IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no: 20341/19

In the matter between:

Minerals Council South Africa — Applicant

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2019 -03- 26
L. W. MOTAU
GRIFFIER VAN DIE HOë HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

and

Minister of Mineral Resources — First Respondent

South African Diamond and Precious Metals Regulator — Second Respondent

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FOUNDING AFFIDAVIT

TABLE OF CONTENTS

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I, the undersigned,

TEBELLO LAPHATSOANA CHABANA

hereby say on oath that:

PART 1: INTRODUCTION

DEPONENT

1 I am the Senior Executive: Public Affairs and Transformation of the Minerals Council South Africa, previously known as the Chamber of Mines of South Africa. I took office on 1 July 2016.

2 I am duly authorised to represent the Minerals Council in this application and to depose to this affidavit on its behalf.

3 The facts in this affidavit are true and correct and, unless otherwise stated or the contrary appears from the context, are within my personal knowledge. Legal submissions in this affidavit are made on the advice of the Council's legal advisors.

DEFINITIONS

4 In this affidavit, the following definitions are used:

4.1 the Mineral and Petroleum Resources Development Act, 2002 which was assented to on 3 October 2002 and took effect from 1 May 2004 is the **MPRDA**;

4.2 the Applicant is the **Minerals Council South Africa (the Minerals Council)**;

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4.3 the First Respondent is the **Minister** and the Department of Mineral Resources is the **DMR**;

4.4 the Second Respondent is the **Diamond and Precious Metals Regulator**;

4.5 the Charter contemplated by section 100(2)(a) of the MPRDA is **the Charter**;

4.6 the *Scorecard for the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (including the Charter)* published in Government Notice 1639, Government Gazette 26661 dated 13 August 2004 is the **Original Charter**. A copy of the Original Charter is annexed hereto marked '**FA1**';

4.7 the *Amendment of the Broad-based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry* published in Government Notice 838, Government Gazette 33573 dated 20 September 2010 is the **2010 Charter.** A copy of the 2010 Charter is annexed hereto marked '**FA2**';

4.8 the *Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 (Reviewed Mining Charter, 2017)* published in Government Notice 581, Government Gazette No. 40923 dated 15 June 2017 is the **2017 Charter**. A copy of the 2017 Charter is annexed hereto marked '**FA3**';

4.9 the *Broad-based Socio-economic Empowerment Charter for the Mining and Minerals Industry, 2018* (Mining Charter, 2018) published in

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Government Notice 1002, Government Gazette No. 41934, dated 27 September 2018 (as amended by the Amendment in Government Notice 1421, Government Gazette No. 42130, dated 20 December 2018) is the **2018 Charter**. Copies of the 2018 Charter and the Amendment are annexed hereto marked '**FA4(1)**' and '**FA4(2)**';

4.10 Historically Disadvantaged Persons are **HDPs**;[1]

4.11 where appropriate, the Original Charter, the 2010 Charter, the 2017 Charter and the 2018 Charter will be referred to collectively as the **Charters**;

4.12 the Constitution of the Republic of South Africa, 1996 is the **Constitution**.

THE PARTIES

5 The applicant is the **Minerals Council**, with its principal place of business at 5 Hollard Street, Johannesburg.

5.1 The Minerals Council is a voluntary association with power to sue and be sued in its own name. It is also registered as an employers' organisation in terms of section 96(3) of the *Labour Relations Act, 1995.*

5.2 The members of the Minerals Council comprise mining finance companies and mines operating in the gold, coal, diamond, platinum, lead, iron ore,

[1] The MPRDA defines the term "historically disadvantaged person". Section 100(2)(a) employs the term "historically disadvantaged South Africans", but there can be little doubt that that term was intended to be a reference to the defined term "historically disadvantaged person". The reference to HDPs or HDSAs was impermissibly substituted in the 2017 Charter with "Black Person" and "Black Owned Company". The 2018 Charter employs the terms "Historically Disadvantaged Persons" (as defined in the MPRDA) and "Historically Disadvantaged Persons Owned and Controlled Company" (not defined in the MPRDA).

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rutile, zircon, ilmenite, leucoxene, monazite, magnetite and other associated minerals, antimony and copper mining sectors. The Minerals Council represents mining companies providing about 90% of South Africa's mineral production and employing about 90% of the employees employed in the mining sector. A list of the Minerals Council's members is attached hereto marked '**FA5**'. The members of the Minerals Council affected by this application are those mining companies which are either holders of, or applicants for, mining rights under the MPRDA. In this affidavit, I refer to these affected members of the Minerals Council as **mining companies**.

5.3 In terms of paragraph 2(a) of its constitution, one of the objects and powers of the Minerals Council is to "advance, promote and protect the mining and other interests of its members" and to "assist... in the prosecution... of actions involving questions the decisions whereof are likely to affect the common interests of its members". A copy of its constitution is attached hereto marked '**FA6'**.

5.4 The Minerals Council is the principal advocate of major policy decisions endorsed by the mining companies and represents these to various organs of South African national and provincial governments and to other relevant policy-making and opinion-forming entities, both within South Africa and abroad.

5.5 The Minerals Council also works closely with the various employer organisations in formulating these positions where appropriate.

5.6 The Minerals Council is a signatory to the Original Charter and represents

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the industry in the forums established in order to review performance under the Charters.

5.7 The Minerals Council brings this application on its own behalf and in the interests of its members.

6 The first respondent is the **Minister of Mineral Resources**.

6.1 The Minister is cited in this application in his official capacity as the Minister responsible for the MPRDA and by virtue of the powers conferred upon him by the MPRDA including, in particular, by section 100(2). His office is situated at Trevenna Campus, 71 Meintjes Street, corner of Meintjes and Francis Baard Streets, Block 2B 2nd Floor, Sunnyside, Pretoria.

6.2 Service of this application on the Minister will be effected by service on the State Attorney, Pretoria, in terms of the provisions of Rule 4(9) of the Uniform Rules of Court.

6.3 This application will also be served on the Director-General: Mineral Resources of the Department of Mineral Resources at the address mentioned in paragraph 6.1 above and on the State Attorney, Pretoria with address at 316 Thabo Sehume St, Pretoria CBD, Pretoria, 0001, as required by section 2 of the State Liability Act No 20 of 1957.

7 The second respondent is the **South African Diamond and Precious Metals Regulator**, a juristic person established by section 3 of the Diamonds Act 56 of 1986, with address at SA Diamond Centre, 251 Fox Street, Johannesburg.

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THE BACKGROUND TO AND NATURE AND PURPOSE OF THIS APPLICATION

8 The Minerals Council and its members are fully committed to the transformational objects of the MPRDA and have given concrete and substantial expression to that commitment.

9 They have played an integral role in the reform of South Africa's minerals policies since 1992 and have contributed positively to the reform agenda throughout the process. They have, in particular, made significant progress on all elements of the Original Charter, including meeting and exceeding the ownership target. The Minerals Council's members continued to support and facilitate HDP ownership even in the face of the collapse of mining equities and constrained markets. This created significant momentum in HDP ownership, in the mining sector and beyond. All of this is demonstrated by the fact that, as set out in annexures '**FA7(1)**' and '**FA7(2)**' hereto, as at the end of 2014, meaningful economic empowerment participation achieved by HDSAs had been 38% on average[2] amongst the members of the Minerals Council, with meaningful economic value transfer of more than R159 billion. The Minerals Council submits that annexures FA7(1) and FA7(2) demonstrate its members' commitment to transformation and to the spirit of the Charters. I also refer the court to the Report of 18 March 2015 which was annexed as Appendix 4 to the Minerals Council's submissions to the Minister in August 2018 in respect of the draft 2018 Charter, and a copy of which submissions (with all appendices thereto) is annexed hereto marked

[2] That figure assumes that empowerment levels once achieved are not eroded by the exit by HDPs from their investments.

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'**FA7(3)**'.

10 In February 2018, the current Minister, Mr Mantashe, with the support of President Ramaphosa, resumed interactions between the DMR and the Minerals Council aimed at averting litigation about the highly contentious 2017 Mining Charter and at preserving and promoting South Africa's mining industry. The Minerals Council did not proceed with the application for the judicial review of the 2017 Charter, which was set down for 19 February 2018, pending the development of a legally compliant Mining Charter that would effectively secure transformation, growth and competitiveness of the sector.

11 Discussions took place over the weekend of 17 to 18 March 2018 through a Principals Committee. The Principals Committee agreed that two task teams be established, namely the Mining Charter and Transformation Task Team ("MCTTT") and the Growth and Competitiveness Task Team ("GCTT"). The purpose of the task teams was to make proposals on Growth, Competitiveness and Transformation for the mining sector in South Africa, to cross-pollinate ideas and to develop a Mining Charter that addressed both the industry's socio-economic transformation challenges and its growth and competitiveness challenges. The task teams were to recommend and seek acceptance of their proposals from the Principals Committee, which was chaired by Minister Mantashe. The MCTTT met on 14 occasions in total and two of these meetings were combined meetings with the GCTT, where presentations were heard from a handful of law advisory firms, the Department of Trade and Industry ("DTI") and the South African Bureau of Standards ("SABS"). Only two Principals meetings were held and,

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unfortunately, the mid-May Principals Committee meeting which was envisaged to resolve several of the issues that arose during the MCTTT meetings, did not proceed.

12 Discussions and negotiations were also held with other industry stakeholders. In particular, a Mining Charter Summit was held on 7 to 8 July 2018, where over 1000 community members gathered together with social partners to discuss the draft 2018 Charter.

13 The Minerals Council wishes to stress that it remains committed to transformation of the mining sector in South Africa and believes that this should be implemented in accordance with the imperatives of job creation, economic growth, competitiveness and social upliftment and development. The Minerals Council, as one of the key stakeholders in the mining industry, regards a transformed, growing and competitive mining sector as a significant catalyst for South Africa's social and economic development and critical for the realisation of the admirable goals of the National Development Plan.

14 This will, however, only be realised through a minerals policy framework, including the Mining Charter, which conforms to the rule of law and principles of legality, and by administrative action which is lawful, reasonable and procedurally fair and consistent in all respects with provisions of the country's legislation. The rule of law, regulatory certainty and the fair and even-handed administration of laws are of the utmost importance in sustaining the mining industry. This will provide a context conducive to commercially sustainable

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operations and capital investment which is not only in the interest of the Minerals Council and its members, but to the economy as a whole.

15 The mining industry is an important component of the South African economy, directly constituting 7.5% of the Gross Domestic Product (GDP), and indirectly promoting substantial economic activity in other sectors of the economy. We set out below the industry's commercial impact on the South African economy, the proportion in which the stakeholders in mining benefit therefrom, and the impact that the 2018 Charter is anticipated to have upon the industry and those employed within it.

15.1 If the direct and indirect multiplier effects of mining are taken into account, the mining sector contributes about 17% to GDP. The sector employed 453 500 people in 2018, which equates to 6.1% of private non-agricultural employment and 4.8% of total non-agricultural employment. A total of R130,5 billion was paid to employees in the same year. Fixed investment from mining totalled R93 billion in 2018, which was 17% of private sector fixed investment and 9.3% of the county's total fixed investment for the year. The industry exported R350 billion worth of output, which accounted for 25% of the country's R1.1 trillion exports. In the 2017/2018 fiscal year the industry paid R7.5 billion in royalties and R 19,4 billion in corporate taxes. The sector also contributed R7,2 billion to skills development, R2 billion to community development and made a significant contribution to health, education and community development initiatives in mining areas.

15.2 As regards the identities of the stakeholders who benefit from mining, and the degree to which they benefit, the position is as follows:

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15.2.1 Employees benefitted 30% in 2011 and 47% in 2018;

15.2.2 Dividends to shareholders were 11% in 2011 and 6% in 2018;

15.2.3 Direct taxes were 11% in 2011 and 12% in 2018;

15.2.4 Employees taxes were 6% in 2011 and 9% in 2018;

15.2.5 Royalties were 3% in 2011 and 3% in 2018;

15.2.6 Community investment was 0% in 2011 and 2% in 2018;

15.2.7 Borrowings were 1% in 2011 and 6% in 2018;

15.2.8 Funds retained/utilised were 6% in 2011 and -14% in 2018;

15.2.9 Funds invested were 32% in 2011 and 29% in 2018.

15.3 The 2018 Charter has and will continue to have a variety of materially adverse effects upon the mining industry, which, as appears from what I say below, is already in decline and under threat.

15.3.1 A country's resource endowment is a necessary but not sufficient condition for a mining sector to exist. The successful economic exploitation of such resources depends on a conducive, stable and predictable policy environment. The challenged clauses of the 2018 Charter are unfortunately not conducive to such an environment and on the contrary have introduced instability and unpredictability into the policy environment. An economically viable mining sector depends on large long-term investment decisions, which require certainty about the policy environment.

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This is particularly felt in the willingness of venture capital to invest in the exploration for such mineral resources, the willingness of investors and bankers to invest in the construction of mines, as well as the willingness of the latter to fund the operations of mining companies.

15.3.2 The impact of the Charters on **exploration** (prospecting) in South Africa has been overwhelmingly negative. Although rights have been issued, investment has stagnated. This is reflected in the decline of 65% in exploration spending over the last 8 years, to below R 400 million a year, the further collapse of the weak (positive) relationship between commodity price movements and exploration, as well as the extreme volatility in exploration spending from one year to the next (between -60% and +60%) over the recent past. The result of these adverse trends is that the pipeline of new resources for mine development is not replenished and will lead to the earlier demise of the sector.

15.3.3 The measure of **investor sentiment** to global, local and company news is via the stock exchange. Investors make their decisions based on comparing a potential risk-adjusted return to the cost of the investment. The similarity in the Johannesburg Stock Exchange resources index response to the 2017 and 2018 mining charters is worth noting - each time dropping by more than 2% and losing around R 50 billion of market capitalisation. The remaining uncertainty around the regulatory circumstances regarding mining right renewals has the potential to shock

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investor confidence in the same way. The Johannesburg Resources Index (June 2018) was down 44% on 10 years ago, significantly underperforming peer resource indices in other mining jurisdictions. The recent recovery of the resources index (outperforming the overall Index over the last two years) could easily be reversed if the issue of regulatory uncertainty introduced by the challenged clauses of the 2018 Charter is not resolved. It must also be mentioned that the financing efforts by mining companies in South Africa happen under the cloud of a possible sovereign credit downgrade, which already had the result of raising the long-term cost of capital to equal or higher levels than countries which do not have investment grade ratings.

