

THE DANISH  
INSTITUTE FOR  
HUMAN RIGHTS



**Business and  
Human Rights  
Dialogue  
Report**



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## EXECUTIVE SUMMARY

The South African Human Rights Commission (SAHRC or Commission) was established in terms of Chapter Nine of the Constitution of the Republic of South Africa, 1996 as a State institution supporting constitutional democracy. In particular, the Commission 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 the Republic. Although South Africa's business and human rights agenda is still in a premature phase that necessitates further collaboration and engagement, there are several areas in which South African business practices have significant human rights impacts.

The Commission has therefore consistently recognised the need to identify and address critical issues with regard to the impact of business on human rights across primary stakeholder groups, including government, business and civil society, through capacity building seminars, community engagements, complaints handling and information sharing. The Commission accordingly convened a Business and Human Rights Dialogue on 13-14 March 2018, which sought to build on its past activities with the objective of improving collaboration between the State, business and civil society to progressively strengthen the responsibility business carries in respect of human rights.

There is often an assumption that the objectives of human rights and the objectives of business conflict: the former aims at protecting the rights of individuals against discriminatory and unjust power; whilst the latter aims at generating profit. However, this binary approach constitutes an undue limitation on the many opportunities for mutual growth and convergence between human rights and business. Moreover, at the crux of addressing the inequality problem in South Africa is the role of human rights and development. Business plays a central role in human, economic and sustainable development of our communities in South Africa. Through regulation such as, for instance, social and labour plans in the extractive industry, government recognises the centrality of business in generating positive value for people, our economy and our communities. In addition, the extent to which private actors offer public services and the accountability of such institutions in South Africa is by no means resolved. The dialogue was accordingly structured to reflect on critical issues in the context of business and human rights, namely the role of business in equality and development; corporate accountability and State-owned enterprises; business and community engagement, and employment equity.

The mining industry, having received considerable attention for its adverse social and environmental impacts, appears to be attempting to address some of these problems. Through the Chamber of Mines, the industry is attempting to guide its members to ensure the protection of human rights and where necessary, that remedies are made available to victims. This is done, amongst other ways, through a voluntary compact that members sign committing themselves to a series of principles, including the commitment to uphold human rights. Yet, a number of challenges still exist. Firstly, the Chamber can only go as far as expelling members that are non-compliant with its own Membership Compact.



Secondly, there appears to be a lack of transparency within the industry generally. In particular, this was highlighted in the context of the negotiation, signing, disclosure and adherence to social and labour plans (SLPs). The Department of Mineral Resources was singled out as an 'absent' actor, due to its reported failure to adequately regulate the mining industry, including the implementation of SLPs.

State-owned enterprises (SOEs) and corporations which operate as business entities also bear responsibilities to respect and implement human rights standards. To this end SOEs must be held accountable for human rights violations. Boards of directors in such entities should ensure that companies' ethics performance is monitored and assessed, in accordance with both domestic legislation as well as international principles on business and human rights. Corporations have human rights responsibilities towards the community and the environment in which they operate and where these responsibilities are not explicitly set out by domestic law, companies should take guidance from international human rights norms, standards and law. These duties are particularly significant for mining companies who bear the social responsibility to contribute to the development of communities impacted by their operations.

A key condition for respect for human rights, particularly the rights of communities impacted by business operations, is that such communities be consulted prior to, and during the lifetime of, business activities to ensure that they have the necessary information to make informed decisions on matters relating to human rights. Grievance mechanisms should also be implemented to enable affected stakeholders to anonymously report their concerns around business operations, particularly in cases of non-compliance. The impact of businesses on human rights should be evaluated prior to the commencement of operations, monitored, and potential violations prevented or detected and responded to early through mechanisms dedicated to this objective.

In South Africa, achieving employment equity continues to be a major challenge in the private sector. Despite South Africa's implementation of transformative employment policies and legal frameworks, unfair discrimination in the workplace, particularly on the basis of race and ethnicity, continues to exist and is most pronounced in management positions. This is further exacerbated by intersecting gender inequalities, since most jobs are occupied by men, as well as by discrimination against persons with disabilities.

Most human rights challenges in the context of business are cross-cutting, and affect a number of stakeholder groups. As such, it is imperative that all the different stakeholders, including government, business, and civil society, come together on a frequent basis to discuss these challenges and find ways to address them. The Commission is well placed to facilitate discussions between different stakeholders while monitoring the observance of human rights by business actors, and will continue its initiatives in this respect going forward.



## INTRODUCTION



SAHRC Chairperson, Adv Bongani Majola, delivers opening address at SAHRC Business and Human Rights Dialogue

The South African Human Rights Commission (SAHRC or Commission) was established in terms of Chapter Nine of the Constitution of the Republic of South Africa, 1996 as a State institution supporting constitutional democracy. In particular, the Commission 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 the Republic. Although South Africa's business and human rights agenda is still in a premature phase that necessitates further collaboration and engagement, there are several areas in which South African business practices have significant human rights impacts. The Commission has therefore consistently recognised the need to identify and address critical issues with regard to the impact of business on human rights across primary stakeholder groups, including government, business and civil society, through capacity building seminars, community engagements,

complaints handling and information sharing.

The Commission, with support from the Centre for Human Rights, University of Pretoria, accordingly convened a Business and Human Rights Dialogue on 13-14 March 2018, which sought to build on its past activities with the objective of improving collaboration between the State, business and civil society to progressively strengthen the responsibility business carries in respect of human rights.

The dialogue, funded by the Danish Institute of Human Rights (DIHR), focused on key human rights challenges in South African business sectors and sought to enhance public understanding and awareness of the roles and responsibilities of stakeholders in upholding and protecting human rights. The dialogue addressed a number of topics, including the role of business in equality and development, corporate accountability and State-owned enterprises (SOEs), business and community engagement, and employment equity.

The Commission will use the outcomes of the dialogue to further integrate business and human rights in its core work and strengthen platforms for further engagement in this context. Insights gleaned from the dialogue will additionally be used to inform the update of the Business and Human Rights Country Guide (Country Guide), which was published by the Commission in 2015, in partnership with the DIHR. The Country Guide aims to improve the human rights practices of companies by providing guidance on how to ensure respect for human rights in their operations and increasing awareness of the potential and actual human rights impact of businesses operating in South Africa.



## BACKGROUND

### The South African context

Many of South Africa's socio-economic policies, as well as the challenges in implementing these policies, are a result of its complex history of apartheid and oppression. Despite the abolition of apartheid's discriminatory legislative framework, stark socio-economic inequalities persist. South African society, including trade unions, civil society organisations and formations, and academia, continue to vocalise its critique of government, particularly on issues of inequality and the impact and implication it has on the people of South Africa.

In 2012, tension between government, labour, communities and the private sector culminated in the death of 47 mine-workers at the Lonmin mine in Marikana as a result of a protracted labour dispute. Since the tragic events of what has become known as the Marikana massacre, it has become increasingly clear that the key to resolving South Africa's complex human rights issues is neither confrontation nor intransigence. Instead, constructive, multi-stakeholder dialogues that include the private sector should be sustained for reforms to effectively be implemented.

