



CORPORATE GOVERNANCE IN AFRICA CASE STUDY SERIES: NO 4

Corporate governance : Social and Labour Plans in the mining sector

External corporate governance controls: A case of action-beyond-obligation defining regulation standards

Abstract

The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) as amended governs mining in South Africa. The Act provides that all mines in South Africa that existed prior to this legislation and all new mines have to submit Social and Labour Plans (SLPs). The SLP of a mine is a document that describes the various social impacts of the mine's operation. Mining is a very significant sector of the economy of South Africa and, without an approved SLP, the Department of Minerals and Energy (DME) will not grant a mining permit or convert an old order right to a new order right. There is a general feeling in the industry that the Department has not given good guidance about what is expected from an SLP. This case study tracks the history of the SLPs and makes some recommendations on how the SLPs could be more successfully implemented.

For reasons related to professional ethics, possible impacts on business relations and direct personal involvement with the issues addressed here, all parties interviewed elected to remain anonymous. Likewise, due to business relationships between the author's employer and the Department, the author also wishes to remain anonymous.

The term, corporate governance, refers to the overall control of a company's actions. Several key stakeholder groups are involved in governing the corporation: Government is involved through its laws and regulations.
(Post et al. 334 – 335, 2002)

1. Overview of the case study and orientation

This case does not address a specific issue or course of action taken by any one individual company and therefore it is not a traditional case study. Instead, it focuses on the challenges faced in a single business sector due to changes in the external business environment. From a corporate governance perspective, government and its laws and regulations form one facet of the external environment that needs to be considered in business decisions.

This case concerns the Social and Labour Plans (SLPs) required of mining companies in South Africa in terms of the Mineral and Petroleum Resources Development Act, Act 28 of 2002 (also known as MPRDA but referred to here as the Act). The first part of the case study analyses the relationship between action-beyond-obligation in the mining industry's engagement with this initially vague requirement and

the evolution of the expectations of the regulatory department – the Department of Minerals and Energy (DME) – regarding these plans.

The case study shows how, when the concept of SLPs was introduced, because of the vagueness about the content and form of what was required, the mining sector attempted to ‘over-comply’, and in fact still does. This over-compliance has raised the expectations of the regulator, making the external corporate governance environment more stringent. The study then comments briefly on the monitoring and enforcement capabilities of the Department.

SLPs are required from all mining operations in the country, regardless of their size or employment count. This case study therefore does not compartmentalise the mining sector.

The case study is based on a review of the legislation and other sources, and also on interviews with role players who deal with the changing legislative landscape on a daily basis. The rationale for including interviews is to emphasise that the issues described are common to many role players in the sector, and are not isolated cases.

2. The history of and legal background to Social and Labour Plans (SLPs)

It was already evident with the drafting of the Minerals and Mining Policy for South Africa, 1998 that the thinking was that the mineral wealth of South Africa was not shared equally among its citizens, and that special attention had to be given to the most needy. However, the White Paper was not clear about whether the SLPs, as they are known today, were conceptualised as stand-alone documents. The White Paper did, however, address issues of human resource development, housing and living conditions, employment conditions, and downscaling, which would all later become central to the SLPs.

Four years later, when the Act was drafted, the SLP was an integral part of it. Guidelines for SLPs were provided in the form of Regulation 46 to the Act, published in 2004. For a significant length of time, this Regulation was the only guidance mines had about the expected content and structure of an SLP. At the same time, the Department took some time to set up the internal personnel and departmental structures to handle the SLPs that the mines submitted. In addition, the directorate which was created at Head Office in the Department was not fully rolled out to the regional offices immediately.

Even before this time and in the absence of any guidance, some larger companies had already made solid commitments to social improvement in the areas in which they operated. Whether this was the result of true commitment or attributable to international shareholder expectations, these companies proactively engaged with the issues of local economic development, social upliftment and neighbourly behaviour, and were, consequently, already a few steps ahead when the SLP became a legal requirement.

