municipality should be engaged by PPL where the choice of sanitary system impacts upon the services which are required to be delivered by the Municipality and in order to determine the compatibility of the chosen system with municipal systems as well as the capacity of the Municipality to carry out the services requested.

5.1.3 Environment (including mine blasting)

5.1.3.1 Observations

As one of the key motivating factors for the relocation, the SAHRC is concerned that the negative environmental impacts on

surrounding communities caused by blasting at the mine may not be fully addressed.



Blasting at the PPL mine in July 2008

5.1.3.2 Explanation

5.1.3.2.1 Ga-Chaba

Currently the community at Ga-Chaba maintain that they are being negatively impacted upon as a result of the nearby blasting. During the blasting community members claim that no process is in place to move them out of the community. However, they further maintain that the nearby Skimming community (comprised of mine workers) are moved during the blasting (this has not as yet been explored further by the SAHRC and requires verification by Anglo Platinum). There is a perception in the community that this is posing a direct risk to the village. PPL have, however, implemented management controls including a protection berm constructed to manage noise and dust pollution. PPL maintain that in terms of the Environmental Impact Assessment the village of Ga-Chaba will only be impacted on in 15 years time. However, there is no information available to outline what these impacts might be and whether it will necessitate the relocation of the community.⁷⁷ Further assessments may commence in 2015.⁷⁸

.....

⁷⁶ Telephonic discussion between Ms C Jesseman of the SAHRC and Mr Makobe of the Municipality on 14 August 2008.

.....

⁷⁷ Anglo Platinum response of 6 June 2008, at para 28.
⁷⁸ Anglo Platinum response of 8 August 2008, at para 9.4.



View of a mine dump adjacent to Ga-Chaba

5.1.3.2.2 Motlhotlo

In contrast to the community members at Ga-Chaba, members of the residual community at Motlhotlo are apparently being moved during the mine blasting. Community members interviewed during the April and July 2008 site visits of the SAHRC maintained that they moved from the site and during the time that they are away security personnel watch their houses. After the blasting is finished these community members are returned to their homes. However, on 23 September 2008 delegates of the SAHRC were on site at Old Motlhotlo while blasting took place. The delegates of the Polokwane office of the SAHRC confirmed that residents in the area were not moved during the blasting and that being present during the blasting was a “terrible” experience. The inconsistency in the practice of moving residents during blasting requires clarification.

5.1.3.3 Regulatory framework

Human Rights context: the South African Constitution

Section 24 “Everyone has the right –

- a) to an environment that is not harmful to their health or well-being; and
- b) to have the environment protected, for the benefit of the present and future

generations, through reasonable legislative and other measures that –

- i) prevent pollution and ecological degradation;
- ii) promote conservation; and
- iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

PPL have undertaken a series of environmental impact assessments to assist them in better understanding the potentially negative impacts on the local communities as a result of the mine’s activities including mine blasting. If management controls implemented to mitigate these risks prove insufficient to prevent environmental damage and cause the kind of pollution described by community members then there is a potential that the blasting could contravene section 24 as detailed above.

Section 26 (1) “Everyone has the right to have access to adequate housing.”

As noted in Ga-Chaba with respect to possible damage caused by blasting, this could undermine the physical integrity of housing and there exists the potential that such blasting could lead to the contravention of section 26. In April 2007 the United Nations Special Rapporteur on Adequate Housing visited South Africa for the purpose of determining the extent to which the right to adequate housing is being realised. The Special Rapporteur made the following relevant comments and recommendations:

“The Special Rapporteur visited the Limpopo Province where mining companies have large projects which have required relocation of several communities. He believes that such projects should not be undertaken at the expense of the human rights of the individuals or the environment, resulting in contamination

of water, forced displacements or evictions, or destruction of livelihoods of the people.”⁷⁹

“101. The Special Rapporteur urges the authorities to ensure that mining projects are in line with national regulations, and to assess the impact of mining activity on local populations. In situations such as in Limpopo Province, where there appear to be serious irregularities and human rights violations, the lease agreement should be reviewed.”⁸⁰

Domestic legislation

The principal Acts are the National Environmental Management Act, 107 of 1998, the Environment Conservation Act, 73 of 1989, and the Mineral and Petroleum Resources Development Act, 28 of 2002 (“MPRDA”).

The National Health Act, 61 of 2003, also has relevance regarding environmental conditions which may constitute a health hazard, providing environmental pollution control services, investigating violations of section 24(a) of the Bill of Rights and various other matters.

International best practice

International best practice on environmental management is extremely well established. Addressing pollution and community health in particular are IFC Performance Standards 3 and 4:

- » International Performance Standard 3 addresses Pollution Prevention and Abatement; and
- » Performance Standard 4 addresses Community Health, Safety and Security.⁸¹



⁷⁹ Milton Kothari, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, *Mission to South Africa*, AHRC/7/16/Add.3 (29 February 2008), p2.

⁸⁰ *Idem*, p28.

⁸¹ International Finance Corporation, Performance Standard 5 - “Land Acquisition and Involuntary Resettlement”.

Anglo Platinum standards

On its website Anglo Platinum maintains that: “The Group is committed to sustaining a safe and healthy environment for all its employees and members of communities with which it interacts. The Group has an integrated policy with specific environmental aims and management principles. Its aims are:

- » To conserve environmental resources.
- » To prevent or minimise adverse impacts arising from the Group’s operations.
- » To demonstrate active stewardship of land and biodiversity.”⁸²

5.1.3.4 Steps already taken

PPL have already taken positive and encouraging steps to mitigate the impact that blasting has on the local environment. Thorough environmental impact assessments had led to the implementation of management controls in the Ga-Chaba village to lessen and mitigate these potentially negative impacts.

However, community assertions give the indication that despite these measures community members are still living in polluted environments. Furthermore as far as the investigation of the SAHRC has been able to ascertain there are limited channels through which community members are able to access redress for damage to their property as a result of the blasting. This requires further investigation and clarification by Anglo Platinum.



⁸² Anglo Platinum, “Environmental Impacts”, <http://www.angloplatinum.com/> [accessed on 29 July 2008].

In response to the SAHRC's request for further clarifications Anglo Platinum stated the following:

- » The environmental management controls were communicated during the public consultation process to the community;⁸³ and
- » Anglo Platinum has established a "liaison forum with the community where concerns can be raised" and there is a "morning air and noise monitoring programme in place".⁸⁴

5.1.3.5 Recommendations

Without access to the monitoring process deployed by PPL, aside from what is stated above and in the Environmental Management Programme Report ("EMPR"), it is impossible for the SAHRC to make clear recommendations over the way in which PPL manages developing environmental issues such as these. The SAHRC would expect that PPL have monitoring controls in place to assess the potential for negative impacts to develop and thereby mitigate them. Anglo Platinum has referred the SAHRC to their EMPR for further management controls.⁸⁵

What concerns the SAHRC is the possible lack of an effective grievance redress mechanism. Reference is made to "liaison forum" above, but this was not mentioned by the community themselves and it is not clear when this was established. Further information is required in order to determine whether there is in fact adequate open communication between the community and the project sponsor itself. The SAHRC is not aware of the specific functioning of the "liaison forum" and therefore cannot make specific recommendations concerning whether or not there are options for the community to alert the company to the fact

⁸³ Anglo Platinum response of 8 August 2008, at para 9.2.

⁸⁴ *Idem*, at para 9.3.

⁸⁵ *Idem*, at para 9.1.

that the management controls are potentially not functioning as intended.

The SAHRC therefore recommends that:

- » PPL demonstrate its ability to constantly monitor the impacts of mining activities on surrounding communities and illustrate how this monitoring is used in conjunction with the grievance redress mechanism to ensure that any potentially negative impacts of the mine both from PPL's and the community's perspective are addressed promptly.

In the interim the SAHRC recommends that:

- » PPL implement a process by which all community members are moved from the area during blasting to not only appease the potentially real risk posed to individuals from the blasting itself, but to address the perception of that risk felt in many communities in the area. Moving the community members at Ga-Chaba during the blasting would also ensure that those community members no longer feel isolated from the protection, which PPL are demonstrably awarding members of surrounding communities, and in particular the Skimming community comprised of mine workers (this is a claim by the community and needs to be verified by PPL).

The SAHRC further recommends that:

- » PPL adhere to the Anglo Platinum commitment "to prevent or minimise adverse impacts arising from the Group's operations"⁸⁶; and
- » PPL inform the communities as to their long term plans for mining in the area. It is an apparent commercial reality that mining is

⁸⁶ Anglo Platinum, "Environmental Impacts", <http://www.angloplatinum.com/> [accessed on 29 July 2008].

undertaken in phases which are determined at various points in time. However, the very real and disruptive impact of this phasing of activities on communities and the accompanying uncertainty with which these communities live must also be realised and addressed.

5.1.4 Electricity

5.1.4.1 Observations

The SAHRC is concerned that residual communities are being denied access to electricity supplies.

5.1.4.2 Explanation

5.1.4.2.1 Old Ga-Pila

During initial consultation with the residual community at Old Ga-Pila, community members claimed that they have had no electricity supplies for the last 7 years. They maintain that the Mogalakwena Municipality supplied four packets of candles to each household between February and April 2008. However, the community claims that they have received no further support since then.



Disconnected electricity supply in Ga-Pila

5.1.4.3 Regulatory framework

Human Rights context: the South African Constitution

Section 26 (1) *“Everyone has the right to have access to adequate housing.”*



Soil erosion around house foundations in Sterkwater



Cracks in a house in Sterkwater

PPL does not bear explicit obligations to provide electricity to residual communities and there is no human right to electricity as such. However, in developing and signing Service

Level Agreements, PPL will have developed an understanding of the capacity of the Mogalakwena Municipality to undertake the provision of key services. It therefore has the potential to bear some of the responsibility in providing access to electricity.

5.1.4.4 Steps taken so far

The SAHRC is unaware of any steps taken so far by stakeholders to address this issue.

5.1.4.5 Recommendations

The SAHRC recommends that:

- » Stakeholders should obtain a clearer understanding of the needs of communities in terms of electricity. As above it recommends that both PPL and Mogalakwena Municipality engage in bilateral discussions to ensure that the needs of the most vulnerable are being met.

5.1.5 Grave removals

5.1.5.1 Observations

The SAHRC is concerned over the alleged lack of consent, and claims by the community of disrespect displayed during the process of moving graves from old communities to new sites as part of the broader relocation process. Communities affected by graveremovals include Motlhotlo, Sekuruwe and Ga-Molekane.



Cemetery in Motlhotlo

5.1.5.2 Explanation

5.1.5.2.1 Motlhotlo

Physical audits undertaken by professionals in consultation with the Motlhotlo community identified and recorded over 2 500 graves on the Overysel and Zwartfontein farms that would need to be relocated. Through consultation it was agreed with the community that these graves would be relocated to established graveyards on the Armoede and Rooibokfontein farms. It was maintained that the full cost of this relocation would be borne by the Project. In consultation it was agreed that a R1 500 “wake-fee” would be paid to each family in compensation for costs associated with ceremonial reburial. Some members of the community requested that this amount be increased to R2 000. However, this request was rejected by the Project asserting that the agreed amount of R1 500 already well exceeded the national average and increasing the amount further could create an unsustainable precedent. PPL were committed to complying with all legal regulations and permitting rules associated with the removal of graves through its contractor.⁸⁷

To date 1 508 graves have been relocated, with a further 40 to 50 outstanding graves that still need to be relocated from the Zwartfontein farm at old Ga-Puka. Next-of-kin are purportedly refusing to give consent for these removals.

PPL maintained that the next-of-kin are refusing to provide consent which has inhibited the removal of the final graves in Motlhotlo.⁸⁸

⁸⁷ Communication with PPL Relocation Project manager, 8 April 2008.

⁸⁸ Communication with PPL Relocation Project manager, 8 and 25 April 2008.



5.1.5.2.2 Ga-Chaba

In discussion with the community and with PPL there seem to be 4 graves in Ga-Chaba for which the community refused to grant permission for removal. These graves have apparently now been moved.⁸⁹

During community meetings with the Ga-Chaba village, residents claimed that PPL had started to use the gravesite at Ga-Chaba to bury non Ga-Chaba residents and thus contravening the customs and culture of the community. They further claim that graves were moved from the site which now houses the mine dump without the knowledge or consent of the community.

5.1.5.2.3 Sekuruwe

During the second site visit the SAHRC delegation discussed the issue of grave removals during a community meeting with members of the Sekuruwe village. They made several key allegations against the process by which graves were relocated from their community graveyard. The first assertion that they made was that community level consent was not achieved on the relocation of graves. Community members assert that although contact was made with relatives of the deceased, allegations were made suggesting that relatives were threatened by s21 company representatives if they refused to consent to the relocation of graves. In some cases community members assert that graves were moved without the consent of the family after which the family was asked to sign a consent form.

The second key allegation made was that during the process of grave relocation, graves were not respected and many bones from several different graves littered the area

around the old grave site, were collected and buried together, thus disrespecting the memory of the deceased and contravening the cultural norms of the community. Furthermore, human remains went missing during the relocation further undermining the process and creating a perception that some human remains relocated may not in fact belong to the deceased. They also maintain that in the new site, name tags had been removed from the graves preventing community members from identifying individual graves.

The community maintains that they approached both the local police and the Mapela Tribal Authority but received no means of redress from either party.

According to PPL there were 82 disputed graves being relocated from the Sekuruwe village. Information elicited from civil society groups working directly with the community indicates that the Sekuruwe community resisted the exhumation and relocation of these graves maintaining that in many cases they did not sign individual agreements with PPL.⁹⁰ Community members claim that agreements have been formulated and signed between PPL and the s21 companies agreeing to the exhumation and relocation of the graves to which the wider Sekuruwe community have not been a party. PPL refute these claims maintaining that individual consent has been obtained from either the next-of-kin of the deceased or an appointed representative. Despite the lack of clarity on the issue of consent, civil society organisations working in the area maintain that PPL contractors began the process of grave exhumation and relocation at 4am on the morning of 29 May 2008. Statements were made that some protesting community members were arrested and removed from the scene.

.....
⁸⁹ Meeting minutes between SAHRC and Anglo Platinum, 21 April 2008.

.....
⁹⁰ Communication between SAHRC and Jubilee South Africa, 29 May 2008.



In later communication (from 29 May to 2 June 2008) between the SAHRC and PPL to follow up on this matter, it was requested that PPL submit to the SAHRC a list of the 82 disputed graves which were at that point either being relocated or had already been relocated. It was requested that the list indicate the identified deceased as well as the next of kin with whom PPL or their subcontractor had concluded an individual agreement and from whom PPL had obtained consent for the grave removal and relocation. It was then suggested that from that point the next-of-kin or their demonstrably mandated representative would be able to access these agreements, thereby assuring protection of the individual right to privacy. At this point it was already acknowledged by various parties that it would be too late to halt the exhumation and relocation of all graves as the process was already underway.⁹¹

The SAHRC made a further written request for this information, and a list of the requested information was provided by Anglo Platinum under cover dated 8 August 2008.

5.1.5.3 Regulatory framework

Domestic legislation

National Heritage Resources Act, 25 of 1999, section 36 (3)(b): A permit is required from SAHRA to exhume and re-inter the contents of graves older than 60 years.

Human Rights framework: the South African Constitution

As one of the most sensitive and potentially contentious issues arising from the relocation of the Motlhotlo community and from the impacts on surrounding communities the potential human rights implications of the relocation of graves are manifold.

Section 10 *“Everyone has inherent dignity and the right to have their dignity respected and protected.”*

Claims that the lack of respect displayed for the remains of the deceased during the removal of the bones at Sekuruwe have the potential to contravene section 10 by depriving the deceased of their dignity after death.

