



THE DANISH  
INSTITUTE FOR  
HUMAN RIGHTS

Human Rights and Business Country Guide

# South Africa

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# Table of Contents

|   |            |
|---|------------|
| How to Use this Guide.....                    | 3          |
| Background & Context .....                    | 7          |
| <b>Rights Holders at Risk .....</b>           | <b>15</b>  |
| Rights Holders at Risk in the Workplace.....  | 15         |
| Rights Holders at Risk in the Community ..... | 25         |
| <b>Labour Standards .....</b>                 | <b>35</b>  |
| Child Labour .....                            | 35         |
| Forced Labour .....                           | 39         |
| Occupational Health & Safety .....            | 42         |
| Trade Unions .....                            | 49         |
| Working Conditions.....                       | 56         |
| <b>Community Impacts .....</b>                | <b>64</b>  |
| Environment.....                              | 64         |
| Land & Property .....                         | 72         |
| Revenue Transparency & Management.....        | 80         |
| Security & Conflict.....                      | 87         |
| <b>Sector Profiles .....</b>                  | <b>94</b>  |
| <b>Region Profiles .....</b>                  | <b>111</b> |
| Sources.....                                  | 114        |

# How to Use this Guide

*This Human Rights and Business Country Guide contains information regarding the potential and actual human rights impacts of businesses operating in South Africa. The information in this Guide is gathered from publicly available sources, and is intended to help companies respect human rights and contribute to development in their own operations and those of their suppliers and business partners.*

## **About the Human Rights and Business Country Guide**

The Human Rights and Business Country Guide provides country-specific guidance to help companies respect human rights and contribute to development.

For companies to manage their potential human rights impacts, they must have comprehensive information about the local human rights context in which they operate. The Country Guide provides a systematic overview of the human rights issues that companies should be particularly aware of. For each issue, it provides guidance for companies on how to ensure respect for human rights in their operations or in collaboration with suppliers and other business partners.

The Country Guide is not only a resource, but a process. This Guide was produced through a systematic survey carried out by the Danish Institute for Human Rights (DIHR) and the South African Human Rights Commission (SAHRC). The aim of this Guide is to improve the human rights practices of companies operating in South Africa, including through facts-based dialogue regarding the issues presented here.

## **How the Human Rights and Business Country Guide can be used by companies**

- Develop company policies and procedures related to human rights issues in the local environment.
- Assess and track the potential human rights impacts of your own operations or in suppliers, business partners and investments.
- Raise awareness among staff, suppliers and other business partners.
- Engage with workers, potentially affected communities, consumers and other stakeholders whose human rights might be affected by your operations.
- Engage with civil society organisations, government bodies or international organisations on human rights-related issues.
- Provide background information for auditors.
- Establish or collaborate with mechanisms for workers, communities and other whose human rights might be affected by your operations.
- Contribute to development initiatives that align with human development needs and priorities in the local context.

## **How the Human Rights and Business Country Guide can be used by governments**

- Review and reform public policy and legislation relevant to the human rights impacts of business, including in the areas of labour, environment, land, equal treatment, anti-corruption, taxation, consumer protection or corporate reporting.
- Ensure respect for human rights in the state's own business affairs such as state-owned companies, sovereign wealth funds and other investments, public procurement, development assistance, export credit and other activities.

- Build awareness and capacity on human rights and business issues within relevant areas of public administration.
- Provide targeted advice to domestic companies.
- Inform the development of trade policy, trade and investment agreements and trade and investment promotion.
- Improve effective access to judicial and non-judicial remedies for victims of business-related human rights abuses.
- Enhance the contribution of the private sector in national and regional development programmes relevant to human rights.

#### **How the Human Rights and Business Country Guide can be used by civil society organisations**

- Inform human rights research and monitoring related to business operations.
- Work with affected workers and communities to define human rights and human development priorities related to the role of business.
- Provide capacity-building to government, business and civil society stakeholders on human rights and business.
- Work with local stakeholders to provide recommendations to business and government.
- Facilitate dialogue and engagement with, including multi-stakeholder forums, with state agencies and businesses.

*DIHR and SAHRC aim to work with all stakeholders to promote, monitor and expand the activities described above. We request that all stakeholders who use the findings of the Country Guide in their work notify the Country Guide team of their activities and lessons learned. These experiences will be included in the Country Guide website, [HRBCountryGuide.org](http://HRBCountryGuide.org).*

## **Country Guide Process**

The South Africa Country Guide was produced by the Danish Institute for Human Rights and the South African Human Rights Commission. Special acknowledgement is extended to the Centre for Human Rights, University of Pretoria, for contributing additional research capacity to ensure that the data represented in the Guide was accurate.

This report is a compilation of publicly available information from international institutions, local NGOs, governmental agencies, businesses, media and universities, among others. International and domestic sources are identified on the basis of their expertise and relevance to the South African context, as well as their timeliness and impartiality.

The initial survey of publicly available, international sources was carried out by the Danish Institute for Human Rights. A draft was shared with the South African Human Rights Commission, who carried out local consultations and contributed further local information. The completed Country Guide aims to provide a comprehensive overview, on the basis of the information available, of the ways in which companies do or may impact human rights in South Africa.

This report also includes recommendations on how companies may address their impacts or contribute to development. These recommendations are adapted from existing Danish Institute guidance for companies, as well as local sources. Company initiatives are drawn from the Business and Human Rights Resource Centre, as well as local consultations.

The current Country Guide is not meant as an end product, or a final determination of country conditions. It is intended to be the basis, and the beginning, of a process of dissemination, uptake and modification. DIHR and SAHRC seek further engagement with local stakeholders, and intend to update the Country Guide every two years on that basis.

## Country Guide Content

*The South Africa Country Guide contains the following information:*

### Areas for Attention

Each section of the Country Guide identifies areas for particular attention by businesses. The Country Guide identifies these areas through an analysis of the country's legal framework for human rights protection; enjoyment of human rights in practice; and the proximity of third-party human rights violations to company operations.

The headline and risk description describe the relevance of each issue for businesses. The text that follows the risk description presents the quantitative and qualitative information upon which this determination was based.

- **Background & Context** gives an overview of economic, political and demographic characteristics.
- **Rights Holders at Risk** identifies groups that may be vulnerable to workplace discrimination or community impacts.
- **Labour Standards** identifies areas for attention related to employees and working conditions. This section includes child labour, forced labour, trade unions, occupational health & safety and working conditions.
- **Community Impacts** identifies areas for attention related to communities whose human rights may be affected by company operations. This section includes impacts related to environment, land & property, revenue transparency & management and security & conflict.
- **Sector Profiles** identifies human rights and business impacts related to a particular industry sector, such as extractive operations, manufacturing or agriculture.
- **Region Profiles** identifies regions of the country where the risk of adverse human rights impacts differs markedly from the national profile. This may include underdeveloped regions, export processing zones or conflict areas.

### Cases

Each rights issue includes cases from media and law where the rights issue in question has been allegedly violated. These cases are drawn from the Business and Human Rights Resource Centre, international and local NGOs and stakeholder consultations. The cases presented here should not be considered comprehensive.

### Access to Remedy

Victims of corporate human rights abuses have the right under international law to mechanisms that provide for remedy. The UN Guiding Principles on Business and Human Rights explicitly obligate governments and businesses to provide and/or participate in such mechanisms.

The Country Guide includes information under each rights area about the remedy mechanisms available to redress violations of the right. Where possible, this also includes practice information about the effectiveness of such bodies, and the number of cases they have heard and redressed.

## Human Rights Guidance for Businesses

This section includes guidance for businesses to prevent and mitigate their adverse human rights impacts. This guidance is drawn from the Danish Institute for Human Rights (DIHR) existing library of human rights due diligence recommendations, as well as international frameworks, principles and guidelines. Where available, this section includes recommendations issued by local NGOs and directed specifically at companies operating in the country.

This section also includes examples of initiatives carried out by companies to mitigate their human rights impacts. These are organized into Due Diligence Initiatives—activities that aim to meet the company’s responsibility not to violate human rights—and Beyond Compliance Initiatives—activities that aim to contribute to development beyond this baseline obligation.

## Engagement Opportunities

Companies have a responsibility to prevent negative human rights impacts, but they also have an opportunity to contribute to positive human rights impacts. Each section of this Guide includes information for companies to link their policies and community engagement processes to ongoing governmental and institutional efforts to promote and fulfil human rights.

This includes Public Sector Initiatives—activities where the government is aiming to fulfil or promote the right in question through discrete programmes—as well as Development Priorities—themes identified by international institutions as warranting deliberate attention, or where companies could have the greatest impact with their development initiatives.

The purpose of the information in this section is to inspire further efforts and engagement by businesses, as well as to identify existing programmes that companies could support or take part in.

## About the Danish Institute for Human Rights

The Danish Institute for Human Rights is a National Human Rights Institution accredited under the UN Paris Principles, and carries out human rights and development programmes in Denmark and around the world. Since 1999, the Danish Institute has worked closely with the business and human rights communities to develop tools and standards for better business practice.

*For more information, see [humanrights.dk](http://humanrights.dk).*

## About the South African Human Rights Commission

The South African Human Rights Commission (SAHRC) is a National Human Rights Institution established in terms of the South African Constitution. It is mandated to promote respect for human rights, and the culture thereof; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in South Africa. The SAHRC is accredited with an “A” status under the United Nations’ Paris Principles.

*For more information, see [sahrc.org.za](http://sahrc.org.za)*



# Background & Context

*This section provides background information on the political and economic context including demographic data, recent trends and human rights and development rankings.*

## Political Context

*Governance structures and political developments*

Many of South Africa's current policies and challenges are a result of its complex history of oppression. In 1948 the National Party (NP) came into power and established Apartheid — a system based on racial segregation. The Apartheid regime ended in 1994, when the first non-racial elections brought the African National Congress (ANC) to power.<sup>1</sup>

A democratic dispensation was established in 1994 and the country has become more inclusive, especially under the stewardship of prominent struggle leaders, such as former president Nelson Mandela, who acted as a driving force. Apartheid-era discriminatory legislation was abolished and a liberal constitution was established in 1996.<sup>2</sup> The 1996 constitution received international acclaim for being progressive in securing human rights.<sup>3</sup> However, despite some progress, inequalities persist, most notably in the enjoyment of socio-economic rights.<sup>4</sup>

South Africa is a constitutional democracy. The South African Parliament consists of the National Assembly (NA) and the National Council of Provinces (NCOP). The NA has 400 members elected for a five-year term through a system of proportional representation, which in turn elects the president internally.<sup>5</sup> The NCOP consists of 90 members elected by the provinces and primarily represent provincial interests.<sup>6</sup> The country consists of nine provinces and 278 municipalities.<sup>7</sup>

With a 73.5 percent voter participation rate in the country's 2014 general elections, the ANC

was confirmed as the most popular political party, securing 62.2 percent of votes.<sup>8</sup> The 2014 general election was declared as being 'free, fair, transparent and credible' by the African Union Observer Mission and was regarded by some observers as the most competitive since 1994.<sup>9</sup> General elections take place every five years, and the next general elections are scheduled for 2019.<sup>10</sup>

During the post-Apartheid era, trade unions have been quite vocal, and challenged the government on issues such as inequality, social welfare, food and energy prices.<sup>11</sup> However, there have been tensions within the trade union movement over the past two years, with the objectivity of some trade union leaders being questioned. Some trade union leaders are perceived as being too political, while others are accused of being too close to business.<sup>12</sup> In 2012, 47 deaths occurred as a result of a mine strike at a Lonmin owned mine in Marikana in the North West Province. Thirty-four of the dead were killed by police officers during protest actions.<sup>13</sup>

Civil society is very active and operates freely in South Africa.<sup>14</sup> Civil and political rights guaranteed under the constitution are respected to a large extent.<sup>15</sup> In 2012 there were moves to amend legislation on protection of state information. The law is colloquially referred to as the 'Secrecy Bill'. Concerns were raised by civil society and the media over the limits that such a law would place on freedom of expression.<sup>16</sup> As of August 2014, the president had not yet signed the bill into law.<sup>17</sup>

# Socio-Economic Context

## *Human development indicators and trends*

In 2012, South Africa's Human Development Index (HDI) score was 0.629, placing the country above the regional average and below only Botswana and Gabon in Africa.<sup>18</sup> Despite an average gross domestic product (GDP) growth of 3.2 percent since 1995, the unemployment rate has remained high, sometimes reaching 25 percent.<sup>19</sup> The African Development Bank reported in 2012 that while only 9.5 percent of Indians and 5.7 percent of whites were unemployed, unemployment among black Africans and coloured people stood at 53 percent.<sup>20</sup>

In 2014 the World Bank reported progress toward the achievement of the Millennium Development Goals (MDGs) on primary education, gender, several health indicators and environmental sustainability.<sup>21</sup> However, according to the Organisation for Economic Cooperation and Development (OECD), challenges remained in the quality of education, especially for the black population.<sup>22</sup> The 2013 South African report on the MDGs noted that the areas where progress was slowest were equality and employment (MDG1), and the maternal mortality ratio (MDG 5).<sup>23</sup>

According to the same source, South Africa was among the most unequal countries in the world, with a Gini coefficient, an indicator of income concentration, of 0.63 in 2009.<sup>24</sup> The highest, Setchelles, had a coefficient of .65, while the lowest, Denmark, had a coefficient of .24. In South Africa, the richest 10 percent of

the population accounted for 58 percent of the country's income, while the poorest 10 percent accounted for 0.5 percent.<sup>25</sup>

In 2014, the World Bank reported a 16 percent decrease in the poverty rate between 2000 and 2010, but noted that pockets of poverty remained, mostly among the black population and women.<sup>26</sup> A 2013 Minority Rights Group International report stated that the income of black Africans and 'coloured' people was one-eighth that of white people.<sup>27</sup>

In 2010, President Zuma tasked the National Planning Commission (NPC) with the development of the National Development Plan (NDP). The final document was the result of a broad consultation process led by the NPC with other governmental bodies, trade unions, academics, industry bodies, non-profit organisations, religious associations and the general public.<sup>28</sup>

The elimination of poverty and a sharp reduction in inequality by 2030 are the primary objectives of the NDP. The plan seeks to improve education for all citizens, spur job creation by promoting employment in labour-intensive industries, invest in infrastructure, support the transition to a low carbon economy, integrate rural communities through education, health care and other services and improve living conditions for low-income families settled outside the city as consequence of persisting Apartheid-era patterns.<sup>29</sup>



# Political, Economic & Development Statistics

*Quantitative indicators and country rankings*

| Demographic Overview      |   |
|---------------------------|---|
| <i>Population</i>         | 54 million (mid-year population estimates 2014)<br>51.8 million (Census 2011)   |
| <i>Ethnic Groups</i>      | Black African 80.2%, white 8.4%, coloured 8.8%, Indian/Asian 2.5% (Mid-year population estimates 2014)  |
| <i>Religious Groups</i>   | Christian 79.8%, African traditional religion 0.3%, Judaism 0.2%, Hinduism 1.2%, Islam 1.5%, Other 0.6%, No religion 15.1%, Undetermined 15.1% (2001 est.) <sup>30</sup>  |
| <i>Languages</i>          | IsiZulu (official) 22.7%, IsiXhosa (official) 16.0%, Afrikaans (official) 13.5%, English (official) 9.6%, Sepedi (official) 9.1%, Setswana (official) 8.0%, Sesotho (official) 7.6%, Xitsonga (official) 4.5%, siSwati (official) 2.5%, Tshivenda (official) 2.4%, isiNdebele (official) 2.1%, Sign language 0.5%, other 1.6% (2011 census) |
| <i>Net Migration Rate</i> | -6.27 migrants/1,000 population (2014 est.)   |

## Trends

*Source: World Bank/Trading Economics/Statistics South Africa*

|   | 2010           | 2011           | 2012          |
|---|----------------|----------------|---------------|
| <i>GDP (Purchasing Power Parity US\$)</i> | 403.89 billion | 382.34 billion | 350.6 billion |
| <i>GDP per capita (PPP, US\$)</i>         | 5916.46        | 5885.22        | 5916.46       |
| <i>GDP real growth rate (%)</i>           | 7.10           | 2              | 1.60          |
| <i>Unemployment (%)</i>                   | 24.9           | 25.1           | 25.2          |

## Freedoms & Participation

Percentile Rank: 100 = highest rank; 0 = lowest rank

Source: World Bank Worldwide Governance Indicators

|                                 | 2010 | 2011 | 2012 |
|---------------------------------|------|------|------|
| <i>Voice and Accountability</i> | 66.4 | 66.2 | 65.4 |
| <i>Political Stability</i>      | 46.7 | 48.6 | 44.1 |
| <i>Government Effectiveness</i> | 66.0 | 66.4 | 63.6 |
| <i>Regulatory Quality</i>       | 62.2 | 64.5 | 63.2 |
| <i>Rule of Law</i>              | 57.8 | 58.2 | 57.8 |
| <i>Control of Corruption</i>    | 61.4 | 58.8 | 53.6 |

## Country Rankings and Ratings

|  | 2012 | 2013 | 2014 |
|--|------|------|------|
| <i>Reporters Without Borders: Press Freedom Index</i><br>1 indicates the highest degree of freedom                                   | 42   | 52   | 42   |
| <i>Ease of Doing Business Index</i><br>of 183, where 1 indicates greatest ease for doing business                                    | 35   | 39   | 41   |
| <i>Freedom House: Map of Freedom – Political Rights</i><br>On a scale of 1 through 7, where 1 indicates the highest level of freedom | 2    | 2    | 2    |
| <i>Freedom House: Map of Freedom – Civil Liberties</i><br>On a scale of 1 through 7, where 1 indicates the highest level of freedom  | 2    | 2    | 2    |
| <i>Transparency International: Corruption Perceptions Index</i><br>of 180, where 1 indicates the lowest level of corruption          | 43   | 42   | n/a  |

## Development

Source: United Nations Statistics Division - Millennium Development Goals Indicators

|   | 2006 | 2009 | 2012 |
|---|------|------|------|
| <i>Human Development Index</i><br><i>Out of 177 countries; 1 indicates highest development</i>                  | n/a  | n/a  | 119  |
| <i>Population below PPP US\$1 per day (%)</i><br><i>MDG: 1.8% by 2015</i>                                       | 17.4 | 13.8 | n/a  |
| <i>Internet users (per 100 people)</i>  | 7.61 | 10   | 41   |
| <i>Net Enrolment Ratio in Primary Education (% both sexes)</i><br><i>MDG: 100% by 2015</i>                      | 95.3 | 94.6 | 90.5 |
| <i>Percentage of pupils starting grade 1 and reaching last grade of primary</i><br><i>MDG: 98% by 2015</i>      | n/a  | n/a  | n/a  |
| <i>Gender Parity Index in primary level enrolment (ratio of girls to boys)</i><br><i>MDG: 1.0 by 2015</i>       | 0.94 | 0.95 | 0.95 |
| <i>Literacy rate, 15-24 years old (%)</i><br><i>MDG: 100% by 2015</i>   | n/a  | 98.4 | 98.9 |
| <i>One-year-old children immunised against measles (%)</i><br><i>MDG: 95% by 2015</i>                           | 64   | 78   | 79   |
| <i>HIV prevalence (%), 15-49 yrs old</i>  | 17.8 | 18.1 | 18.4 |
| <i>Prevalence of tuberculosis (per 100,000 people)</i><br><i>MDG: 50 per 100,000 by 2015</i>                    | 232  | 259  | 305  |
| <i>Mortality rate of children under 5 years old (per 1,000 live births)</i><br><i>MDG: 25 per 1,000 by 2015</i> | 76.5 | 63.1 | 44.6 |
| <i>Maternal mortality ratio (per 100,000 births)</i><br><i>MDG: 83 per 100,000 by 2015</i>                      | n/a  | n/a  | n/a  |
| <i>Percentage of population with access to improved water sources</i><br><i>MDG: 100% by 2015</i>               | 91   | 93   | 95   |
| <i>Seats held by women in national parliament (%)</i>   | 32.8 | 33   | 42.3 |

## International Legal Commitments

### *Accession and ratification of international human rights instruments*

**Not Signed:** South Africa has not signed an international convention and is generally not bound by its principles under international law.

**Signed:** South Africa has signed an international convention, and has expressed the intention to become legally bound by it through ratification.

**Ratified:** South Africa has ratified the international convention, is bound by the articles of the convention and must conform to its principles under international law.

**Acceded:** Accession is another form of ratification of an international convention. It enables countries that have not been present at the signing of the convention to ratify and become formal parties to the convention.

| UN Conventions  |                 |
|---|-----------------|
| International Covenant on Economic, Social and Cultural Rights  | <b>SIGNED</b>   |
| International Covenant on Civil and Political Rights  | <b>RATIFIED</b> |
| Optional Protocol to the International Covenant on Civil and Political Rights   | <b>ACCEDED</b>  |
| Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the Abolition of the Death Penalty                                     | <b>ACCEDED</b>  |
| Convention Against Corruption   | <b>RATIFIED</b> |
| Convention Against Torture  | <b>RATIFIED</b> |
| International Convention on the Elimination of All Forms of Racial Discrimination   | <b>RATIFIED</b> |
| Convention on the Elimination of Discrimination Against Women   | <b>RATIFIED</b> |
| Convention on the Rights of Persons with Disabilities   | <b>RATIFIED</b> |
| Convention on the Rights of the Child   | <b>RATIFIED</b> |
| Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict   | <b>SIGNED</b>   |
| Optional Protocol on the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography                                      | <b>ACCEDED</b>  |
| Convention Against Transnational Organised Crime  | <b>RATIFIED</b> |
| Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime | <b>RATIFIED</b> |

|   |                   |
|---|-------------------|
| International Convention on the Protection of All Migrant Workers and Members of Their Families | <b>NOT SIGNED</b> |
| <b>Regional Instruments</b>   |                   |
| African Charter on Human and Peoples' Rights  | <b>RATIFIED</b>   |
| Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa   | <b>RATIFIED</b>   |
| African Charter on the Rights and Welfare of the Child  | <b>RATIFIED</b>   |
| African Union Convention on Preventing and Combating Corruption                                 | <b>RATIFIED</b>   |
| African Union Convention on the Conservation of Nature and Natural Resources                    | <b>RATIFIED</b>   |
| <b>ILO Conventions</b>  |                   |
| ILO Hours of Work (Industry) Convention (C1, 1919)  | <b>NOT SIGNED</b> |
| ILO Forced Labour Convention (C29, 1930)  | <b>RATIFIED</b>   |
| ILO Labour Inspectors Convention (C81, 1947)  | <b>RATIFIED</b>   |
| ILO Freedom of Association and Protection of the Right to Organise Convention (C87, 1948)       | <b>RATIFIED</b>   |
| ILO Right to Organise and Collective Bargaining Convention (C98, 1949)                          | <b>RATIFIED</b>   |
| ILO Equal Remuneration Convention (C100, 1951)  | <b>RATIFIED</b>   |
| ILO Social Security (Minimum Standards) Convention (C102, 1952)                                 | <b>NOT SIGNED</b> |
| ILO Abolition of Forced Labour Convention (C105, 1957)  | <b>RATIFIED</b>   |
| ILO Discrimination (Employment and Occupation) Convention (C111, 1958)                          | <b>RATIFIED</b>   |
| ILO Medical Care and Sickness Benefits Convention (C130, 1969)                                  | <b>NOT SIGNED</b> |
| ILO Minimum Wage Fixing Convention (C131, 1970)   | <b>NOT SIGNED</b> |
| ILO Holidays with Pay (Revised) Convention (C132, 1970)   | <b>NOT SIGNED</b> |
| ILO Workers' Representatives Convention (C135 of 1971)  | <b>NOT SIGNED</b> |
| ILO Minimum Age Convention (C138, 1973)   | <b>RATIFIED</b>   |
| ILO Migrant Workers (Supplementary Provisions) Convention (C143, 1975)                          | <b>NOT SIGNED</b> |
| ILO Occupational Safety and Health Convention (C155, 1981)                                      | <b>RATIFIED</b>   |

## Background & Context

|   |                   |
|---|-------------------|
| ILO Indigenous and Tribal Peoples Convention (C169, 1989) | <b>NOT SIGNED</b> |
| ILO Worst Forms of Child Labour Convention (C182, 1999)   | <b>RATIFIED</b>   |
| ILO Maternity Protection Convention (C183, 2000)          | <b>NOT SIGNED</b> |
| <b>Other International Instruments</b>                    |                   |
| Declaration on the Rights of Indigenous Peoples           | <b>SIGNED</b>     |
| Rome Statute of the International Criminal Court          | <b>RATIFIED</b>   |



# Rights Holders at Risk

## Rights Holders at Risk in the Workplace

*Societal groups at risk of employment-related discrimination and poor labour conditions*

| Operating Environment                       |   |
|---|---|
| Labour force                                | 15.2 million <sup>31</sup>  |
| Percentage of workforce informally employed | 16.3% (non-agricultural) <sup>32</sup>  |
| Sectors contributing to GDP                 | 21.1% - finance, real estate and business services;<br>15.4% - manufacturing;<br>13.6% - general government services. <sup>33</sup>   |
| HIV/AIDS prevalence                         | 6.1 million <sup>34</sup>   |
| Female labour participation rate            | 47% <sup>35</sup>   |
| Major migrant groups                        | Zimbabweans (possibly between 2 and 3 million, but estimates vary widely) <sup>36</sup>   |
| Persons with disabilities                   | 2.25 million, or about 5% of the population (2001 census results) <sup>37</sup><br>NB – the issue of disability was approached differently in the 2011 South African census, which makes results incomparable with previous census results. The 2011 census results indicated that approximately 96.6% of all South Africans had no problem or limitation in carrying out basic bodily functions. <sup>38</sup> |
| Maternity leave                             | 3 months of paid leave <sup>39</sup>  |
| Prohibited grounds of discrimination        | Among others — Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. <sup>40</sup>   |
| Relevant legislation                        | <ul style="list-style-type: none"><li>• Constitution of the Republic of South Africa<sup>41</sup></li><li>• Employment Equity Act<sup>42</sup></li><li>• Labour Relations Act</li></ul>   |

## Rights Holders at Risk in the Workplace

|   |  |
|---|--|
|   | <ul style="list-style-type: none"> <li>• Promotion of Equality and Prevention of Unfair Discrimination Act</li> <li>• Protection from Harassment Act</li> <li>• Basic Conditions of Employment Act</li> <li>• Unemployment Insurance Act</li> <li>• Guidance and Placement Act</li> <li>• Manpower Training Act</li> <li>• Occupational Health and Safety Act</li> <li>• Compensation for Occupational Injuries and Diseases Act</li> <li>• National Youth Commission Act</li> <li>• Skills Development Act</li> </ul>   |
| Recognition of indigenous groups in law | Not officially recognised  |
| Responsible agencies <sup>43</sup>      | <ul style="list-style-type: none"> <li>• Presidency</li> <li>• Department of Health</li> <li>• Department of Labour</li> <li>• Department of Social Development</li> <li>• Department of Agriculture, Forestry and Fisheries</li> <li>• Department of Economic Development</li> <li>• Department of Environmental Affairs</li> <li>• Department of Small Business Development</li> <li>• Commission for Gender Equality</li> <li>• Employment Conditions Commission<sup>44</sup></li> <li>• South African Human Rights Commission</li> <li>• Public Protector</li> </ul> |
| Local NGOs addressing this issue        | <ul style="list-style-type: none"> <li>• Centre for Applied Legal Studies</li> <li>• Legal Aid South Africa</li> <li>• Legal Resources Centre</li> <li>• Social and Economic Rights Institute</li> <li>• Lawyers for Human Rights</li> <li>• Institute for Poverty, Land and Agrarian Studies</li> <li>• Info4africa (HIV/AIDS)<sup>45</sup></li> <li>• Treatment Action Campaign (HIV/AIDS)<sup>46</sup></li> <li>• The Black Association of the Agricultural Sector</li> <li>• Bench Marks Foundation</li> </ul>   |

## Country Context

*Key human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

The South African Constitution prohibits discrimination on the grounds of ‘race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’. Prohibition of discrimination is not limited to these grounds, however, as the constitution is open-ended on grounds that are directly or indirectly linked to those explicitly mentioned.

The Employment Equity Act prohibits employment discrimination and obliges employers to promote equality and eliminate discrimination on grounds of race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth in their employment policies and practices.<sup>47</sup> These constitutional provisions are in line with generally accepted international standards.<sup>48</sup>

### Ethnic Minorities

*Ethnic minorities may be at risk of discrimination in the workplace. Particular attention should be given to promotion and wage discrimination for ethnic minorities.*

In analysing how ethnic minorities are situated, it is important to consider the way in which the socio-political landscape of the country informs the representation of ethnic groups in the workplace. Apartheid created stark inequalities between white and non-white South Africans. Employment equity is one of the aspects that still requires considerable attention. In South Africa, because of the legacy of Apartheid, it is not the minority white population which is at risk of discrimination in the workplace, but rather the majority—‘coloured’ people and black Africans.

In an effort to mitigate the risk of discrimination in the workplace against the majority, the Employment Equity Act was enacted. Statistics, however, continue to show that the majority lag behind in occupying leadership positions in the workplace.

According to the Commission for Employment Equity, black Africans held 19.8 percent of top management positions in the country in 2013-2014, while whites held 62.7 percent, Indians held 8.4 percent and ‘coloured’ people 5.1 percent. While senior management positions are mainly held by whites (about 57 percent), black representation increased by more than 10 percent from 2011-2013, reaching approximately 23 percent. Black representation also increased in professional and skilled technical positions, reaching 38.4 and 59.2 percent, respectively, compared to 40.6 percent and 22 percent for whites.<sup>49</sup>

White males dominated top management positions in the agricultural, manufacturing and mining sector, while black people were best represented in the community, social and personal services sectors.<sup>50</sup>

In the opening address to the Broad-Based Black Economic Empowerment Summit in October 2013, President Jacob Zuma illustrated that, although the black middle class has more than doubled in eight years, the 2011 census reported that the income of the average white household remains six times that of the average black African household. He further stated that the average annual income of black households was estimated at R60,613, while the average income of white households was R365,164.<sup>51</sup>

The African Development Bank (ADB) reported in 2012 that while only 9.5 percent of Indians and 5.7 percent of whites were unemployed, the rate was almost 53 percent among black Africans and other non-white ethnic groups.<sup>52</sup>

## Indigenous Peoples

*Indigenous peoples may be at risk of access to employment and workplace discrimination. Particular attention should be given to area of hiring discrimination and differential treatment in the workplace.*

In the 2005 report by the Special Rapporteur on the Rights of Indigenous Peoples, the latest report addressing this issue in South Africa, the Special Rapporteur indicated that Khoisan indigenous people worked as sheep watchers, domestic or seasonal farm workers in grape harvesting. They lacked security of tenure and had no job security. The lack of official recognition of indigenous people and their general categorisation as 'coloured' people exacerbated their victimisation in the labour market as they were not accorded any special attention as indigenous persons.<sup>53</sup> The findings of the Special Rapporteur have been reconfirmed as recently as 2013 by The Konrad Adenauer Foundation report on indigenous persons.<sup>54</sup> The Konrad Adenauer Foundation report indicated that laws on employment equity excluded the Khoisan, as they do not identify themselves as 'coloured'.<sup>55</sup>

*For more information on indigenous peoples, see Rights Holders at Risk in the Community*

## Migrant Workers

*Migrant workers may be at risk of limited access to formal employment and workplace discrimination. Particular attention should be given to the areas of working conditions/occupational health & safety.*

The South African Constitution is one of a few in the world that provides rights and freedoms to all people in South Africa, even if they are foreign nationals. Some rights are reserved for citizens, such as voting or standing for certain political offices. Enjoyment of some rights, though extended to foreign nationals, is dependent on being legally resident in the country. The implication of the latter legal requirement is that some migrant workers who are not legally residing may be subject to

abuse, discrimination and exploitation, as they are not formally employed.