These efforts by larger mining companies to grapple with social issues in their areas of operation and the role of government are alluded to in the *King Report on Corporate Governance*, the commonly named *King II* report, which states:

The private sector has to some extent also become a motivator and generator of equitable and sustainable socio-economic development opportunities. Government’s emphasis is increasingly on facilitating this process. While it is clearly preferable for corporate enterprises to control their destiny through pro-active self-regulation, governments around the world have demonstrated that they will introduce legislation where necessary if companies fail to do so.
(King et al. 2001:114)

Governments...have another sort of relationship with the company. In general, their stake is broader than the financial stake... they may wish to... advance other broad social interests.
(Post et al. 2002:13)

The *King II* report also provides some good guidance as to the manner in which mines (and other companies) could engage with this issue. In fact, many elements of the later SLPs are already captured in the *King II* report, as shown below:

14. *The defining characteristics of good corporate citizenship as identified by the Commonwealth Business Council Working Group on Corporate Citizenship are:*

14.2 *Corporate governance*

14.10 *Employee relations*

14.14 *Engaging with local communities*

14.15 *Building capacity*

14.17 *Engaging in dialogue with government*

(King et al. 2001: 110 --112)

3. The evolution of guidance on the content of SLPs

The first and only form of guidance that the Department provided on SLP content was Regulation 46 of the Act. The Regulation lists the required content, but does not provide much guidance on exactly what each plan or sub-programme must contain, or how widely the scope of studies like social impact assessments must be drawn.

The movement from centralized government toward democracy and freedom carries both plusses and minuses for business. Corporations have often found themselves facing large measures of uncertainty and risk.
(Post et al. 2002:20)

In broad terms, according to the Regulation, SLPs must contain:

- a. Background information on the mine in question.
- b. A human resource development programme, encompassing a skills development plan, a career progression plan, a mentorship plan, an internship and bursary plan, and the employment equity statistics.
- c. A local economic development programme which encompasses the social and economic background of the area, its key economic activities, the mine's impact on the social landscape, infrastructure and poverty eradication projects in the line with the IDP, housing and living condition measures, nutrition of employees and a procurement progression plan.
- d. A management of downscaling and retrenchment plan, including future forums, job saving mechanisms, alternative job solutions and social job loss amelioration programmes.
- e. Financial measures to ensure that all aspects of the SLP are provided for financially.
- f. A commitment by the mine owner to the plan.

This was a significant list of studies and other information for the mines to provide, and proved very difficult to comply with, especially for small mining operations. In addition, besides sourcing information generally considered non-core to the mining business, smaller mines now needed to pay specialists to conduct research where information was not available. As a result, many mining consultancies started providing SLP services as logical extensions of their consulting businesses, with mixed success.

4. The Department's guidance on SLPs: the *Social and Labour Plan Guidelines for the Mining and Production Industries*

By 2006, the lack of better SLP guidance could not be hidden by eloquent speeches and presentations at mining conferences on the *intent* of the SLP regulation any longer. Solid guidance was needed. The Department set about writing down the requirements for SLPs in a guideline which subsequently appeared on their website.

The document, entitled *Social and Labour Plan Guidelines for the Mining and Production Industries*, is the Department's attempt to provide guidance on the required content of the SLPs. The document does, indeed, provide some clarity on various aspects of the requirements already outlined in Regulation 46.

However, from a purely corporate governance perspective, at least one of the stated objectives of the SLP seems a little ambitious, to wit:

4.1 Objectives of the Social and Labour Plan

The objectives of the Social and Labour Plan are to:

- (a) *Promote employment and advance the social and economic welfare of **all** South Africans;*

This interpretation may stretch the definition of stakeholder in any business a measure too far. Surely, the fate of *all* people in the country cannot rest on the shoulders of one industry?

The remainder of the stated objectives are perfectly clear and agreeable:

- (b) *Contribute to the transformation of the mining industry; and*
 (c) *Ensure that holders of mining or production rights contribute towards the socio-economic development of the areas in which they are operating as well as the areas from which the majority of the workforce is sourced.*

Despite this, the guideline is still not perfect, perhaps because government seeks to always provide a generic form of guidance in cases like these, and must consider all permutations of the mining industry and their varied SLPs. Even so, some items -- such as those below -- remain frustratingly vague and stand in stark contrast to other sections, for which workforce numbers by various categories may be recorded and reported on in a given format and form.