15.3.4 The confidence of mine owners in future returns on investments is most starkly reflected in their willingness to expand capacity by **investing in fixed capital** (construction of mines, machinery and equipment, transport equipment). Gross fixed investment (net investment plus allowances for depreciation/maintenance) in mining has stagnated at around R 72 billion for almost 10 years, reaching a lowest point in 2016 (R 54 billion) and recovering to R 91 billion in 2018. However, when the numbers are adjusted for inflation, and depreciation allowances removed, net (new) investment has declined by 70% since 2009, with the worst three years being 2016 to 2018.

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15.3.5 Without a recovery in fixed investment in mining, no expansion is possible. Production is already languishing in a band between 10% and 15% below the levels of 2005 and has never recovered since the collapse of the commodity cycle. With ever increasing costs, profitability remains under threat, and employment levels are declining. The sector has lost 7 000 jobs between 2017 and 2018, and 52 000 since 2013.

15.4 The materially increased costs, regulatory uncertainty, and dilution in security of title caused by the challenged clauses of the 2018 Charter will significantly exacerbate the existing decline in investment and employment levels in the mining sector.

15.5 In support of the contents of paragraphs 15.1 to 15.4 above, I refer to the confirmatory affidavit of Mr Henk Langenhoven, the Mineral Council's Chief Economist.

16 In many respects the 2018 Charter addressed the serious deficiencies of the 2017 Charter, and constituted a major improvement on it. However, in spite of extensive public participation (the details of which will have to be included in the record requested in this application in terms of the provisions of Rule 53) and in spite of the majority judgment in *Chamber of Mines v Minister of Mineral Resources & Others* [2018] 2 All SA 391 (GNP) ("*the Chamber of Mines judgment 2018*") , the 2018 Charter unfortunately still proceeds from the basic incorrect premise that it constitutes an instrument of law. It seeks to impose legal obligations, by decree, on mining right holders, to be complied with at all relevant times, in conflict with or in addition to those set out in the

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MPRDA and the regulations or in other legislation, as if the Charter constituted law.

17 The purpose of the present application is accordingly to seek the judicial review and setting aside of certain clauses of the 2018 Charter which was published by the Minister on 27 September 2018 and amended on 20 December 2018. These clauses will collectively be referred to as "**the challenged clauses**".

18 As will appear from what is stated below, most of the challenged clauses suffer from the fundamental defect that their promulgation was beyond the powers of the Minister under section 100(2)(a) of the MPRDA. They are the result of the adoption of the same incorrect philosophy that charters developed in terms of section 100(2) of the MPRDA constitute law; this led to contradictions and conflicts with, and impermissible amplifications to, the MPRDA itself and conflicts with other legislation, such as the Diamonds Act, 1986 and the Precious Metals Act 2005. In including these clauses in the 2018 Charter, the Minister has purported to exercise powers which reside exclusively with Parliament and has, in other words, usurped the role of Parliament. This is not only *ultra vires* and based on an error law; it presents a clear threat to the separation of powers.

19 The majority of the full bench of the Gauteng Division of the High Court (Pretoria) in the *Chamber of Mines judgment 2018* has already ruled on this issue as well as on a number of the other central disputes between the parties. The judgment and order are, however, subject to an application for leave to appeal and the Minerals Council was thus constrained to bring the

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present application, which raises a number of the same issues between the same parties albeit in the context of the 2018 Charter. The specific terms of the 2018 Charter also raised a number of new issues between the parties which also form the subject of this application, as appears from what is set out below.

20 I shall set out the grounds upon which the Minerals Council seeks an order reviewing and setting aside the challenged clauses of the 2018 Charter in more detail below.

PAJA REVIEW OR LEGALITY REVIEW

21 It is necessary at the outset also to deal briefly with the nature of the present review and, in particular, with the question whether it is an administrative law review or a legality review. Notwithstanding the fact that the 2018 Charter constitutes policy and does not constitute law, as set out more fully below, the Minister must, when he considers an application for a mining right in terms of subsection 23(1)(h) of the MPRDA, decide whether the granting of the right will be "*in accordance with the charter contemplated in section 100*". In that context the 2018 Charter will certainly have the capacity to adversely affect the rights of applicants and will have a direct, external legal effect for the purposes of the definition of "administrative action" in section 1 of the *Promotion of Administrative Justice Act, 2000* (**PAJA**).

22 Whether the development and publication of the 2018 Charter constitute administrative action for the purposes of PAJA outside of that context is a more difficult question.

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23 As set out more fully below, the Minerals Council contends that the Charters (including the 2018 Charter) constitute formal expressions of policy. However, because the development and publication thereof take place in terms of, and is mandated by, section 100(2) of the MPRDA, the decision to do so may constitute administrative action. I am advised that PAJA defines administrative action *inter alia* as a decision taken by an organ of state such as the Minister when exercising a public power or performing a public function in terms of any legislation.

24 To the extent that it may be held not to qualify as "administrative action" as defined in PAJA, the 2018 Charter is also constrained by the principle of legality enshrined in section 1(c) of the Constitution. That principle entails that the Minister may exercise no power and perform no function beyond that conferred upon him by law. I am advised that the principle acts as a safety net to give the court some degree of control over action that does not qualify as administrative action under PAJA, but nonetheless involves the exercise of public power. I am further advised that it is accepted by our courts that section 1(c) of the Constitution empowers them to review state action on grounds of excess of power and irrationality.

25 In the case of the review grounds that the Minister exceeded his powers or acted irrationally, it would thus make little practical difference whether the development and publication of the 2018 Charter constitute administrative action or not.

26 Therefore, once it is found that the Minister, in developing and publishing the challenged clauses of the 2018 Charter, exceeded his powers and acted

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outside of the scope of the empowering statute or acted irrationally, those clauses would stand to be reviewed and set aside either on the basis of grounds set out in section 6(2) of PAJA (if it is administrative action) or in terms of the principle of legality, which is founded upon section 1(c) of the Constitution (if it is policy, legislation or a *sui generis* executive act). The Minerals Council relies on both these bases, in the alternative.

27 The Minerals Council has been engaged in ongoing attempts to reach a compromise with the Minister on changes to the 2018 Charter in order to address the Minerals Council's concerns. The Minerals Council has delayed bringing the application in the hope that those discussions would be successful. Given the peremptory 180 day time bar imposed by section 7(1) of PAJA, the Minerals Council was obliged to launch the review proceedings, despite the fact that the discussions are ongoing and may yet bear fruit. In the circumstances this application has been brought without unreasonable delay. Brief details of such attempts are the following:

27.1 **16 October 2018**

Meeting at the DMR offices in Pretoria. Regarding the renewal issue, the Minerals Council stressed that it would be a pity if some members of the Minerals Council took the DMR to court on the issue of renewals as it is key.

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27.2 **16 November 2018**

Meeting at the DMR offices in Pretoria. Regarding the renewal issue, the Minerals Council undertook to provide two senior counsel opinions to the DMR relating to this matter for consideration by the DMR.

27.3 **21 February 2019**

Meeting in Cape Town in the Parliament precinct. At this meeting the 3 legal opinions from senior counsel were shared with the DMR. It was stressed to the Minister, among other things, that the deadline to pursue a review application in terms of PAJA was near 27 March 2019 at which stage the Minerals Council would have to lodge papers if the concerns with the ownership provisions of the Mining Charter were not resolved satisfactorily.

PART 2: THE MINERALS COUNCIL'S GENERAL SUBMISSIONS REGARDING THE INTERPRETATION OF SECTION 100(2) OF THE MPRDA AND THE LEGAL NATURE AND ROLE OF THE CHARTER IN THE CONTEXT OF THE MPRDA

28 Before dealing with the specific instances of excess of power and setting out the review grounds, it is expedient to set out the Minerals Council's main submissions with regard to the proper interpretation of section 100(2), the nature and role of the Charter in the context of the MPRDA, and the nature and ambit of the Minister's powers under section 100(2) of the MPRDA. These submissions underpin the review grounds set out below.

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The statutory context of section 100(2) and its wording

29 The mandate to the Minister in section 100(2) to "develop" a "Charter" does not fall into any recognised juristic niche and it is not immediately clear what the nature and ambit of the Minister's powers under section 100(2) of the MPRDA are, or what the legal nature and role of the Charter mentioned in section 100(2) are.

30 It is trite that section 100(2) stands to be interpreted with due regard to its wording and its context. The interpretation must furthermore be guided by established legal principles pertaining to the rule of law and the doctrine of separation of powers.

31 Section 100(2), as amended, provides that:

> "(a) To ensure the attainment of the 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 <u>for</u> targets and time table for effecting the entry <u>into and active participation</u> of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of <u>the</u> mining and mineral resources <u>and the beneficiation of such mineral resources</u>."[3]
>
> (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."

32 The objects mentioned in section 100(2) are stated as follows in section 2 of the MPRDA, as amended:

[3] The underlined parts were inserted by *Amendment Act 49 of 2008* with effect from 7 June 2013. This coincided with similar amendments to the objects in sections 2(d) and (e) of the MPRDA.

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"The objects of this Act are to –[4]

...

(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;

(d) 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;

(e) promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;

(f) promote employment and advance the social and economic welfare of all South Africans;

...

(i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating."

33 I am advised that the objects of an Act serve as an aide in the interpretation of the provisions of such Act. In the case of the MPRDA, section 4(1) expressly makes provision therefor by providing that -

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

34 The objects of an Act, however, do not operate *in vacuo* and do not impose independent obligations or confer powers in the absence of substantive provisions in the Act. Similarly, the long title and preamble do not impose substantive obligations or confer powers. Once the objects are translated

[4] The underlined parts were inserted by *Amendment Act 49 of 2008* with effect from 7 June 2013.

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into, and given concrete form in, substantive provisions by the legislature, effect must be given to these substantive provisions, properly interpreted in view of the objects.

35 In addition, I am advised, once legislation is passed to fulfil a constitutional right,[5] the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.

36 In the case of the MPRDA, a number of the substantive provisions, unusually, make express reference to objects of the Act, such as sections 12(3)(d)[6], 17(1)(f)[7], 17(4)[8], 23(1)(h),[9] 55(1)[10] and item 7(2)(k)[11] in Schedule II of the MPRDA.

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[5] In casu, sections 9, 24 and 25(8) of the Constitution

[6] S 12(3)(d) provides that: "(3) Before facilitating the assistance contemplated in subsection (1), the Minister must take into account all relevant factors, including— ... (*d*) the extent to which the proposed prospecting or mining project meets the objects referred to in section 2 (*c*), (*d*), (*e*), (*f*) and (*i*)."

[7] S 17(1)(f) provides: "(1) The Minister must within 30 days of receipt of the application from the Regional Manager, grant a prospecting right if— ... (*f*) in respect of prescribed minerals the applicant has given effect to the objects referred to in section 2 (*d*)." There are as yet no such prescribed minerals.

[8] S 17(4) provides: "(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*)."

[9] S 23(1)(h) provides: "(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*) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan."

[10] S 55 provides: "(1) If it is necessary for the achievement of the objects referred to in section 2 (*d*), (*e*), (*f*), (*g*) and (*h*) the Minister may, in accordance with section 25 (2) and (3) of the Constitution, expropriate any land or any right therein and pay compensation in respect thereof."

[11] Item 7(2)(k) provides that the Holder of an old order mining right must as part of the lodgement for conversion, lodge "an undertaking that, and the manner in which, the Holder will give effect to the object referred to in section 2(d) and 2(f)".

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37 These sections of the MPRDA all require that an assessment be made by the Minister, as part of a specific decision-making process, whether and/or the extent to which, an applicant has given effect to the objects of the MPRDA mentioned in sections 2(c), (d), (e), (f) and/or (i) thereof.

38 Just as the objects in section 2 were incorporated in certain substantive sections (as set out above), they were not incorporated in others. I refer in this regard, by way of example, to-

38.1 reconnaissance permissions, mining permits and retention permits in regard to which there are no empowerment requirements in the MPRDA; and

38.2 sections 18 and 24 dealing with renewals, which similarly have no reference to any of the objects of the MPRDA or the Charter.

39 The objects of the MPRDA are framed in broad and general terms, as objects usually are. In the absence of guidelines, the Minister would thus have a very wide discretion in assessing whether an applicant has given effect to the relevant objects of the Act, to the extent that it would be impossible for applicants to predict what factors would weigh with the Minister and what the outcome of their applications are likely to be. This would be contrary to the rule of law. It is submitted that it is in this context that the legislature enacted section 100(2) of the MPRDA, to guide the exercise of the Minister's discretion under the sections mentioned above.

40 The Charter itself is expressly referred to in very few sections of the MPRDA, to wit:

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40.1 in section 23(1)(h) of the MPRDA, which deals with the granting of a mining right, and provides that the Minister must grant a mining right *inter alia* if – "*(h) the granting of such right will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan*"; and

40.2 in sections 25(2)(h) and 28(2)(c) of the MPRDA which require holders of mining rights annually to report on the extent of their compliance with the provisions of sections 2(d) and (f), the charter contemplated in section 100 and the social and labour plan.

41 There are no other provisions in the MPRDA which expressly refer to or require compliance with the Charter as such, and there are no provisions which require constant compliance with the Charter. As stated above, the Charter operates in the MPRDA in the context of specific decision-making processes.

The Charter is a formal policy document which cannot contradict, conflict with or go further than, the MPRDA itself

42 It is submitted that upon a proper contextual interpretation of section 100(2), the Charter is thus intended to guide the Minister's discretion, on the basis of a published document, when he takes decisions under those sections of the MPRDA[12] which require that an assessment be made as to whether, or the extent to which, an applicant has given effect to the objects referred to in section 2(c), (d), (e), (f) and (i) of the MPRDA.

[12] Such as sections 12(3)(d), 17(1)(f), 17(4), 23(1)(h) and 55(1) and item 7(2)(k) in Schedule II of the MPRDA.

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43 At the same time, the Charter is intended to provide a formal indication to the public of what the Minister will regard as "furthering" or "giving effect to" the objects referred to in section 2(c), (d), (e), (f) and (i) of the MPRDA as contemplated in *inter alia* section 23(1)(h) and item 7(2)(k) of the MPRDA.

