IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 71147/17

Application for intervention of as parties:

MINING AFFECTED COMMUNITIES UNITED IN ACTION First Applicant

WOMEN FROM MINING AFFECTED COMMUNITIES UNITED IN ACTION Second Applicant

MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA Third Applicant

In the matter between:

CHAMBER OF MINES Applicant

And

MINISTER OF MINERAL RESOURCES Respondent

APPLICANTS' (MACUA) HEADS OF ARGUMENT

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INTRODUCTION

1. This is an urgent application to intervene as co-Applicant in the review of the 2017 Mining Charter brought by the Respondents against the Minster of the Mineral Resource's ("main application"). The main application is set to be heard on 13 and 14 December 2017.

2. The Applicants are **Mining Affected Communities United in Action ('MACUA'), Women from Mining Affected Communities United in Action ('WAMUA') and Mining and Environmental Justice Community Network of South Africa ('MEJCON')** all of which are voluntary associations/movements specialising in capacitating communities and activists on issues of the environment when dealing with corporations, transnational corporations and government.

RELIEF SOUGHT

3. The Applicants accordingly seek an order in the following terms:[1]

   3.1 That the time periods, firms and manner of service provided for in the rules are dispensed with and the matter is heard as one of urgency in terms of Rule 6(12);

[1] Applicants' Notice of Motion paginated page 2-3.

3.2 A direction that the Applicants are granted leave to intervene in the above matter; and

3.3 A direction that the affidavit and its annexures thereto be admitted as founding papers filed on behalf of the Applicants in the Review application.

4. The Chamber opposes the intervention application on the purported basis of:[2]

4.1 Lack of urgency;[3]

4.2 No *locus standi*;[4]

4.3 The differing grounds of review;[5] and

4.4 The prejudice the Chamber will suffer as a result of the alleged delay.[6]

FACTUAL BACKGROUND

5. On 15 June 2017 the Minster published the 2017 Mining Charter.[7]

[2] Answering Affidavit ('AA') para 5-5.3, pp 119.

[3] AA para 7-23 pp 120-126.

[4] AA para 31 pp 128.

[5] AA para 24-27 pp 126-128.

[6] AA para 5.3-5.3.3 pp 119-120; para 26 pp 127

[7] AA para 9 pp 121.

6. On 26 June 2016, the Respondents brought an urgent application interdicting the implementation of the 2017 Mining Charter pending final determination, in a judicial review of the legality of the 2017 Mining Charter.[8]

7. Though the interdicting application was set down for hearing, it was not to be heard before the parties settled on an undertaking by the Minster that the Mining Charter 2017 will not be directly or indirectly implemented pending the determination of the review application which was to follow.

8. By agreement between the parties, and direction of the Honourable Judge President, the review is set down to be heard on 13 and 14 December 2017.[9] The parties also agreed to procedural time frames for the institution and further conduct of the Review Application.

    8.1 Of importance to these proceedings is that the Respondents were set to serve and file their Review Application on 17 October 2017.[10]

9. It is in relation to the above proceedings that the Applicants seek to intervene as co-Applicants, in order to assert their constitutional rights to just administrative action.

[8] AA para 9 pp 121.

[9] AA para 12 pp 122.

[10] Annexure “AA1” of the AA pp130

10. Below I consider the basis for the application case and the objections raised by the Respondent herein.

LOCUS STANDI

11. The First Respondent argues that the First Applicant has no *locus standi* to bring these proceedings, no reason however is provided for this allegation. The Respondent simply pleads as follows *"I deny that the Applicants have standing to bring this application".*[11]

12. To the extent necessary to deal with this bear denial, we argue as follows:

13. First, there can be no question of the Applicants' *locus standi*. Their confirmatory affidavits further plainly confirm that the First Applicant is authorised to bring the application on their behalf.