Section 31 (1) *“Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –*

(a) to enjoy their culture, practise their religion and use their language...”

The sanctity of gravesites cannot be underestimated and under certain cultural practices may not be moved, and it is essential that customs be respected and customary rituals be allowed to be performed. The removal (and in some cases the disrespectful removal) of such sites has the potential therefore to contravene the communities’ right to enjoy their culture.

5.1.5.4 Steps already taken to address the issue

The SAHRC did attempt to mediate in this issue at the time of the grave removals, but as stated above, the information requested was not initially provided.

Civil society organisations including Jubilee South Africa have worked constantly alongside the community in trying to address the issues surrounding the relocation of graves.

A report was recently provided to the SAHRC by an archaeologist on the permit committee of the South African Heritage Resources

⁹¹ Correspondence between Anglo Platinum, 30 May to 2 June 2008.

Agency ("SAHRA").⁹² This report specifically examines the abovementioned grave removals at Sekuruwe and was also provided to Anglo Platinum, a community legal representative and ActionAid. Comments made in the report include the following:⁹³

- » A number of graves may have been illegally exhumed;
- » It is inappropriate to use a tractor-loader-backhoe (or TLB) to exhume certain graves, as was done in this case;
- » The undertaker should have ceased excavation once it had been discovered that a number of older graves had been uncovered, as opposed to continuing and thereby leaving human remains exposed on the ground and breaking older bones;
- » The lack of attention to detail caused damage and distress; and
- » Traditional headstones and grave contents were not removed for reburial.

At the time of report writing it had as yet not been confirmed to the SAHRC whether SAHRA would further investigate the matter or institute legal action.

5.1.5.5 Recommendations

5.1.5.5.1 Sekuruwe

The SAHRC recommends that:

- » In addition to the list of all graves relocated from the Sekuruwe area recently provided to the SAHRC as stated above, that the accompanying consent forms signed by the next-of-kin or mandated representatives of those next-of-kin also be provided.

- » The community members of Sekuruwe present to PPL and SAHRA a list of graves which it believes to have been moved without consent.
- » PPL engage with civil society organisations defending the interests of the community over this issue.
- » PPL audit the practices of its appointed undertaker.
- » PPL consult sufficiently with the broader Sekuruwe community to more accurately determine the ages of the graves.
- » Further information be provided by PPL concerning the precise nature of consultation between PPL and the affected communities relating to the removal of graves.
- » It be determined what processes are undertaken by Anglo Platinum or their subcontractors to ascertain the heritage status of graves.
- » It be determined whether communities were informed by Anglo Platinum or their subcontractors of any right to refuse consent to grave removal.
- » Grave sites be accurately mapped and removed graves accurately identified.
- » PPL continue to cooperate fully with SAHRA in any future enquires in this regard and communicate this openly to the community.

5.1.5.5.2 Ga-Chaba and Motlhotlo

The SAHRC recommends that PPL engage with the communities at Ga-Chaba and Motlhotlo to better explain by what processes graves were, or are to be, relocated, including addressing outstanding concerns around compensation and the identification of graves.

⁹² Dr Amanda Esterhuysen, Lecturer, School of Geography, Archaeology and Environmental Studies, University of the Witwatersrand, *Sekuruwe Report to SAHRA* (31 July 2008), by e-mail dated 7 August 2008.

⁹³ *Ibid*, p2.

5.1.6 Agricultural land and food security

5.1.6.1 Observations

The concerns surrounding agricultural land are related to concerns about compensation discussed in the following section and the two sections should be read together.

The SAHRC is concerned about the process of consultation surrounding the removal of and presentation of alternative agricultural land during the relocation process. Despite the demonstrable amount of consultation which took place during this relocation process the SAHRC is concerned that informed consent may not have been achieved as a way to mitigate future discontent with the relocation process. There is no legal compulsion to achieve such consent but given the high risk nature of any relocation project this should have been a primary principle underpinning the whole relocation process.

The SAHRC is concerned that resistant members of the Motlhotlo community maintain that they have not consented to the dispossession of their land. Community members further maintain that PPL failed to notify and consult some community members. The SAHRC is aware that this initial issue is *sub judice*. However, the SAHRC's main priority is not an assessment of legal compliance but rather the measures implemented by PPL to mitigate the risk of and address potential and alleged human rights violations.

From a documentary review and site visits the SAHRC is concerned that access to new agricultural land may have been undermined through a lack of community consent on the alternative land decision making process. As a result access to new land is still pending, but it has been stated that this is as a result of preparation of the land of which the community was both aware and for which they were compensated. The implication by the

community is that many community members are being denied access to their primary method of subsistence. However, reference must be made to the clarifications provided by Anglo Platinum as stated below.

Indications are that even if there is legal compliance that the procedure has not met the objectives for which it was designed.

The SAHRC was further concerned at the quality of land provided at the host site. Although under no legal compulsion to provide more than equivalent carrying capacity of alternative land the SAHRC believes that PPL may have missed the opportunity to improve the quality of life and living standards of resettled communities by not providing land of improved quality. It is generally advisable that the availability of a better quality of agricultural land should be explored and adequately explained to the affected community. This requires further investigation.

5.1.6.2 Explanation

5.1.6.2.1 Motlhotlo

Physical audits were undertaken by professionals in consultation with the Motlhotlo Minerals Committee and the affected communities to identify and record the extent of developed or utilised agricultural land on the Overysel and Zwartfontein farms. It was agreed with the community that new agricultural land of at least equivalent carrying capacity would be prepared on the host sites of Armoede and Rooibokfontein with all costs being borne by PPL. PPL further maintain that affected individuals with ploughing fields who were being relocated would also received financial compensation for losses incurred during the relocation process and these amounts were advised by a professional valuator.

In February 2008, the Motlhotlo s21 companies and the elders from both communities met Greg Morris, PPL relocation manager and

indicated areas in the host sites of Armoede and Rooibokfontein where they would like new maize fields to be established. The land take was estimated to be approximately 200 hectares per village. Subsequent site investigation of the proposed areas identified by the s21 companies indicated that these areas were in fact not the best available. There existed at this time a conflict between the MDC and the s21 companies on the extent and situation of replacement agricultural land. This conflict halted the process temporarily.

In July 2007 specialist consultants Genis Consulting were commissioned to review the extent of replacement land required and optimise the layout in terms of the site soil conditions on Armoede and Rooibokfontein. Genis submitted its findings in August 2007 which indicated that in 2002 (during which time the relocation audits had taken place) there had existed 238 fields in the old Motlhotlo village covering a footprint of 240 hectares ("ha").

The newly instituted task team addressed the issue of land replacement and compensation in July 2007. A process of ensuring all community members could register and claim for agricultural land was put in place and by September 2008 it was apparent that the land claimed by the community was approximately 700ha which amounted to 3 times that of the original community land take at the old Motlhotlo village.

In October 2007, a process was initiated by which 700ha of agricultural land on the farms of Armoede and Rooibokfontein was to be prepared and established. In November the

Motlhotlo s21 companies complained to PPL that some of the land that was being prepared should not be used for agricultural purposes for fear that it would inhibit the future village expansion plans.

The process by which the agricultural land is being prepared is near completion. The next stage will be further consultation with community representatives to determine how the land will be allocated to the community in time for the new rainfall season.⁹⁴

Anglo Platinum has confirmed that the allocation of agricultural land will be done "in conjunction with the Headmen (who are expected to do so in consultation with the Kgoshigadi in accordance with tribal law and custom) and with the assistance of the Project Manager."⁹⁵ Furthermore, Anglo Platinum states that it will ensure transparency by making available the map of the allocation of the agricultural land.⁹⁶ Anglo Platinum have confirmed that 700ha of agricultural land will be prepared for planting by approximately October 2008.⁹⁷

Acknowledging the low yield potential of the farm land in the surrounding areas, the SAHRC is nevertheless concerned that it appears from some sources that limited efforts appear to have been initially made by PPL to enhance agricultural potential of the land and thereby use the relocation process as a vehicle to improve the economic situation of those being relocated.⁹⁸ PPL did, however, assert that it is currently preparing the replacement agricultural land.

PPL secured the surface rights on portions of Overysel and Zwartfontein farms around



⁹⁴ Communication with PPL Relocation Project Manager, 25 April 2008.
⁹⁵ Anglo Platinum response of 8 August 2008, at para 7.6.
⁹⁶ *Idem*, at para 7.8.
⁹⁷ *Idem*, at para 7.1.1.
⁹⁸ "Short Term" Issues Raised by the Task Team, 14 September 2007. Received from PPL.

2002. However, through the lease agreements, the affected communities were allowed to continue using the land until mining activities commenced in February or March 2006. Once such activities commenced and access to this land was cut off PPL maintain that it assisted the communities by providing fodder and additional water for livestock. The SAHRC then requested confirmation that such livelihood replacement processes have been instituted to protect community food security.

Anglo Platinum confirmed that:

- » "Agricultural land is available to all Motlhotlo [sic] community members irrespective of whether they have moved or not...the community has been making use of the grazing land prior to the commencement of the relocation process";⁹⁹
- » Anglo Platinum "at no point denied the community access to any agricultural or grazing land;"¹⁰⁰
- » The community's Minerals Committee deals with all matters relating to agricultural land and requests for fodder amongst others; and
- » Financial compensation is being paid while the cultivatable lands are being prepared.¹⁰¹

Further details concerning compensation were not provided in this response including the amount of compensation and the date of initiation of compensation payments.

Despite confirmation of the above, it is nevertheless concerning to hear community testimony regarding claims of distress as regards alleged failure to access agricultural land, quality of agricultural land, compensation for loss of agricultural land and consent to replacement agricultural land. As stated

above, the SAHRC emphasises that indications are that even if there is legal compliance that the procedure has not met the objectives for which it was designed.

Replies received from Bhadrish Daya Attorneys to questions relevant to the above did not add further nor alter the SAHRC's understanding of the above.

5.1.6.2.2 Ga-Chaba

Ga-Chaba village, although in close proximity to the PPL mine extension site, has not to date been included in plans for relocation.

During a meeting with the Ga-Chaba Land Committee and broader community the SAHRC noted several allegations made concerning the removal of agricultural or ploughing land from their village as a result of the development of a PPL mine dump. The community claim that an environmental assessor came to the community and described the likely impacts of the mine dump to the community in terms of the loss of planted herbs, pollution (dust) and the impacts of blasting. However, the community maintain that this was the limit to the consultation process, and no efforts were made to ascertain community consent. Rather they claim that the PPL Community Liaison Manager simply informed the community that they must stop ploughing. The community further claim that they were then forced to identify and ascertain their own replacement ploughing land which they maintain is of a lower quality and poorer yield.

Anglo Platinum has directed the SAHRC to, and the SAHRC in turn refers to, the affidavits of the Respondent and the judgement in Case No. 12499/06 (TPD).¹⁰²

⁹⁹ Anglo Platinum response of 8 August 2008, at para 7.3.

¹⁰⁰ *Idem*, at para 7.2.1.

¹⁰¹ *Idem*, at para 7.5.

¹⁰² *Idem*, at para 9.6.

5.1.6.2.3 Old Ga-Pila

Communities at Old Ga-Pila have been designated replacement land at the new site at Sterkwater. However, during meetings with community members on 10 – 11 July concerns were raised over the land tenure of this replacement land. Community members claimed that this is “tribal owned land” and as such is potentially subject to a land restitution claim.

In this regard Anglo Platinum provided the following clarification:

The alternative land being allocated to the Ga-Pila community at Sterkwater is owned by Rustenburg Platinum Mines. There are no “gazetted land claims” over the land, and the land includes “portions of the farm Groenfontein”.¹⁰³

5.1.6.2.4 Sekuruwe

During the site visit dated 10 – 11 July community members maintain that they have lost agricultural land as a result of the mine activities. They maintain that there was little involvement of the community in the decision reached by the DLA, MTA and PPL in the removal of this land, and community consent was neither sought nor achieved. Despite this community members do maintain that they received compensation. PPL furthermore identified alternative land for the community. However, community members claim that this was too far away from the village to have been a practical alternative. Despite this, members of the Motlhotlo community showed the SAHRC delegation the Sekuruwe alternative land as it travelled into Motlhotlo.

¹⁰³ *Idem*, at para 8.3.

Anglo Platinum provided the following in response to the SAHRC’s request for further information, which requires further study:¹⁰⁴

- » An Anglo Platinum report on the process to secure a surface lease agreement on the part of the farm Blinkwater which included the sequence of dates for meetings held during the consultation with the Sekuruwe community, the Kgoshigadi Langa and the Mogalakwena Municipality;
- » Issues discussed including employment; the tailings dam, water, the road, graves, a clinic and compensation;
- » Copy of a draft unsigned notarial lease for the relevant portion of the farm Blinkwater;
- » A resolution of the Sekuruwe community (199 members thereof and an attendance register is provided); and
- » Proof of attendance of an official of the DLA.

5.1.6.3 Regulatory framework

Human Rights context: the South African Constitution

Section 25 (1) *“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”*

Communities claim that they have lost agricultural land without proper consultation or the achievement of consent. There is a potential therefore that section 25 could have been inhibited.

Section 27 (1) *“Everyone has the right to have access to... (b) sufficient food and water...”*

¹⁰⁴ *Idem*, Annexure C.

A possible lack of consultation may limit access to agricultural land. This may directly affect community members' food security.

Article 25 of the Universal Declaration of Human Rights¹⁰⁵ – *"1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."*

Article 11(1) of the International Covenant on Economic, Social and Cultural Rights guarantees *"the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions"*.¹⁰⁶

Article 11(2) of the International Covenant on Economic, Social and Cultural Rights recognises the *"fundamental right of everyone to be free from hunger"*.

General Comment 12 of the Committee on Economic, Social and Cultural Rights - *"the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights"*.¹⁰⁷ *The aforementioned rights imply "the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable in the given culture, and accessibility of food in ways that are sustainable*

¹⁰⁵ G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

¹⁰⁶ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976.

¹⁰⁷ Right to adequate food (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 62 (2003), at para 4.

and do not interfere with the enjoyment of other rights".¹⁰⁸

Domestic legislation

Mineral and Petroleum Resources Development Act, 28 of 2002. The requirements to notify and consult in terms of this act are contained in sections 5, 10 and 22. These sections, together with the compensation and expropriation provisions, are set out in full in paragraph 6.4.3 concerning "consultation" below. The obligation to consult with interested and affected parties rests on the applicant ie. the mining company, and not the State. However, the State, specifically DME, must ensure that this obligation has been fulfilled and proof thereof submitted to the DME as part of the application process.

[Interim Protection of Informal Land Rights Act, 31 of 1996.](#)

[Interim Procedures Governing Land Development Decisions.](#)

International best practice

Consultation

IFC PS5: (9) "Following disclosure of all relevant information, the client will consult with and facilitate the informed participation of affected persons and communities, including host communities, in decision making processes related to relocation. Consultation will continue during the implementation, monitoring and evaluation of compensation payment and relocation to achieve outcomes that are consistent with objectives of this PS."

¹⁰⁸ *Idem*, at para 8.

Economic displacement

IFC PS5: (20) "If land acquisition for the project causes loss of income or livelihood, regardless of whether or not the affected people are physically displaced, the client will meet the following requirements;

- » Promptly compensate economically displaced persons for the loss of assets or access to assets at full replacement cost.
- » In cases where land acquisition affects commercial structures, compensate the affected business owner for the cost of re-establishing commercial activities elsewhere, for lost net income during the period of transition, and for the costs of the transfer and reinstallation of the plant, machinery or other equipment.
- » Compensate economically displaced persons who are without legally recognisable claims to land."