44 It is accordingly submitted that the Charter constitutes a formal guideline or statement of policy, mandated by section 100(2) of the MPRDA, which must be applied in terms of and in the manner contemplated in the substantive provisions of the MPRDA.

45 A policy, formal or otherwise, is not legislation and remains a guideline. The fact that section 23(1)(h) of the MPRDA requires the Minister to consider, when considering an application for a mining right, whether the grant of the right will be *"in accordance with the Charter contemplated in section 100"* does not transform the Charter into a law. It remains a statement of policy which cannot override, supplement, amend or be in conflict with laws (including subordinate legislation), otherwise the separation between legislature and executive will disappear.

46 The Charter could thus never be applied so as to have the force of law or to preclude an applicant for a mining right from adopting other means of furthering or giving effect to the objects of the Act. Section 100(2)(b) indeed requires that the Charter should set out how the objects referred to in those sections *can* be achieved. That is language indicative of a desire to achieve policy objectives and not of legislation.

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The Charter is not law

47 The Charter is not subordinate legislation. In previous litigation between the same parties, the Minister's predecessor in office took the view that the transformational objects of the Act (but, incidentally, not the other objects of the Act) as well as the Charter are all legally binding in the sense of being directly legally enforceable and producing obligations which the right holders must at all times meet. "*Non-compliance*" with any aspect thereof at any time was regarded as non-compliance with the MPRDA and was viewed as subject to the sanction in section 47. The current Charter seems to depart from the same erroneous premise.

48 This view, however, does not accord with the content or structure of the MPRDA, the rule of law or the doctrine of separation of powers:

48.1 Firstly, as stated, the objects of the Act only produce obligations which applicants for rights must meet to the extent that such obligations have been incorporated in the substantive provisions of the Act, as they have in, for example sections 12(3)(d), 17(1)(f), 17(4), 23(1)(h), 55(1) and item 7(2)(k) of Schedule II of the MPRDA. Outside of these provisions, the objects of the MPRDA only serve as an aide in the interpretation of the substantive provisions of the MPRDA, as provided in section 4 thereof.

48.2 Secondly, the definition of "this Act" in section 1 of the MPRDA does not and cannot include the Charter, and consequently the contention that the Charter forms part of the Act or that non-compliance with the Charter constitutes non-compliance with the Act is misconceived.

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48.3 Thirdly, there is no indication whatsoever in the wording of section 100(2) that the Charter was intended to be subordinate legislation. If Parliament had intended to empower the Minister to make laws regarding the attainment of the Government's objectives of addressing historic inequality in the mining industry, it could have provided in section 100(2)(a) that the Minister may make regulations in that regard. It did not do so.

49 I emphasize that the Charter, which is intended to assist the Minister in assessing whether an applicant/holder has given effect to these objects does not, and cannot lawfully, operate outside of the structure and provisions of the MPRDA as if it were a stand-alone law of general application which supplements and amends the MPRDA, and even overrides other legislation.

50 A policy, formal or otherwise, is not legislation and remains a guideline. The fact that section 23(1)(h) of the MPRDA requires the Minister to consider, when considering an application for a mining right, whether the grant of the right will be *"in accordance with the Charter contemplated in section 100"* does not transform the Charter into a law. Policy could never be applied so does not render the Charter so as to have the force of law or to preclude an applicant for a mining right from adopting other means of furthering the objects or giving effect to the objects of the Act. As stated, section 100(2)(b) indeed requires that the Charter should set out how the objects referred to in those sections *can* be achieved. As stated, that is language indicative of a policy, not of legislation.

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Separation of powers

51 It is trite that the legislative authority of the national sphere of government is vested in Parliament, as set out in sections 43(a) and 44 of the Constitution. The National Assembly has the power to pass legislation with regard to any matter (subject to certain exclusions which are not relevant for present purposes) and to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government (i.e. in the provincial or local sphere). The Minister is not a "legislative body" but rather is part of the executive.

52 The executive authority of the Republic is vested in the President by section 85 of the Constitution who exercises the executive authority, together with other members of the Cabinet (consisting of the Deputy-President and Ministers), by *inter alia* (a) implementing national legislation; (b) developing and implementing national policy; and (e) performing any other executive function provided for in the Constitution or in national legislation.

53 The separation of powers between the legislative, executive and judicial branches of government *inter alia* entails that the branches of government may not usurp one another's powers and that each branch of government must perform its constitutionally allocated function, consistently with the Constitution.

54 I am advised that the doctrine of separation of powers does not preclude Parliament, as the legislative body, from delegating its power to make laws to other bodies, including the executive. However, the Constitution places

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certain constraints on the delegation of authority to make law to the executive in view of the doctrine of separation of powers. These include that:

54.1 plenary power to the executive to amend the source of its authority to make law or to amend Acts of Parliament is constitutionally impermissible as it would inevitably subvert the manner and form provisions of the Constitution and allow the executive to confer power upon itself to do as it pleases;

54.2 the constitutionality of a delegation of the power to make subordinate legislation would depend on a range of factors including *inter alia* the nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegate, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegate and practical necessities generally.

55 In the case of the MPRDA, there is simply no express or implied indication in the text that it was Parliament's intention to mandate the Minister to legislate to achieve the attainment of the objects identified in section 100(2)(a). In fact, such an interpretation of section 100(2) would render it unconstitutional in view of:

55.1 the wide and unqualified nature and ambit of the purported delegation;

55.2 the subject-matter to which it relates;

55.3 the degree of delegation;

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55.4 the fact that the discretion of the Minister is in no way structured and guided by the enabling Act;

55.5 the total absence of control and supervision retained or exercisable by Parliament, with the result that Parliament does not continue to exercise its control as a public forum in which issues can be properly debated and decisions democratically made;

55.6 the public importance and constitutional significance of the measures which, because they touch on questions of broad public importance and controversy, require greater scrutiny; and

55.7 the fact that the subject-matter does not necessitate the use of forms of rapid intervention which the slow procedures of Parliament would inhibit.

56 It is accordingly submitted that -

56.1 on a conspectus of all these factors, the statutory framework and the wording of section 100(2), the Charter was not, and could not permissibly have been, intended by the legislature to be subordinate legislation, and was not in fact enacted as subordinate legislation. It was "developed" by the executive under section 100(2) as a formal policy, as contemplated in section 85(2)(b) of the Constitution;

56.2 an unconstitutional interpretation should be avoided and section 100(2) should accordingly not be interpreted as empowering the Minister to legislate. The latter interpretation is supported by the wording and structure of the MPRDA and is in conformity with the constitutional norm of separation of powers.

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57 In any event, even if section 100(2) is held to constitute a proper delegation of legislative powers to the Minister, which remains denied:

57.1 the Minister could still not lawfully amend the source of his authority to make law or amend Acts of Parliament or assume powers which are not conferred by the MPRDA;

57.2 the nature, purpose and permissible scope of the Charter all still fall to be determined by the provisions of MPRDA, which is the empowering legislation.

The role of the charter as contemplated in the MPRDA

58 The MPRDA deals with a holder's duties in respect of the objects in sections 2(d) and (f) of the MPRDA in a specific manner. In the case of the grant of mining rights, and conversions of old order mining rights into mining rights, the position is as follows:

58.1 Section 22 provides that application must be made for a mining right in the prescribed manner. Part B of the application form (prescribed in the regulations) requires information on "OWNERSHIP OF PARTICIPATION BY HISTORICALLY DISADVANTAGED SOUTH AFRICANS (HDSA)". It also requires that the application must be accompanied by the prescribed social and labour plan, as set out in regulation 46.

58.2 Section 23(1) provides that the Minister must grant the mining right *inter alia* if -

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"(h) the granting of such right will further the objects referred to in section 2(d) and (f) and[13] in accordance with the charter contemplated in section 100 and the prescribed social and labour plan".

58.3 In the case of conversions of old order mining rights, item 7(3) in Schedule II provides that the Minister must convert an old order mining right into a mining right if the holder complies with item 7(2) including item 7(2)(k) which, from 7 June 2013, provided that the holder must lodge:

"(k) documentary proof of the manner in which the holder of the right will give effect to the object referred to in section 2(d) and 2(f)."[14]

58.4 If the application or conversion is successful, the ensuing mining right is granted on certain terms and conditions, as appears from section 23(6) of the MPRDA.

58.5 The standard mining right document contains a recordal of the empowerment agreement relied upon for the grant of the right and imposes an obligation on the holder to honour the terms of such agreement. Copies of the standard mining right and of the standard converted mining right are annexed hereto marked '**FA8(1),** and **FA8(2)**'. In addition, the social and labour plan is approved if it complies with regulation 46.

58.6 Once granted, the holder is obliged to comply with the provisions of the MPRDA and the terms and conditions of its mining right as contemplated

[13] It is submitted that, in the context, it is clear that the "and" was erroneously retained in the text in this place. Acting Justice Barrie in par 83 of the *Chamber of Mines* judgment found that the subsection can only be read sensibly by omitting the word "and".

[14] Prior to 7 June 2013, it read: *"(k) an undertaking that, and the manner in which, the holder will give effect to the object referred to in section 2(d) and 2(f)."*

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in section 23(6). It also has to comply with the provisions of its approved social and labour plan.

58.7 After the grant, the holder has the obligation in terms of section 25(2)(h) to report on its compliance with these provisions and documents.

58.8 If the holder fails to comply with the terms of its right, the Minister is authorised to invoke the provisions of section 47.

59 It is accordingly clear that before granting an application for a "new order" mining right or converting an old order mining right, the Minister (or his delegate) must satisfy himself that the grant of such right would further the objects referred to in sections 2(d) and (f), in accordance with the Charter contemplated in section 100(2) and the prescribed social and labour plan. The requirements to be met by an applicant in applying for a mining right or lodging an old order mining right for conversion must be those that prevail at the time the application or lodgement is made.

60 Once an applicant for a mining right has satisfied the requirements of section 23(1)(h) or item 7(2)(k) in Schedule II and once a decision has been taken to grant a mining right, (which constitutes administrative action):

60.1 a holder cannot be required thereafter to do so again, failing which its right will be placed in jeopardy - the MPRDA does not permit it; in fact, it is also an object of the MPRDA in section 2(g) and an object of item 2(a) of Schedule II (Transitional Arrangements) to the MPRDA to provide for security of tenure in respect of prospecting and mining operations;

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60.2 the decision-maker is *functus officio* and may not revisit his decision, save on the usual review grounds recognised by our law.

61 Accordingly, a mining right once granted cannot be revoked or cancelled because the holder fails to comply with Charter requirements introduced after the grant of the right. Quite apart from the presumption against retrospectivity when interpreting statutory provisions, there is nothing in the MPRDA which provides, either expressly or by necessary implication, that once a mining right has been granted to an applicant, the applicant will, in order to retain such right, have to meet new requirements set out in a Charter as revised from time to time. The majority of the court in the *Chamber of Mines* matter held that the MPRDA empowers the Minister to consider a mining right holder's compliance with the Charter before the right is granted (or refused). After the right is granted, the Minister may only revisit such compliance if it is a condition of the mining right itself that the mining right holder continuously meet specific HDP requirements.

62 As shown below, the first substantive provision in the 2018 Charter, which in clause 2.1 provides that "a mining right holder must comply with the following", is for this very reason beyond the powers of the Minister.

Main propositions

63 The following main propositions follow from the principles set out above, and are dealt with more fully below.

(i) The holder of a mining right does not have a continuing obligation to replenish its HDP shareholding under the MPRDA

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64 The starting point with regard to the obligations of holders of mining rights must be the provisions of the MPRDA. There is nothing in the language of section 23 (in particular section 23(1)(h)), or in item 7 (in particular item 7(2)(k)) in Schedule II, which imposes a continuing obligation upon the successful applicant for a mining right or converted mining right to replenish or restore the targeted HDP ownership level referred to in the Charter where the required percentage falls below this level after the grant of the holder's mining right, failing which such holder may be held as being in contravention of the MPRDA.

65 This interpretation of the MPRDA is not only in line with the language and context of the MPRDA as set out above, but also with the objectives of the MPRDA, including the expansion of opportunities for HDPs to invest in the mining industry, and the promotion of employment in that industry.

66 This view, which has been referred to as "once empowered always empowered", was upheld by the majority in the *Chamber of Mines* matter, and is recognised, partially, in the 2018 Charter. Clause 2.1.1.1 of the 2018 Charter duly recognises that "*An existing mining right holder who has achieved a minimum of 26% BEE shareholding shall be recognised as compliant for the duration of the mining right*". The exclusions to this general recognition in cases of renewal or transfer of existing mining rights, which are set out in clauses 2.1.1.2 and 2.1.1.4 to 2.1.1.6 of the 2018 Charter, however, are beyond the powers of the Minister. The MPRDA simply does not require compliance with the Charter in cases of renewal and transfer of existing mining rights. To the extent that clause 2.1.6 applies to existing rights, its provisions are similarly beyond the powers of the Minister. These

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clauses of the 2018 Charter are dealt with in more detail below.

(ii) The Minister's lack of power to cancel mining rights on the basis of non-compliance with new Charter requirements after the date of grant

67 It is furthermore submitted that the Minister is not empowered to cancel a mining right in terms of section 47 in the event of non-compliance with the Charter requirements. This is manifestly impermissible.

68 The Minister cannot by decree elevate the Charter's status to that of legislation and cannot by decree provide in the Charter (in clause 9) that non-compliance therewith shall render the mining company in breach of the MPRDA and subject to the provisions of section 93 read in conjunction with sections 47, 98 and 99 of the Act. Only Parliament, by means of appropriate amendments to the MPRDA, can render a breach of the Charter a breach of the MPRDA.

69 National or provincial Acts and regulations are legislative instruments, whereas documents setting out governmental policy are not. As a matter of sound government, a clear distinction should be maintained between policy documents and legislative instruments.

70 The Minister therefore acted beyond his powers in including clause 9 of the 2018 Charter. This is also dealt with in more detail below.

