IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No. 71147/17

In the matter between:

CHAMBER OF MINES OF SOUTH AFRICA	First Applicant
MINING AFFECTED COMMUNITIES UNITED IN ACTION	Second Applicant
WOMEN FROM MINING AFFECTED COMMUNITIES UNITED IN ACTION	Third Applicant
MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA	Fourth Applicant
SEFIKILE COMMUNITY	Fifth Applicant
LESETHLENG COMMUNITY	Sixth Applicant
BABINA PHUTHI BA GA-MAKOLA COMMUNITY	Seventh Applicant
KGATLU COMMUNITY	Eighth Applicant

and

MINISTER OF MINERAL RESOURCES	Respondent

and

NATIONAL UNION OF MINEWORKERS	First *Amicus Curiae*
SOLIDARITY TRADE UNION	Second *Amicus Curiae*

RESPONDENT'S HEADS OF ARGUMENT
IN RESPONSE TO THE FIRST APPLICANT

CONTENTS

INTRODUCTION

1. The Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA**") enjoins the state, amongst other things, to--

    1.1. Promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;[1]

    1.2. Substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;[2]

    1.3. Give effect to section 24 of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**") by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development;[3] and

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1 Section 2(c) of the MPRDA.

2 Section 2(d) of the MPRDA.

3 Section 2(h) of the MPRDA.

1.4. Ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.[4]

2. It is precisely this transformative agenda – mandated by both the Constitution and the MPRDA – that the Minister of Mineral Resources ("**the Minister**") seeks to achieve through the *Reviewed Broad-based Black Economic Empowerment Charter for the South African Mining and Minerals Industry* published in Government Gazette No. 40923 on 15 June 2017 ("**2017 Charter**").

3. In an effort to preserve the status quo for its members, the Chamber of Mines of South Africa ("**the Chamber**") seeks to review and set aside the 2017 Charter. In the first instance, it seeks to do so by relying on the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**"); in the alternative, it seeks to rely directly on particular provisions of the Constitution. For the reasons set out below, the Chamber's application falls to be dismissed with costs.

4. The Minister's heads of argument in response to the Chamber is structured as follows:

4.1. First, the relevant background and legislative context;

4.2. Second, the flawed nature of the Chamber's application;

4.3. Third, the general grounds of review raised by the Chamber;

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[4] Section 2(i) of the MPRDA.

4.4. Fourth, the grounds of review relating to the ownership element;

4.5. Fifth, the grounds of review relating to the non-ownership elements;

4.6. Sixth, the miscellaneous grounds of review raised by the Chamber;

4.7. Seventh, the relief sought and costs.

RELEVANT BACKGROUND AND LEGISLATIVE CONTEXT

5. The three key elements are: i) the Constitution, ii) the Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA"** or "**the Act**") and iii) the original Charter published by the Minister in terms of section 100(2)(a) of the MPRDA[5] ("**the original Charter**" or "**the 2004 Charter**"), which has twice been subject to revision since its publication, in 2010 ("**the 2010 Charter**")[6] and in the 2017 Charter.

6. Parliament enacted the MPRDA as a measure *inter alia* to correct the past and to ensure introduction and participation of HDS into the mining industry in an incremental, meaningful and sustainable manner in the future.[7]

7. The MPRDA was enacted to address the skewed distribution of economic benefits, to facilitate equitable access to and sustainable development of the nation's mineral and petroleum resources and, having considered the

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5 Scorecard for the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (including the Charter), Government Notice 16399, Government Gazette 26661, 13 August 2004.

6 Amendment of the Broad-based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, Government Notice 838, Government Gazette 33573, 20 September 2010.

7 See generally **Agri SA v Minister for Minerals & Energy** ("**Agri-SA**") 2013 (4) SA 1 (CC).

obligations of the State under the Constitution, "*to take legislative and other measures to redress the results of past racial discrimination*",[8] and "*to eradicate inequality imbedded in all spheres of life under the Apartheid order.*"[9]

8. The MPRDA vested rights in the limited mineral resources in the state, as custodian on behalf of all South Africans.[10] The MPRDA gave effect to this principle by granting limited prospecting, mining, exploration or production rights to successful applicants.[11] Provision was made for the grant, content and

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8 In **Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (Bengwenyama-ye-Maswati Royal Council Intervening)** 2011 (4) SA 113 (CC) ("**Bengwenyama**") para 3 the Constitutional Court set out the constitutional underpinning of the MPRDA as follows:

> *"Equality, together with dignity and freedom, lie at the heart of the Constitution. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of substantive equality the Constitution provides for legislative and other measures to be made to protect and advance persons disadvantaged by unfair discrimination. The Constitution also furnishes the foundation for measures to redress inequalities in respect of* access *to the natural resources of the country. The [MPRDA] was enacted amongst other things to give effect to those constitutional norms.*"

The **Bengwenyama** decision of the Constitutional Court (paras 40-43 and 45-46) is also germane in that it sets out the importance of an interpretive approach aimed at rendering the MPRDA consonant with the Constitution.

In **Agri SA** (para 1) the Constitutional Court elaborated upon this as follows:

> "*Regrettably, the architecture of the apartheid system placed about 87 percent of the land and the mineral resources that lie in its belly in the hands of 13 percent of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness. exclusion and poverty. To address this* gross *economic inequality, legislative measures were taken to facilitate equitable* access *to opportunities in the mining industry.*
>
> *That legislative intervention was in the form of the Mineral and Petroleum Resources Development Act. (MPRDA) "*

9 Per the (unanimous) Constitutional Court in **Bengwenyama** at para 46.

10 The Constitutional Court in **Minister of Mineral Resources and others v Sishen Iron Ore Company (Pty) Ltd and another** 2014 (2) SA 603 (CC) para 10 described the fact that the MPRDA dispensed with the notion of mineral rights held by private persons and placing mineral resources in the hands of the nation as a whole as *"pivotal"* to achieving the MPRDA's objects of eradicating discrimination and redressing inequality. In interpreting the provisions of the Charter aimed at achieving these objects, this must remain at the heart of the analysis.

11 Within the legislative framework established by the MPRDA, only limited real rights are available to mining companies. These rights are described by the courts as being in the nature of a *"gift of the State"* (see **Minister of Minerals and Energy v Agri South Africa** 2012 (5) SA 1 (SCA) paras 82 and 113; **Agri-SA** para 20).

duration of the rights (generally limited to varying time periods and subject to stipulated conditions of up to 30 years). In terms of the MPRDA, these rights if not appropriately exercised, may be suspended or cancelled.

9. Prospecting and mining rights are granted in the context of the purpose of the MPRDA are subject to some of these broad and salutary transformational objects of the MPRDA.

9.1. In terms of section 17 of the MPRDA,[12] the Minister is obliged to grant prospecting rights if certain conditions are fulfilled. One such condition is that the Minister may (and invariably does) request an applicant to give effect to the objects referred to in section 2(d) of the MPRDA (which have been crystallised under the Charters).

9.2. In terms of section 23 of the MPRDA,[13] after having had regard to various peremptory requirements including the achievement of HDSA ownership in the mining entities, the Minister is enjoined to grant a mining right, but

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12 The relevant provisions of section 17 of the MPRDA reads:

"*(1) Subject to subsection (4) the Minister **must** grant a prospecting right if – …*

(2) …

(3) …

*(4) The Minister may, having regard to the type of mineral concerned and the extent of the proposed prospecting project, request the **applicant to give effect to the object referred to in section 2(d)**."* (Own emphasis).

13 Section 23(1), provides in relevant part as follows:

*"(1) Subject to subsection (4) the Minister **must** grant a mining right if –* ...

…

*(h) The granting of such right will **further the objects referred to in section 2(d) and (f) in accordance with the Charter** contemplated in section 100 and the prescribed social and labour plan"* (own emphasis).

only if it would further the objects in sections 2(d) and (f) of the MPRDA in accordance with the Charter and the social and labour plan.

10. Section 100(2)(a) of the MPRDA[14] obliges the Minister to develop a broad based socio-economic empowerment[15] Charter to ensure the attainment of government's objective of redressing historical, social and economic inequalities as stated in the Constitution and set out in the purpose and objects of the MPRDA. The Charter is to set the framework, targets and timetable for effecting broad-based entry into the mining industry to enable persons to benefit from the exploitation of mining and mineral resources.

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[14] Section 100(2) provides as follows:

"*(a)* ***To ensure the attainment of Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution****, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment* ***Charter that will set the framework, targets and time-table for effecting the entry of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources***" (own emphasis).

(b) The Charter must set out, amongst others how the objects referred to in section 2(c), (d), (e), (f) and (i) can be achieved."

[15] "*Broad based economic empowerment*" as used in section 100(2)(a) is defined in section 1 of the MPRDA to mean:

"*a social or economic strategy, plan, principle, approach or act which is aimed at –*

(a) redressing the results of past or present discrimination based on race, gender or other disability of historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries; and

(b) transforming such industries so as to assist in, provide for, initiate or facilitate -

(i) the ownership, participation in or the benefiting from existing or future mining, prospecting, exploration or production operations;

…

(iv) the ownership of and participation in the beneficiation of the proceeds of the operations or other upstream or downstream value chains in such industries;

…

(vii) the socio-economic development of all historically disadvantaged South Africans from the proceeds or activities of such operations".

11. In 2009, the Department of Mineral Resources ("**DMR**") appointed a third-party service provider to undertake a review or assessment of the effectiveness of the implementation of the Original Charter, following which a Mining Charter impact assessment report was drawn up by the DMR.[16]

12. After extensive consultation, the 2010 Charter was published in the Government Gazette on 20 September 2010, and incrementally built on the Original Charter.[17] The 2010 Charter expressly provided that the "*Department shall monitor and evaluate, taking into account the impact of material constraints which may result in not achieving targets*" (at para 3).[18] Moreover, in anticipation of the inevitable situation arising that the Minister would need to amend the Charter from time to time, it provided that "*[t]he Minister of the Department of Mineral Resources may amend the Mining Charter as and when the need arises*" (at para 4).[19]

13. In the Chamber's annual report for 2009/2010, the Chamber expressed its full commitment to the 2010 Charter, stating as follows:[20]

> "*Contrary to what some stakeholders have reportedly asserted, the Department of Mineral Resources (DMR) had in fact consulted with all stakeholders in the process of drafting the revised Charter. The Chamber is satisfied that the outcome is a reasonably balanced*

16 AA pp 306-307 paras 60-61.

17 AA p 316 paras 71-72.

18 AA p 321 para 86.

19 AA p 321 para 86.

20 AA pp 321-322 para 88.

Charter. The views of no single stakeholder are fully accommodated, but the Chamber and its members are fully committed to ensure that the revised Charter is implemented not only in the letter but also in the spirit."

14. The 2010 Charter has now been in force, and applied by the mining industry – albeit with varying levels of compliance – for the past seven years. Through the 2017 Charter, and in furtherance of the abovementioned constitutionally- and legislatively-mandated objectives, the Minister seeks to put in place further steps to bring the mining industry closer to achieving these objectives. It would undoubtedly be inimical to the achievement of these objectives for the mining industry to be permitted to stagnate on targets set more than a decade ago in the Original Charter.

15. It is therefore inconsistent for the Chamber to argue now that amendments to the Original Charter are impermissible, whilst currently applying the revised 2010 Charter. The revisions set out under the 2017 Charter have been the product of extensive consultation by the Minister and the DMR with various stakeholders, including the Chamber and its members, prior to publication. Notably, the Chamber no longer persists with the contention raised in Part A of this application that there was a lack of consultation prior to the finalisation of the 2017 Charter.[21]

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21 AA pp 357-358 para 162.

