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BRIEFING

Briefing on the report *The Bermuda connection: profit shifting, inequality and unaffordability at Lonmin 1999–2012*

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Introduction

The President's office set up the Marikana Commission of Inquiry, chaired by Judge Ian Farlam, to investigate responsibility for the disastrous events that took place between 10 and 16 August 2012 and culminated on 16 August in the massacre of 34 mine workers. One of the many issues the Commission investigated, but which did not come up in cross-examination and is not mentioned in Judge Farlam's final report, was whether Lonmin was at all in a financial position to meet the rock drill operators' (RDOs') demand for R12,500 in basic wage. An initial background paper was prepared by this author to investigate this and other affordability issues by examining Lonmin's financial position in 2012. Its aim was to give an informed opinion on the following problems:

(1) The competitiveness of rock drill operator wages paid by Lonmin prior to the protest in 2012.
(2) The affordability for Lonmin of the increases demanded by the RDOs.
(3) The financial capacity of Lonmin to provide decent work and living conditions for its employees.[1]

That background paper was forwarded in August 2014 to the Commission.

A preliminary report for media, using material made available to the public by the Commission at that time and only dealing with Lonmin's transfer pricing arrangements from the perspective of the RDOs' wage demand, was published in October 2014 (after an effort first was made by Lonmin to interdict it).

The final report was published in June 2015 by the Alternative Information and Development Centre (AIDC).[2] It incorporates new insights and facts collected after the Commission hearings were closed, corrects some mistakes made in earlier iterations, and comments on responses to questions by the *Mail & Guardian* newspaper in October 2014. It also includes an analysis of employment equity reports from 2006–2013 submitted to the Department of Labour by Lonmin as well as of labour data lodged at the Department of Mineral Resources – the kind of data that informs Statistics SA's labour and GDP statistics.

This Briefing draws on that report to examine the extent and mechanisms of Lonmin's profit-shifting activities and its relationship with the R12,500 wage demand of its workers. It argues that when profits are shifted from subsidiaries out of the country, the effect on wages is bigger than the effect on tax revenues. If the corporate income tax is 28%, a company has to move R100 million to a tax haven in order to avoid R28 million in taxation. In this way, R100 million is effectively moved from the stakeholder table in

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South Africa. We must therefore talk about *wage evasion* and *wage avoidance*, as well as tax avoidance and evasion, and look at the *total value* that every year is moved out of reach of domestic stakeholders through transfer pricing or in other ways. As for wages, the scope and sums involved in aggressive transfer pricing arrangements and illicit financial flows out from South Africa, and Africa, should displace the debate about unaffordable demands put forward by workers. The 'affordability' of wage demands in the South African (SA) mining sector and legal social obligations under the Mining Charter is thus about the *choice* of what to afford.

The data and its importance

In contributions to the debate about platinum mine-worker wages and the future of the industry, consultants such as JP Morgan and academics like Bowman and Isaacs drew conclusions from access to official Lonmin financial statements (Bowman and Isaacs 2014; Morgan 2014). The Marikana Commission made it possible to access financial reports from Lonmin's SA subsidiaries for the financial years 2000–2010 without much delay. They are archived at the Companies and Intellectual Property Commission (CIPC) as hard copies. The subsidiaries examined as far as the data material allowed were Western Platinum Ltd (WPL), Eastern Platinum Ltd (EPL), Lonmin Management Services (LMS) and Western Metal Sales Ltd (WMSL), based in Bermuda.

Information regarding the finances of Lonmin's SA subsidiaries is crucial to the content and conclusions in all the reports on Lonmin finances. It is safe to say that this goes for all multinational enterprises.

The 2011 and 2012 annual financial statements (AFS) from Lonmin subsidiaries WPL and EPL are missing after a problem with the electronic filing system at CIPC. Companies were obliged to file documents electronically only from 2011. The 2012 AFS of WPL denominated in US$ was however lodged by Lonmin at the Commission in September 2014.

The Marikana Commission asked Lonmin to provide financial and other information on its subsidiaries WMSL in Bermuda and LMS covering the period 2009–2012. A Commission Evidence Leader, Matthew Chaskalson SC, was in September permitted to see, but not copy, financial statements of WMSL.