Main grounds of review of the challenged clauses

71 The main grounds of review of the challenged clauses of the 2018 Charter are thus that they are -

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71.1 unconstitutional in that the Minister lacks the power to publish the Charter in the form of what purports to be a legislative instrument and, to the extent that he sought to do so and usurped the functions of the legislature, he offended against the separation of powers, which is entrenched as part of the rule of law in section 1(c) in the Constitution, so that the challenged clauses fall to be set aside in terms of the principle of legality implicit in the Constitution and/or under section 6(2)(i), 6(2)(f)(i), 6(2)(d) and/or 6(2)(i) of PAJA, and

71.2 unauthorised by section 100(2) of the MPRDA generally and the decision to publish them as part of the 2018 Charter was materially influenced by an error of law so that they accordingly fall to be set aside in terms of the principle of legality implicit in the Constitution and/or under sections 6(2)(i), 6(2)(f)(i), 6(2)(d) and/or 6(2)(i) of PAJA.

PART 3: GROUNDS OF REVIEW IN RESPECT OF CLAUSES UNDER THE OWNERSHIP ELEMENT (clause 2.1 of the 2018 Charter) and DISPOSAL OF BEE SHAREHOLDING IN RESPECT OF EXISTING MINING RIGHTS (clause 2.1.6 of the 2018 Charter)

OWNERSHIP: EXISTING MINING RIGHTS (clause 2.1.1 of the 2018 Charter)

Introduction

72 The 2018 Charter introduces onerous re-empowerment obligations in respect of the renewal and transfer of existing mining rights.

73 The Minerals Council seeks to review and set aside clause 2.1 (introductory sentence, which applies to both existing and new rights holders), clauses

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2.1.1.2, 2.1.1.4, 2.1.1.5 and 2.1.1.6 which appear under the ownership element under the heading "Existing Mining Rights" as well as clause 2.1.6, insofar as it purports to apply to existing rights. (The introductory sentence of clause 2.1 and clause 2.1.6 are also dealt with under the heading of new mining rights below.)

74 The main ground of review is that the Minister is as a matter of principle not empowered to impose further or new obligations on the holders of existing mining rights outside of the provisions of the MPRDA and its regulations. The imposition of new charter obligations after the grant or conversion of a mining right in the case of renewals and transfers of existing mining rights (in clauses 2.1.1.2 and 2.1.1.4 to 2.1.1.6) is accordingly unauthorised and the said clauses fall to be reviewed and set aside in terms of the principle of legality and/or sections 6(2)(a)(i) and (f)(i) of PAJA. The provisions mentioned below are also unclear and vague as shown below, and thus also fall foul of the requirements of the rule of law as contemplated in section 1 of the Constitution and section 6(2)(i) of PAJA in this regard.

The imposition of new charter obligations after the grant or conversion of a mining right is beyond the Minister's powers under the MPRDA

75 The 2018 Charter defines the term "*Existing mining right holder*" to mean, "*for purposes of the ownership element*", as "*a holder of a mining right granted prior to the commencement of the Mining Charter, 2018*".

76 In terms of section 1 of the MPRDA, the term "*holder*" is defined as "*in relation to a ... mining right .... the person to whom such right . . . has been granted or such person's successor in title*".

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77 The introductory sentence of clause 2.1 of the 2018 Charter, which applies to both existing rights holders and new rights holders, provides as follows:

> "To give effect to meaningful economic participation;[15] integration into the mainstream economy; and effective ownership of the country's mineral resources by the Historically Disadvantaged Persons, a mining right holder must comply with the following:" [own underlining].

78 The obligations of the holder of a mining right are exhaustively set out in the MPRDA and its regulations (see for example sections 23(6) and 25(2)). The MPRDA does not authorise the Minister after grant to impose additional obligations on holders of mining rights (whether new or existing holders) by way of the Charter.

79 The MPRDA deals with a holder's duties in respect of the objects in sections 2(d) and (f) of the MPRDA in a specific manner, to wit:

79.1 Section 22 provides that application must be made for a mining right in the prescribed manner. Part B of the application form (prescribed in the regulations) requires information on "*OWNERSHIP OF PARTICIPATION BY HISTORICALLY DISADVANTAGED SOUTH AFRICANS (HDSA)*". It also requires that the application must be accompanied by the prescribed social and labour plan (regulation 46).

79.2 Section 23(1) provides that the Minister must grant the mining right inter alia if "*(h) the granting of such right will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan*".

[15] As defined in the 2018 Charter.

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79.3 In the case of conversions of old order mining rights, item 7(3) In Schedule II provides that the Minister must convert an old order mining right into a mining right if the holder complies with item 7(2) including item 7(2)(k) which, from 7 June 2013, provided that the holder must lodge "*(k) documentary proof of the manner in which the holder of the right will give effect to the object referred to in section 2(d) and 2(f).*"[16]

79.4 If the application or conversion is successful, the ensuing mining right is granted on certain terms and conditions, as appears from section 23(6) of the MPRDA. As a matter of departmental practice, the mining right document contains a recordal of the BEE agreement relied upon for the grant or conversion of the right and imposes an obligation on the holder to honour the terms of such agreement as appears from the standard mining right document and standard converted mining right document referred to and copies whereof are annexed as annexures FA8(1) and FA8(2) above. In addition, the social and labour plan is approved if it complies with regulation 46.

79.5 Once granted, the holder is obliged to comply with the provisions of the MPRDA and the terms and conditions of its mining right.[17] If an applicant entered into an agreement with an empowerment partner to satisfy the criterion in section 23(1)(h), compliance with such agreement is required

[16] Prior to 7 June 2013, it read: "*(k) an undertaking that, and the manner in which, the holder will give effect to the object referred to in section 2(d) and 2(f).*"

[17] In terms of section 23(6) of the MPRDA, the mining right is subject to "this Act". The latter is defined in section 1 of the MPRDA to include any term or condition subject to which the right has been granted.

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as part of the right granted. It also has to comply with the provisions of its approved social and labour plan.

79.6 After the grant, the holder has the obligation in terms of section 25(2)(h) to report on its compliance with these provisions and documents.

80 It is thus clear that the legislative scheme is that the Minister must, when granting an application for a mining right, or converting an old order mining right, be satisfied that the grant of such right would further the objects referred to in sections 2(d) and (f), in accordance with the Charter contemplated in section 100(2) and the prescribed social and labour plan. The requirements to be met by an applicant in applying for or conversion to a mining right are clearly those that prevail at the time the application or lodgement is made.

81 Once the Minister is satisfied that an applicant for a mining right has satisfied the requirements of section 23(1)(h) or item 7(2)(k) in Schedule II and once the Minister (or his delegate) has taken a decision to grant a mining right, which is an administrative act, he is *functus officio* and may not revisit his decision.

82 A holder can thus not be required by the Charter, after the decision to grant the right to him has been taken, to comply with additional criteria, failing which its right will be placed in jeopardy - the MPRDA does not permit it; in fact, it is also an object of the MPRDA in section 2(g) to provide for security of tenure in respect of prospecting and mining operations. In terms of section 4(1) of the MPRDA, "*when interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must*

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be preferred over any other interpretation which is inconsistent with such objects.".

83 An interpretation of section 100(2)(a) which would permit the Minister to impose new obligations upon the holder of a mining right which, if not met, would expose such holder to the loss of such right, would also be inconsistent with the description of a mining right in section 5(1) of the MPRDA as a "limited real right".

84 Accordingly, a mining right once granted on application or conversion cannot be revoked or cancelled on the grounds of a failure to comply with Charter requirements imposed after the grant or conversion in the absence of a clear statutory power to do so and there is none. Quite apart from the presumption against retrospectivity when interpreting statutory provisions, there is nothing in the MPRDA which provides, either expressly or by necessary implication, that once a mining right has been granted on application or conversion to an applicant, the holder will, in order to retain such right, have to meet the new requirements set out in a Charter as revised from time to time. In particular, as set out below, sections 47, 93, 98 and/or 99 of the MPRDA do not grant the Minister such power. These sections are discussed more fully below in the context of clause 9 of the 2018 Charter.

85 It is accordingly submitted that the Minister has no power, after he has granted a mining right, whether on application or conversion, through the Charter, to impose new obligations on holders of existing rights outside of, and over and above, the provisions of the MPRDA and its regulations and

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the terms and conditions of their granted or converted mining rights and approved social and labour plans. It is not authorised by the MPRDA.

Order granted in previous litigation (the Chamber of Mines judgment 2018)

86 Prior to commencement of the 2018 Charter, there was a long-existing dispute between the Minister and his functionaries on the one hand, and the Chamber of Mines as it was then known and its members on the other, about whether or not, once a party which has applied for a mining right has satisfied the Minister that the granting or conversion of the right will be in accordance with the Charter contemplated by section 100 of the MPRDA, that party is obliged, after the right has been granted or converted (therefore, as mining right holder), to "top up" the 26% HDSA ownership target (now for new mining rights 30% HDP ownership), if for one reason or another it fell below that level. This was referred to as the *"once empowered, always empowered"* issue.

87 The Minister and his functionaries took the view under the previous Charters, that a holder of a mining right has a continuing obligation to maintain a 26% HDSA ownership level (now, for new mining rights, 30%) and that a failure to do so constitutes a contravention of the Charters, of the terms of their mining rights and of the MPRDA.

88 As stated above, the Mineral Council's view at the time was that there is nothing in the language of section 23 (in particular section 23(1)(h)), or in item 7 (in particular item 7(2)(k)) in Schedule II, which imposes such an obligation upon the successful applicant for, or for conversion to, a mining right. The MPRDA, in particular, does not oblige the holder to restore the

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percentage ownership by HDPs to the 26% (or now, for new mining rights, 30%) target referred to in the Charters where such percentage falls below this level after the grant of the holder's mining right.

89 In consequence of an application for a review of the Original Charter and the 2010 Charter (under case number 41661/2015), the Chamber (as it was then known) was granted an order in the Chamber of Mines judgment 2018 on 4 April 2018 by Acting Justice Barrie (Justice Mabuse concurring, but Justice Siwendu dissenting) declaring that, upon a proper interpretation of the MPRDA, once the Minister or his delegate is satisfied in terms of section 23(1)(h) or item 7(2)(k) in Schedule II of the MPRDA that the grant or conversion of the mining right applied for in terms of section 22 of the MPRDA or lodged for conversion in terms of item 7 in Schedule II of the MPRDA will further the objects referred to in sections 2(d) and (f) in accordance with the Charter, and has granted or converted the mining right applied for or lodged for conversion, the holder thereof is not thereafter legally obliged to restore the percentage ownership controlled by HDPs or HDSAs to the 26% target referred to in the Original Charter and in the 2010 Charter where such percentage falls below 26%, unless the obligation is specified as an obligation in the terms and conditions stated in the right, as referred to in section 23(6) of the MPRDA. As mentioned, the judgment and order are subject to an application for leave to appeal.

The provisions of the 2018 Charter

90 The 2018 Charter was published on 27 September 2018, some five months after the *Chamber of Mines judgment 2018* on 4 April 2018. The 2018

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Charter recognises the principle reflected in the above mentioned order and judgment in clause 2.1.1.1 thereof by providing that "*An existing mining right holder who has achieved a minimum of 26% BEE shareholding shall be recognised as compliant for the duration of the mining right*". To remain "compliant", however, the Implementation Guidelines[18] provide that such holders must submit annual reports on their current BEE shareholding, meaningful economic participation and their shareholders' rights. This is already an erosion of the principle set out in clause 2.1.1.1 of the 2018 Charter.

91 The Minister also did not extend this principle in the 2018 Charter to renewals and transfers of existing mining rights, but instead introduced onerous re-empowerment obligations in such cases:

91.1 clause 2.1.1.2 provides that "*such recognition will not be applicable <u>upon renewal</u>*";

91.2 clause 2.1.1.4 provides that "*The recognition of continuing consequences, in respect of an existing mining right, shall not be transferrable (sic) and shall lapse <u>upon transfer of such mining right</u> or part thereof*";

91.3 clause 2.1.1.5 provides that "*The recognition of continuing consequences shall not apply to an application for a new mining right or <u>renewal of a mining right</u>*"; and

[18] Which were contemplated in GN 1002 *GG* 41934 of 27 September 2018 (a copy whereof is annexure **FA4(1)** above) in terms whereof the 2018 Charter was published, and which were published in GN 1399 *GG* 42122 of 19 December 2018, a copy whereof is annexure **FA9** hereto (Implementation Guidelines).

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91.4 clause 2.1.1.6 provides that "*A renewal of an existing mining right shall be subject to Mining Charter requirements applicable at the time that a mining right renewal application is lodged*";

[own underlining].

92 It is submitted that the principle remains that, unless authorised to do so by the MPRDA or unless specified in the terms and conditions stated in the right as referred to in section 23(6) of the MPRDA, the Minister has no power after grant, through the Charter, to impose new obligations on holders of existing rights in the case of renewals and transfers of their existing mining rights.

Renewals of existing mining rights

93 The relevant provisions of the MPRDA with regard to renewals of mining rights are sections 25(1) and section 24.

94 Section 25(1) provides that:

> "In addition to the rights referred to in in section 5, the holder of a mining right has, subject to section 24, the exclusive right to apply for and be granted a renewal of the mining right in respect of the mineral and mining area in question."

95 Section 24 of the MPRDA, under the heading "Application for renewal of mining right", provides as follows:

"(1) Any holder of a mining right who wishes to apply to the Minister for the renewal of a mining right must lodge the application—

(*a*) at the office of the Regional Manager in whose region the land is situated;

(*b*) in the prescribed manner; and

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(*c*) together with the prescribed non-refundable application fee.

(2) An application for renewal of a mining right must—

(*a*) state the reasons and the period for which the renewal is required;

(*b*) be accompanied by a report reflecting the extent of compliance with the conditions of the environmental authorisation;

(*c*) include a detailed mining work programme for the renewal period.

(3) The Minister must grant the renewal of a mining right if the application complies with subsections (1) and (2) and the holder of the mining right has complied with the—

(*a*) terms and conditions of the mining right and is not in contravention of any relevant provision of this Act or any other law;

(*b*) the mining work programme;

(*c*) requirements of the prescribed social and labour plans; and

(*d*) conditions of the environmental authorisation.

(4) A mining right may be renewed for further periods, each of which may not exceed 30 years at a time.

(5) A mining right in respect of which an application for renewal has been lodged shall despite its expiry date remain in force until such time as such application has been granted or refused."