PRELIMINARY REMARKS: THE FLAWED NATURE OF THE CHAMBER'S APPLICATION

16. At the crux of this matter is the Minister's entitlement to revise relevant aspects of the Charter in pursuance of the objectives set out in the MPRDA. The 'kitchen-sink' approach to this litigation which the Chamber has adopted is unfortunate: in raising its 58 grounds of review, many of which have only been raised blithely and with little attempt at substantiation, the Chamber has muddied the key issues to be determined in this matter.

17. The Chamber's application contains several overarching contentions that recur through various grounds of review. At the outset, it is necessary to dispel these incorrect contentions. In sum:

17.1. PAJA is not applicable to the present matter, as the substance under review by the Chamber does not constitute "administrative action" as defined under section 1 of PAJA.

17.2. The 2017 Charter is permitted by section 100(2) of the MPRDA, and is a legally binding instrument.

17.3. The Chamber's approach to the interpretation of the 2017 Charter conflicts with the ordinary principles of statutory interpretation, as well as section 4 of the MPRDA.

18. These aspects are dealt with in turn immediately below, as well as further in regard to the specific grounds of review to which they apply, as necessary.

The Promotion of Administrative Justice Act is not applicable

19. The applicability of PAJA is fundamental to the Chamber's application as a whole. The Chamber seeks to review and set aside the 2017 Charter on the basis of it being impermissible administrative action in terms of PAJA, alternatively the principle of legality. However, the Chamber itself accepts the difficulty with it seeking to rely on PAJA for the purpose of its application.[22] The Chamber further does not answer the Minister's contentions in this regard in its replying affidavit.[23]

20. The definition of "administrative action" is set out in section 1 of PAJA, and the contemplated grounds of review under section 6(2) of PAJA.

21. Of relevance in this regard:

    21.1. The Chamber fails to identify the "decision" which it seeks to challenge. It refers in broad, vague terms to the "developing and publishing" of the 2017 Charter. For the purpose of a judicial review in terms of PAJA, the definition of "administrative action" expressly requires there to be a decision under review, as defined in section 1 of PAJA.

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22 FA p 51 para 98.

23 RA p 2307 para 64.

21.2. The definition of "administrative action" imposes particular threshold requirements: that the decision has an adverse effect on the rights of any person; and that the decision has a direct, external legal effect. The challenge impacting the Chamber is that its case exists in an entirely hypothetical vacuum, in terms of which it prematurely assumes that the 2017 Charter will have adverse consequences on it and its members. This, however, is not borne out by any of the facts presented. As such, the Chamber cannot meet the threshold set by section 1 of the PAJA.

21.3. The definition of "administrative action" in terms of PAJA expressly excludes executive and legislative action from its ambit.

22. A review based on the principle of legality only permits three possible grounds: lawfulness; reasonableness; and procedural fairness.[24] The import of the Chamber not being able to rely on PAJA is that the scope of the grounds of review on which it relies is significantly reduced.[25]

23. A further point of consideration in this regard is our courts' appreciation that the judiciary should not usurp the functions of administrative agencies, nor cross over from review to appeal.[26]

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24 Section 33 of the Constitution.

25 Under section 6 of PAJA, other grounds of review include, for instance, bias (section 6(2)(a)(iii)); ulterior purpose or motive (section 6(2)(e)(ii)); irrelevant considerations being taken into account or relevant considerations not being considered (section 6(2)(e)(iii)); bad faith (section 6(2)(e)(v)); capriciousness (section 6(2)(e)(vi)).

26 **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others** ("**Bato Star**") 2004 (4) SA 490 (CC) at para 46, citing **Minister of Environmental Affairs and Tourism and**

The 2017 Charter is binding law

24. The Charter is necessarily a flexible mechanism, enabling the Minister to respond effectively to a fluid and ever-changing industry in order to achieve the objects set out in the MPRDA in meeting the exigencies of a developing society. Practically, a Charter that can be updated from time to time by the Minister ensures that the Minister is able to act effectively and expeditiously. The test for legality is that the Charter remains in the confines of section 100(2)(a).

25. It is much easier and more practical to give effect to section 100(2)(a) including the objects of the MPRDA by the Minister updating or replacing the Charter than to than to keep amending the MPRDA through the legislative process that is inherently far slower and more cumbersome.

26. In other words, the intention of the legislature was that, over time, as it was discovered that some aspects of the Charter worked, that others did not nad

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others v Phambili Fisheries (Pty) Ltd and Another [2003] 2 All SA 616 (SCA) at para 47. It was stated that:

"*A judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administration action, but by a careful weighing up of the need for and the consequences of judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.*"

Similarly, as noted in **Bato Star** at para 45, in the assessment of reasonableness as a ground of review, the nature of the decision and the identity and expertise of the decision-maker are relevant factors to be taken into consideration.

that some aspects required further development the Minister could, effectively and relatively expeditiously, give effect to section 100(2) and some of the key objects of the MPRDA. That would avoid:

26.1. casting the modalities and mechanisms of giving effect to the relevant objects of the MPRDA through primary legislation (as opposed to a Charter), and

26.2. the resultant danger that, if the legislative mechanisms for giving effect to section 100(2) and the relevant objects of the MPRDA did not go far enough or if they proved to be excessive or if they needed to be amended as time passed and the situation changed (as would inevitably be the case), it would be impossible to amend them with any degree of flexibility and expeditiousness.

27. As a point of departure, a "law" refers to "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law".[27] The Charter is an enactment within the framework created by section 100(2) of the MPRDA; while the Charter is not an Act of Parliament, it is nevertheless a law contemplated in the definition above.

28. The terms of the Charter are binding and require compliance. This is clear from at least the following. First, the wording of the MPRDA, when construed against its objects, makes that plain.

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[27] Section 1 of the Interpretation Act 31 of 1957.

28.1. The Constitution demands that everyone enjoy equality which includes the full and equal enjoyment of all rights and freedoms. Participation of HDSA in the mining industry is a search for the substantive equality that is promised under the Constitution. The objective to achieve equality is not merely aspirational or a guideline.

28.2. The MPRDA in its own various provisions makes it patently clear that the transformational objectives spelt out, *inter alia,* in section 2(d), are legally binding. The granting of a mining right or a prospecting right is only legally competent if the Minister is satisfied that the transformation objectives are achieved as well.

28.3. Furthermore, section 25(2)(d) of the MPRDA provides that the holder of a mining right must "*comply with the relevant provisions of this Act, any other relevant law and the terms and conditions of the mining right*". Similarly, section 19(2)(d) of the MPRDA provides that the holder of a prospecting right must "*comply with the terms and conditions of the prospecting right, relevant provisions of this Act and any other relevant law*".

28.4. "*[T]his Act*" is defined in section 1 of the MPRDA as including "*the regulations and any term or condition to which any permit, permission, licence right, consent, exemption, approval, notice, closure certificate, environmental management plan, environmental management*

programme or directive issued, given, granted or approved in terms of this Act, is subject". Each mining or prospecting right itself confirms that such right is subject to the objects of the MPRDA and must be in compliance with the Act.

28.5. The granting of a right is generally subject to the legally enforceable and binding condition that the transformation objectives (enshrined in the Charter) are achieved.[28]

28.6. Read against the objects of the Act, there is nothing in the wording of section 100(2) of the MPRDA that suggests that the Charter is meant to be an aspirational document or a non-binding guideline. On the contrary, the wording is consonant with a binding obligation.

28.7. Taken together, these are at least some of the factors that demonstrate that the transformation objectives spelt out in the Constitution and the MPRDA, and enshrined in the Charter, produce obligations which the right holders are compelled to meet if they wish to continue exploiting the nation's limited mineral resources for the duration of their licence.

29. Second, the contention that the Charter is binding, and can amended, is more consonant with the legislative objective underpinning the MPRDA.

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[28] The SCA in **Minister of Mineral Resources and others v Mawetse (SA) Mining Corporation (Pty) Ltd** [2015] 3 All SA 408 (SCA) paras 22 to 27 held that the *"terms and conditions"* subject to which the right - in that case, a prospecting right - is issued, are not matters of agreement between the parties. No consensus between the mining right holder and the regulator is required. The SCA held that the granting of the right was a unilateral administrative act, and that the Minister could impose terms and conditions arising out of the section 2(d) objects of the MPDRDA, albeit that those would have to be authorised by the relevant legislation.

29.1. The MPRDA empowers the Minister to develop a Charter. Parliament, in empowering the Minister to develop the Charter was intent on ensuring that government's objectives of redressing historical, social and economic inequalities must be achieved in the broadest manner possible.

29.2. Parliament's objective, as set out in section 2(d) and (f) of the MPRDA, of redressing historical inequalities through the Charter, would not be realised if the Charter had no legal force.

29.3. Parliament's objective of redressing historical inequalities through the Charter, would not be realised if the framework and targets set in the Charter are permanently cast in stone in 2004 and remain so, save for an amendment to the MPRDA which can only be effected through the mechanism of the relatively more unwieldy, more contested and drawn-out legislative process. The Chamber does not offer any meaningful explanation of what the consequences of non-compliance with the targets set out in the Charter would be. The reason for this is simple. On the Chamber’s version, there would not be any direct and effective legal consequences for non-compliance with the Charter. That proffers no real or effective basis for altering the legal regime for mining in South Africa in order to ensure equal access to the nation's resources to all.

29.4. The framework, targets and timetable in the respective Charters are a baseline set for the transformation of the mining industry at a particular

point in time and for a particular period of time, until such time that the Minister deems it prudent to revisit them given,[29] for example, changed circumstances or the non-effectiveness of any measures. In short, the Charter was intended by the legislature:

29.4.1. to constitute a flexible measure implemented by the Minister in 2004 that was to be incrementally developed as and when the occasion arose;

29.4.2. to effectively ensure the broad-based empowerment into the mining industry and, more importantly, to ensure that the benefits from the exploitation of mining and mineral resources are enjoyed in a meaningful and substantive manner over the long term.

30. Third, the enforcement of the MPRDA and compliance therewith by mining companies (including members of the Chamber) also make it clear that all the parties understood and accepted that the terms of the Charter required compliance. The Chamber cannot legitimately dispute this, at least in relation to the 2004 Charter and the 2010 Charter, both of which were enforced by the DMR, and viewed by mining companies (including the Chamber and its constituent members), as binding.

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[29] Where a functionary is given a power to do something, that functionary would have the power to undo that where good reason exists to do so. This is quite different to the principle of the *functus officio.* (See **Masetlha v The President of the Republic of South Africa and Another** 2008 (1) BCLR I (CC) paras 66- 70.)

30.1. Although the terms of the 2004 Charter and the 2010 Charter were enforced by the DMR in a flexible, sensitive and accommodating manner, they were not aspirational or viewed as such. Non-compliance notices in terms of section 47 of the MPRDA were issued under those Charters. The holders of relevant rights (including many members of the Chamber of Mines) purported to comply and indicated that they had complied with the terms of the Charter.

