

**Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; and the Special Rapporteur on the situation of human rights defenders**

REFERENCE:  
AL OTH 12/2017

21 August 2017

Dear Mr. Sibonelo Mkhize,

We have the honour to address you in our capacities as Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 35/7, 28/11, 34/5.

In this connection, we would like to bring to your attention information we have received concerning the filing of allegedly abusive defamation lawsuits by Mineral Sands Resources (MSR) and its director against Tracey Davies, Christine Reddell and Davine Cloete, three South African environmental human rights defenders, for having made statements in an academic forum against the company, in relation to MSR's mining activities in the coast of the Western Cape Province.

According to the information received:

On 25 January 2017, Ms. Davies, Ms. Reddell and Ms. Cloete participated in a course organized by University of Cape Town focusing on the activities of extractive industries in the Western Coast of South Africa, including their environmental and social impacts. The three defenders gave presentations on the Tormin mineral sands mine, a mining project owned by MSR for the extraction of zircon, ilmenite, rutile, magnetite and garnet in a coastal area some 350 kilometres north of Cape Town. In their presentations, they focused on the environmental damage caused by the project and informed about the struggle of the community as well as environmental activism planned around it.

On 2 May 2017, the Western Cape Division of the High Court of South Africa issued combined summons instituting civil procedures against Ms. Davies, Ms. Reddell and Ms. Cloete, in relation to a lawsuit filed by MSR and its director claiming damages for defamation in relation to their statements at the University of Cape Town on 25 January 2017. The claims in damage amount to R250 000 for Ms. Davies and Ms. Reddell each, and R750 000 for Ms. Cloete, who is said to have defamed not only the company itself, but also its director. Because of their legal complexity, these lawsuits are said to pose an undue burden in terms of human capacities and financial resources on the part of the human rights defenders, requiring them to hire legal counsel and invest a significant amount of time for that purpose. In this sense, it is claimed that these lawsuits have the effect

of intimidating activists and distract, silence and ultimately demobilise environmental human rights defenders.

While we acknowledge that defamation lawsuits are established procedures of law for the protection of legitimate legal interests, we express concern at the allegations of their abusive use by MSR to overwhelm the human and financial capacities of Ms. Davies, Ms. Reddell and Ms. Cloete, who in pursuance of their work as human rights defenders expressed criticism of the company's activities in the Tormin mineral sands mining project. Particularly, we are concerned that the defamation claims brought against them seem to have the intention of demobilizing them and silencing their work as environmental human rights defenders.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations. The full texts of the human rights instruments and standards are available on [www.ohchr.org](http://www.ohchr.org) or can be provided upon request.

It is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. We would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information on the claims of defamation filed by MSR against Ms. Davies, Ms. Reddell and Ms. Cloete. In particular, please explain how according to MSR their statements on 25 January 2017 in the University of Cape Town constitute an excessive and illegitimate use of their freedom of expression amounting to defamation.
3. Please explain how the claims of defamation brought by MSR against Ms. Davies, Ms. Reddell and Ms. Cloete are compatible with the company's responsibility to respect freedom of expression and the work of human rights defenders under the UN Guiding Principles on Business and Human Rights.
4. Please provide information about the measures that MSR has taken, or is considering to take, to ensure that its human rights position and further policies and practices will be in line with the UN Guiding Principles on Business and Human Rights.

We would appreciate receiving a response as soon as possible. Your response will be made available in a report to be presented to the Human Rights Council for its consideration and publicly available at the following website in due course: <http://www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx>.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Your response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Sir, the assurances of our highest consideration.

Surya Deva

Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises

John H. Knox

Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Michel Forst

Special Rapporteur on the situation of human rights defenders

## **Annex**

### **Reference to international human rights law**

In connection with above alleged facts and concerns, we would like to take this opportunity to draw your attention to applicable international human rights norms and standards, as well as authoritative guidance on their interpretation. These include:

- The Universal Declaration of Human Rights (UDHR);
- The UN Guiding Principles on Business and Human Rights;
- The UN Global Compact Principles;
- International Code of Conduct for Private Security Service Providers
- The International Covenant on Economic, Social and Cultural Rights (ICESCR);
- The International Convention on the Elimination of All Forms of Racial Discrimination;
- The International Covenant on Civil and Political Rights (ICCPR); The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- The United Nations Declaration on the Rights of Indigenous Peoples; and
- Indigenous and Tribal Peoples Convention, 1989 (No. 169) from International Labour Organization.