In 2011, the Special Rapporteur on the Human Rights of Migrants undertook a country visit to South Africa. His report indicated that the lack of migration data made it impossible to confirm allegations that foreign migrant workers, especially those from Zimbabwe, worked longer hours for lower wages, and that they worked under conditions that were not compliant with national legislation.<sup>56</sup>

Estimates about the number of foreign and undocumented migrants differ. For example, Africa Monitor newspaper reported a 2013 University of the Witwatersrand estimate that foreign migrants amounted to 1.6 million to 2 million people, with Zimbabweans alone making up 1 million to 1.5 million.<sup>57</sup> The Special Rapporteur reported that in Gauteng province alone in the period 2001 to 2007, 26 percent of population growth was a result of migration, with foreign migration accounting for at least 3 percent.<sup>58</sup>

According to a 2013 Mail & Guardian article, migrant workers, who were primarily employed in the agricultural, mining and tourism sectors, faced challenges in accessing social security benefits.<sup>59</sup> International NGOs, in agreement with the regional civil society network AIDS and Rights Alliance for Southern Africa (ARASA) reported in 2013 that international migrant workers affected by tuberculosis, HIV or silicosis were sent back to their original communities without compensation in the mining industry, with no cross-border health referral and no source of income while receiving treatment.<sup>60</sup>

## Persons with Disabilities

*Persons with disabilities may be at risk of limited access to employment and workplace discrimination. Particular attention should be given to the areas of hiring discrimination and access to workplace facilities.*

The Employment Equity Act prohibits employment discrimination and states that employers should provide reasonable accommodation for people with disabilities.<sup>61</sup> It goes on to provide guidelines on the recruitment and selection of persons with disabilities and guidelines on proper handling of employee medical information.<sup>62</sup> The Labour Relations Act prohibits dismissal on the ground of disability,<sup>63</sup> while the Promotion of Equality and Prevention of Unfair Discrimination Act prohibits discrimination on the basis of disability.<sup>64</sup>

According to the Commission for Employment Equity, persons with disabilities accounted for 0.9 percent of the total workforce in 2013.<sup>65</sup> The figure is still below the South African government target of ensuring that at least 2 percent of the labour force is persons with disabilities.<sup>66</sup>

Mywage reported in 2014 that discriminatory practices included employment requirements excluding people living with certain disabilities (e.g. owning and driving a car), low-status jobs, below-average wages, inaccessible workplaces, lack of adequate technical workplace support and inappropriate or non-existent training.

In 2013, delegates from South Africa to the UN Human Rights Council indicated that inadequate education infrastructure did not allow young people living with disabilities to compete in the labour market or pursuing self-employment.

The South African Human Rights Commission monitors how South Africa is implementing the Convention on the Rights of Persons with Disabilities. As such, it looks into matters regarding the employment of persons with disabilities.

## People Living with HIV/AIDS

*Persons with HIV/AIDS may be at risk of workplace discrimination. Particular attention should be given to the areas of hiring, privacy, and workplace harassment.*

The Employment Equity Act prohibits discrimination based on HIV status, such as HIV testing of a job applicant as a prerequisite for employment or requiring tests to retain employment.<sup>67</sup> The Constitutional Court, the highest, has stated definitively that pre-employment HIV testing is illegal.<sup>68</sup>

As required by the Employment Equity Act, a Code of Good Practice on HIV/AIDS and workplace has also been developed. The Code of Good Practice deals with elimination of unfair discrimination and promotion of equal opportunity and treatment, ensuring a healthy and safe working environment, management of HIV and AIDS in the workplace, and monitoring and evaluation of people living with HIV and AIDS.<sup>69</sup>

In 2012, UNAIDS estimated that 6.1 million people were living with HIV in South Africa. More than 50 percent were women.<sup>70</sup> In 2013, the ILO reported that the sectors most affected by HIV were transport, mining, construction, metals processing and agriculture.<sup>71</sup>

In 2011, the Bench Marks Foundation reported high rates of HIV infection in the mining sector. The high prevalence in the mining sector was linked to the use of migrant labour and the lack of job opportunities for women, forcing some into sex work to earn an income.<sup>72</sup> Bench Marks Foundation found that in the North West province, 40 percent of all deaths were related to HIV/AIDS, reaching 63 percent among females aged between 15 and 44.<sup>73</sup> In 2013 the United Nations Development Programme started exploring ways to include issues of HIV and gender in the environmental impact assessment process.<sup>74</sup>

Mywage reported in 2014 that workplace discrimination against people with HIV/ AIDS most often occurred in the form of pre-employment HIV testing, dismissals for being

HIV positive and denial of employee benefits based on HIV status.<sup>75</sup>

### Sexual Minorities

*Lesbian, gay, bisexual, transgender or intersex persons may be denied access to employment or discriminated against in the workplace. Particular attention should be given to the areas of hiring, privacy and workplace harassment.*

The South African Constitution was the first in the world to outlaw discrimination based on sexual orientation.<sup>76</sup> It does so in section 9.<sup>77</sup> Both the Promotion of Equality Act and Prevention of Unfair Discrimination Act give voice to the provisions of section 9.<sup>78</sup> The Employment Equity Act regards any harassment based on gender, sex and sexual orientation as a form of discrimination.<sup>79</sup> The Basic Conditions of Employment Act accords same sex partners the same status as heterosexual partners, including with respect to family responsibility leave.<sup>80</sup>

Since 2002, same-sex couples can adopt children, and same-sex marriage was legalised in 2006.<sup>81</sup>

Legally, discrimination on the basis of sexual orientation is not allowed but in reality some people reportedly face discrimination on the basis of their sexual orientation.<sup>82</sup> In 2013, the Wits Business School Journal reported that, on the face of it, being lesbian or gay was not a major cause for discrimination, but may be a cause for latent discrimination.<sup>83</sup> Mywage reported in 2014 that lesbian and bisexual women encountered problems receiving benefits, for example regarding medical aid for their partners, and received fewer promotion opportunities.<sup>84</sup>

### Women

*Women may be at risk of discrimination in the workplace. Particular attention should be given to the informal sector and to the areas of hiring, equal pay, working conditions, sexual harassment, maternity and pregnancy.*

The constitution<sup>85</sup> and the Employment Equity Act provide that no one may be discriminated against on the basis of gender.<sup>86</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act contains similar provisions.<sup>87</sup> The Protection from Harassment Act provides for access to remedy for victims of harassment, including at the workplace.<sup>88</sup> The Department of Labour has issued a Code of Good Practice on Handling Sexual Harassment Cases to eliminate sexual harassment at the workplace.<sup>89</sup>

In 2013, Freedom House reported that women were subject to sexual harassment and wage discrimination in the workplace.<sup>90</sup> South Africa ranked 17th out of 136 countries in the 2013 World Economic Forum Gender Gap Index. It was the second best performing in Africa, after Lesotho. While the country's rankings in some areas, such as health, survival, economic participation and opportunity, were as low as 102nd, South Africa ranked 8th on political empowerment.<sup>91</sup>

According to a 2014 report by the Commission for Employment Equity, women only held 20.6 percent of top management positions and 29.9 percent of senior management positions. Female representation in professional positions was 43 percent, and 47 percent in skilled technical jobs.<sup>92</sup> The Black Association of the Agricultural Sector reported that in 2012, women accounted for 36 percent of workers in the agricultural sector.<sup>93</sup>

In 2012 the OECD reported higher unemployment rates among women. The difference was particularly acute in the 15 to 24 age group, with 54 percent of women unemployed and 45 percent of men. The poverty rate was 52 percent among black women in 2012, compared to the national rate of 28 percent.<sup>94</sup> According to the 2013 Human Development Index, female labour force participation was 44 percent, compared to 61 percent among males.<sup>95</sup>

Studies conducted by Oxfam in 1993 and 2008 noted that women earned roughly 40 percent less than men.<sup>96</sup> In the agricultural sector in the Western Cape province, the Black Association of the Agricultural Sector confirmed the



underpayment of women, who were reportedly paid less than what their male counterparts received for equal work.<sup>97</sup>

In 2011, the Bench Marks Foundation reported that the mining sector offered few employment opportunities to women due to bias and a predominant masculine culture. Women in the mining sector mostly worked in unskilled or semi-skilled jobs.<sup>98</sup> According to the Bench Mark Foundation, some mining companies used local chiefs and councillors for recruitment, and they have in some instances asked for sexual favours for women seeking employment.<sup>99</sup>

### Temporary Workers

*Temporary workers may be at risk of discrimination in the workplace. Particular attention should be given to the areas of hiring and working conditions.*

Over the past ten years, the number of permanent full-time employees in South Africa has fallen from 11 million to 9.1 million, while the number of temporary employees has risen from 2.6 million to 3.9 million.<sup>100</sup> This 50 percent increase in temporary workers is consistent with global trends, and has manifested in the use of labour outsourcing or brokering.

A number of sectors of the South African economy rely on labour brokers to supply workers. Employees are hired under temporary contracts and are classified as the employees of a recruitment agent rather than the business entity for whom they perform their daily work.

According to a 2009 report by a confederation of South African trade unions, workers under labour-broker schemes were vulnerable to low wages, insecurity and reduced benefits

compared to directly employed workers.<sup>101</sup>

Labour broker contracts reportedly included clauses stating that temporary employees cannot join organisations that oppose the company to which they are contracted, a clause that has been used to fire union organisers.<sup>102</sup>

According to stakeholders consulted in South Africa in 2014, labour brokers were most prevalent in the retail and agriculture sectors. The issue of labour brokers has received a great deal of attention in recent years, with trade unions advocating for banning labour brokers altogether and government advocating for tighter regulation.<sup>103</sup>

### Young Workers

*Young people may be at risk of discrimination in the workplace. Particular attention should be given to the area of access to employment.*

In 2013, the United Nations Population Fund (UNFPA) reported that 70 percent of young people up to the age of 24 who were seeking jobs were unemployed.<sup>104</sup> Of that number, 45 percent were males and 55 percent were females.<sup>105</sup> Unemployed young people were reportedly concentrated in the Eastern Cape, KwaZulu-Natal, Gauteng and Limpopo provinces.<sup>106</sup>

The Policy Action Network: Children (an initiative of the Human Sciences Research Council and UNICEF South Africa) reported in 2014 that that youth unemployment figures were determined by the education they received; young people who completed grade 12 were 30-60 percent more likely to be in formal employment than those who did not complete high school. The same study indicated that those who obtained a tertiary level qualification had the highest chance of employment.<sup>107</sup>

## Access to Remedy

*Bodies to which victims of corporate human rights abuses can file grievances and seek redress.*

The South African Human Rights Commission (SAHRC) and the Office of the Public Protector (i.e. ombudsperson) can investigate cases of discrimination in the workplace.<sup>108</sup> The SAHRC investigated almost 9,000 cases during the period 2012-2013, of which 13 percent concerned labour relations, namely racial discrimination and hate speech at the workplace.<sup>109</sup>

Discrimination cases and sexual harassment claims can also be brought to the Commission for Conciliation, Mediation and Arbitration (CCMA), an independent dispute reconciliation body set up under the terms of the Labour Relations Act.<sup>110</sup> Should the dispute remain unresolved, either party may refer the dispute to the Labour Court.<sup>111</sup> In 2011/2012, the CCMA received about 160,000 cases, with about 135,000 being related to unfair dismissals and unfair labour practices. The CCMA reportedly had a 70 percent settlement rate during the same period.<sup>112</sup>

The Commission for Gender Equality is mandated to monitor and investigate issues related to gender equality and can therefore be approached to deal with cases of discrimination. Another body that can be

approached as an avenue for remedies by indigenous persons, among others, is the Commission for Promotion and Protection of Rights of Cultural, Religious and Linguistic Minorities.

Victims of sexual assault also have the right to press separate criminal or civil charges against an alleged perpetrator.<sup>113</sup> Victims of discrimination, hate speech or harassment can also bring their cases to Equality Courts.<sup>114</sup> Bringing a case before the Equality Courts involves no costs.

According to a 2012 report by the UN Special Rapporteur on the Right to Food, migrant workers and others in the informal sector had few incentives to report abuses due to fear of expulsion from the country and difficulties in finding employment in the formal sector.<sup>115</sup>

Although South Africa ratified the Protocol to the African Charter on Human and Peoples' Rights, establishing the African Court on Human and People's Rights, the country did not accept the competence of the court to directly receive cases from NGOs and individuals. Consequently, in 2012 two cases could not be heard on grounds of lack of admissibility.<sup>116</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media*

- *July 2013, Section 27:* Three people filed a complaint against the South African National Defence Force at the North Gauteng High Court for discrimination on the basis of their HIV status.<sup>117</sup>
- *August 2012, Mail & Guardian:* During labour unrest, 34 miners were killed by the South African Police Service at Wonderkop, near Marikana in the North West Province.<sup>118</sup> A commission of inquiry was established and as of January 2015 was investigating the incident.
- *February 2012, Safety News:* A female worker at Anglo American Platinum's Khomanani mine in Rustenburg, North West province, was found dead at an underground location, having been assaulted and raped.<sup>119</sup>

- *February 2012, Section 27:* In a case concerning the dismissal of a horse riding instructor on the basis of his HIV status, the Labour Court declared the dismissal unfair and awarded the plaintiff 12 months' compensation.<sup>120</sup>
- *2011, Bench Marks Foundation:* Xstrata Coal South Africa was accused by the

National Union of Mineworkers (NUM) of firing 12 HIV-positive mine workers. NUM argued that the company was aware of the workers' HIV status through the joint NUM-Xstrata Voluntary Counselling and Testing programme.<sup>121</sup>

## Human Rights Guidance for Business

*Guidance by the Danish Institute for Human Rights and other institutions to help companies ensure respect for human rights when addressing common challenges.*

### Recommendations

**Bench Marks Foundation:** In a 2011 publication, the Foundation made the following recommendations to mining companies in South Africa:<sup>122</sup>

- Provide proper housing and accommodation for all employees, assuming responsibility for the impacts that the living-out allowance has on informal dwellings, and the resultant health and safety problems, as well as the spread of HIV/AIDS.

American. Speak Up is managed by Deloitte Tip-offs Anonymous. Complaints can be submitted through an online form or by telephone, fax, e-mail or regular mail. Telephone complaints can be submitted in English, isiZulu, Afrikaans, IsiXhosa and Sesotho.<sup>124</sup>

### Company Beyond Compliance Initiatives

**Anglo-American:** The company developed the Thermal coal HIV/AIDS programme, a voluntary HIV counselling and testing initiative for its employees and members of their families. Approximately 95 percent of permanent workers have been tested for HIV since the programme began. Since 2002, the company provided about 240 affected employees with free anti-retroviral treatment (ART).<sup>125</sup>

**South African Airways (SAA) Youth Programmes:** The career day targets schools in disadvantaged communities. The Cadet Pilot Training Programme targets disadvantaged unemployed youth.<sup>126</sup>

**Murray and Roberts, Aveng, Group 5, Basil Read and WBHO in partnership with the National Business Initiative:** These institutions have developed an initiative on work-integrated learning in the construction sector to respond to the needs of construction companies. The initiative involves the development and implementation of Further

### Company Due Diligence Initiatives

**BHP Billiton:** The mining giant's manganese focused subsidiary, Samancor Manganese, started with a human rights and security focused training programme in 2013. The training aims to enhance the capacity of employees on basic human rights understanding, and in particular how this relates to security operations. The materials and sessions are developed and delivered by the Centre for Human Rights, University of Pretoria.<sup>123</sup>

**Anglo-American:** In 2001, the company established 'Speak Up', a confidential reporting system to which employees, business partner and other stakeholders can file complaints about conduct contrary to the values of Anglo-

Education and Training college curriculum, implementation of work-based learning programmes and an internship programme aimed at providing relevant skills to youth.<sup>127</sup>

**National Business Initiative and the Industrial Development Co-operation:** This initiative

creates jobs in the green economy through skills development, capacity training of lecturers, creating a work-integrated learning component for learners as well as an enterprise development programme to build the capacity of colleges. The initiative empowers youth with the aim of decreasing unemployment.<sup>128</sup>

## Engagement Opportunities

*Development initiatives by public and private actors that provide opportunities for companies to contribute to human development*

### Public Sector Initiatives

**Broad-Based Black Economic Empowerment**

**Framework for Agriculture:** The strategy promotes the economic empowerment of black people, women, workers, young people, disabled people and people living in rural areas.<sup>129</sup>

**National Rural Youth Service Corps**

**programme:** This programme aims to train youth in rural communities to acquire technical skills, including in the agricultural and construction sectors.<sup>130</sup>

**Community Work Programme:** The programme provides an employment safety net to unemployed people by employing them for two days a week or eight days a month. The programme pays workers 63 rand (US\$6) per day.<sup>131</sup>

### Development Priorities

**National Development Plan:** The plan aims to reduce the unemployment rate from 25 percent to 6 percent by 2030; increase labour force participation and the employment rate (especially in rural areas); and increase income among the bottom 40 percent of the population.<sup>132</sup>

**African Development Bank Country Strategy Paper 2013-2017:** The strategy focuses on

supporting small and medium enterprises to create jobs and skills. The overarching aim is to ensure the development of a capable workforce.<sup>133</sup>

**World Bank Country Partnership Strategy**

**2014-2017:** The strategy supports the government in creating jobs near urban townships for low-skilled workers, especially women, and reducing travel distances and costs for poor households.<sup>134</sup>

**UNDP Country Programme Document 2013-**

**2017:** The programme aims to create a 'Jobs Lab'. The lab would test various options in terms of policy, financing and institutions, to promote employment in rural areas with a focus on youth and women. The options would be tested with the aim of generating 'green' environmentally friendly and sustainable jobs.<sup>135</sup>

**ILO Decent Work Country Programme 2010-**

**2014:** The programme focuses on creating jobs, especially among women, youth and persons with disabilities.<sup>136</sup>

# Rights Holders at Risk in the Community

*Societal groups who may be at particular risk of adverse human rights impacts by businesses or who may be excluded from benefits generated by businesses activities*

| Operating Environment   |   |                                       |
|---|---|---------------------------------------|
|   | South Africa  | Sub-Saharan Africa                    |
| Percentage urban population   | 54% <sup>137</sup>  | 37.2% <sup>138</sup>                  |
| Percentage non-urban population   | 46.3% <sup>139</sup>  | 62.8% <sup>140</sup>                  |
| Life expectancy   | 59.6 <sup>141</sup>   | 57 <sup>142</sup>                     |
| Human Development Index (HDI) score   | 0.629 <sup>143</sup>  | 0.475 <sup>144</sup>                  |
| Population below US\$1.25 per day (%)   | 7.4% <sup>145</sup>   | 48% <sup>146</sup>                    |
| Literacy rate, 15-24 years old (%)<br><i>MDG: 100% by 2015</i>  | 92.7% <sup>147</sup>  | 77% male<br>67% female <sup>148</sup> |
| HDI Gender Equality Gap Index   | 0.7510 <sup>149</sup>   | n/a                                   |
| OECD Social Institutions and Gender Rank  | 4 (2012) <sup>150</sup>   | n/a                                   |
| Maternal mortality ratio (per 100,000 births)<br><br><i>MDG: 57 per 100,000 by 2015</i>                               | 269 (2010) <sup>151</sup>   | 500 <sup>152</sup>                    |
| Seats held by women in national parliament  | 40.8% <sup>153</sup>  | 22.2% <sup>154</sup>                  |
| Constitution prohibits discrimination on the grounds of:<br><i>(Continued – prohibited grounds of discrimination)</i> | Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. <sup>155</sup><br>n/a  |                                       |
| Major indigenous groups   | <ul style="list-style-type: none"> <li>• San: Northern Cape province</li> <li>• Khoekhoe, including the Nama: Northern Cape province</li> <li>• Koranna: Northern Cape and Free State provinces</li> <li>• Griqua: Western Cape, Eastern Cape, Northern Cape, Free State and KwaZulu-Natal provinces</li> </ul> |                                       |

## Rights Holders at Risk in the Community

|   |   |
|---|---|
|   | <ul style="list-style-type: none"> <li>• Cape Khoekhoe: Western Cape and Eastern Cape, with growing numbers in Gauteng and Free State provinces.<sup>156</sup></li> </ul>   |
| Recognition of indigenous groups in law | Not officially recognised   |
| Relevant Laws                           | <ul style="list-style-type: none"> <li>• Constitution of South Africa<sup>157</sup></li> <li>• Promotion of Equality and Prevention of Unfair Discrimination Act</li> <li>• Protection from Harassment Act</li> </ul>   |
| Responsible agencies                    | <ul style="list-style-type: none"> <li>• Presidency</li> <li>• Department of Health</li> <li>• Department of Labour</li> <li>• Department of Social Development</li> <li>• Department of Agriculture, Forestry and Fisheries</li> <li>• Department of Economic Development</li> <li>• Department of Environmental Affairs</li> <li>• Department of Small Business Development</li> <li>• Commission for Gender Equality</li> <li>• Commission for Promotion and Protection of Rights of Cultural, Religious and Linguistic Minorities</li> <li>• Employment Conditions Commission<sup>158</sup></li> <li>• South African Human Rights Commission</li> <li>• Department of Cooperative Governance and Traditional Affairs</li> <li>• Public Protector</li> </ul> |
| Local NGOs addressing this issue        | <ul style="list-style-type: none"> <li>• Disabled People South Africa</li> <li>• Lawyers for Human Rights</li> <li>• Centre for Applied Legal Studies</li> <li>• Centre for Human Rights</li> <li>• Centre for Child Law</li> <li>• Children's Institute</li> <li>• Legal aid South Africa</li> <li>• Legal Resources Centre</li> <li>• Section 27</li> <li>• Social and Economic Rights Institute</li> <li>• Lawyers for Human Rights</li> <li>• Institute for Poverty, Land and Agrarian Studies</li> <li>• Info4africa (HIV/AIDS)<sup>159</sup></li> <li>• Treatment Action Campaign (HIV/AIDS)<sup>160</sup></li> <li>• The Black Association of the Agricultural Sector</li> <li>• Bench Marks Foundation</li> </ul>                                       |



## Country Context

*Key human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

### Migrants

*Companies may affect the health, livelihoods or material well-being of migrant workers.*

*Particular attention should be paid to this issue when identifying stakeholders for community consultation, operating in conflict-affected areas and recruiting employees*

The Immigration Act regulates migration across South Africa's borders.<sup>161</sup> South Africa is known for its huge influx of illegal immigrants, with government spending at least 90 million rand per year on deporting illegal immigrants.<sup>162</sup>

The number of undocumented migrants is not known. The Special Rapporteur on the Human Rights of Migrants noted in 2011 a significant lack of disaggregated and updated data on the characteristics and conditions of migrant workers. The Special Rapporteur reported that the poor living conditions of migrants, including overcrowding, insufficient ventilation, poor nutrition, lack of sanitation and access to clean water, were exacerbated by lack of access to healthcare.<sup>163</sup>

In 2012, several South African organisations reported hate crimes against migrants and denial of social services to undocumented children and children of migrants.<sup>164</sup> Human Rights Watch reported in 2012 that migrants faced discrimination in healthcare facilities, including verbal abuse, unlawful user fees and denial of basic and emergency services.<sup>165</sup>

In 2013, Freedom House reported that illegal migrants, especially from Zimbabwe, Mozambique and Somalia, were subject to xenophobic violence by vigilantes and some members of the police.<sup>166</sup> The Centre for Human Rights asked for a multi-pronged response to growing desensitisation among South Africans to acts of xenophobic violence.<sup>167</sup> The call was made after a Somali

man was publicly attacked and killed in the Eastern Cape province.<sup>168</sup>

A 2013 Institute for Security Studies report indicated that since 2008 the Somali community, estimated at about 50,000 people, has been targeted for xenophobic attacks. Language barriers, religious differences and the lack of integration into host communities were identified as contributory factors for the attacks.<sup>169</sup>

The South African Human Rights Commission (SAHRC) is mandated by the constitution to respect, promote and protect the rights in the Bill of Rights.<sup>170</sup> This includes a special focus on migration, and consequently, migrants.

### Indigenous Peoples

*Companies may disrupt the traditional livelihoods of indigenous communities.*

*Particular attention should be paid to this issue when operating in the Northern Cape, Western Cape, Eastern Cape, Free State and KwaZulu Natal provinces.*

In 2011 the International Work Group for Indigenous Affairs reported that the indigenous peoples of South Africa amounted to approximately 1 percent of the overall population. They were generally categorised under the Khoisan, which comprises of five groups—the San, Nama, Griqua, Koranna, and Revivalist Khoisan Groups.<sup>171</sup> The International Labour Organization (ILO) and the African Commission on Human and Peoples' Rights also identified these groups in a Country Research Report prepared on the Constitutional and Legislative Protection of the Rights of Indigenous People in South Africa.<sup>172</sup>

The San and Khoekhoe, including the Nama, mainly reside in the Northern Cape province, and the Koranna mainly in the Northern Cape

and Free State provinces. The Griqua people are spread across the Western Cape, Eastern Cape, Northern Cape, Free State and KwaZulu-Natal provinces. The Cape Khoekhoe reside mainly in the Western Cape and Eastern Cape, with growing numbers in Gauteng and the Free State.<sup>173</sup> The 2011 census did not provide for an 'indigenous people' category, and consequently the Khoisan peoples are categorised as 'Coloured' or 'Other' racial groups.<sup>174</sup>

The 2011 National Traditional Affairs Bill, circulated for public comment in 2013, recognises Khoisan leadership structure, governance and customary law.<sup>175</sup> However, the Khoisan indigenous language is not recognised as one of the eleven official languages of South Africa.<sup>176</sup> Neither the constitution nor any other law recognise the Khoisan as indigenous peoples. In addition, South Africa has not ratified ILO Convention 169 that deals with recognition of indigenous peoples.<sup>177</sup>

The latest report by the Special Rapporteur on the Rights of Indigenous Peoples (2005) reported that the Khoisan, especially the Nama and the San, lived in rural areas and were among the poorest groups in the country. Indigenous women, children and youth were vulnerable to discrimination, violence, drug abuse, suicide, prostitution and alcoholism.<sup>178</sup> In 2013, the Konrad Adenauer Foundation confirmed that the challenges identified by the Special Rapporteur still persisted among the Khoisan indigenous people.<sup>179</sup>

Although some Khoisan groups received rural farmland through the land reform process, the International Work Group for Indigenous Affairs reported in 2011 that a lack of start-up resources posed a challenge for indigenous communities in South Africa to farm productively.<sup>180</sup>

The Konrad Adenauer Foundation further noted that access and ownership of land and post-settlement support remained unresolved problems for indigenous communities.<sup>181</sup> Other challenges faced by indigenous persons included exploitation of their traditional

knowledge by pharmaceutical companies and displacement from their lands.

## Persons with Disabilities

*Companies may negatively impact the health, livelihoods or ability to access public services for persons with disabilities. Particular attention should be paid to this issue when conducting community consultations.*

Section 9 of the constitution prohibits unfair discrimination on the ground of disability,<sup>182</sup> as does the Promotion of Equality and Prevention of Unfair Discrimination Act.<sup>183</sup> If they meet the necessary criteria, persons with disabilities are entitled to a Disability Grant or a Care Dependency Grant (for children) under the Social Assistance Act.<sup>184</sup>

However, persons with disabilities continue to face difficulties in accessing their rights in South Africa. In 2011, the National Digital Repository consultations with persons with disabilities revealed that they were not well understood within their communities and were marginalised and 'hidden away' by their families, as their disability was a source of shame.<sup>185</sup>

Education law and policy, such as the South African Schools Act<sup>186</sup> and Education White Paper 6,<sup>187</sup> both guarantee proper education for children with disabilities. However, NGO submissions to the South African Universal Periodic Report Review process noted that the initiatives laid down by law and policy are yet to be fully implemented.<sup>188</sup> In 2012 the United Nations Human Rights Council reported that, according to UNICEF, the lack of trained teachers and inadequate school infrastructure in South Africa were barriers for disabled persons in accessing education.<sup>189</sup>

Keeping in mind that the South African Human Rights Commission is mandated by the constitution to respect, promote and protect all rights in the Bill of Rights,<sup>190</sup> its work includes a special focus on people with disabilities. The South African Human Rights Commission also monitors the implementation of the Convention on the Rights of Persons with

Disabilities to which South Africa is a state party.

## People Living with HIV/AIDS

*Companies may negatively impact persons with HIV/AIDS. Particular attention should be paid to this issue when conducting community consultations.*

Section 9 of the Constitution<sup>191</sup> prohibits unfair discrimination on the basis of health, as does the Promotion of Equality and Prevention of Unfair Discrimination Act.<sup>192</sup>

Amnesty International reported in 2012 that persons with HIV/AIDS, especially the poor and those living in rural areas, had difficulties accessing treatment due to physical and economic barriers.<sup>193</sup> According to a 2013 Minority Rights Group International report, KwaZulu-Natal and Mpumalanga provinces recorded the highest HIV prevalence rates.<sup>194</sup>

In 2013, BMC Public Health reported that while on the decline in South Africa, stigma against people living with HIV/AIDS impacts upon HIV prevention, diagnosis and treatment. Stigma is often manifested through discrimination, hostility and prejudice, including people living with HIV being denied access to essential services. The same source links stigmatisation associated with HIV to lack of understanding of the disease, lack of access to treatment and the fact that the disease is incurable.<sup>195</sup>

## Sexual Minorities

*Companies may negatively impact the security of lesbian, gay, bisexual, transgender or intersex persons. Particular attention should be paid to the issues of privacy and personal security.*

Since the inception and adoption of the South African constitution, sexual minority rights have been a key focus in South African human rights discourse. Keeping in mind that the South African Constitution was the first of its kind to outlaw discrimination on the basis of sexual orientation, discrimination is prohibited both in the workplace and in all other areas of life.

In 2013 the Wits Business Journal reported that being lesbian or gay in South Africa may not, on the surface, be a cause for discrimination, but discrimination may still take place covertly.<sup>196</sup>

Human Rights Watch reported in 2011 that assaults on sexual minorities were rarely reported due to the victims' fear of stigmatisation, and that the few who reported assault were ridiculed or harassed by police.<sup>197</sup>

Freedom House reported in 2013 that there were a number of physical attacks on LGBTI people, especially through 'corrective rape' (wherein men believe that this act of violence against lesbians could change victims' sexual orientation).<sup>198</sup>

From June to November 2012, Amnesty International recorded at least seven murders of LGBTI persons, including five against lesbian women that occurred because of their sexual orientation or gender identity.<sup>199</sup>

## Women

*Companies may disproportionately affect the health, livelihoods or material well-being of women, or may exacerbate already-existing gender disparities in development. Particular attention should be paid to under-representation of women in traditional structures, gender disparities in poverty rates and access to land.*

The South African Constitution, in section 9, prohibits discrimination based on gender.<sup>200</sup>

The Promotion of Equality and Prevention of Unfair Discrimination Act gives voice to the provisions of section 9.<sup>201</sup> The Commission for Gender Equality is established under Chapter 9 of the constitution, and is mandated to 'promote respect for gender equality and the promotion, development and attainment of gender equality.'<sup>202</sup> Employment equity laws reflect a positive element as far as inclusion of women is concerned but reality sometimes does not reflect this positive element.

In 2013, Freedom House reported that women were discriminated against in marriage, divorce, inheritance, and property rights, especially in rural areas. In 2012, more than

60,000 women suffered sexual abuse.<sup>203</sup> Rape statistics, according to a 2013 report by the Guardian, were badly skewed due to under-reporting.<sup>204</sup>

Amnesty International reported in 2012 that rural women and girls had higher risk of HIV infection and difficulties in accessing treatment.<sup>205</sup> Women and girls in communities surrounding development and infrastructure projects were also at risk of sexual crimes and infection of sexually transmitted diseases due to the huge influx of migrant and contract workers typically associated with these projects.

### Refugees/ Asylum Seekers

*Companies may negatively impact the rights of asylum seekers or refugees. Particular attention should be paid to the issues of hiring, equal treatment and access to and enjoyment of social security.*

In its provision that everyone is equal before the law, and that no one may discriminate against anyone on the basis of their ethnic or social origin, the constitution protects the rights of refugees and asylum seekers from unfair discrimination.<sup>206</sup> This is echoed in the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act.<sup>207</sup> Refugees and asylum seekers are also protected under the Refugee Act.<sup>208</sup>

Africa Check reported in 2013 that there were significant problems in monitoring the number of asylum applications and that available data was not reliable.<sup>209</sup> Farming communities was also reportedly abusing unregistered migrants, especially in the Limpopo and Mpumalanga provinces that border Zimbabwe and Mozambique. Unregistered migrants were reluctant to report to authorities.

In 2013, Amnesty international reported looting and destruction of shops and displacement of refugees and asylum-seekers. The response to those attacks from the police was reportedly slow, and at times complicit with the attackers.<sup>210</sup> Following a police operation in Limpopo province, 600 small

businesses run by asylum-seekers and refugees were reportedly closed. This resulted in a loss of livelihood and homes, increasing vulnerability to other abuses.

