

Implementing the MoU signed by The Bench Marks Foundation and Anglo Platinum in Paris on April 8, 2010

*Mediation Report (final) by Wouter Pronk and Reinier de Man,
Amsterdam/Leiden, August 27, 2010*

Executive Summary

On April 8, 2010, the Bench Marks Foundation (BMF) and Anglo Platinum (AP) signed an MoU to cooperate in a project to empower the relocated households in the Community of Magobading (Limpopo). The project idea was developed in the context of the Roundtable on the Sustainable Production and Use of Platinum Group Metals (RT-PGM). Since then a number of difficulties prevented the project partners to implement the MoU. Notably there were disagreements on the fair representation of the relocated Community. The trust level between AP and BMF/the Community appeared too low for continuing the implementation of the MoU as originally planned.

BMF and AP asked Wouter Pronk and Reinier de Man (RT-PGM) to come to South Africa to mediate between the parties and to find a path to get the project back on track again. The mediation took place in Johannesburg from August 11 to August 17, 2010 and included discussions with AP, BMF and Community members separately, one meeting with AP and BMF and a final mediation meeting with all parties present, including Community representatives.

The mediators concluded that both AP and BMF were still motivated to implement the project as formulated in the MoU but that the first need was to build up trust to the level required for effective cooperation. The parties agreed to exchange information on two concrete issues and that AP would implement the projects as agreed in the MoU with a different role for BMF. In more detail:

Building Trust between AP, BMF and the Community

1. AP and BMF will exchange information on the rights and obligations as defined in the contracts between AP and the Community members.
2. AP and BMF will share their information on which they base their differing perceptions of the representation issue in the (relocated) Magobading Community.

Implementing the Project in the Magobading Community

3. The original MoU is no longer the formal basis for cooperation between BMF and AP.
4. AP will implement projects in the Magobading Community and include the project as originally agreed in the MoU. BMF will not be member of the project team, however.
5. AP will make sure that there is a fair process, not influenced by AP, for choosing Community representatives in the project structure.
6. As the trust building process develops, BMF and AP continue their discussion on a feasible role for BMF as a monitoring organisation and on the issues to be monitored.
7. BMF and AP do not exclude the option that BMF will become a project partner in the future, as originally foreseen in the MoU, but they decide to work on trust building measures first.

Background, Objective and Procedure

On April 8, 2010, a Memorandum of Understanding (MoU) was signed by Anglo Platinum (AP) and The Bench Marks Foundation (BMF). The MoU expressed the parties' commitment to cooperate in a project that will empower the Community of Magobading (Limpopo). It selected two issues of immediate interest: empowering the community in maintenance and renovation of their homes and setting up a trust fund to support socio-economic development in the Magobading Community.

After April 2010, a number of problems came up that prevented that first steps in implementing the MoU were made. There were disagreements and conflicts about a number of issues and the parties perceived each other as not living up to the spirit of the MoU. TMF and AP asked Reinier de Man and Wouter Pronk, who had initiated the project idea on behalf of the Roundtable on the Sustainable Production and Use of Platinum Group Metals, to come to South Africa and perform a mediation that would bring the implementation of the MoU back on track.

The procedure used by the mediators included the following ten steps:

1. A meeting with representatives of the Magobading Community and BMF¹ in Johannesburg on August 11, 2010, in which the mediators were informed about the position of the Community and BMF as well as historical backgrounds.
2. A meeting with Anglo Platinum representatives² on August 12, 2010, in which the mediators were informed about Anglo Platinum's position and their perception of the problems that arose since signing the MoU.
3. A meeting with BMF³ on August 12, 2010, in which the mediators gave feed-back on their progress and the mediators could obtain a more clear picture of BMF's perception of the problems in implementing the MoU.
4. A meeting with AP⁴ on August 13, 2010, in which the mediators gave feed-back on their progress.
5. A meeting with representatives of BMF and AP⁵, in which the mediators brought the parties together to share their views on a number of issues that are vitally important for making progress. This was an 'exploration' and not a 'decision making' meeting. John Capel (BMF) and Mary-Jane Morifi (AP) did not participate in this meeting.
6. The results of the first 5 steps were summarised in the first draft of this report, which contained an analysis of the situation and a proposal for making progress in the implementation of the MoU.
7. On the basis on this first draft, conditions for continuing or stopping the mediation process were defined and discussed with AP and BMF⁶. It was agreed to have a mediation meeting on August 17, with AP, BMF and community members present as observers.