Since 2012, South Africa's score on the Human Development Index placed it above the regional average, below only Botswana and Gabon. However, unemployment remains unacceptably high, with multiple disproportionate impacts on black and coloured people, women, and persons with disabilities. Unemployment results in poor development and exacerbates living conditions in the country in the long-term. The most recent Quarterly Labour Force Survey published by Statistics South Africa estimates the unemployment rate at 26,7 percent.<sup>1</sup> The high rate of unemployment renders the achievement of the goals encapsulated in South Africa's National Development Plan (NDP) to eliminate unemployment and poverty by 2030, unlikely.

For the objectives of the NDP to be achieved, contribution from the private sector is crucial. A 2011 diagnostic undertaken by the National Planning Commission (NPC) stipulates that one of the challenges faced by South Africa is infrastructure that 'is poorly located, under-maintained and insufficient to foster higher (social) growth'.<sup>2</sup> Inadequate infrastructure is a consequence of insufficient public investment and funding that cannot meet the economic and social needs of the country. Business plays a central role in human, economic and sustainable development in South Africa<sup>3</sup> and therefore constitutes a key stakeholder in improving socio-economic infrastructure. Business activities (whether privately or government-owned) are thus inextricably linked to the realisation of human rights entrenched domestically in the Constitution, and committed to in the NDP and the Sustainable Development Goals (SDGs). Moreover, the rights enshrined in the South African Bill of Rights provide a normative and legal basis in terms of which meaningful transformation and development can occur.



## Key international developments

The adoption of the Declaration on the Right to Development in 1986<sup>4</sup> established consensus among States, international organisations, and development finance institutions that close linkages exist between human rights and development, and that a human rights-based approach to development would encapsulate the non-economic dimensions of development that are necessary to alleviate poverty. The conversation around the right to development constitutes one example of how developments at the international level have influenced the interpretation of and response to issues domestically. In addition, a number of other key international developments have set the agenda around business and human rights. However, the path to the adoption of a normative framework that regulates the relationship between business and human rights at the international level has not been a smooth one.

Although the push towards a legally binding treaty on business and human rights has gathered momentum in the last decade, efforts towards such an initiative can be traced as far back as the 1970s. In 1973, the United Nations (UN) created the Commission on Transnational Corporations (UNCTC), which was mandated to formulate a corporate code of conduct for transnational corporations. The UNCTC's work continued into the 1990s, but was ultimately unsuccessful, largely due to disagreements between developed and developing countries, and was consequently dissolved in 1994. In 1976, the Organisation for Economic Co-operation and Development (OECD) undertook a similar effort and established guidelines for multinational enterprises to promote responsible business conduct consistent with applicable laws. In 1977, the International Labour Organisation (ILO) adopted its Tripartite Declaration of Principles Concerning Multinational Enterprises, which calls upon business to adhere to relevant ILO conventions and recommendations.

In January 1999, then UN Secretary General, Kofi Annan, proposed a legally non-binding Global Compact of shared values and principles at the World Economic Forum. The Global Compact invites business to voluntarily support and adopt ten core principles which are divided into categories dealing with general human rights obligations and environmental protection standards. Later, in 2005, Professor John Ruggie was appointed as the UN Secretary General's Special Representative on business and human rights. In 2011, following significant research and consultation on the topic, the United Nations Human Rights Council (UNHRC) unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs), which consists of 31 principles recording duties related to the 'Protect, Respect and Remedy' framework on the issue of human rights and transnational corporations. The UNGPs provide a global standard for preventing and addressing the risk of adverse impacts on human rights posed by business activity. The UNGPs furthermore constitute an internationally accepted framework for enhancing standards and practice regarding business and human rights.





These aforementioned initiatives are not considered legally binding under international human rights law. As a result, on 25 June 2014, the UNHRC passed a resolution that established an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (IGWG). The IGWG's mandate is to elaborate an international legally binding instrument on business and human rights. The resolution was sponsored by Ecuador and South Africa, but has faced opposition from a number of States. The IGWG will have its fourth session in 2018. As discussed in more detail below, it emerged from the dialogue that many stakeholders in South Africa support the government in its efforts to secure an international legally binding instrument on business and human rights. It is hoped that a legally binding instrument would be valuable in addressing human rights violations perpetrated by the private sector. As a result of South Africa's political efforts to advocate for such an instrument, uptake of the UNGPs has been relatively slow domestically. In fact, many multi-national corporations (MNCs) are only familiar with the UNGPs due to exposure to the principles abroad.

In addition, the SDGs cannot be achieved without private sector participation and partnership. The SDG agenda is premised on the principle that no one should be left behind. Participation amongst 'all countries, all stakeholders and all people' thus constitutes the foundation of Agenda 2030.<sup>5</sup> This all-encompassing, participatory approach to implementation of the SDGs means that it is not only the purview of government to ensure the success of Agenda 2030, but also that of the private sector. The United Nations Conference on Trade and Development (UNCTAD) has described private sector contribution towards the realisation of the SDGs as 'indispensable'.<sup>6</sup> Companies are viewed as contributing to Agenda 2030 in two pivotal ways: through good governance and investment in sustainable development. The former contribution involves companies avoiding and mitigating business activities that adversely affect the economic, social and environmental pillars of the SDGs. The second contribution is monetary in nature and acknowledges that the fulfilment of SDG goals and targets will require significant capital, particularly in developing countries. It is estimated that the global investment required for the achievement of the SDGs is between \$5 trillion to \$7 trillion per year and in developing countries the amount is \$3.3 trillion to \$4 trillion annually.<sup>7</sup>

### **Legal and policy framework on Business and Human Rights**

International and regional developments in respect of business and human rights are not necessarily reflected in South Africa's policy and legislative frameworks. In particular, due to the fact that South Africa follows a dualist approach to international law, international legal commitments must be domesticated to be considered binding in local courts. Nonetheless, section 39 of the Constitution requires any domestic court, tribunal or forum to consider international law when interpreting the Bill of Rights.



Given that ‘business and human rights’ is a thematic issue that cuts across the entire spectrum of human rights, the same commitments found in international treaties such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), are applicable in the context of business and human rights. Furthermore, while the UNGPs are not binding per se, they do set out existing international law and best practice. As such, the UNGPs are a useful tool in determining the extent to which South Africa has domesticated international human rights law principles in the context of business and human rights.

South Africa’s regional human rights commitments and obligations likewise apply in the context of business and human rights. This includes South Africa’s commitments and obligations under the African Charter on Human and Peoples’ Rights, the African Charter on the Rights and Welfare of the Child, the Maputo Protocol on the Rights of Women in Africa, and the African Charter on Democracy, Elections and Governance. At the regional level, the African Commission on Human and Peoples’ Rights (ACHPR) has taken a special interest in the impact of extractive industries on human rights. In 2009, the ACHPR established the Working Group on Extractive Industries, Environment and Human Rights. During the course of the dialogue, extractive industries emerged as a key sector that could potentially add value to the South African context from a regional perspective.

Domestically, South Africa has a relatively well-developed legislative and regulatory framework on business and human rights, especially for an emerging market. The South African Constitution and the Bill of Rights provide a robust framework that underpins all other legal obligations in the country. The South African Constitution was also one of the first in the world that explicitly catered for the horizontal application of the Bill of Rights in Section 8:

### **8 Application**

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.***
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.***

South Africa’s legislative and regulatory framework related to business and human rights further consists of a number of laws and regulations around labour rights, environmental protection, property and land management, health and safety, corporate and securities, tax, procurement, anti-bribery and corruption, and data protection. South Africa also applies affirmative action measures through its Broad-Based Black Economic Empowerment (BBBEE) policy, which is aimed at addressing historical disadvantage as manifested in socio-economic inequality and skewed access to opportunities. The BBBEE policy informs a number of the laws referred to above, most notably those related to labour rights and employment.