30.2. There were also a number of cases where the holder of a right under the MPRDA challenged allegations of non-compliance with the framework targets and milestones set out in the Original Charter. There is no case where the validity of the Original Charter as a binding instrument was challenged or where it was contended that a Charter in terms of section 100(2) is a mere non-binding guideline.[30]

30.3. Although not required for purposes of enforcement of the Original Charter, it appears from a reference in the Original Charter that the relevant stakeholders signed the Original Charter as a mark of their acquiescence therein. Furthermore, in relation to the 2010 Charter the Chamber, amongst others, signed the 2010 stakeholder's declaration that preceded, informed and gave effect to it. The Chamber's express conduct belies its relatively recent submission that the Charter is a non-binding guideline. As set out in the answering affidavit, and detailed

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[30] The Chamber challenged the 2010 Charter but only in relation to its so-called 'once empowered always empowered' assertion. That matter was heard in November 2017 before a full bench of this division. Judgment is pending as at the date of the filing of these heads.

above, in its 2009/2010 annual report the Chamber expressly acknowledged that the 2010 Charter was effectively a binding document to be implemented by its members and that it was the result of a full and proper consultative process.

The correct approach to statutory interpretation

31. As is a trend throughout the Chamber's application, it inclines towards the most strained interpretation of various provisions in an effort to establish its case against the 2017 Charter, but in doing so ignores the fundamental principles of constitutional and statutory interpretation. It is therefore necessary to set out the correct approach to statutory interpretation that the Chamber should have adopted when considering the 2017 Charter.

32. Section 39(2) of the Constitution lies at the heart of statutory interpretation. It "*introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights'*."[31] Furthermore, as described above, section 4(1) of the MPRDA requires that when interpreting its provisions any reasonable interpretation that accords with the objects of the MPRDA must be favoured.[32] The legislature was therefore clear that precedence must be given to any reasonable interpretation which is consistent with the objects of the MPRDA.

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31 **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others** 2004 (4) SA 490 (CC).

32 More particularly, section 4(1) of the MPRDA provides as follows:

> "*When interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must be preferred over any other interpretation which is inconsistent with such objects.*"

33. The principles of constitutional and statutory interpretation are also by now well-entrenched in our law, and have been addressed in a significant number of judgments.[33]

34. The following principles of interpretation can be distilled:

34.1. In considering the language used, one must consider: (i) the ordinary rules of grammar and syntax; (ii) the context; (iii) the background to the preparation and production of the document; (iv) the apparent purpose of the provision; and (v) the material known to those responsible for its production.

34.2. In the event of more than one possible meaning, each possibility should be weighed against these factors, and assessed objectively.

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[33] The *locus classicus* in this regard is the decision of the SCA in **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) at paras 18-19, where the Supreme Court of Appeal summarised the principles as follows:

> "*Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. … The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document*" (footnotes ommitted).

34.3. Context and language should be considered together, and with equal importance.

34.4. The context of a provision is ascertained by reading the provision in light of the document as a whole, and the circumstances for it coming into existence.

35. Accordingly, the context of a provision of the MPRDA is ascertained by reading the provision in light of the statute as a whole, including most importantly its objects. As described above, in the context of the 2017 Charter, this would relate to the constitutional and legislative imperatives to redress historic inequalities, and to ensure that black persons are empowered to own the means of production and meaningfully participate in the mainstream economy, which had been denied through the systematic marginalisation and exclusionary policies of the apartheid regime.[34] The context of the 2017 Charter must also be considered against the backdrop of the failure by the minerals and mining industry to fully embrace the spirit of the Mining Charters or fully transform.[35]

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34 Preamble of the 2017 Charter; section 1 of the 2017 Charter.

35 Preamble of the 2017 Charter.

As stated by the Constitutional Court in **Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa and Hidro-Tech Systems (Pty) Ltd and Another** 2011 (1) SA 327 (CC) at paras 1-2:

> "*One of the most vicious and degrading effects of racial discrimination in South Africa was the economic exclusion and exploitation of black people. Whether the origins of racism are to be found in the eighteenth and nineteenth century frontier or in the subsequent development of industrial capitalism, the fact remains that our history excluded black people from access to productive economic assets. After 1948, this exclusion from economic power was accentuated and institutionalised on explicitly racially discriminatory grounds, further relegating most black people to abject poverty.*
>
> *Driven by the imperative to redress the imbalances of the past, the people of South Africa, through their democratic government, developed, among others, the broad-based black economic empowerment programme and the preferential procurement policy.*"

36. Therefore, it is clear from these principles that the ordinary meaning must be ascribed to the words in the 2017 Charter. The Chamber cannot seek to discredit the 2017 Charter by relying on strained interpretations, contrary to the context and ordinary meaning of the language used and contrary to the objects of the MPRDA.

GENERAL GROUNDS OF REVIEW RAISED BY THE CHAMBER

(i) The legal status of the 2017 Charter and the Minister's powers

37. The legal status of the Charter has been dealt with above. In sum, for the reasons set out in the answering affidavit and the preceding section, the Minister submits that the Charter is binding, as was intended by the legislature when it enacted section 100(2) of the MPRDA.

38. The Chamber contends that the Minister does not have the power to publish the Charter,[36] and that the scope of the Charter goes beyond that which is contemplated in section 100(2) of the MPRDA. There is no merit to either of these contentions.

39. There are five key tenets to section 100(2) of the MPRDA:

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[36] FA p 41 para 72.

39.1. It mandates the development of a broad-based socio-economic empowerment Charter.

39.2. It requires that such an empowerment Charter must set out a framework for targets and time-table.

39.3. The framework for targets and time-table must effect entry into, and active participation of, HDSAs into the mining industry, and allow them to benefit from mining and beneficiation.

39.4. The empowerment Charter must set out how the specified objectives can be achieved – including in relation to, amongst other considerations, the promotion of equitable access to the nation's mineral and petroleum resources, the substantial and meaningful expansion of opportunities for HDSAs to enter into and actively participate in the industry, and the contribution of mining and production rights holders towards the socioeconomic development of the areas in which they operate.

39.5. Notably, section 100(2) does not provide an exhaustive list of what the empowerment Charter must contain. Sub-section 100(2)(b) provides for what the empowerment Charter must set out, "amongst others". As such, in giving effect to the mandate contained in section 100(2), the Minister is vested with a discretion to determine what should be contained in the empowerment Charter.

40. This is placed squarely in the remit of the Minister, and the Minister has accordingly acted as required by section 100(2) of the MPRDA.

41. The power to the amend the Charter is an implied power granted to the Minister under section 100(2) of the MPRDA.

41.1. It is a well-established principle of law that any powers granted to a public authority includes those powers which are reasonably necessary or required to give effect to, and which are reasonably or properly ancillary or incidental to, the express powers that are granted.[37]

41.2. In determining the scope of the power, regard should be had to the particular provision of the enactment; the purpose of the provision and that of the Act; other requirements for valid administrative action; the Constitution (specifically the Bill of Rights); and the broader social and economic context.[38]

41.3. The main question to be asked is whether the implied power is necessary in order to achieve the purpose of the statute and of the statutory provision concerned.[39]

42. The power to amend the Charter is a necessary power that the Minister must exercise in order to ensure that the objectives of the MPRDA can be met by the

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37 See de Ville *Judicial review of administrative action in South Africa* (2006) p 108.

38 de Ville pp 108-109.

39 de Ville p 109.

mining industry in a flexible and effective manner. Indeed, the Original Charter (to which the Chamber was a signatory) expressly stated that "*[s]takeholders agreed to meet after five (5) years to review the progress and to determine what further steps, if any, need to be made to achieve a 26% target*".[40] Further, as set out above, the Chamber has already accepted the Minister's power to amend the Charter in relation to the 2010 Charter.

43. In its replying affidavit, the Chamber seeks to clarify its position as being an acceptance that the objects of the MPRDA are binding,[41] and that it is disingenuous for the Minister to suggest the Chamber's view to be that compliance with the Charter is optional.[42] While these averments are certainly welcome, they are difficult to reconcile with the Chamber's approach elsewhere in its application.

44. As indicated, section 100(2)(b) of the MPRDA does not provide an exhaustive list of what the Charter must contain. The Chamber's allegation that this amounts to an unfettered discretion is incorrect. The Minister's discretion is guided in this regard by the other provisions of section 100(2), including that the Charter must ensure the attainment of government's objectives to redress historical, social and economic inequalities in line with the Constitution; that it must effect entry into the mining industry and allow South Africans to benefit from the exploitation of mining and mineral resources; and that it must address

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40 AA p 361 para 169.

41 RA p 2305 para 63.6.

42 RA p 2306 para 63.10.

how the objectives referred to in section 2(c), (d), (e), (f), and (i) can be achieved.

45. This discretion is similar to the discretion afforded to the Minister in terms of section 107 of the MPRDA, in terms of which the Minister may make regulations on any other matter, in addition to those listed in the preceding sub-sections, on any matter which may be necessary or expedient to achieve the objects of the MPRDA.[43]

46. The Chamber does not identify any particular provision of the 2017 Charter that falls beyond the scope of that contemplated in section 100(2). Indeed, if the Chamber were correct in this regard, the Original Charter and the 2010 Charter would similarly stand to be disregarded. This is simply incorrect.

47. Accordingly, it is submitted that this ground of review falls to be dismissed.

(ii) The application of the 2017 Charter to "Black Persons"

48. The Chamber both complains about the widening of the definition of "Black Persons" (to include persons Africans, Coloureds and Indians who became citizens of the Republic of South Africa by naturalisation on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation

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[43] Section 107(1)(l) of the MPRDA.

prior to that date), and the narrowing of the definition (to exclude white women).[44]

49. The MPRDA is clear that it seeks to address the inequalities of our racially discriminatory past. As discussed above, section 100(2) confers on the Minister an implied power in order to achieve the objects of the MPRDA. This amendment seeks to do precisely that.

50. The Chamber's approach ignores material aspects of the lived realities of the majority of South Africans. Black persons constitute the majority of HDSAs living in South Africa. Furthermore, the Chamber should not blatantly ignore the ongoing socio-economic realities faced by persons living in mine-affected communities in South Africa today. The 2017 Mining Charter could be a further arrow in the Government's quiver that seeks to remedy this and meaningfully address the plight of persons living in such communities.

51. The 2017 Charter also seeks to ensure that exiles and persons predominately from neighbouring African countries, who have spent decades working on mines in South Africa, should similarly be entitled to empowerment opportunities (for instance, through the roll-out of employee share schemes) in recognition of their labour.

52. As the Constitutional Court has stated:[45]

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44 FA pp 54-55 para 106.

45 **South African Police Service v Solidarity obo Barnard** (2014 (6) SA 123 (CC) ("**Barnard**") at para 35.

"*An allied concern of our equality guarantee is the achievement of full and equal enjoyment of all rights and freedoms. It permits legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. Restitution or affirmative measures are steps towards the attainment of substantive equality. Steps so taken within the limits that the Constitution imposes are geared towards the advancement of equality. Their purpose is to protect and develop those persons who suffered unfair discrimination because of past injustices.*"

53. This measure – as contemplated under section 9(2) of the Constitution – passes the three-part test as laid down by the Constitutional Court:[46]

53.1. It is targeted at a particular class of people who have been susceptible to unfair discrimination, in this case "Black Persons" as defined;

53.2. It is designed to protect or advance those classes of persons; and

53.3. It promotes the achievement of equality.

54. The Constitutional Court has affirmed that: "*Once the measure in question passes the test, it is neither unfair nor presumed to be unfair. This is so because the Constitution says so. It says measures of this order may be*

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46 **Barnard** at para 36.

taken."[47] As has been noted, the measures that bring about transformation will inevitably affect some members of society adversely, particularly those coming from previously advantaged communities.[48]

55. Notably, the definition of "Black Persons" also accords with the Broad-Based Black Economic Empowerment Act 53 of 2003 ("**BBBEE Act**") as amended, and the applicable codes.

56. The amendment in question is both within the Minister's power to effect, and is reasonably and rationally connected with the objects of the Constitution and the MPRDA. Accordingly, this ground of review falls to be dismissed.