Police raids reportedly took place without warning, were indiscriminate and involved the seizure of trading stock. Refugees and asylum-seekers were reportedly subject to xenophobic verbal abuse, detention and charged or fined for running their businesses.<sup>211</sup>

### Youth

*Companies may negatively impact the rights of youth. Particular attention should be paid to the issues of hiring, public participation and community consultation.*

The South African Constitution, in section 9, prohibits discrimination based on age.<sup>212</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act gives voice to the provisions of section 9.<sup>213</sup> In 2013, the United Nations Population Fund reported that about 42 percent of the population was between the ages of 14 and 35. Despite improvements in living conditions, including access to housing, adequate water and sanitation, electricity and communication, young people continued to face high HIV infection and unemployment rates. Young people were increasingly heads of households.<sup>214</sup>

The Employment Tax Incentive Act, colloquially referred to as the 'youth wage subsidy', came into effect on 1 January 2014. The Act, under which employers will receive a tax incentive for employing young workers for a maximum of two years under certain circumstances, is aimed at promoting employment of young people to decrease unemployment rates in areas identified as special economic zones.<sup>215</sup>

Access to HIV prevention, treatment, care and support services was challenging due to limited decision-making power, lack of control over financial resources, restricted mobility, and care responsibilities of young people.<sup>216</sup> Despite a decline in pregnancy rates among youths, the UNFPA reported that about 14 percent of

teenagers between 15 and 19, and 9 percent of people aged 10 to 14, were pregnant.<sup>217</sup>

### Children

*Companies may negatively impact the rights of children in the community. Particular attention should be paid to the best interest of the child, community engagement and corporate social responsibility initiatives.*

The rights of children are expressly protected in section 28 of the South African Constitution.<sup>218</sup>

The rights of children in South Africa are also protected under the Children's Act.<sup>219</sup> The Social Assistance Act makes provision for three social grants for children — the child support grant, the foster care grant and the care dependency grant (for children with disabilities).<sup>220</sup>

The Child Justice Act protects children who fall afoul of the law.<sup>221</sup> The South African Schools

Act seeks to ensure that children are not kept out of school.<sup>222</sup>

The Children's Institute indicates that, as of February 2015, approximately 10.5 million children were making use of the Child Support Grant,<sup>223</sup> 525,000 the Foster Care Grant<sup>224</sup> and 113,000 the Care Dependency Grant.<sup>225</sup> Despite the utilisation of these government grants, 55.5 percent of all children in South Africa were living in poverty.

The Children's Institute further reported that around 3% children of school-going age do not attend school. Of those enrolled, the gender parity index is a total of 1, meaning that an equal number of boys and girls attend school.<sup>226</sup>

The South African Human Rights Commission as mandated by the constitution to respect, promote and protect the rights in the Bill of Rights, pays special focus on children's rights and the right to a basic education.

## Access to Remedy

*Bodies to which victims of corporate human rights abuses can file grievances and seek redress.*

The South African Human Rights Commission, the Commission for Gender Equality and Commission for Promotion and Protection of Rights of Cultural, Religious and Linguistic Minorities can all be approached for remedy.

The South African Constitutional Court is the highest court in all constitutional matters and, as such, can deal with all matters in the Bill of Rights. Cases before reaching this apex court have to go through lower courts.

A number of specialised courts are in place to address various issues. For instance, victims of discrimination, hate speech or harassment can bring their cases to Equality Courts.<sup>227</sup> There are no costs related to bringing a case to the Equality Courts. Victims of sexual abuse can access the Sexual Offences Courts, which have been set up to ensure that they respect victims,

provide special care and support to reduce victims' secondary trauma.<sup>228</sup>

However, even though court systems exist, according to a 2012 report by the International Commission of Jurists, refugees and asylum-seekers who were victims of physical and property violations experienced difficulties in accessing justice and remedies, resulting in impunity for perpetrators.<sup>229</sup>

The Commission on Traditional Leadership Disputes and Claims can investigate disputes involving traditional leadership. However, the commission has no decision-making mandate and can only make recommendations.<sup>230</sup> The proposed Traditional Courts Bill, though promising to improve access to justice, also raises challenges of access to remedies and is considered in some circles as being potentially discriminatory against women.<sup>231</sup>

Although South Africa ratified the Protocol to the African Charter on Human and Peoples' Rights, establishing the African Court on Human and People's Rights, the country did not accept

the competence of the court to directly receive cases from NGOs and individuals.

Consequently, in 2012 two cases could not be heard on grounds of lack of admissibility.<sup>232</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media*

- *August 2013, Open Society Initiative for Southern Africa:* An agreement between the San and Khoi indigenous groups and the pharmaceutical company Cape Kingdom Nutraceuticals recognised the intellectual property rights of indigenous people over the buchu medical plant and its use. The pharmaceutical company agreed to hand over 3 percent of profits related to buchu products to the indigenous groups and share its knowledge on the commercial use of the plant, which is beneficial in combating obesity, diabetes and hypertension.<sup>233</sup>
- *July 2013, Global Post:* A 26-year-old black woman was raped with a toilet brush and killed, reportedly for being a lesbian, in Ekurhuleni, a township outside of Johannesburg.<sup>234</sup>
- *April 2013, The New Age:* A blind man was reportedly prevented from getting into a bus with his guide dog.<sup>235</sup>
- *September 2012, Amnesty International:* Thirty displaced Ethiopians were forced to flee a house they had been sheltering in after it was petrol-bombed.<sup>236</sup>
- *June 2012, Amnesty International:* Seven hundred refugees and asylum-seekers, mainly of Ethiopian origin, were displaced following the looting of their shops in the Free State province.<sup>237</sup>
- *Centre for Child Law:* A matter was brought before the courts to clarify the issue of access to tenders to pay out child grants.
- *Centre for Child Law:* Case brought to clarify the issue of who qualifies to access child grants and who has common law duty to care for children.



# Human Rights Guidance for Business

*Guidance by the Danish Institute for Human Rights and other institutions to help companies ensure respect for human rights when addressing common challenges.*

## Recommendations

**Bench Marks Foundation:** In a 2013 publication, the Foundation made the following recommendations to the steel and mining company Arcelor Mittal:<sup>238</sup>

- When making company decisions, the company should take into account the cultural rights of communities;
- Company initiatives should be aimed at building sustainable communities and community relationships;
- Inclusively involve all stakeholders concerned in company activities;
- Engage with NGOs and civil society prior to making company decisions; and
- Affected stakeholders (by company activities) should have access to fair and responsive dispute resolution procedures.

## Company Due Diligence Initiatives

**Anglo-American:** In 2001, the company established 'Speak Up', a confidential reporting system to which employees, business partner and other stakeholders can file complaints about conduct contrary to the values of Anglo-American. Speak Up is managed by Deloitte Tip-offs Anonymous. Complaints can be submitted through an online form or by telephone, fax, e-mail or regular mail. Telephone complaints can be submitted in English, isiZulu, Afrikaans, IsiXhosa and Sesotho.<sup>239</sup>

## Engagement Opportunities

*Development initiatives by public and private actors that provide opportunities for companies to contribute to human development*

### Public Sector Initiatives

#### **Know Your Rights and Responsibilities**

**Campaign:** The campaign is designed to aid citizens by educating them about their rights when accessing government services, ensuring that when accessing services citizens do so responsibly. It also aims to discourage complacency on the part of public service officials and strengthen partnerships between citizens and the public service.<sup>240</sup>

#### **National Strategic Plan for HIV, STIs and TB**

**(NSP) for 2012–2016:** The plan was launched by the president in December 2011 with the following objectives:

- 1) Decreasing the number of new HIV infections by at least 50 percent;
- 2) Ensuring that at least 80 percent of people eligible for treatment for HIV are receiving it (at least 70 percent should be alive and still on treatment after five years);
- 3) Decreasing the number of new TB infections and deaths by at least 50 percent;
- 4) Ensuring that the rights of people living with HIV are protected; and
- 5) Battling stigma related to HIV and TB.<sup>241</sup>

#### **National Plan of Action for Children 2012-**

**2017:** The plan has been developed to embrace new legislation and legal instruments aimed at

protecting children, which have been adopted at local, regional and international levels. There are five sub-themes of the plan: child survival, child development, protection and care for children, standard of living of children, and child participation.<sup>242</sup>

### Development Priorities

**National Development Plan:** The roadmap focuses on policy making, demographic trends, economy and employment, economy, infrastructure, environmental sustainability, an integrated and inclusive rural community, positioning South Africa in the world,

transforming human settlement and the national space economy. It aims to achieve these objectives by improving education, training and innovation, promoting health and social protection, building safer communities, building a capable developmental state, fighting corruption, transforming society and uniting the country.<sup>243</sup>

**UNICEF Country Programme 2013-2017:** The programme aims to support the government in improving access to quality education and increasing school retention, completion and achievement rates. The programme also aims to improve the national child protection system.<sup>244</sup>

# Labour Standards

## Child Labour

*Work that interferes with the health, development, education or family life of persons under the age of 18 years*

### Country Context

*Key human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

*Companies may employ persons under 18 to the detriment of their health, development, education or family life. Particular attention should be given to agriculture and the informal sector.*

South Africa has ratified the United Nations Convention on the Rights of the Child (CRC).<sup>245</sup> Article 32 deals with the right of the child to be protected from economic exploitation and requires states to set minimum wages for work.<sup>246</sup>

In accordance with section 23, the constitution guarantees everyone the right to fair labour practice.<sup>247</sup> According to section 43 of the Basic Conditions of Employment Act, it is a criminal offence to employ a child under the age of 15 years.<sup>248</sup> There are certain exceptions to this, for instance if the employer has a permit to employ children in the performing arts.<sup>249</sup> The Act further states that no person may employ a child in employment that is inappropriate for their age, or that compromises their well-being, education, physical and mental health and others.<sup>250</sup>

The Regulations on Hazardous Work by Children in South Africa prohibit children from working more than eight hours per day. While children not enrolled in school can work a maximum of 40 hours per week, those

attending school can work only two hours per day, 20 hours a week, and 4 hours on a day followed by a non-school day. Children enrolled in school may work 40 hours per week during school holidays.<sup>251</sup> Besides trade unions, issues of unfair labour practices can be addressed by the Commission for Conciliation, Mediation and Arbitration.

The Regulations also prohibit night work and work requiring overnight separation from parents or guardians, unless the parent or guardian of the child consents to the separation and the schooling of the child is not adversely affected. It also provides a list of activities that are prohibited for children younger than 18.<sup>252</sup>

The Department of Labour reported in 2012 that 821,000 children were subject to child labour.<sup>253</sup> According to the latest national survey (1999), 36 percent of children were engaged in working activities.<sup>254</sup> In 2012, Education International noted that child labour was mostly concentrated in the informal and agricultural sectors.<sup>255</sup>

Labour inspectors must give notice prior to conducting an inspection on an agricultural establishment, according to a 2012 U.S. Department of Labour report.<sup>256</sup> Of the specific activities performed by children, the Department of Labour's 2010 report on Child

Labour and Other Work Related Activities in South Africa cited market-related activities as including working for a wage, salary, commission or payment in kind, being said to have run a business or said to have worked in a household business. Non-market economic work included producing food for household use, looking after livestock, fetching water or fuel for household use, catching fish or other food for household consumption and others.<sup>257</sup>

## Worst Forms of Child Labour

*Companies may employ children under 18 under conditions of forced labour or in work that is hazardous, harmful or exploitative. Particular attention should be paid to the agricultural, domestic and informal sectors.*

South Africa ratified the International Labour Organization (ILO) Convention on the Worst Forms of Child Labour in 2000.<sup>258</sup> A Plan of Action has been developed and South Africa is currently at phase three of its implementation.

South Africa has also ratified the two optional protocols to the United Nations Convention on the Rights of the Child focused on sexual exploitation and armed conflict. The Regulations on Hazardous Work by Children in South Africa provides a list of hazardous activities that are prohibited for children younger than 18 years, as well as a list of the worst forms of child labour, in alignment with international standards.<sup>259</sup>

In 2012 the International Trade Union Confederation (ITUC) reported that HIV/AIDS orphans were at higher risk of being involved in the worst forms of child labour.<sup>260</sup>

The LexisNexis Human Trafficking Awareness Index reported that 67 children, or 12.4 percent of total trafficking victims, were trafficked into and within South Africa between 2011 and

2013.<sup>261</sup> The 2013 Trafficking in Persons Report stated that children were trafficked from rural to urban areas (e.g. Johannesburg, Cape Town, Durban and Bloemfontein).<sup>262</sup>

## Education

*Employees under 18 may be unable to access primary education. Companies may not pay adult employees wages sufficient to afford school fees for their children.*

The Constitution of South Africa, under section 29, provides for the right to basic education.<sup>263</sup> The education system is regulated by the South African Schools Act,<sup>264</sup> its regulations and a myriad of other policy documents.

In order to make schools more accessible, the South African Government has introduced 'no-fee' schools (as determined by the Minister for Basic Education) and school fee exemptions.<sup>265</sup> However, it has been argued that measures such as these are not adequate to ensure that children 'at risk in schooling' or those who have dropped out prematurely (for example due to child labour) are retained in or reintegrated into the education system.<sup>266</sup>

According to South Africa's 2013 Millennium Development Goals Report, the adjusted net enrolment ratio for primary school education was 98.8 percent, with a 93.8 percent completion rate.<sup>267</sup> In 2012, Education International reported that availability and quality of primary schooling were problematic in rural areas. Schools lacked teachers and teaching materials, and classrooms were overcrowded. Sexual abuse and harassment in schools also remained a serious problem.<sup>268</sup>

In 2012 several South African organisations reported that schools in coloured and black areas had worse infrastructure, lower attendance and higher repetition rates.<sup>269</sup>

## Access to Remedy

*Bodies to which victims of corporate human rights abuses can file grievances and seek redress.*

Child labour violations are tried in either a criminal or labour court.<sup>270</sup> If the child labours under the care of a parent guardian or other caregiver, he may be in need of care and protection, in which case the case would be heard by a children's court.<sup>271</sup> Of the 11 cases of child labour violations reported by the Department of Labour from April 2011 to March 2012, only two were processed.

Victims of human rights abuses can file a complaint to the South African Human Rights Commission, which has powers to

investigate.<sup>272</sup> They can also be assisted by trade unions and the Commission for Conciliation, Mediation and Arbitration.

The 2013 Trafficking in Persons Report stated that the prosecution of two individuals suspected of forced labour of 10 children was initiated.<sup>273</sup> In 2013, eight children who were victims of trafficking were repatriated without providing victim statements, resulting in the withdrawal of charges against the alleged traffickers.<sup>274</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- January 2013, South African Human Rights Commission:** A complaint was lodged of a child on a farm who was not allowed to attend school on some days and instead forced to work to help reduce his parents' rent expenses to the farmer. An investigation was carried out by the South African Human Rights Commission and the child was able to resume school.
- February 2013, U.S. Department of State:** A hearing was instituted at a Magistrate's Court in the Free State regarding a Chinese grocery store owner charged with forcing seven children into labour.<sup>275</sup>
- June 2011, 2 Ocean Vibe News:** A 14-year-old boy lost his hand operating a machine on a farm in Rustenburg, North West province.<sup>276</sup>

# Human Rights Guidance for Business

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## Company Due Diligence Initiatives

**Anglo-American:** In 2001, the company established 'Speak Up', a confidential reporting system to which employees, business partner and other stakeholders can file complaints about conduct contrary to the values of Anglo-

American. Speak Up is managed by Deloitte Tip-offs Anonymous. Complaints can be submitted through an online form or by telephone, fax, e-mail or regular mail. Telephone complaints can be submitted in English, isiZulu, Afrikaans, IsiXhosa and Sesotho.<sup>277</sup>

## Engagement Opportunities

*Development initiatives by public and private actors that provide opportunities for companies to contribute to human development*

### Public Sector Initiatives

**Action plan to 2014: Toward the Realisation of Schooling 2025:** The plan was developed by the Department of Basic Education to address poor learning outcomes and the inequalities within the education system. The interventions identified by the plan are:

- 1) Simplify the curriculum;
- 2) Introduce annual national assessments for learners in Grades 1 to 9 in language and mathematics;
- 3) Provide workbooks and textbooks to all learners for every subject; and
- 4) Improve educational infrastructure.<sup>278</sup>

**The Child Labour Programme of Action (2003-present):** The programme aims at the prevention, reduction and elimination of child labour. It started in 2003, and in April 2013 entered its third phase. The third phase will end in March 2017 and focus on service delivery and implementation. The Department of Labour runs the programme, but other government departments, business

organisations, trade unions and civil society groups are also involved in implementation.<sup>279</sup>

**Child Support Grant (1998-present):** The programme transfers 300 rand (approximately US\$27) per day per child under 18 to primary caregivers of vulnerable children. It aims to alleviate economic pressures and lower the cost of raising a child.<sup>280</sup>

### Development Priorities

**National Development Plan:**<sup>281</sup> While the NDP does not necessarily focus on child labour, it does focus on education and the overall well-being of youth and children in South Africa, which will undoubtedly include freedom from child and forced labour.

**UNICEF Country Programme 2013-2017:** The programme aims to support the government in improving access to quality education and increasing school retention, completion and achievement rates. The programme aims also to improve the national child protection system.<sup>282</sup>

# Forced Labour

*Debt bondage, human trafficking or other coercion that makes workers unable to freely leave employment.*

| Operating Environment  |  |
|--|--|
| U.S. Department of Labour Trafficking in Persons: Tier Placement | Tier 2   |
| Relevant laws  | <ul style="list-style-type: none"> <li>• Constitution prohibits slavery, servitude and forced labour.<sup>283</sup></li> <li>• Basic Conditions of Employment Act prohibits forced labour.<sup>284</sup></li> <li>• Prevention and Combating of Trafficking in Persons Act</li> <li>• Criminal Law (Sexual Offences and related Matters) Amendment Act prohibits sex trafficking.</li> <li>• The Children's Act</li> <li>• Labour Relations Act</li> </ul> |
| Responsible agencies   | <ul style="list-style-type: none"> <li>• Department of Justice and Correctional Services</li> <li>• Department of Social Development oversees shelters for trafficking-specific victims.<sup>285</sup></li> <li>• Department of Labour</li> </ul>  |
| Local NGOs addressing this issue                                 | <ul style="list-style-type: none"> <li>• Salvation Army (South Africa)</li> <li>• One Society Initiative</li> <li>• Legal Aid South Africa</li> </ul>  |

## Country Context

*Key human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

*Companies may deny workers the ability to freely enter and leave employment. Particular attention should be paid to the informal and agricultural sectors.*

The South African Constitution states in section 13 that no one may be subject to slavery, servitude or forced labour.<sup>286</sup> The Basic Conditions of Employment Act provides up to three years' imprisonment for forced labour.

The 2013 Global Slavery Index ranked South Africa 115th out of 162 countries, with an estimated 44,500 people in 'slavery, slavery-like practices (including debt bondage, forced marriage, and or sale of or exploitation of children), human trafficking and forced labour'.<sup>287</sup> At the regional level, South Africa ranked 41st out of 44 countries.<sup>288</sup>

## Human Trafficking

*Companies may employ workers who are subject to exploitative labour conditions through internal or external trafficking. Particular attention should be paid to the agricultural, mining, construction and fishing sectors, as well as sectors dependent on female or migrant workers.*

In August 2013, President Jacob Zuma signed South Africa's first comprehensive anti-trafficking law, the Prevention and Combating of Trafficking in Persons Act.<sup>289</sup> The new law provides for fines of up to 100 million rand (US\$9 million).<sup>290</sup>

However, the actual number of people trafficked is difficult to ascertain, and estimates vary widely. The LexisNexis Human Trafficking Awareness Index reported that an estimated 540 people were trafficked into and within South Africa between 2011 and 2013 — 96 for sexual exploitation, 271 for forced labour, 90 for organ trafficking, four for forced marriages (*Ukuthwala*) and two as drug mules.<sup>291</sup> A local newspaper, the Times, estimated the number to be as large as 100,000 even though no clear indication was given as to how such a number was arrived at.<sup>292</sup>

Most victims of trafficking are used in forced labour, sexual exploitation, organ trafficking and drugs. The Times reported that the lack of a centralised database on human trafficking and legislative shortcomings that hindered prosecutions were the main reasons why a true

reflection of the situation was difficult to establish.<sup>293</sup> It is difficult to get actual statistics but it is clear that human trafficking does take place.

The U.S. Department of State's 2013 Trafficking in Persons Report stated that Chinese and Taiwanese men were forced to work in mobile sweatshop factories in Chinese urban enclaves, while Cambodians and Malagasy were found aboard fishing boats in South Africa's territorial waters.<sup>294</sup> The South African government reportedly failed to monitor and investigate labour trafficking in the agricultural, mining, construction and fishing sectors.<sup>295</sup>

Victims of trafficking faced challenges, some related to interpretation that prevented investigations and successful prosecution. Victims were also reportedly deported before being thoroughly interviewed or participating in the prosecution of their traffickers.<sup>296</sup>

According to the U.S. Department of State's 2013 Trafficking in Persons Report, the absence of formal procedures for identifying trafficking victims among vulnerable groups resulted in the repatriation of foreign victims without being identified as trafficking victims.<sup>297</sup>

The LexisNexis Human Trafficking Awareness Index reported in 2013 that police corruption was a major impediment to combating trafficking, and consequently forced labour in South Africa.<sup>298</sup> In 2013, four policemen were identified as directly colluding with human traffickers.<sup>299</sup>

## Access to Remedy

*Bodies to which victims of corporate human rights abuses can file grievances and seek redress.*

Victims of human rights abuses, including forced labour, may file a complaint to the South African Human Rights Commission, which has investigatory powers.<sup>300</sup> Complaints could also be filed before the Commission for Gender Equality. Complaints can also be brought before the civil or criminal courts if a right in the Bill of Rights is violated. The South African

Human Rights Commission investigated almost 9,000 cases of human trafficking during the period 2012-2013.<sup>301</sup>

Although South Africa ratified the Protocol to the African Charter on Human and Peoples' Rights, establishing the African Court on Human and People's Rights, the country did not accept



the competence of the court to directly receive cases from NGOs and individuals.

Consequently, in 2012 two cases could not be heard on grounds of lack of admissibility.<sup>302</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media*

- *December 2013, The Times:* Seventy-five Indonesian fishermen were kept in slave-like working conditions aboard seven Taiwanese-owned vessels in Cape Town's harbour. They worked 20 hours per day with little food, poor hygienic and health conditions and no pay.<sup>303</sup>
- *May 2012, Daily Maverick:* South African Police Services saved 47 Ethiopians, who were kidnapped from a refugee centre in Limpopo. The kidnappers demanded a ransom, and if it was not paid, the refugees were to be sold.<sup>304</sup>

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### Company Due Diligence Initiatives

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## Engagement Opportunities

*Development initiatives by public and private actors that provide opportunities for companies to contribute to human development*

### Public Sector Initiatives

**Tsireledzani! South Africa Against Human Trafficking:** This is a joint initiative between UNICEF, the South African Police Services, the Film and Publications Board and the International Organisation for Migration. Launched in 2010, it aims to educate the public about human trafficking and provides phone lines through which incidences can be reported.<sup>306</sup>

# Occupational Health & Safety

*Unsafe or unhealthy working conditions that expose workers to the risk of accidents or occupational illnesses*

| Operating Environment            |  |
|----------------------------------|--|
| Relevant laws                    | <ul style="list-style-type: none"><li>• Occupational Health and Safety Act<br/><i>This act does not cover mine or ship workers.</i><sup>307</sup></li><li>• Mine, Health and Safety Act<sup>308</sup></li><li>• Compensation for Occupational Injuries and Diseases Act<sup>309</sup></li><li>• Occupational Diseases in Mines and Works Act<sup>310</sup></li><li>• Maritime Occupational Safety Regulations to the Merchant Shipping Act<sup>311</sup></li></ul> |
| Responsible agencies             | <ul style="list-style-type: none"><li>• Department of Labour<sup>312</sup></li><li>• National Institute for Occupational Health<sup>313</sup></li><li>• Department of Mineral Resources<sup>314</sup></li><li>• Department of Transport<sup>315</sup></li></ul>  |
| Local NGOs addressing this issue | <ul style="list-style-type: none"><li>• Legal Aid South Africa</li><li>• National Economic Development and Labour Council (NEDLAC)</li><li>• Industrial Health Resource Group</li><li>• National Institute for Occupational Health</li></ul>   |

## Country Context

*Key human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

*Companies may not adequately prevent accidents and long-term health effects in the workplace. Particular attention should be paid to the mining, construction and agricultural sectors.*

While the Mine, Health and Safety Act provides mine workers with the right to refuse working in dangerous conditions,<sup>316</sup> no laws provide

explicitly for a similar right in other sectors. However, according to the Industrial Health Resource Group, this right is implicit in sections 8 and 14 of the Occupational Health and Safety Act.<sup>317</sup> All employers are prohibited from retaliating against employees who disclose dangerous workplace conditions.<sup>318</sup>

In addition to national legislation governing occupational health and safety, South Africa is a signatory to both international and regional instruments related to the protection of the rights of workers to a healthy and safe working environment. These include the International Labour Organization's (ILO) Convention on Occupational Health and Safety (No. 155),<sup>319</sup> and the Southern African Development Community's (SADC) Charter of Fundamental Social Rights. Articles 11 and 12 of the Charter establish the rights to improved living and working conditions and the protection of health, safety and the environment.<sup>320</sup> In addition, article 24 of the SADC Protocol on Health governs occupational health,<sup>321</sup> while article 9 of the SADC Protocol on Mining governs occupational health and safety in the mining sector.<sup>322</sup>

According to the ILO's Decent Work Country Program for South Africa, most occupational injuries occurred in the mining, construction, iron, steel and agricultural sector. Hearing loss caused by loud noises, pneumoconiosis, silicosis and asthma caused by inhalation of dust, and skin diseases caused by chemicals were the most common occupational injuries.<sup>323</sup>

*Company operations may not be subject to effective health and safety inspections. Particular attention should be paid to mining, construction and agricultural sectors.*

The Department of Mineral Resources is responsible for enforcing the Mine, Health and Safety Act. It monitors compliance through the Mine, Health and Safety Inspectorate<sup>324</sup> and the Mine, Health and Safety Council.<sup>325</sup> The council is a tripartite board consisting of state, employer and labour representatives, and advises the government on occupational health and safety policies in South African mines.<sup>326</sup> Mine inspectors can enter mines at any time and interview employees. Unsafe mine conditions can result in the imposition of fines or imprisonment for the employer.<sup>327</sup>

The Labour Department's Inspection and Enforcement Service conducts workplace inspections to monitor and enforce labour laws

and investigate occupational health and safety incidents.<sup>328</sup> Inspectors can search the workplace and question employees and employers. If an employer is found to violate the Occupational Health and Safety Act, it can result in the imposition of a fine or a prison sentence.<sup>329</sup> The Department conducts 'blitz' inspections on high-risk sectors, including hospitality, iron and steel, agriculture, chemicals and fisheries.<sup>330</sup>

According to the ILO, the country faced a shortage of qualified labour inspectors, resulting in limited capacity and non-systematic application of workplace inspections.<sup>331</sup> Lack of effective communication systems, poor record-keeping and electronic data, little strategic planning and limited follow-up on inspections were identified as factors contributing to the limited capacity to undertake inspections.<sup>332</sup>

The ILO reported that the division of responsibility for promoting occupational health and safety led to fragmentation of the national strategy on health and safety.<sup>333</sup>

A 2011 Human Rights Watch report stated that only 107 labour inspectors were responsible for inspecting over 6,000 farms and all other workplaces in the Western Cape province.<sup>334</sup> An agreement between the Department of Labour and the farmer's association, Afri South, required inspectors to notify farmers before inspections. This early warning reportedly undermined inspectors' capacity to identify health and safety violations.<sup>335</sup>

The Department of Mineral Resources recorded a reduction in mining fatalities from 123 in 2011 to 112 in 2012.<sup>336</sup> However, an increase in mining injuries was recorded in the same period with 3,299 injuries in 2011 and 3,377 injuries in 2012.<sup>337</sup> Data for the 2012/2013 period had not been made public as of February 2015, but the Department's Annual Performance Plan for 2013/2014 includes a target for reducing injuries and fatalities by 20 percent for the 2013/2014 and 2014/2015 financial years.<sup>338</sup>

The highest numbers of fatalities and injuries were recorded in gold and platinum mining in 2012.<sup>339</sup> According to the Department of

Mineral Resources, the highest number of mining fatalities and injuries occurred in Gauteng province and in the Rustenburg area within the North West province.<sup>340</sup> It should be noted that statistics related to mining deaths and injuries relate only to mining that is considered legal. Illegal mining constitutes a significant safety hazard, as demonstrated by the case of 200 illegal miners who were trapped underground in an abandoned mine-shaft in February 2014.<sup>341</sup> During the same month, a total of 26 mining fatalities were recorded, a combination of legal and illegal occupational incidents.

According to a 2013 Think Africa press article, 760,000 new cases of tuberculosis were registered in the mining sector in 2011, amounting to a third of all new cases in Africa and 9 percent of all new cases in the world.<sup>342</sup> The University of Cape Town's Centre for Occupational and Environmental Health Research refers to the prevalence of tuberculosis and silicosis in South Africa's mines as a 'crisis' that requires urgent attention.<sup>343</sup>

The tuberculosis incidence rate (i.e. the number of new cases per year) in mine workers in South Africa ranged between 3,000 and 7,000 cases per 100,000 people, the highest in the world.<sup>344</sup> This has been linked to high HIV/AIDS incidence and prevalence rates in mining communities.<sup>345</sup> In 2009, the Department of Health established a Risk Committee for Mines and Works to monitor potential health-related risks. However, in a response to a parliamentary question in July 2014, the Minister of Health reported that the Committee had only met twice since 2010.<sup>346</sup>

The international NGO Results and the regional civil society network ARASA reported in 2013

that employees (often migrant workers) affected by tuberculosis, HIV or silicosis were sent back to their original community without compensation from the mining company, no cross-border health referral and no source of income while receiving treatment.<sup>347</sup>

According to a 2012 survey by the University of South Africa, gold and platinum mining were characterised by unhygienic conditions of underground sanitary facilities. This particularly affected female workers, who experienced gynaecological problems.<sup>348</sup>

In 2013, a Bench Marks Foundation report stated that loss of eyesight and hearing, as well as respiratory problems were common among workers at Arcelor Mittal-owned steel plants in Vanderbijlpark, Gauteng province. The company reportedly took insufficient safety measures to prevent injuries, resulting in high rates of illnesses, injuries and death. It also failed to provide comprehensive assistance with medical bills or compensation.<sup>349</sup>

A 2011 Human Rights Watch report stated that agricultural workers were exposed to pesticides without adequate safety equipment, did not have access to drinking water, hand washing facilities or toilets, and were refused paid sick leave.<sup>350</sup> In addition, at the time of writing (August 2014) a matter is being investigated by the South African Human Rights Commission in relation to allegations of inadequate protection of workers at Arcelor Mittal in Gauteng.<sup>351</sup>

According to the British Safety Council, of the 1,058 inspections in the iron and steel sector carried out in 2011/2012, only 522 employers complied with occupational health and safety laws, and standards varied by region.<sup>352</sup>

## Access to Remedy

*Bodies to which victims of corporate human rights abuses can file grievances and seek redress.*

Two compensation systems exist for occupational health and safety in South Africa.<sup>353</sup> The Occupational Diseases in Mines and Works Act (ODMWA) covers mineworkers and ex-mineworkers and only provides for compensation for lung diseases.<sup>354</sup> According to a 2012 Reuters article, the Miners Compensation fund was underfunded, and many mineworkers suffering from lung diseases never received any compensation.<sup>355</sup>

In 2011, the Medical Bureau of Occupational Diseases (MBOD) found 878 cases to be fully compensable, but there was no clear information on how many were actually paid. A 2012 Reuters article reported that the largest lump-sum received by a mineworker as compensation was R105,000 (approximately US\$9,500).<sup>356</sup> A 2014 report in the Daily Maverick indicated that over 700,000 cases of statutorily compensable lung disease in former mineworkers remain unpaid, paying specific attention to the severe lack of capacity within the MBOD, where some claims date back to the 'mid-20<sup>th</sup> century'.<sup>357</sup>

The Compensation for the Occupational Injuries and Diseases Act (COIDA) covers occupational injuries and diseases in all sectors, including mining issues not covered by the ODMWA (e.g. noise-induced hearing loss).<sup>358</sup> The Act established a Compensation Fund to pay workers or their families in cases of disability, illness or death as a result of occupational injuries or diseases.<sup>359</sup>

The Department of Labour reported in 2012 that the compensation fund paid over R2.7

billion (US\$243 million) in 2010/2011 in compensation for injuries and diseases in the workplace in the five highest risk sectors. The breakdown per sector was:

- 1) Iron and steel: R427.5 million (US\$38.5 million);
- 2) Transport: R363 million (US\$32.6 million);
- 3) Construction R287 million (US\$25.8 million);
- 4) Agriculture: R188 million (US\$16.9 million); and
- 5) Chemicals: R105 million (US\$9.4 million).<sup>360</sup>

In July 2014, Mining Weekly reported that the Department's compensation commissioner for occupational diseases had a backlog of 18,000 claims while the compensation fund had a backlog of 12,000 claims.<sup>361</sup> Victims of human rights abuses can file a complaint at the South African Human Rights Commission, which has investigatory powers.<sup>362</sup> However, while the Commission does receive labour-related complaints, these are generally referred to bodies with compensatory powers such as the bargaining councils, the Department of Labour, and the CCMA.

Although South Africa ratified the Protocol to the African Charter on Human and Peoples' Rights, establishing the African Court on Human and People's Rights, the country did not accept the competence of the court to directly receive cases from NGOs and individuals.