The role of business in society, especially in the context of human rights, is increasingly interrogated. For example, questions that remain relatively underexplored include whether business bears an obligation to act in concert with the State to achieve certain human rights-based outcomes. A number of multi-national corporations commit themselves either directly, or through their membership to multi-stakeholder initiatives and industry organisations, to principles around sustainability and human rights. While the consequence of these environmental and social commitments are not always clear, such initiatives overlap with certain objectives of the State, including those related to the enjoyment of and respect for human rights. It is difficult to ascertain whether these commitments by businesses are a result of a compliance-based approach, or demonstrate attempts at active citizenship. However, it is important to emphasise that domestic and international human rights obligations ultimately remain legal obligations, and should not be perceived as mere voluntary commitments.

### **Interventions made by the SAHRC on Business and Human Rights**

As an internationally recognised 'A-status' National Human Rights Institution (NHRI), the Commission has actively participated in advancing respect for human rights by business. In 2010, the Commission participated in the Global Alliance of NHRIs (GANHRI)<sup>8</sup> annual biennial conference under the theme, 'Business and Human Rights: The role of NHRIs'. The conference, held in Scotland, culminated in the adoption of the 'Edinburgh Declaration' which committed NHRIs to engage proactively with corporate human rights responsibility and abuses; broaden their activities on business and human rights; integrate private sector issues into strategic planning; to share knowledge and expertise; and institutionalise their exchange and interaction.<sup>9</sup> Similarly, in 2011, the SAHRC participated in the Network of African NHRIs (NANHRI) regional workshop, held in Cameroon, which sought to explore the specific role of African NHRIs in business and human rights. During the workshop, NHRIs adopted the Yaoundé Declaration, which affirms their collective commitment to strengthen their capacity on business and human rights; address business-related human rights abuses; with specific attention to the fields of labour, environment and land-related human rights abuses.<sup>10</sup>

Furthermore, in 2011, the Human Rights Council adopted a resolution wherein it recognised, 'the important role of national human rights institutions established in accordance with the Paris Principles in relation to business and human rights, and encouraged national human rights institutions to further develop their capacity to fulfil that role effectively, including with the support of the Office of the High Commissioner and in addressing all relevant actors'.<sup>11</sup>

The Commission's activities in response to the business and human rights environment in South Africa have therefore largely been informed by the above commitments and institutional engagements at the international and regional level. These activities have resulted in a number of initiatives to promote awareness and understanding of the impact of business on human rights in South Africa.



In the course of fulfilling its mandate, the Commission has noted instances where business impacts on human rights over a period of time in the country. Given the relatively underdeveloped nature of the business and human rights agenda in South Africa, the Commission has accordingly sought to promote awareness and understanding of the impact of business on human rights in South Africa, while addressing specific violations by business brought to its attention through complaints handling at an individual level. Thus, in 2013, the Commission hosted a Business and Transparency Conference with key stakeholders to discuss issues of business transparency and inform the development of a National Action Plan for South Africa to support the implementation of the UNGPs.<sup>12</sup> The Commission's engagement on business and human rights was further supported by its inclusion as a key strategic focus area in the Commission's 2014-15 Annual Performance Plan.<sup>13</sup> To give impetus and continuity to its focus, the business and human rights theme adopted during 2014/15 was then extended to 2015/16 in terms of the SAHRC Strategic Plan for the fiscal years 2015 to 2020.<sup>14</sup> A critical point of inception for its work was to build its own institutional capacity while simultaneously promoting awareness at local levels. The activities in this earlier period relied therefore on raising awareness about the UNGPs and to catalyse conversations which explored the adequacy of existing legal frameworks in respect of business and human rights.

Moreover, the Commission sought to promote a human rights approach in the business context by developing tools that monitor awareness and implementation of business and human rights principles. The need for monitoring tools arose in a context where the State had failed to adequately and systematically monitor and assess the impacts of business practices on human rights. In March 2015, the Commission, in partnership with the DIHR, published a Human Rights and Business Country Guide for South Africa (Country Guide).<sup>15</sup> The Country Guide is underpinned by the UNGPs and outlines the roles and responsibilities of the State, corporations and business enterprises in upholding and promoting human rights in the South African context. The Country Guide includes recommendations to government and other stakeholders on business-related issues, including minimum wages for the agricultural sector, improving the monitoring of employment contracts, enforcing environmental obligations and providing adequate housing.

The Commission also convened national hearings and related interventions to investigate and address systemic issues in the business and human rights context. For example, in June 2015, the Commission hosted a roundtable discussion on Children's Rights and Business Principles. The objectives of the roundtable were to examine the child rights challenges resulting from the actions of the business community and possible remedial action; explore the opportunities for the promotion and protection of children's rights in the workplace; raise awareness of children as community members and important stakeholders of business; and share avenues for information gathering and sharing for the purpose of claiming and accessing rights.<sup>16</sup> In April 2016, the Commission hosted a business and human rights roundtable under the theme 'access to justice: creating access to effective remedies for victims of business related human rights violations'.<sup>17</sup> The roundtable sought to build on the Country



Guide's findings and focused primarily on the advantages and limitations of an international legally binding instrument to protect against human rights abuses by business and provide access to remedy for victims.

In seeking to deepen respect for a culture of human rights, a key approach has been to focus on and support efforts directed at eradicating systemic violations by business particularly where impacts are most pronounced for vulnerable groups. During 2016, the Commission has participated in strategic impact litigation to advance principles of business and human rights. The Commission intervened and was admitted as a friend of the court in the matter of University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others,<sup>18</sup> where the Commission submitted arguments in terms of international law highlighting that States have a duty to protect against and remedy human rights violations committed on their territory by private parties through creating effective judicial remedies to prevent or punish the infringement of a debtor's rights. The matter involved low income earners whose salaries were subject to attachment orders for the payment of oftentimes trifling debts, resulting in considerable rights violations. The case reached the highest court in South Africa (Constitutional Court), which ruled that these attachment orders – which were not subject to judicial oversight – were inconsistent with the provisions of the Constitution.

Building on the success of protections secured for vulnerable debtors, during July 2017, the Commission prepared a report for the National Credit Regulator on the impact of short term loans on the realisation of socio-economic rights.<sup>19</sup> The report highlighted the impact of debt, and particularly short-term loans, on the enjoyment of socio-economic rights. The report reveals a power imbalance between consumers and credit providers; a lack of information provided to consumers; a lack of awareness by consumers of their rights, with a corresponding lack of enforcement of rights; and consumers tied to unfair and burdensome credit contracts.

The Commission has thus consistently endeavoured to reflect the importance of business in respecting, protecting and promoting human rights through the fulfilment of its promotion, protection and monitoring mandates. The dialogue held during South Africa's human rights month, in March, accordingly sought to build on earlier initiatives by creating a platform for further engagement by business, government and civil society. The dialogue was structured to provide the space where participants and experts interacted to identify and respond to the pressing issues of the role of business in equality and development; corporate accountability and State-owned enterprises; business and community engagement; and employment equity.