(iii) The application of the 2017 Charter to all "Holders"

57. The objects contained in section 2 of the MPRDA apply to the Act broadly. Indeed, for instance, section 2(d) of the MPRDA speaks of the expansion of opportunities to enter the mineral and petroleum industries generally. Nothing in the wording of section 2 gives any substance to the contention that the imperatives contained in section 2 apply only to mining and prospecting rights holders, and not to other rights holders.

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47 **Barnard** at para 37.

48 **Minister of Finance and Others v Van Heerden** 2004 (6) SA 121 (CC) ("**van Heerden**") at para 44.

58. Similarly, section 100(2)(a) of the MPRDA refers to a Charter that will effect entry into the mining industry. Again, it does not limit its ambit of application to mining and prospecting rights holders, to the exclusion of other rights holders.

59. While the import of non-compliance may differ depending on the terms of a particular mining right – and cognisant of the flexible and understanding approach that the Minister has adopted in the past – the upshot remains that all Holders, as defined in section 1 of the MPRDA, are required to comply with the Charter. There can be no basis for creating imperatives for some rights holders, on the one hand, and absolving other rights holders entirely of taking any steps to achieve the transformative objectives contained in the MPRDA.

60. Accordingly, this ground of review falls to be dismissed.

(iv) The Code of Good Practice

61. In its founding affidavit, the Chamber states blithely that: "*The 2017 Charter conflicts with the [Code of Good Practice] as whole*".[49] The Chamber further does not deal with this contention in its replying affidavit. The Minister is therefore left at a loss as to what the Chamber's argument in this regard is.

62. In any event, it is submitted that the Chamber's argument is incorrect:

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49 FA p 57 para 115.

62.1. A review of the 2017 Charter and the Code of Good Practice reveals that it is outright factually inaccurate to state that the two conflict with each other as a whole. It is apparent that there remain both points of overlap and points of difference.

62.2. Furthermore, the Code of Good Practice for the Minerals Industry is developed by the Minister in terms of section 100(1)(b) of the MPRDA. It is clearly stated under paragraph 1 that: "*The Code can be amended by the Minister of Minerals and Energy when there is a change in mining policy and legislation*". Furthermore, paragraph 5 of the Code states that: "*The Code may be amended by the Minister of Minerals and Energy from time to time*".

63. It is therefore expressly within the Minister's power to amend the Code of Good Practice through the 2017 Charter, to bring it in line with current mining policy and legislation.

GROUNDS OF REVIEW RELATING TO THE OWNERSHIP ELEMENT

(i) Existing rights: Alleged imposition of new obligations

64. The position in terms of each of the three Charters has been set out in the Minister's answering affidavit.[50] This context is relevant when considering the Chamber's challenge to the 2017 Charter. It should further be noted that the

[50] AA pp 366-371 paras 189-190.

holder must align existing targets cumulatively from the targets in the 2010 Charter. The 2017 Charter further provides a transitional period in order for the holder to meet the targets. In effect, for the Chamber's members who have sought to comply with obligations under the 2010 Charter, the import of the 2017 Charter should only require a 4% change for holders, for which they are granted a 12-month grace period to comply.

65. At the outset, it bears repeating – as has been set out above – that the Minister has an implied power in terms of section 100(2) to revise and amend the terms of the Charter in pursuance of the objects contained in the MPRDA. This power is necessarily flexible in order to ensure that the Minister is able to act effectively and efficiently. The power to revise and amend is also contained in the Original Charter, and has previously been acquiesced to by the Chamber through its acceptance of the 2010 Charter.

66. The Minister has not imposed any additional obligations on holders of mining rights above what was committed to at the time of the grant of the right. The additional requirements are for the purposes of giving effect to the objects contained in section 2 of the MPRDA, which the mining right holder committed to at the time of the application and grant of the mining right.

67. The MPRDA makes clear that there is an ongoing duty to comply with the transformative objectives of the MPRDA, as borne out through the Charter:

67.1. Section 17 provides that the Minister may, having regard to the type of mineral concerned and the extent of a proposed prospecting project, request the holder to give effect to the object referred to in section 2(d).

67.2. Section 19(2)(d) provides that the holder of a prospecting right has to comply with the terms and conditions of the prospecting right, relevant provisions of the MPRDA and any other relevant law.

67.3. Section 23(1)(h) provides that the Minister must grant a mining right if the granting of such right will further the objects referred to in section 2(d) and (f) and in accordance with the Charter and the prescribed social and labour plan.

67.4. Section 25(2)(d) and (f) provides that the holder of a mining right must comply with the relevant provisions of the MPRDA and any other relevant law and the terms and conditions of the mining right.

67.5. Section 25(2)(h) provides that the holder of a mining right is required to submit a prescribed annual report, detailing the extent of the holder's compliance with the provisions of section 2(d) and (f), the Charter and the social and labour plan.

68. Moreover, mining rights specifically provide as follows:[51]

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[51] AA p 373 para 200.

"*Provision relating to section 2(d) and (f) of the Act in the furthering of the object of this Act, the holder is bound by the provisions of an agreement entered into between the holder and empowering partner which agreement or arrangement was taken into consideration for purposes of compliance with the requirements of the Act and/or broad-based economic empowerment Charter developed in terms of this Act and such agreement shall form part of this writing."*

69. Section 47(1)(b) of the MPRDA empowers the Minister to cancel or suspend any reconnaissance permission, prospecting right, mining right, mining permit, retention permit or holders of old order rights or previous owner of works, if the holder or owner thereof "*breaches any material term or condition of such right, permit or permission*". This provision clearly illustrates that the Minister is indeed empowered by the MPRDA, read together with the mining right, to require compliance with the revisions in terms of the 2017 Charter.

70. The Chamber further contends that the Minister is rendered *functus officio* upon the grant of a mining right. However, this simply cannot be correct. This is borne out by a plain reading of the MPRDA, in terms of which the Minister is empowered – and, indeed, required – to play an ongoing role after the grant of a right. There are a number of provisions that are relevant in this regard, of which three in particular should be highlighted:

70.1. Section 25(2)(h) of the MPRDA requires that the holder of a mining right must submit a prescribed annual report detailing its compliance with,

inter alia, section 2(d) and (f) of the MPRDA and the Mining Charter. There is therefore clearly an ongoing monitoring role that the Minister is required to play in ensuring that the transformative objectives are indeed met.

70.2. Section 47 of the MPRDA makes it clear that the Minister has an ongoing right to cancel or suspend a right, permit or permission after it has been granted.

70.3. Section 102 of the MPRDA makes it clear that the MPRDA does not envisage a mining right remaining a static document. As set out in this section, a mining right (amongst others) may be amended or varied with the written consent of the Minister.

71. In its replying affidavit, the Chamber seeks to explain its position in this regard to be that the Minister is *functus officio* in respect of amending the terms of the mining right, but not in terms of suspending or cancelling the mining right.[52] However, it is unclear on what basis the Chamber conceives this apparent partial *functus officio*. This position is certainly not supported by the provisions of the MPRDA, including section 47(3) of the MPRDA, which provides that the Minister must direct a holder to take specified measures to remedy any contravention, breach or failure.

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52 RA p 2314 para 78.1.

72. A related aspect is the Chamber's contention that this provision imposes retrospective obligations on mining rights holders. This is clearly misconstrued. Firstly, this requirement is not new. This has been the requirement since the 2004 Charter, carried through to the 2010 Charter, and now concretised in the 2017 Charter for the avoidance of doubt. The Government has been consistent and clear on this. The fact that the Chamber has not chosen to heed the Government's repeated indications in this regard is solely at the fault of the Chamber.

73. Furthermore, this requirement also coheres with the approach taken in the development of the previous charters, and with the ultimate view to achieve meaningful economic participation. Static targets would wholly fail to achieve meaningful transformation, and result in a failure to meet the objectives of section 2(d) and (f). It would also fail to realise the effective integration and participation of black persons into the mainstream economy.

74. The MPRDA allows the Minister a wide remit in determining how the objectives are achieved through the Charter, and the requirement that a rights holder comply with section 2(d) is an unequivocal condition that the Minister is permitted to impose through the grant of the mining right.[53]

75. Accordingly, this ground of review falls to be dismissed.

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[53] **Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd** [2015] 3 All SA 408 (SCA) at para 12.

76. In addition to the review ground raised by the Chamber, it further seeks a declarator to the effect that once the Minister or his delegate has been satisfied in terms of section 23(1)(h) or item 7(2)(k) in schedule II of the MPRDA that the grant of a mining right or the conversion of an old order mining right will further the objects in section 2(d) and (f) in accordance with the Charter applicable at the time, the Minister is not authorised to require, and the holder is not legally obliged to take, steps to comply with any newly revised Charters.

77. Such a declarator would run counter to the objects of the MPRDA, and be inimical to the transformative aims of the Charter. It would cause transformation of the mining industry to stagnate. Such an approach would also directly conflict with the supervisory powers granted to the Minister under the MPRDA, including in terms of section 47.

78. It is therefore submitted that the Chamber is not entitled to the relief sought.

(ii) Existing rights: References to past transactions

79. The Minister has held the consistent approach that the argument of "once empowered always empowered" has no role under the 2017 Charter (or any of the previous Charters), and that it undermines the objects of section 2(d) of the MPRDA.

80. The 2017 Charter is clear in its approach in this regard. As set out in the answering affidavit, paragraph 2.1.2 of the 2017 Charter contemplates different

factual situations which may exist, having regard to historical targets and levels of BEE shareholding actually achieved and retained, as at the date of publication of the 2017 Charter.[54] The import of these provisions is clear in applying the ordinary principles of statutory interpretation, as set out above.

81. Section 23(1)(h) of the MPRDA provides that the grant of a mining right must be "*in accordance with the charter contemplated in section 100…*", and item 7(2)(k) requires that an applicant for conversion of an old order mining right must provide an undertaking that the holder "*will give effect to the object referred to in section 2(d) and (f)*". As such, before granting a mining right or a conversion of an old order right, the Minister must be satisfied that the objects referred to in section 2(d) and (f) would be met. These provisions, amongst others,[55] read with section 100 of the MPRDA, make it clear that the MPRDA demands that steps are taken to ensure compliance with the Charter.

82. The Chamber takes umbrage at the requirement that the ownership targets contained in the 2017 Charter must be maintained on a consistent basis. Rather, the Chamber's preferred view, described as "once empowered, always empowered", is that once a mining right holder has ticked the box of meeting the ownership target contained in the charter, that is the end of the enquiry: the Minister should thereafter be satisfied that empowerment has successfully been achieved. Thereafter, on the Chamber's proffered view, even if the mining company were to later reduce its black ownership to 0%, the mining company

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54 AA pp 376-377 paras 206-211.

55 See, for example section 12 of the MPRDA.

should anyway be accepted as having furthered the transformative objectives of the MPRDA and the 2017 Charter, because it reached its target for a single moment in time.

83. This patently would not give meaningful effect to transformation, or realise substantive equality in any meaningful way. The Chamber claims that its interpretation is consistent with the objectives of the MPRDA.[56] The Chamber presents the options in a distorted binary, with there only being two possible options: on the one hand, either HDSAs are subject to a perpetual lock-in that "*would reduce the value of their investment, materially impair the opportunities available to non-HDSAs and discourage investment by HDSAs*"; and, on the hand, if mining companies did not subject HDSAs to a perpetual lock-in, "*the resultant cost, uncertainty and administrative burden would provide a material disincentive to investment in the mining industry*".[57]

84. The Chamber's approach runs foul of section 9(2) of the Constitution and the MPRDA, which requires substantive equality to be achieved.[58] The Chamber's

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56 FA p 68 para 137.