96 A plain reading of section 24 shows that the Minister has no power, by way of the Charter or otherwise, to require compliance with further requirements set out in revised Charters from time to time as a pre-condition for the granting of a renewal. There is little doubt that the onerous re-empowerment requirements in the 2018 Charter in the case of renewals go further than those imposed under section 24 of the MPRDA and afford the Minister greater powers than those set out in the MPRDA when he decides whether or not to grant the renewal of an existing mining right. Further argument in this regard will be presented to the court at the hearing of the matter.

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97 The provisions of clauses 2.1.1.2, 2.1.1.5 and 2.1.1.6 as well as 2.1.6.2, insofar as they purport to oblige an existing holder of a mining right to comply with the new requirements of the 2018 Charter relating to ownership upon renewal of a mining right, are accordingly clearly beyond the powers of the Minister. The non-recognition of renewals is furthermore contrary to the object of security of tenure in section 2(g) of the MPRDA (which includes continuity of tenure by way of renewals) and contradicts section 24(3) which does not include re-empowerment as a jurisdictional fact for compulsory grant of renewal applications. The aforesaid clauses are accordingly not authorised by the provisions of the MPRDA and stand to be reviewed and set aside in terms of section 6(2)(a)(i) and/or 6(2)(f)(i) of PAJA, alternatively in terms of the principle of legality.

Transfers of existing mining rights

98 According to clause 2.1.1.4 of the 2018 Charter, the HDP ownership credentials of the transferor (seller) do not follow the existing mining right upon a transfer to the transferee. Instead, it seems, the transferee must ensure that it complies with the HDP ownership provisions applicable to new rights under the 2018 Charter. It is submitted that clause 2.1.1.4 is unauthorised by the MPRDA.

99 Section 11 of the MPRDA deals with the transferability of mining rights. Sections 11(1) and 11(2) are relevant and provide as follows:

"(1) A prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the

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written consent of the Minister, except in the case of change of controlling interest in listed companies.

(2) The consent referred to in subsection (1) must be granted if the cessionary, transferee, lessee, sublessee, assignee or the person to whom the right will be alienated or disposed of—

(*a*) is capable of carrying out and complying with the obligations and the terms and conditions of the right in question; and

(*b*) satisfies the requirements contemplated in section 17 or 23, as the case may be. ..."

100 Section 11(2)(a) contemplates therefore that the transferee will comply with whatever empowerment obligations have been incorporated into the relevant mining right pursuant to the Charter in force when the mining right was granted.

101 Section 11(2)(b) only requires that the transferee satisfy those provisions of sections 17 and 23 of the MPRDA which relate to the capacity of the holder of a mining right to meet particular criteria. For that reason section 23(1)(a) would not have to be satisfied by the transferee because it relates to the nature of the mineral resource to be mined, not to the nature of the miner. By contrast, section 23(1)(b) would have to be satisfied by a transferee, because it relates to the financial and technical strength of the miner.

102 The requirement relating to empowerment in section 23(1)(h) in its terms relates to the point in time when the right is granted. It provides that "*the Minister must grant a mining right if ... (h) <u>the granting of such right</u> will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan*" [own underlining]. As pointed out above, the transferee will, upon the

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transfer of the mining right, become obliged to comply with the empowerment agreement which the Minister was satisfied would be in accordance with the relevant Charter when he granted the right. Section 23(1)(h) does not therefore relate to the capacity of the holder to meet the requirements of that section and there would therefore be no need for the transferee to satisfy the Minister that it is able to meet the requirements of that section. Those requirements are met because the empowerment agreement in question was concluded.

103 Importantly, section 11 does not impose obligations upon a transferee which the transferor did not have. The provisions of section 23(1)(h) can therefore not be relied upon as a source of power for the Minister in the Charter to require compliance with the new Charter conditions on transfer of an existing mining right.

104 The Minister is accordingly not empowered by the MPRDA, by way of the Charter, to impose a further and new obligation upon a cessionary or transferee of an existing right again to comply with the ownership requirements for new rights under the 2018 Charter or to impose it as a pre-condition to granting consent for a transfer in terms of section 11 of the MPRDA.

105 The provisions of clause 2.1.1.4 of the 2018 Charter accordingly fall to be reviewed and set aside in terms of the principle of legality and/or sections 6(2)(a)(i) and (f)(i) of PAJA.

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OWNERSHIP: DISPOSAL OF BEE SHAREHOLDING IN RESPECT OF EXISTING MINING RIGHTS (clause 2.1.6 of the 2018 Charter)

106 Clause 2.1.6 of the 2018 Charter refers in its heading not only to *new mining rights* but also to *existing mining rights*. The reference to existing mining rights in the heading appears however to be an error.

107 This appears, in the first instance, from the sequence of the clauses. Clause 2.1.6 appears after the clause dealing with new mining rights (clause 2.1.3) and between other clauses also dealing with new mining rights. This suggests that it was only intended to deal with new mining rights.

108 Secondly, there is no reference to existing rights in the body of clause 2.1.6. The only reference to existing rights appears in the heading.

109 Thirdly and importantly, it is clear from the content of clause 2.1.6 that, if it were applied to existing rights, it would directly conflict with the contents of clause 2.1.1 which deals expressly with existing mining rights. By way of example:

109.1 clause 2.1.1 (existing rights) provides that an existing mining right holder who has achieved a minimum of 26% BEE shareholding shall be recognised as compliant for the duration of the mining right (except in the case of renewals and transfers, as set out above);

109.2 clause 2.1.6 (disposal of BEE shareholding), on the other hand, provides that where BEE shareholding is disposed of, a mining right holder's empowerment credentials shall only be recognised if *inter alia* in terms of

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clause 2.1.6.1.1 it is compliant with the requirements of the 2018 Charter (which is 30%) at the time of the disposal.

110 The Minerals Council accordingly submits that clause 2.1.6 was only intended to apply to new rights. In any event, it stands to be reviewed and set aside for being unauthorised *alternatively* as being impermissibly vague and therefore inconsistent with the principle of legality and/or section 6(2)(i) of PAJA in respect of new and existing rights. I deal with new rights in more detail below.

111 I shall deal with the provisions of clause 2.1.6 in respect of new mining rights below, when dealing with new mining rights.

OWNERSHIP: NEW MINING RIGHTS and DISPOSAL OF BEE SHAREHOLDING IN RESPECT OF NEW MINING RIGHTS (clauses 2.1.3 to 2.1.7 of the 2018 Charter)

Introduction

112 Clauses 2.1.3 to 2.1.7, as read with clause 7.2 and the Scorecard of the 2018 Charter, deal with the following main topics in relation to new mining rights:

112.1 A new minimum of 30% BEE shareholding is prescribed (clause 2.1.3.1 of the 2018 Charter).

112.2 The manner of distribution of the 30% is prescribed (clause 2.1.3.2 as well as clause 2.1.4 in relation to clause 2.1.3.2(ii) of the 2018 Charter).

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112.3 It is prescribed that a minimum of 50% BEE shareholding shall vest within two thirds of the duration of a mining right (clause 2.1.5.1).

112.4 It is further prescribed that the minimum 30% target shall apply for the duration of a mining right (clause 2.1.5.2). See also clause 7.2 of the 2018 Charter which provides that for mining right holders, the ownership element is ring-fenced and that 100% compliance is required at all times, as well as the Scorecard which only provides for a *yes* or *no* in measuring compliance with the ownership element.

112.5 Clause 2.1.6.1, however, seems to recognise consequences of empowerment deals for the duration of the new mining right but only in the limited circumstances set out in clause 2.1.6.1.1 to 2.1.6.1.4, although the obligations mentioned in the previous paragraph are not expressly subjected to clause 2.1.6.1.

113 The Minerals Council seeks a judicial review of the clauses mentioned in subparagraphs 2, 4 and 5 above on the grounds set out below.

Manner of distribution of 30% ownership

114 There is no section in the MPRDA which authorises the Minister to prescribe the specific distribution of shareholding in the case of all companies holding new mining rights, as he seeks to do in clauses 2.1.3.2 and 2.1.4.

115 As stated above, the Charter is intended to guide the Minister's discretion but cannot exclude the exercise of his discretion in this manner. Clauses 2.1.3.2. and 2.1.4 accordingly stand to be reviewed and set aside in terms of the principle of legality and/or sections 6(2)(a)(i) and (f)(i) of PAJA.

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Obligation to retain 30% at all times and the apparent exception to the rule

116 The provisions of the Charter that the minimum 30% target shall apply for the duration of a mining right, as embodied in clauses 2.1.5.2 and 7.2 and the Scorecard, are furthermore challenged by the Minerals Council on the basis of the lack of power of the Minister in terms of section 6(2)(a)(i) and/or 6(2)(f)(i) of PAJA and error of law in section 6(2)(d) of PAJA *alternatively* on the basis of the principle of legality. The Minister is simply not empowered by the MPRDA to decree by way of the 2018 Charter that a holder of a new mining right has a continuing obligation to maintain the minimum HDP ownership level (which has now been increased to 30%), and (when read with clause 9.1) that a failure to be 100% compliant at all times constitutes a contravention of the 2018 Charter and is subject to the provisions of sections 93, 47, 98 and 99 of the MPRDA.

117 Secondly, the provisions of the above mentioned clauses, when read with clause 2.1.6.1 are not clear and fall to be set aside for vagueness. Although it is stated categorically in clauses 2.1.5.2 and 7.2, and is implied in the scorecard, that 30% BEE shareholding (as prescribed) must be maintained at all times, clause 2.1.6.1 apparently detracts from this obligation in that it seems to recognise consequences of empowerment deals (apparently concluded in respect of such new rights) for the duration of the new mining right. Such recognition is, however, limited to the circumstances set out in clause 2.1.6.1.1 to 2.1.6.1.4.

118 Whether this is the correct meaning of the above mentioned clauses is however not clear, because the obligation to maintain 30% is not expressly

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made subject clause 2.1.6.1. The interpretation of clause 2.1.6 is further complicated by the fact that it purports in its heading to apply also to existing rights, as already set out above.

119 Even if that is the correct meaning of the said clauses when read together, the point remains that the Minister does not have the power to decree by way of the 2018 Charter that a holder of a new mining right has a continuing obligation to maintain the minimum HDP ownership of 30% or the power to soften his own *ultra vires* rule with an exception, but only on the basis set out in clauses 2.1.6.1.1 to 2.1.6.1.4.

120 The main issue remains whether or not, once a party which applies for a mining right has satisfied the Minister that the granting of the right will be in accordance with the 2018 Charter, that party is obliged, after the right has been granted (therefore, as mining right holder), to "top up" the 30% HDP ownership target, if for one reason or another it falls below that level, such as where a holder entered into a transaction which achieved a minimum of 30% HDP shareholding, but where the HDP partner/s has/have exited the transaction, or where the contract between the holder and the HDP Partner/s has/have lapsed or was cancelled due to breach, or where the previous HDP Partner/s transferred its/their shares to a person/s other than an HDP Person.

121 As stated above, there is nothing in the language of section 23 which imposes such an obligation upon the successful applicant for a mining right. The MPRDA, in particular, does not oblige the holder to restore the percentage ownership by HDPs to the target (now 30%) referred to in the

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Charter where such percentage falls below this level after the grant of the holder's mining right.

122 As also pointed out above, the majority of the full bench of the Gauteng High Court in Pretoria in the *Chamber of Mines judgment 2018* has already held that there is no such obligation in the MPRDA. It is submitted that it is irrational that the 2018 Charter implements the *"once empowered, always empowered"* principle in relation to existing rights (albeit only to the extent set out in clause 2.1.1) but does not also implement it in respect of new mining rights (except, apparently, in the circumstances set out in clause 2.1.6). (Even an old order mining right converted after 26 September 2018 will also rank as a new mining right governed by clause 2.1.3.) The same principles apply in both cases.

123 It is submitted that the Chamber's interpretation of the MPRDA is not only in line with the language of the MPRDA, but is also in line with the objectives of the MPRDA, including the expansion of opportunities for HDPs to invest in the mining industry, and the promotion of employment in that industry. Indeed, it is irrational for the Minister to decree in the 2018 Charter that 30% shareholding must be maintained at all times save in the limited circumstances set out in clauses 2.1.6.1.1 to 2.1.6.1.4:

123.1 If HDSA shareholders or other economic participants in mining companies were to be subject to "perpetual lock-ins" or, at least, locked in for a third of the duration of the mining right, it would reduce the value of their investment, materially impair the investment opportunities available to non-HDPs and discourage investment by HDPs.

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123.2 If mining companies were not to subject HDP owners to perpetual or lengthy lock-in arrangements and were required to continually replace departing HDP investors (save if all the requirements in the subclauses of clause 2.1.6.1 are met), the resultant cost, uncertainty and administrative burden would provide a material disincentive to investment in the mining industry in general and mining companies in particular.

124 It is submitted that where a mining right holder has complied with its HDP obligations by meeting the 30% ownership target, it will, where the transaction successfully led to empowerment, have empowered the HDP participants in question even if such participants realise their investments and withdraw, other than in the limited circumstances mentioned in the subclauses of 2.1.6.1. The argument that the objects of sections 2(d) and (f) of the MPRDA are not fulfilled by a mining company if it does not continuously replace one HDP investor with another, save in cases where the requirements of subclauses of 2.1.6.1 are all met, irrationally ignores the empowerment and transformational benefits achieved by the departing HDP investors. It confuses quotas with empowerment objectives. It also fails to have any regard to the economic consequences thereof. It is submitted that it is simply not sustainable for any business and is irrational.

125 It is submitted that the MPRDA does not authorise the imposition of new requirements by way of the Charter after grant or conversion in respect of existing rights (upon renewal or transfer) or in respect of new rights (as qualified or not) and that the manner in which the Minister has sought to do so is not in accordance with the rule of law and is ultra vires, irrational and unreasonable. The clauses mentioned above accordingly stand to be

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reviewed on the basis of the principle of legality alternatively section 6(2)(a)(i), 6(2)(e)(i), 6(2)(f)(i), 6(2)(f)(ii)(aa) and (bb), 6(2)(h) and/or 6(2)(i) of PAJA.