¹BMF: John Capel, Hassen Lorgat, Brown Motsau, Erik Mokuoa; Magobading Community: Jerry Tshehlakgolo, Johannes Moeti, Martin Thobeyane, Elisa Thobejane, Precilla Dimpeng, Clara Moela.

²Mary-Jane Morifi, Stephen Bullock, , Trinity Mthiyana , Tshepo Kgasago, Jimmy Johnston, Sibonelo Shinga.

³BMF: John Capel, Hassen Lorgat, Brown Motsau, Erik Mokuoa.

⁴AP: Mary-Jane Morifi, Stephen Bullock, Tshepo Kgasago.

⁵BMF: Hassen Lorgat, Brown Motsau and Erik Mokuoa; AP: Stephen Bullock and Tshepo Kgasago.

⁶ Phone calls and e-mails to and from BMF (John Capel) and AP (Stephen Bullock).

8. A second draft of the mediation report was written. It contained a proposal for three options for developing the project further: A. continue as originally planned, B. breaking up the MoU and ending the cooperation between BMF and AP, C. continuing the implementation of the projects as planned in the MoU, but changing the character of the BMF – AP cooperation.
9. The mediation meeting finally took place on August 17, from 12:00 – 14:30 in the Johannesburg Mapungubwe hotel. Participants were representatives from the Magobading community, BMF and AP⁷. During the meeting, AP and BMF agreed on changing BMF's role in the implementation of the projects for the Magobading Community whilst continuing the trust building process between AP and BMF.
10. The final results of the mediation process have been included in the third and final draft of the mediation report (this report).

⁷AP: Stephen Bullock, Tshepo Kgasago , Trinity Mthiyana; BMF: John Capel, Hassen Lorgat, Brown Motsau. Community representatives were Jerry Tshehlakgolo, Johannes Moeti, Martin Thobeyane, Elisa Thobejane, Anna Thobejane and Clara Moela. Erik Mokuoa (BMF) was present to provide simultaneous translations to community representatives who do not understand English.

Issues and Questions

The implementation of the MoU has never really started because of a number of unfortunate events (notably during May 2010), which did not create but rather destroyed trust between the project partners. In this report, we will not try to analyse these events, let alone ask questions about who was responsible for the situations that developed. Instead, we ask ourselves on which issues the parties need to create agreement in order to avoid similar negative developments in the future. During the mediation process, we discovered that disagreement and lack of clarity about the answers to the following questions has been blocking progress:

1. In what spirit do the parties wish to cooperate in the envisaged project?
2. What is the motivation of the parties to engage in this cooperative effort? Do the parties want to continue or to stop the implementation of the MoU?
3. How is the Community defined in the coming project? Who are the community members?
4. Who is representing the Community in this project and how?
5. Who is participating in the Project Team and how will the project team work?

In the following, we will give a short analysis of the disagreements and make recommendations for finding answers that are acceptable to all. The analysis and recommendations were the starting point for the discussions and decisions in the final mediation meeting. The following text contains recommendations as they were formulated before the mediation meeting.

Spirit of Cooperation

Analysis

Both AP and BMF accused the other to have acted against the spirit of cooperation, even to violate the spirit and content of the MoU, which was agreed in good faith. Generally we see a lack of openness and (informal) exchange of information between AP and BMF. Instead we see many e-mails and indirect methods such as involvement of press and media. This reflects a low level of trust and the absence of effective trust building processes.

Recommendation

Without a real effort from both sides to work on trust building measures, there is no future for the project. Before continuing the cooperation, the parties must agree at least on the following:

- “We allow each other to make mistakes, we help each other to correct them”;
- “We do not organise meetings and other actions in the context of the project without due consultation of the others”;
- “We talk to each other about problems and developing conflicts and try to solve them before involving others, including media and the press”.

Motivation to Continue

Analysis

By asking for the mediation process, both parties had already expressed their will to continue the implementation of the MoU. We asked for the parties’ motivation to continue.

- BMF's interest is to improve the situation of those who have been relocated to give way to mining activities and to strengthen their rights; BMF believes that it is an advantage to have Anglo Platinum and the Community at the table in the context of the International Platinum Roundtable.
- AP's interest is to improve the situation of local communities such as Magobading. AP sees a real advantage in cooperating with BMF, who can contribute to the quality of AP's community involvement on the basis of their extensive knowledge and experience in this area.