14. The First Applicant has brought this application, with the Second to Third Applicants, to assert and protect the rights of mining communities to just administrative action in terms of section 33 of the Constitution, and section 6 of the Promotion of Administrative Justice Act, 3 of 2000. The application is also brought in the interests of its members, and in the

[11] AA para 29 pp 128.

public interest.[12] It is respectfully submitted that the Respondent's technical objection to the Applicant's standing, given the rights at stake is ill-founded.

15. Secondly, it is further bad in law, both in terms of the stricter position of the common law and the more accommodating position under the Constitution.

16. Section 38 of the Constitution is wide and provides in Section 38(d) that anyone can approach the court acting as a member of or in the interest of a group or class or persons. A narrow approach is unnecessary and a variety of cases have confirmed this.

17. In **Highveldridge Residence Concerned Party v Highveldridge** TLC 2002 (6) SA 66 TPD, in the context of voluntary associations where fundamental rights are at stake, it was held that a court ought to take an expansive view of *locus standi*. It is submitted that wider standing should also apply to the common law where a non-profit organisation acts in the public interest. Ad paragraph 24 the following is said in Highveldridge:

> *"To restrict voluntary associations in the way they are restricted by way of common law requirements, particularly when rights enshrined in the Bill of Rights are at stake, would be incompatible with various*

[12] Founding Affidavit ("FA") para 10-11 pp 11.

principles contained in, and which by necessary implication underpin, the Constitution."

18. Finally, in the case of **Tergniet and Toekoms Action Group v Outeniqua Kreosootpale** (Pty) Ltd,[13] the First Applicant was a voluntary association that represented the interests of the residents of *Tergniet* and Toekoms, residential areas situated close to the site of the Respondent's pole treatment facility. The Court (Van Reenen J), had to determine whether the Applicants' enjoyed *locus standi*. It was contended by the Respondent that the First Applicant (the voluntary organisation) lacked *locus standi* in respect of all relief sought and that all of the Applicants lacked *locus standi* in respect of the relief claimed in respect of non-compliance with APPA. The court expressly noted that section 38 of the Constitution[14] and section 32 of the National Environmental Management Act[15] have broadened the notion of *locus standi* and the Court according found that the voluntary association was befit with *locus* to institute proceedings in its name.

19. In the wider application of the rules of *locus standi* in the constitutional era the *locus standi* of the First Applicant ought to be recognised.

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[13] Tergniet and Toekoms Action Group and Others v Outeniqua Kreosootpale (Pty) Ltd and Others (10083/2008) [2009] ZAWCHC 6 (23 January 2009) – hereafter Tergniet.

[14] Constitution of the Republic of South Africa, 1996 – hereafter Constitution.

[15] 106 of 1998 – hereafter NEMA.

URGENCY

20. Once again it is common cause between the parties that the main application matter is set to be heard on 13 and 14 December 2017. It is our submission that this matter is urgent for the following reasons:

20.1 First, in the main application the Respondents set to review and set aside the Charter on a number of grounds. Bellow I endeavour to illustrate the ground of the review of a specific section and how, if such a provision is set aside, would impact the lives mining communities.

20.2 Second General Ground of review: the Charters application to "Black Persons".[16]

Community impact: The Charter increases targets for Black Persons to be employed at different levels of management and importantly requires that half of those positions be occupied by black women.

20.3 Ground of review in relation to prospective mining rights:[17]

[16] FA in the main Review Application pp 47-50.

[17] FA in main application 52 -78.

Community impact:[18] Charter has further made provision for 8% of total shares by the mining right holder to be held in the form of a community trust managed by an agency called the Mining Transformation and Development Agency ("MTDA"). Although this is a welcomed development, there is very little information on the following:

1. The process the Minster will follow to establish the MTDA;
2. The skills required to be appointed as functionaries who will serve and managed MTDA; and
3. It is also unclear whether some of the members of the communities will form part of the MTDA.