57 FA p 68 para 137.1-137.2.

58 As was noted in one of the early decisions of the Constitutional Court, in **Brink v Kitshoff** 1996 (4) SA 197 (CC) at para 40 in reference to section 8 of the Interim Constitution:

> *"As in other national constitutions, section 8 is the product of our own particular history. Perhaps more than any of the other provisions in chap 3, its interpretation must be based on the specific language of section 8, as well as our own constitutional context. Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that*

approach of “once empowered always empowered” furthermore would have the Charter cast in stone at a particular time and, as set out above, that was never in contemplation of Parliament in enacting section 100(2) of the MPRDA nor was it ever in the contemplation of the Minister in drawing the Charter.

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history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.”

In **Bato Star** at para 74, Ngcobo J (concurring with a unanimous court) noted that:

> “In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.”

In **Van Heerden** at para 31, the Constitutional Court expressed that:

> “*[W]hat is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.*”

In **Bengwenyama**, the Constitutional Court stated that:

> “*Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of substantive equality the Constitution provides for legislative and other measures to be made to protect and advance persons disadvantaged by unfair discrimination. The Constitution also furnishes the foundation for measures to redress inequalities in respect of access to the natural resources of the country. The Mineral and Petroleum Resources Development Act (Act) was enacted amongst other things to give effect to those constitutional norms. It contains provisions that have a material impact on each of the levels referred to, namely that of individual ownership of land, community ownership of land and the empowerment of previously disadvantaged people to gain access to this country’s bounteous mineral resources*.”

Furthermore, in **Barnard** at paras 28-29 (footnotes omitted), the Constitutional Court stated as follows:

> “*Our constitutional democracy is founded on explicit values. Chief of these, for present purposes, are human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law. The foremost provision in our equality guarantee is that everyone is equal before the law and is entitled to equal protection and benefit of the law. But, unlike other constitutions, ours was designed to do more than record or confer formal equality.*
>
> *At the point of transition, two decades ago, our society was divided and unequal along the adamant lines of race, gender and class. Beyond these plain strictures there were indeed other markers of exclusion and oppression, some of which our Constitution lists. So, plainly, it has a transformative mission. It hopes to have us re-imagine power relations within society. In so many words, it enjoins us to take active steps to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination. This was and continues to be necessary because, whilst our society has done well to equalise opportunities for social progress, past disadvantage still abounds.*”

(iii) Existing rights: Shareholding

85. Paragraph 2.1.2.6 of the 2017 Charter provides that the top-up required by paragraphs 2.1.2.3 and 2.1.2.4 "*shall be effected by a reduction in the remaining shareholders who are not Black Persons in proportion to their respective shareholding in the company*". The Chamber seeks to argue that this is a deprivation that amounts to an expropriation.[59]

86. However, the Chamber's claim fails at every stage of the test set out under section 25 of the Constitution,[60] as has been developed by the Constitutional Court.

87. Various sub-sections of section 25 of the Constitution recognise the need to redress past racial discrimination and historic inequality, and the role that the property clause plays in achieving such redress.[61] Importantly, section 25(8) provides that:

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59 FA p 70 para 142.

60 Section 25 of the Constitution provides in relevant part as follows:

"*(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*

(2) Property may be expropriated only in terms of law of general application—

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

…

(3) For the purposes of this section— (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (b) property is not limited to land."

61 See, for instance, subsections 25(3), (4), (5), (6).

> "*No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).*"

88. The first question in the enquiry is whether there has been a deprivation of property. In **Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing in the Province of Gauteng**, the Constitutional Court held that:[62]

> "*Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.*"

89. The Chamber offers no legal basis or a factual underpinning in either its founding affidavit or replying affidavit that "*property*" is involved, or that that there has been a "*substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment*".

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62 2005 (1) SA 530 (CC) ("**Mkontwana**").

90. Secondly, even assuming that there has been a deprivation of property, the Chamber further fails to establish that any such deprivation is arbitrary. To establish the arbitrariness of a deprivation, this requires that "*the law in issue either fails to provide 'sufficient reason' for the deprivation or is procedurally unfair*".[63] Furthermore, in order to determine whether there is sufficient reason for a permitted deprivation, "*it is necessary to evaluate the relationship between the purpose of the law and deprivation effected by that law*".[64] The test in this regard is rationality: a mere rational connection between the means and ends could be sufficient reason for a minimal deprivation to render it not arbitrary. The greater the extent of the deprivation, the more compelling the purpose and the closer the relationship between the means and ends must be.[65]

91. In the present matter, the Chamber falls short on both counts. On the one hand, the deprivation alleged by the Chamber – assuming it exists at all (which is denied) – is minimal at best. On the other hand, there is a clear and cogent connection between paragraph 2.1.3 of the 2017 Charter and the purpose of redress that it seeks to achieve. Any deprivation in terms thereof would certainly not be arbitrary.

92. However, even if the Chamber finds itself able to establish that paragraph 2.1.3 of the 2017 Charter amounts to an arbitrary deprivation, this is still not the end of the enquiry: it must further be examined whether the deprivation limits the

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63 **Mkontwana** at para 34.

64 **Mkontwana** at para 34.

65 **Mkontwana** at para 35.

section 25(1) right; and, if so, whether the limitation is reasonable and justifiable in terms of section 36 of the Constitution. In this regard, it is submitted that paragraph 2.1.3 would indeed be constitutionally permissible, in that it is consonant with section 25(8) of the Constitution, is realised through a law of general application, and is reasonable and justifiable in accordance with section 36. The objects and purpose of paragraph 2.1.3 are again of relevance to this enquiry, read as a measure in the context of the 2017 Charter more broadly. Any limitation that may arguably arise from paragraph 2.1.3 is therefore justifiable. As such, the Chamber's claims in this regard fall to be dismissed.

93. An expropriation is considered a specific form or subset of deprivation. As explained in **Agri-SA**, "*there is … more required to establish expropriation although there is an overlap and no bold line of demarcation between sections 25(1) and 25(2). Section 25(1) deals with all property and all deprivations, including expropriation, although additional requirements must be met for deprivation to rise to the level of expropriation.*"[66]

94. In order to prove expropriation, "*a claimant is required to establish that the state has acquired the substance or core content of what it was deprived of*".[67] It is well-established in our constitutional jurisprudence that "*[t]here can be no expropriation in circumstances where deprivation does not result in property being acquired by the State*".[68]

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66 **Agri-SA** at para 48.

67 **Agri-SA** at para 58.

68 **Agri-SA** at para 59. See also **Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another** 2009 (6) SA 391 (CC) at para 64, in which the Court stated:

95. There is nothing in the wording of this provision that would result in property being acquired by the state. The Chamber's contention that this amounts to an expropriation is therefore incorrect in both law and fact.

96. Similarly, the Chamber's contention that this provision conflicts with the Companies Act 71 of 2008 is also incorrect. Although the Chamber states in its replying affidavit that it has allegedly shown "clear conflicts between the 2017 Charter and the Companies Act",[69] this is simply not true. Instead, this is yet a further example of a ground of review raised by the Chamber with no effort to substantiate its contentions.

97. The Chamber refers only, in a single paragraph, to section 37(1) of the Companies Act in support of this argument.[70] This, it claims, establishes that shareholders be treated equally. Section 37(1) provides as follows:

> "*All of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class.*"

"*Although it is trite that the Constitution and its attendant reform legislation must be interpreted purposively, courts should be cautious not to extend the meaning of expropriation to situations where the deprivation does not have the effect of the property being acquired by the state. It must be emphasised that section 10(3) does not transfer rights to the state … As I have said, the state has not acquired the applicants' land as envisaged in sections 25(2) and 25(3) of the Constitution. For that reason, no compensation need be paid.*"

69 RA p 2321 para 91.

70 FA p 71 para 145.

98. However, as the Minister has already explained in the answering affidavit, the Companies Act does not prohibit different classes of shareholders.[71] Section 37(1) therefore does not support the Chamber's argument in this regard.

99. In light of the above, the Chamber is not entitled to the relief sought.

(iv) Existing rights: Transitional provisions

100. As set out above, the Minister and the DMR have been consistent in its approach that the targets contained in the Charters are to be read together and in context. As such, a holder who has complied with the obligations imposed by the 2010 Charter should only be required to top-up by 4% in compliance with the 2017 Charter.

101. The Chamber has not offered any factual basis to reflect that there are existing or new rights holders who will not be able to comply with the provisions. The Chamber assumes in the abstract that this will be the case, and expects both the Court and the Minister to accept this assumption. This is not permissible, and ignores the flexible approach that the Minister has consistently adopted in considering the facts of each case.

102. The Minister's stated position is that minerals are non-renewable resources, and as such the transformation of the mining industry cannot be unduly

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71 AA p 382 para 229.

prolonged,[72] as the Chamber would have occur. The Chamber's reluctance in this regard reflects a concerning unwillingness to work with the Minister in achieving the transformative objectives of the MPRDA in a timely manner.

103. With regard to the non-recognition of renewals, it is submitted that the provisions of section 18(3) and 24(3) of the MPRDA reveal that compliance is required with either the terms and conditions of the prospecting or the mining right, and no contravention of any relevant provision of the MPRDA or other law is permitted. Both prospecting and mining rights make express provision for the objects of section 2(d) to be achieved.

104. Accordingly, the Chamber has failed to make out a case for this ground of review, and it falls to be dismissed.

(v) New rights: Reference to all prospecting rights holders

105. Section 17 of the MPRDA makes express reference to the grant of a prospecting right being contingent on the applicant having given effect to the objects of section 2(d). The imposition of a 51% black shareholding in respect of minerals falls squarely within the ambit of seeking to achieve the objects contained in section 2(d). The Chamber provides no further exposition in regard to this complaint, in its replying affidavit.

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72 AA p 585 para 240.

106. The Chamber's argument in this regard is unfounded and misplaced, and falls to be dismissed.

(vi) New rights: 51% Black ownership

107. The Chamber persists with its speculative, negative outlook, without any facts underpinning its contentions. This provision accords with the objects of the MPRDA. The Chamber has failed to make out an argument in its founding affidavit, and has not dealt with this at all in its replying affidavit.

108. Accordingly, this ground of review falls to be dismissed.

(vii) New rights: Specific distribution of shareholding

109. As a point of departure, it is noted that the Charter does more than simply guide the Minister's discretion. It is a binding legal instrument that is intended to create a framework and set timeframes to allow for greater participation.

110. It is unclear from the papers why the Chamber contends that the Minister's discretion is excluded by this provision.

110.1. First, it is the Minister himself who exercised his discretion in the first place in determining the specific shareholding.

110.2. Second, the prescribed minimum does not impede the Minister's discretion to the extent that shareholding is achieved in excess of these targets.

110.3. Third, for the reasons set out above, the Minister is empowered to amend this provision, should it be deemed necessary or prudent to do so.

111. Accordingly, the Chamber's ground of review falls to be dismissed.

(viii) New rights: Transfers

112. The crux of section 11 of the MPRDA, particularly section 11(1), is that the Minister's consent is required for the cession, transfer, let, sublet, assignment, alienation or other disposal of a prospecting or mining right, or interest in such right. There is nothing contained in section 11 of the MPRDA that renders this provision impermissible.

113. As explained in the answering affidavit, the rationale behind this provision is to ensure that the thresholds reached are maintained.[73] Furthermore, it accords with the transformative intentions of the MPRDA and the Charter. The Minister will continue to exercise his powers under section 11 in the ordinary course.