Apparently, there is a high level of agreement on the ultimate goal of this project and similar projects in the future: to improve the situation of those living in Communities such as Magobading. On a general level, there is consensus. However, there does not appear to be a clear consensus about how to bring this goal forward.

Recommendation

The parties should recognise their agreement on the ultimate goal of the project and use it as a basis for cooperation. The parties should recognise more that, despite differences about concrete steps, there is a common denominator.

The Community

Analysis

The MoU mentions the Community of Magobading, without clearly defining what is meant. For BMF, it was clear from the beginning, that the project exclusively refers to the re-located households in Magobading. BMF suspected AP to have a different definition of the Magobading community: all households in the Magobading township.

Discussions with AP have revealed that, in principle, AP cannot exclude services to any group in a community and that will not develop projects for selected groups, as this would create a risk of dividing the community. However, AP recognises that BMF's interest is to work specifically with the re-located households and they accept BMF's argument that the relocated households have special rights and needs. Therefore AP does not oppose to limiting the cooperation project with BMF to re-located households only, as long as the risks of dividing the community are being recognised and minimised in the project.

Recommendation

The parties should accept that

- AP is developing and implementing projects for larger communities than the relocated people only;
- cooperation between BMF, the Community and AP refers to re-located households;
- there are risks involved, for which the parties should find solutions in mutual cooperation as they come up.

Representation of the Community

Analysis

Already during the formulation of the MoU (February 2010), there were differences of perception of who are the legitimate leaders of the relocated Magobading community who should take part in the development of the project. Representatives of the Magobading community, as proposed by BMF, were allowed to participate in the February 18, 2010 meeting, but were not formally involved in decision making or signing the MoU. The level of irritation and conflict grew after a number of events not long after signing the MoU.

- BMF were convinced and are still convinced today that they involved the legitimate leaders of the re-located Magobading community in the project. They do not have any doubts about the procedures by which the Community members have chosen their leaders;
- Based on several experiences, AP was not and still is not convinced that the leaders as put forward by BMF do represent the full relocated community and suspect them to represent only one fraction.

The discussion is still going on, partly through contributions to the press and the media. There is no easy and quick agreement in sight. However, there is a strong consensus between AP and BMF about the underlying principle: “The leaders that we involve in the project should represent the whole relocated community and not just a fraction”. AP and BMF have made clear to the mediators that they are willing to exchange information on the matter, as they apparently base their conclusions on different sources. They have agreed that this should be done in a way that will not create dangers for any individuals in the community. Dealing with confidentiality is a major concern here. Creating better understanding between BMF and AP on this issue will take time. This issue cannot be resolved through easy and quick decisions.

Recommendation

The mediators’ recommendation consists of two separate actions. The first action does not formally belong to the project, but concerns the context in which the project will be developed. The second action is part of the project itself.

1. Joint fact finding and understanding of the representation issue
AP and BMF organise a number of meetings, in which they exchange their information about the leadership issue as mentioned above. They will jointly find out whether additional leaders or other leaders should be involved in future project development. For the time being, they accept the leaders, as proposed by BMF, to continue to take part in the coming meetings.
2. Electing members on the Project Team
AP and BMF do not wait for the leadership issue to be fully resolved before starting the project. They decide to have a simple and fair procedure for members of the relocated community to be on the project team, see next section (‘Project Team’).

Project Team

Analysis

The first step to be made in implementing the MoU is to set up a project team for the project “Maintenance and Renovation of Homes”. The project team should include representatives from members of the relocated community (especially those who have hands-on experience with the problems discussed) and representatives from AP. It was agreed in the MoU that BMF will play an advisory role.

Recommendation

Our recommendation is to start setting up the project team as soon as possible and to draft its Terms of Reference. The following general set-up appears to be acceptable to all parties:

- First day members are:
 - three representatives from the relocated community, chosen by all relocated community members on the basis of a fair and transparent procedure. The representatives will not receive any fees, but will receive travel expenses if so required.
 - three representatives from AP, to be decided by AP, including representatives from the local mine level.
 - three advisory members on behalf of BMF.
- The first day members are free to extend their Project Team with experts, advisers, etc. as required.
- The Project Team’s first task is to work out a concrete plan for action.
- It is advisable to have, at least for the first three meeting, independent facilitation of the meeting. We propose that AP and BMF / the Community propose their preferred facilitator and that the meetings will be jointly prepared and facilitated by these two facilitators.