Consequently, in 2012 two cases could not be heard on grounds of lack of admissibility.<sup>363</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- *August 2014, South African Human Rights Commission:* A complaint was lodged against Arcelor Mittal through Bench Marks Foundation. The complaint included violations in respect of health and environment. It was alleged that the company conducted its business in a manner that did not take adequately manage the effects of emissions on the health and safety of members of the community and children.
- *August 2014, South African Human Rights Commission:* A complaint was lodged against Arcelor Mittal concerning unfair labour practices. The complainant alleged race-based discrimination by the company and prohibition of the right to establish and join a South African Communist Party unit within the organisation.
- *February 2014, BBC:* Two mine workers died at Harmony Gold mine sites. One accident, due to mine waste, occurred at the Kusasaletu mine in the North West province. The other was a result of blasting activities at the Joel mine in the Free State province.<sup>364</sup>
- *February 2014, Reuters:* Eight mine workers died in a fire and rock-fall at a Harmony Gold mine near Johannesburg. The Minister for Mineral Resources called for an investigation to be opened into the accident.<sup>365</sup>
- *September 2013, Bloomberg:* Twenty-three miners who contracted lung diseases when working for Anglo American and consequently sued the company in 2004 reached a settlement. A class-action representing 25,000 miners and the dependents of deceased workers who contracted silicosis and tuberculosis while working on the company's gold mines was ongoing.<sup>366</sup>
- *August 2012, Safety News:* An electrician died from an electric shock during inspection work at a gold mine in Carletonville.<sup>367</sup>
- *July 2012, Safety News:* Five miners died and 14 others were injured from a fire in a mine in Carletonville. Lack of compressed air in the section where the miners worked allegedly caused the deaths.<sup>368</sup>

# Human Rights Guidance for Business

*Guidance by the Danish Institute for Human Rights and other institutions to help companies ensure respect for human rights when addressing common challenges.*

## Recommendations

**Results and ARASA:** In a 2013 joint publication, the organisations recommended that British mining companies adopt the 'Prevent, Find, Treat' strategy to better meet the needs of employees and former employees with tuberculosis.<sup>369</sup>

**University of South Africa:** In a 2012 study on the occupational and health conditions in gold and platinum mines, the university made the following recommendations to companies:

- Women should be educated on correct biomechanics when moving heavy equipment to prevent the development of musculoskeletal disorders;
- Women should be provided with ergonomically designed equipment and custom designed personal protective equipment;
- Sanitary facilities should be improved through the provision of basic amenities, such as SHE-bins and hand washing facilities; and
- Female sanitary facilities should be demarcated for reasons of privacy, protection and dignity.

**Bench Marks Foundation:** In a 2013 publication, the foundation recommended that the steel and mining company Arcelor Mittal provide figures for incidents of injuries and

fatalities for every plant, instead of giving national averages.<sup>370</sup>

## Company Due Diligence Initiatives

**Anglo-American:** In 2001, the company established 'Speak Up', a confidential reporting system to which employees, business partner and other stakeholders can file complaints about conduct contrary to the values of Anglo-American. Speak Up is managed by Deloitte Tip-offs Anonymous. Complaints can be submitted through an online form or by telephone, fax, e-mail or regular mail. Telephone complaints can be submitted in English, isiZulu, Afrikaans, IsiXhosa and Sesotho.<sup>371</sup>

## Company Beyond Compliance Initiatives

**Build Safe South Africa (2011-present):** Build Safe South Africa is a non-profit organisation consisting of major companies in the South African construction industry. The organisation aims to improve health and safety conditions for construction workers through sharing experiences and best practices on how to prevent accidents at the workplace.<sup>372</sup>

## Engagement Opportunities

*Development initiatives by public and private actors that provide opportunities for companies to contribute to human development*

### Public Sector Initiatives

The Department of Mineral Resources has allocated just over R171 million toward the promotion of mine safety and health for the 2014/2015 financial year, with this figure projected to rise to R179 million in the 2015/2016 financial year.<sup>373</sup>

### Development Priorities

#### ***The Department of Labour's Strategic Plan for***

**2012-2017:** The plan aims to promote health and safety in the workplace and reduce accidents in the agricultural, construction, chemical, and iron and steel sectors. The plan also focuses on awareness-raising of occupational health and safety issues among employers and employees.<sup>374</sup>

#### ***World Bank Country Partnership Strategy***

**2014-2017:** The strategy supports the government to effectively respond to tuberculosis in the mining sector.<sup>375</sup>



# Trade Unions

*Restrictions on the right of workers to collectively represent their interests*

| Operating Environment   |  |
|---|--|
| Percentage of private-sector workers belonging to a union                 | 1.868 711 or 24.4% of workers (2013)   |
| Number of protected and unprotected strikes in most recent year available | 54 protected and 59 non-protected strikes occurred in 2013. <sup>376</sup><br>30 'violent protests a day' were reported in October 2013. <sup>377</sup>  |
| Relevant laws   | <ul style="list-style-type: none"> <li>• Constitution of South Africa<sup>378</sup></li> <li>• Labour Relations Act provides fair dismissal guidelines, dispute resolution mechanisms, and retrenchment guidelines<sup>379</sup></li> <li>• Gatherings Act<sup>380</sup></li> </ul>  |
| Largest trade unions and union confederations                             | <ul style="list-style-type: none"> <li>• Congress of South African Trade Unions (COSATU)<sup>381</sup> is the largest trade union federation of South Africa, representing 20 trade unions and 2.2 million workers.<sup>382</sup></li> <li>• Federation of Unions of South Africa (FEDUSA) is the second largest trade union federation, representing 18 trade unions and 375,000 workers.<sup>383</sup></li> <li>• National Council of Trade Unions (NACTU) is the third largest federation, representing 19 trade unions and about 400,000 workers.<sup>384</sup></li> </ul> |
| Responsible agencies  | <ul style="list-style-type: none"> <li>• National Economic Development and Labour Council (Nedlac)<sup>385</sup></li> <li>• Department of Labour<sup>386</sup></li> <li>• Department of Mineral Resources</li> <li>• The Employment Conditions Commission</li> <li>• Commission for Conciliation, Mediation and Arbitration</li> </ul>   |
| Local NGOs addressing this issue  | <ul style="list-style-type: none"> <li>• People Against Suffering, Oppression and Poverty (PASSOP)</li> <li>• Black Sash</li> <li>• Legal Aid South Africa</li> <li>• The Casual Workers Advice Office</li> <li>• Naledi</li> </ul>  |

## Country Context

*Key human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

### Barriers to Unionisation

*Workers may be prevented from forming or joining independent worker's associations. Particular attention should be given to the informal and agricultural sectors.*

The constitution guarantees freedom of association under section 18 and in section 23 guarantees freedom to join a trade union.<sup>387</sup>

The Labour Relations Act prohibits employers from discriminating on grounds of past, present or potential union membership or participation in lawful union activities. It also provides for the automatic reinstatement of workers dismissed due to union activities.<sup>388</sup>

Bhorat, Naidoo and Yu reported in 2013 that 24.4 percent of all workers in South Africa were affiliated with a trade union, amounting to almost 1.9 million workers.<sup>389</sup> The South African Institute of Race Relations (SAIRR) reported that in 2013, 3.4 million people were members of a trade union and that in 2012 approximately 25.4 percent of the employed were registered union members.<sup>390</sup>

According to a 2011 Human Rights Watch report, unionisation among agricultural workers was low, standing at only 3 percent in the Western Cape province. The report further stated that some farmers prevented workers from forming unions.<sup>391</sup> According to a 2012 report by the Black Association of the Agricultural Sector, 25 percent of farm workers in the Western Cape province could not freely join a trade union and in more than 40 percent of cases trade unions had no ready access to farms.<sup>392</sup>

The informal sector is not unionised.<sup>393</sup> Accurate statistics of the sector are not available due to its nature. However, estimates by Statistics South Africa indicate 2.3 million people in the informal sector<sup>394</sup> while AdCorp South Africa puts the figure at 6.5 million people.<sup>395</sup>

In 2014 an estimated 103 trade unions were registered in South Africa.<sup>396</sup> A 2012 U.S. Department of State report stated that trade unions were independent from political interference. However, the Congress of South African Trade Unions (COSATU), South Africa's largest trade union federation has been historically linked to the ruling African National Congress.<sup>397</sup>

A 2013 Global Research article reported tensions between the National Union of Mineworkers (NUM) and the Association of Mineworkers and Construction Union (AMCU) over mine workers' representation in Rustenburg, North West province. AMCU was eventually recognised as the majority union at Lonmin's mines.<sup>398</sup> The tensions between the two trade unions allegedly resulted in the killing of a NUM female shop steward.<sup>399</sup>

The rivalry between the NUM and AMCU trade unions has resulted in tensions and a number of violent clashes, including being implicated as one of the contributing factors to the violence that led to the deaths of more than 40 miners at Marikana in August 2012.<sup>400</sup>

In February 2013, 13 mine workers were seriously injured at Anglo American Platinum's Siphumelele mine in violence reportedly related to union rivalry.<sup>401</sup> In October of the same year, Business Day reported that the chair of the NUM branch at Marikana was shot dead, sparking fears of resurgent violence.<sup>402</sup>

## Collective Bargaining

*Workers may be prevented from engaging in collective bargaining. Particular attention should be given to legal and administrative barriers and the mining, agricultural and construction sectors.*

The Labour Relations Act does not define the criteria for trade unions to be ‘sufficiently representative’, which is a precondition to establish bargaining councils where collective bargaining takes place.<sup>403</sup>

According to the ILO, in 2011 there were 47 collective bargaining councils, covering about 2.5 million workers.<sup>404</sup> The total labour force in South Africa was estimated at 18.5 million in 2013.<sup>405</sup> Collective bargaining also took place in statutory councils, non-statutory centralised structures in the mining and automobile sectors and at the company and plant level.<sup>406</sup> According to a 2012 report by the Black Association of the Agricultural Sector, larger farms were more inclined toward collective bargaining than small farms in the Western Cape province.<sup>407</sup>

In the mining sector, the Chamber of Mines organises centralised negotiations on working conditions every two years with trade unions, according to a 2013 Gold Wage Negotiations report. Platinum, diamond and base metal mines, as well as small gold and coalmines, negotiated regularly on a decentralised basis.<sup>408</sup>

According to a 2012 Department of Labour report, unprotected strikes in the mining sector and the failure of trade unions to organise and engage in collective bargaining processes were linked to a loss of trust in trade unions by workers.<sup>409</sup> The ILO reported in 2011 that bargaining partners lacked negotiating skills, access to information and resources, the power to influence and educate their own constituencies and were characterised by staff turnover. A lack of trust among negotiating partners was also reported.<sup>410</sup>

The 2013 Annual Report of the Department of Labour states that *‘The Department of Labour stays committed to ensuring that the labour market will be conducive for positive collective*

*bargaining, job creation and fair labour practises’.*<sup>411</sup>

Nonetheless, in May 2014 it was reported that the Free Market Foundation (FMF) had applied for a date to hear its application in the High Court in Pretoria to change one word in section 32 of the Labour Relations Act. The FMF seeks a declaratory order to the effect that the word ‘must’ means ‘may’, thus offering employers the opportunity to seek exemption from collective bargaining arrangements on the grounds that this may be harmful to their economic or operational interests.

If successful, the Minister of Labour would only extend agreements if they promote the stated objectives of the LRA, one of which is economic development. Collective agreements concluded by bargaining councils would then only be extended where they have been agreed to by a majority in the bargaining council, and the Minister of Labour is satisfied that it is in the interests of the wider economy to extend them to ‘non-parties’.<sup>412</sup>

According to a 2013 report of the Labour Research Service, collective bargaining produced results that displayed only modest gains and isolated instances of improved benefits.<sup>413</sup> For example, workers covered by bargaining councils had access to the longest maternity leave benefits and were most likely to be members of provident funds. However, other benefits, such as housing benefits and family responsibility leave, were gained through bilateral bargaining.<sup>414</sup> According to a 2013 working paper by the Global Labour University, collective bargaining was undermined by intransigent employers in the low-wage economy who used aggressive legal action and high unemployment to continue preventing workers from collectively bargaining.<sup>415</sup>

## Strikes

*Workers may be prevented from, or improperly sanctioned for, participating in strike actions. Particular attention should be given to the agricultural, construction, transport and mining sectors, as well as violence by security forces.*

The right to assembly, demonstration, picket and petition are guaranteed in section 17 of the constitution.<sup>416</sup> The Department of Labour's Annual Industrial Action Report for 2013 reflected that work stoppages had increased by 15 percent from the previous reporting period.<sup>417</sup> According to the Department of Labour, 3.3 million workdays were lost due to strike actions in 2012.<sup>418</sup> This figure has multiplied dramatically, according to a report by Fin24, which stated that strikes cost South Africa 13 million working days in the first half of 2014.<sup>419</sup>

The Mail and Guardian newspaper reported that the strikes in the platinum mining sector during the first half of 2014 were the longest and costliest in South African history.<sup>420</sup> Mining accounted for 68.9 percent of work stoppages in 2013, with community services, manufacturing and transport accounting for just over 7 percent each.<sup>421</sup> The unions whose members were most prominently represented in strike actions in 2013 were the South African Transport and Allied Workers Union (SATAWU), followed by the National Union of Metal Workers (NUMSA) and the Association of Mineworkers and Construction Union (AMCU).<sup>422</sup>

The law allows employers to hire replacement workers only in cases of a defensive lock-out (e.g. lock-out in response to a strike) and not

before workers can embark on a strike (i.e. offensive lock-out).<sup>423</sup> In 2013, 54 protected and 59 non-protected strikes took place.<sup>424</sup> The Gauteng province had the highest number of strikes, followed by the Western Cape and Mpumalanga provinces. The number of strikes more than doubled between 2012 and 2013 in the Gauteng, Western Cape, KwaZulu-Natal, Eastern Cape and Free State provinces.<sup>425</sup>

Workers have reportedly been intimidated and assaulted by security officers during strikes. According to the U.S Department of State, strikes in the mining and transport sectors were among the most violent in 2012, resulting in deaths and property damages.<sup>426</sup> In May 2014, the South African Government News Agency reported that the South African Police Service (SAPS) had been authorised to adopt a 'zero tolerance' approach, having made about 5,000 arrests in strike-related actions over the preceding year.<sup>427</sup> The World Socialist Web Site reported that a number of cases where police used rubber bullets, stun grenades, teargas and water cannons against striking workers had been recorded.<sup>428</sup>

In May 2013, for example, 10 miners were hospitalised after clashes with police at the Lanxess Chrome Mine in Rustenburg.<sup>429</sup> Similarly, in May 2014, the African People's Democratic Union of South Africa (APDUSA) alleged that striking miners were being intimidated and harassed by police as well as private security forces.<sup>430</sup> Striking workers have also been implicated in acts of violence and intimidation against their non-striking counterparts and against workers from rival unions.<sup>431</sup>

*For more information, see Security & Conflict*

## Access to Remedy

*Bodies to which victims of corporate human rights abuses can file grievances and seek redress.*

The Labour Relations Act provides for tripartite institutions to address dispute resolution, including the Commission for Conciliation Mediation and Arbitration (CCMA), which deals with all employment relationships at an institutional or individual level, and the National Economic Development and Labour Council (NEDLAC) which is a national-level forum for government, business and community organisations to reach consensus on social and economic policy issues.<sup>432</sup>

The CCMA can conciliate, mediate and arbitrate in cases of labour dispute. It is intended to be an informal and time-bound process, but it has a limited capacity due to a large caseload.<sup>433</sup> In 2012, the CCMA received a record 160,000 cases with about 4,000 related to collective bargaining. The CCMA reportedly had an overall 70 percent settlement rate during the same period.<sup>434</sup> Since 2010, five out of the six disputes presented to the NEDLAC were solved with one remaining under negotiation as of 2013.<sup>435</sup>

Labour Courts, which have the same status as High Courts, may resolve disputes between trade unions, employers' organisations and their members over any violation of the constitution of those organisations.<sup>436</sup> In addition, where parties are dissatisfied with the

outcome of CCMA or bargaining council proceedings, cases may be instituted in the labour courts. Where the outcome remains unsatisfactory, it may be appealed in the Labour Appeals Court.<sup>437</sup>

Following the death of mine workers at the Lonmin-owned Marikana mine in North West province in 2012, the Compliance Advisor Ombudsman (CAO) of the International Financial Corporation (IFC) opened a preliminary investigation on the adverse social and environmental impacts of the IFC-funded mine. Despite the identification of environmental and social concerns, the CAO decided not to proceed with further investigation as there was no direct link between those concerns and the death of the workers and no complaint from affected workers was filed.<sup>438</sup>

In December 2013, NUMSA announced that it was seeking a legal opinion on the possibility of pursuing a criminal investigation related to the Marikana tragedy before the International Criminal Court (ICC). In particular, the union suggested that National Police Commissioner and Lonmin shareholders, including African National Congress (ANC) Deputy President should be indicted by the ICC.<sup>439</sup> However no formal ICC proceedings have been instituted.

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- *August 2014, South African Human Rights Commission:* At least two complaints were received in which workers were denied the right to join a union. The Commission intervened and secured an investigation by the Department of Labour in one instance and by the National Bargaining Council for the Road Freight and Logistics Industry in the other.<sup>440</sup>
- *May 2014, Mail and Guardian:* The National Union of Mineworkers announced that two miners in the 'platinum belt' were hacked to death on their way to work, while another was killed at his home along with his wife.<sup>441</sup>
- *August 2013, Business Day Live:* A female representative of the National Union of Mineworkers (NUM) was killed in Marikana, in the North West province. The accident was allegedly linked to the conflict between the NUM and the Association of Mineworkers and Construction Union (AMCU).<sup>442</sup>
- *June 2013, Business Day Live:* According to the South African Law Journal, competition authorities went beyond their mandate when granting protection to the South African Commercial, Catering and Allied Workers Union (Saccawu) in the Walmart-Massmart merger. The protection allegedly granted Saccawu a monopoly position, raised the cost of production and prices and harmed the employees' right to freely select their affiliation to a union.<sup>443</sup>
- *June 2013, BBC:* One trade unionist was killed and another was injured at a Lonmin-owned mine in Marikana, North West province. Both unionists belonged to the National Union of Mineworkers.<sup>444</sup>
- *June 2013, Bloomberg News:* Glencore Xstrata allegedly fired 1,000 workers who participated in a non-protected strike at three chrome mines in Limpopo province. The strike started at the Helena mine after an employee, a member of the AMCU, accused a shift supervisor of assault.<sup>445</sup>
- *May 2013, Fin24:* A representative of AMCU was killed in Rustenburg, North West province, near Anglo Platinum's Khomanani mine.<sup>446</sup>
- *July 2012, ITUC:* During a countrywide strike by workers in the engineering, gold, chemicals and coal sectors, four workers demonstrating peacefully were injured after police shot them with rubber bullets. Other workers also reported police harassment and intimidation during the strike.<sup>447</sup>
- *March 2012, ITUC:* Bridgestone South Africa locked out 1,200 members of the National Union of Metalworkers' of South Africa (NUMSA) and tried to force the workers to sign acceptance letters to wages much lower than those set by a collective agreement between NUMSA and the New Tyre Industry Employers Association.<sup>448</sup>
- *January 2012, ITUC:* Over 600 casual workers on a poultry factory owned by Astral Foods claimed to have been working on permanent basis over several years without receiving benefits. The workers were hired through labour brokers and did not hold trade union membership. The unions were not allowed to interfere in the dispute.<sup>449</sup>

# Human Rights Guidance for Business

*Guidance by the Danish Institute for Human Rights and other institutions to help companies ensure respect for human rights when addressing common challenges.*

## Recommendations

### **South African Informal Traders Alliance**

**(SAITA)** is a grouping of nine provincial traders' organisations, the Congress of South African Trade Unions (COSATU), the South African Municipal Workers Union and StreetNet International. SAITA has recommended that the Department of Labour facilitate the unionisation of informal workers, recognising that the informal sector is the fastest growing employer in South Africa.<sup>450</sup>

### **COSATU's Central Executive Committee**

adopted a proposal in 2012 identifying and acknowledging:

- a) The need to campaign for adoption of a national minimum wage;
- b) The need for development of Federation-wide collective bargaining;

- c) The need for strategies to reconfigure the wage structure;
- d) An introduction of legislated mandatory centralised bargaining;
- e) The need to campaign for universal income support to cover all adults; and
- f) Where employment is threatened in crisis-hit industries, a package of rescue measures needs to be devised and implemented by the parties together with government.<sup>451</sup>

**The Labour Research Service** recommends the development of a Wage Database to support monitoring and harmonisation of minimum and actual wages, and to monitor wage movements within the bargaining units.<sup>452</sup>

## Engagement Opportunities

*Development initiatives by public and private actors that provide opportunities for companies to contribute to human development*

### Public Sector Initiatives

**Mining Lekgotla:** The Department of Mineral Resources, the Chamber of Mines and the National Union of Mineworkers host an annual Mining Lekgotla (gathering) to consider challenges and opportunities in relation to the mining sector, with specific reference to labour relations.<sup>453</sup>

councils as well as improved regulation of both permanent and non-permanent employment relationships, with the centralisation of human rights as an explicit objective.<sup>454</sup>

### **ILO Decent Work Country Programme 2010-**

**2014:** The programme focuses on strengthening collective bargaining and social dialogue.<sup>455</sup>

### Development Priorities

**National Development Plan (NDP) 2030:** The NDP includes, as one of its goals, the promotion of a 'decent work agenda'. This includes the strengthening of the CCMA and bargaining

**Labour Research Service (LRS):** The LRS has proposed the formulation of Trade Union Development Indicators that will consider: Representation; Internal Democracy; Solidarity; and Social Activism and Dialogue.<sup>456</sup>



# Working Conditions

*Employment status, wages, working hours and social security*

| Operating Environment                       |  |
|---|--|
| Minimum wage                                | <p>In South Africa the minimum wages vary from sector to sector:</p> <ul style="list-style-type: none"> <li>• The minimum wage for farm workers and forestry sector employees is R2,420.41 (US\$235) per month.</li> <li>• In the hospitality sector, the minimum wage is between R2,415 (US\$235) – R2,692 (US\$260) per month.</li> <li>• In the taxi industry, the minimum varies between R1,848 (US\$170) – R2,643 (US\$260).</li> <li>• Contract cleaners earn at minimum between R14.19 – (US\$1.30) R15.66 (US\$1.45) per hour.</li> <li>• Domestic workers earn a minimum of between R1,146 (US\$110) – R1,877 (US\$175) per month.<sup>457</sup></li> </ul> |
| Median income                               | R3,033 per month <sup>458</sup>  |
| Living Wage                                 | <p>Defined as relative poverty in South Africa. South Africa does not have an official poverty line but uses \$2 a day, or R524 per person, per month, as unofficial guides. A person is considered as living in poverty if they live in households with an income lower than the poverty income. This varies according to family size and is adjusted every year. According to the survey, a person needs approximately R1,450 per month to live above the poverty line. A family of eight would need R5,170 to live above the poverty line<sup>459</sup></p>   |
| Percentage of workforce informally employed | Excluding agriculture: 16.2 %  |
| Relevant laws                               | <ul style="list-style-type: none"> <li>• Constitution<sup>460</sup></li> <li>• Basic Conditions of Employment Act<sup>461</sup></li> <li>• Employment Equity Act</li> <li>• Skills Development Act</li> <li>• Labour Reform Act</li> <li>• Unemployment Insurance Act</li> </ul>   |
| Responsible ministries/committees/agencies  | <ul style="list-style-type: none"> <li>• Department of Labour</li> <li>• Employment Conditions Commission advises the Minister of Labour on minimum wages for various sectors<sup>462</sup></li> <li>• South African Social Security Agency<sup>463</sup></li> <li>• Labour Court</li> <li>• Commission for Conciliation, Mediation and Arbitration</li> </ul>   |
| Local NGOs addressing this                  | <ul style="list-style-type: none"> <li>• Community Agency for Social Enquiry</li> </ul>  |

|                                  |   |                        |
|----------------------------------|---|------------------------|
| issue                            | <ul style="list-style-type: none"><li>• Black Sash</li><li>• Legal Aid South Africa</li><li>• People Against Suffering Oppression and Poverty</li></ul> |                        |
| Working Conditions: National Law |   |                        |
|                                  | South Africa  | International Standard |
| Overtime pay rate                | 1.5   | 1.25                   |
| Holidays with pay, per year      | 3 weeks   | 3 weeks                |
| Maximum daily working hours      | 9   | 10                     |
| Maximum weekly working hours     | 45  | 48                     |
| Uninterrupted weekly rest period | 36 hours per 7 days   | 24 hours per 7 days    |

## Country Context

*Key human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

### Wages

*Workers may not be able to earn a wage sufficient to meet the basic needs for themselves and their dependants. Particular attention should be given to the agricultural, domestic work and informal sectors.*

South Africa does not have a national minimum wage.<sup>464</sup> However, the Basic Conditions of Employment Act permits the Department of Labour to set minimum wages for sectors where collective bargaining is not common.<sup>465</sup> Wages are usually lowest in those sectors where there is a tendency for poor rates of unionisation and collective bargaining such as the taxi, hospitality, wholesale, retail, agriculture, domestic work, and forestry sectors. The minimum wage is adjusted annually.<sup>466</sup> The national poverty line is estimated at R524 per month or \$2 a day.<sup>467</sup>

From March 2013 to February 2014, the minimum monthly wage for farm workers was R2,420 (US\$209) per month.<sup>468</sup> However, the law provides that small farms employing fewer than five workers do not have to pay the

minimum wage.<sup>469</sup> The state, after raising the minimum wage of workers to R105 (US\$10) a day, also allowed for those farmers who would not be able to afford this to apply for exemptions.<sup>470</sup>

The exemption process is governed by section 50 of the Basic Conditions of Employment Act. According to the law firm Webber Wentzel, the primary consideration in deciding whether or not to grant an exemption is the financial viability of the employer, and what effect the increased wage will have on the employer's financial situation. An exemption will only be granted if the employer can give reasons justifying why she or he should be exempt from the minimum wage.<sup>471</sup>

MyWage reported in 2014 that, according to an investigation commissioned by the Department of Labour, in 45 percent of cases the minimum wage requirements were not respected and payment below the minimum was even more prevalent in the agricultural sector and domestic work.<sup>472</sup>

The 2011/2012 report of the Employment Equity Commission stated that the minimum wage for farm workers was not sufficient for them to survive on.<sup>473</sup> According to a 2012 Black Association of the Agricultural Sector report, 50 percent of farm workers were paid between R251 (US\$23) and R330 (US\$30) per week, which was less than the minimum wage for the agricultural sector.<sup>474</sup> The situation was particularly critical in the Western Cape Province.<sup>475</sup>

Garnishee orders (sometimes referred to as emolument attachment orders) also have a major impact on the salaries of workers in South Africa. A garnishee order is a court order that allows creditor to deduct money directly from employees' salaries.<sup>476</sup> In South Africa, there are no limitations on the amount owed or the number of garnishee orders that can be issued against the salary.

This was found to be a major trigger in the events leading up to the Marikana incident, where striking miners were killed after violently protesting. Almost 13 percent of miners were found to have garnishee orders against their salaries. Many of the workers involved in the wage disputes were not able to access a significant percentage of their salaries because of garnishee orders.

Mining has the highest number of workers with garnishee orders. Furthermore, a number of systemic issues were found with regards to garnishee orders such as corrupt court officials issuing fraudulent orders, orders granted without the amounts owed being stipulated (resulting in debtors paying instalments without any prospect of ever settling their debts) and errors in the calculation of interest and the actual debt.<sup>477</sup>

## Working Hours

*Workers may be subject to excessive working hours and may be denied compensation for overtime work. Particular attention should be given to the agricultural and domestic work sectors.*

The Basic Conditions of Employment Act sets a maximum of 45 working hours per week with meal breaks of one hour every five hours and a rest period of 12 hours daily and 36 hours weekly. Overtime may not exceed 10 hours per week.<sup>478</sup> On Sundays, public holidays and for overtime work, an employee is entitled to twice the normal wage.<sup>479</sup> According to a 2011 International Labour Organization (ILO) report, collective bargaining agreements may set higher standards of protection on working hours and rest periods than provided for by law.<sup>480</sup>

In 2010, about 24 percent of the workforce reportedly worked overtime, and rural workers were more likely to work overtime than urban workers.<sup>481</sup> According to a 2012 U.S. Department of State report, working hours were not adequately monitored on small farms, where 12-hour workdays were common during harvest time, with few farm workers compensated at the required overtime rate.<sup>482</sup>

## Social Security

*Migrant workers may not have access to social security benefits.*

The South African Constitution, under section 27, recognises social security as a right and provides for appropriate social assistance for those who are unable to support themselves and their dependants.<sup>483</sup>

In 2014, the Global Extension of Social Security reported that the country's social security system was based on three pillars:

- 1) Non-contributed (tax financed);
- 2) Contributed; and
- 3) Private (voluntary)

The first pillar consists of public cash transfers to vulnerable groups, provision of social services (e.g. free health care, basic education and housing for poor people) and basic services. The second pillar consists of mandatory social insurances, and the third pillar is voluntary private insurances, covering pension.<sup>484</sup>

The Bertelsmann Foundation reported that in 2012 the government started a five-year pilot programme of the National Health Insurance (NHI) system.<sup>485</sup> The NHI is an initiative by the South African government meant to guarantee universal health care for all legal South African residents. It will be implemented over a period of 14 years. As of February 2015, pilots were underway.<sup>486</sup>

According to a 2013 Mail & Guardian newspaper article, migrant workers in South Africa faced major challenges in accessing social security benefits, especially those employed in the agricultural, mining and tourism sectors.<sup>487</sup>

A 2013 World Finance article reported that about 75 percent of the population retired with no private pension benefits, and consequently relied exclusively on the old-age grant provided by the government,<sup>488</sup> which amounted to R1,260 (US\$116) per month.<sup>489</sup> According to the 2013 South Africa Survey, however, only 4.9 percent of adults own a retirement annuity and only 14.6% had a pension retirement fund.<sup>490</sup>

## Informal Sector

*Workers may lack written employment contracts, or may otherwise lack the protection of labour laws. Particular attention should be given to temporary and migrant workers.*

Estimations on the size of South Africa's informal sector vary. While the 2011 census stated that informal employment amounted to about 1.6 million workers, the recruitment company AdCorp South Africa reported it was 6.5 million, or 33 percent of the workforce, at the end of 2012.<sup>491</sup> In 2013, the Organisation

for Economic Co-operation and Development reported that the informal economy amounted to less than 20 percent of total employment.<sup>492</sup> The 2013 South Africa Survey puts the figure at just over 2.3 million – using Statistics South Africa figures.<sup>493</sup>

According to a 2012 report by the Black Association of the Agricultural Sector, only about 30 percent of farm workers in the Western Cape Province signed a work contract and only two thirds of the latter possessed a copy of such a contract.<sup>494</sup>

The ILO reported in 2011 that informal employment was higher among women and in rural areas.<sup>495</sup> In 2012, the Ecumenical Service for Socioeconomic Transformation reported that 39 percent of all employed women worked in the informal sector, compared to 29 percent of men.<sup>496</sup> Women accounted for about 60 percent of informal employment in wholesale and retail, and almost 76 percent in the domestic sector.<sup>497</sup>

The AdCorp report stated that the informal sector was characterised by absence of employment contracts, lack of medical aid, pension and unemployment benefits and no access to formal labour dispute resolution mechanisms.<sup>498</sup>

According to a 2014 Reuters article, illegal mining, common in abandoned gold mineshafts around Johannesburg, was characterised by dangerous working conditions of miners. These miners live in cramped conditions for weeks, resulting in fatalities and clashes between rival groups. Many of the illegal miners were reportedly from Zimbabwe, Mozambique and Lesotho.<sup>499</sup>

## Access to Remedy

*Bodies to which victims of corporate human rights abuses can file grievances and seek redress.*

Workers not paid the minimum wage can complain to the Department of Labour, trade unions (if members),<sup>500</sup> or the Commission for Conciliation, Mediation and Arbitration (CCMA). If no agreement is reached between the employer and the employee, cases may be brought before the Labour Court.<sup>501</sup> In cases where employers do not respect minimum wage requirements, the employee in question may be fined and requested to compensate the worker.<sup>502</sup> In 2011/2012 the CCMA received about 160,000 cases, with a settlement rate of approximately 70 percent.<sup>503</sup>

A 2012 AdCorp report stated that informal sector workers lacked access to the CCMA and labour courts.<sup>504</sup> In the agricultural sector particularly, farm workers were either illiterate or semi-literate and unaware of their rights. Consequently, employers frequently took advantage of the situation by evicting farm workers without due process, requiring that they work overtime without pay, victimising them if they refused to work, and refusing them trade union membership.<sup>505</sup>

Victims of human rights abuses can file a complaint at the South African Human Rights Commission, which has investigatory powers.<sup>506</sup>

According to a 2012 report by the Black Association of the Agricultural Sector, almost 60 percent of farm workers in the Western Cape province had no access to grievance procedure or complaint boxes.<sup>507</sup>

Although South Africa ratified the Protocol to the African Charter on Human and Peoples' Rights, establishing the African Court on Human and People's Rights, the country did not accept the competence of the court to directly receive cases from NGOs and individuals.