5.1.6.4 Steps already taken to address the issue

The SAHRC is not aware of steps taken to address the issue of access to agricultural land and food security in affected communities save those efforts referred to above regarding the Minerals Committee and the statement by Anglo Platinum that the Motlhotlo replacement fields would be ready for the next planting by approximately October 2008.

5.1.6.5 Recommendations

The SAHRC recommends that:

- » The issue of access to agricultural land be recognised within the context of subsistence farming and food security as well as being part of the culture of the affected communities.
- » At the time of consultation with affected communities, that it be more clearly and properly explained that there will or may

be the possibility of a time delay between PPL's appropriation of agricultural land for mining purposes and the provision to communities of replacement agricultural land. This includes not only the provision of compensation, but the determination of the impact on food security of the affected communities given the traditional and partial reliance on subsistence farming and limited access to commercial food sources.

- » Taking into account the traditional and partial reliance on subsistence farming and the nature of traditional communal living, that Anglo Platinum more broadly consider adherence to IFC PS5 which requires the compensation of economically displaced persons who do not have legally recognisable claims to land.
- » Matters related to agricultural land should be included in a land rights clarification to be undertaken with the affected communities prior to any relocation process.

5.1.7 Compensation

5.1.7.1 Observations

Financial compensation

The SAHRC welcomes the detailed breakdown of compensation development.

The SAHRC is concerned about the previous distribution of relocation compensation payments. It has been claimed by communities that recipients of compensation receive R12 000 on moving and a further R8 000 when all community members have relocated. This concern applies equally as regards the allocation of agricultural land.

This is a potentially inflammatory process with the potential to create conflict between those relocating and those resisting the relocation or awaiting relocation.

The SAHRC is concerned that not all affected individuals may have received the full agreed

compensation, and the SAHRC requires further information in this regard.

The SAHRC is concerned that affected communities are not being explicitly compensated for the time delay in preparing and granting access to new agricultural land. However, as referred to above, Anglo Platinum informed the SAHRC that compensation for this delay has in fact been provided to the Motlhotlo community, although no mention was made of the amount or the date of commencement thereof.¹⁰⁹

Non financial compensation

The SAHRC is concerned at a perception within the community that limited monetary compensation is the only benefit which the community can expect from the legal agreement signed between the s21 companies and PPL for the relocation.

PPL have in fact created a compensation package to focus on using the relocation to create sustainable development opportunities for the relocated community as detailed below.

5.1.7.2 Explanation

Replacement villages

Motlhotlo

PPL commenced the process of alternative host site consideration in 1997, through consultation with affected communities of Motlhotlo and the MTA, PPL acquired five farms that were considered to be suitable as potential host sites. These were:

- Blinkwater;
- De Hoogedoorns;

- Sterkwater;
- Groenfontein; and
- Mooihoek.

Considerable discussions were undertaken between PPL, the affected communities, the MTA and relevant government authorities, at the end of which a signed agreement between the MTA and PPL was concluded for one of the farms as an acceptable host site.

Subsequently the community altered their views on the suitability of the new host site and pronounced an interest in the farms Armoede and Rooibokfontein which were owned by the government under the jurisdiction of the Department of Land Affairs (“DLA”). As PPL had no control therefore over the land the DLA became a key player in the allocation of the host site. The DLA agreed that the Armoede and Rooibokfontein farms would be allocated to the resettled community for two new villages along with the allocation of “the use of” the Bultongfontein and Rietfontein farms. PPL therefore had to make private land available to the DLA to compensate for the loss of their land. It was therefore agreed between PPL and the DLA that one of the original potential sites identified by the mine would be transferred to the DLA in exchange.¹¹⁰

Financial compensation

Household monetary value compensation

PPL maintain that all items within a household stand contributing to the livelihood of each household were valued by a consulting specialist in order to determine the financial compensation to be paid to such households. This valuation included assets such as fruit trees, medicinal plants, boreholes in their yards, etc. As a result of this valuation each homeowner

¹⁰⁹ Anglo Platinum response of 8 August 2008, at paras 7.2.1 and 7.5.

¹¹⁰ Final Environmental Impact Assessment Scoping Report, 18 October 2002. Received from PPL.

signed off a compensation sheet which acknowledged which items they would receive compensation for and the amount of such compensation. These one-on-one agreements included the signed off compensation sheets. Anglo Platinum maintains that the purpose of paying compensation was communicated to the homeowners at the outset of the process.¹¹¹

Financial compensation for loss of communal maize field

Agricultural land beyond the immediate village footprint, which was mainly used for grazing and maize fields, was valued. Although the mine was leasing the land for a fixed period it still compensated field owners as soon as mining started in this area and the land became inaccessible. Anglo Platinum stated that “[i]t was communicated to the community that this compensation was for the loss of livelihood during the relocation process”.¹¹²

Non financial compensation

Beyond the monetary compensation awarded to individual households there are key non-financial benefits awarded to the relocated communities. These include:

- » Bursaries to be made available to the community and an additional two bursaries to be provided to each of the two communities;
- » Provision for training and skill endowment for members of the community;
- » Preferential employment provision for members of the two communities;

¹¹¹ Anglo Platinum response of 6 June 2008, at paras 16.2.1 specifically and 16 generally for para above.

¹¹² *Idem*, at paras 16.2.2 specifically and 16 generally for para above.

- » PPL’s commitment to achieving a certain level of the additional jobs created by the PPrust North Project to be kept for members of the two communities;
- » PPL’s further commitment to undertake in line with its social and economic development policy to uplift the standard of the community and to create employment opportunities;¹¹³
- » Provision of water; and
- » Clinic construction.¹¹⁴

Receipt of compensation

The SAHRC asked Bhadrish Daya Attorneys to clarify whether “s21 [companies have] already distributed all financial compensation detailed in the compensation agreements to all affected community members”.¹¹⁵ Bhadrish Daya Attorneys replied that the “Project Manager will be able to furnish a comprehensive report in this matter.”¹¹⁶ This therefore requires further clarification.

5.1.7.3 Regulatory framework

Human rights framework: the South African Constitution

Section 25 “(1) No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application –

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment

¹¹³ Answering affidavit of Lesetja Frans Moshabi, *Masubebele v. PPL*, at para 63.3; Anglo Platinum response of 8 August 2008, Annexure C.

¹¹⁴ Anglo Platinum response of 8 August 2008, Annexure C.

¹¹⁵ SAHRC request to Bhadrish Daya Attorneys for further information, 25 July 2008, at para 10(a).

¹¹⁶ Bhadrish Daya Attorneys response of 31 July 2008, at para 5.11(a).

of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances..."

Domestic legislation

Mineral and Petroleum Resources Development Act, 28 of 2002, sections 11, 12, 54, 55.

International best practice

IFC Performance Standard 5 maintains that:

"When displacement cannot be avoided, the client will offer displaced persons and communities compensation for loss of assets at full replacement cost and other assistance to help them improve or at least restore their standards of living or livelihoods..."¹¹⁷

See also the reference in the above section on agriculture specifically as regards the IFC requirements concerning compensation and economically displaced persons.

5.1.7.4 Steps already taken to address the issue

PPL maintain that although this dispersal of compensation payments was being practiced, such practices have been amended. The current position is that the payment of R8 000 is now made within 3 months of the first payment of

R12 000. The payment is therefore no longer conditional on the whole village moving.¹¹⁸

5.1.7.5 Recommendations

The SAHRC recommends that:

» PPL further engage with affected communities to clarify and outline the non-financial benefits of relocation.

The SAHRC's recommendations above regarding agriculture and food security are of equal application to the specific question of compensation.

See further the SAHRC's general recommendations concerning community consultation.

5.1.8 Transportation of children to school

5.1.8.1 Observations

The SAHRC is concerned that access to education may be inhibited for the children (particularly young children) of those households yet to relocate and resistant to the relocation.



The Langalibalele Secondary School at Ga-Molekane

¹¹⁷ International Finance Corporation Performance Standard 5 – 'Land Acquisition and Involuntary Resettlement'

¹¹⁸ Anglo Platinum response of 6 June 2008, at para 20.



The new school in Rooibokfontein

5.1.8.2 Explanation

During the initial site visit it was noted that members of the Motlhotlo residual communities were concerned that access to education was being inhibited through claims of a lack of transport from the old site at Motlhotlo to the relocation site. They were specifically concerned about the access to school for younger children.

At the early stages of the SAHRC investigation 123 (out of 956) households remained in the Old Motlhotlo village, although this is an aggregated number comprising of those resistant to the relocation and those households simply awaiting relocation. Children from these households are transported to school by bus. African Tramways were contracted by PPL to transport primary and secondary school children from Old Motlhotlo Village to the four new schools in the new village. In addition PPL has contracted a taxi firm to transport pre-school children from the old village to new crèches and home. At the time of report writing there were 14 preschool children that used this service.

PPL maintain that the MRRC have on occasion blocked public access roads to the village and

allege that they have also thrown stones at project related vehicles. On these occasions the transport service for children has been halted through safety fears.¹¹⁹

While committed to providing free school transport to those children whose families are yet to relocate whilst the relocation process is ongoing, PPL did not confirm whether they will continue to provide this service in the longer term. During the site visit dated 10 July 2008, Motlhotlo community members maintained that PPL project managers had informed them that when the new school term started on 14 July 2008 there would be no more transportation between Old Motlhotlo and the schools at the new site. This has not been confirmed and Anglo Platinum’s specific clarifications are set out below.

5.1.8.3 Regulatory framework

Human Rights context: the South African Constitution

Section 29 (1) *“Everyone has the right – (a) to a basic education...”*

Section 28 (2) *“A child’s best interests are of paramount importance in every matter concerning the child.”*

If the project sponsors, in conjunction with the Municipality where municipal resources allow, do not continue to provide transport to school for the children of those refusing to relocate there is a potential that through an exacerbation of vulnerabilities access to section 29 could be inhibited.

5.1.8.4 Steps already taken to address the issue

The SAHRC has addressed PPL to ascertain the extent of its commitment to the children of



¹¹⁹ Communication with PPL Resettlement Project Manager, 25 April 2008.



residual communities in providing access to schools in the relocation site.

Anglo Platinum confirmed that:

- » It was committed to provide transportation for school children “[u]ntil such time as the relocation process has been completed”.¹²⁰ They have as yet not decided, together with “other relevant stakeholders”, whether such transportation will be provided after relocation has been completed.¹²¹

5.1.8.5 Recommendations

The SAHRC recommends that:

- » PPL meet with the Municipality to determine what transportation will be provided for all children of all ages in households yet to relocate and those resistant to relocation. This is not simply a municipal responsibility and Anglo Platinum must take responsibility for the long term consequences of relocation, including the effects upon communities refusing to relocate. The Municipality may not be in a position financially or as regards capacity, to provide for such transportation. The relocation would then have the effect of inhibiting those children’s access to education if municipal resources are diverted to the new villages. Anglo Platinum should not divorce itself from these consequences or from the responsibility of determining and implementing sustainable solutions.
- » Ultimately, there should be a realisation that there is a danger that the vulnerable are being negatively impacted upon by the relocation negotiation process. Removing transport links for children will negatively impact key stakeholder groups that in fact have no real agency in the relocation decision making process. This therefore has

the potential to exacerbate vulnerabilities both in the short and long term.

5.1.9 Concrete batch plant

5.1.9.1 Observations

Concerns were raised over the proximity of a concrete batch plant to the secondary school at Rooibokfontein and Armoede.



View of new school and concrete batch plant in the distance

5.1.9.2 Explanation

During the initial site visit dated 3 to 4 April 2008 to Rooibokfontein and Armoede relocation sites the SAHRC delegation observed a concrete batch plant located directly next to the Cornelius Masebe secondary school and between the two villages. Inquiries were made as to the status of the plant and the potential for it to be moved or decommissioned as it appeared to have the potential to affect the safe environment of the school, possibly have a detrimental environmental impact and possibly impact upon children attending the school.

Anglo Platinum indicated that the concrete batch plant was located at this site for logistical reasons. At the time of establishment it had been planned to locate the school further

¹²⁰ Anglo Platinum response of 8 August 2008, at para 3.

¹²¹ *Ibid.*

north, closer to the Ga-Puka village. It is asserted by PPL that the s21 companies requested that the school be constructed next to the concrete batch plant. The school was opened on 8 October 2007 and to date although PPL have received snag reports from the school none of these have made reference to the concrete batch plant.¹²²

5.1.9.3 Regulatory framework

Human Rights framework: the South African Constitution

Section 29 (1) *“Everyone has the right - (a) to a basic education, including adult basic education...”*

The location of the concrete batch plant in proximity to the school had the potential to disrupt classes through noise and general disturbance

Section 24 *“Everyone has the right - (a) to an environment that is not harmful to their health or well being...”*

The potential risks posed by the proximity of the batch plant to the children at Cornelius Masebe school were not known to the SAHRC. To the knowledge of the SAHRC at the end of the investigation, no complaints were raised by the school itself. However, it was not an ideal location and other locations could have been considered once the school location had been altered as indicated above. Furthermore, it was not ideal to leave the concrete batch plant next to the school for more than six months after its decommissioning in October 2007. Steps could have been taken earlier to dismantle the plant and remediate the land. It

¹²² Communication with PPL Resettlement Project Manager, 8 April 2008.

is not clear what the reason was for this delay and further clarification is required.

Anglo Platinum stated that “no adverse environmental or other impact was either assessed or reported.”¹²³

5.1.9.4 Steps already taken to address the issue

PPL instructed the contractor, Group 5 Housing to formalise the plant’s decommissioning by removing the plant from the site by 2 May 2008.¹²⁴ Anglo Platinum later confirmed that Group 5 Housing had informed them that the plant had been dismantled and that “site remediation” was underway on 26 May 2008.¹²⁵ Anglo Platinum stated that it was currently undertaking remediation of the relevant land and a possible use still under consideration was that of an extension of the school sports fields.¹²⁶



Open land next to the new school where the concrete batch was situated, July 2008

5.1.9.5 Recommendations

The SAHRC is not aware of any serious threat to the community at the Cornelius Masebe



¹²³ Anglo Platinum response of 6 June 2008, at para 2.
¹²⁴ Communication with PPL Resettlement Project Manager, 15 May 2008.
¹²⁵ Anglo Platinum response of 6 June 2008, at para 2.
¹²⁶ Anglo Platinum response of 8 August 2008, at para 2.1.

School posed by the concrete batch plant. As stated above though, this position was not ideal. However, the SAHRC recommends that:

- » PPL provide information to all key stakeholders indicating that remediation of the land is complete and its future intended use.
- » Such plants in future be dismantled and removed directly after their being decommissioned, including the removal of cement dust and aggregate stockpiles, and that there should be a rehabilitation of the land.

5.2 Medium to long term issues

5.2.1 National government departments

5.2.1.1 Observations

As stated at the outset of this report, the SAHRC has focused primarily on the relationship between business and communities and further engagement is required with the relevant national governmental departments, specifically, the Department of Land Affairs, the Department of Minerals and Energy and the Department of Environmental Affairs and Tourism.

The SAHRC is concerned about compliance with requirements that the relevant departments be consistently engaged on an ongoing basis and the relevant departments in turn engage communities as per various legislative requirements.

5.2.1.2 Explanation

Various legislation including the MPRDA places an obligation on various government

departments to carry out relevant functions including consulting with other departments. For example, in terms of section 40(1) the minister of DME “must” when considering an environmental management plan or programme “consult with any State department which administers any law relating to any matters which affect the environment.” Note, however, that the obligation to consult with interested and affected parties in terms of the MPRDA rests on the applicant, ie. the mining company, and not the State.