## DAY 1 SUMMARY OF PROCEEDINGS

### Panel 1: The Role of Business in Equality and Development

The first panel comprised representatives from civil society, industry associations, independent experts and multi-stakeholder platforms. Specifically, it included representatives from Oxfam, the South African Chamber of Mines, Bardill and Associates and the Global Compact Network. The panel focused on the roles and responsibilities of business pertaining to equality in, and development of, South African society, with general agreement that it is not only the purview of government, but also firmly a business prerogative.



Mr Thembinkosi Dlamini, Senior Extractives Lead, Oxfam South Africa; Mr Tebello Chabana, Senior Executive, Public Affairs and Transformation, Chamber of Mines; Ms Nozipho January-Bardill, Executive Director, Bardill and Associates; Chair: Dr Achieng Ojwang, Head of Secretariat, Global Compact Network South Africa

### Background

Business engagement with social and human rights issues in South Africa often occurs at the business-State level and is broadly focused on social policy, and the way in which it impacts business operations. Disappointingly, there appears to be little engagement between the private sector and communities, which only takes place when required by legislation or when circumstances necessitate it. The sector-specific compliance approach has resulted in persistent substantive inequality at community level. Increased will among private actors must be coupled with adequate engagement to encourage a united community of leadership which could develop a framework for collective commitments. Due to the absence of universal acceptance by business of its human rights obligations and adequate dialogue, there is little understanding of the potential role that business can play in addressing inequality and underdevelopment and what the expectations of communities are in that regard.



Economic inequality in South Africa continues to manifest along racial lines, with the white population generally enjoying better socio-economic circumstances than their black counterparts. On the one hand, higher income individuals and families live in affluent suburbs and enjoy material wealth, while also being provided with opportunities to further improve their socio-economic status.<sup>20</sup> On the other hand, lower income individuals and families tend to live in townships, informal settlements, on farms and segregated communities, earning low wages and struggling to find employment. They often do not have access to basic services and have very few opportunities to change their circumstances. Business operations that impact on such communities carry higher risks of resulting in human rights violations and thereby exacerbating inequality and poor living conditions. As a result, the poverty and inequality cycle is perpetuated.

These adverse impacts often also affect certain groups in society more than others, and this is particularly the case for black women in South Africa. In the 2015 Millennium Development Goals report, it was revealed that black women in South Africa have the least access to secure, paying jobs and are most commonly excluded from positions of leadership. Further, as a group, black women are more likely to experience sexual and domestic violence in both the private and public spheres.<sup>21</sup>

## **Discussion**

While equality and development in the workplace dominated discussions, the mining industry received significant attention as a contributor to development. The development and implementation of social labour plans (SLPs) to address developmental issues in mining-affected communities emerged as a topic of much debate and controversy. A SLP is one of a set of documents that mining companies are required to submit to the Department of Mineral Resources (DMR) to determine whether a potential mining project is viable, and to receive the approval or license to operate. The SLP sets out how the company intends to share some of the benefits that flow from mining, including initiatives for developing the skills of their employees, upgrading local infrastructure, as well as providing housing, water and sanitation in affected communities. Once a company is awarded a mining right, the SLP becomes a binding legal document.

One of the panellists referred to SLPs as a form of mining tax that mining companies pay to the community in exchange for mining in the area, thus essentially serving as a codified attempt to secure a social license to operate in a particular community. At face value, it would appear that through SLPs, mining companies are fulfilling their corporate social responsibilities. However, closer scrutiny reveals that SLPs are not made public and consequently communities (and relevant stakeholders) are unable to ascertain if targets specified in SLPs are being met.

Remarks from civil society participants highlighted a need to introduce mandatory reporting on the amounts paid to the State and/or municipalities by public companies, especially those that are labour intensive, and for this information to be made publicly available. The need for companies to be more transparent about revenues, incomes, and wages was also highlighted, particularly since the lack of



access to this information drives the impetus for workers to engage in labour disputes. It may be that in some cases, workers will ask for better pay based on the revenues of the company, but in other cases it will be to the benefit of the company to be able to demonstrate any financial pressure it is under.

It emerged in discussions that besides anecdotal evidence, there is very little research on the effectiveness of SLPs in South Africa.<sup>22</sup> This problem is exacerbated by the culture of secrecy that exists at the DMR and within companies themselves. It is imperative for mining companies to adhere to the provisions of SLPs and aid in the provision of services such as access to water and food. Discussion revealed that there is also a need for more research to be undertaken on the benefits of SLPs.

Civil society stakeholders stated that an appreciation and acknowledgement of other power dynamics in business, besides those between the employer and employees, are required. In a contemporary world, other factors such as political, technological and environmental risks contribute to the attitude and responses by business to human rights. The primary objective for business is to seek reward through profit maximisation. However, the risks associated with such a narrowly conceived of objective are often transferred to local communities through externalised factors, including environmental pollution, low wages and the displacement of communities from ancestral lands.

It was further asserted that the reward-risk system is skewed in favour of business and, as a result, is prejudicial to human rights. An opinion was expressed that disproportionate adverse risk is borne by communities, while mining companies reap disproportionate rewards. The risk borne by communities is especially pronounced in the South African context. Thus, it was highlighted that perspectives around development should be changed to broaden its definition beyond economic development to one that pays equal regard to the rights of the community.

The need to recognise communities' right to self-determination as well as principles like Free, Prior and Informed Consent (FPIC), and the right to say 'no' to mining projects, was also raised by discussants. Under South African legislation, mining companies are required to obtain prior, informed consent from communities who are likely to be affected by their operations. Both consultation itself, and the quality and processes around consultation, do not appear to be adequate in most instances. Furthermore, requirements for obtaining free consent and for communities to be provided with adequate time to grant such, must be properly adhered to. The preconditions for meaningful consent must include the provision of access to information that is not simply a vertical provision of information, but which is capable of being understood and interacted with by communities.

A sentiment articulated by participants was that mining companies often compromise and undermine customary law, which drives inequality in affected communities. This results in a trust deficit between communities and mining companies. Trust building is thus a crucial element in the management of projects, but remains largely unaddressed in South Africa. In addition, uncertainty prevails regarding the roles and responsibilities for driving and coordinating engagement between communities and





the mining sector, and there is a disjuncture between the expectations of government and mining companies in this regard.

The Commission notes that recently such matters have formed the subject of litigation, with claimants asserting that community interests are ignored before these projects are undertaken. The Amadiba Crisis Committee, acting on behalf of the Umgungundlovu Community of Xolobeni in the Eastern Cape, has instituted legal proceedings against the Department of Mineral Resources and Transworld Energy and Mineral Resources. The basis of the suit is the exclusion of the local community from the process of granting rights to the mining company. As a result of the lack of transparency and inadequate consultation, the community is concerned that it will be displaced from its land with no alternative access to food or water.<sup>23</sup>

Participants accused companies of driving 'wedges' between traditional leaders and the wider communities. Such allegations arise from a tendency by companies to enter into private negotiations with traditional leaders, with decisions often taken on behalf of communities without broader consultation. The notion that communal land belongs to traditional leaders has proven to be extremely dangerous and rendered many rural communities across the country vulnerable to land rights deprivation by traditional leaders, government, and private companies.<sup>24</sup>

A number of participants expressed strong views that business has a role to play in addressing the aforementioned human rights challenges. It is asserted that business has an influential reach at all levels of society, and can offer employment opportunities in a context of widespread unemployment. Business should strive to understand the human rights challenges experienced in their sphere of influence by engaging more regularly with civil society and human rights activists. These engagements would go a long way in understanding the roles each sector can play and to clarify expectations in a manner that demonstrates shared values of improving and realising human rights. There was a general consensus among participants that, at the very least, business should respect human rights, and offer redress where right violations have occurred.



