

MALAWI HUMAN RIGHTS COMMISSION



BUSINESS AND HUMAN RIGHTS

MALAWI CASE STUDY: IN THE MATTTTER OF ENVIRONMENTAL POLLUTION AT NJULI ROCK AGGREGATE QUARRY

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1.1 INTRODUCTION

The human rights discourse is increasingly taking cognizance of the inextricable linkage of business and human rights. It is not disputable that activities of businesses can both be a contribution to the protection of human rights as well as a contribution to human rights violations. Nonetheless, the engagement of human rights institutions with private persons, let alone legal entities such as businesses over issues of human rights violations tends to be less robust compared to the engagement with state institutions. The paradigm shifting from the view of the state in its capacity as the primary duty bearer for human rights and hence easier to engage with on accountability of human rights violations to viewing private entities in the same manner is yet to gain concrete ground.

This brief write up discusses one strategic case that the Malawi Human Rights Commission (MHRC) handled from the year 2009 to 2010, touching on engagement of businesses for their accountability for human rights violations. The MHRC's approach to issues of this nature is twofold, i.e. by way of investigations and alternative dispute resolution or by way of human rights monitoring. In this regard, the MHRC's have been guided by a Rights-based Approach. Thus, the engagement with the Businesses in question has sought to ensure that the activities of the Businesses are in line with the basic elements of a rights based approach, i.e. meaningful participation of affected communities (empowerment), express linkage to rights, non-discrimination, accountability of all actors, attention to marginalised groups and a focus on both processes and outcomes. This paper will demonstrate through a case study how the MHRC engaged a mining company in Malawi to facilitate access to effective remedies for the attendant human rights violations, by the affected communities.

1.2. ABOUT THE MALAWI HUMAN RIGHTS COMMISSION

The MHRC is an independent institution established under chapter xi of the Constitution of the Republic of Malawi. The MHRC is mandated to promote and protect human rights in the broadest sense possible and to **investigate violations of human rights on its own volition or upon complaints received from any person, class of persons or body.** The Commission is further regulated by an Act of Parliament, the Human Rights Commission Act, in terms of its establishment, composition, functions, responsibilities, modes of operation and finances among other things. Sections 13 and 14 of the Human Rights Commission Act mandate the MHRC to *interalia*:

- Consider, deliberate upon, and make recommendations regarding any human rights issues, on its own volition or as may be referred to it by the Government
- to study the status and effect of legislation, bills, judicial decisions and administrative provisions for the protection and promotion of

human rights and to prepare reports on such matters and submit the reports, with such recommendations or observations as the Commission considers appropriate, to the authorities concerned or to any other appropriate authorities;

- to submit to the President, Parliament or any other competent authority, on an advisory basis, either at the request of the President, Parliament or such other authority or on its own volition, its opinions, recommendations, proposals or reports on any matters concerning the protection and promotion of human rights;
- to examine any legislation, judicial decisions or administrative provisions in force as well as Bills and administrative proposals and make recommendations as it considers appropriate in order to ensure that such legislation, judicial decisions, administrative provisions, Bills and administrative proposals conform to the fundamental principles of human rights;

It is in line with the statutory powers of Investigations that the MHRC conducted the investigations and other strategic engagement through Alternative Dispute Resolution Mechanisms (ADR) with a local Mining Company in Malawi, Terrastone Limited, whose activities led to a number of human rights violations and environmental impact.

2.1 THE CASE IN BRIEF

The Malawi Human Rights Commission (MHRC) received a complaint from Mr. Mandala Potiphar Kumbemba on behalf of a village organization called Olira Club¹. The complaint stated that the activities of Terrastone Limited Company who operate a quarry at Njuli in Chiradzulu District were leading to pollution of the area in the immediate vicinity of the quarry. In particular, the community stated that there are a number of activities at the site that affected their livelihood as follows:

- a. There was a stone grinder at the site that emitted clouds of dust when grinding rocks resulting in pollution of the area and surrounding gardens. The dust produced in the blasting and grinding of stone significantly pollutes the air resulting into breathing difficulties and coughs.
- b. The stone blasting at the site produced deafening sound affecting people's ears.