20.4 Ground of review relating to Employment Equity[19] :

Community impact:[20] targets of employment of Black Persons in the Mining Charter are of paramount importance to mining affected communities. As matters stand and acknowledged in the preamble of the 2017 Mining Charter mining affected communities live in abject poverty and high unemployment rates. A provision calling for the employment of Black Persons would

[18] FA para 93 – 95 pp 90.

[19] FA in main pp 99 -102.

[20] FA para 98 pp 31.

receive much support from mining affected communities. Our exclusion in the negotiation processes of the 2017 Mining Charter makes it hard for mining affected communities to access information on how such provisions could be implemented.

20.5 Ground of review relating to employment equity Human Resources Development[21].

Community impact:[22] relation to Human Resources Development the 2017 Mining Charter expressly provides that expenditure on human resources development is to be allocated to training of both employees and community members who are not employees.

20.6 Ground of review relating to Community Development[23] :

Community Impact:[24] This provision of the 2017 Mining Charter is important for improving the quality of lives of people living in mine affected community as skills development may increase their employment chances.

[21] FA in main application 105 – 107.

[22] FA para 100 pp 31.

[23] FA in main application 109 – 110.

[24] FA para 100 pp 32.

21. Therefore we submit that any decision by this Court in hearing the main review application in the absence of the Applicants will have a direct and substantial impact on the interest of the mining communities.

22. The consistent conduct of the Respondents and the Minister in ignoring the plight of the mining communities continues to be an isolated issue that remains unaddressed. We further submit that this matter is urgent in that it will allow the Applicants redress in the Main Hearing and will afford the Applicant an opportunity to voice their concerns when decisions are made which directly impact on their livelihood.

23. Secondly, The parties have found each other in relation to the urgency of this application:

23.1 The Respondents pleaded that given the urgency of the main application the Deputy Judge President indicated that, the intervening parties *"could not be brought in the ordinary cause and would probably have to be brought on an urgent basis.*"

23.2 Instituting these urgent proceedings is indeed the correct legal position if one wishes to be part of the special allocation hearing on 13 and 14 December 2017.

23.3 Even if the Applicants proposed timelines it had agreed to comply with the hearing dates as allocated.

24. Therefore, it is against the direction, in the case of the applications, or the advice, in the case of the Respondent, of the Honourable Deputy Judge President and the correct legal basis, that we have lodged these proceedings urgently.

REQUIREMENTS FOR JOINDER AS INTEVENING PARTY

25. Rule 12 of the Uniform Rules of Court provides:

12 Interventions of Persons as Plaintiffs or Defendants

"Any person entitled to join as a Plaintiff or liable to be joined as a Defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a Plaintiff or a Defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may deem fit."

26. The intervention of a party is necessary if that party has a direct and substantial interest that may be affected prejudicially by the judgment of

the Court in the proceedings concerned. The SCA has set out the test as follows:

> "*The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned*."[25]

27. The SCA went on to state that:

> "…*if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined*.[26]

28. It therefore seems clear that beyond the standard "direct and substantial interest" enquiry the SCA extended the text to "legal interest" in the subject matter".

[25] Gordon v Department of Health, Kwazulu-Natal 2008 (6) SA 522 (SCA) ("Gordon") at para 9. See also Judicial Service Commission v Cape Bar Council 2013 (1) SA 170 (SCA) at para 12.

[26] Gordon at para 9.

Direct and substantial interest

Objective of 2017 Charter

29. The 2017 Mining Charter seeks to achieve the a number of objectives. In particular the following pertain either expressly or implicitly to community rights and interest:

(c) Substantially and meaningfully expanding opportunities for Black Persons to enter the mining and minerals industry and to benefit from the exploitation of the State's mineral resources;

(d) Utilising and expanding the existing skills base for the empowerment of Black Persons;

(e) Advancing employment and diversifying the workforce in order to achieve competitiveness and productivity of the mining and minerals industry;

(f) Enhancement of the social and economic welfare of Mine Communities and major Labour Sending Areas in order to achieve social cohesion;

(g) Promotion of sustainable development and growth of the mining and minerals industry;

(h) Catalysing growth and development of the local mining inputs sector by leveraging the procurement spend of the mining and minerals industry; and

(i) Promoting Beneficiation of South Africa's mineral commodities by South African Based Companies.