Consequently, in 2012 two cases could not be heard on grounds of lack of admissibility.<sup>508</sup>

Following the death of mine workers at the Lonmin-owned Marikana mine in North West province in 2012, the Compliance Advisor Ombudsman (CAO) of the International Financial Corporation (IFC) opened a preliminary investigation on the adverse social and environmental impacts of the IFC-funded mine. Despite the identification of environmental and social concerns, the CAO decided not to proceed with further investigation as there was no direct link between the concerns and the death of the workers and no complaint from affected workers was filed.<sup>509</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- 2014, South African Human Rights Commission:** The provincial office receives a high number of complaints wherein verbal abuse in the form of hate speech, verbal assault and discrimination is alleged. Most complaints are against small to medium private businesses. Complainants typically are unable to obtain legal representation, are intimidated by the power imbalances and are reluctant to call witnesses as they fear exposing other employees to victimisation. Complaints are instead referred to organisations such as South African Society for Labour Law (SASLAW) and organisations that support the Commission for Conciliation, Mediation and Arbitration (CCMA).

- *August 2014, South African Human Rights Commission:* A complaint was lodged against Transnet, a freight logistics company, for allegedly selling its land to a consortium whilst their lease agreement were still in force and valid. The community was unlawfully evicted and their properties were unlawfully demolished by the consortium, which wanted to develop the land.
- *Ongoing 2014, South African Human Rights Commission:* At present there are no formal protections in place for informal traders. Complaints have been lodged by traders regarding exclusion from the sector and arbitrary decision-making. The complaints have also raised frequent and unauthorised confiscation of goods by the South African Police Service (SAPS) with no prospect of return as perishable items are no longer of a quality for sale and consumption.
- *August 2014, South African Human Rights Commission:* Successful mediation took place in a labour dispute in which complainants alleged that the employer was discriminating against casual contractors on the basis of gender. In this instance the parties had agreed to the jurisdiction of the Commission.
- *August 2014, South African Human Rights Commission:* A complaint related to the installation of cameras in the toilets. The Commission conducted a preliminary investigation, but on engagement with the CCMA was advised that jurisdiction in the matter resided with that body.
- *August 2014, South African Human Rights Commission:* The Commission investigated a matter involving interception of correspondence (emails and telephone calls) by Investec. In its findings the Commission referred the matter to National Prosecuting Authority and the police.
- *August 2014, South African Human Rights Commission:* A complaint was made against SPAR Wholesalers for poor working conditions and unfair dismissals. Complainants have been referred to both CCMA and Department of Labour.
- *2012, South African Human Rights Commission:* Complainant was visually impaired and was concerned with the conditions of his employment and further wanted the employer to provide him with daily transportation from home to work and back. Complainant was referred to the Employment Conditions Commission.
- *2013/14, South African Human Rights Commission:* Complainant alleged that he was forced to be at work despite being sick and that he was dismissed when he did not report for duty. The matter was referred to the CCMA.
- *February 2014, BBC:* Two illegal miners died by being trapped in an abandoned mine site near Johannesburg.<sup>510</sup>
- *February 2014, Reuters:* Twenty-two artisanal gold miners who were temporarily trapped in an abandoned shaft near Johannesburg were arrested on charges of illegal mining.<sup>511</sup>
- *January 2014, Business & Tech:* Negotiations to end a strike of platinum mining workers were ongoing. The Association of Mineworkers and Construction Union demanded a pay increase and better working conditions.<sup>512</sup>
- *September 2013, IOL News:* The Congress of South African Trade Unions (COSATU) organised a strike against the Phoenix trucking company, which allegedly had the worst working conditions in the transport sector in KwaZulu-Natal province.<sup>513</sup>
- *May 2013, BBC:* Mining workers at Lanxess-owned chrome Rustenburg mine, in North West province, went on an unprotected strike over salary bonuses.<sup>514</sup>
- *January 2013, BBC:* Farm workers in the wine-producing Western Cape region

went on strike demanding an increase of their daily wage to approximately R186 (US\$17).<sup>515</sup>

- *August 2012, BBC:* Workers at the Lonmin-owned platinum mine in North West province went on strike demanding

higher wages. During clashes with the police, 34 miners were killed.<sup>516</sup> The strike ended in September 2012, when an agreement for an 11 percent to 22 percent salary increase and a once-off bonus of R2,000 (US\$182) was reached.<sup>517</sup>

## Human Rights Guidance for Business

*Guidance by the Danish Institute for Human Rights and other institutions to help companies ensure respect for human rights when addressing common challenges.*

### Company Due Diligence Initiatives

**Solms-Delta:** The wine estate Solms-Delta in the Western Cape province established the Wijn de Caap Trust. The trust receives 33 percent of profits from the estate's wine sales and re-invests them to improve the lives of farm workers by providing quality housing and medical care to families and investing in education facilities for children.<sup>518</sup>

**Anglo-American:** In 2001, the company established 'Speak Up', a confidential reporting system to which employees, business partner and other stakeholders can file complaints about conduct contrary to the values of Anglo-American. Speak Up is managed by Deloitte Tip-offs Anonymous. Complaints can be submitted through an online form or by telephone, fax, e-mail or regular mail. Telephone complaints can be submitted in English, isiZulu, Afrikaans, IsiXhosa and Sesotho.<sup>519</sup>

**Tesco:** In 2009, together with the UN Special Representative of the Secretary General on

Business and Human Rights, the company piloted a non-judicial, company-level grievance mechanism for their fruit suppliers in Western Cape province.<sup>520</sup> According to the NGO ACCESS Facility, the process failed to address the mistrust between workers and employers in the industry and undermined its outcome.<sup>521</sup>

### Recommendations

- With regards to minimum wage in the agricultural sector, the Employment Conditions Commission recommended that the minimum wage be raised by 9.5 percent so as to be more commensurate with the lives and needs of farm workers.
- The Bench Marks Foundation recommended that the accurate reporting on the employment of contract workers in the industry be enforced through well-resourced monitoring and auditing systems, and through the establishment of accountability mechanisms to address inaccurate reporting.<sup>522</sup>



# Engagement Opportunities

*Development initiatives by public and private actors that provide opportunities for companies to contribute to human development*

## Public Sector Initiatives

### **Framework Agreement for a Sustainable**

**Mining Industry:** In July 2013, the government, trade unions and federations, the Chamber of Mines and the South African Mining Development Association signed the agreement, which aims to increase the sustainability of the mining sector. The agreement's objectives include: ensuring the rule of law, peace and stability, improved working conditions and the provision of proper and sustainable human settlement infrastructure in the Rustenburg Platinum belt.<sup>523</sup>

## Development Priorities

**National Development Plan (NDP):** The NDP aims to ensure that working conditions, at the very least, do not diminish by raising employment and providing incentives to ensure entry into the labour force by young people.<sup>524</sup>

# Community Impacts

## Environment

*Company impacts on the environment that affects the health or livelihoods of local communities*

| Operating Environment   |   |
|---|---|
| Percentage of population with access to clean water<br><i>MDG: 100% by 2015</i> | 86.1% of all households have access to free basic water. However, only 46,7% of all households receive free basic water from municipalities <sup>525</sup><br>91.2% have access to piped water.<br>46.2% have access to piped water within dwellings. <sup>526</sup>  |
| Environmental Performance Index rank  | 72 out of 178 countries <sup>527</sup>  |
| Food Security Index rank  | 46 out of 109 countries <sup>528</sup>  |
| Relevant laws   | <ul style="list-style-type: none"><li>• Section 24 of the South African Constitution recognises the right to a healthy environment, and environmental protection for present and future generations<sup>529</sup></li><li>• Section 184(3) requires the South African Commission to get reports from organs of states indicating measures they have taken toward realisation of various rights including on the environment</li><li>• National Environmental Management Act, No. 107 of 1998</li><li>• National Water Act, No. 36 of 1998</li><li>• Promotion of Access to Information Act, No. 2 of 2000</li><li>• Mineral and Petroleum Resources Development Act, No. 28 of 2002</li></ul> |
| Responsible agencies  | <ul style="list-style-type: none"><li>• The Department of Environmental Affairs (issues environmental licences and monitors compliance).<sup>530</sup></li><li>• Department of Water Affairs and Sanitation</li><li>• Department of Mineral Resources</li><li>• Department of Energy</li><li>• Department of Agriculture, Forestry and Fisheries</li></ul>  |
| Local NGOs addressing this issue  | <ul style="list-style-type: none"><li>• Centre for Environmental Rights</li><li>• Bench Marks Foundation</li><li>• Centre for Applied Legal Studies</li><li>• Centre for Human Rights</li><li>• Groundwork</li><li>• Earthlife Africa</li></ul>   |

# Country Context

*Key human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

## Air & Water Pollution

*The health and livelihoods of local populations may be adversely impacted by company operations. Particular attention should be paid to the areas of air and water pollution and land degradation. Particular attention should also be paid to the mining and manufacturing sectors.*

The 2014 Environmental Performance Index ranked South Africa 72nd out of 178 countries, with 1 indicating the best performing country in terms of compliance with environmental policy.<sup>531</sup> The report concluded that environmental concerns were secondary to economic growth.<sup>532</sup>

According to a 2013 joint report by the United Nations Development Programme (UNDP), the Global Environment Facility (GEF) and the Open Society Institute of Southern Africa (OSISA), water pollution control laws were not implemented and the pollution of groundwater represented a major concern in South Africa.<sup>533</sup> Overlaps between the National Environmental Management Act (NEMA) and the Minerals and Petroleum Resources Development Act (MPRDA), as well as a lack of institutional coordination between the Department of Mineral Resources (DMR), Department of Water Affairs (DWA) and the Department of Environmental Affairs (DEA) were also reported. The DMR issued a mining licence to Coal of Africa (CoAL) near Mapungubwe National Park, a UNESCO World Heritage Site, without complying with environmental and water use laws.<sup>534</sup>

Similarly, the National Water Act was not fully implemented. The Centre for Environmental Rights stated in 2013 that contributing factors included lack of coordination between the DMR, the DWA and the DEA, as well as the DWA's poor leadership and financial management.<sup>535</sup> Water licences (particularly relevant for mining) were issued late, by poorly capacitated staff and without including

recommendations made during the evaluation process.<sup>536</sup>

As of January 2012, the Blue Scorpions unit tasked with enforcing the National Water Act, was investigating 153 cases:

- 18 cases of non-compliance with, or lack of, water use licences by mining companies;
- 85 cases of agriculture companies not applying for verification of lawfulness of existing water use and not taking action to rectify contraventions;
- 42 cases of failure by the Water Services Authorities; and
- 8 cases of failure by other institutions to prevent and remediate the effects of pollution due to waste water.<sup>537</sup>

A 2013 Bench Marks Foundation report stated that over the last ten years, the government increased sulphur dioxide emissions quotas to accommodate mining companies such as Lonmin, which over a ten year period (2003-2013) had made very little progress in reducing its negative environmental impact. When the mining company eventually did make some progress between 2011 and 2012 in reducing its sulphur dioxide emissions, it did so at the expense of ground water pollution, which was reported to have increased during the same period.<sup>538</sup>

Data pertaining to South Africa's carbon footprint and magnitude of air pollution varies significantly. According to the Bench Marks Foundation, South Africa caused 98 percent of air pollution and 86 percent of waste in Africa, primarily linked to mining operations. However, the Environmental Defence Fund and the International Emissions Trading Association estimated that South Africa's carbon emissions contribute to between 40 and 50 percent of all emissions in Africa in 2014.<sup>539</sup> A 2013 Times of South Africa article reported that acid drainage

water released by gold mining operations in the North West province resulted in pollution of underground and surface water.<sup>540</sup>

A 2012 article by the Environmental Justice Organisations, Liabilities and Trade reported that increased mining activity in the Weltevreden pan area in Mpumalanga since 1993 had an adverse impact on agriculture and water in the area.<sup>541</sup> According to a 2013 Bench Marks Foundation report, Arcelor Mittal operations in Vanderbijlpark, Gauteng province, were linked to air and sound pollution and contamination of underground water.<sup>542</sup>

## Water Scarcity

*Companies may adversely impact the access of local populations to safe and affordable water for personal or other use. Particular attention should be paid to the agricultural and mining sectors.*

According to a 2013 joint report by UNDP, OSISA and GEF, a lack of institutional coordination led the Department of Water Affairs to issue water licences in water-scarce areas, as the Department of Mineral Resources previously issuing mining licences to companies in the same areas.<sup>543</sup>

A 2013 Institute for Security Studies report stated that South Africa, mainly the Karoo area in Western Cape province, was characterised by low annual rainfall and high evaporation, making it the 30th driest country in the world. Water is mainly used for domestic and agricultural purposes, with 21 percent of the rural population not having access to improved water sources. It was reported that the use of freshwater in the Karoo area for fracking could increase the rural population in the region's vulnerability.<sup>544</sup> Due to the fact that South Africa is a water scarce country, it imports water from neighbouring countries such as Lesotho.

In 2013, Business Day reported that agriculture, covering 1.5 percent of arable land, used 63 percent of the country's fresh water reserves for irrigation.<sup>545</sup> According to Department of

Water Affairs statistics, in 2010 approximately 32 pre-directives and 16 directives to cease illegal use of water by the mining sector were issued, and three criminal charges were filed. The agricultural sector was issued 127 pre-directives, 48 directives and 13 criminal charges.<sup>546</sup>

## Participation & Access to Information

*Communities may not have access to relevant information regarding environmental impacts of company operations that may affect their health or livelihoods. Particular attention should be paid to the area of transparency, especially when reporting emissions.*

According to the Environmental Impact Assessment Regulations contained in the National Environmental Management Act, companies are obliged to perform assessments before conducting operations that may impact land or its inhabitants. Companies are required to produce an Environmental Management Plan (EMP), and report regularly on its implementation.<sup>547</sup> The 2010 regulations included a revised list of activities requiring environmental impact assessments (EIA).<sup>548</sup> Consultation with interested and affected parties is regarded as a minimum condition for EIAs.<sup>549</sup> In 2013, the Department of Environmental Affairs reported that since 2006 competent authorities received almost 24,000 EIAs and processed about 21,300.<sup>550</sup>

EIAs and EMPs are available to the public through procedures under the Promotion of Access to Information Act (PAIA), which provides the population with the right to access records in the custody or under control of public bodies.<sup>551</sup> However, the Centre for Environmental Rights reported in 2013 that the Department of Mineral Resources (DMR) was the worst-performing department in terms of access to information. It added that the DMR and the Department of Water Affairs (DWA) were non-compliant with PAIA, as no statutory reports were filed to the South African Human Rights Commission. At provincial level, the environment departments of Eastern Cape,

Mpumalanga, Northwest and Northern Cape were also non-compliant for the same reason.<sup>552</sup>

In 2012, approximately 50 percent of all companies contacted by the Centre for Environmental Rights (e.g. Cousins Coal Pty Ltd, Arcelor Mittal South Africa, Sasol, Omnia Holdings, NATREF, Digby Wells and Associates, Central Rand Gold, FFS Refiners, DRD Gold and Anglo Operations) refused to make environmental information accessible.<sup>553</sup>

Notification requirements of prospecting and mining applications as per the Mineral and Petroleum Resources Development Act were deemed inadequate in rural areas by the Centre for Environmental Rights in 2012.<sup>554</sup>

According to a 2013 Global Policy article, the lack of effectiveness in environmental impact assessments was due to corruption, such as in the case of the KwaZulu-Natal Wildlife, where officials intentionally obstructed the assessment process.<sup>555</sup>

In order to ensure the protection of the environment, public interest organisations and individuals frequently bring suits against private and non-state actors to protect the right to a healthy environment. According to an analysis in the South Africa Journal of Human Rights, these types of suits, termed public interest environmental litigation, have encountered a number of obstacles – one of these being ‘strategic litigation against public participation’ suits (SLAPP). Its objective is to exhaust the time and resources of the party seeking to enforce or vindicate their legal rights until they withdraw their case. The suits take the form of defamation claims, abuse of legal process, malicious prosecution or delictual (tort) liability cases. Most environmental issues raised in this manner pertain to the use of natural resources and compliance with environmental laws by developers. Lawsuits are therefore most frequently instituted by public interest groups, making it a target for SLAPP suits brought by developers in pursuit of their property rights.<sup>556</sup>

## Access to Remedy

*Bodies to which victims of corporate human rights abuses can file grievances and seek redress.*

Traditionally, violators of environmental rights and regulations have paid punitive monetary penalties through prosecution in criminal courts. However, the process has been criticised because it places a heavy burden on an already overburdened criminal justice system. Also, inadequate and relatively low fines mean it is cheaper for the violators to continue breaching environmental legislation and regulations than to comply with them. Experts therefore suggest an administrative penalty system similar to the one in South Africa’s anti-trust legislation – the Competition Act, which provides for:

- Complaints to be filed and investigated by the responsible agency;

- The adjudication of contraventions on a balance of probabilities by a tribunal like the Water Tribunal;
- The determination of an appropriate, meaningful monetary penalty (having regard to particular penalties in a permit, or by reference to a published formula that takes relevant factors into account), which should be paid to the National Revenue Fund; and
- Rights of appeal against decisions of the tribunal to a court.

An administrative penalty system allows for a fixed amount to be imposed for certain categories of non-compliance.<sup>557</sup>

The Centre for Environmental Rights is of the view that the administrative penalty system

would result in more violations being pursued and more fines being imposed. The system would create meaningful, transparent and consistent regulatory responses, as well as the consideration of the economic benefit of non-compliance.<sup>558</sup>

The administrative penalty system used by the Department of Water Affairs allows people to file a complaint to the Department and the Water Tribunal to decide on a monetary penalty to be paid to the National Revenue Fund. Appeals against the tribunal's decisions can be filed with a court.<sup>559</sup> According to a 2012 Centre for Environmental Rights report, the Water Tribunal was reported to be expeditious and cost-effective, although confusion about its jurisdiction and mandate was reported.<sup>560</sup>

Complaints can also be filed with the police, the Department of Mineral Resources (DMR), the Department of Environmental Affairs (DEA), and the Environmental Management Inspectorate ('Green Scorpions'). Offences related to the illegal use or pollution of fresh water resources can be filed with the Catchment Management Agency.<sup>561</sup>

Victims of human rights abuses can file a complaint at the South African Human Rights Commission, which has investigatory powers.<sup>562</sup>

Although South Africa ratified the Protocol to the African Charter on Human and Peoples' Rights, establishing the African Court on Human and People's Rights, the country did not accept the competence of the court to directly receive cases from NGOs and individuals.

Consequently, in 2012 two cases could not be heard on grounds of lack of admissibility.<sup>563</sup>

In 2013, a complaint was filed with the International Financial Corporation Compliance Advisor Ombudsman (CAO) regarding the alleged adverse environmental impacts of Tsodilo mining exploration in the Badplaas protected area. Following the CAO assessment process, the compliance appraisal process started and was underway by April 2013, which would decide whether or not the complaint will be investigated.<sup>564</sup> The CAO has since completed its assessment report regarding the complaint. However, Tsodilo was not prepared to meet with the complainant and the CAO will continue with a compliance function and compliance appraisal.<sup>565</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- February 2014, Centre for Environmental Rights:* Several NGOs submitted objections to the national electricity company Eskom's applications for postponement of compliance with air pollution minimum emissions standards for 16 of the company's power stations.<sup>566</sup>
- February 2014, Centre for Environmental Rights:* A Regional Court in Limpopo province sentenced the managing director of the clay mining company Blue Platinum Ventures to five years in prison for mining-related environmental offences.<sup>567</sup>
- December 2013, Times:* The Supreme Court of Appeal ruled that landholders, such as Harmony Gold, are obliged by the National Water Act to take responsibility for pollution emanating from a property even after it has been sold, to Pamodzi Gold in this case.<sup>568</sup>
- November 2013, Bench Marks Foundation:* The Foundation reported a poor score by Arcelor Mittal on transparency and community engagement due to the company's refusal to make its environmental master plan publicly accessible.<sup>569</sup>
- November 2013, Bench Marks Foundation:* The mining company Arcelor Mittal reportedly ignored a court order to hand

over its environmental mitigation plan and the details regarding its Vaal disposal site, where hazardous waste was illegally dumped in 2007.<sup>570</sup>

- *October 2013, Business Day:* 1,000 people marched against Shell's operations in Karoo, in the Western Cape province. Protesters' major concern was fracking.<sup>571</sup>
- *May 2013, South African Human Rights Commission:* A person brought a complaint against Enviroserv Waste Management complaining that an incinerator was being operated near his home, polluting the air and affecting his health. The matter was investigated by the South African Human Rights Commission and a report with recommendations has been submitted and as of February 2015 was under consideration.
- *April 2013, Environmental Justice Organisations, Liabilities and Trade:* Msobo Coal undertook an early scoping phase of possible mining operations inside the Chrissiesmeer biodiversity site, in Mpumalanga province, which would reportedly result in the destruction of several farms.<sup>572</sup>
- *February 2013, Environmental Justice Organisations, Liabilities and Trade:* The Lakenvlei area was reportedly under threat from planned diamond and coal mining by William Patrick Bower Proprietary. Mining activities would reportedly have an adverse impact on groundwater, and consequently the water quality for neighbouring farms.<sup>573</sup>
- *November 2012, Environmental Justice Organisations, Liabilities and Trade:* The mining company Exxaro allegedly dug trenches without authorisation in the Weltevreden pan, rich in wetlands, fertile land and coal reserves. In June 2012, the Department of Water Affairs issued an order to stop the company. However, in September 2012, allegations of Exxaro having cut deep into the border of the pan were reported.<sup>574</sup>

## Human Rights Guidance for Business

*Guidance by the Danish Institute for Human Rights and other institutions to help companies ensure respect for human rights when addressing common challenges.*

### Recommendations

The Centre for Environmental Rights recommended the creation of a tax or anti-trust like system of administrative penalties to ensure compliance with environmental legislation, and to dissuade violators from taking refuge in the inconvenience and expense of criminal prosecution.

The Bench Marks Foundation recommended that the Department of Mineral Resources use the powers derived from the Mining charter and the Mineral and Petroleum Resources Development Act to enforce the provisions pertaining to environmental protection and housing. The following should be included:

- A clear, rapid, enforceable process to provide decent, affordable housing to all workers in the industry;
- Implementation of clear, measurable, common standards for environmental measurement and protection across the industry;
- Allocation of sufficient resources, including human resources, to ensure effective oversight; and
- Enforcement of an immediate clean-up, at the companies' expense, of all environmental damage.



## Company Beyond Compliance Initiatives

**Woolworths Holdings Limited:** The company established the Farming for the Future programme, aiming at increasing food sustainability by reducing water and chemicals use. In 2011-2012, the company's top 15 suppliers reduced their water consumption 16 percent.<sup>575</sup>

**Anglo-American:** In 2001, the company established 'Speak Up', a confidential reporting

system to which employees, business partner and other stakeholders can file complaints about conduct contrary to the values of Anglo-American. Speak Up is managed by Deloitte Tip-offs Anonymous. Complaints can be submitted through an online form or by telephone, fax, e-mail or regular mail. Telephone complaints can be submitted in English, isiZulu, Afrikaans, IsiXhosa and Sesotho.<sup>576</sup>

## Engagement Opportunities

*Development initiatives by public and private actors that provide opportunities for companies to contribute to human development*

### Public Sector Initiatives

**The Green Fund:** The initiative was established in 2012 by the Department of Environmental Affairs. It aims to support green initiatives to help the country transition to low carbon, resource efficient and climate-resilient development. The Development Bank of Southern Africa is the implementing agent of the fund.<sup>577</sup>

**Climate Change Policy Framework:** In 2012 the Department of Public Enterprises launched the initiative, which aims to reduce carbon emissions by state-owned companies without compromising their financial viability.<sup>578</sup>

**The Green Economy Accord:** The plan set 12 commitments to implement a green economy, and create jobs.<sup>579</sup>

**Zero Hunger Programme:** This strategy was established by the Department of Social Development to address and combat hunger, especially in the North West and KwaZulu-Natal provinces. The programme aims to ensure food access for vulnerable groups, improve nutrition security and food production capacity and foster partnerships with all stakeholders within the food supply chain. In 2012-2013 approximately 472,267 households from 400 communities participated from the programme.<sup>580</sup>

**The South African King Committee Report on Corporate Governance (King III):** This report is a code of corporate governance and a requirement for companies listed on the Johannesburg Stock Exchange. The initiative aims to align local businesses with international best practice in terms of the natural environment, social environment and the global economy.<sup>581</sup>

### Development Priorities

**African Development Bank Country Strategy Paper 2013-2017:** The strategy focuses on the reduction of CO2 emissions and increased access to affordable, sufficient and safe water and sanitation.<sup>582</sup>

**World Bank Country Partnership Strategy 2014-2017:** The strategy supports the government in reducing carbon and greenhouse gas emissions, and increasing employment opportunities and entrepreneurial capacity for youth and women in ecosystem conservation and tourism in the Lake St Lucia area, in KwaZulu-Natal province.<sup>583</sup>

**National Development Plan (NDP):** The plan recounts South Africa's steps to implement measures to adapt to and mitigate climate change. The aim is to transition to a low carbon economy through, amongst others, adopting a

|  |  |
|--|--|
| carbon budget approach that sets the amount of carbon that can be emitted in a given | amount of time; committing to a domestically set mitigation target and carbon pricing. |
|--|--|

# Land & Property

*Human rights impacts related to company acquisition, use and management of land*

| Operating Environment   |   |
|---|---|
| International Property Rights Index rank                          | 26th of 97 countries  |
| Heritage Foundation: Economic Freedom Index Property Rights score | 50 (out of 100)   |
| Relevant law  | <ul style="list-style-type: none"> <li>• Constitution of South Africa</li> <li>• Communal Land Rights Act</li> <li>• Expropriation Act</li> <li>• Expropriation Act Amendment</li> <li>• Extension of Security of Tenure Act</li> <li>• Land Reform Act</li> <li>• National Heritage Resources Act</li> <li>• Recognition of Customary Marriages Act</li> <li><i>(Providing equal legal status to men and women regarding property and land ownership with joint common ownership, unless otherwise specified in an agreement.<sup>584</sup>)</i></li> <li>• Restitution of Land Rights Act</li> <li>• Mineral and Petroleum Resources Development Act</li> </ul> |
| Responsible ministries, agencies and committees                   | <ul style="list-style-type: none"> <li>• Deeds Office</li> <li>• Department of Rural Development and Land Reform</li> <li>• Department of Mineral Resources</li> <li>• Department of Agriculture, Fisheries and Forestry</li> <li>• Office of the Valuer-General</li> <li><i>(determining the purchase price of any land identified by the state for purposes of expropriation).<sup>585</sup></i></li> <li>• Land Claims Court</li> <li>• Commission on Restitution of Land Rights</li> <li>• Department of Public Works</li> </ul>  |
| Local NGOs addressing this issue                                  | <ul style="list-style-type: none"> <li>• Institute for Poverty, Land and Agrarian Studies</li> <li>• AgriSA</li> </ul>  |

## Country Context

*Key human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

### Land Administration & Distribution

*Companies may disrupt the livelihoods of local populations if they do not establish the ownership and use of land before it is purchased. Particular attention should be paid to the ongoing structural disparities due to the Apartheid system.*

Land acquisition structures and spatial and settlement patterns in South Africa have been shaped by historical processes such as colonialism and the Apartheid system, which resulted in large-scale dispossession of black people. The Natives' Land Act (No. 27 of 1913) was the first attempt by the newly formed Union of South Africa to codify a system of territorial segregation and racial discrimination inherited from its colonial rulers. The most important provision of the Land Act (which was subsequently renamed the Bantu Land Act 1913, and Black Land Act 1913) was to prohibit Africans from acquiring land across 93 percent of the geographical surface of the country.<sup>586</sup> In general, legislation such as the Asiatic Land Tenure Act of 1946 and the Group Areas Act of 1966 was promulgated as a means of securing the most attractive land and property for the white minority.<sup>587</sup> These pieces of legislation were repealed by the Abolition of Racially-Based Land Measures Act of 1991.<sup>588</sup>

In addition to the repeal of laws, which served as barriers to the acquisition of land, the Provision of Land and Assistance Act<sup>589</sup> established grants for land restitution and redistribution as part of South Africa's post-Apartheid land reform programme.<sup>590</sup> The reform was based on a restitution policy through the 'willing seller, willing buyer' approach, which entailed the government paying market value for disputed land and handing it over to those dispossessed during Apartheid.<sup>591</sup> Due to the slowness and high costs of this approach, the government switched to a 'just and equitable' principle for

compensation in 2013, to avoid paying more than the actual value of the land.<sup>592</sup>

In February 2014, the Minister of Rural Development and Land Reform tabled a proposal to transfer ownership of 50 percent of agricultural land from 'historical owners' to labourers who work on these properties. Consultations on the proposal continue until April 2015.<sup>593</sup>

According to a University of the Western Cape analysis, the extent of land dispossession of the indigenous population in South Africa was greater than any other country in Africa, and endured for a long period of time.<sup>594</sup> In a 2013 report, Freedom House reported that Apartheid-era racially discriminatory property laws resulted in about 80 percent of farmland being owned by white South Africans, representing 14 percent of the population.<sup>595</sup> Over 13 million black people, the majority of them poverty-stricken, remained crowded into the former homelands, where rights to land were generally unclear or contested and the system of land administration was in disarray.<sup>596</sup> Despite the homeland (or '*bantustan*') system being eliminated between 1990 and 1994, land distribution remains problematic and often controversial, with estimates of black ownership ranging between 13 and 32.5 percent.<sup>597</sup>

As a result of the discriminatory land distribution system under Apartheid, thousands of black and coloured farm workers continued to suffer from insecure tenure rights and lived as illegal squatters.<sup>598</sup> The South African government committed to transferring 30 percent of land to black owners by 2014. However, according to the Freedom House report, only about 6 percent was transferred by the end of 2011.<sup>599</sup>

A 2013 South Africa Info article reported that, according to the government, from 1994 to

2013, approximately 4,860 farms were transferred to black owners through the redistribution programme, benefitting about 231,000 people, including more than 50,000 women, 32,000 youth and 674 people with disabilities.<sup>600</sup>

While Freedom House reported that 90 percent of redistributed farms failed to become economically viable as commercial enterprises, the Institute for Poverty, Land and Agrarian Studies reported that half of the restitution resulted in better living conditions for the beneficiaries.<sup>601</sup> However, the redistribution programme reportedly lacked coherence and support for farmers and business plans provided to new farmers were for commercial farming and did not adequately take into account their abilities and wishes.<sup>602</sup>

The South African government has identified women, farm workers, persons living with disabilities and young people as priority groups in terms of land reform. However, there is no strategy specifically targeting these groups and no data indicate the extent to which they have been beneficiaries of land reform.

In 2013, the United Nations Development Programme (UNDP), the Global Environment Facility (GEF) and the Open Society Institute of Southern Africa (OSISA) reported that companies that acquired land rights during Apartheid were offered the opportunity of renewing those rights if some of their shareholding in the land was allocated to historically disadvantaged people.<sup>603</sup>

According to a 2012 NGO Pulse article, 25 percent of the land in South Africa was state owned and 75 percent was privately owned.<sup>604</sup> The Bertelsmann Foundation reported in 2014 that women were discriminated against in access to land titles.<sup>605</sup> The Social Institution and Gender Index reported that according to a 2011 report by the Commission for Gender Equality, only 9 percent of women, compared to 91 percent of men, benefitted from the land restitution programme between 2005 and 2009.<sup>606</sup>

According to the 2013 Global Corruption Barometer, 20 percent of households reported

having paid a bribe to the land services officials.<sup>607</sup>

## Land Acquisition

*Local populations may be improperly deprived of land ownership and usage rights as a consequence of land acquisition by companies. Particular attention should be paid to the extractive and agricultural sectors.*

The South African Constitution and associated legislation protects the right to property, allows for the appropriation of land for public interest (with compensation) and makes provision for land reform for communities and individuals whose land tenure is insecure due to past racially discriminatory laws and practices.<sup>608</sup>

The Mineral and Petroleum Resources Development Act (MPRDA) regulates displacement by the extractive industry. The requirements to notify and consult in terms of the MPRDA are contained in sections 5, 10 and 22. The obligation to consult with interested and affected parties rests on the applicant, i.e. the mining company, and not the state. However, the state, specifically the Department of Mineral Resources (DMR), must ensure that this obligation has been fulfilled and that proof is submitted to the DMR as part of the application process.<sup>609</sup>

According to Terminski, it is difficult to estimate the number of people that have been resettled in South Africa due to mining, but research reports indicate that this figure is quite significant.<sup>610</sup> One of the most famous examples of resettlement due to mining in South Africa is the resettlement exercise undertaken by Anglo Platinum near its Mogalakwena mine. Approximately 10,000 people (957 households) from Ga-Pila and Motlhotlo were resettled. Following many years of negotiations, 98 percent of Ga-Pila residents accepted the offer to move to the newly built village. The program of relocation was voluntary and was realised with the strong support of local authorities and tribal leadership. However, studies by ActionAid<sup>611</sup> and the South African Human Rights

Commission<sup>612</sup> identified human rights violations due to the resettlement process.