LMS is described as 'legally indivisible' from Lonmin Plc in the 2013 annual report, where it is mentioned for the first time (Lonmin 2013, 65). However, LMS is taxed in SA and keeps financial records for that purpose through audited financial statements denominated in South African rand that are sent to the SA Revenue Service (Marikana Commission of Inquiry 2014a, 38241f). At CIPC, on the other hand, no AFSs of LMS in its current juridical form as a so-called *external company* (of Lonmin Plc in UK) have ever been lodged. The physical CIPC files with LMS' name and present company registration number only contain official annual reviews and reports of the mother company, Lonmin Plc.[3] In the CIPC database the name is 'Lonmin Plc' and LMS is the trading name of its branch in SA. A company with the same name but a different registration number was liquidated by Lonmin in 2003 and dissolved in 2005.[4]

At any rate, WPL's finances show that 'LMS' – first as a subsidiary that was dissolved and from about 2003 as Lonmin Plc's branch in SA (Lonmin 2005) – was the recipient of management fees from local SA subsidiaries at least as far back as 1999.

On 16 September, Lonmin's Director Mr Mohamed Seedat responded with the word 'Correct' to Chaskalson SC when the latter stated: 'You couldn't do a transaction between LMS and Lonmin PLC, they are the same entity.' However, whilst receiving management fees from EPL and (much larger amounts) from WPL, LMS has in its turn been paying R429 million in 'management fees' to Lonmin Plc between 2007 and 2010 in transactions out of South Africa (Marikana Commission of Inquiry 2014a, 38240f; also Marikana Commission of Inquiry 2014c).

Lonmin was asked by Evidence Leaders to produce AFSs from LMS, but this did not transpire. For LMS' finances, Chief Financial Officer (CFO) Simon Scott's 29 September written testimony and a 'Facts Agreed' document provided by Lonmin in September disclosed that some key data from 2007–2012 had to be used (Lonmin Sept 2014; Marikana Commission of Inquiry 2014c[5]).

With reference to missing information, we can add the financial statements of Lonmin Insurance Ltd (LIL), incorporated in Bermuda until 2012 and on Guernsey from 2013. That such documents might have shed further light on Lonmin's affordability problems in South Africa in relation to Social Labour Plan (SLP) obligations and wages only became clear in October 2014. 'WPL, EPL and Lonmin buy most of their insurance through LIL,' was Lonmin's answer in a Question and Answer session with *Mail & Guardian's* Craig McKune (Lonmin 10 Oct 2014). However, LIL and transactions with LIL are not mentioned in the section called Related Parties in the AFSs of WPL and EPL where they would be expected to appear.

In September 2014, Lonmin also lodged five 2007–2011 Special Purpose financial statements from WPL directed to the SA Revenue Service and denominated in rand. Simultaneously, the 2012 WPL financial statements were lodged, denominated in US$ for WPL shareholders (as are the AFSs for financial years 2006–2010 filed at CIPC).

'The Bermuda connection' and the issue of 'substance'

WPL's and EPL's financial statements told a reader that Lonmin's subsidiary in Bermuda marketed and sold the Lonmin Group's platinum group metals and received a commission for this service. In addition, LMS provided services for which WPL was paying management fees.

Both the commissions and the fees were based on a percentage share of the revenue of WPL. The investigation showed that, starting from 2006, commissions and fees were substantially higher than the 2% and 1.9% of WPL's revenue that was stipulated in the inter-company agreement. This appeared to be because of a double accounting error, even if Mr Seedat – who took on the task of answering questions about Lonmin's finances – gave another explanation for the anomaly during cross-examination at the Commission on 29 September that does not concur with the data. In addition, Mr Scott's written testimony of 29 September, when untangled, shows that LMS in turn paid 'management fees' over the period 2007–2010 of between 20% and 37% of its revenue to Lonmin Plc in London, amounting to R429 million, as already mentioned above (Marikana Commission of Inquiry 2014c).

The *substance* of the services sold to WPL came under question in the Commission hearings. The issue of 'substance' concerns whether the service paid for in a transfer pricing arrangement is really provided or the commercial value of the service is being exaggerated (Davis Tax Committee 2014).

The questionable value of the services rendered and if they were not in practice performed 'in-house' by WPL itself and neither outsourced to Bermuda nor to LMS can be illustrated in various ways.