¹ Olira Club is a voluntary organization set up by concerned villages in the villages surrounding the hill where Njuli Quarry is situated in Njuli.

- c. The company did not give adequate time between the issuance of a warning for blasting through a siren and the actual blasting with the effect of unnecessary disruptions of the peoples' livelihoods. Whenever blasting was to take place, sirens were blown and people are expected to leave their houses and take positions in safe places far away from their homes and the blasting sites².
- d. The dust from the site was spreading into maize and vegetable gardens which surrounded the quarry site. As a result crops grew with difficulties and the community was unable to eat the vegetables as they were contaminated with dust.
- e. The big stream near the community was buried by the sand deposits from the mining activities rendering the river dry. This disrupted the farming activities along the river such as growing of sugarcane, vegetables, maize, beans, and tomatoes.
- f. The vibrations from the blasting and grinding caused significant damage to a number of structures including dwelling houses in the community. The damage extended to people's properties such as household utensils.
- g. The complainants also linked increasing cases of Tuberculosis patients in the area to the constant inhalation of dust from the quarry.
- h. A huge mountain of sand had developed and piled into an expanse of land that was previously farming land and the community's graveyard

The people affected were from the five villages of Chakachaza, Katsizi, Luwanga, Chikuse and Namakhuwa in Traditional Authority Mpama in Chiradzulu District. The quarry is situated at Njuli along Blantyre-Zomba Road.

2.2 THE INVESTIGATIONS AND FINDINGS

The MHRC undertook a series of fact finding/investigation activities at the quarry. MHRC conducted field investigations using four key methods: site inspection and observations; focus group discussions with community members, semi-structured

² It is alleged that due to intensity of the blasting, traffic on the main road is also stopped when blasting takes place.

interviews of key informants and institutional informants, picture documentation and sampling of vegetables. The Manager of Terrastone Limited at the site in Njuli, Chiradzulu and the Medical Assistant at the nearby health facility Mbulumbuzi Health Center were specially interviewed. The stream, maize gardens and people's houses were inspected to ascertain the damage caused to property and food.

The MHRC confirmed most of the allegations by the complainants. The MHRC observed that the activities at the quarry were having an impact on the environment both in the short and long term, and were a disruption of the peoples' livelihoods and a threat to their safety and health. MHRC physically examined 7 houses that clearly showed cracks consistent with damage from excessive vibration akin to seismic activity and because of the rocks that chip away and fly from the blasting site and land on the roofs and walls of houses. The damage included walls of houses, iron sheets, plates, flasks and animal shelters. An inspection of records at the nearby health centre, the Mbulumbuzi Health Centre indicated that there were many more people around Njuli Quarry as compared to the other areas far from the quarry, that suffered from various coughs including TB. (However, due to resource constraints, the MHRC was not able to pursue this matter to seek expert opinion on the issue).

The MHRC also established that in the period of over ten years that the company took over the quarry's business from previous owners an Environmental Impact Assessment as required by the Environment Management Act had never been conducted, even when the company scaled up the activities of the quarry to full scale stone extraction and grinding into quarry. The activities at the quarry had therefore not complied with the requisite legal regulations.

The MHRC arrived at the following findings among others:

The Ministry of Energy and Mining that has an obligation under the Environmental Management Act to cause to happen approved Environmental Impact Assessments before projects of such nature as the Njuli Quarry are authorized and make sure all companies follow acceptable standards regarding the environment, had not effectively exercised the authority vested on it by the law.

Terrastone Limited had a duty to ensure that it carried out its operations in compliance with the law and in a manner that respects human rights, and the company had consistently failed to meet these requirements.

The relevant Ministry had an obligation to ensure that where the activities of companies in the extraction industry would affect people through displacement, acquisition of land, or any damage to property, the affected people are supposed to be thoroughly briefed and the issues of compensation or relocation have to be properly addressed if the venture should really be sited in the selected place at all.

The MHRC linked the state of affairs to actual and potential violations of a number of human rights such as:

- right to safety and security of persons,
- the right to health,
- the right to food
- the right to health
- the right to a clean and safe environment,
- the right to liberty and freedom,
- the right to housing and,
- the right to property.