According to a 2011 Human Rights Watch report, farm workers were provided with accommodations on farms as part of their employment and were often joined by their families and former workers, including the elderly and the injured.

The Extension of Security of Tenure Act (ESTA) protects farm dwellers by regulating evictions, providing access to legal remedies when unlawful evictions occur (e.g. notices and court orders), and prohibiting retaliatory measures such as cutting off water supply. In 2012 the Special Rapporteur on the Right to Food noted that this legislation resulted in employers circumventing the provisions of the Act by reducing the quality of facilities on farms, including housing and switching to employment contracts, leading to ‘pre-emptive evictions’ or ‘voluntary’ departures.<sup>613</sup> A 2013 Think Africa Press article reported that a lack of governmental capacity in monitoring legal processes, and a lack of clarity on the rights and duties of owners and dwellers, has affected the implementation of the law, and as a result evictions occurred.<sup>614</sup>

According to Human Rights Watch, more than 930,000 farm dwellers were evicted without compensation between 1994 and 2004, particularly in cases where the persons in question were no longer able to work. Farmers reportedly cut electricity and water supply to make dwellers leave and harassed them at night with security forces and dogs. Criminal proceedings were rarely initiated for these evictions.<sup>615</sup>

Despite a strong legal protection system for housing rights, the Centre on Housing and Evictions reported that low-cost housing settlements were located on the extreme periphery of urban suburbs, resulting in severe limitations on access to transport, schools, health facilities and, in some cases, even jobs.<sup>616</sup> Hence, poor people preferred insecure-tenure accommodation, such as townships, closer to job opportunities. To avoid evictions, people living in poverty occupied abandoned

buildings and lived in overcrowded conditions with poor sanitation and other facilities.

## Free, Prior & Informed Consent

*Companies may fail to obtain the free, prior and informed consent of indigenous communities when accessing or impacting on their lands and natural resources. Particular attention should be paid to the mining and agricultural sectors.*

South Africa did not ratify ILO Convention 169 on the rights of indigenous peoples, and indigenous groups are not officially recognised.<sup>617</sup> However, the National Heritage Resources Act mentions indigenous peoples and empowers them to participate in the conservation and management of the resources under their land.<sup>618</sup>

In South Africa, the National Environmental Management Act,<sup>619</sup> the Mineral and Petroleum Resources Development Act,<sup>620</sup> and numerous provisions related to local government require that efforts be taken by government, as well as by contracted businesses, to ensure public participation and that environmental impact assessments are conducted to ensure responsible natural resource governance.

Of particular significance is section 152 (1)(e) of the Constitution of South Africa, which states that it is one of the objectives of local government ‘to encourage the involvement of communities and community organisations in matters of local governance’.<sup>621</sup>

Despite this, the South African Human Rights Commission, in a report related to issues of acid mine drainage in 2013, concluded that ‘often times, consultation between stakeholders and communities either does not take place at all, or happens in a way that is not meaningful, leading to a disintegration of trust between all stakeholders. Mining companies need to put plans in place to ensure that affected communities are provided with clarity and certainty with regard to any decisions being made in their areas.’<sup>622</sup>

In 2005, the UN Economic and Social Council reported that relocations and land

redistribution negatively impacted indigenous peoples. Indigenous communities were relocated into areas where they could not practice their traditional lifestyles or readily access education and healthcare.<sup>623</sup> The 2011 Green Paper on Land Reform, developed by the Department of Rural Development and Land Reform<sup>624</sup> did not include dispossession of land before 1913, resulting in the exclusion of most land claims by the Khoisan indigenous community, according to Minority Rights Group International.<sup>625</sup>

Although some Khoisan groups received rural farmlands through the land reform process, the lack of start-up resources was reported to be a major challenge by the International Work Group for Indigenous Affairs in 2011. The Konrad Adenauer Foundation reported in 2013 that access and ownership of land, and post settlement support, remained unresolved problems for indigenous communities.<sup>626</sup> The intellectual property rights of indigenous people were also reportedly challenged through exploitation of their traditional knowledge by pharmaceutical companies.<sup>627</sup>

## Informal Housing

*Companies may contribute to poor housing conditions for their workers and local communities. Particular attention should be paid to this issue when operating in urban areas.*

According to the Housing Development Agency, 3.3 million households live in shacks.<sup>628</sup> Informal housing is linked to business, as people come from rural areas and neighbouring countries seeking employment, but cannot find safe, affordable housing.

Habitat for Humanity reported in 2014 that these households were without adequate services and in overcrowded shacks made from cardboard, corrugated iron and scrap wood.<sup>629</sup>

In a 2013 speech, the then-Minister of Housing and Human Settlements, Tokyo Sexwale, referred to South Africa's increasingly populous urban settlements as 'internal refugee camps'.<sup>630</sup> Moreover, despite South Africa having provided 3 million free houses between 1994 and 2013, the number of people living in informal settlements has not decreased significantly.<sup>631</sup>

Living conditions in informal settlements have been the subject of a number of investigations, including by the South African Human Rights Commission. In June 2013, the Commission undertook an investigation in Disteneng, an informal settlement in Limpopo province, where it was found that 27,000 people were sharing 20 self-made toilets as well as three water taps.<sup>632</sup> As of February 2015, the Commission's engagement with local authorities was ongoing.

Poor living conditions in surrounding informal settlements were also cited as a source of dissatisfaction of workers that resulted in the deaths of miners at Marikana in August 2012.<sup>633</sup> One year later, the Mail and Guardian newspaper reported that living conditions remained 'squalid' in the 15 informal settlements surrounding Lonmin's operations.<sup>634</sup> In July 2014, the North West provincial government and Lonmin announced a project to eliminate informal housing through the construction of 2500 homes in the areas adjacent to Marikana.<sup>635</sup>



## Access to Remedy

*Bodies to which victims of corporate human rights abuses can file grievances and seek redress.*

The Commission for the Restitution of Land Rights investigates claims and facilitates the submission of unsettled claims to the Land Claims Court.<sup>636</sup>

The Land Claims Court deals with disputes related to the Restitution of Land Rights Act, the Land Reform Act and the Extension of Security of Tenure Act.<sup>637</sup> It holds the same status as the High Court, and appeals against its decisions can be filed to the Supreme Court of Appeal or the Constitutional Court under certain circumstances.<sup>638</sup>

The Land Claims Court rendered 15 judgments in 2013.<sup>639</sup> The same year the U.S. Department of State reported that the majority of cases seeking government expropriations were against white farm owners, following court rulings, which stated that the land was seized from blacks during the Apartheid era. Matters were settled before any final expropriation

actions and, in all cases, agreement on compensation was reached.<sup>640</sup>

According to a 2012 report by the Black Association of the Agricultural Sector, farm workers evicted from their houses often lacked knowledge of the legal process and access to remedy due to the costs to file a claim at the High Court.<sup>641</sup>

Victims of human rights abuses can file a complaint at the South African Human Rights Commission, which has powers to investigate.<sup>642</sup>

Although South Africa ratified the Protocol to the African Charter on Human and Peoples' Rights, establishing the African Court on Human and People's Rights, the country did not accept the competence of the court to directly receive cases from NGOs and individuals. Consequently, in 2012 two cases could not be heard on grounds of lack of admissibility.<sup>643</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- August 2014, South African Human Rights Commission:* A complaint cited forceful removal of a community in 2006 to establish a golf estate, residential estate and a hotel. The community had resided on the land for many years and the land was used for grazing and access to water. They were relocated to adjacent land which had temporary structures of poor quality. The respondent has tabled an offer to the complainant that, as of February 2015, was yet to be accepted.
- July 2014, South African Human Rights Commission:* IRASA lodged a complaint about reselling land identified as traditional lands of the Khoisan people. The land was reportedly sold off for commercial interests and sacred sites were being sold off.
- August 2014, South African Human Rights Commission:* A complaint was lodged that certain portions of land were provided to the South African National Roads Agency Limited (SANRAL) for the construction of roads and an electronic tolling system. No

consultation with traditional leaders took place. The matter was referred to the Department of Local Government and Traditional Affairs.

- August 2014, South African Human Rights Commission:* An anonymous complaint was made against the Eastern Cape Parks and Tourism Agency. The complainant alleged that plans were afoot to incorporate farmlands into a nature game reserve. No consultations with residents had been conducted and allegations of forceful removals and that the respondent had released wild animals onto land occupied by community members had been made. As of February 2015, the Commission was communicating with the respondent.
- August 2014, South African Human Rights Commission:* A complaint was lodged about a community that had leased land since the 1950s from a Tribal Authority for agricultural purposes. The community requested assistance from the government to allocate the land to them. Instead, the land was sold to a private person.
- October 2013, Cape Times:* A property was mined for sand by a company, Macsand, in an area that was the subject of a land claim. Sand dunes had been affected, thereby altering the landscape to the detriment of the community.
- August 2014, South African Human Rights Commission:* An anonymous complaint alleged that the Eastern Cape Parks and Tourism Agency may have conducted illegal removals as well as unlawful transfers of land. The matter remained under investigation as of August 2014. There were also ongoing investigations related to the treatment of local communities by the Royal Bafokeng Nation's investment arm in the North West province, which remained the subject of review by the Commission, particularly in respect of unlawful evictions.<sup>644</sup>
- January 2014, SABC News:* Police allegedly killed a 28-year-old man who was part of a protest against an eviction in Gauteng province. A court order gave a development company permission to evict residents from a former mining area.<sup>645</sup>
- November 2012, Environmental Justice Organisations, Liabilities and Trade:* When Keaton Energy began its coal mining operations in Vanggatfontein, Mpumalanga province, residential farm workers lost their jobs in commercial farms due to the expansion of mining activities and were relocated to local informal settlements.<sup>646</sup>
- November 2010, Bengwenyama Minerals (Pty)Ltd and 13 others v Genorah Resources (Pty)Ltd and 5 others:* On 30 November 2010 the Constitutional Court delivered a judgment concerning the administrative fairness of the allocation of prospecting rights to a third party in terms of the Mineral and Petroleum Resources Development Act (MPRDA) on land owned by a community. The Constitutional Court held that the granting and execution of prospecting rights was a grave invasion of the property owner's rights. The Court held that the purpose of consultation with landowners, required by the MPRDA, was to provide them with the information necessary to make an informed decision on how to respond to the application.

The Constitutional Court concluded that the mining company had not consulted with the community as required by the MPRDA, and that the decision-maker had not given the community a hearing or complied with the fairness requirements of the Promotion of Administrative Justice Act. Furthermore, the environmental requirements in terms of the MPRDA had not been satisfied. Leave to appeal was granted to the community and the appeal succeeded.<sup>647</sup>

# Human Rights Guidance for Business

*Guidance by the Danish Institute for Human Rights and other institutions to help companies ensure respect for human rights when addressing common challenges.*

## Company Due Diligence Initiatives

**Anglo-American:** In 2001, the company established 'Speak Up', a confidential reporting system to which employees, business partner and other stakeholders can file complaints about conduct contrary to the values of Anglo-American. Speak Up is managed by Deloitte Tip-offs Anonymous. Complaints can be submitted through an online form or by telephone, fax, e-mail or regular mail. Telephone complaints can be submitted in English, isiZulu, Afrikaans, isiXhosa and Sesotho.<sup>648</sup>

## Company Beyond Compliance Initiatives

**Cape Kingdom Nutraceuticals:** In 2013, an agreement between the San and Khoi indigenous groups and the pharmaceutical company recognised the intellectual property right of indigenous peoples over the *buchu* medical plant and its use. The company agreed to hand over 3 percent of profits related to *buchu* products to the indigenous groups and share its knowledge on the commercial use of the plant, which is beneficial for combating obesity, diabetes and hypertension.<sup>649</sup>

# Engagement Opportunities

*Development initiatives by public and private actors that provide opportunities for companies to contribute to human development*

## Development Priorities

### **World Bank Country Partnership Strategy**

**2014-2017:** The strategy supports the government in creating jobs near urban townships, reducing travel distances and costs for poor households, and using land more efficiently.<sup>650</sup>

**National Development Plan (NDP):** The NDP identifies spatial disparities and slow economic growth as the main causes of underdevelopment in rural areas. To give effect to the plan, the Department of Rural Development and Land Reform has undertaken to reprioritise funds over the medium term toward rural development, and to ensure that geospatial and cadastral service land survey programmes used to identify and survey agriculturally viable land which can be allocated to smallholder farmers to contribute toward rural development.<sup>651</sup>

# Revenue Transparency & Management

*Human rights impacts related to transparency of government revenues received from business and the distribution of such revenues*

| Operating Environment   |   |
|---|---|
| Revenue Watch Index Rank<br>(of 58 countries, with 1 indicating the greatest degree of revenue transparency)                              | 21  |
| World Economic Forum Global Competitiveness Rank<br>(of 143 countries, with 1 indicating the best policy environment for competitiveness) | 56  |
| <a href="#">Legatum Prosperity Index</a> : Governance   | 53 (of 142)   |
| Ease of Doing Business Index rank<br>(of 183, where 1 indicates greatest ease for doing business)   | 41  |
| Transparency International: Corruption Perceptions Index<br>(of 180, where 1 indicates the lowest level of corruption)                    | 72  |
| World Bank Worldwide Governance Indicators<br>percentile rank, 2013   |   |
| Rule of Law   | 57.8  |
| Voice and Accountability  | 65.4  |
| Political Stability   | 44.1  |
| Government Effectiveness  | 66.5  |
| Regulatory Quality  | 64.1  |
| Control of Corruption   | 54.5  |
| Government revenue  | R899 billion or 26 percent of GDP for the financial year 2013/14. <sup>652</sup><br>Resources are mainly generated through direct taxes. <sup>653</sup>             |
| Government revenue by source  | <ul style="list-style-type: none"> <li>• Personal Income Tax: 34.5%</li> <li>• Corporate Income Tax: 20%</li> <li>• Value Added Tax: 26.4%<sup>654</sup></li> </ul> |

|  |  |
|--|--|
|  | <ul style="list-style-type: none"> <li>• Customs and Excise: 8.3%<sup>655</sup></li> <li>• Fuel Levy: 5.2%<sup>656</sup></li> <li>• Other: 4.1%<sup>657</sup></li> </ul>   |
| Revenue from natural resource extraction                   | During the financial year 2012/2013, tax revenues amounted to R810.1 billion (US\$73.6 billion) and royalties to R5 billion (US\$454.2 million). <sup>658</sup>  |
| Government expenditure                                     | R1.15 trillion in 2013/14 or 33.2% of GDP. Estimated at R1.351 trillion or 32.6% of GDP. <sup>659</sup>  |
| EITI Country   | Not a signatory<br><i>It is important to note that when consulted about whether to become party to this initiative, the Minister of the Department of Mineral Resources rejected EITI on the basis that it was unnecessary considering South Africa's Promotion of Access to Information Act which extends the right of access to information to the private sector.</i> <sup>660</sup>  |
| Construction Sector Transparency Initiative (COST) Country | Not currently, but South Africa has committed to having a Working Group established by COST to map out a programme for implementation for South Africa. <sup>661</sup>   |
| King III Report  | Drafted and published by the South African Institute of Directors, the King Reports provide a fully comprehensive list of principles to direct companies to operate with good governance, with transparency as a key component and feature.  |
| Open Government Partnership – Open Contracting             | South Africa is not yet participating in this initiative.  |
| Relevant law   | <ul style="list-style-type: none"> <li>• Constitution of South Africa (especially section 214)<sup>662</sup></li> <li>• Annual Division of Revenue Act</li> <li>• Mineral and Petroleum Resources Royalties Act</li> <li>• New Companies Act</li> <li>• Preferential Procurement Policy Framework Act</li> <li>• Prevention and Combating of Corrupt Activities Act</li> <li>• Protection of Information Bill</li> <li>• Protected Disclosures Act</li> <li>• Regulation 28 (Pensions Fund Act)<sup>663</sup></li> <li>• Competition Act</li> <li>• Promotion of Access to Information Act</li> <li>• Public Finance Management Act prescribes the general system for public procurement.<sup>664</sup></li> </ul> |
| Responsible agencies                                       | <ul style="list-style-type: none"> <li>• Ministry of Finance (National Treasury)</li> <li>• Financial and Fiscal Commission</li> <li>• Competition Commission</li> <li>• Public Service Commission</li> <li>• Public Protector</li> <li>• Directorate of Priority Crimes Investigation (the Hawks)</li> <li>• National Anti-Corruption Task Team</li> <li>• South African Revenue Service</li> <li>• Special Investigating Unit</li> </ul>   |

|                                  |  |
|----------------------------------|--|
| Local NGOs addressing this issue | <ul style="list-style-type: none"> <li>• Open Society Initiative for Southern Africa</li> <li>• Corruption Watch</li> <li>• International Budget Partnership</li> <li>• Right 2 Know</li> <li>• Khulumani Support Group</li> <li>• Public Service Accountability Monitor</li> <li>• Centre for Environmental Rights</li> <li>• Open Democracy Advice Centre</li> <li>• Democratic Governance and Rights Unit (based at the University of Cape Town)</li> </ul> |
|----------------------------------|--|

## Country Context

*Key human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

### Corruption

*Companies may attempt to unduly influence public officials. Particular attention should be given to transparency.*

South Africa has signed and ratified the United Nations Convention Against Corruption,<sup>665</sup> Convention on Combating Bribery of Foreign Public Officials in International Business Transactions<sup>666</sup> and the African Union Convention on Preventing and Combating Corruption.<sup>667</sup>

The Prevention and Combating of Corrupt Activities Act requires people in positions of authority in the public and private sector to report corruption of R100,000 (US\$9,000) or more to the police. Failure to do so is a criminal offence.<sup>668</sup> In addition, the act provides up to life imprisonment for a person convicted of corruption by the High Court, up to 18 years if convicted by a regional Magistrates' Court, and up to five years if convicted by a district Magistrates' Court.<sup>669</sup>

The Promotion of Access to Information Act (PAIA) is intended to ensure transparency and good governance in both the public and the private sectors. It requires periodic reporting as well as ensuring access for bodies such as the South African Human Rights Commission, which under the terms of the Act is responsible for

monitoring compliance with PAIA in both the private and public sectors.<sup>670</sup>

With the passage of the Protection of Personal Information Act (PIIA), all monitoring of compliance will be shifted to the Information Regulator, though as of February 2015 this body had not yet been established.<sup>671</sup> In 2013, Corruption Watch reported that a total of 13 national bodies had been established to combat or investigate graft.<sup>672</sup> In a 2013 article, the Institute for Security Studies noted a report by the law firm Edward Nathan Sonnenbergs in which it was stated that in the 2011/2012 financial year, public sector fraud cost taxpayers about R1 billion (US\$90.5 million).<sup>673</sup>

Of public officials accused of financial misconduct, 88 percent were found guilty, but only 19 percent were fired from their jobs.<sup>674</sup> In 2013 South Africa ranked 72nd out of 177 countries on Transparency International's Corruption Perceptions Index. According to this index, 77 percent of respondents felt that South African political parties were corrupt, while 54 percent of respondents felt that business was corrupt or extremely corrupt.<sup>675</sup>

The Institute for Security Studies reported corruption in the private sector, with 15 construction companies fined by the Competition Commission for bid rigging to pay a total of R1.46 billion (US\$132 million).<sup>676</sup> In a 2012 article, Environmental Justice

Organisations, Liabilities and Trade reported that 24 anti-corruption whistle-blowers were killed during the past year and in one case the killing was allegedly arranged by a mayor.<sup>677</sup>

## Revenue Transparency

*There may be lack of public access to information concerning the size of public revenues generated from taxes, royalties and other fees paid by companies. Particular attention should be paid to the areas of contracts between large companies and the South African government, especially the transfer of money and the award process, as well as a lack of annual reporting requirements for public budgets and accounts.*

The New Companies Act provides for the establishment of Social and Ethics Committees for large businesses and state owned companies.<sup>678</sup> These committees are mandated to monitor the company's compliance with relevant laws and codes; to bring matters to the attention of the board; and to report to shareholders on relevant social and ethical issues. In short, the act encourages corporate accountability and transparency, although it is limited in that many of these measures are aimed at promoting transparency to shareholders, rather than to a broad stakeholder base.<sup>679</sup>

The 2013 Resource Governance Index reported that the government did not publish mining contracts or environmental impact assessment reports, which are mandated by the National Environmental Management Act. Furthermore, the Department of Mineral Resources was reportedly one of the least transparent departments due to their non-compliance with the Promotion of Access to Information Act and lack of response to PAIA requests.<sup>680</sup> Despite this, the 2012 Open Budget Survey ranked South Africa as the world's second best performing country.<sup>681</sup>

Since 2010, all companies listed on the Johannesburg Stock Exchange are required to respect and report on the principles in the King III Report on Corporate Governance. Companies must report their data under each

of the criteria defined by the report or give an explanation why they are not reporting.

Besides financial data, the framework requires companies to provide environmental, social and governance information.<sup>682</sup>

According to a 2012 PricewaterhouseCoopers report, the top 100 South African companies (in terms of market capitalisation) did not provide comprehensive information in key areas, including risk management, during the 2011-2012 reporting period and faced challenges in integrated reporting.<sup>683</sup>

As at August 2014, South Africa was not a member or candidate country of the Extractive Industries Transparency Initiative or the Construction Sector Transparency Initiative.<sup>684</sup>

One of the challenges to revenue transparency is the offshore transfer of profits. Business Day reported that one of the challenges faced in South Africa was the abuse of transfer pricing by multinational companies which used the practice to avoid taxes.<sup>685</sup>

## Public Procurement

*Companies may engage in corruption when bidding on public tenders. Particular attention should be paid to the areas of business interests of politicians and public officials, and lack of transparency in public tenders and contracting.*

The South African Constitution states that public procurement should be conducted in a fair, equitable, transparent, competitive and cost-effective way. Those principles are implemented through five pillars:

- 1) Value for money;
- 2) Open and effective competition;
- 3) Ethics and fair dealing;
- 4) Accountability and reporting; and
- 5) Equity.<sup>686</sup>

The 2014 Business Anti-Corruption Portal reported that the government established an online Tender Bulletin to access public procurement tenders and several provincial and local governments were following the same procedure.<sup>687</sup> The government also



implemented a ‘targeted’ procurement system, designed to ensure that procurement was mainly conducted through businesses owned or operated by previously disadvantaged groups as part of the social integration policy.<sup>688</sup>

In 2014, the Business Anti-Corruption Portal reported that, according to the Special Investigating Unit, public procurement was characterised by corruption, with 20 percent of all government procurements in 2011 being lost through theft or negligence.<sup>689</sup> The programme of Broad-Based Black Economic Empowerment, which provides preferential bidding conditions to black-owned businesses, had been criticised for favouring wealthy black elites, and had led to increased corruption in public procurement.<sup>690</sup>

In August 2014, it was reported that South Africa’s eight largest metropolitan municipalities had accumulated more than R3.5 billion in ‘questionable spending’.<sup>691</sup> The Open Government Partnership Initiative, of which South Africa is one of the founding members, has established an initiative called open contracting that provides a list of principles to guide the state in contracting private

companies, and to promote transparency within these interactions.<sup>692</sup>

## Revenue Sharing

*There may be lack of public access to accountability concerning the usage and distribution of public revenues generated from taxes, royalties and other fees paid by companies.*

A 2012 report stated that provincial governments earned 89 percent of their revenues from their own sources and were not dependent on central government transfers.<sup>693</sup> In 2013, the World Bank reported that revenue collection quadrupled and the number of taxpayers more than doubled between 1996 and 2007.<sup>694</sup>

According to a 2013 article in The South African, the government’s fight against tax evasion focused on large businesses and transfer pricing, the construction and textile sector, wealthy individuals and their associated trusts, illicit cigarettes, small businesses and tax practitioners and trade intermediaries.<sup>695</sup>

## Access to Remedy

*Bodies to which victims of corporate human rights abuses can file grievances and seek redress.*

The Companies Act allows any person to initiate legal proceeding against the management of a company for breaching their duties.<sup>696</sup> The Office of the Public Protector (i.e. ombudsman) can investigate and prosecute cases of corruption with respect to public funds, improper enrichment and receipt of improper advantage by public authorities. Complaints can be filed for free within two years of the events.<sup>697</sup>

In terms of the Promotion of Access to Information Act (PAIA), any organisation or individual can make a request for information held by a public or private body. Furthermore, victims of human rights abuses can file a

complaint at the South African Human Rights Commission (SAHRC), which has investigatory powers.<sup>698</sup> In the 2013/2014 financial year, the SAHRC handled 35 complaints related to possible violations of PAIA.

The Competition Commission can also be approached to help address anti-competitive behaviour. Other institutions that can be approached include the Public Service Commission (public management) and the South African Revenue Service (tax evasion).

Although South Africa ratified the Protocol to the African Charter on Human and Peoples’ Rights, establishing the African Court on Human and People’s Rights, the country did not accept

the competence of the court to directly receive cases from NGOs and individuals.

Consequently, in 2012 two cases could not be heard on grounds of lack of admissibility.<sup>699</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- *April 2014, Allpay v SASSA and Others at the Constitutional Court:* The case effectively states that both parties (i.e. public and private) in a contract are liable to fulfil that contract when it has a constitutional dimension, and furthermore that public interest must be factored in when assessing the invalidity of a contract.<sup>700</sup>
- *October 2013, Business Day:* R400 million (US\$36 million) in the 'D-account', the account used to collect payments of mining royalties in the North West province, were mismanaged. Those funds were meant to be used by up to 900 tribal councils for the development of mining communities. An investigation was ongoing.<sup>701</sup>
- *September 2013, Corruption Watch:* Gold Fields was investigated by the U.S. Securities and Exchange Commission over a R2.1 billion (US\$190 million) Black Economic Empowerment deal and the granting of a mining licence for its South Deep mine near Johannesburg. Allegations were made against ANC members and government officials for using their political influence to benefit from the deal.<sup>702</sup>
- *October 2012, Environmental Justice Organisations, Liabilities and Trade:* Electricity bills reportedly increased by 128 percent since 2008, partly due to a deal between the mining company BHP Billiton and some government officials, which provided the company with subsidies.<sup>703</sup>
- *March 2011, Helen Suzman Foundation:* The case of *Glenister v President of the Republic of South Africa* was heard in the Constitutional Court. The Court found that the constitution, along with South Africa's obligations under international law, required that an independent body be established to investigate corruption in South Africa. Corruption was said to 'undermine...the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms'.<sup>704</sup>

## Human Rights Guidance for Business

*Guidance by the Danish Institute for Human Rights and other institutions to help companies ensure respect for human rights when addressing common challenges.*

### Company Due Diligence Initiatives

**Business Unity South Africa (BUSA):** The network represents South African business on macroeconomic issues and is composed of 49 business organisations. BUSA put together an information guide to help companies, especially SMEs, particularly those that are vulnerable to

corruption, to understand the anti-corruption laws in South Africa, how to avoid corruption and how to build an ethical business.<sup>705</sup>

### Company Beyond Compliance Initiatives

**Revenue sharing with local communities:** The Royal Bafokeng Nation, a community comprised of 150,000 people living in 29 villages located in the world's largest platinum reserve, the Merensky Reef in the North West province, owns about 13 percent of the mining company Impala Platinum. The community is also a majority shareholder of its own platinum mining and refining company, Royal Bafokeng Platinum, which employs more than 3000 people. In 2004, the Royal Bafokeng Nation Development Trust was created to manage the community resources and invest them in infrastructure, education, health, security and sport.<sup>706</sup>

**Union Platinum Mine:** Another example of direct community engagement in mining is the Bakgatla-Ba-Kgafela, composed of 350,000

people located in 32 villages in the Moruleng area, North West province.<sup>707</sup> The community owns 15 percent of the Union Platinum Mine, together with Anglo Platinum, which owns 85 percent.<sup>708</sup> Revenues from mining were invested in the community through infrastructure and capacity development and job creation.<sup>709</sup>

**Business Against Crime South Africa (BACSA):** The non-profit organisation supports the government in the fight against crime, including fraud and corruption. It aims to support companies in eliminating crime-enabling processes, building systems and approaches within business and improving crime prevention measures within the control of business.<sup>710</sup>

## Engagement Opportunities

*Development initiatives by public and private actors that provide opportunities for companies to contribute to human development*

### Public Sector Initiatives

**The South African King Committee Report on Corporate Governance (King III):** This report is a code of corporate governance and a requirement for companies listed on the Johannesburg Stock Exchange. The framework aims to align businesses with international best practice in terms of reporting their impacts on environmental and social conditions.<sup>711</sup>

### Development Priorities

The **National Development Plan** recognises that corruption is a significant impediment to economic and social development. It therefore includes strategies for:

- a. Building a resilient anti-corruption system;
- b. Strengthening accountability and responsibility of public servants;
- c. Creating a transparent, responsive and accountable public service; and
- d. Strengthening judicial governance and the rule of law.<sup>712</sup>

# Security & Conflict

*Human rights impacts related to company interaction with public and private security providers.*

| Operating Environment                               |  |
|---|--|
| Failed States Index                                 | 113th of 177 countries <sup>713</sup>  |
| <u>Legatum Prosperity Index</u> : Safety & Security | 77   |
| Relevant law  | <ul style="list-style-type: none"><li>• Constitution of South Africa<sup>714</sup></li><li>• Correctional Services Act</li><li>• Independent Police Investigative Directorate Act</li><li>• Private Security Industry Regulation Act</li><li>• Private Security Industry Regulation Amendment Bill</li><li>• Firearms Control Act</li></ul>                                |
| Responsible agencies                                | <ul style="list-style-type: none"><li>• Department of Police</li><li>• Department of Correctional Services</li><li>• Independent Police Investigative Directorate</li><li>• Judicial Inspectorate of Correctional Services</li><li>• Private Security Industry Regulatory Agency</li><li>• Public Order Act</li><li>• Public Safety Act</li><li>• Gatherings Act</li></ul> |
| Local NGOs addressing this issue                    | <ul style="list-style-type: none"><li>• Institute for Security Studies</li><li>• Lawyers for Human Rights</li><li>• Centre for Human Rights</li></ul>  |

## Country Context

*Key human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

### Public Security Forces

*Public security forces may infringe on the human rights of workers or local populations when protecting company sites and installations. Particular attention should be paid to excessive use of force, arbitrary detention, violent dispersal of public or worker protests, and in particular the mining and agricultural sectors.*

The constitution guarantees the rights to life, freedom from all forms of violence and prohibits torture and other cruel, inhuman and degrading treatment or punishment.<sup>715</sup>

According to Motala, violence during strike action has become commonplace in South Africa, with striking workers, police officials, political parties, trade unions and private security companies contributing to increasing brutality.<sup>716</sup> During the 2014 strike by the National Union of Metal Workers of South Africa (NUMSA), it was reported that 100 people had been arrested on charges of assault, intimidation and public violence.<sup>717</sup>

In 2012, the president of South Africa appointed the Marikana Commission of Inquiry to investigate violence that led to the death of 44 people (mostly striking workers), the injury of more than 70 and the arrest of 250 people at the Lonmin-owned Marikana mine in North West province.<sup>718</sup> A report commissioned by Lonmin that leaked in 2012 referred to problems of severe poverty, lack of services, poor health conditions and inequality as contributing to worker discontent.

Despite awareness of these challenges, Lonmin's social responsibility efforts did not fully address the multitude of problems in surrounding communities, with the report referring to the potential for violence as a 'powder keg'.<sup>719</sup> Subsequently, in an address to Parliament, President Jacob Zuma attributed

the Marikana tragedy to high levels of poverty, unemployment and inequality.<sup>720</sup>

According to a 2013 ABC article, the Marikana Commission accused the police of falsifying and hiding documents and lying about the events.<sup>721</sup> While the Marikana Commission is, as of August 2014, still ongoing, questions have been raised about the role of Lonmin, which had refused to speak to demonstrating workers.<sup>722</sup>

The actions of the South African Police Service in the Marikana incident have been examined closely, with suggestions made that there was poor preparation for incidents of public violence as well as collusion with private security personnel.<sup>723</sup> According to a 2012 Amnesty International report, despite constitutional guarantees, the police regularly violated the right to life and the right to freedom from torture of arrested and detained persons.<sup>724</sup> In 2012, the Independent Police Investigative Directorate Act entered into force, providing for police criminal liability for failure to co-operate with investigations into their conduct.<sup>725</sup> As at August 2014, South Africa had not ratified the United Nations Optional Protocol to the Convention Against Torture (OPCAT), and as a result there is no basis for a permanent oversight body to monitor incidents of torture.<sup>726</sup>

The Guardian stated in 2013 that reports of police brutality had more than tripled in the past 10 years, yet only one in 100 cases resulted in convictions.<sup>727</sup> Although 1,448 police officers were convicted for serious crimes, these officers were not dismissed.<sup>728</sup> In 2013, the Institute for Security Studies reported that, according to the Independent Police Investigative Directorate, police brutality increased 9 percent and 18 percent in the Eastern Cape and Mpumalanga provinces, respectively.<sup>729</sup>

During a strike by workers at Lonmin's platinum mines in May 2014, four people were reportedly killed. The Association of Mine Workers and Construction Union (AMCU) accused the police of 'taking sides' during clashes related to the strike, and also intimidating striking workers.<sup>730</sup>

In 2013, the South African Human Rights Commission opened an investigation against police in the Western Cape province following numerous complaints of use of force against farm workers and dwellers, including women and children.<sup>731</sup> The investigation is still ongoing as of August 2014.