2.2 Career progression (path) plan

Provide a detailed career progression (path) plan, which is in line with the skills development plan provided in 2.1 on how the Mine or Production Operation would progress the employees through the employment levels.

2.3 Mentorship plan

Provide a detailed mentorship plan for the employees and empowerment groups, which is in line with the skills development plan provided in 2.1 and how the plan would be implemented.

2.3 Internship and bursary plan

Provide a detailed internship and bursary plan, which is in line with the skills development plan provided in 2.1 and how the plan would be implemented.

While sections 2.2, 2.3 and 2.4 require that descriptions are given and progression plans must be outlined, they provide no guidance whatsoever on desired courses of progression or desired outcomes for development. Items 3.1, 3.2, 3.5 and 3.6 suffer the same fate -- explaining the Regulation but not really guiding the applicant in a desired development direction. Here, it is perhaps assumed that the applicant will follow a logical course of action and take the initiative to align local conditions with opportunities identified through interaction with local authorities and due reference to the Integrated Development Plan (IDP) for the region. But this is an assumption by the Department, and what seems logical and attainable to one party may be completely unacceptable to another.

Besides the lack of details required and standards employed in the interpretation, the guideline does not give any desired outcomes or the direction in which development should ideally take place, from a conceptual perspective.

In a final quality issue, none of the references to 'the Act' from point 4.2 in the SLP guideline onwards give any indication of what Act is referred to, and the applicant is left guessing that it may well be the Mineral and Petroleum Resources Development Act.

5. The approval process of SLPs since 2004

As the SLP directorate at the Department was established and grew from about 2004, the first SLPs started arriving and demanding attention. It is perhaps at this point that the interpretation of the Department's 'wishlist' of SLP requirements grew most rapidly, though certain requirements were not fully explained. The Department appears to have been reluctant to take binding decisions in the absence of more clarity on the requirements. Consultants and mines that were trying to get their SLPs approved felt that government was returning the SLPs to the mines for the correction of minor errors in order to buy time for better guidance to arrive.

The SLPs approved later in the process all invariably suffered a few rounds of returns before approval. It was a very rare occurrence for a major mine's SLP to pass through the process without several rounds of returns. Issues as small as spelling mistakes or the formatting of tables were enough to warrant a return. However, consultants who went through this process report that in its second or third return, some good, solid comments were often obtained.

The interviewees all agree that each regional office of the Department treats the SLPs very differently. Some offices prefer information in tables, for example, while others prefer text. This degree of variability extends to the full evaluation process, turnaround time and the desired outcomes of each SLP, so no mine or consultant is ever sure what to expect on SLP submission.

6. The current SLP process

In the current process, the consultants employed by mining companies try to engage with officials first before any time and effort is committed to drafting a document. In some cases, however, regional offices prefer not to engage with applicants or their representatives beforehand, and will only respond in writing to a submitted document. Again, the degree of variability is wide, with some offices inviting discussion, and others not prepared to meet with mining applicants. In preparing the SLP, the mine or consultant usually first gathers information about the mine's employment statistics, HR policies and other internal matters, which is usually fairly easy to get for single sub-entity operations. Where the applicant is a large mine with several shafts, the Department usually requires the information per shaft as a sub-business unit and if this information is centrally collated by a Head Office, it may be difficult to extract in the desired format. The next steps are usually bundled together as local community engagement, which may involve anything from a few trips to the local municipality offices and meetings with their managers and IDP co-ordinators to full local community engagement processes.

Once compiled and submitted, the SLP document is then apparently scrutinised by a junior Department official for minor mistakes (spelling errors, format or colour of tables and columns) which generally results in a return. After the document is resubmitted and accepted, a more senior member of the regional office in which it was submitted considers it. If a major issue arises or there are sensitive matters in the document, it is often referred to the Department's Head Office. The total elapsed time to this point may be up to 11 months.

The consultants interviewed report that as many as 6 resubmissions may be required to get an SLP approved. Furthermore, many of them report that they voluntarily submit more information than is required by the SLP guidelines or the regulation. They claim that experience has taught them what works and what does not. They willingly admit to a paperwork 'overkill' in an attempt to prove thoroughness in their submission and in the hope that the SLP will get approved more easily.