WMSL's official address since 1 October 2003 has been the offices of the law firm Appleby Services in Bermuda, an expert in off-shore arrangements (Marikana Commission of Inquiry 2014d). Lonmin's Mr Seedat referred to tax purposes under cross-examination at the Commission on 16 September 2014 when he was asked why Lonmin Plc officially sold its metals from Bermuda: 'Western Metal Sales, again it's not an unusual arrangement to have a marketing company which is generally located in a jurisdiction where the tax regime is much more favourable ... many of the mining companies ... have this arrangement' (Marikana Commission of Inquiry 2014a, 38232). This was retracted by Lonmin in the 23 September media statement. And the Question and Answer document from 10 October stated:

> The WMS structure and fee did not provide a tax benefit as there was a CFC [Controlled Foreign Company] relationship between Bermuda and the UK in terms of which Lonmin Plc was required to pay taxes in the UK on the dividends declared by WMS. In terms of the agreement WMS has to declare dividends in terms of a dividend distribution policy acceptable to the UK revenue authorities. Mr Seedat, whilst continuing with his evidence on 29 September, corrected this position and confirmed that the WMS structure and fee did not provide a tax benefit. (Lonmin Plc 10 Oct 2014)

Mr Seedat was obviously instructed to confirm the implausible position that the Bermuda connection was not for tax planning purposes, when he appeared again before the Commission on 29 September. Despite Lonmin's assertions to the contrary in the quote above, Mr Seedat did not retract anything during his second (and last) appearance before the Commission on 29 September (Marikana Commission of Inquiry 2014b). Had he done so, it would have probably resulted in a round of new questions.

As for the CFC relationship referred to by Lonmin in the quote above, it has not produced any tax income for the UK government. Lonmin has not paid tax in the UK for the past 15 years. The UK has a double tax agreement with SA but not with Bermuda. A dividend paid by WMSL would have been taxed in UK because of the CFC legislation, but Lonmin Plc's taxation in UK for all the years 2000–2013 was nil (Lonmin 2002–2013). A plausible conclusion is that WMSL never paid any dividends, possibly because of expenses balancing the incomes from the sales commissions, leaving no significant profit to hand out. There is no account for tax paid under the CFC rule in the annual reports of Lonmin Plc.

Transfer pricing can be to the disadvantage of ordinary shareholders in a mother company (that transfer pricing is a problem for minority shareholders in the local subsidiary whose funds get depleted by exaggerated invoicing is evident). On the surface of it, all shareholders in a mother company should reasonably benefit from a transfer pricing agreement that is not questioned by local tax authorities (making it possible for auditing firms to advertise that they provide the transfer pricing solutions that 'maximise shareholder value', as PriceWaterhouseCoopers does on its website in June 2015). However, a lot can happen to a teacup on its way from the table to the mouth, as John Maynard Keynes once quipped. It is not hard to imagine cases where the transfer of money to a bank account in a tax haven only benefits a self-appointed group of insiders with exclusive access to this account.

In the 23 September media release, Lonmin commented on the alleged closing of the Bermuda connection in August 2007 – a closing that as late as financial year (FY) 2012 is contradicted by WPL's financial statements: 'The move was based on cost concerns (having a company registered in Bermuda and operating out of London was expensive) and resulted in marketing personnel being based closer to Lonmin's operations,' i.e. casually admitting within parenthesis that the company had not been actually sitting in Bermuda selling platinum. To the *Mail & Guardian*, Lonmin instead repeatedly stated in August that all sales were made from WPL in South Africa, not London: 'The fact is that all of Lonmin's metal is sold directly by Lonmin's operating subsidiary (WPL) direct to third parties' (Lonmin 10 Oct 2014, 8, 12 and 4). In September the narrative stabilised. Lonmin now said that it was LMS that sold the produce of WPL, starting in 2008.

As for the inter-company management services provider LMS, overhead costs of 200–500% have been added every year to the labour costs that were averaging R2 million per employee in FY2013 (R1.4 million FY2012). These unreasonably high costs, of which nature we know nothing, could surely have been radically cut to leave room for other needs. But despite these costs for labour and overheads, LMS' profit rates (accomplished by charging the SA subsidiary and 'customer' WPL) are up to over 60%, creating the inter-company accounting illusion that the staff of LMS is the most profitable in the whole Group.

By combining two sources from the Marikana Commission, Table 1 on marketing commissions and costs can be compiled (when accepting without any further questions that all the sales work was completely taken over by LMS in 2009).

Terminating the Bermuda profit-shifting arrangement could have released R3500–R4000 extra per month for a RDO wage. The key 'contra factual' table is shown below (Table 2).

