IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 20341/19

In the matter between:

MINERALS COUNCIL SOUTH AFRICA	Applicant
and	
MINISTER OF MINERAL RESOURCES	First Respondent
SOUTH AFRICAN DIAMOND AND PRECIOUS METALS REGULATOR	Second Respondent

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FIRST AND SECOND RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned,

SAMSON GWEDE MANTASHE

do hereby make oath and state:

THE DEPONENT AND SCHEME OF THE AFFIDAVIT

1. I am an adult male who has since 26 February 2018 served as Minister of Mineral Resources. Since the announcement of a new Cabinet by the President on 29 May 2019, I have served as Minister of Mineral Resources and Energy. My work address is at the Department of Mineral Resources, Building 2 C, Trevenna Campus, c/o Meintjes and Francis Baard Street, Schoeman Street, Sunnyside, 0007.

2. The facts deposed to in this affidavit are true and correct and, unless otherwise stated, are of my personal knowledge.

3. I have read the founding and supplementary founding affidavits deposed to Mr. Chabana for the applicant.

4. Where I make submissions of law, I do so on the advice of my legal advisors which I accept to be correct..

5. For ease of reference, I refer to the applicant as "*the Council*" or, where historically appropriate, "*the Chamber*". For more than 125 years, the Council was known as the Chamber of Mines. I refer to myself or predecessors as "*the Minister*", to the second respondent as "*the Regulator*" and to the Mineral and Petroleum Resources Development Act 28 of 2002 as "*the MPRDA*". In other respects, I adopt the abbreviations used by Mr. Chabana in his founding affidavit.

6. This affidavit is on behalf of the first and second respondents. This fact, insofar it relates to the second respondent, shall be confirmed by a confirmatory affidavit

deposed to by Mr. Cecil Khosa, Chief Executive Officer of the second respondent.

7. Given the length of the founding papers, and so as to assist this Honourable Court, I have sub-divided this affidavit into two Chapters.

7.1. In Chapter 1, I address two points.

7.1.1. The first concerns the Council's failure to join various others who have a direct and substantial interest in the relief sought in this application.

7.1.2. The second explains the process by which the 2018 Charter was developed. I address this at the outset, since it is of material importance to all that follows in this affidavit.

7.2. In Chapter 2, I address the allegations in the founding affidavit and in the supplementary founding affidavit. In this regard, I follow the scheme used by Mr. Chabana, by which he sub-divided the founding affidavit into seven parts. I do the same in Chapter 2.

8. Whilst every care has been taken to respond to all of the substantive averments in Mr. Chabana's affidavit, any allegation therein contained to which I have not specifically answered must be taken to be in dispute.

CHAPTER 1

(i) Non-joinder

9. The Council has cited only the Minister and the Regulator as respondents in this application. This, I submit, results in the material non-joinder of other stakeholders who have a direct and substantial interest in the relief sought in this application

10. In order to understand the range of stakeholders who have a direct and substantial interest in this application and who ought therefore to have been joined, it is necessary to consider the legislation which underpins the 2018 Charter.

11. The MPRDA rests on the foundational proposition, set out in section 3 of the MPRDA, that mineral resources are the "*common heritage*" of "*all the people of South Africa*". This, I am advised, marked a fundamental departure from the common law, which perceived mineral resources through the prism of property law. As a general proposition, the common law regarded mineral resources as being owned by whomever owned the land in which they were to be found.

12. In *Agri SA v Minister for Minerals & Energy* 2013 (4) SA 1 (CC) the apex Court described the context of the MPRDA in the following words:

> "[1] South Africa is not only a beauty to behold but also a geographically sizeable country and very rich in minerals. Regrettably, the architecture of the apartheid system placed about 87% of the land and the mineral resources that lie in its belly in the hands of 13% of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty. To address this gross economic inequality, legislative measures were taken to facilitate equitable access to opportunities in the mining industry.
>
> [2] That legislative intervention was in the form of the Mineral and Petroleum Resources Development Act (MPRDA). Its commencement had the effect of freezing the ability to sell, lease or cede unused old order rights until they were converted into prospecting or mining rights with the written consent of the Minister for Minerals and Energy (Minister). It also had the deliberate and immediate effect of abolishing the entitlement to sterilise mineral rights, otherwise known as the entitlement not to sell or exploit minerals. This ought to come as no surprise in a country with a progressive Constitution, a high unemployment rate and a yawning gap between the rich and the poor which could be addressed partly through the optimal exploitation of its rich mineral and petroleum resources, to boost economic growth....
>
> [68]... The custodianship of this and other mineral and petroleum resources is, in terms of the MPRDA, vested in the state on behalf of the people of South Africa... The state, as the custodian of these resources, is not seeking or

supposed to be a co-contender with people or business entities for the right to prospect for or mine these minerals. It is a facilitator or a conduit through which broader and equitable access to mineral and petroleum resources can be realised."