National government departments are important stakeholders in the relocation process and matters cannot be abdicated wholesale to provincial and municipal level, although there is required delegation to a certain extent.

In reply to a request for clarification Anglo Platinum replied that they had ongoing interaction with the Department of Land Affairs (municipal, national and Ministerial levels) which also witnessed the signing of the Motlhotlo Relocation Agreements.¹²⁷

What is of concern, however, is that during both site visits various elements of affected communities indicated an absence of either clear or adequate interaction between themselves and the abovementioned departments on a provincial and national level.

5.2.1.3 Regulatory framework

The principal Act is the Mineral and Petroleum Resources Development Act, 28 of 2002.

Further relevant legislation includes the National Environmental Management Act, 107 of 1998, and the Environment Conservation Act, 73 of 1989.

.....

¹²⁷ *Idem*, at para 12.1.

5.2.1.4 Steps already taken to address the issue

The establishment of the Task Team could have been proclaimed a victory of sorts, both as regards government involvement (particularly the Office of the Premier) and the contribution which this made to grievance redress. The Task Team was, however, disbanded and is discussed further in paragraph 4.6.8 above.

5.2.1.5 Recommendations

The SAHRC has stated that there has been insufficient focus on this aspect of the investigation and recommends that future undertakings further consider compliance by the DME, DEAT and DLA with their consultation requirements both inter-departmentally and with the affected communities.

The recommendations made by the SAHRC in this report concerning the obtaining of free prior informed consent of affected communities apply equally to State undertakings. This recommendation remains despite the legislative standard being one of "consultation", on the part of the applicant mining company, as set out in section 22 (4)(b) of the Mineral and Petroleum Resources Development Act, 28 of 2002, and is again an attempt to move beyond compliance.

The SAHRC recommends that:

- » The DME clearly state what its criteria are for meeting the required standard of "consultation" by the applicant mining company with the affected community. This will further empower the affected community to assert their rights during the process as opposed to objecting to a process after the fact.
- » The DLA engage affected communities on the nature of land rights at the outset of any resettlement negotiation process so

as to avoid confusion and uncertainties. This lands rights clarification will provide certainty for communities concerning their informal rights to land.

- » The SAHRC engage further with the DME, DLA and the DEAT.

5.3 Relationships

The SAHRC is concerned at the *perception* over a lack of transparent and accountable multi stakeholder engagement throughout the process. Many of the relationships developed during the relocation appear to have been bilateral, albeit in various directions, and the details undisclosed to the wider affected stakeholders. Where information was disclosed at a delayed date, a sense of distrust may have already developed which could negate the objective of the later disclosure.

The SAHRC acknowledges that the time limited nature of the investigation meant that it had to prioritise gaining a better understanding of the relationships between PPL and local communities. However, as highlighted above, the key challenge of this relocation process seems to have been a multi stakeholder dislocation which created a lack of trust in the process at the local community level. Analysis of these relationships is therefore fundamental to the investigation. The SAHRC recognises that further analysis is needed to better understand the dynamics, roles and relationships between all key stakeholders in the relocation process and therefore welcomes submissions to clarify many of the issues touched upon below.

Nevertheless when analysing these relationships, the SAHRC has acknowledged the primacy of community perceptions and claims, even if these cannot be substantiated. **Trust** in many of the relocation and wider mining processes appears to have been undermined within elements of the communities. Regaining the trust of these community members will

not be achieved through the presentation of substantiated facts but through ongoing, sensitive and thorough engagement.

The SAHRC believes that in conjunction with the urgent issues highlighted above, a lack of trust in brokered multi stakeholder relations may be a product of institutional flaws. The existence of urgent issues and the disintegration of trust are seen as indicators for potential and alleged human rights violations which could stem from these institutional problems.

Clarification was sought from the Mogalakwena Municipality as to when relationships between various stakeholders began, including the Municipality, the MTA, s21 companies, Anglo Platinum and the affected communities.¹²⁸ The SAHRC further requested the views of the Municipality on the status of these stakeholder relationships. A representative of the Municipality indicated telephonically that PPL may have communicated with stakeholders directly, but did not do so through the Municipality or notify the Municipality.¹²⁹ Information was further requested from the Municipality on the level of interaction and the characterisation of the relationship between the Municipality and the communities, the Mapela Tribal Authority, the s21 companies and Anglo Platinum. The sense obtained is that the Municipality may have felt alienated from the process much like the affected communities perception of loss of agency and the inevitability of the mining and relocation processes.

5.3.1 Delegation of decision making, consultation and process management to s21 companies

5.3.1.1 Observations

As stated above, various matters relating to the s21 companies are *sub judice* and the legality or otherwise of relevant processes and structures of those matters will accordingly not be the subject of specific findings or recommendations.

The SAHRC is concerned at the manner in which PPL delegated out responsibility for fundamental aspects of the relocation process through the use of community bodies and external contractors. The use of external and professional technicians to enhance capacity is of course necessary. However, the SAHRC is particularly concerned that PPL delegated out responsibility for community consultation to what could have been a potentially unrepresentative community organisation.

The s21 companies were unable to keep the communities they represented united in the relocation process and claims were therefore made that they were consequently unable to fully represent the needs of all community members.

The SAHRC is seriously concerned at the negative perceptions of the s21 companies within elements of the affected communities.

¹²⁸ SAHRC written request for information from Mogalakwena Municipality, 25 July 2008.

¹²⁹ Telephonic discussion between Ms C Jesseman of the SAHRC and Mr Makobe of the Municipality on 14 August 2008.



5.3.1.2 Explanation

5.3.1.2.1 s21 companies as a vehicle for consultation

Consultation is dealt with in greater detail above (see paragraph 6.4). However, the SAHRC is concerned that PPL delegated responsibility through the MTA to a body which had no prior experience of community consultation. Being constituted by members from the community does not necessarily ensure expertise in organising or conducting effective community consultation.

During the extended period of consultation and relocation planning several divisions in the affected communities developed. Although a Task Team was instituted temporarily during 2007, there appears to be no consultative entity that addressed these divisions. In its apparent inability to keep the community united in the face of the relocation process, the SAHRC is seriously concerned that the views of all affected peoples may not have been addressed. The factual complexity, claims, counter claims and often the passing of years, rendered it near impossible to disentangle the truth in certain instances. As emphasised, as regards those matters *sub judice* it is not the task of the SAHRC to determine legality.

5.3.1.2.2 Perceptions of the s21 companies

The SAHRC is concerned about varying community perceptions on the relationships brokered as part of the relocation process. Whether fact or merely perception, this may serve to negate the intention for which these structures were established. For example, one of the key concerns noted by the MDC

is a perceived nepotism practiced by the s21 companies in benefiting community members. Further perceptions noted among various elements of communities include:

- » The belief that the s21 companies enjoy exclusive relationships with the Tribal Authority to the detriment of the wider community;
- » The belief that the s21 companies are in receipt of financial benefits from PPL;
- » The belief that legal representatives, aside from their own where applicable, are not acting in the best interests of the community;
- » The belief that s21 companies are not elected, mandated or accountable bodies;
- » The belief that only members of the s21 companies are able to find employment on the PPL mine; and
- » The belief that community leadership structures are not being recognised by the Tribal Authority as a result of community engagement of legal representative Richard Spoor.¹³⁰

5.3.1.3 Regulatory framework

See paragraph 6.4 on consultation below.

5.3.1.4 Steps already taken to address the issue

The SAHRC has engaged with the legal representative of the s21 companies and the s21 companies themselves to better understand the perceptions of the s21 companies within the community.

The SAHRC asked Bhadrish Daya Attorneys how “the negative perceptions of the s21 companies within some sections of the community [are] being addressed to ensure that trust in the



¹³⁰ Anecdotal evidence collected from community consultation collected during initial site visit dated 3 to 4 April and during the follow up visit during 10 to 11 July 2008.



process is established within the community".¹³¹ Bhadrish Daya Attorneys replied that this is "continuously addressed by interaction with the said members and addressing (where possible) whatever grievances they may have."¹³²

5.3.1.5 Recommendations

See paragraph 6.4 on consultation below.

5.3.2 The role and responsibilities of the Mogalakwena Municipality

5.3.2.1 Observations

The SAHRC is concerned that the Service Level Agreements ("SLAs") entered into between s21 companies and the Mogalakwena Municipality may not have acknowledged potential capacity shortfalls within the local municipality. There is therefore a potential concern that the Municipality will not be able to provide the basic services, which the successful relocation of communities to the new Motlhotlo villages depends on.

The SAHRC is again concerned at the delegation of responsibility or brokering of SLAs with the s21 companies that may not have had the institutional capacity to understand the nature of the Municipality's capacity to provide these services.

The SAHRC acknowledges that it is the Mogalakwena Municipality and not PPL that is mandated as the service provider for all communities affected by the relocation and therefore party to the SLAs.

The SAHRC is concerned at the lack of delineation of institutional responsibility for service provision as highlighted during the

recent reactions to water contamination at the Ga-Molekane community.

The SAHRC is concerned with an overwhelming perception amongst community members interviewed that the Mogalakwena Municipality is in the control of PPL.

However, the SAHRC also acknowledges efforts being made by the Mogalakwena Municipality in some cases to address the needs of the communities demonstrated through their Integrated Development Plans.

Furthermore the SAHRC acknowledges the partnerships brokered between PPL and the Mogalakwena Municipality in seeking to address water shortages in the area.

The SAHRC is concerned by the expression of exclusion from relevant discussions taking place from the inception of the relocation process, by the Municipality.¹³³

5.3.2.2 Explanation

In trying to garner a greater understanding of the relationship between the Mogalakwena Municipality and the affected communities, the SAHRC has approached both affected communities and undertaken an extensive documentary review of the process undertaken in brokering relationships between the Mogalakwena Municipality and the relocation process.

Engagement between the relocation project managers, civil and structural engineer consultants, the s21 companies and the Mogalakwena Municipality was undertaken to discuss the development of the SLAs outlining the provision of services to the Motlhotlo relocation sites. The agreements were signed

¹³¹ Request for further information by SAHRC to Bhadrish Daya Attorneys, 25 July 2008, at para 8(a).

¹³² Bhadrish Daya Attorneys response of 31 July 2008, at para 5.9.

¹³³ Telephonic discussion between Ms C Jesseman of the SAHRC and Mr Makobe of the Municipality on 14 August 2008.



on 23 March 2004 and assert that “the parties agree that the Municipality shall take over the services upon completion of construction thereof in the township and shall operate and maintain the services in the township”. However, the agreements maintain that the responsibility for the provision and maintenance of services to the townships lies with the Municipality as outlined in the SLAs entered into between the Municipality and the two s21 companies. These responsibilities include the supply of potable water and maintenance of borehole pumps, supply mains, purification, storage and reticulation, supply of electricity, solid waste management, sanitation, roads and other infrastructure.¹³⁴

At present the SLA is the only information that the SAHRC is party to in aiding it to better understand the relationship between PPL, the s21 companies and the community in relation to the Municipality. However, the Mogalakwena Municipality *Integrated Development Plan (2008/2009)* offers insight into the needs and priorities of the community in terms of municipal services. This Plan demonstrates relationships between the municipality and the community and in particular demonstrates community priorities as identified by specific wards and villages during community meetings. All the villages affected by the relocation process identified the same top priorities, namely:

- » Water and Sanitation;
- » Roads and storm water;
- » Housing;
- » Crime prevention;
- » Safety and security; and
- » Unemployment.

However, the SAHRC has as yet been unable to gain an understanding of how the capacity of the Mogalakwena Municipality was assessed



¹³⁴ Services Agreement, Memorandum of Understanding between Mogalakwena Municipality and GaO Sekhaolelo Relocation and Development Association (incorporated under Section 21).

by PPL to better understand how capable it was in undertaking the service provision as proscribed within the SLAs. The Integrated Development Plan outlines both the strengths and weaknesses of the municipality and therefore does give a very narrow indication of capacity. Weaknesses listed include:

- » Disruptive political agendas; and
- » Political change.

Perhaps most crucially, another weakness listed is:

- » Inability to access adequate external funding for prioritised projects to address needs.¹³⁵

By no means does this address the question of municipal capacity to provide the services agreed to through the SLAs but it does provide an indication that capacity is limited.

The SLAs provided to the SAHRC only characterise the provision of services in the relocation sites and do little to assist the SAHRC in gaining a better understanding of the level of service provision in the residual communities (Old Ga-Pila), and those communities not included in that relocation process (Sekuruwe, Ga-Molekane and Ga-Chaba). After consultation with these affected communities, claims have been made that the provision of services is inconsistent. This is outlined in greater detail above in paragraphs 5.1.1 and 5.1.4 concerning water and electricity.

In the absence of this characterisation the SAHRC can only assess the levels of service provision within the affected communities as an indicator of how able the Mogalakwena Municipality was to fulfil these commitments.

The SAHRC is therefore able to draw two conclusions. The first is that the Mogalakwena



¹³⁵ Mogalakwena Municipality, 2008/2009 Integrated Development Plan.



Municipality is democratically mandated to act as the service provider for all communities falling under its jurisdiction including all communities affected by relocation. The second is that through community consultation with members of the Old Ga-Pila, Old Motlhotlo, and Ga-Chaba (as detailed above) the SAHRC is under the impression that the provision of services is inconsistent.

Despite the clear mandate for the Mogalakwena Municipality to act as service provider to these communities subject to the SLAs reactions to the contamination of water within the Ga-Molekane community has highlighted a lack of clarity over the delineation of this responsibility. In this specific case, PPL maintain that as the issue of contamination is being addressed it is currently supplying potable water to the Mogalakwena Municipality to distribute to the community and schools at Ga-Molekane.

Complicating this delineation of responsibility even further is an overriding perception in many communities visited that the Mogalakwena Municipality is (in the words of an Old Ga-Pila community member) "the baby of the mine". In the memorandum submitted to the MTA, the Sekuruwe community asserted that:

"We are sick and tired of the so called councillor in our village because he serves the interests of the mine. We inform you that he is no longer our councillor"¹³⁶

During consultation with the Motlhotlo community, community members raised the issue of representation at the Mogalakwena Municipality. The divisions within the Motlhotlo community have been well documented, however, members of the MRRC maintain that the municipal leadership has yet to recognise this division and represents the views of the community as though they were a united

entity. The claim is therefore that the views of all sectors of the community are therefore not being presented to the Mogalakwena Municipality.

It could be argued that the development of SLAs created an extra layer of accountability for the Mogalakwena Municipality in their capacity as service provider for the specific villages affected by resettlement, which are already included in its mandate. However, it could also be argued that in the knowledge that the Mogalakwena Municipality potentially lacked the capacity to fully adhere to the SLAs, PPL should have retained some responsibility for this service provision, or engaged in greater bilateral discussions to work out how this responsibility could be shared between both parties. The risk for PPL is that the success of the SLAs directly affects the success of the relocation process by impacting on the achievement of minimum benchmark for PPL to have maintained or improved the quality of relocated communities lives and livelihoods. The ability for the Mogalakwena Municipality to adhere to the SLAs is absolutely critical.

The SAHRC acknowledges the success of the partnership brokered between the Mogalakwena Municipality and PPL in addressing water shortages in the area. The Municipal Infrastructure Investment unit in 2003 brokered a public-private partnership whereby PPL offered to finance the construction of the new Doorndraai pipeline as a lack of adequate bulk water supplies was limiting PPL's future expansion potential. The contract developed to formalise this agreement asserted PPL as retaining the ownership of the assets during the concession term and transferring those assets to the public entities once the capital investment had been recouped. The partnership yielded benefits for both parties: the Municipality gained a new pipeline and

¹³⁶ Memorandum submitted to the MTA by the Sekuruwe community on 10 July 2008.