Many consultants and mines who have been through this process report that they feel their SLP is judged by the standard set by the last 5 SLPs submitted – there is no fixed standard or criteria for evaluation. Some even report that they have been in SLP evaluation meetings with the Department where the official is sitting with another mine's SLP open in front of him or her, using it as a 'reference' while the current SLP is being discussed. Further investigation of this matter through interviews bore out

an important point from a respondent who said that: ‘...the SLP *requirements* have not evolved so much, but the *interpretation* of those requirements by the Department has changed significantly.’ This singular insight into the issue points to (a) the capacity to evaluate the SLPs submitted and (b) the lack of clear standards in SLP interpretation.

7. Evaluation, monitoring and control mechanisms

The method of evaluating the document for quality before the process proceeds cannot be faulted per se. The feeling among industry participants is, however, that the document by its very nature deals with fairly complex issues and that minor issues, like table formatting or font, should not hold up major mining developments. In short, assuring a good quality document is one thing, but nitpicking to find minor faults is another when people’s jobs are at risk. Insofar as the ability to assess the SLP itself for technical competence and ability to implement is concerned, there are many unanswered questions. There are very few recorded instances of the Department actually sending out an officer to inspect mine site conditions and compare it with the stated objectives of the SLP. The plans and instruments for monitoring and verification are not known at all.

In terms of the usefulness of SLPs, consultants and mine company representatives interviewed agreed unanimously that the SLP is treated as a paper exercise to get approval for the mining licence. None of them were convinced that the SLP served much useful purpose once it was approved. From a developmental perspective, the SLP is also seen as rigid, and not allowing for changing local circumstances over the lifetime of the mine.

Perhaps most tellingly, and despite the presence of a fair amount of approved SLPs, no cases were recorded where the conditions of an SLP relating to retrenchments were invoked in the aftermath of the 2008 world financial crisis. The SLP does make provision for this, but two factors may hamper its successful implementation:

- the capacity of the Department to monitor economic conditions and then to enforce the retrenchment conditions of the SLP, and
- the time lag imposed. Mines often take retrenchment decisions based on economic conditions much faster than the 12-month profitability assessment period the DME requires in the SLP.

8. The evolution of standards as an emergent government strategy for the management of complex issues

It is easy to see how the current conditions, attributable to the factors explained, frustrate the process:

- There is no clear guidance on SLPs, which leads to varying interpretations of requirements, on both the side of government and business.
- Business then tries to ‘overkill’ on the paperwork, either to justify consultancy fees or to genuinely showcase the efforts they made to be thorough.
- Government then has ample opportunity to focus only on SLPs that are fresh in their minds.
- The absence of a standard allows Government to fail or praise SLPs only according to recent memory of good or bad SLPs evaluated.
- This process, almost of necessity, points to the need for several iterations before the parties are likely to agree, with government wanting more commitment to local economic development and business giving in to requests because it is not their core business and they perceive it only as a hurdle to obtaining a mining right.

Government decisions will be influenced by good efforts on the side of business, but the danger is that these then become the *de facto* standard by which subsequent SLPs are judged. The reports that some government officials sit with the thick impressive, expensive SLPs of large mines open in front of them when they call consultants to address their SLPs, clearly shows the lack of a stand-alone standard.

In a new development, this ‘emerging standard’ concept is taken further and the lack of guidance and standards becomes even more evident in tangible terms.

Consultants interviewed report that regional offices differ in their interpretation of what 'procurement and local business assistance' means, for example. The Free State regional office of the Department, in one reported instance, accepted grants of building materials and computers as sufficient assistance to help local business projects get off the ground. The Gauteng regional office, however, demands full immersion of the mine in the local business project start-up, helping with finance, buildings, business training and procurement contracts. New trends like these keep advancing the new 'minimum standard' for every subsequent SLP submitted. The situation is frustrating, because a mine might well find that 'the goalpost has shifted' since it submitted its SLP. It is not clear what to do or what to expect. At the very least, this tedious process results in wasted time and expenses for business.