OWNERSHIP: BENEFICIATION EQUITY EQUIVALENT AGAINST THE OWNERSHIP TARGET (clause 2.1.7)

126 Both the Original Charter and the 2010 Charter made reference to the continuing consequences of empowerment deals. The 2017 Charter, without expressly referring to "continuing consequences", in paragraph 2.1.1.13 only made provision for off-setting under the ownership element against the value of beneficiation. The 2018 Charter has now, once again, changed the parameters of claiming off-sets under the ownership element against the value of beneficiation. Whilst none of these provisions in any of the Charters is clear, I deal with the topic below on the basis of what seems to be a reasonable interpretation of these sections.

Original Charter

127 In the Original Charter the term *"continuing consequences"* was used to describe how in practice previous deals would continue to be taken into account whenever a right holder's achievement of HDSA ownership is measured. In addition, provision was made for offsets.

128 In the Original Charter, after it dealt with "Active involvement" and "Passive involvement", the following was stated:

> "In order to measure progress on the broad transformation front, the following indicators are important:

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- The currency of measure of transformation and ownership could, *inter alia*, be market share as measured by attributable units of South African production controlled by HDSA's.
- That there would be capacity for offsets which would entail credits/offsets to allow for flexibility.

The continuing consequences of all previous deals would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production."

129 Under the Original Charter a mining company was thus entitled to take into account, for the purposes of meeting the HDSA ownership targets, previous empowerment deals also to the extent to which a "credit" or "offset" arose, which could be utilised to meet the HDSA requirements on a later occasion. That approach was explained further in the final bullet point under paragraph 4.7 of the Original Charter, which provided that in order to increase participation and ownership by HDSAs in the mining industry, mining companies agreed:

- "That where a company has achieved HDSA participation in excess of any set target in a particular operation, then such excess may be utilised to offset any shortfall in its other operations."

Furthermore, in paragraph 4.8 (Beneficiation), it was provided that:

> Mining companies will be able to offset the value of the level of beneficiation achieved by the company against its HDSA ownership commitments.

130 It is submitted that these provisions were rational and reasonable. The Chamber's members relied upon those credits/offsets when entering into empowerment transactions and when entering into further commercial transactions and investing in new and ongoing mining operations.

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2010 Charter

131 Paragraph 2.1 of the 2010 Charter provided that it is only the continuing consequences of deals concluded prior to the promulgation of the MPRDA which may be included in calculating credits or offsets in terms of market share as measured by attributable units of production.

- "The continuing consequences of all previous deals concluded prior to the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002 would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production." [emphasis added]

132 In regard to off-sets themselves, the second bullet point in paragraph 2.1 of the 2010 Charter provided that:

- "The only offsetting permissible under the ownership element is against the value of beneficiation, as provided for by section 26 of the MPRDA and elaborated in the mineral beneficiation framework."

Furthermore, in paragraph 2.3 (Beneficiation), it was provided that:

> "Mining companies may offset the value of the level of beneficiation achieved by the company against a portion of its HDSA ownership requirements not exceeding 11 percent". [emphasis added]

133 The 2010 Charter thus materially limited the ability of measured entities to offset, and limited continuing consequences, not only to offsets or credits arising from the value of beneficiation, but also to deals concluded prior to the promulgation of the MPRDA. The limitation of the continuing consequences of empowerment deals to deals concluded prior to the coming into force of the MPRDA was irrational, since it was the MPRDA which created the requirement to enter into such deals. While a number of mining companies entered into empowerment transactions in the knowledge of what

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would be required after the effective date of the MPRDA, there was no rational reason to exclude deals concluded after that date.

2017 Charter

134 The 2017 Charter limited this further in providing in paragraph 2.1.1.13 thereof that -

> "The only offsetting permissible under the ownership element is against the value of Beneficiation as provided for in paragraph 2.1.4 below. Such offsetting shall account for a maximum of 11% against the ownership target where such offsetting has been approved by the Department of Mineral Resources."

Paragraphs 2.1.4(a) to (e) provided that:

(a) A Holder may offset a maximum of 11% of Black Persons ownership by financially investing in and contributing to Beneficiation over and above the provisions of Section 26 of the MPRDA.

(b) The offsetting referred to in paragraph 2.1.4(a) shall not exceed 11% irrespective of the formulae, methods and/or mechanisms identified.

(c) A Holder claiming an offset pursuant to Beneficiation must meet the following criteria:

- The Holder must have, since 2004 in addition to section 26 requirements of the MPRDA, invested in Beneficiation;
- The activities that are deemed to be Beneficiation are in line with the baseline contemplated in the definition of Beneficiation in the MPRDA; and
- The Department of Mineral Resources must approve the proposed activities to ensure that such activities are in line with Beneficiation Policies published by it from time to time.

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(d) Offsetting shall not apply to any Beneficiation project which existed post 2004 but which has since ceased to exist and or has been terminated.

(e) Offsetting may only be claimed where the Holder's contribution to Beneficiation is still ongoing.

2018 Charter

135 In the first instance, beneficiation is defined in section 1 of the MPRDA. The Charter, however, adopts a different definition "for purposes of the Mining Charter". This is unauthorised. The Minerals Council submits that this is an exceptional case justifying the court granting an order as contemplated in s8(1)(c)(ii)(aa) of PAJA, substituting the existing definition of "beneficiation" in the 2018 Charter with the definition of "beneficiation" in section 1 of the MPRDA.

136 The beneficiation offset afforded under previous Charters to mining companies that undertake beneficiation is retained to an extent in the 2018 Charter. It is not, however, available to licenses or permits issued under the Diamonds Act, 1986 or the Precious Metals Act, 2005. In addition, the eleven percent offset provided for under the 2010 Charter is reduced (apparently in the case of new rights) to five percent and may only be claimed against a maximum of five percent of the BEE entrepreneur shareholding. To qualify for the offset, the mining right holder must submit a beneficiation equity equivalent plan with the Minister as well as meet the criteria set out in the Guidelines. The Minister must, in turn, consider and approve the plan within 60 days from the date of submission thereof. (See clauses 4.4.3 and 4.4 of the Implementation Guidelines.)

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137 In the case of existing mining rights, clause 2.1.7.1.2 of the 2018 Charter provides that existing holders which claimed the 11 percent offset *prior* to the commencement of the 2018 Charter retain the offset for the duration of the right. It is unclear how such holders would have been able to do so because the 2010 Charter did not provide any mechanism for calculating the percentage offset or for submitting a claim.

138 It is clear that the Minister has in the 2018 Charter sought to extinguish retrospectively the credits/offsets conferred by the Original Charter and even the curtailed ones in the 2010 Charter in respect of the continuing consequences of empowerment transactions.

139 The Mineral Council's members relied upon those credits/offsets when entering into empowerment transactions and when entering into further commercial transactions and investing in new and ongoing mining operations. Massive transactions were designed and implemented on this basis. They would be severely prejudiced if they were retrospectively deprived of these credits/offsets and the benefits of the continuing consequences of empowerment transactions.

140 It is submitted that it is a core principle of the rule of law that persons subject to the regulation should be able to plan their affairs on the basis of existing laws and policies. Retrospective amendments make it impossible to do so and render the law uncertain. It is inconsistent with the principle of legality to retrospectively deprive holders of benefits of the continuing consequences of empowerment transactions conferred by the Original Charter, without making proper provision for transitional measures. In particular, it is unauthorised as

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well as irrational to introduce new requirements with which empowerment transactions have to comply, because they render compliant transactions non-compliant overnight and extinguish substantial benefits conferred by past transactions without any transition.

141 Section 100(2) of the MPRDA does not either expressly or by necessary implication permit the Minister to retrospectively withdraw, in later Charters, compensating advantages conferred in earlier Charters.

142 The Minerals Council will accordingly seek an order reviewing and setting aside the limitation in paragraph 2.1.7.1.2 of the 2018 Charter to recognition of an 11% beneficiation offset on the basis that such limitation is not authorised by section 100(2) of the MPRDA, offends the principle of legality and that it is irrational and arbitrary to retrospectively deprive holders of mining rights of the benefits of the continuing consequences of previous empowerment transactions and of existing levels of offsets (including of beneficiation offsets in excess of 11%), which benefits were conferred by the Original Charter. Accordingly, the Minerals Council seeks the following orders:

142.1 setting aside the words "against a BEE Entrepreneur" where they appear in clause 2.1.7.1;

142.2 setting aside the words "a maximum of 5 percentage points of a BEE Entrepreneur" where they appear in clause 2.1.7.1.1;

142.3 setting aside the whole of clauses 2.1.7.1.2 to 2.1.7.1.5.

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143 A further issue is that there is no rational basis for the limitation of the beneficiation offset to 11% of the 26% ownership target (in relation to existing rights) or to 5% of the 30% ownership target (in relation to new rights). The 11% and 5% are entirely arbitrary and irrational. A mining right holder should be able to offset 100% of its 26% or 30% ownership target through its beneficiation projects. This limitation would lead to unequal treatment between a mining right holder which satisfies the 26% ownership target but has no beneficiation obligations, on the one hand, and a mining right holder which does not meet the 26% ownership target but nevertheless has substantial beneficiation projects to offset against the ownership target. The 2018 Charter furthermore does not give any indication of how the 11% or the 5% is to be calculated. That is to say, a mining right holder will not know, simply by looking at the 2018 Charter, whether it has reached the 11% or 5% target, or indeed what percentage its beneficiation projects have reached *vis-à-vis* the 26% or 30% ownership target. The beneficiation element is accordingly impermissibly vague and does not meet the most basic requirements of the rule of law.

144 The beneficiation element in the 2018 Charter accordingly falls to be set aside on the basis that it offends against the rule of law, is conducive to unequal treatment of mining rights holders, and is arbitrary or irrational in terms of the principle of legality or as contemplated in section 6(2)(a)(i), 6(2)(e)(i), 6(2)(f)(i), 6(2)(f)(ii)(aa) and (bb), 6(2)(h) and/or 6(2)(i) of PAJA.

145 It is noted that the majority of the full bench of the Gauteng High Court, Pretoria in *the Chamber of Mines judgment 2018* has already granted an order (par 2.5, p 57 of the judgment) declaring that the 2010 Charter did not

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retrospectively deprive holders of mining rights of the benefit of (a) the capacity for offsets as referred to in clauses 4.7 and 4.8 of the Original Charter, or of (b) the continuing consequences of empowerment transactions concluded by them after the coming into force of the MPRDA as referred in clause 4.7 of the Original Charter or of (c) the right to utilise an excess of any set target to offset any shortfall in other operations, as referred to in clause 4.7 of the Original Charter or of (d) the entitlement to offset the value of the level of beneficiation achieved by the holder against its HDP or HDSA ownership commitments, as referred to in clause 4.8 of the Original Charter. As stated, the said judgment and order are, however, subject to an application for leave to appeal.

PART 4: GROUNDS OF REVIEW RELATING TO THE NON-OWNERSHIP ELEMENTS (clauses 2.2 to 2.6 of the 2018 Charter)

GROUNDS OF REVIEW OF PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT ELEMENT (clause 2.2 of the 2018 Charter)

146 The Charter imposes certain procurement obligations on a holder in relation to that holder's procurement policy. The obligations are meant to apply to (i) "*mining goods*", (ii) "*services*", (iii) "*verification of local content*", (iv) "*enterprise and supplier development*", (v) "*research and* development", and (vi) "*processing of samples*". I shall deal with these in turn, starting with procurement of mining goods.

147 At the outset however, the Minerals Council submits that the aim of boosting manufacturing and thus job creation cannot be achieved by the setting of unachievable targets. This element should have been based on scientific

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study. The blunt targets imposed in this element are arbitrary and irrational, because they were not based on proper scientific analysis of economically viable South African manufacturing, with the support of fact-based industrial development initiatives. A decision by a state functionary to impose obligations on persons who face severe sanctions if they fail to comply with such obligations will inevitably be irrational and/or capricious if the functionary is not possessed of credible evidence that there is a reasonable prospect that the obligations in question can be met.

(i) Mining goods

148 The term "South African manufactured goods" is defined in the 2018 Charter to refer to goods with a minimum of 60% local content during the assembly or manufacturing of the product in South Africa, and that the calculation of local content excludes profit mark-up, intangible value such as brand value, and overheads. The definition is unclear in that there are two alternative ways of achieving the target, namely 60% of value added during manufacturing (which is very seldom achieved), and 60% of value added during assembly (which seems to mean only the process of assembling a knock-down kit of a product). Furthermore, the exclusion effectively means that only labour is considered to be "value-add". The Minerals Council submits that targets for value added should have been informed by comprehensive studies that indicate local capabilities and which will probably differ by types of mining such as surface mining, underground coal mining, underground hard rock mining, and so on.

149 The term "Mining Goods" is defined in the 2018 Charter to refer to capital

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goods and consumables used by a right holder or by a contractor on behalf of a right holder. However, contractors would have to apply the applicable codes in terms of the Broad-Based Socio-Economic Empowerment Act, leading to a conflict between the requirements under that Act and under the 2018 Charter.

150 The definition of "Youth" in the 2018 Charter refers, insofar as natural persons are concerned, to young South African citizens between the ages of 18 and to 35 years based on national or provincial demographics. This conflicts with South Africa's National Youth Policy and the National Youth Commission Act and the Youth Development Strategy, which define youth as persons between the ages of 14 and 35 years, resulting in inconsistency.

151 The Charter provides that:

> "2.2.1 **MINING GOODS**
>
> 2.2.1.1 A minimum of 70% of total mining goods procurement spend (excluding discretionary expenditure) must be on South African manufactured goods. The 70% shall be allocated as follows:
>
> 2.2.1.1.1 21% to be spent on South African manufactured goods produced by a Historically Disadvantaged Persons owned and controlled company;
>
> 2.2.1.1.2 5% to be spent South African manufactured goods produced by a women or youth owned and controlled company; and
>
> 2.2.1.1.3 44% to be spent on South African manufactured goods produced by a BEE compliant company."

152 There are, I submit, various difficulties with this sub-element, which I set out

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below.

153 First, the sub-element is premised on the relevant manufacturers being able to provide the mining goods. If they are not and this results in the holder being below levels 6 and 8 of the Mining Charter scorecard, then a holder would be in breach of the Charter if, having attempted to spend the requisite percentage, it was unable to do so because there is no relevant manufacturer to provide the mining goods. This has the potential of operating unduly harshly on a holder.

154 I am advised and respectfully submit that this state of uncertainty as to whether manufacturers are able to provide the mining goods is against the rule of law enshrined in section 1(c) of the Constitution. This sub-element is in addition void for vagueness to the extent that it does not spell out the consequences of non-compliance, assuming the Charter to be law.