PPL received a guaranteed supply of water to support its expansion plans.¹³⁷

In reply to requests for clarification, Anglo Platinum iterated that Mogalakwena Municipality was engaged at the outset of the process as is evident in the minutes of stakeholder meetings.¹³⁸ Furthermore, when it was identified that the Municipality would not have the capacity to carry out the services required themselves, an engineering firm was appointed by the Municipality to do so, on its behalf.¹³⁹ This appointment and the nature and operation of this relationship has not been verified further with the Municipality.

Requests for information from Mogalakwena Municipality included the following:

- “(a) Clarification and further information is needed on the interaction between the Mogalakwena Municipality and the following communities: residual communities of Motlhotlo (Ga-Puka and Ga-Sekhaolelo); residual community of Old Ga-Pila; community at Sekuruwe; community at Ga-Molekane.
- (b) Information is needed on whether the Mogalakwena Municipality is responsible for the supply of services (water, sewerage, electricity, health, education, transport) to the communities listed above. Please confirm how these services are delivered, and for how long they will continue to be provided, beyond the provision of Service Level Agreements (“SLAs”), which the SAHRC has been provided with.
- (c) Please provide information as to how and with whom the SLAs were developed and agreed upon.
- (d) Confirmation is needed of the inclusion of the above communities within the



¹³⁷ Mogalakwena Municipality, <http://www.mogalakwena.gov.za/index.php?page=mining>, [accessed on 29 July 2008].

¹³⁸ Anglo Platinum response of 8 August 2008, at para 3(b)(i).

¹³⁹ *Idem*, at para 3(b)(ii).

Municipality’s Integrated Development Plan.”¹⁴⁰

5.3.2.3 Regulatory framework

Human Rights context: the South African Constitution

Section 24 *“Everyone has the right – (a) to an environment that is not harmful to their health or wellbeing...”*

Section 26 (1) *“Everyone has the right to have access to adequate housing.”*

Section 27 (1) *“Everyone has the right to have access to - (a) health care service, including reproductive health care; (b) sufficient food and water...”*

The Municipality is the mandated and democratically elected service provider for communities affected by the relocation. As such the Mogalakwena Municipality has an obligation to fulfil its mandate to the best of its abilities over and above the obligations, which it is contractually obliged to uphold through the SLAs. If the Mogalakwena Municipality lacks the capacity to fulfil its mandate by providing necessary services to the local communities there is a chance that the ability for communities to access the rights as outlined above could be inhibited.

5.3.2.4 Steps taken so far

The SAHRC in acknowledging its potential lack of thorough insight into the relationship between the s21 companies, PPL and the Mogalakwena Municipality submitted questions of further inquiry to the Mogalakwena Municipality. The Municipality did not respond in writing by the



¹⁴⁰ SAHRC written request for information to the Mogalakwena Municipality, 25 July 2008.



time of writing this report despite indicating that it would do so. The SAHRC therefore refers intermittently in the report to telephonic discussion of the written request, between a representative of the Municipality and of the SAHRC.

5.3.2.5 Recommendations

The SAHRC recommends that:

- » The s21 companies, PPL and Mogalakwena Municipality revisit the SLAs signed in 2004 and assess whether the Mogalakwena Municipality has the capacity to undertake the level of service provision outlined in the agreements.
- » PPL should continue to share responsibility for service provision until these agreements have been revisited and continue to share this responsibility if it transpires that the Mogalakwena Municipality is unable to fulfil these agreements.
- » The Municipality should be included as a stakeholder in all relevant engagements from the outset of any discussions concerning resettlement. The Municipality should therefore be recognised as a critical stakeholder with whom ongoing engagement is essential.
- » The ability of the Municipality to deliver upon the SLAs should be periodically reviewed through ongoing and open engagement between the Municipality and PPL.

5.3.3 Sensitive community relationships: The Mapela Tribal Authority (“MTA”)

5.3.3.1 Observations

The SAHRC is concerned that relationships developed between the s21 companies, PPL and the Mapela Tribal Authority have led

to the perceived dislocation between some community members and the Tribal Authority and may thereby have disrupted traditional leadership structures. In turn this may, in some cases, have left communities isolated from traditional methods of grievance redress, exacerbated by the possible lack of institutional grievance processes, or effective and accessible grievance processes, instituted by the PPL mine.

The SAHRC is further concerned that divisions within communities are not being acknowledged at a leadership level. For example during consultation with members of the MRRC, representatives maintained that despite the obvious and documented divisions within the Motlhotlo community, that they are still being represented as one unit by the ward councillor.



The Mapela Tribal Authority

5.3.3.2 Explanation

5.3.3.2.1 Ga-Chaba

Governance issues seem starkest within the community at Ga-Chaba. Community members maintain that when Lonmin began prospecting in the surrounding area they asked the Ga-Chaba community to set up a committee which

it would be able to directly deal with.¹⁴¹ It seems over the last few years that the creation of this community has engendered a complicated and potentially damaging power balance within the community. Communities maintain that there are currently divisions between the Induna and the MTA as a result of the mine development. After the community brought in the services of an external legal representative to defend the community interest against the mine, the MTA allegedly stopped recognising the authority of the Induna. According to the community members interviewed the MTA has made it increasingly clear that if the Ga-Chaba Induna wants to be recognised by the MTA then the relationship with external legal representative has to end. Additional power struggles have been outlined by the community. They maintain that only members of the original committee created to liaise with Lonmin Plc have been able to find employment at the PPL Mine, or have had housing damage complaints addressed. Allegedly, non committee members of the community have lodged complaints concerning damage to their houses, however, these have been largely ignored. Many youth members of the community believe that their communications with the MTA also remain unheard. Enflaming these claims is the underlying perception in the community that the Ga-Chaba committee is part of the s21 companies.

During engagement with the Ga-Chaba community assertions were made that issues within the community were not being directed

to the Induna but rather being referred straight to the Tribal Authority thus circumventing traditional protocol.

5.3.3.2 *Old Ga-Pila*

Similar governance issues were communicated to the SAHRC by the community at Old Ga-Pila. They maintained that the MTA is refusing to acknowledge the authority of the Induna until he collaborates with the s21 Company.

5.3.3.3 *Sekuruwe*

Community members of Sekuruwe issued a Memorandum to the MTA (see annexure 2) voicing their serious concerns over what they perceive as partisan behaviour on the part of the MTA, which they allege is no longer serving the interest of the community. One section of the memorandum exclaims "stop eating the same cake with section 21 and serve the majority of the people".¹⁴²

In reply to a request for clarification, Anglo Platinum stated that:

- » The relationship with the MTA was initiated from the beginning of the relocation process and the Indunas formed part of the Relocation Committees; and
- » The MTA has sent a representative to all meetings.¹⁴³

During community meetings with all affected communities there appeared to be common

¹⁴¹ The SAHRC has not engaged Lonmin during this investigation as it was only made aware of their presence during the July site visit and in so far as their prospecting activities are concerned.

¹⁴² Memorandum submitted to the MTA by the Sekuruwe community on 10 July 2008.

¹⁴³ Anglo Platinum response of 8 August 2008, at para 14.

themes emerging over the lack of adequate and transparent interaction with the MTA.



March by the Sekuruwe community to the Mapela Tribal Authority in July 2008

5.3.3.3 Regulatory framework

The Mapela Tribal Authority is headed by the Kgoshigadi.

There is a Tribal Council at tribal level.

There are Headmen (Indunas) at community level.

5.3.3.4 Steps already taken to address the issue

During both the initial site visit dated 3 to 4 April 2008 and during the follow up site visit dated 10 to 11 July 2008 the SAHRC directly engaged with the Mapela Tribal Authority. The SAHRC explained the purpose of its visit and discussed the allegations made in the ActionAid report, as well as the wider human rights context surrounding the relocation process. During the initial visit the MTA asserted that they would submit a response to the allegations presented in the report and that this would be provided to the Polokwane office of the SAHRC by approximately 14 April 2008. Through correspondence prior to and during the follow up visit the SAHRC requested

the submission of this response, acknowledging that the MTA wanted to present its position within this initial findings report of the SAHRC. The representatives of the MTA consulted on the follow up visit stated that the MTA was in the process of consulting with the Tribal Council, Chief and Elders to draft its submission. The SAHRC was concerned that the response would not be drafted in time for it to be included in this report and reiterated this to the representatives. No formal response has been received from the MTA up to the date of report writing.

5.3.3.5 Recommendations

The SAHRC recommends that:

- » The MTA should submit its response to allegations presented in the ActionAid report within an agreed time frame.
- » The MTA should call an extraordinary meeting of traditional leadership structures to discuss and clarify all aspects relevant to the resettlement processes.
- » There should be a recognition of the possibility of tension between individual and community interest and that a clear and transparent grievance procedure be put in place to deal with this.
- » One of the items on the agenda should be the transparent interaction between the MTA, PPL and the s21 companies, and how to put this into practice to the satisfaction of affected communities.
- » The Mogalakwena Municipality should be kept informed of relevant developments and interactions.
- » There should be explicit recognition of all Indunas, including those who are opposed to the relocation, aspects thereof or specific processes. In other words, there should be room for disagreement and the necessary mechanisms in place to deal with dissent and resolve disputes.

5.3.4 Sensitive community relationships: The South African Police Service ("SAPS")

5.3.4.1 Observations

The SAHRC is concerned over perceptions common to elements of all the affected communities that the police are partisan stakeholders in the employment of PPL and as such are not able to fulfil their function of protecting the community members and addressing crime effectively. There are many incidents that can be cited to refute this claim; however, allegations laid out by the community infer that there are also incidents to support it.

5.3.4.2 Explanation

5.3.4.2.1 *Old Ga-Pila*

Community representatives from Old Ga-Pila maintain that the community receives no support from the SAPS and that the crime in Old Ga-Pila goes unaddressed. There is an increasingly concerning perception in the community that crimes in Old Ga-Pila will not be addressed by the police, and of even greater concern, that the law should be taken into the hands of the community. The SAHRC delegation warned against the severity of such a statement and advised the community that it is not acceptable to take the law into one's hands.

5.3.4.2.2 *Ga-Chaba*

The community raised serious allegations against the SAPS in relation to its functioning at the Ga-Chaba village. They maintain that there is no formal line of communication between the village and the police service. On occasion the police were requested to address issues of criminality in the community, but

the community claims the police use violence against community members over issues relating to the mine.

5.3.4.2.3 *Sekuruwe*

Members of the Sekuruwe community maintain that members of the SAPS insulted them when they visited sites to which relocated graves had been moved. They maintain they have been victims of humiliation and intimidation at the hands of the SAPS.

Furthermore community members maintain that members of the SAPS used violence against them; in one case deploying rubber bullets to break up a community protest. This is the incident of 29 May 2008 during which several members of the Sekuruwe community protested against the removal of graves and several protesting members of the community were arrested.

5.3.4.2.4 *Motlhotlo*

There has been repeated engagement between the community at Motlhotlo and the SAPS. For example on 5 June 2008, as community members protested against the mine blasting police allegedly arrested many elderly members of the gathered party. The community maintain the SAPS constantly target specific members of the community for arrest. On trying to lodge a complaint against the specific superintendent the community suspect of orchestrating the arrests, the application was allegedly denied.

However, during the first site visit on 3 – 4 April 2008, the SAHRC witnessed a road block put up by the Motlhotlo resistance community as a sign of protest. This again ended in the arrest of several members of the community and furthermore impeded the progress of the SAHRC delegation through the village. Although the SAHRC supports the community rights to assembly and protest it does not

support the inciting of clashes to attract attention to such protests.

Community protest

On 27 May 2008 fifteen members of affected communities undertook an allegedly peaceful protest outside the perimeter gates of the PPL mine. Jubilee South Africa informed the SAHRC that the protest did not block the free flow of traffic into the mine. Towards the end of the protest civil society organisations working in the area maintain that the SAPS arrived at the scene, and allegedly in some cases pulled community members out of their cars, dragged them inside the perimeter gates of the mine whereupon they were arrested. The SAHRC was informed that eleven members of the protest were arrested, many of whom came from outside Limpopo. The SAHRC was informed by a community source that those arrested were later released without charge.¹⁴⁴

However, the SAHRC have also been witness to several peaceful, policed protests within the surrounding area of the community. During the initial site visit dated 3 to 4 April 2008 the SAHRC witnessed a peaceful protest by the community of Ga-Chaba outside the Mapela Tribal Authority. As far as the SAHRC witnessed this was not interrupted by the police. Furthermore during the visit dated 10–11 July 2008 the SAHRC witnessed a peaceful protest of the Sekuruwe community again at the Mapela Tribal Authority. This protest was monitored by the police without interference while the SAHRC was in attendance for a short period.



Community road blockade in Motlhotlo

There are two further incidents of protest of which the SAHRC is aware. The first took place on 4 April 2008, during which members of the community allegedly blockaded the main road in Ga-Puka:

- » Greg Morris, Project Manager for PPL, informed the SAHRC delegation telephonically that the MRRC had constructed a road block in Motlhotlo allegedly to inhibit access to the water tanker, which as a result is unable to deliver fresh water to the community;
- » The SAHRC delegation went to the site of the road block with the intention of informing community members that this was not acceptable;
- » The SAHRC delegation witnessed a police entourage pass across the road block;
- » After some time the SAHRC delegation passed around the road block and encountered the police entourage at the

¹⁴⁴ Correspondence between SAHRC and Jubilee South Africa, 27 May 2008.

other side. Members of the MRRC were apparently arrested (one member called the SAHRC delegation to inform them of this), but as the SAHRC delegation arrived the police bus containing these arrested members departed from the scene;

- » The SAHRC tried to engage with members of the police, but the police refused to disclose any further information. The Police Superintendent first stated that he could not speak to media. When he was informed that the delegation was from the SAHRC he still refused to co-operate or provide any information.

The second incident took place on 29 May 2008 at the graveyard in Sekuruwe. Community members were protesting against alleged illegal removal and relocation of community graves. Several community members were arrested and the SAPS allegedly fired rubber bullets at the protesters. A representative of the SAHRC spoke to an attorney at the site to verify this and attempted to mediate with PPL on the matter, as referred to in paragraph 5.1.5 examining the issue of grave removals.

5.3.4.3 Regulatory framework

Human Rights context: the South African Constitution

The interference by security forces or otherwise into the peaceful protest and demonstration of the community is demonstrably not commonplace and yet isolated incidents are sufficient to raise serious concern. Claims made over the context within which community protest was disbanded on 29 May 2008 and on other occasions described by members of the Motlhotlo community have the potential to contravene key human rights as outlined in the Bill of Rights.

Section 12 (1) “Everyone has the right to freedom and security of the person, which includes the right –

- (a) Not to be deprived of freedom arbitrarily or without just cause;
- (b) Not to be detained without trial;

- (c) To be free from all forms of violence from either public or private sources...”

Accusations made against the manner in which the police allegedly arrested and detained members of the community have the potential to contravene (a) and (c) outlined above.

Section 17 “Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.”

Claims made of the disbandment of peaceful protest have the potential to contravene this right to peaceful assembly and demonstration.

5.3.4.4 Steps taken so far

The SAHRC has been informed that several complaints have been lodged by both community members and civil society organisations. The SAHRC has also been informed that charges have been filed against certain members of the community. The SAHRC was not aware at the time of report writing as to the status of these complaints and charges.

5.3.4.5 Recommendations

The SAHRC recommends that:

- » The SAPS should proactively engage with affected communities to develop their trust relationship.
- » The SAPS should investigate all complaints of misconduct by members of the SAPS and provide its findings to the SAHRC.
- » PPL should initiate community dialogues with SAPS.
- » The SAHRC’s Polokwane office in Limpopo should initiate a programme of education to better enable individuals to seek redress for alleged dissatisfaction with SAPS services and alleged police abuse to empower community members and avoid community members taking the law into their own hands.