The MHRC variously engaged the Community members to ascertain their needs. This was followed up with engagements with Terrastone Limited on the issue of redress of the problems the community members were facing due to the mining activities. Later on, in a series of meetings, MHRC facilitated discussions between Terrastone and the Community representatives on the problem and strategies for the way forward. MHRC engaged the Media and this resulted in media coverage of the problem as well as documentation of some of the strategic activities in the resolution of the matter.

MHRC issued out a report of its findings regarding the human rights situation at the quarry. The MHRC established that, state institutions with regulatory and monitoring responsibility for the mining sector did not effectively perform their roles and this contributed to the violation of the human rights of the people of Njuli community. Further that, the relevant state machinery failed to hold Terrastone Limited accountable for its environmental stewardship, as required by law. In this regard, the MHRC report stated that;

“the blasting effect, noise, dust and air pollution that operations of the Terrastone quarry is bringing out are serious enough to warrant official intervention. It is in our view easier to enforce action against a company for violating environmental regulations if duty bearers have their eyes open and are willing to do so. The right to a healthy environment requires urgent application of environmental standards to regularise activities of companies such as Terrastone. The gains in economic terms in such an area are not in our view so important that human rights violations should be allowed. It is in our view most noble to consider relocation of the quarry to a site that would not affect the people of Njuli so much. We do not believe that the people of Njuli or any other community in Malawi should be saddled with human rights violations for all economic development when their very lives are endangered”

The MHRC further recommended that the Ministry of Energy should take up the issue and ensure that remedial measures were implemented on issues such as compensation for damage to property, addressing environmental degradation and conducting an Environmental Impact Assessment. The MHRC report was used to engage relevant authorities particularly the Ministry of Energy and Mining (The Environmental Affairs Department) in a series of meetings with a view to resolving the problems at the quarry.

As a result of the meetings, the Ministry through the Environmental Affairs Department conducted independent inspections of the quarry which resulted in the Department issuing a Stop Order to the Quarry Authorities in line with the Environment Management Act, wherein the Quarry Authorities were ordered to rectify the problems that were arising from their mining activities.

The Stop Order indicated that the quarry was posing significant risk to public health and the environment through:

- the poor stock piling of soil and overburden resulting in the siltation of Matenjere stream thereby adversely affecting downstream users;
- fly rock from blasting resulting in damage to property in the surrounding communities;
- settlement of dust from crushing and blasting on crops including leafy vegetables resulting in contamination of food for the surrounding community.

The order noted that all of these activities are detrimental to the protection and management of the environment and conservation of natural resources. The order also noted that the authorities of Njuli quarry had been negligent in implementing the recommendations of an environmental audit that was carried out on the quarry in the year 2004. Furthermore that the quarry delayed to submit a follow up environmental audit report that it was ordered to produce in the year 2007

In view of the above, the order directed the quarry authorities to:

- Put in place effective measures to reduce runoff from soil and overburden stockpiles into Matenjere stream and peoples' gardens;
- put in place effective measures to reduce damage of property of surrounding community by fly rock;
- put in place effective dust suppression measures to control dust from blasting and crushing operations at all times;
- to take such measures as are necessary for the restoration of natural resources and the environment including the restoration, as far as may be possible, of Matenjere stream which has been degraded by the quarry's activities by planting trees and appropriate grasses along the stream and caring for the same;

- to conduct blasting between 16:00 hours and 17:00 hours and give effective advance notice (at least 2 days before the blast) to the surrounding community of the intention to blast;
- to repair all broken silencers on machinery used at the quarry to avoid unnecessary noise;
- to construct a perimeter wall around the whole quarry site to contain run off, grit and dust within the quarry premises;
- to engage the surrounding community through consultations to be facilitated by Chiradzulu District Assembly to address social issues affecting the surrounding community and compensate affected parties where required; and
- after implementing all of the above measures to undertake an environmental audit of the quarry to determine the extent of compliance on the above issues and any other environmental issues, how this will be done and the time frame.