30. The Charter makes specific provision for communities in a number of its provision, the Charter defines “Communities” as follows:

*“**Mine Community**" refers to communities where mining takes place, major Labour Sending Areas, as well as adjacent communities within a local municipality, metropolitan municipality and/or district municipality”*

31. The Applicants are, as described above, the following:

31.1 Mining Affected Communities United in Action MACUA and WAMUA is a women’s movement within the MACUA structure, who have been active in the mining community of its members;[27] and

31.2 Mining and Environmental Justice Community Network of South Africa (‘MEJCON’) was established to mitigate the distance between the communities affected by mining. The main purpose of MEJCON is to ensure that as mining affected communities and environmental degradation would have to meet and share a

[27] FA para 5 pp 10;Supporting Affidavit para 9-10 pp 54-55.

common objective. At the core of MEJCON's function is the following:[28]

31.2.1 to promote and defend the environmental and human rights of communities both directly and indirectly affected by mining; and to ensure the sustainable use of mineral resources;

31.2.2 to train, develop and capacitate community members;

31.2.3 to access information including information about mining, law, rights, processes and impacts and to share and distribute that information amongst affected communities;

31.2.4 to support and assist community champions, community organisations and the members of both directly and indirectly affected communities; and

31.2.5 to engage all relevant role players including government at local, provincial and national level, industry, civil society organisations, non-governmental organisations, traditional authorities and the institutions created in terms of chapter 9 of the Constitution of the Republic of South Africa Act 108 of 1996.

[28] Supporting Affidavit para 6- 6.5 pp 62-63.

32. Therefore, and based on the above, it is clear that the Charter seeks to protect the mining communities described above, who come before this court in this intervention application.

The Review Application "Main Application"

33. The Application brought by the Respondent seeks to review and set aside the 2017 Charter on the basis that it is the Charter that is unconstitutional to the extent that it usurps the functions of the legislature thus offending against the doctrine of separation of powers which is entrenched as part of the rule of law in section 1(c) in the Constitution and must therefore be set aside in terms of the principles of legality and/or Section6(2)(i) of PAJA and is unauthorised by section 100(MPRDA). The attack on the 2017 Charter extents in relevant portions to the following provisions:

33.1 General grounds : the Charters application to "black persons"

33.2 Employment Equity;

33.3 Human resource development;

33.4 Mine Community development;

33.5 Sustainable development and growth of the mining and minerals Industry ;and

33.6 Housing and living conditions

34. The Applicants are members of the community. Any finding of this Court which varies any terms of the above provisions in the 2017 Charter will adversely affect and have an impact on mining affected community members. I have provided the reason why above, and incorporate the same as if specifically traversed.

35. Moreover, the regulatory framework governing mining gives prominence to the consideration of the needs of communities directly affected by mining.

36. It is the Applicants' contention that substantial inadequacies of the Charter could have been mitigated by the inclusion of mining communities in the negotiations around the Charter. The following has been identified as lacking in the Charter[29]:

36.1 The absence of requirements for restitution and compensation of communities for the harmful impacts of mining;

36.2 The absence of mechanisms and processes to address the negative gendered impacts of mining;

36.3 The absence of measures to ensure mining affected community development is gender responsive;

36.4 The failure to provide for requirements of good governance, democracy, accountability and transparency in the MTDA;

[29] FA para 102 -103 pp 32-33.