CHAPTER 6

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***THE SOURCES:
INSTITUTIONAL PROCESSES***



The SAHRC believes that issues presenting immediate harm to the affected communities and a perceived lack of trust in the relationships developed to undertake the relocation are symptoms of potential and possible flaws in the institutional process, underpinning the relocation or resettlement programme.

Institutional flaws are perceived to be a result of a compliance based approach to resettlement management. There is at the moment a gap in the international approach to resettlement planning between processes which comply with legislation and project requirements and those approaches which seek to push beyond compliance. This latter approach is based on a developing understanding that current legislation and project requirements do not necessarily ensure that risks associated with resettlement are fully mitigated, especially risks of potential human rights violations. The SAHRC suspects that what appears to be a compliance based approach to resettlement employed by PPL has been shown to be insufficient in mitigating the risks that such a process invariably creates.

6.1 Process documentation (including reporting)

6.1.1 Observations

The SAHRC is concerned at the lack of specific resettlement planning documentation.

6.1.2 Explanation

Resettlement planning and managing the risks associated with resettlement processes

The key principle underpinning resettlement planning is the achievement of multi stakeholder agreement on all stages of the resettlement process. In anticipating

resettlement, the processes by which these multi stakeholder agreements are to be achieved are often outlined through a Resettlement Action Plan ("RAP"). Using a thorough collection of baseline data to indicate key impacts and risks a RAP addresses each stage of an anticipated resettlement process to delineate the key agreements which have to be achieved with all stakeholders to mitigate the risks associated with the process. There is as yet no obligation for resettlement project sponsors to develop this type of plan, unless bound under strictures of international debt financing, for example through the World Bank/ International Finance Corporation ("IFC").

The SAHRC have tried to engage PPL on whether they were obliged to comply with IFC standards through debt financing programmes; However, this issue is as yet unresolved. Anglo Platinum stated that:

- » It had contracted Golder Associates Africa (Pty) Limited in 2000 to prepare, in addition to an EIA, a "Relocation Action Plan in accordance with World Bank Standards";¹⁴⁵
- » "At the time of the scoping and EIA exercises only the World Bank Resettlement Guidelines were in existence. The International Finance Corporation Guidelines were only released in April 2006. Regard was had to the latter after its promulgation, particularly as regards Post Relocation Action Plans";¹⁴⁶
- » In response to whether Anglo Platinum was required to comply with the World Bank Directive on Involuntary Relocation they stated that "[t]here have been no involuntary resettlements. The relocation was unanimously agreed to by the Community";¹⁴⁷ and
- » In response to whether Anglo Platinum was required to comply with standards prescribed by its parent company Anglo American Plc they stated that "these were

¹⁴⁵ Anglo Platinum response of 6 June 2008, at para 24.1.

¹⁴⁶ *Idem*, at para 25.

¹⁴⁷ *Idem*, at para 21.1.



not in existence at the time the relocation was scoped.”¹⁴⁸

There is no indication as to whether Anglo Platinum has since been bound by any parent company standards, whether attempts were made to make any amendments to plans developed at the time of scoping in order to comply with any standards later developed by Anglo American – simply a statement that they did not exist at the time of scoping.

However, in the spirit of moving beyond compliance, the SAHRC is extremely concerned that considering the risks associated with this particular resettlement the project sponsor does not appear to have developed a document which in pre-empting the resettlement includes impact identification and risk mitigation programmes and detailed plans as to how multi stakeholder agreement on each stage of the resettlement process will be achieved.

The SAHRC is furthermore concerned that through constant communication with PPL assertions were made that a RAP had been developed. However, what was submitted to the SAHRC on 13 June 2008 by PPL was a brief Environmental Management Plan (“EMP”) and a statement maintaining that:

“As regards the RAP please note that following the completion of the EIA, which identified management actions, an environmental management plan was compiled to address social and environmental issues. This plan, along with agreements signed with the Langa traditional authority in July 2005, make up the action plan against which the communities are being relocated.”¹⁴⁹

In further requests for clarification the SAHRC acknowledged receipt of the EMPR and relocation scoping report, but requested that Anglo Platinum supply the SAHRC with “the



¹⁴⁸ *Idem*, at para 21.2.

¹⁴⁹ Correspondence of 13 June 2008 from KHL Attorneys on behalf of Anglo Platinum.

separate RAP developed that highlighted the potential impacts and associated risks posed to the community as a result of relocation and outlined management plans to mitigate such risks.”¹⁵⁰

Anglo Platinum replied that:

“The SAHRC is referred to the EIA Scoping Report by Wates, Meiring and Barnard dated October 2003. Section 8.3, Table 4 contains the ‘Impact Evaluation for the relocation of Ga-Puka and Ga-Sekhaolelo Communities’. No independent RAP document containing potential impacts and associated risks posed to the Community has been finalised.”¹⁵¹

The relocation process was initiated in 1998, when PPL approached the Tribal Authority to enter into negotiations over the proposed relocation. The development of a thorough RAP should have been initiated before this initial contact was made. Instead, documentary processes, which are being presented in lieu of a RAP were not undertaken until 2002, the same year that the project sponsors sought to achieve community consent, four years after the process had started. By this time affected communities were under the perception that the relocation was inevitable and their agency in the decision making process had been effectively removed.

The SAHRC is therefore concerned that these documents are being submitted as a RAP when they are in fact management plans to identify and mitigate risk, not detailed plans on how to achieve multi stakeholder buy in on each stage of the relocation process.

In the absence of such documentation, the SAHRC is concerned that such plans underpinning such processes were not



¹⁵⁰ SAHRC request for information from Anglo Platinum, 25 July 2008, at para 4(d)(i).

¹⁵¹ Anglo Platinum response of 6 June 2008, at para 20.



developed creating a resettlement process which was therefore reactionary rather than proactive.

The SAHRC does, however, welcome receipt of the EMP of 2002. Although environmental and social risks are analysed together, the report does clearly identify major risks associated with resettlement and details measures implemented to mitigate those risks.

A small milestone which the SAHRC specifically wishes to acknowledge is the provision by Anglo Platinum of the relevant Social and Labour Plan, the first of its kind which the SAHRC has been provided access to.

6.1.3 Links to potential human rights violations

A lack of open and clearly delineated resettlement planning has the potential to undermine the whole process through a lack of multi stakeholder buy in.

There is the possibility that a lack of resettlement planning can create an ad hoc and reactionary approach to risks emerging out of the process. This can have a very real impact on the risk of human rights violations, the exacerbation of existing vulnerabilities and create an environment of uncertainty for affected communities.

6.1.4 Regulatory framework

International best practice

Whilst seeking to comply with South African legislative requirements, the overarching frame of reference for relocation is the policies, directives and guidelines of the World Bank Group ("WBG"). The key documents with reference to involuntary relocation are:

- » World Bank Operational Policy 4.12 ("OP 4.12) on Involuntary Relocation;
- » World Bank Procedure 4.12 ("BP 4.12") on

Involuntary Relocation; and

- » IFC Performance Standard 5 on Land Acquisition and Involuntary Relocation.

World Bank OP and BP 4.12 on Involuntary Relocation

World Bank OP and BP 4.12 require that involuntary relocation should be avoided or minimized wherever possible. Where this is unavoidable, relocation plans incorporating provisions for development must be formulated and widely consulted upon.

IFC Performance Standard 5 on Land Acquisition and Involuntary Relocation

The IFC is in the process of introducing revised policies and standards in the context of social and environmental sustainability. A draft document entitled Policy and Performance Standards on Social and Environmental Sustainability was released in September 2005. This document will be the base for the formal policies and standards adopted in 2006.

Eight Performance Standards ("PS") underpin the new policy. These are:

- » PS 1: Social and Environmental Assessment and Management System;
- » PS 2: Labour and Working Conditions;
- » PS 3: Pollution Prevention and Abatement;
- » PS 4: Community Health and Safety;
- » **PS 5: Land Acquisition and Involuntary Relocation;**
- » PS 6: Conservation of Biodiversity and Sustainable Natural Resource Management;
- » PS 7: Indigenous Peoples; and
- » PS 8: Cultural Heritage.

Performance Standard 5 addresses involuntary relocation and builds on earlier WBG policies and directives (particularly Operational Policy 4.12). As was the case under the earlier safeguards, PS 5 seeks to provide a framework for the responsible and transparent management

of involuntary relocation and economic displacement. In addition, it strengthens and clarifies many areas. These include scenarios of involuntary relocation, negotiated settlement (as opposed to expropriation), living conditions at relocation sites, the loss of collective assets, cash compensation, entitlements, security of tenure and private sector responsibilities under government-managed relocation. An important change introduced in terms of PS 5 is the clarification of planning requirements for physical displacement and acquisition of land rights through eminent domain (expropriation) on the one hand, and for transactions that do not involve the physical displacement of people. In the former case a RAP is required. For the latter situation, the client is required to develop compensation procedures that meet the requirements of Performance Standard 5.

Sequencing for relocation

The IFC Handbook on Resettlement proscribes a generic framework model by which relocation should be undertaken according to international best practice.

- » Step 1: Determine the scope of the land acquisition/ define project area of influence and all potential socio-economic impacts within that area;
- » Step 2: Select relocation sites as appropriate;
- » Step 3: Select and justify land acquisition and economic displacement alternatives that minimize adverse environmental impact and relocation in the context of IFC policies;
- » Step 4: Carry out socio-economic and other related surveys as required;
- » Step 5: Establish legal framework for RAP; identify gaps between IFC policy and local requirements;

- » Step 6: Develop and consult with Project Affected Persons (“PAPs”) on entitlements;
- » Step 7: Design restoration/ development interventions in consultation with PAPs;
- » Step 8: Establish and verify monitoring and evaluation indicators;
- » Step 9: Consult and establish a grievance mechanism; and
- » Step 10: Assign implementation and monitoring responsibilities.¹⁵²

6.1.5 Steps already taken to address the issue

The SAHRC undertook various communications and requests for clarification with Anglo Platinum through KHL Attorneys in order to better understand the resettlement planning process. Relevant clarifications provided by Anglo Platinum are stated above, but did not significantly add to the SAHRC’s understanding of the planning processes undertaken.

6.1.6 Recommendations

The SAHRC recommends:

- » The progression from a compliance based approach to resettlement to embracing a proactive risk mitigation approach through pre-emptive planning and documentation in line with the latest World Bank and IFC guidelines and standards. This incorporates a substantive, comprehensive stand alone RAP. This further requires that planning and consultation with communities take place in order not to undermine community perceptions as to their own agency in the process. Communities should ultimately be empowered to actively participate in processes that affect them, have certainty as to possible outcomes, processes and grievance redress mechanisms.

¹⁵² *IFC Handbook for Preparing a Resettlement Action Plan*, available at [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_resettle/\\$FILE/ResettlementHandbook.PDF](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/p_resettle/$FILE/ResettlementHandbook.PDF) (hereinafter referred to as “IFC Resettlement Handbook”).

6.2 Monitoring

6.2.1 Observations

The SAHRC is keen to better understand the monitoring processes, which have been implemented by PPL to better enable it to understand how the relocation has preserved or improved the quality of the lives and livelihoods of those being relocated.

The SAHRC is concerned that a possible lack of consistent monitoring of the relocation process may have resulted in discontent and not may allow negative perceptions of the relocation process to be adequately addressed and fed into the ongoing process.

6.2.2 Explanation

Processes by which monitoring is undertaken throughout the relocation are usually established during the resettlement planning stages. Procedures are therefore implemented acknowledging the particular sensitivities of the process which allow the project sponsors to monitor progress, including community perception, at every stage of the resettlement process. In the absence of such monitoring procedures, issues emerging are likely to remain unaddressed, or not effectively addressed.

Monitoring relocation is fundamental at all stages of the relocation process, but most particularly at the end of the process to allow the project sponsors to assess the extent to which the relocation has preserved or improved the quality of lives of those relocated.

The collection of baseline information is fundamental for the monitoring process as it gives the baseline characterisation of the quality of lives and livelihoods against which comparisons at various stages of the project can be made to assess progress. From this

baseline information collection the most crucial is the census. This should provide the project sponsors and those planning relocation with quantitative data that enables them to budget resources and services. Furthermore, surrounding information gathered during the census can be used to create indicators by which the relocation targets of income restoration and sustainable development can be measured.

PPL have demonstrated their collection of baseline information and the SAHRC is engaged further with them to better understand how this information is being used to measure the progress and implementation of the relocation process. Further clarifications are provided in paragraph 6.2.4 below.

6.2.3 Regulatory framework

International best practice

Under international best practice, the IFC recommends that project sponsors “monitor and report on the effectiveness of RAP implementation, including the physical progress of relocation and rehabilitation activities, the disbursement of compensation. The effectiveness of public consultation and participation activities and the sustainability of income restoration and development efforts among affected communities.”¹⁵³ More specifically the IFC recommends that project sponsors implement a coherent monitoring plan which identifies:

- » Organisational responsibilities;
- » Methodology; and
- » Schedule for monitoring and reporting.

6.2.4 Steps already taken to address the issue

Through interactions with PPL, the SAHRC will review the monitoring plans, which have been

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¹⁵³ *Idem*, at p49.

implemented by the project. However, to date the SAHRC has been unable to access these plans.

In response to a request for clarification as to how the relocation process is being monitored in order to ensure that all members of relocated communities are as well off or more well off as a result of the relocation process, Anglo Platinum stated that:

“The relocation process is being monitored by our client [Anglo Platinum], the Section 21 Companies and the community in order to ensure that there is compliance with all provisions of the legal agreements including the Construction Contract.”¹⁵⁴

This same question was asked of Bhadrish Daya Attorneys who replied that:

“The relocation process is monitored by ensuring that the provisions of the legal agreements are complied with. All the legal agreements, including the addenda to the relocation agreement have been approved by the communities. The project management, the operational team, the CLOs and the legal representatives of the two communities continuously monitor the relocation process to ensure compliance with the terms and conditions of the legal agreements. Furthermore, we intend to establish post relocation committees to monitor and manage community projects arising from the legal agreements. The election of such committees will be conducted by a credible outside agency in the presence of all the stakeholders. The SAHRC will be welcomed to send a representative to the inaugural meeting.”¹⁵⁵

This could be illustrative of a compliance based approach resulting in *ad hoc* responses to arising risks.



¹⁵⁴ Anglo Platinum response of 8 August 2008, at para 19.

¹⁵⁵ Bhadrish Daya Attorneys response of 31 July 2008, at para 5.15.

6.2.5 Recommendations

The SAHRC recommends that:

- » PPL provides the SAHRC with all documentary evidence in relation to the monitoring process.
- » PPL adheres to international best practice as outlined above in monitoring the progress of the relocation process.
- » PPL link monitoring and grievance redress mechanisms to create a better understanding of how the relocation process is progressing and better allow PPL to make timely interventions to address issues emerging throughout the relocation process.

6.3 Grievance redress

6.3.1 Observations

The SAHRC is concerned that community members had no formal recourse to transparent and impartial grievance redress. Information gathered from community consultation indicates that the majority of community members believed there to be no formal process. It may be that there is a formal process in place; however, the SAHRC is unaware of it at present. The existence or not of such a mechanism is potentially immaterial for even if such a mechanism does exist the SAHRC is concerned as to:

- » Why the community is unaware of it or is not utilising it effectively; and
- » Why community members felt that they had to resort to protest, media contact and the employment of external legal representation to defend their interests against PPL.