In its counterfactual ('what if') examples, the report has also arbitrarily taken 28% of the transfer payments to provide additional financing of Lonmin's South African subsidiaries' SLP commitments which they seriously neglected (Bench Marks Foundation 2013).

Collapsing the Bermuda arrangement and cutting back on fees to LMS to a reasonable amount would have allowed the Lonmin subsidiaries – the actual employers of Lonmin's workers – to meet the 2012 RDO demands for a basic wage of R12,500 after tax, even after allocating 28% of resources to meet their SLP commitments. This would have been possible if pension costs and other 'knock-on effects' like medical benefits had not been added in full to the increase, mimicking the platinum strike agreement of June 2014, in which a part of the wage increase was agreed to be 'non-pensionable'.

The cost of the profit-shifting arrangements to workers, to mining communities, to Black Economic Empowerment (BEE) shareholders in the subsidiaries and to South African society at large, can be estimated to be well over R400 million per year.

To the two costly transfer arrangements can be added costs booked at WPL for so-called share-based payment expenses. They amount to R100 million each year in 2010–2012, or about R2000 per RDO and month, for each one of those years. This is a special type of remuneration cost that benefits managers and the like.

A public argument broke out in September 2014 over Lonmin's claim that the 'Bermuda connection' was terminated during FY2008 and that WPL paid 100% of both the commissions and fees to LMS

Table 1. Inter-company sales and costs for marketing services at Lonmin (in millions of rand).

Financial year	Sales commissions	LMS' 'marketing costs'	Surplus
FY2007	276 (whole amount to WMSL)	3	273
FY2008	335 ('half of the amount to LMS')	26	309
FY2009	181	154	27
FY2010	232	20	212
FY2011	280	17	263
FY2012	204	19	185

Source: Lonmin Plc Sept 2014; Marikana Commission of Inquiry 2014c.
Note: according to Mr Seedat, the FY2009 jump in costs was due to a contribution to the Jewellery Council.

Table 2. Reallocating the Bermuda Transfer to the workers and the mining community.

Contra-factual table	FY2008	FY2009	FY2010	FY2011	FY2012	Averages per year
Bermuda commissions in US$	44,425,403	20,761,891	31,633,630	39,902,873	25,510,431	*32,446,846*
Bermuda commissions (ZAR)	**334,822,650**	**181,394,668**	**232,008,266**	**279,819,598**	**203,790,933**	***246,367,223***
Exchange rate used above (ZAR to US$1)	7.54	8.74	7.33	7.01	7.99	
Exchange rate in annual reports (rand to US$1)	**7.45**	**9.00**	**7.45**	**6.95**	**8.05**	
28% ‘tax’ on commissions (rand)	93,750,342	50,790,507	64,962,314	78,349,487	57,061,461	*68,982,822*
72% to wages (rand)	241,072,308	130,604,161	167,045,952	201,470,111	146,729,472	*177,384,401*
Estimated no. of RDOs (2012 is given)	3045	3088	3551	4186	4200	
Average higher monthly RDO wage (rand)	**6597**	**3525**	**3920**	**4011**	**2911**	*Using the R177.384mn above for 4200 RDOs:* ***R3520 per month***
Lonmin’s Sustainable Development Reports: total no. of employees	25,967	21,623	23,915	27,796	28,230	

Note: ZAR is the exchange abbreviation used for South African rand.
The 28% subtracted from the ‘commission’ transfer simulates additional financial capacity for social infrastructure spending of R68 million per year for 2008–2012 (or US$9 million). Lonmin average Social Labour Plan spending 2003–2012 was US$6.7 million per year according to the Sustainable Development Reports. The 28% deduction from the transfer is arbitrary. If we redirect the flows to another cost, like wages, the transfer will not be taxed as a profit: it is a cost that decreases the taxable profit, just as do ‘commissions’ or ‘fees’. We can use the whole transfer for wages in this exercise or, alternatively, for the building of mine-worker houses. Lonmin had a legal obligation to build 5500 free-standing mine-worker houses in 2007–2011, but abandoned its R665 million housing budget and built three show houses.
The remaining 72% is used to make a contra-factual and additional average wage-level increase, across the board to the RDO professions or to all A and B category employees (‘unskilled’ and ‘semi-skilled’ in the Paterson grading system). The Marikana Commission’s terms of reference for Phase 2 limited the query to RDOs. Estimated number of RDOs in 2012 is the number given by Lonmin’s Mike da Costa in June 2012, and not the average of previous years. ‘R3520’ follows from that.
Number of employees: according to EEA4 forms 2006–2013, A, B and C employees constitute 97.5% of total workforce for 2002–2005, which also is the 2006–2013 average. A and B employees constitute 90% of the A, B and C workforce. The number of workers in the three rock drill professions was estimated at 4200 in a 27 June 2012 Lonmin Memorandum; even if the number might have been lower, the 4200 number is used here. It comprises a 17.7% RDO share of A and B employees in 2011 and 2012. We assume this share for all years.