Starting Points for the Mediation Process

On the basis of the mediators’ analysis and recommendations, as described in the previous sections, the mediators formulated conditions for continuing the mediation process and discussed them with AP and BMF. These conditions were:

- AP and BMF agree to create and maintain a spirit of open communication and cooperation as the basis for this project;
- AP and BMF, at the highest management level, agree that they will look into the representation issue in due course;
- AP and BMF allow the Community representatives, as proposed by BMF, to take part as observers in the mediation meeting.

As there appeared to exist a good basis for agreement on these issues, the mediators decided to organise the mediation meeting as planned.

Options for Implementing the Project

Based on the results of the mediator's discussions before the mediation meeting, the mediators concluded that three alternative paths for implementing the project needed consideration. One option is to start implementing the MoU as originally planned in a cooperation between the Community and Anglo Platinum with the Bench Marks Foundation as advisers. The alternative option is to decide to break up the MoU as originally envisaged. In the latter case, BMF will not be part of the project structure and Anglo Platinum will carry out the project with the Community only. In a third option BMF will play the role of a monitoring organisation and will not be a partner in the project. Here we describe the three options, the conditions under which they will work and the risks involved.

A. Implementing the MoU as originally planned

Description

AP, BMF and the community decide to start the projects as agreed in the MoU (first: maintenance of homes) as soon as possible and to agree on a date before which the work should have started. This start includes the formation of the Project Team (Community, AP, BMF, facilitators) and an agreement on a working plan.

Conditions

The main conditions have been mentioned throughout this report. First of all, the parties agree to build up trust on the basis of regular exchange of information and ideas through (informal) meetings. They agree that they try to solve problems through cooperation before they resort to other tactics. AP and BMF agree on an open discussion about their differences with relation to leadership issues in the Magobading community, but do not use this discussion as a argument for postponing the project work further.

Opportunities and Risks

If this option – a real innovation in NGO, Community and Business relations – is successfully implemented, it will produce more positive results than any other option for all parties. However, this option requires the highest level of commitment.

On the basis of the discussions between February and August 2010 and particularly during the preparations of the mediation meetings, the mediators are not yet fully confident that the spirit of cooperation, a first requirement for the success of the project, has developed between AP and BMF or that such a spirit is likely to develop in the near future. Only if both parties recognise that a quantum leap in improving the spirit is needed, can the project become a success.

Therefore the mediators recommended that other options would be considered at the mediation meeting. They advised that, if the partners decided for the originally planned MoU implementation, they should also agree that they will switch to the second or third option, once they discover that difficulties in the process prevent positive outcomes for the community.

B. Carrying out the Project without BMF as an adviser

Description

In case the conditions for the first option are not there or are not likely to be created in the short term, it will be better for the community that AP starts its own projects, into which the projects as agreed in the MoU will be included. In this case, AP may decide their own solutions to the representation and leadership issue. BMF is free to continue criticising AP, but as an outsider and not as a project partner.

Conditions

AP can decide to follow this path as they wish. There are no particular obstacles to this option.

Opportunities and Risks

For AP, the risk of this option is that they base their judgment on limited information and miss the information and ideas that could have been provided by BMF. However, the main advantage for both the Community and AP is that the project can start soon without further delays.

C. Carrying out the Project with BMF as a monitoring organisation

Description

In the third option, the difficulties between BMF and AP in defining the project and BMF's role are being recognised and a different role for BMF is chosen. In this option, BMF will not be a project partner but will monitor the project process and outcomes on the basis of pre-defined expectations and criteria. BMF will not be member of the project team.

Conditions

The conditions are similar to the conditions for option A. Also here the partners should develop a minimum level of trust and a culture of open exchange of ideas and information. However, the advantage is that BMF can take more distance to the project and to AP so that there is a chance to play their independent role better.

Opportunities and Risks

The advantage of this option, in comparison to option B, is that through BMF's monitoring role, the quality of the outcomes, in the interest of the community, can be enhanced.

The risks in this option are not too different from the risks of option A. Also in this case the partners need to agree on actively and intensively building trust. If the partners are not prepared to do so, option B is more likely to produce positive results.