The SAHRC is concerned that the grievances may have been and may currently be directed on an *ad hoc* basis in the following ways:

- » To the Mapela Tribal Authority. Under the traditional structure community members take grievances to the Indunas who then take them to the MTA. In the case of Ga-Chaba the community claims that the Induna is being ignored because of his resistance to the process. This therefore results in a lack of clarity in the processes and a lack of confidence in any processes which may exist and any resultant outcomes;
- » To external legal representation;
- » Informally delivered grievances to the PPL Project Office at Armoede. This was formerly an *ad hoc* practice but during the July site visit of the SAHRC the community informed it and it was confirmed that the PPL Project Office was closed to community petition on every day except Fridays. The reason given was the safety concerns of the PPL employees at the Project Office. The SAHRC is not aware of the current status of this practice;
- » Through community protest;
- » Through the media;
- » Through external NGOs; and
- » Through the SAHRC.

Although these are legitimate channels, none have the capacity to effectively and in a timely manner deal with the specific issues surrounding the mine and relocation processes, which will ultimately have to be presented to PPL and the project sponsors. Many of these outlets may also increasingly create significant risks for PPL especially community protest, media coverage, and the use of external legal representation.

The SAHRC believes that if PPL had developed a sustainable, transparent and functional grievance redress process, that the possibility that these routes outlined above would not have to be employed would have been significantly

reduced. For the SAHRC this is evidence enough to suggest that any grievance redress process created by PPL is not functioning effectively.

The SAHRC is further concerned that a lack of meaningful grievance redress is undermining the project sponsor's ability to monitor the relocation process.

6.3.2 Explanation

During the meeting with Anglo Platinum representatives on 21 April 2008 at Human Rights House, Anglo Platinum intimated concern at community "forum shopping" in order to secure grievance redress.

During the SAHRC site visit dated 10 – 11 July 2008, the SAHRC specifically questioned members of all communities visited on their understanding and ability to access a PPL established grievance mechanism. Some community members cited the CLOs and the ability to post *ad hoc* grievances to the PPL Project Office at Armoede. However, there is clearly no real and meaningful understanding of how to access grievance redress in the community.

During this visit the SAHRC witnessed the community of Sekuruwe deliver a Memorandum to the Mapela Tribal Authority (detailed in annexure 2) which listed 24 key issues, which it wanted addressing immediately. This act of community protest, which is not isolated or uncommon within this area, again reinforced the perception that institutional structures systematically dealing with grievance redress are absent from this relocation process or not functioning effectively. Further clarifications were provided by Anglo Platinum and are referred to in paragraph 6.3.4 below, but these clarifications did not alter this conclusion. Similarly, a response was provided by Bhadrish Daya Attorneys to questions posed and this is also referred to below.

6.3.3 Regulatory framework

International best practice

The IFC Performance Standard 5 on Land Acquisition and Involuntary Resettlement states that:

“The client will establish a grievance mechanism consistent with Performance Standard 1 to receive and address specific concerns about compensation and relocation that are raised by displaced persons or members of host communities, including a recourse mechanism designed to resolve disputes in an impartial manner.”

6.3.4 Steps already taken to address the issue

The SAHRC has engaged community members on their ability to access grievance redress. The SAHRC then engaged with PPL to better understand any institutional process implemented to ensure that a grievance mechanism was developed to ensure that community members were able to access and seek redress on raised grievances in a timely manner.

Anglo Platinum responded to further clarifications requested by the SAHRC:

» In response to requests concerning the existence of community grievance mechanisms Anglo Platinum referred to a response to another question stating that the “Community approaches the project Management and/or CLOs and/or Section

21 representatives and/or the Operational Team and/or the Community Legal Adviser on a daily basis. All grievances are recorded and responded to”;¹⁵⁶ and

» Documentation provided sets out the internal requirements and allocation of responsibility for dealing with external and internal communication concerning social, health and environmental issues at PPRust.¹⁵⁷

However, it is uncertain how these internal allocations of responsibility translates into community grievance mechanisms; if and how this is operationalised and communicated to the community (save as described in the bullet point above); and then how external needs are translated into internal processes. Furthermore, it was not clarified by Anglo Platinum, as requested, whether other stakeholders are represented in any grievance mechanism, such as the Municipality and the MTA.

Bhadrish Daya Attorneys was also requested to provide information concerning the following:

- “a. What kind of grievance and redress mechanism was created to ensure that issues raised by the affected peoples about the relocation process are lodged, addressed and answered in a timely fashion?
- b. How was Anglo Platinum involved in this mechanism?
- c. What is the role of the “operational team”? Please supply information on the organisational structure, role and responsibilities.”¹⁵⁸



¹⁵⁶ Anglo Platinum response of 8 August 2008, at paras 23 and 22.3.

¹⁵⁷ *Idem*, at para 23 and Annexure E.

¹⁵⁸ SAHRC request to Bhadrish Daya Attorneys for information, 25 July 2008, at paras 13(a)-(c).

They replied that this is better directed to the Project Manager, but that their firm “continues to address the grievances and plays a mediating role.”¹⁵⁹

6.3.5 Recommendations

- » A grievance redress process is a fundamental vehicle for individual community members to voice concerns over the relocation and thereby endowing them with agency within the process. Through an understanding of traditional and customary practice, and in the knowledge that community members have sought grievance redress elsewhere, the SAHRC recommends that PPL provide clarity for the community on the mechanism created for community members to access grievance redress.
- » A grievance mechanism is a key mechanism by which project sponsors are able to monitor the progress of the relocation process. The SAHRC therefore recommends that grievance mechanisms are meaningfully employed to ensure PPL is aware of developing issues which have the potential to disrupt the relocation process and thereby significantly impact upon the human rights of affected communities.
- » As project sponsors, the SAHRC recommends that PPL needs to recognise its unique position in the web of relationships between stakeholders to address specific concerns on the relocation process. It therefore should seek to clarify its responsibility for grievance redress as distinct from that of other institutions such as the MTA and the Mogalakwena Municipality.
- » The SAHRC recommends formal and transparent lines of communication are installed between the MTA and

Mogalakwena Municipality and PPL to ensure that all relocation and mining related community grievances are delivered to the project sponsor.

- » In developing and evaluating non-judicial grievance mechanisms the SAHRC recommends regard be had to the concept of “rights compatibility” of grievance mechanisms in process and substance. Developing such a set of principles and guiding points was the focus of a project of the Kennedy School of Government’s Corporate Social Responsibility Initiative, Harvard University.¹⁶⁰ The core principles of rights compatibility in process “require that processes affecting the lives, well-being and dignity of individuals and groups should be based on inclusion, participation, empowerment, transparency and attention to vulnerable people. They also demand that any grievance process be fundamentally fair.”¹⁶¹ Furthermore, the grievance mechanism must be rights compatible in substance. This requires that “complaints are addressed in a manner that reflects and respects human rights, including, crucially, the right to an effective remedy”.¹⁶²

6.4 Consultation

6.4.1 Observations

The SAHRC is satisfied that consultation structures were put in place between the project sponsors and the community as discussed further above. This has been repeatedly demonstrated through a wide range of presentations, and report documentations. The SAHRC has requested “documentation relating to the specific level of engagement

¹⁵⁹ Bhadrish Daya Attorneys response of 31 July 2008, at para 5.15.

¹⁶⁰ Corporate Social Responsibility Initiative, Kennedy School of Government, Harvard University, Rights Compatible Mechanisms: A Guidance Tool for Companies and their Stakeholders (January 2008).

¹⁶¹ *Ibid*, p7.

¹⁶² *Idem*, p8.

with affected parties e.g. meeting minutes detailing specific queries, query resolution etc to indicate the depth of consultation which should tally with the mapping of all affected stakeholders".¹⁶³ Anglo Platinum replied that the documentation relating to the numerous meetings between the s21 companies, the MDC, individual community members and other stakeholders is available for inspection by the SAHRC at the mine.¹⁶⁴ The SAHRC is, however, seriously concerned over community claims that despite this they maintain that they were not fully consulted on the relocation process.

The SAHRC is satisfied that affected community members had ample opportunity to raise questions and concerns throughout the relocation planning process. The SAHRC is, however, concerned over community claims that these questions and issues were in some cases not properly addressed.

The SAHRC is concerned that PPL delegated responsibility for consultation to an organisation that was potentially unable to fairly and transparently reflect the collective views of the community.

The SAHRC is concerned that the community were initially consulted under the community perception that the mine expansions would take place and therefore that the relocation was **inevitable**. This was reinforced by the perception of local, provincial and national governments, that in being aware of the proposed expansion they approved of the relocation thus giving the community the impression that they had no agency to protest.¹⁶⁵

The SAHRC is further concerned that the Task Team, intended to address concerns over representation in the Motlhotlo community was disbanded and no alternative representative group has been formed as a replacement.

6.4.2 Explanation

The SAHRC acknowledges that a vast amount of community consultation was undertaken by PPL sponsored consultants and project managers in imminent anticipation of and during the relocation process. It also acknowledges that community members were given ample opportunity to voice concerns and raise major issues.

However, the SAHRC is concerned that PPL effectively delegated responsibility for this consultation to an organisation that lacked the capacity to organise itself as an open, accountable and transparent institution and which would consistently reflect the views and concerns of the community over a time period of many years. The steering committees, which evolved into the s21 companies, were delegated responsibility for consulting with their respective communities. However, these bodies had no previous experience of working on relocation or of engaging with the private sector. The details of community meetings and lists of consultations held, fly in the face of a community which became divided during the relocation process as a direct result of what they perceived as a lack of agency to voice concerns or have issues addressed by the s21 companies. The proof that the s21 companies effectively failed as a consultation vehicle for the community was the ensuing creation of

¹⁶³ SAHRC request to Anglo Platinum for further information, 25 July 2008, at para 4(f)(i).

¹⁶⁴ Anglo Platinum response of 8 August 2008, at para 22.1.

¹⁶⁵ Founding affidavit of Malose Johannes Masubelele, *Masubelele v. PPL*, at para 42.

the MDC, the MRRC, and later on the creation and then the disbandment of the Task Team.

Task Team

Through a review of meeting minutes it seems that the work of the Task Team may have been undermined by an inability to sustainably unify the two divided factions, the MDC and the s21 companies. Through the operation of the Task Team it appears from meeting notes that the two groups were being identified as two separate units. The virtue of the Task Team appears to have been the inclusion of a wider circle of stakeholders; however, it also appears that the attendance of these stakeholders could not be guaranteed.¹⁶⁶

Of even greater concern to the SAHRC is its belief that community members were consulted upon the relocation process under the **perception that the relocation was inevitable**. This is demonstrable in a series of documentation but most starkly in the minutes outlining the actions of the meeting dated 18 October 2002, at which the communities of Ga-Puka and Ga-Sekhaolelo agreed to the relocation of the Motlhotlo village. Meeting minutes state the following:

“Mr Moshabi welcomed the guests. He mentioned that today is not the day to raise complaints and that any complaint will be dealt with the following day when the community is on its own...

...Mr Mashalane was the MC for the day...He then ordered that the mine representative should stand up and tell what they are going to do there....Mr Mashalane tells people that they are not starting with the relocation process, they are actually continuing....”¹⁶⁷

The relocation process had indeed been initiated over 5 years prior to the meeting of 18 October 2002. However, for many community members this was the first opportunity at which they were able to raise concerns and questions, and yet it was at this same meeting at which concerns were not accepted, that the then relocation committees asked the community to agree to the relocation and through that resolution depose themselves of their informal rights to the land. Many communities may have not known at this point that they had any agency to reject the resolution. At neither the Ga-Sekhaolelo community resolution meeting nor the Ga-Puka community resolution meeting both undertaken on the same day, did a single community member vote against the community resolution.

During site visits the SAHRC questioned various members of affected communities on the level of consultation undertaken throughout the process. Invariably community members maintained that consultation directly with PPL was limited and consultation with s21 companies was neither meaningful nor responsive.

The SAHRC is therefore seriously concerned that the affected communities were not given the opportunity to legitimately input into the relocation planning and as such have become resistant to the whole process.

The SAHRC acknowledges that it is necessary to engage further with those members of the community who are not representatives of the s21 companies, but who may be satisfied with the consultation undertaken by PPL and the resettlement process itself. No such persons came forward to the SAHRC.

¹⁶⁶ Notes from Task Team Meeting with Project Management, 21 August 2007.

¹⁶⁷ Minutes of a meeting of 13 October 2002 on the signing of the Tribal Resolution.

6.4.3 Regulatory framework

Domestic legislation

Mineral and Petroleum Resources Development Act, 28 of 2002.

PPL is obliged to consult with the community in terms of the Mineral and Petroleum Resources Development Act, 28 of 2002.

See specifically and generally sections 5(4)(c), 10 and 22(4)(b) and 54 -

“5(4) No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without – (a) an approved environmental management programme or approved environmental management plan, as the case may be; (b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and (c) notifying and consulting with the land owner or lawful occupier of the land in question.”

“10 (1) Within 14 days after accepting an application lodged in terms of section 16, 22 or 27, the Regional Manager must in the prescribed manner – (a) make known that an application for a prospecting right, mining right or mining permit has been received in respect of the land in question; and (b) call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice”

“22 (4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing – (a) to conduct an environmental impact assessment and submit

an environmental management programme for approval in terms of section 39, and (b) to notify and consult with interested and affected parties within 180 days from the date of the notice.”

In the event of a failure to create agreement after consultation the matter the mine is obliged under section 54 to refer the issue to arbitration to be determined by a competent court.

“54 (1) The holder of a reconnaissance permission, prospecting right, mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any reconnaissance, prospecting or mining operations because the owner or the lawful occupier of the land in question – (a) refuses to allow such holder to enter the land; (b) places unreasonable demands in return for access to the land; or (c) cannot be found in order to apply for access.

(2) The Regional Manager must, within 14 days from the date of the notice referred to in subsection (1) – (a) call upon the owner or lawful occupier of the land to make representations regarding the issues raised by the holder of the reconnaissance permission, prospecting right, mining right or mining permit; (b) inform that owner or occupier of the rights of the holder of a right, permit or permission in terms of this Act; (c) set out the provisions of this Act which such owner or occupier is contravening; and (d) inform that owner or occupier of the steps which may be taken, should he or she persist in contravening the provisions.

(3) If the Regional Manager, after having considered the issues raised by the holder under subsection (1) and any written representations by the owner or the lawful occupier of the land, concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the reconnaissance, prospecting or

mining operations, he or she must request the parties concerned to endeavour to reach an agreement for the payment of compensation for such loss or damage.

(4) If the parties fail to reach an agreement, compensation must be determined by arbitration in accordance with the Arbitration Act, 1965 (Act No. 42 of 1965), or by a competent court.

(5) If the Regional Manager, having considered the issues raised by the holder under subsection (1) and any representations by the owner or occupier of land and any written recommendation by the Regional Mining Development and Environmental Committee, concludes that any further negotiation may detrimentally affect the objects of this Act referred to in section 2(c), (d), (f) or (g), the Regional Manager may recommend to the Minister that such land be expropriated in terms of section 55.

(6) If the Regional Manager determines that the failure of the parties to reach an agreement or to resolve the dispute is due to the fault of the holder of the reconnaissance permission, prospecting right, mining right or mining permit, the Regional Manager may in writing prohibit such holder from commencing or continuing with prospecting or mining operations on the land in question until such time as the dispute has been resolved by arbitration or by a competent court.

(7) The owner or lawful occupier of land on which reconnaissance, prospecting or mining operations will be conducted must notify the relevant Regional Manager if that owner or occupier has suffered or is likely to suffer any loss or damage as a result of the prospecting or mining operation, in which case this section applies with the changes required by the context."