13. Section 100(2) of the MPRDA imposes the following obligations upon the Minister:

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

(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."

14. I return, below, to the important question of <u>how</u> the power conferred by section 100(2)(a) is to be interpreted. The Minister and the Regulator, on the one hand, and the Council, on the other, hold very different views in this regard.

15. But leaving that question to one side, it is fundamentally important for the purposes of the non-joinder point to consider the underlined words in the text quoted above. They make it clear that the Charter is not intended for the exclusive benefit of the Council and its members. It is plain from the Council's membership register (annexure "**FA5**") and constitution (annexure "**FA6**") that it represents, at best, only a small proportion of those who are, properly considered, stakeholders in the mining industry and, more generally, in South Africa's mineral resources. The range of stakeholders now goes far beyond only mining rights holders. It is for these reasons that the DMR pursued a wide-

ranging consultation process (which I describe below) in the development of the 2018 Charter.

16. The objects in section 2 of the MPRDA, to which reference is made in section 100(2)(b), are also of importance in relation to the non-joinder point:

> "(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."

17. The Council, with respect, appears not to appreciate that this application directly affects the interests of many others. I refer, by way of one example, to its letter dated 10 May 2019 (a copy of which is attached and marked "**AA1**"). In paragraph 3, the Council (through its attorneys) express the hope for it and the DMR "*to reach a mutually acceptable resolution of the dispute*". That sentiment manifests the Council's failure to appreciate that it is not the only stakeholder whose interests are affected by the application.

18. I am advised that substantially similar questions were raised in a review application brought by Mr. John Hulme Scholes, under case number 50642/15. In that application, Mr. Scholes sought, amongst other things, the review and setting aside of the Original Charter and the Amended Charter. Mr. Scholes was

the first applicant; the law firm (Malan Scholes) was the second; and the Minister was the only respondent.

19. In that matter, the Minister raised, as a point *in limine*, the non-joinder of other parties who had a direct and substantial interest in the relief sought by Mr. Scholes. It is instructive to have regard to the stakeholders who were mentioned in the answering affidavit in that application. I attach an extract from that affidavit, marked "**AA2**". The consultation process is described between paragraphs 72 and 90, and the Stakeholders' Declaration of 2010 (to which I return below) is addressed between paragraphs 91 and 116. I undertake, should it be required, to make available to the Court and to the applicant, a copy of the whole of that affidavit. I make the same undertaking in respect of other extracts of documents or affidavits provided as annexures to this affidavit.

20. I also attach, marked "**AA3**", a copy of the judgment by Mr. Acting Justice Mokoena in which the point of non-joinder was upheld at [22] and [23]. The learned acting judge, noted at [14], the following:

> "The Minister contends that the development and adoption of the Charters ... are a product of several stakeholders in the mining industry who participated in their development and adoption. Based on that, a large portion of would-be litigants whose rights and interest [*sic*] may adversely be affected by the outcome of this application and who would have the right to be parties to the determination of the issued raised ... have not been cited. Some of the stakeholders who participated in the development and adoption of these Charters are named by the Minister in his opposing papers"

21. The process of developing the 2018 Charter entailed a consultation process that was at least as extensive as that which led to the development of previous Charters, if not more so.

22. The 2018 Charter confers rights on various groups of stakeholders including (amongst others) women; youth; BEE entities; local manufacturers; local suppliers; mine communities; and local research and development institutions. Members of each of these groups might therefore be adversely affected if the relief sought in this application is granted.

23. To the knowledge of the Council (then the Chamber) an urgent application was launched on 23 October 2017 under case number 71147/17 for the following relief:

> "Directing that the applicants, Mining Affected Communities United in Action Mining (MACUA), WOMEN FROM MINING AFFECTED COMMUNITIES UNITED IN ACTION (WAMUA) and MINING Environmental Justice Community Network of South Africa (MEJCON) are granted leave for intervention in the above matter".

24. The "*above matter*" referenced in the prayer for relief was the Chamber's application to review the 2017 Mining Charter. A copy of the notice of motion is attached, marked "**AA4**".

25. This is the review application which was not proceeded with as a result of President Ramaphosa's commitment during his 2018 State of the Nation address on 16 February 2018 to "*intensify engagements with all stakeholders on the Mining Charter*", to which I make reference below. This, as I explain below, foreshadowed the process by which the 2018 Charter was developed.