According to a 2012 Amnesty International report, the police were passive or complicit in violence against refugees, asylum seekers and migrants.<sup>732</sup> In 2013, police raided 600 small businesses run by asylum-seekers and refugees in the Limpopo province. The operations reportedly took place without warning, were indiscriminate and involved the seizure of trading stock. Refugees and asylum-seekers were subjected to xenophobic verbal abuse, detention and charged or fined for running their businesses.<sup>733</sup>

## Private Security Forces

*Private security forces may infringe on the human rights of workers or local populations when protecting company sites and installations. Particular attention should be paid to the excessive use of force, arbitrary detention, and the violent dispersal of public or worker protests. Particular should be paid to the mining, agricultural and informal sectors.*

A 2012 Mail & Guardian newspaper article noted that, following the unrest at Lonmin's Marikana mine in August 2012, private security forces at mines were reportedly increasing the use of firearms and showed readiness to use deadly force in case of labour unrest, while public security forces were seen as less likely to use force.<sup>734</sup>

The Marikana Commission noted discrepancies in relation to the role of Lonmin's private security team in the violence due to

inconsistent recording of shots fired at victims between data provided to the Commission and data contained in logbooks.<sup>735</sup>

The private security sector as a whole was estimated at 9,000 private security companies, employing 400,000 people, outnumbering both the police and the army.<sup>736</sup> According to Private Security Monitor, during the Apartheid regime private security companies employed active military personnel, but in the post-Apartheid era they mostly employ retired military officers.<sup>737</sup>

The SADC Protocol on Finance and Investment is designed to ensure that investors are treated equitably, whether national or international. However, it also contains a provision that allows the government to regulate investor activity in the public interest and in particular where health and safety are concerned.<sup>738</sup>

The 2013 Private Security Industry Regulation Amendment Bill provides greater regulatory power to the Department of Police and a quota of 51 percent South African ownership of private security companies.<sup>739</sup> The legislation would directly affect the main foreign-owned security companies operating in South Africa, namely ADT, Chubb, G4S and Securitas, which together employed approximately 30,000 people in 2013, and were estimated in 2014 to be worth around R50 billion.<sup>740</sup> Numerous objections have been raised to the bill, over concerns that it may violate South Africa's obligations under international law, including the SADC Protocol and World Trade Organisation (WTO) regulations, even though the Ministry of Police has suggested that this sector is critical for safety and, therefore, exempt from these instruments.<sup>741</sup>

Private security forces were particularly active in Gauteng and KwaZulu-Natal provinces, according to a 2012/2013 report of the Private Security Industry Regulatory Authority.<sup>742</sup> Site investigations were conducted in all provinces, but were primarily in the Gauteng, Western Cape, Eastern Cape and KwaZulu-Natal provinces.<sup>743</sup>

A 2012 Daily Maverick newspaper article reported a lack of munitions records, data on

deaths or injuries caused by private security companies, and general oversight of the industry.<sup>744</sup> In 2008 approximately 14,729 private security employees (out of 170,728) were found to have criminal records.

The South African Human Rights Commission has received complaints in respect to human rights violations committed by private security personnel. These include potential violations of the right to privacy as a result of searches conducted on individuals, as well as unlawful arrests and use of illegal equipment.

Engagements with the Private Security Industry Regulation Agency have not been successful.<sup>745</sup>

In addition, a broad investigation into evictions is being conducted by the Commission, paying specific attention to the 'Red Ants', a security service used by public housing authorities to conduct evictions.<sup>746</sup>

## Social Conflict

*Companies may contribute to social conflict with or within communities. Particular attention should be paid to the mining, agricultural, manufacturing and informal sector.*

South Africa has had a number of social conflicts in recent decades linked to the operations of companies. Conflict between rival trade unions is a new phenomenon and a source of violence, as reported by Leadership magazine in 2013.<sup>747</sup> According to a 2013 Global Research article, unrest in the mining, agricultural, manufacturing and public sector worsened since 2012 due to the devaluation of the national currency, the fluctuation of strategic mineral prices, and the lack of improved working conditions in the mining sector.<sup>748</sup>

Frustrations linked to the redistribution of farmland led to violence against white-owned farms in 2012, as reported by the Minority Rights Group International. The outbreak of violence was exacerbated by pronouncements of some political figures.<sup>749</sup> Research conducted by Andrew Charman and Laurence Piper of the Sustainable Livelihoods Foundation referred to 'violent entrepreneurship' as a contributing factor to xenophobic violence, due to high levels of criminal activity, competition between local and foreign-owned businesses and poor or onerous regulation of businesses owned by non-nationals.<sup>750</sup>

## Access to Remedy

*Bodies to which victims of corporate human rights abuses can file grievances and seek redress.*

The High Court has the jurisdiction to deal with the most serious criminal matters, while the Magistrate Courts deal with less serious criminal and civil cases. The latter are divided into regional courts, district courts, regional magistrate's courts and ordinary magistrate's courts. Compared to ordinary magistrate's courts, the regional magistrate's courts deal with serious cases such as murder, rape, armed robbery and serious assault.<sup>751</sup>

The primary duty of the Independent Police Investigative Directorate (IPID) is to investigate crimes allegedly committed by police officers, including violations of SAPS policy as well as national legislation. Section 4 of the IPID Act

regulates the relationship between the IPID and other state organs ensuring that IPID remains impartial and independent. In its 2012/2013 annual report, IPID disclosed that a total of 6,728 cases were lodged before it. The majority were assault cases and totalled 4,131. Of the cases received, 703 were other criminal matters, 670 were complaints of discharge of official firearms and 431 of the cases were deaths as a result of police action. There were only 84 convictions, meaning that 1.2 percent of criminal cases opened against law enforcement officials resulted in convictions.<sup>752</sup>

According to a report by the Institute for Security Studies, cases of police brutality



brought against the SAPS in 2013 have had serious consequences for the taxpayer, as the South African Police Service was facing civil claims amounting to more than R480 million in relation to assault and R1.1 billion related to shooting incidents.<sup>753</sup>

The 2012/2013 report of the Private Security Industry Regulatory Authority stated that in March 2013, a total of 1,301 criminal cases were outstanding, compared to 771 a year earlier. A total of 727 new cases were opened in the reporting period, a figure that accounts for a 203 percent increase when compared to the previous year.<sup>754</sup>

Victims of human rights abuses can file a complaint at the South African Human Rights Commission, which has investigatory powers.<sup>755</sup> During the 2013/2014 financial year, the Commission handled almost 5,000 cases, of which 13 percent were related to conditions of detention, imprisonment without trial and the right to appeal.<sup>756</sup>

Other institutions that can be approached for remedies are the Correctional Services and the office of the Judicial Inspectorate.

Although South Africa ratified the Protocol to the African Charter on Human and Peoples' Rights, establishing the African Court on Human and People's Rights, the country did not accept the competence of the court to directly receive cases from NGOs and individuals. Consequently, in 2012 two cases could not be heard on grounds of lack of admissibility.<sup>757</sup>

Following the death of mine workers at the Lonmin-owned Marikana mine in the North West province in 2012, the International Financial Corporation's Compliance Advisor Ombudsman (CAO) opened a preliminary investigation. Despite the identification of environmental and social concerns related to the investment, the CAO decided not to proceed with a further investigation as there was no direct link between those concerns and the death of workers, and no complaint from affected workers was filed.<sup>758</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- *Ongoing 2013-2014, South African Human Rights Commission:* Complaints received regarding the inappropriate searching of customers by private security personnel employed by businesses.
- *Ongoing 2013-2014, South African Human Rights Commission:* The Commission is undertaking a broad investigation of evictions. The evictions processes implemented by sheriffs appear in some instances to be outsourced to a private security company commonly known as the 'Red Ants'. The company is reported to have earned a reputation of conducting evictions that involve forcible removal, assault and damage to property. The investigation is in progress.
- *Ongoing 2013-2014, South African Human Rights Commission:* Numerous complaints against private security companies and their abuse of authority. There are complaints of unlawful arrests and detentions, use of shocking devices on children, violations of the right to freedom and security of the person. Engagements with Private Security Regulatory Authority (PSIRA) have proven ineffective as regulation of the security officers is the domain of the individual company and state oversight appears to be lacking.
- *March 2014, South African Human Rights Commission:* A complaint was lodged against Shoprite for chaining an alleged shoplifter at an entrance for many hours. The police were called to intervene.

- *February 2014, COSATU:* Some white members of the Fidelity security company in Sun City, North West province, were accused of racial attacks, sexual harassment and attempted rape of black workers.<sup>759</sup>
- *February 2014, Mining:* One worker was killed during a protest at the Amplats mine owned by Anglo American Platinum in Limpopo province. An investigation was launched to determine whether the death was the responsibility of the police or the private security company that was involved in quelling the protest.<sup>760</sup>
- *January 2014, SABC News:* A 28-year-old man was killed by the police while protesting against evictions in the Gauteng province. Through a court order, a development company got permission to evict residents from a former mining area.<sup>761</sup>
- *October 2013, BBC:* Detainees at Mangaung prison, in Free State province, claimed to have been subject to electric shocks and forced injections. The prison is managed by G4S, a British security firm. The Department of Correctional Services opened an investigation.<sup>762</sup>
- *May 2013, The Guardian:* A confidential South African government report stated that detainees at Mangaung prison, in Free State province, were held in isolation for up to three years and life-saving medication were denied to inmates with tuberculosis and HIV/AIDS. The prison is managed by G4S, a British security firm.<sup>763</sup>
- *May 2013, BBC:* Ten mining workers were injured by security forces while striking at Lanxess-owned chrome Rustenburg mine, in the North West province.<sup>764</sup>
- *March 2013, Institute for Security Studies:* A taxi driver reportedly died due to police violence in Daveyton, Gauteng province.<sup>765</sup>
- *January 2013, ITUC:* Police used force against more than 800 farm workers protesting in Nkqubela, Robertson city, in the Western Cape province.<sup>766</sup>
- *November 2012, Daily Maverick:* Two workers were allegedly killed by a private security firm contracted by the Canadian mining company, Forbes & Manhattan Coal Corp, in the KwaZulu-Natal province.<sup>767</sup>
- *August 2012, Bloomberg:* Thirty-four mine workers were killed by provincial police in Rustenburg, North West province. The workers were protesting in an unprotected strike demanding an increase in their wages at Lonmin's Marikana mine.<sup>768</sup>
- *May 2012, Amnesty International:* Twelve police officers in the Western Cape province were charged with the abduction and murder of Sidwell Mkwambi in 2009, and the abduction and alleged torture of Siyabulela Njova.<sup>769</sup>

# Human Rights Guidance for Business

*Guidance by the Danish Institute for Human Rights and other institutions to help companies ensure respect for human rights when addressing common challenges.*

## Company Due Diligence Initiatives

**BHP Billiton:** The mining giant's manganese focused subsidiary, Samancor Manganese, started with a human rights and security training programme in 2013. The training aims

to enhance the capacity of employees on basic human rights understanding, and in particular how this relates to security operations. The materials and sessions are developed and delivered by the Centre for Human Rights, University of Pretoria.<sup>770</sup>

## Engagement Opportunities

*Development initiatives by public and private actors that provide opportunities for companies to contribute to human development*

### Public Sector Initiatives

The finalisation of the Marikana Commission is intended to include a report, along with recommendations, for state and non-state actors on how to deal with a number of challenges related to human development and human security which may have been associated with the incident in August 2012.<sup>771</sup>

The South African Human Rights Commission is participating in the Marikana Commission investigation. The Commission has designated Business and Human Rights as one of its focus area for the 2014/2015 financial year and intends to engage stakeholders, including government and the corporate sector in advocacy, monitoring and investigative efforts.

### NGO Initiatives

**Business Against Crime South Africa (BACSA):**

The non-profit organisation supports the government in the fight against crime, including fraud and corruption. It aims to support companies in eliminating crime-enabling processes and build systems to improve crime prevention measures.<sup>772</sup>

# Sector Profiles

## Agriculture

| Operating Environment                 |   |
|---------------------------------------|---|
| Sector contribution to GDP (%)        | 2.6 (2013 estimate) <sup>773</sup>  |
| Sector contribution to employment (%) | 11.6 <sup>774</sup>   |
| Major products                        | Maize, wheat, sugar cane, sunflower seeds and fruits  |
| Relevant laws                         | <ul style="list-style-type: none"> <li>• Conservation of Agricultural Resources Act, 43 of 1983</li> <li>• Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act, 36 of 1947</li> </ul> |

Between 12 percent and 13.7 percent of land in South Africa is arable, with approximately 22 percent being 'high-potential arable' land. About 1.3 million hectares of land are irrigated.<sup>775</sup> In 2007 there were 39,966 commercial farming units in South Africa.<sup>776</sup>

Agricultural activities included intensive crop production (maize, wheat, sugar cane, and sunflower seeds), poultry, cattle, and sheep farming.<sup>777</sup> In 2013, New Agriculturist reported that South Africa was the largest maize producer and exporter in Africa.<sup>778</sup>

The Department of Agriculture, Forestry and Fisheries established a Smallholder Development Working Group to boost the coordination of entities supporting smallholders.<sup>779</sup> The Household Food Security and Ilima-Letsema Campaign aimed at soliciting communities to plough, plant and produce their own food. The Ilima-Letsema Programme focused on increasing food production and rehabilitating irrigation schemes. During 2011-2012, the programme created 14,029 jobs.<sup>780</sup> These programmes are an addition to the ministry's overall strategy.<sup>781</sup>

## Areas for Attention

### Air & Water Pollution

*The health and livelihoods of local populations may be adversely impacted by company operations.*

As of January 2012, the Blue Scorpions unit, tasked with enforcing the National Water Act, was investigating 85 cases of agricultural companies not applying for verification of lawfulness of existing water use and not taking action to rectify contraventions.<sup>782</sup>

### Barriers to Unionisation

*Workers may be prevented from forming or joining independent worker's associations.*

The agricultural sector, at 5 percent, has the lowest percentage of unionised members in the country.<sup>783</sup> Even though in reality there are many unions, the opposite was true for the agriculture sector, as access was difficult and farms where the unions should be formed and operate are guarded as private spaces.

According to a 2012 report by the Black Association of the Agricultural Sector, 25 percent of farm workers in the Western Cape Province could not freely join a trade union, and in more than 40 percent of cases trade unions had no ready access to farms.<sup>784</sup>

According to a 2012 report by the Black Association of the Agricultural Sector, larger farms were more inclined toward collective bargaining than small farms in the Western Cape Province.<sup>785</sup>

### Displacement

*Local populations may be improperly removed from their lands to make way for company investments.*

According to a report by the Black Association for the Agricultural Sector conducted in the

Western Cape, more than a million people have been evicted from farms between 1994 and 2004. Farmers reportedly took advantage of the low levels of literacy among farm workers to push through urgent interdicts in courts, knowing that the workers would not be able to defend themselves against the order. Of particular concern was the fact that the homes that farm workers are evicted from are built with grant money allocated to the farmer for the specific purpose of building accommodation for them.<sup>786</sup>

According to Human Rights Watch, more than 930,000 farm dwellers were evicted without compensation between 1994 and 2004, particularly in cases where the persons in question were no longer able to work. Farmers reportedly cut electricity and water supply to make dwellers leave and harassed them at night with security forces and dogs. Criminal proceedings were rarely initiated for these evictions.<sup>787</sup>

The same report also noted that farm workers were provided with accommodations on farms as part of their employment and were often joined by their families and former workers, including the elderly and the injured.

The Extension of Security of Tenure Act (ESTA) protects farm dwellers by regulating evictions, providing access to legal remedies when unlawful evictions occur (e.g. notices and court orders), and prohibiting retaliatory measures such as cutting off water supply. In 2012 the Special Rapporteur on the Right to Food noted that this legislation resulted in employers circumventing the provisions of the Act by reducing the quality of facilities on farms, including housing and switching to employment contracts, leading to 'pre-emptive evictions' or 'voluntary' departures.<sup>788</sup> A 2013 Think Africa Press article reported that a lack of governmental capacity in monitoring legal processes, and a lack of clarity on the rights and duties of owners and dwellers, has affected the

implementation of the law, and as a result evictions occurred.<sup>789</sup>

A 2013 Think Africa Press article reported that a lack of governmental capacity in monitoring legal processes, and a lack of clarity on the rights and duties of owners and dwellers, has affected the implementation of the law and as a result evictions occurred.<sup>790</sup>

## Informal Sector

*Workers may lack written employment contracts, or may otherwise lack the protection of labour laws.*

According to a 2012 report by the Black Association of the Agricultural Sector, only about 30 percent of farm workers in the Western Cape province signed a work contract, of which only two-thirds possessed a copy of such a contract.<sup>791</sup>

## Forced Labour

*Companies may deny workers the ability to freely enter and leave employment.*

Employers have reportedly had migrants arrested and deported as illegal immigrants.<sup>792</sup> According to the 2013 U.S. Department of State Trafficking in Persons Report, the government failed to monitor and investigate labour trafficking in agriculture, among other sectors.<sup>793</sup>

## Land Distribution

*Companies may disrupt the livelihoods of local populations if they do not establish the ownership and use of land before it is purchased.*

As a result of the discriminatory land distribution system under Apartheid, thousands of black and coloured farm workers continued to suffer from insecure tenure rights and lived as illegal squatters.<sup>794</sup> The South African government committed to transferring 30 percent of land to black owners by 2014. However, according to the Freedom House

report, only about 6 percent was transferred by the end of 2011.<sup>795</sup>

A 2013 South Africa Info article reported that, according to the government, from 1994 to 2013, approximately 4,860 farms were transferred to black owners through the redistribution programme, benefitting about 231,000 people, including more than 50,000 women, 32,000 youth and 674 people with disabilities.<sup>796</sup>

While Freedom House reported that 90 percent of redistributed farms failed to become economically viable as commercial enterprises, the Institute for Poverty, Land and Agrarian Studies reported that half of the restitution resulted in better living conditions for the beneficiaries.<sup>797</sup> However, the redistribution programme reportedly lacked coherence and support for farmers and business plans provided to new farmers were for commercial farming and did not adequately take into account their abilities and wishes.<sup>798</sup>

The South African government has identified women, farm workers, persons living with disabilities and young people as priority groups in terms of land reform. However, there is no strategy specifically targeting these groups and no data indicate the extent to which they have been beneficiaries of land reform.

## Occupational Health & Safety

*Companies may not adequately prevent accidents and long-term health effects in the workplace.*

A 2011 Human Rights Watch report stated that agricultural workers were exposed to pesticides without adequate safety equipment; did not have access to drinking water, hand washing facilities or toilets; and were refused paid sick leave. Many workers were only able to sanitise at home, and as a result posed serious health risks to their immediate family members.<sup>799</sup>

The same report noted that only 107 labour inspectors were responsible for inspecting over 6,000 farms and all other workplaces in the Western Cape province.<sup>800</sup> An agreement between the Department of Labour and the

farmer's association, Afri South, required inspectors to notify farmers before inspections.<sup>801</sup>

## Security & Conflict

*Public security forces may infringe on the human rights of workers or local populations when protecting company sites and installations.*

In 2013, the South African Human Rights Commission opened an investigation following numerous complaints of use of force by police against farm workers and dwellers, including women and children, in the Western Cape province.<sup>802</sup> As of February 2015, the investigation was ongoing.

In 2012, frustrations linked to the redistribution of farmland led to violence against white-owned farms, as reported by the Minority Rights Group International. The outbreak of violence was exacerbated by hate speech by political figures, including former and current ANC representatives.<sup>803</sup> Research conducted by Andrew Charman and Laurence Piper of the Sustainable Livelihoods Foundation referred to 'violent entrepreneurship' as a contributing factor to xenophobic violence, due to high levels of criminal activity, competition between local and foreign-owned businesses and poor or onerous regulation of businesses owned by non-nationals.<sup>804</sup>

In 2012, The Telegraph reported that white farm owners were targeted in violent attacks. Estimates of farmers killed since 1990 vary from 1,500 to 3,000.<sup>805</sup> While the country's murder rate in 2011 amounted to about 32 per 100,000 people, among farmers, the rates rose to 99 per 100,000.<sup>806</sup> As of February 2015, this issue had been recognised by the government, with the newly appointed Minister of Police stating that the issue was high on the ministry's agenda.<sup>807</sup>

## Wages

*Workers may not be able to earn a wage sufficient to meet the basic needs for themselves and their dependants.*

Mywage reported that, in approximately 45 percent of cases, the minimum wage requirement was not respected. It also estimated that this number was higher in the agricultural sector.<sup>808</sup>

The 2011/2012 report of the Employment Equity Commission stated that the minimum wage for farm workers was not sufficient for them to survive.<sup>809</sup> About 50 percent of farm workers were paid between R251 (US\$23) and R330 (US\$30) per week, which amounted to less than the minimum wage.<sup>810</sup> The situation was particularly critical in the Western Cape province.<sup>811</sup>

## Water Scarcity

*Companies may adversely impact the access of local populations to safe and affordable water for personal or other use.*

In 2013, Business Day reported that agriculture, covering 1.5 percent of arable land, used 63 percent of the country's fresh water reserves for irrigation.<sup>812</sup> According to the Department of Water Affairs statistics, in 2010 the agricultural sector was issued 127 pre-directives, 48 directives and 13 criminal charges.<sup>813</sup>

## Women

*Companies may disproportionately affect the health, livelihoods or material well-being of women, or may exacerbate already-existing gender disparities in development.*

The Black Association of the Agricultural Sector reported in 2012 that approximately 64 percent of workers in the agricultural sector were males.<sup>814</sup> According to the 2013 South Africa Survey, the total number of males working in agriculture was estimated at 496,000 while women were 217,000.<sup>815</sup>



## Working Hours

*Workers may be subject to excessive working hours and may be denied compensation for overtime work.*

According to a 2012 U.S. Department of State report, working hours were not adequately monitored on small farms, where 12-hour workdays were common during harvest time, and few farmers paid for overtime.<sup>816</sup>

## Worst Forms of Child Labour

*Companies may employ children under 18 under conditions of forced labour or in work that is hazardous, harmful or exploitative.*

According to the 2012 U.S. Department of Labour report, children were involved in the worst forms of child labour, mainly in the agricultural sector and especially boys. Children working in agriculture experienced long working hours, used dangerous tools and applied harmful pesticides. Children herding livestock reportedly suffered injuries caused by animals.<sup>817</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- August 2014, South African Human Rights Commission:* A complaint was lodged about a community that had leased its land since the 1950s from a Tribal Authority for agricultural purposes. The community requested assistance from the government to allocate the land to them, but instead the land was sold to a private person.
- January 2013, BBC:* Farm workers in the wine-producing Western Cape region went on strike, demanding an increase of their daily wage to US\$17.<sup>818</sup>
- January 2013, International Trade Union Confederation:* Police used force against more than 800 farm workers protesting in Nkqubela, Robertson city, in Western Cape province.<sup>819</sup>
- June 2011, 2 Ocean Vibe News:* A 14-year-old boy lost his hand operating a machine on a farm in Rustenburg.<sup>820</sup>

# Extractive

| Operating Environment                      |  |
|--|--|
| Sector contribution to GDP (mining, %)     | 8<br>(platinum: 2.4%, gold: 2% and coal: 1.5%) <sup>821</sup>                                      |
| Sector contribution to employment (mining) | 1.3 million people (2012) <sup>822</sup>   |
| Major products                             | Gold, platinum and coal  |
| Relevant laws                              | <ul style="list-style-type: none"> <li>Minerals and Petroleum Resources Development Act</li> </ul> |

South Africa has the world's largest reserves of gold, platinum, chrome ore and manganese ore and the second-largest reserves of zirconium, vanadium and titanium.<sup>823</sup>

During the Apartheid era, mining companies acquired mineral rights over agricultural land and environmentally sensitive communal and tribal areas. Minerals were exploited with little accountability and with not much social or environmental concern.<sup>824</sup>

In 2014, South Africa accounted for 80 percent of the world's platinum production. The North-West province, where the majority of platinum mines are located, has experienced unrest since 2012.<sup>825</sup> Some of the unrest is the result of communities seeking access to water, sanitation and adequate housing. These communities are in the vicinity of the platinum mining city of Rustenburg. Mine workers were reportedly exposed to safety risks and are deeply dissatisfied with their wages.<sup>826</sup>

Following the unrest in the platinum industry in 2012, the Minister of Mineral Resources and mining stakeholders signed a framework agreement on peace and stability in the mining industry,<sup>827</sup> as well as a framework agreement for sustainable mining.<sup>828</sup> The agreement was entered into between organised labour, business and government. It recognised the integral role played by the mining industry to the economy and acknowledged historical imbalances, inequalities and tensions that had

undermined stable labour relations, constitutional rights such as the inadequate housing provided to mine workers, equity and the rule of law. It recommitted itself to transformation in the industry in accordance with the targets set in the Mining Charter. The goal of the agreement was to:

- Build a relationship among stakeholders based on trust and respect, and the avoidance of any actions that could adversely affect this relationship;
- Commit to prevailing legislation, regulations, charter and existing agreements aimed at improving the sustainability of the sector;
- Ensure the rule of law, peace and stability;
- Accelerate the process of transformation and beneficiation;
- Bring about the changes required for a peaceful and sustained development;
- Reposition the mining industry to become more attractive to investors and a greater contributor to job creation;
- Respond in a way that restored confidence; and
- Eliminate negative social and economic legacies and empowering workers.

The agreement was signed by the ministers of Mineral Resources and Labour, as well as by the Chamber of Mines, COSATU, FEDUSA and NACTU which are the three largest labour

federations in the country, as well as by trade unions AMCU, NUM, UASA and Solidarity.

According to the Department of Labour's Industrial Action Report, the mining industry had the second highest rate of work stoppages (25) and lost the most working days (27.9 percent of all working days) in the 2012/2013 financial year. However, the agreement might

not have been completely unsuccessful, as the same source reported that strikes were more peaceful than those experienced by the sector in 2012.<sup>829</sup>

The Chamber of Mines reported in 2012 that improved housing and living conditions of mineworkers and mine communities remained to be addressed.<sup>830</sup>

## Areas for Attention

### Air & Water Pollution

*The health and livelihoods of local populations may be adversely impacted by company operations.*

In 2013 the Centre for Environmental Rights reported that water licences (particularly relevant for mining) were issued late, by staff that were not well supported and without including recommendations made during the evaluation process.<sup>831</sup> As of January 2012, the Blue Scorpions unit, tasked with enforcing the National Water Act, was investigating 18 cases of non-compliance with or lack of water use licences by mining companies.<sup>832</sup>

A 2013 Bench Marks Foundation report stated that over the last 10 years, the government had increased sulphur dioxide emissions quotas to accommodate mining companies such as Lonmin, which over a ten year period (2003-2013) had made very little progress in reducing its negative environmental impact. When the mining company eventually did make some progress between 2011 and 2012 in reducing its sulphur dioxide emissions, it did so at the expense of ground water pollution—which is said to have increased during the same period.<sup>833</sup>

Data pertaining to South Africa's carbon footprint and magnitude of air pollution varies significantly. According to the Bench Marks Foundation, South Africa caused 98 percent of air pollution and 86 percent of waste in Africa, primarily linked to mining operations. However, the Environmental Defence Fund and the

International Emissions Trading Association estimated that South Africa's carbon emissions contribute to between 40 and 50 percent of all emissions in Africa in 2014.<sup>834</sup> A 2013 Times of South Africa article reported that acid drainage water released by gold mining operations in the North West province resulted in pollution of underground and surface water.<sup>835</sup>

A 2012 article by the Environmental Justice Organisations, Liabilities and Trade reported that increased mining activity in the Weltevreden pan area in Mpumalanga since 1993 had an adverse impact on agriculture and water in the area.<sup>836</sup> According to a 2013 Bench Marks Foundation report, Arcelor Mittal operations in Vanderbijlpark, Gauteng province, were linked to air and sound pollution and contamination of underground water.<sup>837</sup>

In 2014, Bloomberg News reported that the Public Protector had launched an investigation into the water pollution allegedly caused by mining houses. Almost 40 percent of mines were found not to have adequate funds for environmental rehabilitation in the face of high quantities of uranium, arsenic, sulphuric acid and other toxic substances being found in and around Johannesburg rivers.<sup>838</sup>

In 2013 Mining Weekly reported that, according to the Mining Affected Communities United in Action (Macua), mining-affected communities were excluded from discussions on economic and social development.<sup>839</sup>

## Barriers to Unionisation

*Workers may be prevented from forming or joining independent worker's associations.*

A 2013 Global Research article reported tensions between the National Union of Mineworkers (NUM) and the Association of Mineworkers and Construction Union (AMCU) over mine workers' representation in Rustenburg, North West province. AMCU was eventually recognised as the majority union at Lonmin's mines.<sup>840</sup> The tensions between the two trade unions allegedly resulted in the killing of a NUM female shop steward.<sup>841</sup>

The rivalry between the NUM and AMCU trade unions has resulted in tensions and a number of violent clashes, including being implicated as one of the contributing factors to the violence that led to the deaths of more than 40 miners at Marikana in August 2012.<sup>842</sup>

In February 2013, 13 mine workers were seriously injured at Anglo American Platinum's Siphumelele mine in violence reportedly related to union rivalry.<sup>843</sup> In October of the same year, Business Day reported that the chair of the NUM branch at Marikana was shot dead, sparking fears of resurgent violence.<sup>844</sup>

## Collective Bargaining

*Workers may be prevented from engaging in collective bargaining.*

In the mining sector, the Chamber of Mines organises centralised negotiations on working conditions every two years with trade unions, according to a 2013 Gold Wage Negotiations report. Platinum, diamond and base metal mines, as well as small gold and coalmines, negotiated regularly on a decentralised basis.<sup>845</sup>

According to a 2012 Department of Labour report, unprotected strikes in the mining sector and the failure of trade unions to organise and engage in collective bargaining processes were linked to a loss of trust in trade unions by workers.<sup>846</sup> The ILO reported in 2011 that bargaining partners lacked negotiating skills, access to information and resources, the power to influence and educate their own

constituencies and were characterised by staff turnover. A lack of trust among negotiating partners was also reported.<sup>847</sup>

## Displacement

*Local populations may be improperly removed from their lands to make way for company investments.*

A 2012 article by the Environmental Justice Organisations, Liabilities and Trade reported that when Keaton Energy started its coal mining operations in Vanggatfontein, Mpumalanga province, residential farm workers lost their jobs in commercial farms due to the expansion of mining activities and were relocated to local informal settlements, or townships, joining many other unemployed farm workers.<sup>848</sup>

The Mineral and Petroleum Resources Development Act (MPRDA) regulates displacement by the extractive industry. The requirements to notify and consult in terms of the MPRDA are contained in sections 5, 10 and 22. The obligation to consult with interested and affected parties rests on the applicant, i.e. the mining company, and not the state. However, the state, specifically the Department of Mineral Resources (DMR), must ensure that this obligation has been fulfilled and that proof is submitted to the DMR as part of the application process.<sup>849</sup>

According to Terminski, it is difficult to estimate the number of people that have been resettled in South Africa due to mining, but research reports indicate that this figure is quite significant.<sup>850</sup> One of the most famous examples of resettlement due to mining in South Africa is the resettlement exercise undertaken by Anglo Platinum near its Mogalakwena mine. Approximately 10,000 people (957 households) from Ga-Pila and Motlhotlo were resettled. Following many years of negotiations, 98 percent of Ga-Pila residents accepted the offer to move to the newly built village. The program of relocation was voluntary and was realised with the strong support of local authorities and tribal leadership. However, studies by ActionAid<sup>851</sup>

and the South African Human Rights Commission<sup>852</sup> identified human rights violations due to the resettlement process.

