



## UN ANNUAL FORUM ON BUSINESS AND HUMAN RIGHTS

### **Multi-stakeholder perspectives on access to remedy: The establishment of an independent problem-solving service for communities affected by mining operations in South Africa**

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#### **Business and Human Rights in South Africa**

South Africa's apartheid history and rights-based, democratic present makes the country unique in terms of business and human rights challenges and progress. Social frustrations remain, and expectations of companies are constantly shifting. Further, there is increasing pressure from stakeholders – business partners, investors, home and host governments, not to mention communities, NGOs and unions – to develop and maintain best practices.

Many of the business and human rights issues in South Africa today have their origins in the country's apartheid history. Racially-based disparities in wealth, income and opportunity all have their roots in that history. The country's constitution and Bill of Rights deal with the need to address these inequalities, particularly the equality clause which permits and even encourages 'measures designed to protect or advance persons disadvantaged by unfair discrimination.' The second and third generation rights (dealing with social, economic and cultural rights) from clause 26 onwards are designed, among other things, to reinforce this approach of redressing the wrongs of the past.

Much legislation and regulation has developed in this regard, in particular socio-economic charters in various sectors and the overarching Broad Based Black Economic Empowerment codes. Remediation of these legacies is a big ticket item for much of South Africa's business community. In addition, the Companies Act requires companies to establish social and ethics committees to oversee company performance not only on these areas but also matters of the environment and health and safety, and performance in respect of the principles of the UN Global Compact (the Act preceded the approval of the UNGPs). Successive King reports on corporate governance have addressed such issues. The existence of a high quality constitution, Bill of Rights and quite comprehensive set of legislation does not, however, mean that contemporary issues are devoid of human rights concerns. The most stark recent example of this were the events at Marikana in 2012.

There are a range of other human rights issues that have arisen in South Africa's more recent business activities that provide challenges over and above ongoing efforts to deal with the legacies of the country's history. These are often dealt with in companies' risk registers. The challenge is for companies to view these not only as risks to the company but also from the perspective of risk to the external stakeholder.

## The Independent Problem Solving Service

The Chamber of Mines has reported that at least three protests per day take place around mining operations. Frught relations between mining companies and communities represent a microcosm of the daily struggles of many in South Africa. In the mining sector, communities face a multitude of challenges, whether access to water, land, and community health and wellbeing or livelihood impacts.

The Bench Marks Foundation (a South African NGO) are working to establish a rights-based problem-solving service that affected communities can utilise in mining areas in South Africa focused on facilitated dialogue and developmental solutions. The proposed service seeks to independently facilitate sustainable solutions in the context of fraught histories, the absence of trust between business and communities and systemic challenges.

The service comprises a process of facilitated dialogue, followed where necessary by processes drawn from a 'toolbox' of components for each specific case. The scope of the service is expansive, encompassing any community grievance, though these are likely to concern health, housing, livelihoods, pollution or water. It is multi-faceted and includes both reactive and proactive elements including ongoing monitoring and early interventions, community awareness raising and continuous engagement with mining companies.

For many years, Bench Marks has been looking at the issues of access to fairness, justice and balancing out the unequal power relations between mines and communities. Originally Bench Marks proposed an independent grievance mechanism, but after much thought and analysis, we have realised that we need a more holistic approach to deal with the crisis in the mining sector. Thus, the concept of a holistic problem-solving service has emerged, called the independent problem-solving service (IPSS), backed up by an independent capacity building fund (ICF). The ICF will address skewed power relations, giving communities access to specialist advice on the one hand, and training company sustainability officers to engage communities with care and respect on the other.

Bench Marks is currently in a consultative process with communities and civil society regarding the IPSS and the ICF. Discussions have also begun with the business community, including the Chamber of Mines. In addition, academics have also been approached for their input. The IPSS has a 'toolbox' of problem solving components, with facilitated dialogue at its centre. If this does not resolve the problem, several further options are available, including a formal grievance hearing, mediation and or expedited arbitration. The approach is flexible, allowing the case to be diagnosed, and identifying the best approach to be used. Importantly, the IPSS does not remove any rights of parties in law, allowing for judicial and other interventions as well. The emphasis is on dialogue, as opposed to a more rigid grievance mechanism approach, and is informed by both local and international experience, pointing to facilitated dialogue being a more conducive form of engagement for problem solving. Of great importance is that dialogue will be driven by suitably skilled and impartial facilitators, considering the complexities and challenges involved, including skewed power relations.

Overall, the core objective of this initiative is the restoration and maintenance of human dignity. It requires a mindset shift at both company and community level. Trust in the process is a prerequisite. It is a service with many facets. It involves both pro-active and reactive components, with a process specifically designed for each case. It prioritises a non-legalistic, non-adversarial, accessible and empowering process, with facilitated dialogue at its centre. It aspires towards sustainable, developmental solutions which go beyond rights-based remedies.

[For more information on the IPSS see: [\[link to Benchmarks\]](#) – or request feedback on the proposal?]