155 Second, there is no reason to believe that at the time the Minister decided to impose this obligation he was possessed of credible evidence that companies *currently* providing mining goods meet the empowerment specifications in the sub-element. The Charter must be capable of compliance by those to whom it applies, and holders should be assured (as at present they are not) that they will be able to procure goods and services from specified manufacturers. As far as I am aware, there is no evidence of that. I accordingly call upon the Minister to produce such evidence in his answering affidavit.

156 Third, the definition of "*South African manufactured goods*" is unclear and incapable of practical application. The term is defined thus in the Charter:

" '**South African manufactured goods**' refers to goods with a minimum of 60% local content during the assembly or manufacturing of the product in South Africa. The calculation of local content excludes profit mark-up, intangible value such as brand value and overheads[.]"

157 A holder seeking to comply with this sub-element will have to determine, before procuring from a relevant manufacturer, that those goods have a "*minimum of 60% local content during the assembly or manufacturing of the product in South Africa*". In determining this, the holder will have to be satisfied that the "*calculation of local content excludes profit mark-up, intangible value such as brand value and overheads.*"

158 Quite how this complicated determination is to be carried out when a holder is simply seeking to procure mining goods is not explained in the Charter. Clause 2.2.3 (Verification of Local Content) does not assist in this regard. There is no infrastructure that the Charter has set up or requires for this complex determination. There is no corresponding requirement on the manufacturer that it must possess this information at the point of sale. Should (as is possible) the information as to local content be unavailable when a holder seeks to purchase mining goods, there is no clarity whether the holder may not purchase those goods or whether it may purchase them even if it is in potential breach of the Charter.

159 Nor is it clear what components go to making up "*60% local content*" ie whether it is raw material, labour, technology or capital. What if, for example, all the capital is local but the raw materials are foreign? What if the labour and capital are foreign, as might happen? All these are possible in a globalised world. The point I am making is this: the apparently simple phrase "*local content*", as it stands, is not capable of easy determination. It is, in

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short, so vague as to be void. There is no reason why this Honourable Court should not require the Minister to make clear what he means in this regard.

160 There is another problem. The determination of "*local content*" is not something that the holder can do. The holder depends on the information from the manufacturer in this regard. It should be enough for the holder to satisfy itself that it is procuring from a qualifying manufacturer. It should then be on the manufacturer, which after all possesses the information as to "*local content*" - assuming it knows what that phrase means - to tell the holder that the mining goods have the requisite local content. Again quite how it will determine this is unclear.

161 There is also no obligation on the qualifying manufacturer to keep records in order to enable a holder to comply with this sub-element. It follows that, absent this infrastructure and absent these obligations on manufacturers, this sub-element is incapable of implementation.

162 I am advised that a measure incapable of implementation is on that basis alone unlawful. Further argument in this regard will be advanced at the hearing of this application.

163 Lastly, I am advised that this element also impacts negatively on South Africa's international trade obligations, as set forth more fully in **Annexure FA10** hereto.

164 For all the above reasons, therefore, I am advised and submit that this procurement sub-element is *ultra vires* the MPRDA and therefore contrary to sections 6(2)(e)(vi) of PAJA and is in any event in breach of section 1(c) of

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the Constitution.

(ii) Services

165 This sub-element provides that:

"2.2.2 **SERVICES**

2.2.2.1 A minimum of 80% of the total spend on services (excluding non-discretionary expenditure) must be sourced from South African based company. The 80% shall be allocated as follows—

2.2.2.1.1 50% must be spent on services supplied by Historically Disadvantaged Persons owned and controlled company;

2.2.2.1.2 15% must be spent on services supplied by women owned and controlled companies;

2.2.2.1.3 5% must be spent on services supplied by youth; and

2.2.2.1.4 10% must be spent on services supplied by BEE compliant company.

2.2.2.2 The above-mentioned procurement targets must be complied with progressively within a period of five (5) years, as outlined in the transitional arrangements.

2.2.2.3 A mining right holder must ensure that the terms and conditions offered to women owned and controlled companies, or youth, are not less favourable than those offered to other suppliers.

2.2.2.4 All procurement expenditure reported must be the actual expenditure incurred by a mining right holder."

166 The Charter defines "services" in the following terms:

" **'Services"** refers to services contracted by a right holder, or by a contractor on behalf of a right holder, which includes but is not limited to, mining production services, drilling, mineral trading, mineral marketing, legal, shipping, transportation, information technology services, security,

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payroll, finance, medical, consulting, cleaning, insurance and any other services which are supplementary to the mine[.]"

167 I respectfully submit that there are insuperable difficulties with this sub-element. For example, if there are no companies owned or controlled by women or by Historically Disadvantaged Persons from which to source services in the relevant percentages, or if there are no youth providing the services, then holders would not be able to comply with this sub-element. The definition of "services" in the Charter is wide (and I make no criticism of this); I merely wish to point to potential difficulties of compliance.

168 What is clear is that the Minister did not know, before publishing the Charter, whether the targets in this sub-element could be satisfied. For example, the Minister cannot say that the youth can provide the legal, shipping or transportation services. These are examples. The Minister must of course produce the full information he had before him as to implementation and compliance. Only then would this Honourable Court be satisfied that the Minister proceeded upon correct information, or proceeded upon no information at all (thereby undermining the legality of this sub-element) in publishing the Charter.

169 As matters stand, there is no evidence that the companies currently providing such services are qualified in the sense defined in this sub-element (i.e. HDP, women, youth), or that they are capable of providing the services in the relevant percentages. I must emphasise that I am not, in saying this, criticising the relevant service providers. All I am saying is that the Minister ought to have satisfied himself, before publishing the Charter, that the relevant infrastructure exists to enable compliance by the holder with this

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procurement sub-element. It is irrational of the Minister to require compliance with particular obligations where he has not satisfied himself on reasonable grounds that it is possible to do so. There is no indication that the Minister has so satisfied himself. I would of course be happy to be re-assured by the Minister, by reference to facts, that this is the case. Absent that, this sub-element is, I am advised, unlawful. Further argument in this regard will be advanced at the hearing of this application.

170 For all the above reasons, this sub-element is *ultra vires* the MPRDA (and therefore contrary to section 6(2)(e)(i) of PAJA), void for vagueness, and contrary to section 1(c) of the Constitution.

(iii) Verification of local content

171 This sub-element provides as follows:

> "2.2.3 **VERIFICATION OF LOCAL CONTENT**
>
> 2.2.3.1 A mining right holder must procure goods in line with a standardised product identification coding system developed by the Department of Trade and Industry.
>
> 2.2.3.2 A mining right holder shall provide proof of local content for mining goods in the form of certification from the South African Bureau of Standards (SABS) or any other entity designated by the Minister."

172 While falling under the same heading, there is no obvious connection between the two clauses. It is not clear why a standardised "product identification coding system" would assist in the verification of local content, nor, to the best of my knowledge, has such a system been developed.

173 I am advised that the South African Bureau of Standards (SABS) is a

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statutory body whose functions and objects are set out in sections 4 and 5 of the Standards Act, 2008 (Standards Act). Those objects and functions do not include certifying whether mining goods have "*local content*" for purposes of the Charter. On the contrary, the object of the Standards Act is set out in its preamble as:

> "To provide for the development, promotion and maintenance of standardisation and quality in connection with commodities and the rendering of related conformity assessment services; and for that purpose to provide for the continued existence of the SABS, as the peak national institution; to provide for the establishment of the Board of the SABS; to provide for the repeal of the Standards Act, 1993; to provide for transitional provisions; and to provide for matters connected therewith."

Furthermore, the Minister of Trade and Industry during 2018 dissolved the Board of the SABS and placed it under administration in terms of section 49(2) of the Public Finance Management Act, 1999, as a result of lack of service delivery and failure to perform its mandate, which suggests that the SABS is not in a position to carry out its existing mandates, let alone the additional responsibility set out in paragraph 2.2.3 of the 2018 Charter.[19]

174 I am advised that the rendering of "*conformity assessment services*" under the Standards Act does not empower the SABS to issue certificates of local content under the Charter. This is because section 4(b) of the Standards Act limits conformity assessments to matters related to "*standards*". Section 4(b) of the Standards Act provides that one of the objects of the SABS is to:

> "provide reference materials, conformity assessment services, and related

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19 See http://www.polityorg.za/article/sa-south-africanbureau-of-standards-placed-under-administration-2018-07-06

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training services in relation to standards, including a voluntary SABS Mark Scheme proving assurance of product conformity". [Emphasis added]

175 Nor, I am advised, does the Minister have the power to assign functions to the SABS. That power is by section 4(k) reposed in the Minister of Trade and Industry. Nor can the Charter - which, whatever else it might be, is not primary legislation - seek to expand the mandate of the SABS. In short, the SABS has no power to certify whether mining goods have "*local content*" or not.

176 In any event, "*local content*", as understood in the Charter in its definition of "*South African manufactured goods*" (which its exclusions), is something about which only the supplier or manufacturer can have peculiar knowledge. That is why, I submit, it is artificial, impracticable and irrational to impose compliance obligations on a holder. And that is why it is, apart from its illegality, impractical to impose the certification obligation on the SABS.

177 This sub-element is therefore unlawful, incapable of implementation and, I say so with respect, not fully thought through in relation to the existing regulatory regime. It will be found that this difficulty of regulatory mis-alignment characterises large parts of the Charter. This is not so much a problem of over-regulation, as of incoherent policy-making. Further argument in this regard will be advanced at the hearing of this application.

(iv) Enterprise and supplier development

In clause 2.2.4.2.2(d) the 2018 Charter provides a minimum period of five years for a contract between a holder and a supplier. The Minerals Council submits that that period is irrationally too long in that it will limit opportunities

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for more enterprises to be developed.

(v) Research and development

178 This sub-element provides that:

> "**2.2.5 RESEARCH AND DEVELOPMENT**
>
> 2.2.5.1 A mining right holder must spend a minimum of 70% of its total research and development budget on South African based research and development entities, either in public or private sector."

179 The Minerals Council is in broad agreement with the policy of this sub-element. It is not clear, however, what the sub-element means exactly. Would a holder be in breach of the clause if more than 30% of its total research and development budget were "spent" on a foreign entity, where no South African entity can undertake the research and development, but the fruits thereof were to be applied back in South Africa? On the face of it, the answer is in the affirmative, i.e. that the holder would be in breach.

180 But the result would, I submit, be irrational. On my example, mining in South Africa would gain from the research. But the research may never be carried out in South Africa for lack of resources. To put it differently, a holder would not be able to spend 70% of its research and development budget importing technology which may in the end be applied in South Africa. Yet that would be the result of this sub-element. Often it is necessary to spend a lot of one's research and development budget on licences with a view ultimately to develop one's own expertise or technology. Yet, on the face of it, this sub-element would prevent that. That, I am advised, is not rationally related to the aim of the Charter. It is accordingly unlawful.

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(vi) Processing of samples

181 This sub-element requires holders to "*use South African based facilities or companies for the analysis of 100% of all mineral samples across the mining value chain*" (clause 2.2.6.1). If a holder is not to do so, then it must obtain the prior written permission of the Minister (clause 2.2.6.2).

182 When a similar proposal was previously made by the Minister, the Minerals Council made submissions to the Minister. In its submissions, the Minerals Council commented that there is no evidence that local companies have the capacity to conduct an analysis of 100% of a holder's mineral samples. The Minister does not seem to have taken this factor into account. In the light of the Minister's failure to respond to the Minerals Council's submission, there is no reason to believe that at the time of his decision to impose this obligation the Minister was possessed of credible evidence that South African based companies will be able to conduct an analysis of all the mineral samples produced in the mining industry in South Africa.

183 Having failed to satisfy himself, before imposing this sub-element, that there is capacity in South Africa to conduct analysis of 100% of samples, the Minister has in the clause 5.11.2.3 of the Charter Implementation Guidelines put the *onus* on a holder to show that there is no such capacity. It is submitted that the Minister cannot, by means of this stratagem, evade his duty to have satisfied himself, on the basis of credible evidence, that the obligations imposed upon mining right holders in clause 5.11 are capable of compliance. It is submitted that it was both capricious and in bad faith for the Minister to adopt this stratagem.

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184 In the circumstances clause 2.2.6 of the 2018 Charter should be reviewed and set aside under sections 6(2)(a), 6(2)(e)(iii), 6(2)(e)(vi), 6(2)(f)(i), 6(2)(f)(ii)(bb) and 6(2)(f)(ii)(cc).

PART 5: GROUNDS OF REVIEW IN REGARD TO THE APPLICATION OF THE MINING CHARTER TO LICENCES GRANTED UNDER THE PRECIOUS METALS ACT, 2005 AND THE DIAMONDS ACT, 1986 (clauses 4, 6.2, 7.1, 7.3, 8.7, 8.8, 8.9 and 9.2 of the 2018 Charter)

185 In the platinum group metals sector, the smelting, refining and marketing activities currently have licenses under the Precious Metals Act, 2005 (Precious Metals Act). Section 6(1)(b) of the Precious Metals Act provides that –

> "(1) In considering an application for any licence, permit or certificate the Regulator-
>
> ...
>
> (b) must have regard to the requirements of the Broad-Based Socio-Economic Empowerment Charter developed in terms of section 100 of the Mineral and Petroleum Resources Development Act, 2002 (Act No.28 of 2002);".

186 Similarly, section 5(2) of the Diamonds Act, 1986 (Diamonds Act) provides that -

> "(2) The Regulator may[20]—
>
> (a) when considering an application for any of the licences or permits provided for in this Act, have regard to the broad-based socio-economic empowerment Charter contemplated in section 100 of the

[20] This is to be contrasted with the "shall" in section 5(1) thereof.

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Mineral and Petroleum Resources Development Act".

187 As in the case of the MPRDA, these provisions clearly operate at the time of the grant of a licence and mean that the Regulator must – in the case of the Diamonds Act – or may – in the case of the Precious Metals Act - have regard to the Charter developed in terms of section 100 of the MPRDA *in deciding whether or not to grant a licence* under the Precious Metals Act or under the Diamonds Act.