36.5 The absence of recognition that the rights and interests of communities, including communities living according to African Customary Law, cannot be reduced to those of traditional leadership;

36.6 The failure to provide requirements for meaningful direct community participation in the design, implementation and monitoring of social and labour plans and other mining affected community developments ;

36.7 The absence of provisions for community housing; and

36.8 The failure to provide guidance on ensuring fair and transparent local procurement of mining goods and services.

37. The above makes the point plain, that any decision of this court in the main application cannot be implemented without adversely affecting and or prejudicing the Applicants. It is therefore on the above basis that the Applicants have established a legal interest in these proceedings.

NO PREJUDICE TO THE RESPODENTS

38. The third ground of Chambers opposition is that it will be prejudiced by the Applicants' intervention. The basis of this objection is premised on three legs:[30]

[30] AA para 5.3 – 5.3.3 pp 120.

38.1 The review application will unlikely be heard on 13 and 14 December 2017;

38.2 The Application will likely take longer than 2 days; and

38.3 The uncertainty of the 2017 Mining Charter will continue to have a negative effect on the mining industry and South Africa's economy.

39. For purpose of consistency I will dispose of the first and second concerns collectively and then they will be followed by the last objection;

Delay of the hearing and the matter taking longer than 2 days

40. The suggestion that the Applicants will delay the hearing of the Main Application is disingenuous. In the letter from the Applicants dated 11 October 2017,[31] wherein the Applicants notified the Respondents of the imminent application to intervene, the Applicants indicated a proposed time line that would not interfere with the procedural time frames agreed to between the parties in the Main Application. To date the Applicants have kept to the said date and have served and filed their intervening application on the 24 October 2017 as foreshadowed.[32] It is my

[31] Annexure MM7 of the FA, at pages 84.

[32] FA served and filed on 24 October 2017.

submission that the only delay is that of the Respondent in opposing this application, when no relief is sought against it in the main application.

41. In relation to proceedings exceeding the 2 days period, it is my submission that In terms of section 173 of the Constitution this Honourable court has the inherent jurisdiction to regulate its own proceedings.

42. Therefore there is nothing that prohibits this court in deciding how the proceedings of 13 and 14 December 2017 may proceed so as to ensure that the matter is finalised and heard within the allocated time frames.

43. If this is the only point that the Respondents seeks to establish prejudice, then the Applicants could have, without much difficulty, requested undertakings from Applicants that their written submissions be used and that a restriction on oral argument be confined to time periods as agreed between the parties.

Uncertainty of the 2017 Mining Charter

44. However, and in contrast, MACUA's ground of review will in no way prejudice the Respondent. This is based on the terms of the agreement

reached between itself and the Minister on 14 September 2017, which stated that the Minister will not implement or apply the provisions of the 2017 Charter in any way, directly or indirectly, pending the final determination of the review application.[33]

45. The difficulty we have with the approach adopted by the Respondent is that, should the Applicant be forced to instituted separate proceedings the uncertainly looming over the Charter will still prevail pending the finalisation of the second review application. This still does not aid the Respondents because the sections which they seek to review directly impact the rights of community members and would thus be pending before another court.

45.1 By way of example; the current review as it stands seeks to review and set aside the provision in relation to Housing and Living Conditions. Though this provision is a plausible development, the Applicants will contend that the communities living in the vicinity of mines frequently face lack of available housing which is exacerbated for operations and regions where a significant proposition of workforce have been drawn from other regions of the country (including sectors responsible for the continuing system of migrant labour). The Applicants would then raise the point that had meaningful engagement been a priority

[33] AA para 10 pp 121.

before the final draft of Charter was published, then the community would have ensured that housing for the broader community is addressed.

46. The courts would be faced with determining the same issues on the same provisions twice. This proposition of litigation in piecemeal fashion does not assist the Respondent nor does it mean to bring the live issues between the parties and the Minister to bed.

47. I must bring it to the Court's attention in addition to the above that:

47.1 no relief is sought against the Respondent;

47.2 The Applicants would be joining the Respondents as Co-Applicants in the Main application, therefore the Applicant does not need to respond to any of the allegations made in the Applicant's papers; and

47.3 In light of the undertaking that the Applicants will adhere to any directive of this court in relation to how proceedings will be conducted on 13 and 14 December 2017.