## Panel 2: Corporate Accountability and State-owned Enterprises

This panel comprised representatives from civil society, academia, the legal profession and a social enterprise organisation. Specifically, it included representatives from Corruption Watch, the Centre for Applied Legal Studies at the University of Witwatersrand, Gildenhuis Malatji Attorneys, and Influence Africa.



Ms Leanne Govindsamy, Head of Legal and Investigations, Corruption Watch; Ms Akhona Mehlo, Attorney, Business and Human Rights, Centre for Applied Legal Studies; Ms Sayi Nindi-Tshiani, Senior Associate – Public Law and Commercial Litigation, Gildenhuis Malatji Attorneys; Chair: Mr Tagbo Agbazue, Executive Chairperson, Influence Africa

### Background

For the duration of the dialogue, a misunderstanding and conflation of different terms used in the context of accountability – specifically the terminology around corporate accountability, corporate governance and corporate social responsibility – was discernible. As such, a brief introduction of these different terms is provided.

Corporate accountability is generally accepted to refer to the ability of those affected by corporations to hold these entities to account for their operations.<sup>25</sup> Accountability envisages a responsibility in the form of legal duties on directors of corporations, in their fiduciary capacity, and provides legal rights for the communities to seek remedy when they have suffered as a result of the conduct of corporations.



Corporate governance is the exercise of ethical and effective leadership by a governing body of an entity towards the achievement of ethical culture, good performance, effective control and legitimacy.<sup>26</sup> Typically, corporate governance is the means by which corporations are directed and monitored by a board of directors. In this oversight role, a board must ensure that a company's ethics performance is monitored, assessed, reported and disclosed. The ultimate objective of assessment, reporting and disclosure is to improve a company's ethical culture by enhancing its ethical performance. Assessing, reporting and disclosing should enable use of ethics reports to form opinions and make decisions based on verified information.<sup>27</sup>

Corporate social responsibility relates to a company's responsibility towards the community and environment in which it operates. It focuses on the voluntariness of corporations, as citizens, with responsibility arising from their roles as social partners. It emphasises self-guided decision making as opposed to responses to external responsibilities, often in the form of responses to laws and regulations. It further refers to companies accepting responsibility for their impact on society.<sup>28</sup>

SLPs complement corporate social responsibility commitments through law in South Africa. SLPs are designed to record a commitment by mining companies to 'give back' to the communities in which they operate. Such commitments would include initiatives to provide employment opportunities in affected communities and to develop the skills of their employees, upgrading local schools and roads, and providing housing, water, and sanitation in the area.<sup>29</sup> Companies must consult with mining-affected communities before finalising SLPs. Participating in the SLP process can also strengthen a community's position when engaging with a mining company in the future.<sup>30</sup>

A 'social license to operate' refers to the level of acceptance by local communities and stakeholders of projects that will likely impact them. Levels of acceptance are impacted by the strength of relationships with all relevant stakeholders. The relationships are, in turn, strengthened by the fulfilment of commitments by the entity in respect of the community, its interaction and responses to community concerns and requests, the creation of conditions for interaction, engagement and consultation such as the provision of accessible information, transparency, levels of disclosure, mechanisms and legitimacy of mechanisms through which community interaction is supported and other process-related assurances relevant to the specific conditions for participation prevalent in or unique to the particular community. Basic considerations of the factors referred to contribute to significant reduction in the risks of public criticism, social conflict and damage to a company's reputation.<sup>31</sup>

The panellists observed a proliferation of cases around corporate accountability in the context of human rights in recent years. In 2004, 23 mineworkers contracted silicosis while working in the mines, which formed the basis of a claim against Anglo American South Africa mines. Of the 23 miners, eight died prior to the finalisation of the claim in 2013, at which time the case was settled outside of court.<sup>32</sup>



On 21 December 2012, a motion was filed in court seeking a class certification for as many as 17,000 former gold mineworkers suffering from silicosis. The class action named 30 gold mining companies as defendants. The plaintiffs alleged that the defendant companies knew of the danger posed to the miners by exposing them to silica dust and that defendants failed to take adequate measures to protect the workers from this exposure. On 12 May 2016, the court granted the application for class action but the defendant companies appealed the decision, which was rejected. In September 2016, six defendants were granted the right to appeal the decision allowing the plaintiffs to pursue the class action. In December 2017, both parties requested the Supreme Court of Appeal to postpone the hearing pending attempts to reach a settlement. This request was granted by the court in January 2018, and the parties continued to negotiate a potential settlement out of court.<sup>33</sup>

On 3 May 2018, seven mining companies set up a trust fund to benefit gold miners or their dependents. The companies undertook to provide five billion rand for the affected mine workers. This settlement provides an opportunity to those suffering from silicosis and/ or tuberculosis to receive a medical examination and compensation, without the need to pursue extended litigation. The agreement outlines ten classes of claimants to benefit from the fund. The mining companies will pay 845 million rand for the administration of the trust fund with an initial payment of five million rand, and thereafter 100 million rand in the first year. The companies will initially contribute 1.4 billion rand for the first two years of benefit payments, and thereafter make annual contributions based on the claims laid against the companies by sick mineworkers or their dependents.<sup>34</sup> South African litigation involving a duty of care by mining companies to employees and affected communities reveals certain trends. Amongst these are a propensity for settlements after litigation has been instituted, often by other parties on behalf of affected persons, and, secondly, terms of payment are often structured. These trends emphasise power imbalances between affected persons and business; resulting in business testing the resolve of other parties to pursue litigation, and only thereafter opting to settle. When pursuing settlements, corporations seek to secure advantages through the structuring of the terms of settlement that favour smaller payments over time as opposed to once off payments.

The significant role of State-owned enterprises (SOEs) in the business and human rights discourse did not escape scrutiny. According to OECD guidelines, SOEs are corporations in which the State has significant control. They are independent bodies, partially or wholly owned by government, introduced to promote effective and efficient service delivery.<sup>35</sup> Laws and regulations applicable to SOEs include the Companies Act, 71 of 2008 (Companies Act), Public Financial Management Act, 1 of 1999 (PFMA) and the King III Report on Corporate Governance.<sup>36</sup>

The Companies Act provides general principles regarding ethical leadership and corporate governance,<sup>37</sup> the PFMA ensures transparency, accountability and the sound management of the revenue, expenditure, assets and liabilities of SOEs,<sup>38</sup> and the King III Report on Corporate Governance establishes a committee on compliance and stakeholders' relationships, amongst other things.<sup>39</sup>



These laws and regulations are relevant to the realisation of human rights and it is important that companies are monitored in terms of compliance.

There was consensus that SOEs and the issues arising from SOEs tend to be quite complex in nature, and require further attention in the context of human rights. The fact that the State is involved in the activities of SOEs should not exonerate these entities from being held accountable for their actions. Discussants flagged the need for future engagement on how best to address concerns regarding the responsibility of SOEs.