188 The words "have regard to" are important. They mean, in their context, that the Regulator must pay attention to the Charter and apply it where it is appropriate to do so. When it is not appropriate to do so, the Regulator ought not to apply the Charter. The abovementioned Acts thus confer on the South African Diamond and Precious Metals Regulator ("Regulator") a discretion as to the extent to which the consideration of the requirements of the Mining Charter is appropriate when considering an applications for a particular licence or permit. The Regulator thus has a discretion as to how to apply the mining charter in this context, and is not obliged to refuse the grant of a license, permit or certificate application on the basis of non-compliance with the mining charter.

189 Additionally, the Regulations made in terms of section 95 of the Diamonds Act make provision only for applicants for diamond dealer's licences and diamond beneficiation licences to lodge, together with their applications, a proposed business plan, "inclusive of the broad-based socio-economic empowerment charter developed in terms of section 100 of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002)". No other licence or permit applications under the Diamonds Act have such a

requirement. The Minister does not have the power under the MPRDA, through the 2018 Charter, to determine that the 2018 Charter should apply to all licence and permit applications under the Diamonds Act, contrary to the provisions of the Regulations made in terms of section 95 of the Diamonds Act. Furthermore, the Minister does not have the power to override the discretion conferred on the Regulator to decide whether to apply the 2018 Charter in relation to a licence application under either the Diamonds Act or the Precious Metals Act.

190 Neither section 100(2) nor the above mentioned provisions of the Precious Metals Act or of the Diamonds Act authorise the Minister, as he has sought to do in paragraphs 4, 6.2, 7.1, 7.3, 8.7, 8.9, 8.8 and 9.2 of the 2018 Charter, to impose targets in respect of licence holders or to make the targets and elements of the Charter applicable to licence holders under those Acts, in line with the tables in clause 4 thereof. They also do not authorise the Minister to prescribe ownership targets for licensees in the downstream diamonds and precious metals industry. To do so violates section 5(2) of the Diamonds Act and section 6(1)(b) of the Precious Metals Act, is *ultra vires* the Minister's powers under the MPRDA, and is unlawful and unconstitutional.

191 It is also irrational. Smelting, refining and marketing activities are an integral part of a mine's value chain and are not operated as 'profit centres', with the actual costs of processing recharged directly back to the mines, which carry the individual mining right. The obligation under the Charter to empower is correctly linked back to a mining right level, as that is where value is created, through either empowerment at the holding company level or at an individual

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mining operation level, apportioned to the 'mining right'. To make the application of the obligations under the 2018 Charter mandatory on the smelting, refining and marketing activities would only increase the costs of processing which would be recovered from the mines, thereby reducing the revenue of the mining right holder, which is the empowered entity.

192 The indiscriminate application of the 2018 Charter to the downstream diamond industry has been proclaimed in respect of an industry that is in steady decline. It is therefore unlikely that the downstream diamond industry will be capable of surviving the cost of compliance with the requirements proposed in the 2018 Charter.

193 As both the precious metals industry and downstream diamonds industry are, in any event, subject to the Codes of Good Practice issued under the Broad-Based Black Economic Empowerment Act, 2003, the mandatory application of the 2018 Charter to entities in these industries for purposes of furthering transformation in unnecessary. Furthermore, many of the social issues regulated in the 2018 Charter are already catered for by other applicable (and appropriate) legislation. The mandatory application of the 2018 Charter would create unnecessary regulatory confusion across the PGM sector and the downstream diamond industry as to the empowerment statuses of the different parts of the PGM and diamonds value chain.

194 Notwithstanding the above, there is no provision made in the 2018 Charter for the recognition of historical BEE transactions under the Ownership element where the table in clause 4 and clause 4.5.1 require compliance with the Ownership element.

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195 Clause 4 also does not provide transitional periods for the Inclusive Procurement and Employment Equity elements applicable to holders of any licences or permits in terms of the Precious Metals Act and the Diamonds Act.

196 It is submitted that operations which hold licences under the Precious Metals Act and the Diamonds Act, have to adhere to the empowerment obligations in accordance with those Acts respectively, and that the 2018 Charter cannot by decree be made applicable to them as the 2018 Charter has sought to do.

197 Even if it could simply be applied to them, which remains denied, it is irrational that existing mining right holders that require licenses or permits in terms of the Precious Metals Act and Diamonds Act cannot rely on the recognition of historical BEE transactions set out in clause 2.1.1 and similarly qualify for the stated transitional periods in respect of Inclusive Procurement and Employment Equity. It is further submitted that entities which are not holders of rights, permits or permissions in terms of the MPRDA (such as manufacturers of auto catalytic convertors or of jewellery) will find difficulty in applying the 2018 Charter to their activities.

198 Paragraph 8.8 of the 2018 Charter is *ultra vires* because neither the Precious Metals Act nor the Diamonds Act applies the Charter to renewals of licences or permits. The Minister cannot, by means of the 2018 Charter, impose an obligation on applicants for renewals of licences and permits under those Acts where Parliament has not seen fit to do so.

199 Paragraph 9.2 of the 2018 Charter is also *ultra vires* insofar as it attempts to render non-compliance with the Charter a breach of the Diamonds Act and

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the Precious Metals Act. Section 11 of the Precious Metals Act sets out, in exclusive terms, the grounds upon which licences, permits and certificates may be cancelled. Non-compliance with the Charter is not one of them. That Act furthermore does not contain any provision which renders a breach of the Charter a breach of the Act. The term "the Act" is defined in section 1 of the Precious Metals Act to mean "the Precious Metals Act, 2005 (Act 37 of 2005)".The Minister has no power to amend the definition of "the Act" Precious Metals Act by providing, in the 2018 Charter, that a breach of its terms constitutes a breach of that Act.

200 The same considerations apply to the Diamonds Act. The definition of "this Act" in section 1 does not contain any reference to the Charter. In addition, section 37, which deals with the suspension and cancellation of licences, contains no provision referring to the Charter.

201 Insofar as the following clauses relate to existing or new licences and permits issued in terms of the Diamonds Act and the Precious Metals Act, clauses 4, 6.2, 7.1,7.3, 8.7, 8.9, 8.8, as well as clause 9.2 of the 2018 Charter are accordingly not authorised and in any event irrational and stand to be reviewed and set aside in terms of sections 6(2)(a)(i) and/or 6(2)(f)(i) and/or 6(2)(i) of PAJA alternatively on the basis of the principle of legality.

PART 6: GROUNDS OF REVIEW IN REGARD TO NON-COMPLIANCE WITH THE 2018 CHARTER (clause 9 of the 2018 Charter)

202 Clause 9.1 of the 2018 Charter is *ultra vires*. Clause 9.1 provides that a mining right holder who fails to comply with the ownership and mine community development requirements and falls within levels 6 and 8 of the

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Scorecard "shall be" in breach of the MPRDA and subject to the provisions of section 93 read in conjunction with section 47, 98 and 99 of the MPRDA.

203 Section 47 of the MPRDA provides the following:

> "**47. Minister's power to suspend or cancel rights, permits or permissions**
>
> (1) Subject to subsections (2), (3) and (4), the Minister may 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—
>
> (a) is conducting any reconnaissance, prospecting or mining operation in contravention of this Act;
>
> (b) breaches any material term or condition of such right, permit or permission;
>
> (c) is contravening any condition in the environmental authorisation;
>
> (d) has submitted inaccurate, false, fraudulent, incorrect or misleading information for the purposes of the application or in connection with any matter required to be submitted under this Act."

204 Section 47 thus makes provision for the cancellation or suspension of rights, permits or permissions in the circumscribed instances mentioned in section 47(1). No reference is made therein to non-compliance with the Charter, nor would one expect to find such a reference. As stated above, if an applicant for a right has entered into an agreement in order to give effect to the objects in section 2(d) and (f), the standard prospecting right or mining right provides as one of its terms that the holder is bound to the empowerment agreement it has concluded. This means that the holder must give effect to the objects of section 2(d) of the MPRDA in the form and manner set out in the concrete

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agreements. Section 47 would become applicable if a holder breaches a material term of such right. Absent such a breach, the Minister is not entitled, once an applicant has complied with the granting or conversion criteria in section 23(1), including 23(1)(h), or in item 7(2)(k) in Schedule II of the MPRDA, and a mining right has been granted on application or conversion, to cancel or suspend it in terms of section 47(1) of the MPRDA based on new Charter requirements imposed after the date of grant.

205 Section 93 authorises an authorised official who finds a contravention or suspected contravention of a provision of the Act or of a term of any right, to order the taking of rectifying steps or to suspend the operations concerned. Section 98 renders the contravention or failure to comply with the provisions of the MPRDA listed therein an offence, and section 99 sets the penalties a court may impose in case of conviction of such offences.

206 No power to cancel or suspend is conferred upon the Minister in any of these sections or in section 47 for not complying with the Charter, nor is non-compliance with the Charter listed as an offence in section 98. This is to be expected because, as set out above, the way the MPRDA is structured is that the Minister must be satisfied at the stage of considering whether or not to grant or convert a mining right, that the granting or conversion of such right will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100. If, therefore, the Minister is not so satisfied, the right will not be granted. This again serves to confirm that the Minister's idea of the Charter operating as a self-standing piece of legislation in which he can create new obligations and offences and which must at all times be obeyed, is misconceived.

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207 I repeat, as set out above, that the Charters do not constitute regulations and do not constitute legislation. In particular, they do not fall within the definition of "this Act" in the MPRDA. Instead they constitute formal guidelines or statements of policy, which are mandated by section 100 of the MPRDA. As stated, they are intended to provide a formal indication, made known to the public, of what the Minister will regard as "furthering" or "giving effect to" the objects referred to in section 2(c), (d), (e), (f) and (i) of the MPRDA as contemplated in *inter alia* section 23(1)(h) and item 7(2)(k) in Schedule II of the MPRDA. A policy, formal or otherwise, is not legislation and remains a guideline. It could never be applied so as to have the force of law or to preclude an applicant for a mining right from adopting other means of furthering the objects or giving effect to the objects of the Act. Section 100(2)(b) indeed requires that the Original Charter should set out how the objects referred to in those sections can be achieved. In this regard it is important to note that section 100(2)(b) does not require that the contemplated charter prescribe, on an exclusive basis, what must be done in order to achieve the objects of those provisions.

208 The Minister cannot by decree elevate the Charter's status to that of legislation and cannot by decree provide in the Charter that non-compliance therewith shall render the mining company in breach of the MPRDA and subject to the provisions of sections 47, 93, 98 and 99 of the MPRDA.

209 The Minerals Council will accordingly seek an order reviewing and setting aside clause 9.1 of the 2018 Charter as not being authorised by the MPRDA as contemplated in section 6(2)(a)(i) of PAJA *alternatively* on the basis that this excess of power offends the principle of legality.

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210 The Minerals Council will also seek an order declaring that a failure by a holder of a mining right or converted mining right to meet the requirements of the Charter(s), and in particular a failure to maintain a 30% HDP ownership level after the grant of a mining right, does not constitute a contravention of the MPRDA including, in particular, a contravention for the purposes of sections 47(1)(a) or 93(1)(a), and does not constitute an offence for the purposes of section 98(a)(viii). It is noted that such an order has already been granted (paragraph 2.3, p 56 of the judgment) by a majority of the full bench of the Gauteng High Court, Pretoria on 4 April 2018 in the *Chamber of Mines judgment 2018* but that such order and judgment are subject to a pending application for leave to appeal.

PART 7: CONCLUSION

211 It is accordingly submitted that the 2018 Charter stands to be judicially reviewed on the basis of PAJA and/or the principle of legality. As set out above, the decision to promulgate the challenged clauses of the 2018 Charter:

211.1 was not authorised by section 100(2)(a) or (b) of the MPRDA, from which the Minister purports to derive his power and/or was taken for a reason not authorised by the said empowering provisisons (sections 6(2)(a)(i) and 6(2)(e)(i) of PAJA);

211.2 was materially influenced by an error of law inasmuch as the Minister believed that he enjoyed the power to create law in the manner in which he has sought to do and in that the challenged clauses do not constitute, as they purport to, a form of binding legislation (section 6(2)(d) of PAJA);

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211.3 was inconsistent with the MPRDA or other national legislation (section 6(2)(f)(i) of PAJA);

211.4 was irrational, arbitrary and/or capricious (section 6(2)(e)(vi) of PAJA);

211.5 failed to take into account relevant considerations and information which was before the Minister (section 6(2)(e)(iii) of PAJA);

211.6 was not rationally connected to the purpose of the empowering provision or the information before the Minister (sections 6(2)(f)(ii)(bb) and (cc) of PAJA); and/or

211.7 was otherwise unconstitutional or unlawful as contemplated in section 6(2)(i) of PAJA in that it violates the rule of law in section 1(c) of the Constitution in that the challenged clauses are so confusing and contradictory that those to whom they purport to apply cannot reasonably regulate their affairs in compliance with the 2018 Charter and in that the 2018 Charter contravenes the separation of powers principle.

Confirmatory affidavit

212 I respectfully refer to the confirmatory affidavit by **Mr Henk Langenhoven**, filed herewith.

WHEREFORE, the applicant seeks the relief set out in the notice of motion to which this affidavit is annexed.

TEBELLO LAPHATSOANA CHABANA

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I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at Johannesburg on the 25th day of **MARCH 2019**, the regulations contained in Government Notice No R1268 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Sarah Ashleigh Stodart
Commissioner of Oaths
Practising Attorney
Republic of South Africa
4th Floor, The Forum
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List of Annexures

Copies of:

FA1	:	The Original Charter
FA2	:	The 2010 Charter
FA3	:	The 2017 Charter
FA4(1)	:	The 2018 Charter
FA4(2)	:	The 2018 Charter Amendment
FA5	:	List of the Minerals Council's members
FA6	:	The Constitution of the Minerals Council
FA7(1)	:	Chamber's statement relating to last-minute MIGDETT meeting on 14 May 2015
FA7(2)	:	Media statement and ancillary documents from the media conference held by the Chamber on 15 May 2015
FA7(3)	:	Minerals Council's submissions to the Minister in August 2018 in respect of the draft 2018 Charter
FA8(1)		Standard Mining Right
FA8(2)	:	Standard Converted Mining Right
FA9	:	Implementation Guidelines published in GN 1399 GG 42122 of 19 December 2018
FA10	:	Note on South Africa's international trade obligations

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