In particular, would like to bring to your attention the UN Guiding Principles on Business and Human Rights (contained in A/HRC/7/31), which the Human Rights Council unanimously adopted in 2011 following years of consultations with Governments, civil society and the business community. The Guiding Principles have been established as the authoritative global standards for all States and businesses with regard to preventing and addressing the risk of business-related human rights impact.

The Guiding Principles clearly outline that private actors and business enterprises have a responsibility to respect human rights, which requires them to avoid infringing on the human rights of others to address adverse human rights impacts with which they are involved. The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. Furthermore, it exists over and above compliance with national laws and regulations protecting human rights.

The corporate responsibility to respect human rights covers the full range of rights listed in the UDHR, the ICCPR and the ICESCR. In this regard, we would like to remind you that everyone has the right to life and the protection of their physical and mental integrity as well as the right to be free from torture or cruel, inhuman or degrading treatment or punishment. These rights are set forth, inter alia, in the UDHR, the ICCPR and the CAT. Furthermore, we would like to recall that the UDHR and ICCPR also guarantee the rights to freedom of opinion and expression and freedom of association, respectively.. Moreover, we wish to refer to article 25 of the UDHR which recognizes the

right of everyone to a standard of living adequate for the health and well-being of himself and of his family, including medical care. This right is further elaborated in article 12 of the ICESCR, which guarantees the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

The Guiding Principles 11 to 24 and 29 to 31 provide guidance to business enterprises on how to meet their responsibility to respect human rights and to provide for remedies when they have caused or contributed to adverse impacts.

In this connection, we recall that the Guiding Principles have identified two main components to the responsibility to respect human rights for business enterprises, which require that “business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and] (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts” (Guiding Principle 13). This dual-requirement is further elaborated by the requirement that the business enterprise put in place:

1. A policy commitment to meet their responsibility to respect human rights;
2. A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights. The business enterprise should communicate how impacts are addressed; and
3. Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute (Guiding Principle 15).

Each of these is elaborated below.

#### *Policy Commitment:*

The first of these requirements, a policy commitment, must be approved by the company’s senior management, be informed by human rights expertise (internal or external) and stipulate the human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services. The statement of policy must be publicly available and communicated internally and externally and reflected in operational policies and procedures necessary to embed it throughout the business enterprise (Guiding Principle 16).

#### *Human Rights Due Diligence:*

The second major feature of the responsibility to respect is the “human rights due-diligence”, the procedures for which have been deemed necessary to “identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships” (Guiding

Principle 18). Adequate human rights due diligence procedures must include “meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation” (Guiding Principle 18).

To prevent and mitigate against adverse human rights impacts, the findings of the human rights impact assessment should be effectively integrated across the relevant internal functions and processes of a company (Guiding Principle 19). Responsibility for addressing such impacts should be assigned to the appropriate level and function within the business enterprise, and internal decision-making, budget allocations and oversight processes should enable effective responses to such impacts.

Any response by a company to address its adverse human rights impacts should be tracked to ensure that it is effective. Tracking should be based on appropriate qualitative and quantitative indicators, and drawing on feedback from internal and external sources including affected stakeholders (Guiding Principle 20). In addition, information about activities taken to address any adverse human rights impacts, and how effective those actions have been, should be communicated externally (Guiding Principle 21).

#### Remediation:

The Guiding Principles acknowledge that “even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent”. Where a company identifies that it has “caused or contributed to adverse impacts” it “should provide for or cooperate in their remediation through legitimate processes” (Guiding Principle 22).

Business enterprises should establish or participate in operational-level grievance mechanisms “to make it possible for grievances to be addressed early and remediated directly” (Guiding Principle 29). Operational-level grievance mechanisms should reflect eight criteria to ensure their effectiveness in practice, as outlined in Guiding Principle 31: (a) Legitimate, (b) Accessible, (c) Predictable, (d) Equitable, (e) Transparent, (f) Rights-compatible, (g) A source of continuous learning, and (h) Based on engagement and dialogue. Lastly, operational-level grievance mechanisms must not be used to preclude access by individuals and communities to judicial or other non-judicial grievance mechanisms (Guiding Principle 29).