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[73] AA p 392 para 262.

114. The Chamber does not expand on its argument in its founding affidavit,[74] and does not deal with this in its replying affidavit. As such, it is submitted that the Chamber has failed to make out a case in this regard, and that this ground of review falls to be dismissed.

(ix) New rights: Section 9 of the Constitution

115. Paragraph 2.1.1.5 of the 2017 Charter pertains to any reduction in shareholding of existing shareholders through the issue of new shares, and is directed towards ensuring that the threshold levels of black ownership are not progressively diluted.

116. The Chamber seeks to rely generally on section 9(1), (2) and (3) of the Constitution, on the basis that this provision permits unequal treatment based on race. The permissibility of such a provision has already been dealt with above. It is noted in this regard that:[75]

116.1. While paragraph 2.1.1.5 does constitute differentiation, this does not amount to unfair discrimination.

116.2. To the contrary, the provision is rationally connected with the achievement of a legitimate governmental purpose to remedy the

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74 FA p 78 para 166.

75 See, generally, **Harksen v Lane NO and Others** 1997 (11) BCLR 1489 (CC) ("**Harksen**") at paras 42-50.

injustices of our racially discriminatory past, and in accordance with the objects of the MPRDA.

116.3. As discussed above, measures such as this are both permissible and required by section 9(2) of the Constitution.

117. As set out in **Harksen**, in order to determine whether a discriminatory provision has impacted on complainants unfairly, factors to be considered include:

> "*(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;*
>
> *(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question …*
>
> *(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of*

their fundamental human dignity or constitutes an impairment of a comparably serious nature."

118. There is nothing provided in the Chamber's papers to support the contention that this provision of the 2017 Charter discriminates against persons who have suffered from patters of disadvantage in the past, or that this provision has resulted in the impairment of dignity. To the contrary, it is clear from its wording that it serves a "*worthy and important societal goal*" by furthering equality and standing to assist persons who have been subject to unfair racial discrimination in the past.

119. Accordingly, this ground of review falls to be dismissed.

(x) New rights: Alleged expropriation of debt

120. The DMR's intention through paragraph 2.1.1.6 of the 2017 Charter is to ensure that black shareholding is unencumbered.[76] The Chamber's legal arguments are unfounded: the 2017 Charter is indeed a law of general application; and the provision does not constitute a deprivation or expropriation as contemplated under section 25 of the Constitution. This has been dealt with above. Accordingly, the Chamber's ground of review falls to be dismissed.

(xi) New rights: Sections 9 and 25 of the Constitution, and section 37(1) of the Companies Act

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[76] AA p 393 para 268.

121. The legal position and interpretation relating to sections 9 and 25 of the Constitution have been dealt with above. Such a measure is both permitted and mandated by the Constitution and the MPRDA. Accordingly, the Chamber's ground of review falls to be dismissed.

(xii) New rights: The Companies Act

122. The interpretation of paragraph 2.1.1.12 is clear, applying the ordinary principles of statutory interpretation set out above. Paragraph 2.1.1.12 gives effect to active participation of Black shareholders, and ensures that the benefit from the exploitation of mineral resources.[77] The intention behind this provision is to ensure that black persons are not deprived of their share of equity, and are active participants in the running of operations to ensure meaningful skills transfer.[78] The Chamber does not provide any factual underpinning to support its contention that black persons would not want to so participate, or why such a position would be contrary to the Companies Act.

123. The Chamber has failed to make out a case in this regard, and its ground of review falls to be dismissed.

(xiii) Sale of mining assets, beneficiation and off-sets

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77 AA p 395 para 275.

78 AA pp 395-396 para 276.

124. The 2017 Charter deals with beneficiation in a manner that aims to develop industrialisation, facilitate de-racialisation and encourage the entry of black persons into the mining industry.[79]

125. It is noted as follows:

125.1. The Minister is empowered to revisit aspects of the Charter. This has been dealt with above. The Chamber is misplaced in conflating this power with an imposition of retrospective obligations.

125.2. There is no discrimination against mining right holders who have met the 30% ownership target.

125.3. The Chamber's apparent view that a right holder should be permitted to offset the entire 30% ownership target is inimical to the objects contained in the MPRDA and the Charter, and would not serve any benefit in seeking to achieve transformation of the mining industry.

125.4. The post-amble to paragraph 2.1.4 clearly sets out how the 11% offset is to be achieve.

126. In relation to the preferential option on sale of a mining asset, paragraph 2.1.3 of the 2017 Charter provides that a holder who sells its mining assets must give black owned companies a preferential option to purchase such assets. This, as

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79 AA pp 398-399 para 289.

the provision states, is a measure intended to ensure effective and meaningful participation of black persons in the mining and minerals industry, and is notably in line with the objects of the 2017 Charter, the MPRDA and the Constitution. It is clear from a plain reading of this provision that it does not compel a holder to dispose of its mining assets in circumstances where it does not want or voluntarily intend to do so; nor does it in any way compel a holder to dispose of its mining assets on terms that are unfavourable to it. All that the provision simply requires is that, in circumstances where the holder chooses to sell its assets, it offers black owned companies a preferential option to purchase.

127. The Chamber complains further that paragraph 2.1.3 "*confers a right of first refusal but contains no mechanism*".[80] The Chamber does not explain how or why this would be the case. It is submitted, however, that this cannot be correct.

128. Preferential options, or rights of first refusal, are commonplace and uncontroversial. There is an array of widely used and generally accepted ways in which this is effected in practice. In respect of the government, there is a raft of legislative provisions that deal with preferential procurement, for instance, including section 217 of the Constitution, the Preferential Procurement Policy Framework Act 5 of 2000, and the BBBEE Act.

129. As mentioned above, the Constitutional Court has recognised that such measures are driven by the imperative to redress the imbalances of the past.

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80 FA p 90 para 200.

Additionally, preferential options are commonly seen in the commercial sphere, for instance through preferential share offerings to historically disadvantaged persons. These are facilitated in a range of ways, depending on the particular needs and requirements of the parties, the transaction, and the subject-matter under exchange.

130. Contrary to the Chamber's contention, if the Minister had been unduly prescriptive of such a mechanism in these circumstances, this might have undermined the fluidity and flexibility for such a transaction. As already set out above, the intention and context of the provision is clear. It is submitted that the Chamber's contention that lack of a mechanism is baseless and falls to be dismissed.

GROUNDS OF REVIEW RELATING TO THE NON-OWNERSHIP ELEMENTS

(i) Procurement, supplier and enterprise development: Context

131. Paragraph 2.2 of the 2017 Charter provides for certain criteria to be met by holders in its procurement policies. These, as stated therein, are intended to strengthen linkages between the mining and minerals industry and the broader economy, which would in turn expand economic growth, create decent jobs, and widen the scope for market access of South African manufactured goods and services. The Chamber complains about this, as dealt with in turn below.

132. As a point of departure, it bears reiterating the following three points that were set out in the answering affidavit against the legal and factual background relating to procurement:[81]

132.1. First, the policy imperative underpinning domestic procurement is not sudden or surprising. It is also not exceptional, as it applies in many other countries.

132.2. Second, the Chamber has constantly been engaged on this issue, and has been consulted on procurement on a detailed level throughout the processes leading to the 2004 Charter, the 2010 Charter and the 2017 Charter.

132.3. Third, the Chamber has in the past fully supported, and been in agreement with, the 2004 Charter and the 2010 Charter, as demonstrated in the answering affidavit.

133. This context is relevant when considering the Chamber's complaints set out below.

(ii) Procurement, supplier and enterprise development: Mining goods

The meaning of the term 'set aside'

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81 AA p 411 para 314.

134. The Chamber contends that it does not understand the use of the term ‘set aside’. As it has done repeatedly through the application, the Chamber again opts for a strained interpretation of the provision that leads to the most unfavourable interpretation, and seeks to give rise to undue and unwarranted confusion about the provisions of the 2017 Charter. The appropriate principles have already been set out above. As set out therein, the mere fact that there is more than one possible interpretation does not render a provision invalid. On the contrary, our courts have provided ample guidance on the factors to consider in such a circumstance, bearing in mind the spirit, purport and object, as well as the language and context, and preferring the most sensible interpretation.

Provisions relating to black ownership

135. The proper approach to interpretation has already been dealt with above. Furthermore, as set out in the answering affidavit, it is difficult to understand the Chamber’s complaint, given its intimately involvement in the consultative process regarding the 2017 Charter.[82] The Chamber did not at any point prior to the filing of this application complain of this paragraph, despite its detailed submissions relating to other aspects of the 2017 Charter.

136. The Chamber’s ground of review falls to be dismissed.

Alleged impossibility

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82 AA pp 413-414 paras 320-321.

137. The Chamber contends that there is no evidence that companies currently providing mining goods are Black Owned Companies.[83] The Minister has dealt in detail in the answering affidavit in respect of why the Chamber's contentions are misplaced.[84] In sum:

137.1. The Minister has proffered two examples, at the behest of the Chamber, confirming that there is existing HDSA supplier capacity for mining goods. However, it is the Chamber who contends that this provision is impossible to comply with, and the burden rests on the Chamber to make out a case for its claim in this regard.

137.2. The Chamber claims on the one hand that its members have been complying with their procurement obligations for the last 13 years in order to develop HDSA capacity, and on the other that no such HDSA capacity exists.

137.3. The amendment contained in the 2017 Charter is relatively minor and incremental from the position under the 2010 Charter. Moreover, the position under the 2017 Charter is more flexible in favour of the rights holder, allowing the holder more flexibility in the structuring of the of its HDSA procurement targets.

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83 FA p 93 para 208.

84 AA pp 414-422 paras 322-331.

138. As stated above, the Minister's approach has always been one that is sensitive and flexible, with due regard to the specific circumstances at hand. In this regard, paragraph 2.9 of the 2017 Charter states that: "*The Department shall monitor and evaluate the Holder's implementation of this Mining charter of 2017, taking into account the impact of material constraints which may result in not achieving the set targets*".

139. Accordingly, the Chamber's ground of review falls to be dismissed.

Relevant considerations and information

140. The 2017 Charter requires holders to spend certain prescribed minimum percentages of total mining goods procurement on South African manufactured goods, as defined. In terms of the definition of South African manufactured goods, an assessment is required of the value added during assembly and/or manufacture of the product within South Africa, excluding the profit mark-up, intangible value and overheads.

141. However, the Chamber ignores the requirement under '*Verification of local content*' which resolves the issue for the holder, and places it in the hands of the South African Bureau of Standards ("SABS"). The SABS, through the statutory tools with which it is empowered, is tasked with certifying qualifying suppliers. The provision states further that: "*The responsibility to verify local content lies with the supplier of goods and/or services*".

142. All relevant considerations were taken into account, and the conclusion reached that compliance was not impossible. This ground of review accordingly falls to b be dismissed.

Alleged breach of GATT and the TDCA

143. The Chamber baldly alleges in the founding affidavit that the 2017 Charter would render South Africa in breach of its obligations under the General Agreement on Tariffs ("**GATT**") and Trade and the Trade, Development and Cooperation Agreement between the European Community and South Africa ("**TDCA**").[85]

144. There are a range of arrangements that provide for differing trade regimes. South Africa has both bilateral treaties and regional treaties that allow for differing treatment between South Africa and other states. Special and differential treatment, forged to provide greater flexibility for developing countries in trade commitments, has significantly evolved in trade negotiations and investment agreements.

145. Importantly, the treaties themselves provide for this. For instance, article XIV of GATT provides for exceptions to the rule of non-discrimination. Section 27 of the TDCA similarly provides for exceptions.[86]

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85 FA pp 94-95 para 210.