"Minister's power to expropriate property for purpose of prospecting or mining 55 (1) If it is necessary for the achievement of the objects referred to in section 2(d), (e), (f), (g) and (h) the Minister may, in accordance with section 25(2) and (3) of the Constitution, expropriate any land or any right therein and pay compensation in respect thereof.

(2) (a) Sections 6, 7 and 9(1) of the Expropriation Act, 1975 (Act No. 63 of 1975), apply to any expropriation in terms of this Act. (b) Any reference in the sections referred to in paragraph (a) to "the Minister" must be construed as being a reference to the Minister defined in this Act."

International best practice

A group should be established to coordinate the implementation of the RAP. The IFC recommends that this group should comprise representatives of the project sponsor, relevant government line and administrative departments, community organisations, NGOs involved in support of relocation as well as representatives of the communities affected by the project, including host communities.

The IFC also recommends the creation of Community Relocation Committees. It is crucial that these committees comprise the formal leadership of the affected population as well as representatives of interest groups within the community that may have no leadership role for example landless households, **women**, the elderly and the youth to ensure that vulnerability is not exacerbated by the process.¹⁶⁸

6.4.4 Steps already taken to address the issue

The SAHRC is not aware of additional steps taken to address this issue save for various

¹⁶⁸ IFC Resettlement Handbook, pp43–45.

matters which are *sub judice* and will be addressed by the Courts.

6.4.5 Recommendations

» A representative community consultation committee should have been formulated at the start of the process which allowed for representation from all major stakeholders. This type of representation was only developed late in the process during the latter half of 2007 when community protest against the relocation process and developing conflict between the MDC and the s21 companies prompted the creation of the Task Team.

This view has been validated by the s21 companies and the MDC.

The Task Team has since disbanded and the SAHRC recommends that all stakeholders engage in developing a new relocation committee, which includes representation from all affected stakeholders to ensure meaningful and thorough representation in the process.

- » The SAHRC recommends reference to international guidance through the following IFC publications:¹⁶⁹
- » Stakeholder engagement: A good practice guidance for companies doing business in emerging markets; and
 - » Doing better business through effective public consultation: A good practice manual.

In general, reference could be made to *Creating Successful Sustainable Social Investment – Guidance documentation for the oil and gas industry*.¹⁷⁰

6.5 Achievement of consent (beyond a single fixed point in time)

6.5.1 Observations

During resettlement processes the achievement of consent is the most fundamental process in reducing risks associated with resettlement, but to ensure that resettlement can be used as a vehicle to ensure that the relocation process either maintains or improves the quality of lives and livelihoods.

The SAHRC is concerned that PPL took a compliance based approach to the achievement of community consent for the resettlement process and as such neither anticipated nor mitigated the risks associated with the possible absence, or claims of the absence of free, prior and informed consent. The SAHRC is concerned as to claims that PPL is unable to prove the achievement of free, prior and informed consent (in line with international best practice) beyond the provision of one-on-one agreements between the Project and individual community members. In light of claims made by community members that consent was elicited through duress additional documentary evidence needs to be supplied by PPL to establish the achievement of this consent.

¹⁶⁹ http://www.ifc.org/ifcext/sustainability.nsf/Content/Publications_GoodPractice_StakeholderEngagement [accessed on 29 July 2008].

¹⁷⁰ IPIECA (March 2008, CDA Collaborative Learning Projects), <http://www.ipieca.org/activities/social/downloads/publications/SocialInvestmentGuide.pdf> [accessed on 22 August 2008].

6.5.2 Explanation

Consent for relocation was achieved through two mechanisms. The first was community resolutions passed in October 2002. The second was the one-on-one agreements signed with individual households.

The SAHRC is seriously concerned that the community resolution, which effectively initiated the relocation process by community agreement to the dispossession of land, may not have signified the individual consent of all affected peoples. The resolution was passed by the majority of households in both the Ga-Puka and Ga-Sekhaolelo. This majority consent has been used as evidence of legal compliance. However, moving beyond compliance, the SAHRC is concerned that this type of consent was insufficient to mitigate the risk of eventual minority dissent against the process which we are now witnessing.

The SAHRC is further concerned that consent for the dispossession of land came after key contractors for the relocation had already seemingly been appointed thereby creating the perception in the community that the relocation was inevitable. It is claimed, but is not established as fact to the knowledge of the SAHRC, that it was under these conditions, orchestrated by the appointed project managers that the community resolutions were passed. Minutes of a meeting of 13 October 2002 at which the Community resolution was signed it was asserted that "today is not the day to raise complaints and that any complaint will be dealt with the following day when the community is on its own...today is a day for the community to sign a community resolution".¹⁷¹

It is unclear when the first opportunity for individual structural input into the process came, or whether it was in fact at the signing

of one-on-one agreements. However, the relocation process had already been initiated as if individual consent had already been achieved and dissent was deemed ineffective. The majority of concerns for individuals signing one-on-one agreements were not the ending of the relocation process, but trying to ensure that assets were not lost as a result of a process, which had already been deemed inevitable.

6.5.3 Regulatory framework

There is currently international debate over the achievement of consent during the relocation processes. Domestic legislation in South Africa and in many other countries reflects a compliance based approach necessitating only that project sponsors consult with affected people. Legislation allowing for provisions of land appropriation and eminent domain are often used when community consent cannot be achieved. PPL has made it quite clear that it sought a negotiated settlement through a compensation approach to the resettlement rather than appropriation. However, to fully manage the risks associated with resettlement the SAHRC proposes that the achievement of free, prior and informed consent is the preferred and critical standard, albeit not a legally required standard under domestic legislation.

Achievement of Free, Prior and Informed Consent

- » **Free** refers to the general principle of law that consent is not valid if obtained through coercion or manipulation.
- » **Prior** refers to meaningful, informed consent sought sufficiently in advance of any activities by a company.
- » **Informed** means that the process must involve consultation and participation by

¹⁷¹ Minutes of a meeting of 13 October 2002 on the signing of the Tribal Resolution.

Indigenous peoples with full disclosures of a development activity in accessible and understandable forms to affected peoples and communities.¹⁷²

In September 2007 the Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly of the United Nations, with South Africa voting in favour of its adoption. This was a relatively groundbreaking declaration which asserts that:

“States shall consult and operate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their free, informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resource.”¹⁷³

6.5.4 Steps already taken to address the issue

The SAHRC is not aware of additional steps taken to address this issue save for various matters which are *sub judice* and will be addressed by the Courts.

6.5.5 Recommendations

- » The SAHRC recommends that community members vocalise dissent earlier in the process to ensure that complaints are heard in time for effective action to be taken.
- » The SAHRC recommends that PPL acknowledges the flaws identified in the achievement of the consent process and engages with all stakeholders including resistant community members in working through any stalemate.
- » The SAHRC recommends that Anglo Platinum move beyond a compliance based approach in undertaking community consultation and achieving community consent and in future seek to achieve free, prior and informed consent as a key risk mitigation strategy.

¹⁷² *Free, Prior and Informed Consent* <http://www.oxfam.org.au/campaigns/mining/ombudsman/consent.html> [accessed on 25 July 2008].

¹⁷³ Article 32, Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007).

CHAPTER 7

.....

CONCLUSION



In addition to the specific recommendations of this report the SAHRC makes the following general recommendations and statements concerning future engagement in order to further locate this investigation in the context of extractive industry activities in South Africa and the human rights and business debate.

GENERAL RECOMMENDATIONS AND FUTURE ENGAGEMENT

7.1 Assist communities in understanding their rights and how to access them

A lack of grievance redress is a major theme emerging from the findings in this report. Institutional mechanisms that communities can access within the company have already been dealt with in the body of the report.

However, it is also crucial that individuals and individual communities are able to gain a better understanding of their human rights and how they are able to access them. One of the resounding findings of this report is that communities did not voice their concerns early enough in the process. To this end it is important to bear in mind the SAHRC's mandate to address individual complaints from affected people who believe that their human rights have been violated.

The SAHRC therefore recommends that these communities need to be made more aware of what rights they have and how they are able to access them. In this vein the SAHRC's National and Provincial offices will continue their programmes of training and awareness raising to address this particular need.

The SAHRC recommends that it would be of great benefit to affected communities if a **general education programme is conducted**

in all affected communities in South Africa who have been subjected to relocation, but ideally amongst communities prior to any resettlement consultations. This education programme would have several objectives, including: human rights awareness; knowledge of all rights and obligations arising from any proposed or existing resettlement processes; knowledge of all processes including grievance redress mechanisms. It is suggested that **experienced specialist consultants** can be contracted to develop this programme, and that they take into account work undertaken by, and the experience of, existing role players such as the IFC and the World Bank. This should further be undertaken in conjunction with the SAHRC. This initiative could be **funded by voluntary contributions from extractive industry companies** operating in South Africa who have, will, or may undertake such community relocations in pursuit of mineral wealth. The implementation of this education programme should be established as the norm. This programme should also be revisited and revised annually.

7.2 Assist companies in moving beyond a compliance-based approach to resettlement

As has been demonstrated above an imperative has been created for companies to move beyond legalistic compliance when undertaking resettlement due to the risk of human rights violations and the exacerbation of existing vulnerabilities. Countless examples internationally have indicated that compliance with current domestic legislation is insufficient in mitigating the potential risks associated with resettlement. Companies need to move beyond compliance based approaches, particularly in the following areas:

- » Consultation;
- » Achievement of free, prior and informed consent; and
- » Grievance redress processes.

The SAHRC recommends that a general human rights audit becomes a recommended standard practice for all extractive industry and other companies undertaking the resettlement of affected communities. Companies need to move beyond compliance based planning and activities in order to limit the exacerbation of existing vulnerabilities and potential human rights violations.

7.3 Assist companies in understanding the human rights implications of their behaviour and operation within their sphere of impact

This report has tried to demonstrate how social and environmental issues surrounding the operation of a mine may lead to human rights violations. Although not conferring broad obligations on the part of the company to promote, protect and respect the human rights of all individuals within its area of operations, the allegations directed at Anglo Platinum should demonstrate the reputational and financial risks of not engaging with potential human rights impacts. In many cases, mitigating human rights risk necessitates an additional layer of analysis as part of any normal risk assessment and mitigation process. However, the important issue is that in future Anglo Platinum should be able to use human rights rhetoric and additional contextual analysis to better understand how social impact issues can evolve into potential human rights violations. In considering the human rights implications of the activities of a company, it is also necessary to cast the net wider and consider the cumulative impact of the actions of several companies upon one affected community – that actions of one company in its sphere of impact may overlap with that of another company. In this context, the SAHRC is concerned that the activities of various mining companies in the Mokopane area or elsewhere may be undertaken in isolation and their collective effect upon

communities may therefore not be holistically captured and effectively addressed. This may also result in procedural confusion, where mining company X informs a community to use grievance procedure A, while mining company Y makes use of grievance procedure B for the same community, and so on. In the context of this specific investigation Anglo Platinum stated that it does interact with Lonmin Plc through various forums. However, the SAHRC recommends that as a standard practice a general forum be established of which all mining companies in the relevant area, whether operating under mining right or prospecting, be members. Additional members should include a representative of the Municipality and the Premier's Office, the Department of Minerals and Energy, the Department of Land Affairs and the Department of Environmental Affairs and Tourism, the Tribal Authority as well as members of affected communities as proposed in the report, as an addition to the Resettlement Committee.

Business engagement with human rights is an evolving field. The SAHRC has already referred to the role that Anglo Platinum's parent company Anglo American is playing in this discourse.

This report, however, demonstrates that one of the most crucial issues at play is the need for not single but multi stakeholder engagement to address alleged and potential future human rights violations at the hands of corporate actors. The United Nations Special Representative to the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, iterates this in the model that he created to broker a way across the impasse maintaining that:

"there is no single silver bullet solution to the institutional misalignment in the business and human rights domain. Instead all social actors

– States, businesses, and civil society – must learn to do things differently. But those things must cohere and become cumulative...”¹⁷⁴

The SAHRC therefore recommends that PPL make efforts to engage in broader multi-stakeholder engagement, particularly with civil society organisations which they may misguidedly place themselves in opposition to, to manage their potential human rights impacts.

7.4 Community and legal representatives’ input on what could have been done differently

During its site visits and written communications the SAHRC asked various communities, the legal representatives and structures what they

think should have been done differently and what measures could have been implemented at the commencement of negotiations with affected communities to better ensure engagement with the relocation process and ensure community unity. Their **varied views** and proposals included the following:

- » A “union” type of system is recommended to represent the community in addition to the Tribal Authority;
- » Nothing could have been done differently and all proper procedures were followed;
- » The Task Team was a positive development and steps should have been taken to ensure its continuation and effectiveness; and
- » Steps should have been taken to unite the communities or to establish a structure which could have dealt transparently with differences.

¹⁷⁴ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (7 April 2008, A/HRC/8/5).

ANNEXURE 1

Stakeholder identification

Local level stakeholders:

1. Affected communities
 - » Motlhotlo (Ga-Puka and Ga-Sekhaolelo)
 - » Ga-Chaba
 - » Ga-Molekane
 - » Sekuruwe
 - » Old Ga-Pila
 - » Resettled communities at Sterkwater, Armoede and Rooibokfontein
2. Formed stakeholder groups from affected communities
 - » Motlhotlo Relocation Resistance Committee
 - » Motlhotlo Development Committee
 - » Ga-Chaba Land Committee
3. Key relocation stakeholders
 - » Ga-Puka Relocation and Development Association (incorporated under Section 21)
 - » Ga-Sekhaolelo Relocation and Development Association (incorporated under Section 21)
 - » Minerals Committee
 - » Mapela Tribal Authority
 - » Mogalekwane Municipality
 - » Office of the Premier
 - » Anglo Platinum

National stakeholders:

1. National civil society organisations
 - » ActionAid
 - » Jubilee South Africa
 - » The Bench Marks Foundation
2. National government departments
 - » Department of Minerals and Energy
 - » Department of Land Affairs
 - » Department of Environmental Affairs and Tourism

ANNEXURE 2

Memorandum submitted by the Sekuruwe community on 10 July 2008 (direct transcript translation)

1. The community of Sekuruwe/ Blinkwater Village want to inform the Tribal Authority (Moshate) to instruct the mine to stop working at our place
2. We request the mine to stop any activities that take place at our environment
3. WE don't want to live side by side with these new mining and industrial activities
4. Houses are now cracking
5. Water will soon be polluted
6. Air pollution will cause respiratory diseases and productive land is replaced by slimes unemployed
7. There is no development for the people of this community because most of them are still unemployed
8. We assure you that will fight to put land before mining and people before profit
9. We request Tribal Authority not to continue serving the interests of the so called section 21 companies on our expenses
10. We also want to inform you that the section 21 company has been terminated to serve us any longer
11. We are sick and tired of the so called councillor in our village because he serves the interests of the mine
12. We inform you that he is no longer our councillor
13. We are sick and tired of you to allow the section 21 to come at Tribal Authority (Moshate) to talk about some of the community members
14. Stop eating the same cake with section 21 and serve the majority of the people
15. We also want to know about the MTN Aerial that has been structured at our village
16. What about the Eskom Poles that has been structured at our ploughing land
17. Why Tribal Authority (Moshate) are you quiet whereas some of the members of the community are harassed, shoot by members of the police
18. Never try to appoint a headman (Induna) for us
19. Avoid to be a dictator
20. Stop the friendship with your styn on our expenses
21. Why are you not coming to the community, whereas you know there is a crisis
22. Did you sign for the lease agreement? If not why are they working at our village?
23. The fine imposed on Mr Dan Motlana must be automatically cancelled with immediate effect.
24. We therefore request Tribal Authority (Moshate) to reply or respond within 14 days.

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