from October 2008, which is when the 2009 financial year started. This is contradicted by all WPL's AFSs from 2008 to 2012, except for the FY2011 Special Purpose AFS.[6] Lonmin paradoxically denied that this was the case and its auditor KPMG supported Lonmin's position, in an email to this author.

The mystery surrounding the Bermuda connection is further analysed and described in the longer report. Here we shall only say this: whether WPL's payments are made to Bermuda or to the head office company LMS does not matter to the depletion of its funds. It has however importance for taxation in SA. The taxable profits of an external company like LMS were taxed at a rate of 33% before 2013, but there are of course no taxes paid to SA from Bermuda.

Conclusion

Profit shifting within multinational companies starts locally. A critical analysis should start from the point of view of stakeholders in subsidiaries. They hire workers and pay their wages. They pay tax on profits in the country where the actual value production takes place. In South Africa they hold the mining licences and have the legal SLP obligations. It is also in the subsidiaries that BEE partners hold shares from which they receive dividends.

It is the subsidiaries' funds that are depleted by exaggerated inter-company invoicing in the first link of a chain of transactions. Transfer pricing is not only a cross-border arrangement.

The Briefing has argued that the wage demands in the 2012 strike were affordable and were, fundamentally, about a choice of what to afford. Was *and* is such a reallocation of resources of the kind suggested here at all politically possible and 'realistic'? The question should be answered in steps, starting by saying that this has to be made possible. In contrast, were the killings and the massacre in August 2012 the 'really' existing and the 'realistic' alternative to other solutions?

At any rate, the final catastrophe and choice taken on 16 August 2012 was politically possible. One of the aims of the Marikana Commission was of course to contribute to the political impossibility of that choice in South Africa for all foreseeable futures. It appears that the Commission does not do that enough in its final report. One reason is that the R12,500 demand is mentioned in passing and not examined; more or less leading the reader of the final report to believe that the demand was completely impossible, stupid and outrageous (Marikana Commission of Inquiry 2015, 50f).[7] This Briefing has attempted to reverse those assumptions and locate the question of affordability within the wider, and hitherto hidden, picture of Lonmin's profit-shifting activities.

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Disclosure statement

No potential conflict of interest was reported by the author.

Notes

1. These issues formulated for **Phase 2: Underlying Causes** of the Marikana Commission were forwarded to me by the senior commission researcher for Phase 2.

2. The full report (Forslund 2015) is available at the AIDC website (http://www.aidc.org.za).
3. The registration number provided in Lonmin (2013, 65) '1969/00015/10' is wrong: the correct number is 1969/000015/10.
4. The information is provided by WINDEED for Lonmin Management Services, 1947/024975/07. WINDEED takes its data from CIPC. As this dissolved company obviously was a subsidiary and not an 'external company', one should be able to find AFSs for before 2005 in a file with this number at CIPC.
5. We know from a note in Mr Scott's 29 September testimony that LMS does have AFSs. He notes in his tables of payments and incomes FY2012 that 'AFS not yet finalised/signed'.
6. We do not know how the US$-denominated 2011 AFS, gone missing at CIPC, books the sales commissions.
7. In the view of this author, the Commission's final report on the discussions between Lonmin's Mike da Costa and a delegation of RDOs in June 2012 on the R12,500 demand gives a biased picture of how the workers argued (Marikana Commission of Inquiry (2015, 50–52), both when compared to the cross-examination of da Costa (Marikana Commission of Inquiry (2014d, 30066–30068), and even more when compared to da Costa's internal report about the discussion with the workers to Lonmin's Executive Committee. That report is discussed in Chapter 2 of the full-length report published by AIDC (Forslund 2015).

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