It is also reasonable to say that the evolution of the standards is not yet complete. The current SLP guideline is very weak in several areas and leaves a lot of scope for alternative interpretations – whether by accident or design. The implementation of the SLP requirement for mines remains a major challenge.

9. Resources required for successful implementation of the SLP requirements

There remain many gaps in the handling of SLPs in Department's regional offices and even at Head Office. The most significant of these is the inconsistency in approach and the long turnaround times involved. The facets of capacity that need attention are:

- the technical capacity to evaluate the SLP
- the volume capacity to handle the number of SLPs, and
- the capacity to monitor the implementation of SLP and transient conditions in the economy that will necessitate the downscaling of operations and other factors addressed in the SLP.

In terms of technical capacity, it is suggested that the Department needs social scientists to evaluate the SLP fully in the regional offices. Geographers, possibly with reasonable Geographic Information System GIS knowledge, who can analyse spatial patterns quickly to verify claims made in SLPs, would also be useful.

Local knowledge is perhaps the most essential element in this part of the equation. Department personnel may reasonably be expected to know the areas under application and to know what local conditions are like. This alone will allow quicker and more informed decisions about SLPs.

In terms of monitoring capacity, some co-ordination on a national scale is probably sufficient. Economists who understand the relationships between capital and value flows into and out of societies under certain economic conditions may provide regional offices with regular updates or point to economic warning signals.

The Department needs to develop the capacity to monitor the overall economic position of the industry and its fortunes. The capacity to deal with the volume of SLPs is perhaps only a temporary situation related to the current pressure to convert all the old order rights to new order ones, but certainly this facet of capacity needs attention in the short term, too.

References

Post, J.E., Lawrence, A.T., Weber, J. 2002. *Business and society; corporate strategy, public policy, ethics*. 10th Ed. McGraw Hill Irwin: New York.

Mineral and Petroleum Resources Development Act, Act 28 of 2002.

Mineral and Petroleum Resources Development Regulations. Regulation Gazette No. 7949. 2004. Republic of South Africa: Pretoria.

Social and Labour Plan guidelines for the mining and production industries. <http://www.dme.gov.za/pdfs/minerals/> Website of the Department of Minerals and Energy, South Africa. [Accessed 9 January 2009].

Annual report of Anglo Platinum; 2003. Sustainable Development report. http://www.angloplatinum.com/investor_media/im_annual_rep/ar_03/ Website of Anglo Platinum Corporation. [Accessed 9 January 2009].

Developing a social and labour plan: How to write it up and what not to do. 2005. Presentation delivered by Kgosi Mogaki on 17 November 2005 to Chamber of Mines Safety and Sustainability Conference 2005. <http://www.bullion.org.za/Departments/SafetySustDev/Downloads/Conf2005/> Website of the South African Chamber of Mines. [Accessed 9 January 2009].

Social and Labour Plan. Presentation delivered by Sanah Machaba. Undated. IAIA newsletter issue 635. 31 December 2005. http://www.easimail.co.za/BackIssues/IAIASA/0712_Issue635.html [Accessed 9 January 2009].

King Report on Corporate Governance for South Africa 2001. 2001. Institute of Directors. Accessed via: <http://general.uj.ac.za/infosci/scipsa/king-report-on-corp-gov.pdf> [Accessed 20 January 2009].

The role of external factors in corporate governance decisions; The social and labour plans of the Department of Minerals and Energy. Questionnaire compiled by author. Transcript of personal interview conducted with consultant who elected to remain anonymous. Digby Wells and Associates. Randburg. 21 January 2009.

The role of external factors in corporate governance decisions; The social and labour plans of the Department of Minerals and Energy. Questionnaire compiled by author. Transcript of personal interview conducted with consultant who elected to remain anonymous. Wilsenach van Wyk Attorneys. Pretoria. 27 January 2009.

The role of external factors in corporate governance decisions; The social and labour plans of the Department of Minerals and Energy. Questionnaire compiled by author. Transcript of telephonic interview conducted with consultant who elected to remain anonymous. Brikor. Midrand. 5 February 2009.