86 Section 27 of the TDCA provides that:

> "*The Agreement shall not preclude prohibitions or restrictions on imports, exports, goods in transit or trade in used goods justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of*

146. The permissibility of differential treatment is further recognised in the Protection of Investment Act 22 of 2015 ("POIA"), which was assented to on 13 December 2015, but has not come into force as yet. Section 8(1) of POIA provides that foreign investors and their investments must not be treated less favourable that South African investors in like circumstances. However, section 8(4) provides that subsection (1) must not be interpreted in a manner that will require South Africa to extend foreign investors and their investments the benefit of any treatment, preference or privilege resulting from, *inter alia*, "*any law or other measure, the purpose of which is to promote the achievement of equality in South Africa or designed to protect or advance persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability in the Republic*".

147. A further consideration is that the agreements are not directly binding domestically. The Chamber acknowledge that the treaties are not part of South Africa's domestic law.[87] South African courts are unwilling to uphold a blanket ban on preferential treatment under international trade law.[88]

> *national treasures possessing artistic, historic or archaeological value; or the protection of intellectual, industrial and commercial property or rules relating to gold and silver. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary or unjustifiable discrimination where the same conditions prevail or a disguised restriction on trade between the Parties.*"

87 FA p 64 para 89.

88 In **SA Metal Group (Proprietary) Limited v The International Trade Administration Commission (ITAC) and Another**, [2017] ZASCA 14 (17 March 2017) at para 4 the Supreme Court of Appeal noted that South Africa is a signatory to GATT, and acceded to it. The facts of that case were as follows. In 2013, International Trade Administration Commission ("ITAC") published export control guidelines, which provided as follows:

> "*[S]crap metal will be allowed to be exported only if the scrap metal concerned was offered to domestic consumers at a price that is 20% below international spot prices for the published types and grades of scrap metal.*

148. The Chamber has not made a case that South Africa's international trade agreements render the 2017 Charter null. Accordingly, this falls to be dismissed.

(iii) Procurement, supplier and enterprise development: Services

149. The Chamber's contentions in relation to services are the same as those in relation to mining goods, and falls to be dismissed on the same grounds.

(iv) Procurement, supplier and enterprise development: Samples

Evidence to demonstrate local capacity

…

ITAC will exempt affected exports from these requirements to the extent that application of these requirements would be in conflict with South Africa's obligations under an existing trade agreement. The guidelines will be applied and implemented in such a manner that they are consistent with any binding trade agreement" (at para 8).

ITAC amended the guideline, and published it the following year (at para 9). SA Metal Group sought exemptions for ten permits from the price preference system, primarily on the basis that the application of those requirements would be in conflict with South Africa's obligations under the GATT; the requests were refused by ITAC, on the basis that "*subjecting the application to the guidelines would not violate South Africa's obligations under the GATT*" (at para 9).

SA Metal Group's application was dismissed by the High Court (Western Cape Division, Cape Town), and the appeal dismissed by the Supreme Court of Appeal. The High Court dismissed the application and noted that the orders issued by the Panel or the Appellate Body of the WTO – regarding alleged breaches of the provisions of GATT – are mere recommendations to the offending state party to rectify the impugned measure. The High Court dismissed the application for the following reasons: the SA Metal Group, as applicant, failed to provide factual evidencing (how, by whom, when and where) the impugned decision of ITAC violated the provisions of GATT (at paras 70-71); the exceptions in Article XI:2(a) and XX(i) of GATT in any event saved the decision of ITAC from falling foul of the relevant provision of GATT that the SA Metal's Group had identified in its founding affidavit (at paras 72-92).

150. The Chamber mistakenly contends that it is Minister's responsibility to show the availability of capacity. As set out in the answering affidavit, the processing of samples is not a new provision introduced for the first time in the 2017 Charter. The Chamber does not provide current evidence that such targets currently cannot be met either wholly or in substantial part, or that it could not be met in the future with concerted and dedicated commitment to achieving this.

151. In any event, it is incorrect for the Chamber to contend that the Minister did not take its submissions into account.[89] This has been addressed by the Minister in the answering affidavit.[90] There is no obligation on the Minister to follow or adopt the submissions received through public consultation processes. In **Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others**,[91] the Constitutional Court held that "*[t]he method and degree of public participation that is reasonable in a given case depends on a number of factors, including the nature and importance of the legislation and the intensity of its impact on the public*".[92] The Court stated further that: "*[t]here is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government*".[93]

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89 FA p 97 para 217.

90 AA pp 428-429 para 349.

91 2008 (5) SA 171 (CC).

92 **Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others** 2008 (5) SA 171 (CC) at para 27.

93 **Merafong** at para 50. The Court stated further at para 53 that: "*The facilitation of public involvement is aimed at the legislature being informed of the public's views on the main issues addressed in a bill, not at the accurate formulation of a legally binding mandate."*

152. Accordingly, the Chamber's challenge falls to be dismissed.

The Minister's discretionary powers

153. The Chamber contends that the Minister has unfettered powers under this provision, which, so the argument runs, is impermissible. The Constitutional Court has previously held that:[94]

> "*Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times, they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made.*"

154. The Minister is required, at all times, to act reasonably, including in terms of deliverables and timeframes. Accordingly, the Chamber's challenge falls to be dismissed.

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94 **Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others** 2000 (3) SA 936 (CC) at para 53.

Micro-management

155. As set out in the answering affidavit, the Minister denies the allegation that he will not be able to timeously process requests received for written permission in circumstances where a holder cannot obtain the sampling services of a South African based company,[95] or that it is the Minister's intention to micro-manage.[96] There is no basis for these contentions raised by the Chamber, which accordingly fall to be dismissed.

Section 100(2) of the MPRDA

156. As set out above, section 100 of the MPRDA does not provide an exhaustive list of what is required by the Charter, and offers the Minister a discretion in this regard. The provisions of the 2017 Charter seek to further the objects of the MPRDA and ensure meaningful economic participation. This therefore clearly falls within the ambit of section 100(2).

157. Accordingly, the Chamber's ground of review falls to be dismissed.

(v) Procurement, supplier and enterprise development: Verification of local content

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95 AA p 430 para 351.

96 AA p 430 para 352.

158. The Chamber contends that the MPRDA does not apply to or bind suppliers. It is not clear what the basis for this submission is. The MPRDA is broadly inclusive in its terms, and does not circumscribe a particular category of persons or entities to which it applies alone. As set out above, one must consider the language and context of the provision. Furthermore, the express mechanism created in terms of the 2017 Charter is through the certification from the SABS.

159. While the 2017 Charter does not impose direct obligations on the supplier, the consequence of refusal is that the supplier cannot benefit from the transaction in order for the holder to be compliant with the MPRDA. This provision is therefore rendered operative through duality.

160. Accordingly, this ground of review falls to be dismissed.

(vi) Procurement, supplier and enterprise development: Contribution by foreign suppliers

161. The 2017 Charter establishes a Mining Transformation and Development Agency ("**MTDA**"), and provides for transitional arrangements in order to allow for such establishment. Foreign suppliers would be required to contribute a minimum of 1 per cent annual turnover generated from local mining companies to the MTDA.

162. The Chamber contends that this constitutes a "*tax, levy, duty or surcharge*", and that the 2017 Charter is in fact a money bill as contemplated by section 77 of the Constitution, and must therefore undergo the parliamentary process set out in section 75 of the Constitution in order to facilitate this contribution by foreign suppliers. This, however, is not correct.

163. The Constitutional Court's decision in **South African Reserve Bank and Another v Shuttleworth and Another**[97] is decisive in this regard. There are a number of relevant findings in this regard, including the following:

163.1. A law, other than a money bill, may authorise the executive arm of government to impose regulatory charges in order to pursue a legitimate government purpose.[98] There is a raft of pre- and post-constitutional legislation that authorises the executive to impose fees, tariffs, levies, duties, charges and surcharges.[99]

163.2. It is therefore necessary to distinguish between a regulatory charge from a tax, as the latter may only be procured through a money bill.[100]

163.3. The seminal test in this regard is whether the primary or dominant purpose of the statute is to raise revenue or regulate conduct: if regulation is the primary purpose of the revenue raised under the statute,

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97 **South African Reserve Bank and Another v Shuttleworth and Another** 2015 (5) SA 146 (CC).

98 **Shuttleworth** at para 46.

99 **Shuttleworth** at para 46.

100 **Shuttleworth** at para 47.

it would be considered a fee or a charge rather than a tax; if the dominant purpose is to raise revenue then the charge would ordinarily be a tax.[101]

163.4. Features that tend towards making a tax identifiable include that the money is paid into a general revenue fund for general purposes; and when no specific service is given in return for payment.[102]

163.5. Not every duty, levy, charge or surcharge that raises national revenue is a national tax, and not every law that permits the raising of national revenue is a money bill.[103]

163.6. It is not required that every national revenue, tax or not, can only be raised by original legislation.[104]

164. On the facts of the **Shuttleworth** decision, the Constitutional Court ultimately held that the dominant purpose of the exit charge was not to raise revenue, and it therefore did not have to be subjected to the requirements of section 75 of the Constitution. In reaching this conclusion, the Court took into account the fact that the fact that the charge was only imposed on a discrete portion of the population; that there was a close relationship between the regulatory charge and the persons being regulated; and that the regulatory charge was not collected through the normal machinery of collecting taxes.

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101 **Shuttleworth** at para 48.

102 **Shuttleworth** at para 49.

103 **Shuttleworth** at para 64.

104 **Shuttleworth** at paras 63-71.

165. The same considerations can be applied to the present matter to reach the conclusion that the 1 per cent is a regulatory charge, not a tax, and therefore not a money bill that is required to be subjected to the provisions of section 75 of the Constitution. It is clear that this specifically to foreign suppliers who fall within the ambit of the MPRDA and the 2017 Charter, and is therefore limited in its scope and application. Furthermore, section 100(2) of the MPRDA, properly interpreted in light of the objects of the MPRDA and the wording of that section, provides the Minister with the power to impose this regulatory charge.

166. Furthermore, there is no merit to the Chamber's contention relating to extraterritorial jurisdiction. The provision clearly applies to foreign suppliers generating income from local mining companies. The Chamber's contentions therefore fall to be dismissed.

(vii) Procurement, supplier and enterprise development: Transitional arrangements in relation to procurement

167. The proper interpretation to this provision has been set out in paragraph 371 of the answering affidavit:[105]

167.1. Paragraph 2.11(c) stipulates that a rights holder has three years within which to implement the HDSA procurement targets.

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105 AA pp 439-440 para 380.

167.2. Paragraph 2.11 (e) provides that, in relation to mining goods, the first year target is 15% of the 70%, the second year target is 45% of the 70%, and the third year target is the full 70%.

167.3. Paragraph 2.11 (d) states that in relation to all HDSA procurement targets, after this three-year period, the transition period may upon request by the rights holder be extended by a further two years in terms of paragraph 2.11 (d) of the 2017 Charter.

168. At best for the Chamber, there appears to be an omission in relation to staggered yearly thresholds for the other HDSA procurement targets over the three-year period. However, that does not in any way detract from the above. It simply means that in respect of those HDSA procurement targets, the rights holders are at liberty to decide how and to what extent they which to phase in compliance with the prescribed target over the three year period, provided that by the end of the three year period, they meet the prescribed target.