Management of companies, including that of SOEs, bear a fiduciary duty to act in good faith, with a reasonable degree of care, skill and diligence.<sup>40</sup> In the 2016-2017 financial year, the amount for irregular expenditure incurred by SOEs totalled higher than that of the past four years, indicating a worrying increase in irregular conduct.<sup>41</sup> In June 2017, the Auditor-General proposed amendments to the Public Audit Act 25 of 2004 that would improve its ability to hold government officials to account for irregular spending in SOEs.<sup>42</sup>

The role of civil society organisations as a significant value adding contributor to business was emphasised. The dialogue noted a disconnect between companies and shareholders and proposed that these gaps could be filled by role players like civil society organisations through the creation of accessible platforms for engagement. Through such mechanisms, enhanced diligence, improved enforcement of ethical anti-corruption regulations and general good governance frameworks could be strengthened. For example, since 2017, some individuals were summoned to a parliamentary inquiry to testify in the case of mismanagement and corruption at Eskom, but failed to do so.<sup>43</sup> This level of non-cooperation has negative implications for the quality of parliamentary oversight as well as for the levels of transparency and compliance by SOEs, thereby reinforcing evidence of gross mismanagement of public funds. Gathering evidence is therefore a necessary component to holding SOEs accountable, which appears to be a systemic problem in the South African context. It is in this milieu that civil society organisations can play a valuable role as watchdogs. Embedding a culture of transparency and accountability could benefit from the contribution of civil society organisations, resulting in more healthy scorecards which improve public and investor confidence in business.

One of the panellists asserted that business enterprises (irrespective of composition, ownership and size) tend to escape accountability because there is no overarching international treaty addressing corporate-related human rights violations. There are several 'soft law' measures attempting to tame unfettered corporate influence over the weak legal systems of host States and the adverse effect on environmental and human rights. Indeed, measures like the UNGPs through the 'protect, respect and remedy' framework serve as important tools to embolden change in the way that human rights are viewed by business. However, such guidelines and measures are undertaken by business enterprises on a voluntary basis, meaning that business enterprises may choose not to follow such measures, thus maintaining a state of impunity in international law.



In addressing the issue of impunity, in 2014, South Africa, together with Ecuador, endorsed the drafting of a binding international treaty on Transnational Corporations and Human Rights. A number of States such as China, members of the European Union, Russia and the United States have expressed their opposition to a binding treaty. Nonetheless, as a result of Resolution 26/9, the UN established an open-ended inter-governmental working group on transnational corporations and other business enterprises with respect to human rights (IGWG), which is tasked with elaborating on what such a treaty is to comprise.<sup>44</sup> The IGWG has held three sessions in Geneva in July 2015,<sup>45</sup> October 2016,<sup>46</sup> and October 2017.<sup>47</sup> Leading up to the third session in 2017, the OHCHR published a document containing draft elements of what a treaty on Transnational Corporations and Human Rights could potentially contain. The fourth session will convene in October 2018.

### Discussion

The necessity of a binding business and human rights treaty dominated this panel discussion. This enquiry was premised on the fact that business enterprises are subject to South African law, potentially rendering an international treaty futile. The irony of South Africa endorsing a binding treaty, while theoretically already possessing the power to regulate companies, was also highlighted. In the context of this discussion, South Africa's intention to withdraw from the International Criminal Court was viewed as undermining its endorsement of international measures for accountability.

The issue of State capture was also raised. South Africa has experienced the phenomenon of 'State capture' in recent years, in terms of which private individuals and companies allegedly have influence in and control over the mechanisms of government. For example, a number of media reports support and expand the findings of the Public Protector<sup>48</sup> in suggesting that the executive branch of government has been unduly influenced by a group of private individuals and companies, to the extent that there is an abuse of State power and resources to benefit specific individuals and companies. The redirecting of public resources in this fashion has commonly come to be accepted as corruption which, through the alleged collaboration of public officials and senior members of the administration, is now being investigated and prosecuted. Again, the absence of adequate governance measures, lack of transparency, and the will to collude with corrupt private actors have resulted not only in a diversion of much needed funds for development, but have eroded public confidence, and continue to incur costs associated with complex, drawn out investigations and prosecutions.



## DAY 2 SUMMARY OF PROCEEDINGS

### Panel 3: Business and Community Engagement

This panel consisted of representatives from civil society, the consultancy sector, as well as the national human rights institution. Specifically, representatives included the Bench Marks Foundation, Synergy Consulting, Lawyers for Human Rights, and the South African Human Rights Commission.

#### Background

The panel departed from the premise that communities must be effectively engaged in development endeavours to ensure maximum benefit and to mitigate adverse impacts. These benefits to development are most optimally realised where pre-conditions for effective engagement with communities are realised. Panellists indicated that the pre-conditions relate to the form of engagement, the processes for engagement, and accessible information sharing. The panellists elaborated on these elements by identifying examples arising from work with communities, research, judicial precedent and a consideration of the existing legal framework.

Highlighting the need for mechanisms to facilitate engagement with communities, forums where communities can freely and consistently lodge complaints were recommended. In the case of *Southern Developments Pty Ltd v Transnet*<sup>49</sup> the court held that negotiations and engagements should be conducted in good faith in order to enable communities to make informed decisions. Engagement should be capable of influencing the outcomes or decisions, otherwise such engagement is rendered meaningless.

The DMR has also published a number of guidelines on stakeholder engagement and consultation, in accordance with legal requirements and Environmental Management Plans.<sup>50</sup> In addition, several international human rights principles and guidelines document and expand on the concept of community engagement and how consultation could be undertaken to achieve both meaning and purpose. An underlying principle to FPIC, is the idea that a community has the right to withhold giving its consent to a project.<sup>51</sup>

Regarding the remaining elements contained in FPIC, reference to 'free' is taken to entail communities giving consent without coercion, manipulation or any force,<sup>52</sup> 'prior' refers to the fact that engagement must take place before commencement of the project,<sup>53</sup> 'informed' entails that the information provided to communities needs to be accessible, complete, objective, understandable and correct,<sup>54</sup> and 'consent' refers to the understanding that communities need to explicitly give their consent before the project is allowed to proceed. FPIC empowers communities to be part of the decision-making process of projects that affect them, and also gives them the opportunity to express their ideas and opinions about such projects.<sup>55</sup> The principle of FPIC thus needs to be observed throughout the life of the mining project in order to be developed and strengthened.



The panel expressed a need for interventions to address power relations by building capacity in communities that would enable them to engage with business in an informed way. Businesses should invest in the capacity of communities to enable them to have these conversations, and to level the playing field to some extent to ensure better outcomes. There is also a need to ensure that such engagements lead to human rights based development outcomes.

Operational Level Grievance Mechanisms (OLGM) were only recently introduced in the context of business and human rights, and the importance of such mechanisms is reiterated in international instruments that include the UNGPs. OLGM is essentially a formalised means for affected stakeholders to raise concerns about any human rights related impact they believe a company has had on them, in order to seek a remedy. The mechanism should help identify problems early, prior to escalation, and provide solutions to those impacted.<sup>56</sup> However, civil society indicated that a number of concerns and challenges remain around accessing OLGMs, including the need to gather evidence. Such challenges inherent in the requirement to causally prove right violations frustrate communities, and cause the OLGM process to be regarded as relatively ineffective.