The MHRC went on to hold round table discussions on the Njuli Quarry Matter with the quarry authorities, representatives of concerned community members, Officials from the Chiradzulu District Assembly offices, the relevant Member of Parliament for Chiradzulu Central and officials from the Ministries of Energy and Mining and the Department of Environmental Affairs. The main aim of the meeting was to assess the compliance of the quarry authority with the conditions that were set out in the stop order issued by the Environmental Affairs Department against Njuli quarry and make recommendations on the way forward.

MHRC issued a report of the Round Table Discussions observing that the quarry authorities had made significant progress in addressing the human rights issues that arose from the activities at the quarry. For instance, most of the affected persons had been compensated with the involvement of the Officers from Chiradzulu District Assembly, the Quarry authorities had embarked on a tree and planting exercise on the banks of Matenjere River, there was a joint committee of the Quarry Authorities and Community members to address developmental issues

in the area, including construction of a health clinic and an affirmative action for employment of community members at the quarry including women, silencers were being used when blasting, and water was being used to contain the dust from the blast. The report also enjoined the Chiradzulu DC and Chiradzulu Central MP to closely monitor the developments at the quarry and work hand in hand with the concerned communities.

3.1 CHALLENGES

A major challenge that the Investigating team encountered initially was the lack of cooperation with the local chief of the area. The lack of cooperation could be for the reason that the Quarry Authorities had constructed a house for the chief. Another challenge arose from the fact that chieftaincy wrangles between the complainant's representatives and the local chief surfaced in the course of the investigations. This in some ways distorted the complainants' complaint as a way of settling old scores with the local chief. Another challenge was the limitations in terms of resources, which entailed that the MHRC could not handle the case with the needed expedition, and could also not involve experts such as (Medical Doctors, Environmental specialists, Geologists, etc) for expert opinions. Furthermore, the process for engaging other offices such as Government Departments was also protracted due to excessive bureaucratic processes in the Departments.

3.2 LESSONS LEARNT

This case study illustrates the practical application of a Rights-Based Approach in engaging businesses on issues of human rights violations. Firstly, the communities were mobilised to ensure their meaningful participation in the resolution of the matter. They were consulted from time to time directly or through representatives. Eventually, skills and knowledge were transferred to the community and they gained capacity to engage the Quarry authorities on their own, e.g. through establishment of the joint committee. This could also ensure sustainability of the human rights monitoring. This is in line with the Participation and Empowerment principle in the RBA. Secondly, the MHRC facilitated a process whereby various stakeholders were pressed for accountability in line with their social, moral or legal obligations over the matter. These authorities included the Quarry authorities, the ministry of Energy and Mining, the Department of Environmental Affairs, the Member of Parliament and Traditional chiefs for the area.

Thirdly, throughout the process the MHRC ensured that the various issues were expressly linked with the human rights that were at stake and made specific reference to the provisions of these rights in the Malawi constitution as well as

other relevant international human rights instruments which Malawi has signed. This further legitimized the issues and immediately connected the issues to the duties of promotion, protection, and fulfillment of rights by duty bearers including the state. Finally, the MHRC adopted an inclusive approach that also paid specific attention to marginalised groups. For example, in the focus group discussions, women were exclusively targeted to ensure that they shared their experiences with regard to the effects of the quarry activities as well as put forward their needs.

All in all, the Njuli Quarry case shows the following:

- The added value of employing a Rights Based Approach,
- The significance of building alliances e.g. with the Media, local authorities
- The cost effectiveness and timeliness of resolving matters by way of ADR

3.3 CONCLUSION

Most importantly, although this case study demonstrates engagement with a small level private entity as opposed to a multinational or huge business conglomerate, it illustrates that National Human Rights Institutions can employ their broad mandate of the promotion and protection of human rights to hold private entities accountable for human rights violations. National Human Rights Institutions can play a pivotal and complementary role to other enforcement mechanisms in the domain of human rights and business. As stated in the MHRC report in the Njuli Quarry matter; "The gains in economic terms (from businesses) are not in our view so important that human rights violations should be allowed ... the people (of Njuli or any other community in Malawi) should (not) be saddled with human rights violations for all economic development when their very lives are endangered"