169. There can be no confusion as claimed by the Chamber. Its claim to that effect is, with respect, contrived.

(viii) Procurement, supplier and enterprise development: Procurement

170. As set out above, public participation requires the decision-maker to engage, but does not require that the decision-maker adopt the proposals proffered, particularly where this would be contrary to government policy. In the present

matter, while the Minister did indeed apply his mind in considering the submissions, the Chamber's approach would have hindered the transformative agenda being pursued by the Minister, and therefore could not be adopted. There is therefore no basis to the contention raised by the Chamber.

(ix) Employment equity

171. As dealt with above, the Minister has adopted a flexible, reasonable approach, as evinced by paragraph 2.9 of the 2017 Charter. The targets also have a long history, and have been an issue on which the Minister and the Chamber have consulted extensively. The Chamber and its members have therefore long-since been aware of the targets in this regard.

172. It does not behove the Chamber and its members to comply at having to achieve targets from a baseline, owing to their own conduct in not complying historically and incrementally with employment targets. Furthermore, the Chamber does not provide any evidence for its view that this target cannot be met.

173. As indicated in the answering affidavit, it is not correct that the Chamber has to comply with the targets immediately.[106] Furthermore, paragraph 2.9 of the 2017 Charter makes clear that the DMR is required to take into account the impact of material constraints which may result in the set target not being achieved.

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106 AA p 444 para 390.

174. Accordingly, this ground of review falls to be dismissed.

(x) Human resource development

175. The Minister submits as follows:

175.1. There is no basis for the Chamber's claim that the Minister failed to consider the existing skills levy.

175.2. There is nothing impermissible about different sectors being subject to different regulatory regimes. Indeed, this is commonplace. Different sectors have their own requirements, for instance community service.

175.3. The Minister's powers to amend the Charter have been dealt with above. There is no basis for this provision to be considered differently.

175.4. For the reasons set out above, the 5 per cent is a regulatory charge, not a tax, and is therefore not subject to the provisions of section 75 of the Constitution. As set out in the answering affidavit, this has a long-standing history in the previous iterations of the Mining Charter, and ought not to be surprising or unexpected to the Chamber.

175.5. The MTDA has been dealt with above.

176. It is submitted that there is no merit to the grounds of review raised by the Chamber, and that this falls to be dismissed with costs.

(xi) Mine community development

177. The Minister submits as follows:

177.1. The term ‘investment’ can and should be ascribed its ordinary meaning, in line with the principles set out above.

177.2. In relation to social and labour plans (SLPs), the 2017 Charter merely reinforces the provisions that are set out therein, and bolsters efforts at seeking compliance. Furthermore, there is no basis to the argument that the timing between the two would be so out of sync as to render the provision invalid, given that SLPs are renewed every five years. This contention therefore falls to be dismissed.

178. Accordingly, the Chamber’s grounds of review fall to be dismissed.

(xii) Sustainable development and growth

179. The Minister submits that:

179.1. It is artificial to contend, as the Chamber seeks to do, that health and safety and sustainable development are not part of a socio-economic development obligation.

179.2. The principles of statutory interpretation, and the discretion afforded to the Minister, have been set out above.

179.3. The 2017 Charter reinforcing existing obligations does not render the 2017 Charter unlawful. Furthermore, the Chamber does not identify the other pieces of legislation to which it refers.[107]

179.4. As set out in the answering affidavit, contrary to the Chamber's contention, the Department has taken into account various relevant considerations in determining the institutions in question.[108] There is no basis for the Chamber's claim that these institutions do not have the requisite capacity.

180. Accordingly, the Chamber's grounds of review fall to be dismissed.

(xiii) Housing and living conditions

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107 FA p 113 para 256.

108 AA pp451-452 paras 413-415.

181. There is no basis for the Chamber's claim that the Minister not empowered to regulate this matter under the 2017 Charter because of the Housing and Living Condition Standard. This ground therefore falls to be dismissed.

MISCELLANEOUS GROUNDS OF REVIEW

(i) Application to the Precious Metals Act and the Diamonds Act

182. The Chamber contends that paragraphs 2.8. and 2.8.1 of the 2017 Charter are *ultra vires* the provisions of the Diamonds Act 56 of 1986 because, in terms of the provisions of the Diamonds Act, the Minister is not authorised to make the targets and elements of the 2017 Charter applicable to licence holders under the Diamonds Act.[109] (Although the heading in the founding affidavit refers to the Precious Metals Act, 2005 as well, this is not dealt with further in the founding affidavit. Suffice it to say that the arguments set out below apply similarly to the Precious Metals Act, which has a similar scheme to the Diamonds Act.) We note that the Minister to the present application is also the Minister responsible for the administration of the Diamonds Act.

183. Section 5(2)(a) of the Diamonds Act states that when considering an application for any licence or permit under the Diamonds Act, "*the Regulator may … have regard to the socio-economic empowerment Charter contemplated in section 100 of the [MPRDA]*." Section 5(1)(a) further provides a peremptory requirement that the Regulator shall have regard to the promotion of equitable

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109 FA pp 58-59 paras 75-77.

access to and local beneficiation of diamonds when considering an application for a licence or permit. Section 27(2) of the Diamonds Act provides further that the Regulator is entitled to require an applicant for a licence to furnish any such additional particulars in connection with the application as the Regulator may require.

184. The Regulator is afforded a wide discretion when considering applications for licences. In terms of section 28(1) of the Diamonds Act, the Regulator may conduct any investigation that it deems fit regarding the application before it makes a decision. Furthermore, section 28(2) provides the Regulator with a discretion to grant or refuse an application for a licence, as well as a list of grounds on which the Regulator shall not grant a licence. This includes a case where, in terms of section 28(2)(e), the Regulator is of the opinion that "*the issue of the licence will be contrary to the public interest*".

185. In respect of the Chamber's complaint regarding paragraph 2.8 and 2.8.1 of the 2017 Charter, section 30 of the Diamonds Act relating to the conditions of licences is particularly important. Section 30(1) entitles the Regulator to determine conditions of the licence at the time of granting the licence. Moreover, the Regulator is further empowered by section 30(2) with a broad discretion in order to "*cancel or vary any condition to which a licence is subject*" or "*impose any condition or any further condition in respect of a licence*".

186. It is clear, therefore, that – contrary to the Chamber's contentions – licence conditions are not static or frozen at the point of them being granted. It is

therefore entirely permissible for the Regulator to give effect to paragraphs 2.8 and 2.8.1 of the 2017 Charter, both when considering new applications, and in terms of existing applications. Accordingly, when read in the context of the relevant provisions of the Diamonds Act, it is apparent that these provisions are capable of being given effect to, and are not *ultra vires.*

187. The Chamber further contends that paragraph 2.8.2 of the 2017 Charter is also ultra vires as the Minister has no power to repeal the Code of Good Practice in terms of section 100(2)(a) of the MPRDA. However, as set out above, paragraph 1 of the Code states that: "*The Code can be amended by the Minister of Minerals and Energy when there is a change in mining policy and legislation*". Furthermore, paragraph 5 of the Code states that: "*The Code may be amended by the Minister of Minerals and Energy from time to time*".

188. In the present case, paragraph 2.8.2 of the 2017 Charter seeks to repeal paragraph 3 of the Code of Good Practice for the Minerals Industry, which deals with the Diamonds Act and the Precious Metals Act. As contemplated in the Code, this amendment by the Minister is a reflection of a change in mining policy occasioned by the 2017 Charter. This provision ensures that the 2017 Charter and the Code are reconciled, and that the applicable provisions are clear to the affected permit or licence holders. It is therefore submitted that the Chamber's contention must fail.

(ii) Ring-fencing and compliance

189. The Chamber does not explain its stated position that compliance is impossible and irrational. As stated above, the Minister and the DMR have always adopted a flexible and understanding approach, and are duly cognisant of paragraph 2.9 of the 2017 Charter.

(iii) Applicability of targets

190. The Chamber merely repeats its contentions raised in under the general grounds of review. The Minister's submissions in response thereto apply equally.

(iv) Non-compliance with the 2017 Charter

191. In giving effect to the provisions of the 2017 Charter, paragraph 2.12 provides that holders who do not comply with the ownership, mine community development and human resource development elements, and who fall between level 5 and 8 of the scorecard, will be regarded as non-compliant with the 2017 Charter – and therefore in breach of the MPRDA. Paragraph 2.12 indicates that such a breach will be dealt with in terms of section 93 of the MPRDA, read with sections 47, 98 and 99 of the MPRDA.

192. The rationale behind the provision is clear. As stated in the preamble to the 2017 Charter, and set out in the answering affidavit, the Department has been frustrated in its efforts to realise the transformative ideals of the 2004 Charter

and the 2010 Charter due to non-compliance by the mining and minerals industry. Paragraph 2.12 of the 2017 Charter is an effort to remedy that.

193. The Chamber contends that paragraph 2.12 of the 2017 Charter is *ultra vires* because the 2017 Charter does not constitute binding law. This has already been dealt with above. The 2017 Charter does indeed constitute binding law, necessary to fulfil the transformative agenda of the MPRDA, and cannot be wished away by the Chamber.[110]

194. It is also relevant to have regard to section 93 of the MPRDA.[111] There are three salient features that emerge from this provision that are relevant to the contention made by the Chamber.

194.1. The first is that section 93(1)(b) of the MPRDA clearly contemplates that it can be triggered by a law other than an express provision of the

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110 FA p 56 para 69.

111 In particular, section 93(1) of the MPRDA provides that:

> "(*1*) *If an authorised person finds that a contravention or suspected contravention of, or failure to comply with—*
>
> *(a) any provision of this Act; or*
>
> *(b)* ***term or condition of any right, permit or permission or any other law granted or issued or any environmental management programme or environmental management plan approved terms of this Act****, has occurred or is occurring on the relevant reconnaissance, exploration, production, prospecting mining or retention area or place where prospecting operations or mining operations or processing operations are being conducted,* ***such a person may****—*
>
> *(i) order the holder of the relevant right permit or permission, or the person in charge of such area, any person carrying out or in charge of the carrying out of such activities or operations or the manager, official, employee or agent of such holder or person to,* ***take immediate rectifying steps****; or*
>
> *(ii) order that the reconnaissance, prospecting, exploration, mining, production or processing operations or part thereof be suspended or terminated, and give such other instructions in connection therewith as may be necessary*." (Own emphasis.)

MPRDA or another Act of Parliament. In addition to what is listed, it refers to non-compliance with "*any other law*". The 2017 Charter clearly falls within its ambit. The consequences of section 93 can on the ordinary interpretation of the legislation apply to non-compliance with the relevant provisions of the 2017 Charter.

194.2. The second is that section 93(1) is not prescriptive in the consequences that arrive. In this regard, an authorised person has a discretion as to how it responds to a contravention or non-compliance, which is apparent through the use of the discretionary word "*may*".

194.3. The third, closely linked to the second, is that the authorised person may, in the exercise of such discretion, opt to order that rectifying steps be taken. As such, through the framework laid out by section 93 of the MPRDA, non-compliance with paragraph 2.1.3 of the 2017 Charter does not automatically or necessarily lead to dire consequences for a holder. In any event, section 93(2) provides an overarching safeguard in requiring that any order in terms of section 93(1)(a) or (b) must be confirmed by the Director-General.

195. It is submitted that the Chamber's contention in this regard must fail.

RELIEF SOUGHT AND COSTS

196. The Chamber has raised 58 grounds of review. The Minister emphasises in this regard that Various of these complaints have only been raised blithely, with no effort to substantiate the complaint by the Chamber. Furthermore, various of these complaints have been raised without legal and/or factual underpinnings being provided by the Chamber.

197. In the result, for the reasons set out above, the Minister submits that the Chamber's application falls to be dismissed with costs, including the costs of three counsel.

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15 December 2017