In certain instances, business operations necessitate resettlement of people or communities from the place where a company intends to conduct its activities. This is especially prevalent in industries that require large tracts of land, such as the extractive industries. For effective resettlement, mining-affected communities must be included in the decision-making process around resettlement, in order to identify risks related to such actions and the associated projects. It is crucial to ensure that resettlement action plans are developed by consensus, are well arranged and executed, and that compensation is adequate. There also has to be adequate information, and complaints mechanisms, for communities to raise informed concerns about resettlements. Participants felt that the livelihood of communities always tends to pose the biggest challenges when it comes to resettlement, as some of the communities rely on subsistence farming, which is not necessarily an option once resettled.

The panel highlighted that the approach needs to view individual needs within communities on the basis that each affected individual is a right holder. The approach therefore needs to extend beyond a mere identification of 'communities.' This need becomes evident through observed increases in intra and inter-community conflicts, whether in respect of land, supply chain contracts or other pertinent issues. It surfaced in the course of the dialogue that, as the push for more benefits for communities is made, conflict appears to increase as a result of the dynamics within communities, often fuelled by competition for those benefits. These dynamics should be mediated within the affected communities prior to engagements with external actors. Such conflicts appear to be most pronounced on account of an apparent low level of human rights respect and protection by local authorities, whether municipalities or traditional structures. Such failures on the part of government and leadership adversely impact on projects and instances were cited where community benefits from such projects are completely negated, or delayed so significantly that value derived is minimal.





Human Rights Impact Assessment (HRIA) is a process where the impact of the operations of a business on human rights is identified, predicted and responded to.<sup>57</sup> The challenges inherent in determining direct versus indirect impacts on human rights were noted. Human rights enjoyment depends on an ecosystem of different role players and actions, and therefore there is a need to carefully consider how social compacting should take place in a country with such deep-rooted inequalities and power dynamics. Data gathering and interpretation are thus key to understanding social and human rights issues, as well as developing the appropriate responses and avenues for redress.

Panellists noted that, at present, legislation does not require companies to conduct HRIAs as part of the environmental and social impact assessment processes. However, there appears to be a need for an explicit human rights focus in impact assessments, as many human rights challenges persist, even where social and environmental impact assessment tools have been used.

### **Discussion**

During the discussion, it was generally agreed that the South African public should not dismiss the positive contribution of the mining sector, particularly in terms of the country's economic growth. For example, in instances where local government is unable to deliver public services, mining companies often take the lead in providing infrastructure and services, even if not required to do so by law. The mining sector makes a significant contribution to the South African fiscus, and entry level employees in the sector earn higher than the basic wage (as the benefits are included in the wage) in South Africa. However, the sector is plagued by dissatisfaction around wages, leading to significant worker protest action over a period of time.

Nonetheless, it was argued that even if mining companies provide benefits, an asymmetrical relationship between the communities and mining companies persists, ultimately placing the affected communities at a disadvantage. CSRs and SLPs were also raised during the discussions. In this regard, a view was expressed that CSR projects ultimately appear to be embarked on by business as a public relations exercise, and that the projects consequently do not provide tangible benefits to communities. It was pointed out that SLPs, which are legal requirements for the purposes of securing a mining license, are conflated with the notion of CSR. The role of government in facilitating SLP and CSR initiatives emerged as an area requiring clarity. Apparent uncertainty regarding the role that government should play in respect of these initiatives, coupled with poor dispute resolution mechanisms and inadequate engagement raised above, have resulted in frustration regarding the implementation and enforceability of these measures.



### Panel 4: Employment Equity

This panel comprised representatives from government, business associations, trade unions, and academia. Specifically, representatives included the Commission for Gender Equality, the Black Management Forum, the South African Federation of Trade Unions and the Centre for Human Rights.



Commissioner Tamara Mathebula, Deputy Chair, Commission for Gender Equality;  
 Mr Thabile Wonci, Managing Director, Black Management Forum;  
 Commissioner Annelie Gildenhuys, Commission for Employment Equity; Chair: Mr Josua Loots, Centre for Human Rights

### Background

A notable theme that emerged consistently throughout the dialogue was the fact that South Africa remains an unequal society,<sup>58</sup> and that this worrying characteristic extends to the employment sector. Inequality can be traced back to the colonial and apartheid legacy in South Africa, which was premised on the notion of superiority and inferiority amongst people based on race. This has been exacerbated by unfair discrimination in the workplace, most pronounced along racial lines of black and white employees.

Programmes aimed at securing employment equity are therefore directed to increasing employment opportunities for previously disadvantaged groups, thereby contributing to the attainment of equality and integration of diverse groups in the workplace. Employment equity further aims to promote opportunities that would have a direct impact on economic productivity and eliminate unfair discrimination.



Section 9 of the Constitution provides that everyone is equal before the law and has the right to equal protection of the law, while further prohibiting unfair discrimination. Other legislation is also in place to ensure the right to equality and eliminate unfair discrimination in the workplace. These include the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA) and the Employment Equity Act, 55 of 1998 (EEA). The EEA aims to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination. The Act further promotes substantive equality through the implementation of affirmative action to ensure redress and equitable representation in the workplace. Specifically, section 15 of the EEA states that 'suitably qualified people from designated groups<sup>59</sup> have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer'. However, this does not mean that people who are not from a designated group are excluded from equitable access to employment.<sup>60</sup>

The government has also established institutions with the mandate to ensure that people enjoy their right to equality, namely the Commission for Employment Equity (CEE), the Commission for Gender Equality (CGE), the Equality Court and the SAHRC. Other key stakeholders with mandates to promote effective implementation of the objectives of the EEA include the Broad-Based Black Economic (B-BBEE) Commission and the Black Management Forum (BMF).

Despite legislative measures targeted at increasing employment equity, inequalities still exist between black and white people in employment. These inequalities often manifest as instances of unfair discrimination in the workplace.<sup>61</sup> The Commission confirmed this view, relying on the 749 equality-related complaints it had received by March 2016, constituting the highest recorded grievances as one indicator of prevalence.<sup>62</sup> The CEE 17th Annual Report, which is based on the Economically Active Population (EAP),<sup>63</sup> revealed that some progress has been made at some professional and technically skilled levels. However, these advancements are not reflected at managerial level, and top management positions in business enterprises continue to be dominated by white employees.

In particular, the CEE Report<sup>64</sup> indicated that representation of top management positions in the private sector as well as educational institutions continue to be dominated by the white population at 68.5 percent, followed by the Indian group at 8.9 percent. It was observed that the white population is also afforded preferential treatment for recruitment, promotion and training opportunities. Similarly, the senior management echelon is occupied by white people at 58.1 percent, followed by the Indian group at 10.6 percent in all sectors of the economy and business type. However, the black population is highly represented at semi-skilled and unskilled levels in all provinces.

It was noted that the rate of unemployment in South Africa of black and coloured people remains dire. One of the factors contributing to the high unemployment rates for these groups was attributed to corporate perception that transformation is a cost driver and not a business imperative. While there seems to be a perception among employees that there are few qualified and interested black



candidates to fill high managerial positions, organisations like the BMF expressed that they are willing to assist employers in finding the right candidates.

Representation of women in the workplace continues to pose serious challenges for the attainment of gender equality in employment. Trends indicate that inequalities continue to persist in the labour market in the distribution of jobs, occupations and incomes. Despite a strong business case for diversity, there has been limited progress towards equality at work for women in professional and managerial positions.<sup>65</sup> Men continue to dominate most of the workforce at the occupational level, and women continue to encounter the glass ceiling effect in the workforce.