A 2013 Think Africa Press article reported that a lack of governmental capacity in monitoring legal processes, and a lack of clarity on the rights and duties of owners and dwellers, has affected the implementation of the law, and as a result evictions occurred.<sup>853</sup>

## Informal Housing

*Companies may contribute to poor housing conditions for their workers and local communities.*

Poor living conditions in surrounding informal settlements were also cited as a source of dissatisfaction of workers that resulted in the deaths of miners at Marikana in August 2012.<sup>854</sup> One year later, the Mail and Guardian newspaper reported that living conditions remained 'squalid' in the 15 informal settlements surrounding Lonmin's operations.<sup>855</sup> In July 2014, the North West provincial government and Lonmin announced a project to eliminate informal housing through the construction of 2500 homes in the areas adjacent to Marikana.<sup>856</sup>

## Informal Sector

*Workers may lack written employment contracts, or may otherwise lack the protection of labour laws.*

According to a 2014 Reuters article, illegal mining, common in abandoned gold mineshafts around Johannesburg, was characterised by dangerous working conditions of miners. These miners live in cramped conditions for weeks, resulting in fatalities and clashes between rival groups. Many of the illegal miners were reportedly from Zimbabwe, Mozambique and Lesotho.<sup>857</sup>

## Ethnic Minorities

*Companies may affect the health, livelihoods or material well-being of ethnic minorities.*

In 2013 Global Research reported that about 84 percent of the workers in the mining industry were black but that approximately 84 percent of top managers, 72 percent of middle managers and 68 percent of professional workers and artisans were white.<sup>858</sup>

## Occupational Health & Safety

*Companies may not adequately prevent accidents and long-term health effects in the workplace.*

The Department of Mineral Resources is responsible for enforcing the Mine, Health and Safety Act. It monitors compliance through the Mine, Health and Safety Inspectorate<sup>859</sup> and the Mine, Health and Safety Council.<sup>860</sup> The council is a tripartite board consisting of state, employer and labour representatives, and advises the government on occupational health and safety policies in South African mines.<sup>861</sup> Mine inspectors can enter mines at any time and interview employees. Unsafe mine conditions can result in the imposition of fines or imprisonment for the employer.<sup>862</sup>

According to the ILO, the country faced a shortage of qualified labour inspectors, resulting in limited capacity and non-systematic application of workplace inspections.<sup>863</sup> Lack of effective communication systems, poor record-keeping and electronic data, little strategic planning and limited follow-up on inspections were identified as factors contributing to the limited capacity to undertake inspections.<sup>864</sup> The ILO reported that the division of responsibility for promoting occupational health and safety led to fragmentation of the national strategy on health and safety.<sup>865</sup>

The Department of Mineral Resources recorded a reduction in mining fatalities from 123 in 2011 to 112 in 2012.<sup>866</sup> However, an increase in mining injuries was recorded in the same period with 3,299 injuries in 2011 and 3,377 injuries in 2012.<sup>867</sup> Data for the 2012/2013

period had not been made public as of February 2015, but the Department's Annual Performance Plan for 2013/2014 includes a target for reducing injuries and fatalities by 20 percent for the 2013/2014 and 2014/2015 financial years.<sup>868</sup>

The highest numbers of fatalities and injuries were recorded in gold and platinum mining in 2012.<sup>869</sup> According to the Department of Mineral Resources, the highest number of mining fatalities and injuries occurred in Gauteng province and in the Rustenburg area within the North West province.<sup>870</sup> It should be noted that statistics related to mining deaths and injuries relate only to mining that is considered legal. Illegal mining constitutes a significant safety hazard, as demonstrated by the case of 200 illegal miners who were trapped underground in an abandoned mine-shaft in February 2014.<sup>871</sup> During the same month, a total of 26 mining fatalities were recorded, a combination of legal and illegal occupational incidents.

According to a 2013 Think Africa press article, 760,000 new cases of tuberculosis were registered in the mining sector in 2011, amounting to a third of all new cases in Africa and 9 percent of all new cases in the world.<sup>872</sup>

The University of Cape Town's Centre for Occupational and Environmental Health Research refers to the prevalence of tuberculosis and silicosis in South Africa's mines as a 'crisis' that requires urgent attention.<sup>873</sup>

The tuberculosis incidence rate (i.e. the number of new cases per year) in mine workers in South Africa ranged between 3,000 and 7,000 cases per 100,000 people, the highest in the world.<sup>874</sup> This has been linked to high HIV/AIDS incidence and prevalence rates in mining communities.<sup>875</sup> In 2009, the Department of Health established a Risk Committee for Mines and Works to monitor potential health-related risks. However, in a response to a parliamentary question in July 2014, the Minister of Health reported that the Committee had only met twice since 2010.<sup>876</sup>

The international NGO Results and the regional civil society network ARASA reported in 2013

that employees (often migrant workers) affected by tuberculosis, HIV or silicosis were sent back to their original community without compensation from the mining company, no cross-border health referral and no source of income while receiving treatment.<sup>877</sup>

According to a 2012 survey by the University of South Africa, gold and platinum mining were characterised by unhygienic conditions of underground sanitary facilities. This particularly affected female workers, who experienced gynaecological problems.<sup>878</sup>

In 2013, a Bench Marks Foundation report stated that loss of eyesight and hearing, as well as respiratory problems were common among workers at Arcelor Mittal-owned steel plants in Vanderbijlpark, Gauteng province. The company reportedly took insufficient safety measures to prevent injuries, resulting in high rates of illnesses, injuries and death. It also failed to provide comprehensive assistance with medical bills or compensation.<sup>879</sup>

According to the British Safety Council, of the 1,058 inspections in the iron and steel sector carried out in 2011/2012, only 522 employers complied with occupational health and safety laws, and standards varied by region.<sup>880</sup>

## Participation & Access to Information

*Communities may not have access to relevant information regarding environmental impacts of company operations that may affect their health or livelihoods.*

According to the Environmental Impact Assessment Regulations contained in the National Environmental Management Act, companies are obliged to perform assessments before conducting operations that may impact land or its inhabitants. Companies are required to produce an Environmental Management Plan (EMP), and report regularly on its implementation.<sup>881</sup> The 2010 regulations included a revised list of activities requiring environmental impact assessments (EIA).<sup>882</sup> Consultation with interested and affected parties is regarded as a minimum



condition for EIAs.<sup>883</sup> In 2013, the Department of Environmental Affairs reported that since 2006 competent authorities received almost 24,000 EIAs and processed about 21,300.<sup>884</sup>

EIAs and EMPs are available to the public through procedures under the Promotion of Access to Information Act (PAIA), which provides the population with the right to access records in the custody or under control of public bodies.<sup>885</sup> However, the Centre for Environmental Rights reported in 2013 that the Department of Mineral Resources (DMR) was the worst-performing department in terms of access to information. It added that the DMR and the Department of Water Affairs (DWA) were non-compliant with PAIA, as no statutory reports were filed to the South African Human Rights Commission. At provincial level, the environment departments of Eastern Cape, Mpumalanga, Northwest and Northern Cape were also non-compliant for the same reason.<sup>886</sup>

In 2012, approximately 50 percent of all companies contacted by the Centre for Environmental Rights (e.g. Cousins Coal Pty Ltd, Arcelor Mittal South Africa, Sasol, Omnia Holdings, NATREF, Digby Wells and Associates, Central Rand Gold, FFS Refiners, DRD Gold and Anglo Operations) refused to make environmental information accessible.<sup>887</sup>

Notification requirements of prospecting and mining applications as per the Mineral and Petroleum Resources Development Act were deemed inadequate in rural areas by the Centre for Environmental Rights in 2012.<sup>888</sup>

Swedwatch reported that communities surrounding the platinum mining city of Rustenburg lacked access to water and sanitation, adequate housing, and were exposed to safety risks. Mineworkers were also reported to be deeply dissatisfied with wages.<sup>889</sup>

## People Living with HIV/AIDS

*Companies may negatively impact persons with HIV/AIDS.*

In 2011, the Bench Marks Foundation reported high rates of HIV infection in the mining sector. The high prevalence in the mining sector was linked to the use of migrant labour and the lack of job opportunities for women, forcing some into sex work to earn an income.<sup>890</sup>

Bench Marks Foundation found that in the North West province, 40 percent of all deaths were related to HIV/AIDS, reaching 63 percent among females aged between 15 and 44.<sup>891</sup>

The tuberculosis incidence rate (i.e. the number of new cases per year) in mine workers in South Africa ranged between 3,000 and 7,000 cases per 100,000 people, the highest in the world.<sup>892</sup> This has been linked to high HIV/AIDS incidence and prevalence rates in mining communities.<sup>893</sup> In 2009, the Department of Health established a Risk Committee for Mines and Works to monitor potential health-related risks. However, in a response to a parliamentary question in July 2014, the Minister of Health reported that the Committee had only met twice since 2010.<sup>894</sup>

## Private Security Forces

*Private security forces may infringe on the human rights of workers or local populations when protecting company sites and installations.*

A 2012 Mail & Guardian newspaper article noted that, following the unrest at Lonmin's Marikana mine in August 2012, private security forces at mines were reportedly increasing the use of firearms and showed readiness to use deadly force in case of labour unrest, while public security forces were seen as less likely to use force.<sup>895</sup>

The Marikana Commission noted discrepancies in relation to the role of Lonmin's private security team in the violence due to inconsistent recording of shots fired at victims between data provided to the Commission and data contained in logbooks.<sup>896</sup>



## Public Security Forces

*Public security forces may infringe on the human rights of workers or local populations when protecting company sites and installations.*

In 2012, the president of South Africa appointed the Marikana Commission of Inquiry to investigate violence that led to the death of 44 people (mostly striking workers), the injury of more than 70 and the arrest of 250 people at the Lonmin-owned Marikana mine in North West province.<sup>897</sup> A report commissioned by Lonmin that leaked in 2012 referred to problems of severe poverty, lack of services, poor health conditions and inequality as contributing to worker discontent.

Despite awareness of these challenges, Lonmin's social responsibility efforts did not fully address the multitude of problems in surrounding communities, with the report referring to the potential for violence as a 'powder keg'.<sup>898</sup> Subsequently, in an address to Parliament, President Jacob Zuma attributed the Marikana tragedy to high levels of poverty, unemployment and inequality.<sup>899</sup>

According to a 2013 ABC article, the Marikana Commission accused the police of falsifying and hiding documents and lying about the events.<sup>900</sup> While the Marikana Commission is, as of August 2014, still ongoing, questions have been raised about the role of Lonmin, which had refused to speak to demonstrating workers.<sup>901</sup>

The actions of the South African Police Service in the Marikana incident have been examined closely, with suggestions made that there was poor preparation for incidents of public violence as well as collusion with private security personnel.<sup>902</sup> According to a 2012 Amnesty International report, despite constitutional guarantees, the police regularly violated the right to life and the right to freedom from torture of arrested and detained persons.<sup>903</sup> In 2012, the Independent Police Investigative Directorate Act entered into force, providing for police criminal liability for failure to co-operate with investigations into their

conduct.<sup>904</sup> As at August 2014, South Africa had not ratified the United Nations Optional Protocol to the Convention Against Torture (OPCAT), and as a result there is no basis for a permanent oversight body to monitor incidents of torture.<sup>905</sup>

During a strike by workers at Lonmin's platinum mines in May 2014, four people were reportedly killed. The Association of Mine Workers and Construction Union (AMCU) accused the police of 'taking sides' during clashes related to the strike, and also intimidating striking workers.<sup>906</sup>

## Revenue Sharing

*There may be lack of public access to accountability concerning the usage and distribution of public revenues generated from taxes, royalties and other fees paid by companies.*

A 2012 article by Environmental Justice Organisations, Liabilities and Trade reported a 128 percent electricity bill increase for South Africans since 2008, due to a deal between the mining company BHP Billiton and governmental officials, which provided the company with cross-subsidy.<sup>907</sup>

The Royal Bafokeng Nation, a community of 150,000 people living in 29 villages located in the world's largest platinum reserve, the Merensky Reef, owns about 13 percent of the mining company Impala Platinum. The community is also a majority shareholder of its own platinum mining and refining company, Royal Bafokeng Platinum, which employs over 3,000 people. In 2004, the Royal Bafokeng Nation Development Trust was created to manage the community resources and invest them in infrastructure, education, health, security and sport.<sup>908</sup>

Another example of direct community engagement in mining is the Bakgatla-Ba-Kgafela, composed of 350,000 people located in 32 villages in Moruleng area, North West province.<sup>909</sup> The community owns 15 percent of Union platinum mine, together with Anglo Platinum Limited, which owns 85 percent of the

mine.<sup>910</sup> Revenues from mining were invested in the community through infrastructure and capacity development, and job creation.<sup>911</sup>

## Revenue Transparency

*There may be lack of public access to information concerning the size of public revenues generated from taxes, royalties and other fees paid by companies.*

The 2013 Resource Governance Index reported that the government did not publish mining contracts or environmental impact assessment reports, which are mandated by the National Environmental Management Act. Furthermore, the Department of Mineral Resources was reportedly one of the least transparent departments due to their non-compliance with the Promotion of Access to Information Act and lack of response to Promotion of Access to Information Act requests.<sup>912</sup> Despite this, the 2012 Open Budget Survey ranked South Africa as the world's second best performing country.<sup>913</sup>

As at August 2014, South Africa was not a member or candidate country of the Extractive Industries Transparency Initiative.<sup>914</sup> It is important to note, however, that when consulted about whether to become party to this initiative, the Minister of the Department of Mineral Resources rejected EITI on the basis that it was unnecessary considering South Africa's Promotion of Access to Information Act which extends the right of access to information to the private sector.

## Strikes

*Workers may be prevented from, or improperly sanctioned for, participating in strike actions.*

The Mail and Guardian newspaper reported that the strikes in the platinum mining sector during the first half of 2014 were the longest and costliest in South African history.<sup>915</sup> Mining accounted for 68.9 percent of work stoppages in 2013, with community services, manufacturing and transport accounting for just over 7 percent each.<sup>916</sup> The unions whose

members were most prominently represented in strike actions in 2013 were the South African Transport and Allied Workers Union (SATAWU), followed by the National Union of Metal Workers (NUMSA) and the Association of Mineworkers and Construction Union (AMCU).<sup>917</sup>

Workers have reportedly been intimidated and assaulted by security officers during strikes. According to the U.S Department of State, strikes in the mining and transport sectors were among the most violent in 2012, resulting in deaths and property damages.<sup>918</sup> In May 2014, the South African Government News Agency reported that the South African Police Service (SAPS) had been authorised to adopt a 'zero tolerance' approach, having made about 5,000 arrests in strike-related actions over the preceding year.<sup>919</sup> The World Socialist Web Site reported that a number of cases where police used rubber bullets, stun grenades, teargas and water cannons against striking workers had been recorded.<sup>920</sup>

## Water Scarcity

*Companies may adversely impact the access of local populations to safe and affordable water for personal or other use.*

According to a 2013 joint report by UNDP, OSISA and GEF, a lack of institutional coordination led the Department of Water Affairs to issue water licences in water-scarce areas, as the Department of Mineral Resources previously issuing mining licences to companies in the same areas.<sup>921</sup>

Business Day reported in 2010 that, according to the Department of Water Affairs, approximately 32 pre-directives and 16 directives were issued to cease illegal use of water by the mining sector, and three criminal charges were filed.<sup>922</sup>

According to a 2013 Bench Marks Foundation report, contamination of underground water due to waste waters of steel production in Gauteng province was linked to Arcelor Mittal operations in Vanderbijlpark.<sup>923</sup>

## Women

*Companies may disproportionately affect the health, livelihoods or material well-being of women, or may exacerbate already-existing gender disparities in development.*

In 2011, the Bench Marks Foundation reported that the mining sector offered few employment opportunities to women due to bias and a

predominant masculine culture. Women in the mining sector mostly worked in unskilled or semi-skilled jobs.<sup>924</sup> According to the Bench Mark Foundation, some mining companies used local chiefs and councillors for recruitment, and they have in some instances asked for sexual favours for women seeking employment.<sup>925</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- *May 2014, Mail and Guardian:* The National Union of Mineworkers announced that two miners in the 'platinum belt' were hacked to death on their way to work, while another was killed at his home along with his wife.<sup>926</sup>
- *February 2014, BBC:* Two mine workers died at Harmony Gold mine sites. One accident, due to mine waste, happened at the Kusasalethu mine, North West province. The other incident, a result of blasting activities, occurred at the Joel mine near in Free State.<sup>927</sup>
- *February 2014, Reuters:* Eight mine workers died in a fire and rock fall at a Harmony Gold mine near Johannesburg. The Minister of Mineral Resources called for an investigation to be opened on the accident.<sup>928</sup>
- *February 2014, BBC:* Two illegal miners died by being trapped in an abandoned mine site near Johannesburg.<sup>929</sup>
- *February 2014, Reuters:* Twenty-two artisanal gold miners who were temporarily trapped in an abandoned shaft near Johannesburg were arrested on charges of illegal mining.<sup>930</sup>
- *February 2014, Mining:* One worker was killed at the Amplats mine owned by Anglo American Platinum in Limpopo province while protesting. An investigation was opened to determine whether the death was the responsibility of the police or the private security company at the mine.<sup>931</sup>
- *February 2014, Centre for Environmental Rights:* A Regional Court in Limpopo province sentenced the managing director of the clay mining company, Blue Platinum Ventures, to five years in prison for mining-related environmental offences.<sup>932</sup>
- *January 2014, SABC News:* A 28-year-old man was killed by the police while protesting against an eviction in Gauteng province. A court order gave a development company permission to evict residents from a former mining area.<sup>933</sup>
- *January 2014, Business & Tech:* Negotiations to end a strike of platinum mining workers were ongoing. The Association of Mineworkers and Construction Union demanded a pay increase and better working conditions.<sup>934</sup>
- *November 2013, Bench Marks Foundation:* The Foundation reported a poor score by Arcelor Mittal on transparency and community engagement due to the company's refusal to make its environmental mitigation plan publically accessible.<sup>935</sup> The company reportedly ignored a court order to hand over its environmental mitigation plan and the details regarding its Vaal disposal site,

- where hazardous waste was illegally dumped in 2007.<sup>936</sup>
- *October 2013, Business Day:* One thousand people marched against Shell's operations in Karoo, in the Western Cape province. Protesters' major concern was fracking.<sup>937</sup>
  - *October 2013, Business Day:* Four hundred million rand (US\$36 million) in the D-account, used to collect payments of mining royalties in the North West province, were mismanaged. Those funds were meant to be used by about 900 tribal councils for the development of mining communities. An investigation was ongoing.<sup>938</sup>
  - *September 2013, Bloomberg:* Twenty-three miners contracted lung diseases while working for Anglo American and consequently sued the company in 2004. The parties reached a settlement outside court. Since then, a class action representing 25,000 miners and the dependents of deceased workers who contracted silicosis and tuberculosis while working on the company's gold mines has been filed.<sup>939</sup>
  - *September 2013, Corruption Watch:* Gold Fields was investigated by the U.S. Securities and Exchange Commission over a R2.1 billion (US\$190 million) Black Economic Empowerment deal and the granting of a mining licence for its South Deep mine near Johannesburg. Allegations were made against ANC members and government officials of using their political influence to benefit from the deal.<sup>940</sup>
  - *August 2013, Business Day Live:* A female representative of the National Union of Mineworkers (NUM) was killed in Marikana, North West province. The accident was allegedly linked to the trade union conflict between the NUM and the Association of Mineworkers and Construction Union (AMCU).<sup>941</sup>
  - *June 2013, BBC:* One trade unionist was killed and another injured at a Lonmin-owned mine in Marikana, North West province. Both unionists belonged to NUM.<sup>942</sup>
  - *June 2013, Bloomberg News:* Glencore Xstrata allegedly fired 1,000 workers who participated in a non-protected strike at three chrome mines in Limpopo province. The strike started at the Helena mine after an employee, a member of AMCU, accused a shift supervisor of assault.<sup>943</sup>
  - *May 2013, BBC:* Mining workers at Lanxess-owned chrome Rustenburg mine, in North West province, went on an unprotected strike over bonuses.<sup>944</sup>
  - *May 2013, BBC:* Ten mining workers were injured by security forces while striking at Lanxess-owned chrome Rustenburg mine, in North West province.<sup>945</sup>
  - *May 2013, Fin24:* A representative of the AMCU was killed in Rustenburg, North West province, near Anglo Platinum's Khomanani mine.<sup>946</sup>
  - *April 2013, Environmental Justice Organisations, Liabilities and Trade:* Msobo Coal undertook an early scoping phase of possible mining operations inside the Chrissiesmeer biodiversity site, in KwaZulu-Natal province, which would reportedly result in the destruction of several farms.<sup>947</sup>
  - *February 2013, Environmental Justice Organisations, Liabilities and Trade:* The Lakenvlei area was reportedly under threat from planned diamond and coal mining by William Patrick Bower Proprietary. Mining activities could have an adverse impact on groundwater; hence water quality for neighbouring farms.<sup>948</sup>
  - *November 2012, Environmental Justice Organisations, Liabilities and Trade:* The mining company Exxaro allegedly dug trenches without authorisation in the Weltevreden pan, rich in wetlands, fertile land and coal reserves. In June 2012, the Department of Water Affairs issued an

order to stop the company. However, In September 2012, allegations of Exxaro having cut deep into the border of the pan were reported.<sup>949</sup>

- *November 2012, Environmental Justice Organisations, Liabilities and Trade:* When Keaton Energy began its coal mining operations in Vanggatfontein, Mpumalanga province, residential farm workers lost their jobs in commercial farms due to the expansion of mining activities and were relocated to local informal settlements.<sup>950</sup>
- *August 2012, Safety News:* An electrician died from electric shock during inspection work at a gold mine in Carletonville.<sup>951</sup>
- *August 2012, BBC:* Thirty-four workers at the Lonmin-owned platinum mine in North West province were killed by the provincial police in Rustenburg, North West province. Workers went on strike demanding higher wages.<sup>952</sup> The strike ended in September when an agreement for a 11percent to 22 percent salary increase and a one-off bonus of R2,000 (US\$182) was reached.<sup>953</sup>
- *February 2012, Safety News:* A female worker at Anglo American Platinum's Khomanani mine in Rustenburg, North West province, was found dead at an underground location, having been assaulted and raped.<sup>954</sup>
- *2011, Bench Marks Foundation:* Xstrata Coal South Africa was accused by the NUM of firing 12 HIV-positive mine workers. NUM argued that the company was aware of the workers' HIV status through the joint NUM-Xstrata Voluntary Counselling and Testing programme.<sup>955</sup>

# Construction

## Corruption

*Companies may attempt to unduly influence public officials.*

In 2013 the Institute for Security Studies reported corruption in the construction sector. The Competition Commission fined 15 construction companies for bid rigging and ordered them to pay fines totalling R1.46 billion (US\$132 million).<sup>956</sup>

The Competition Commission found that between 2000 and 2010, construction companies had been colluding on a regular basis. The Competition Commission identified 300 cases where collusion took place in projects that were worth R47 billion (US\$4 billion).<sup>957</sup> It only investigated 160 of those cases, occurring between 2006 and 2009.

The companies involved were 20 of the country's largest construction firms. Had all the executives and managers involved been prosecuted to the full extent of the law, more than half of the sector's leadership would have been removed.<sup>958</sup> The collusion included construction projects on the 2010 Soccer World Cup stadiums, roads, dams and private sector projects such as the building of Clearwater Mall.

## Occupational Health & Safety

*Companies may not adequately prevent accidents and long-term health effects in the workplace.*

According to a 2013 report by PwC, building and construction was a high-risk sector for work-related injuries.<sup>959</sup> The sector had 171 fatalities and 755 injuries from 2007 to 2010.<sup>960</sup> The report indicated that while there were high numbers of incidents and injuries, the reason was not carelessness on the part of business. In fact, business had an incentive to apply special care to prevent work related injuries, as they caused production stoppages and a decline in productivity.<sup>961</sup> In 2012 government, labour and business signed the Construction Healthy and Safety Accord to improve the status of health and safety in the construction industry.<sup>962</sup>

## People Living with HIV/AIDS

*Companies may negatively impact persons with HIV/AIDS.*

In 2013 the International Labour Organization (ILO) reported that construction was among the sectors most affected by the epidemic.<sup>963</sup> Because its labour force was predominantly migratory, it was a prime contributor to the spread of HIV/AIDS.<sup>964</sup> The Department of Public Works reported that it had the third highest incidence rate of HIV/AIDS per sector in South Africa in 2004.<sup>965</sup> In 2008, the Construction Management and Economics Journal, after conducting HIV/AIDS tests on 10,243 employees, reported that construction had the highest prevalence rates of the disease.<sup>966</sup>

# Region Profiles

Areas where human rights conditions or impacts differ markedly in nature or scale from the national profile.

## Gauteng

### Air & Water Pollution

According to a 2013 Bench Marks Foundation report, Arcelor Mittal operations in Vanderbijlpark, Gauteng province, were linked to air and sound pollution and contamination of underground water.<sup>967</sup>

### Occupational Health & Safety

According to a 2012 report by the Department of Mineral Resources, Gauteng province had one of the highest rates of fatalities and injuries in mines.<sup>968</sup> A 2013 Bench Marks Foundation report stated that loss of eyesight and hearing and respiratory problems were common among workers at Arcelor Mittal-owned steel plant in Vanderbijlpark. The company reportedly took insufficient safety measures, resulting in high rates of illnesses, injuries and death. It also failed to provide comprehensive assistance with medical bills or compensation.<sup>969</sup>

### Strikes

According to the Department of Labour, in 2013 Gauteng remained the province with the highest number of strikes. It had 97, followed by Western Cape at 66, and KwaZulu-Natal at 44.<sup>970</sup>

## Mpumalanga

### Air & Water Pollution

A 2012 article by the Environmental Justice Organisations, Liabilities and Trade reported that increased mining activity in the Weltevreden pan area in Mpumalanga since 1993 had an adverse impact on agriculture and water in the area.<sup>971</sup>

### Displacement

A 2012 article by the Environmental Justice Organisations, Liabilities and Trade reported that when Keaton Energy started its coal mining operations in Vanggatfontein, residential farm workers lost their jobs in commercial farms due to the expansion of mining activities. The workers were relocated to local informal settlements, or townships, joining many other unemployed farm workers.<sup>972</sup>

### People Living with HIV/AIDS

According to a 2013 Minority Rights Group International report, Mpumalanga recorded one of the highest HIV prevalence rates.<sup>973</sup> Mpumalanga's HIV-positive population was 12 percent in the province—502,186 were reportedly living with the disease.

### Public Security Forces

In 2013, the Institute for Security Studies reported that, according to the IPID, police brutality increased 18 percent in Mpumalanga province.<sup>974</sup>



## North West

### Air & Water Pollution

A 2013 Times of South Africa article reported that acid drainage water released by gold mining operations in the North West province resulted in pollution of underground and surface water.<sup>975</sup>

### Unionisation

A 2013 Global Research article reported tensions between the National Union of Mineworkers and the Association of Mineworkers and Construction Union over mine workers' representation in Rustenburg.<sup>976</sup>

### Occupational Health & Safety

According to the Department of Mineral Resources, one of the highest rates of fatalities and injuries in mines occurred in Rustenburg, North West province in 2012.<sup>977</sup>

### People Living with HIV/AIDS

In 2011 the Bench Marks Foundation reported that, in North West province, 40 percent of all deaths were related to HIV/AIDS and reached as high as 63 percent among females aged 15 to 44.<sup>978</sup>

### Public Security Forces

In 2012, the president appointed the Marikana Commission of Inquiry to investigate the violence that led to the death of 44 people (mostly striking workers), the injury of more than 70 and the arrest of 250 people at the Lonmin-owned Marikana mine in North West province.<sup>979</sup>

According to a 2013 ABC article, the Commission accused the police of falsifying and hiding documents, and lying about the account of events.<sup>980</sup>

## Revenue Sharing

The Royal Bafokeng Nation, a community comprised of 150,000 people living in 29 villages located in the world's largest platinum reserve, the Merensky Reef in the North West province, owns about 13 percent of the mining company Impala Platinum. The community is also a majority shareholder of its own platinum mining and refining company, Royal Bafokeng Platinum, which employs more than 3000 people. In 2004, the Royal Bafokeng Nation Development Trust was created to manage the community resources and invest them in infrastructure, education, health, security and sport.<sup>981</sup>

Another example of direct community engagement in mining is the Bakgatla-Ba-Kgafela, composed of 350,000 people located in 32 villages in the Moruleng area, North West province.<sup>982</sup> The community owns 15 percent of the Union Platinum Mine, together with Anglo Platinum, which owns 85 percent.<sup>983</sup> Revenues from mining were invested in the community through infrastructure and capacity development and job creation.<sup>984</sup>

## Western Cape

### Unionisation

According to a 2011 Human Rights Watch report, unionisation among agricultural workers was low, only 3 percent in the Western Cape province.<sup>985</sup> According to a 2012 report by the Black Association of the Agricultural Sector, 25 percent of farm workers in the Western Cape province could not freely join a trade union and in more than 40 percent of cases, trade unions had no ready access to farms.<sup>986</sup>

According to a 2012 report by the Black Association of the Agricultural Sector, larger farms were more inclined toward collective bargaining than small farms in the Western Cape province.<sup>987</sup>

## Informal Sector

According to a 2012 report by the Black Association of the Agricultural Sector, only about 30 percent of farm workers in the Western Cape province signed a work contract, of which only two-thirds possessed a copy of such a contract.<sup>988</sup>

workers were paid between R251 (US\$23) and R330 (US\$30) per week, which amounted to less than the minimum wage for the agricultural sector.<sup>990</sup> The situation was reported to be particularly critical in the Western Cape province.<sup>991</sup> Female farm workers were also paid less than their male counterparts for equal work.<sup>992</sup>

## Public Security Forces

In 2013 the South African Human Rights Commission instituted an investigation following numerous complaints of use of force by police against farm workers and dwellers, including women and children, in the Western Cape province.<sup>989</sup>

## Water Scarcity

A 2013 Institute for Security Studies report stated that the Karoo area in Western Cape province was characterised by low annual rainfall and high evaporation. Water was mainly used for domestic and agricultural purposes, with 21 percent of the rural population lacking access to improved water sources. As a result, the use of freshwater in the Karoo area for fracking activities could potentially increase the rural population's vulnerability.<sup>993</sup>

## Wages

According to a 2012 Black Association of the Agricultural Sector report, 50 percent of farm

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|               | <ul style="list-style-type: none"> <li>• Global Research</li> <li>• Green Fund</li> <li>• Habitat for Humanity</li> <li>• Helen Suzman Foundation</li> <li>• Human Rights Watch</li> <li>• Human Sciences Research Council</li> <li>• Industrial Health Resource Group</li> <li>• Info4africa</li> <li>• International Budget</li> <li>• International Lesbian and Gay Association</li> <li>• International Trade Union Confederation</li> <li>• International Work Group for Indigenous Affairs</li> <li>• InterWaste</li> <li>• Kasi Economics</li> <li>• Konrad-Adenauer-Stiftung</li> <li>• Labour Guide</li> <li>• Mining Weekly</li> <li>• Minority Rights Group International</li> <li>• MyWage</li> <li>• Open Society Initiative for Southern Africa</li> <li>• Organisation for Economic Cooperation and Development</li> <li>• Oxfam</li> <li>• Policy Action Network</li> <li>• Polity</li> <li>• PwC</li> <li>• Revenue Watch Institute</li> <li>• Section 27</li> <li>• Social Institution &amp; Gender Index</li> <li>• Special Rapporteur on the Human Rights of Migrants</li> <li>• Swedwatch</li> <li>• The Global Slavery Index</li> <li>• The International Trade Union Confederation</li> <li>• Transparency International</li> <li>• U. S. Department of Labour</li> <li>• University of Denver Private Security Monitor</li> <li>• Wage Indicators</li> <li>• Women in National Parliaments</li> <li>• World Economic Forum</li> <li>• World Finance</li> <li>• World Institute for Development Economics Research</li> </ul> |
| Media Reports | <ul style="list-style-type: none"> <li>• ABC</li> <li>• 2 Oceans Vibe</li> <li>• AdCorp</li> <li>• Africa Check</li> <li>• Africa Monitor</li> <li>• All Africa South Africa</li> </ul>  |

|                  |   |
|------------------|---|
|                  | <ul style="list-style-type: none"> <li>• BBC News</li> <li>• Black Association of the Agricultural Sector</li> <li>• Bloomberg News</li> <li>• Business &amp; Tech</li> <li>• Business Against Crime</li> <li>• Business Day</li> <li>• Business Day Live</li> <li>• Daily Maverick</li> <li>• Eye Witness News</li> <li>• Fin24</li> <li>• Financial Mail</li> <li>• IRIN</li> <li>• Leadership Magazine</li> <li>• LegalBrief</li> <li>• Mail &amp; Guardian</li> <li>• Mail and Guardian</li> <li>• Mining</li> <li>• New Agriculturist</li> <li>• Reuters</li> <li>• SABC News</li> <li>• Safety News</li> <li>• South African Civil Society Information Service</li> <li>• The Guardian</li> <li>• The New Age</li> <li>• The South African</li> </ul> |
| <b>Companies</b> | <ul style="list-style-type: none"> <li>• Allpay Consolidated Investment Holdings</li> <li>• Anglo American</li> <li>• Woolworths</li> </ul>   |



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