48. The Minister against whom a substantial relief is sough, stated at the meeting with the DJP on the 20 October 2017, that he would have no objections to any intervention applications, provided they are filed on or

before 24 October 2017;[34] in fact to the contrary, the Minister indicated that the more parties that participate will assist this court. Furthermore on 8 November 2017, the Minster filed a notice to abide by any rule of this Honourable Court.[35]

49. Therefore if the very party to whom substantial relief is sought does not oppose the intervention, it then becomes unclear the basis on which a Co- Applicant would oppose intervention. As a result and in the absence of a delay and the in the interest of this litigation coming to an end, the intervention must succeed.

COSTS

50. **Biowatch Trust v the Registrar, Genetic Resources and Others** (2009) 6 SA 232:[36]

> *"as a general rule in constitutional litigation an unsuccessful Applicant in proceedings against the state ought not to be ordered to pay costs."*

51. I pause to note that no relief is sought against the Respondents, the relief herein for intervention and in the main application is sought against the

[34] Replying Affidavit ("RA") para 44 pp 153.

[35] RA para 44 pp 153.

[36] Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009) ("Biowatch").

Minster in his official capacity. The Respondents should not, I submit, be entitled to cost against.

52. In the above case the Court being mindful of the important role public interest litigation plays in litigation state the following:[37]

> *"A perusal of the law reports shows how vital the participation of public interest groups has been to the development of this Court's jurisprudence. Interventions by public interests groups have led to important decisions concerning the rights of the homeless, refugees, prisoners on death row, prisoners generally, and the landless. There has also been pioneering litigation brought by groups concerned with gender equality, the rights of the child, cases concerned with upholding the constitutional rights of gay men and lesbian women, and in relation to freedom of expression.*
>
> *Similarly, the protection of environmental rights will not only depend on the diligence of public officials, but on the existence of a lively civil society willing to litigate in the public interest. This is expressly adverted to by the National Environmental Management (NEMA) which provides that a Court may decide not to award costs against unsuccessful litigants who are acting in the public interest or to*

[37] Biowatch ibid para 19.

protect the environment and who had made due efforts to use other means for obtaining the relief sought"

53. The approach is not without limitations, as the Courts may depart therefrom if an application is frivolous or vexatious.

54. The Courts in **Ferguson and Others v Rhodes University** [2017] ZACC[38]; stated that

54.1 in the absence of a finding that the application is frivolous, vexatious, or brought in bad faith;

54.2 where the Applicant exercised a right to bring proceedings ; and

54.3 where they were able to mount an arguable, but ultimately unpersuasive case, in their favour.

55. Then the Courts should be reluctant to grant costs against such Applicants. The Courts continued to state that it would thus be appropriate if the parties were ordered to bear their own costs.

56. Nevertheless, even allowing for the invaluable role played by public interest groups in our constitutional democracy, Courts should not use costs awards to indicate their approval or disapproval of the specific work done by or on behalf of particular parties claiming their constitutional

[38] Ferguson and Others v Rhodes University (CCT187/17) [2017] ZACC 39 (7 November 2017) para 28-29.

rights. It is my submission that there has been no allegation of impropriety in the manner in which the litigation has been undertaken. Thus, the Applicants whom seeking to protect their rights should not be treated unfavourably as a litigant simply because it sought assets its constitutionally protected rights.

CONCLUSION

57. There can be no prejudice to the Respondents should the interveners be permitted to participate in proceedings affecting them. As has been noted, this intervention application has been brought within days of the Chamber of Mines' founding papers in the main application being lodged. Furthermore no relief is sought against the Respondent.

58. We therefore pray that the Application be declared urgent and that the Applicants are granted the rights to intervene in the main application.

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