In South Africa, women remain underrepresented at top and senior management levels, with only 20.7 percent representation in the private sector and 30.8 percent representation in the public sector in all provinces.<sup>66</sup> It is important to note that these positions are also dominated by white women, rendering black women especially vulnerable to multiple levels of discrimination.

Reports from the Commission for Conciliation, Mediation and Arbitration (CCMA) indicate that unfair discrimination persists in the workplace, citing racial discrimination and sexual harassment as the top most received cases, followed by concerns around equal pay for work of equal value.<sup>67</sup> This is further confirmed by a report produced by the Public Service Commission,<sup>68</sup> which likewise indicates that complaints related to unfair treatment, specifically sexual harassment, was the second highest category of reported complaints.

Although the most recent amendments to the EEA enable victims to refer disputes around discrimination in the workplace to the CCMA, the strict requirement of burden of proof renders it difficult to avail evidence to prove grounds for discrimination. This requirement was cited as a barrier to securing redress through legal mechanisms and as impacting accurate information about the prevalence of unfair discrimination in the workplace.

The CGE is constitutionally mandated to promote the protection and fulfilment of gender equality and prevent unfair discrimination. National legislation mandates the CGE to monitor and investigate, research, educate, lobby and advise and make recommendations on gender equality. Challenges in achieving employment equity are most pronounced in the private sector. Nevertheless, the CGE is working with institutions to streamline gender in their workplace and employment policies. The CGE indicated that there was a need for business enterprises to be held accountable on a more consistent basis for the implementation of employment equity policies.

It was emphasised that businesses should consider the strategic benefits of a discrimination-free workplace, and the impact of such a workplace on human and economic growth. Businesses should therefore encourage diversity in management since this could lead to greater success, as companies that are more representative internally prove to be more successful overall. There is thus significant incentive for companies to put in place measures to eradicate unfair discrimination.



## Discussion

The need for more transparency in the private sector was raised during the discussion following the panel's presentations. Transparency emerged as an issue in the context of barriers to achieving employment equity. For instance, in terms of remuneration and available job opportunities, only 20 percent of jobs are advertised, while 80 percent are filled within existing networks or by internal employees. Given skewed employment demographics, this practice was cited as limiting competition and opportunity while perpetuating continued patterns of imbalance. Discussants questioned the role of labour brokers, and identified labour broking as a mechanism that lends itself to exploitation due to the fact that employment agencies do not always provide adequate information about remuneration.

In the context of high unemployment rates, the need to create better employment opportunities by encouraging entrepreneurship and supporting small business development, was emphasised. It was also acknowledged that there is a need to work with tertiary institutions to identify skilled and talented students to address the 'brain drain' and to encourage talented, young South Africans to seek employment within the country, rather than abroad. Lastly, for purposes of human resource development, there is need for the Department of Small Business Development to foster skills transfers and workshops between foreign nationals and South African communities in the context of employment.



## CONCLUSION

The dialogue evidenced a marked shift in attitude from earlier trends observed by the Commission. A welcoming trend which saw the role of business as a partner in finding solutions was clear. A clear appreciation of the central role business can play in its operations in the domestic environment to promote, respect and fulfil human rights emerged on the back of issue identification. It was also clear that in South Africa, similar to many other developing countries, the role that business can and should play in the context of human rights has not yet been exhaustively explored. However, South Africa now has a clearer body of evidence which demonstrates the tremendous potential for business and the private sector to play a positive role in the realisation of human rights and sustainable development. Such roles envisage both compliance with domestic and international norms and standards, and substantive contributions toward development, which are people driven. Moreover, it bears emphasis that a human rights-based approach to business and development ultimately results in more sustainable benefits and advantage for corporations and society if fully embraced.

The complex South African environment, means that the lessons which have been learnt from documented violations, are in and of themselves insufficient to form the foundation for the achievement of basic reforms. Sustained dialogues, conversations and interaction are required through bodies like the Commission, the government, traditional leadership structures, civil society, faith based organisations, communities and the private sector, to organically grow frameworks and embed practices which are rich in human rights approaches. These multi-stakeholder efforts will support collectivism and common commitments to both human rights, and development much more sustainably. As a constitutionally mandated institution supporting democracy, the Commission fulfils a crucial role in ensuring sustained engagements to canvass the complexities of business and human rights. Furthermore, in terms of both its domestic and international status, the Commission must continue to monitor the development of South Africa's legal and policy framework in respect of business and human rights, in order to ensure that the private sector's understanding of its obligations in this regard is enhanced while strengthening respect for human rights by all relevant actors. Moreover, the Commission and similar mandated bodies are well situated to provide support to stakeholders and seek appropriate redress where business practices result in human rights violations. However, such institutions require adequate resources and should sustain capacity building initiatives to meaningfully occupy this role.

On 16 July 2018, a draft treaty on Transnational Corporations and Human Rights was made public by the IGWG, led by Ecuador and South Africa. The draft treaty appears to be more limited in scope than initially suggested by the 'treaty elements' released in 2017. For example, the draft treaty contemplates a much more conventional approach in that it sets out a number of human rights norms, and relies on States for domestic implementation of those norms. It focuses on issues such as human rights due diligence for companies, and how States can work together to assure access to remedies



for victims of corporate human rights abuses under domestic laws. It does not, however, envision an international tribunal or court with direct authority or jurisdiction over business enterprises. As it stands, the draft treaty will set up a committee of experts with oversight and monitoring functions, but not a complaints mechanism. Ultimately, government thus remains responsible for ensuring that corporations adhere to the laws and rules already enacted to prevent abuse of corporate power.

Business cannot, and should not, be left to regulate itself since for obvious reasons it does not operate in isolation from the people affected by its activities. Normative frameworks to rein in corporations that are in flagrant violation of their obligations must be promoted and developed to allow for effective enforcement. The primary enforcer of these rules is government. A notable example of regulation aimed at promoting meaningful and purposeful corporate action is the requirement for SLPs. SLPs must be subject to community, local authority and government scrutiny before they are implemented to reduce the possibility of abuse and corruption by corporations and traditional leaders. Moreover, a paradigm shift is required to prioritise the interests of stakeholders – employees, local communities, local authorities – for these priorities to rank just as highly as those of corporate shareholders. Collaboration by the business community, government and other actors is therefore recommended for the purposes of developing industry-wide approaches to address egregious right infringements such as child labour and adverse environmental impacts, to help create a common culture for positive change.

Furthermore, civil society organisations should strengthen strategic partnerships and alliance amongst stakeholders aimed at protecting the fundamental rights of those at risk, more specifically workers and community members. Increasing accountability at this level could take the form of referring complaints of alleged human rights violations by business corporations to relevant institutions like courts of law and the Commission for appropriate remedies. In addition, communities must be supported to demand and interact with information; and to be informed of their rights, and the obligations that the State and corporations have towards them. The strength of community voices is an important element in contributing not only to the detection of human rights violations; but also for the identification and response to areas where reforms are needed or which require strengthening. Both access to justice, access to information and participation are therefore critical success indicators which prospectively could improve the participation of business as a sector in the societal goal of securing human rights.

Finally, the business sector must build its internal capacity to meaningfully contribute to South Africa's project of transformation and the global sustainable development agenda. Management across sectors should instil a culture of respect for human rights, and should actively promote human rights and sustainable development within the areas and communities in which business operates. Business should seek the support of government and mandated institutions, including the Commission, in advancing its human rights agenda. Ultimately, a more equal society will benefit all members of society.




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