Outcomes of the Mediation Process

Agenda of the August 17 Mediation Meeting

The mediation meeting on August 17, 2010 (12:00 – 14:30) had the following agenda:

1. Introducing all participants
2. Mediators' introduction and questions to the participants
3. BMF's statement on their position and the position of the Magobading community
4. AP's statement on their position
5. Discussion, possibly leading to a final agreement on implementing and/or changing originally agreed MoU.

Mediators' Introduction and Questions to the Participants

The mediators summarised their findings during the mediation process. Wouter Pronk presented the five central questions, dealing with (1) the spirit of cooperation, (2) the motivation to continue, (3) the definition of the community, (4) the representation issue and (5) the future project structure. He emphasised that the mediators' main concern was related to the spirit of cooperation, i.e. the low level of trust and that there is no future for the project without a systematic trust building process based on a strong motivation from all sides. Reinier de Man gave a short presentation of the three options that were available in principle: A. continuing as planned, B. breaking-up the MoU and continuing without BMF as a project partner, C. finding a new and more appropriate role for BMF.

The mediators expressed their scepticism about the likelihood that the original scenario A would work. "We are not going to convince the parties that the original plan can work. We doubt, whether that is possible. The level of trust is just too low. So, if you want to continue on the original track, please convince us." They would rather go for scenario C, but warned the parties that also C requires a higher level of mutual trust than has developed until present: "BMF should engage with Anglo Platinum and the Community in their monitoring role. At the same time, BMF and AP should start building trust through organising discussions on two issues: disclosing information about the relocated families' rights (as documented in contracts and reports) and discussing the leadership and representation issue by disclosing the information held by both parties.

The Bench Marks Foundation's and the Community's Position

BMF expressed their continued motivation to implement the agreements as formulated in the MoU. They repeated many of the arguments that were brought forward in the earlier meetings that week. One of their central concerns was again that the relocated families need special concern, have special problems and special rights and that only a project in which the relocated households (and not all households) are represented is acceptable to BMF and the Community. BMF's and the Community's worries about the representation issue were expressed again, also referring to the unfortunate events of May 2010.

The mediators said that they had not tried and would not try to precisely understand the May 2010 events and that they did not wish to discuss them during the mediation meeting. "These events are an expression of the low level of trust between the parties and, for the project to succeed, we need to work on trust building processes."

Anglo Platinum's Position

Anglo Platinum made clear that it is AP's policy to work with all groups in communities and not with selected groups in communities, but that AP agrees to work, in cooperation with BMF, on the special needs and rights of the relocated households. AP agreed on the mediators' report with respect to the low level of trust that was blocking progress in the implementation of the MoU. As to the different scenarios, AP expressed its preference for a development as sketched by scenario C. According to that scenario, AP would implement the projects as agreed in the MoU, but without BMF as part of the formal project structure. AP would solve the representation issue in the project by having an open and transparent election process, organised by an independent third party. AP said it would welcome BMF to become involved in monitoring progress in project implementation.

The Final Agreement

Having heard the arguments from the Community, Anglo Platinum and the Bench Marks Foundation, the mediators proposed the following agreement:

1. The parties will no longer be bound⁸ to implement the MoU, as signed in April 2010.
2. The parties agree that further delays in implementing the projects as originally agreed in the MoU will be at the expense of the Magobading community and should therefore be avoided.
3. Anglo Platinum will continue to implement the project as formulated in the MoU and in the spirit of the MoU. The two focus issues for the near future are 'home maintenance/renovation' and 'setting up a trust fund'. BMF will not be member of the project team (article 16 of the MoU).
4. AP and BMF will continue the trust building process in the spirit of the meetings during the mediation process (August 11-17, 2010), see next points (5 and 6).
5. AP and BMF will set up a number of meetings on disclosing information on the rights and obligations defined in the contacts between AP and the Community members. AP and BMF. AP and BMF will take confidentiality issues seriously into account.
6. BMF and AP will share their information on the representation issues in the relocated Magobading community. They will disclose their information without creating dangers for members of the Magobading community.
7. As the trust building process develops, BMF and AP continue their discussions on a feasible role for BMF as a monitoring organisation and the issues to be monitored.
8. The parties do not exclude the option of BMF as a future project partner, as originally foreseen in the April 2010 MoU, but they agree to work on trust building (points 5 and 6) and on monitoring (point 7) first before re-considering scenario A.

The mediators' proposal was accepted by both the Bench Marks Foundation and Anglo Platinum.

⁸ Please note that the MoU has never been a legally binding document, as stated in its preamble: "This MoU is a legally non-binding document".