26. By then, argument had already been heard in an application (under case number 41651/2015) for certain declaratory relief in respect of the 2010 Charter, on 9 and 10 November 2017. Judgment in that application was given by the Full Bench on 4 April 2018. This is the judgment to which Mr. Chabana refers (and

upon which the Council relies) in paragraphs 86 to 89 and elsewhere of his founding affidavit.

27. On 28 February 2018, the day when the Chamber's review of the proposed 2017 Charter was set down for argument before a Full Bench of this Division, the application for leave to intervene was called and the Full Bench issued the Order attached marked "**AA5**", in which:

"It is recorded that the 2nd to the 8th Applicants (namely the bodies who applied for leave to intervene), as recognised by the Respondent, the Minister of Mineral Resources, are interest(ed) and relevant stakeholders for the purpose of consultation on the Charter formulation, process."

28. I am advised that the Chamber was represented at Court when this Order was issued.

29. During the consultations which preceded the adoption of the (subsequent) 2018 Charter, the said intervening applicants were recognised as interested parties and stakeholders in accordance with the Order of the Court.

30. The following submissions on the 2018 draft Mining Charter were received from the intervening parties to the 2017 Mining Charter review litigation:

30.1. Submissions made by the Centre for Applied Legal Studies (CALS) in its capacity as representatives of the mining-affected community networks Mining-Affected Communities United in Action (MACUA); Women Affected by Mining United in Action (WAMUA); and the Mining and Environmental Justice Community Network of South African (MEJCON-SA). CALS' representations are to be found in annexure "**AA6**";

30.2. Submissions made by Lawyers for Human Rights (LHR) in its capacity as the legal representative of the mining host communities of Bakgatla

Sefikile, Lesethleng, Babina Phuthi Ba Ga-Makola, and Kgatlu. LHR's representations are to be found in annexure "**AA7**"; and

30.3. A separate submission from the steering Committee of the Mining and Environmental Justice Community Network of South Africa ("*MEJCON*"), on behalf of its members and affiliates who are communities, community based organisations and community members from different parts of South Africa. MEJCON's representations are to be found in annexure "**AA8**".

31. The Council has made no attempt to join any person or body who might properly be thought to represent or otherwise speak for any of these stakeholders. Its failure to do so is inexplicable.

32. Mr. Chabana was present at various meetings convened by the DMR at which representatives of at least some of these stakeholders were present. This is apparent, for example, from minutes of the meeting of the Mining Charter Transformation Task Team ("*MCTT*") held on 3 April 2018. A copy, marked "**AA9**" is attached. Those minutes record twenty-one attendees, representing (in addition to the Council) the CGS (the Council for Geoscience); the DMR; AMCU (the Association of Mineworkers and Construction Union); UASA (the acronym represents "*United Association of South Africa*", although it is nowadays known only by its acronym); SAMDA (the South African Mining Development Association); the Chamber of Mines; NUM (National Union of Mineworkers); and Solidarity (which is also a trade union organisation). None of these bodies, nor any of the stakeholders whom they represent, nor any of the stakeholders to whom specific rights are given under the 2018 Charter, is joined in this application.

33. I therefore submit that the Council's application is bad for material non-joinder of the stakeholders mentioned above.

(ii) The process by which the 2018 Charter was developed

34. Mr. Chabana, in his founding affidavit, provides a rather slender account of how the 2018 Charter was developed. A proper appreciation of that process is fundamental to much of what follows in this answering affidavit. I therefore provide this explanation at the outset of this affidavit.

35. The Original Charter was gazetted and came into force in 2004. Following assessment reviews (which I describe more fully below) in 2009 and 2015, the decision was taken to develop a new Charter, this being the 2017 Charter. Shortly afterwards, however, the Chamber instituted various proceedings, thus resulting in an impasse between the Chamber and the DMR.

36. That impasse was resolved by a statement released by the Presidency on 18 February 2018. A copy is attached and marked "**AA10**". Paragraph 3 reflected a mutual acceptance by the Chamber and the Minister that other stakeholders' interests were also affected by the interdict which the Chamber had sought:

> "The Presidency and the Chamber of Mines have approached the seven other applicants, as well as two amici curiae, namely the National Union of Mineworkers and Solidarity, to advise them of this development, and have encouraged them to similarly postpone their applications.
>
> This is in line with President Cyril Ramaphosa's commitment during the State of the Nation Address to intensify engagements with all stakeholders on the Mining Charter "to ensure that it is truly an effective instrument to sustainably transform the face of mining in South Africa."

37. It was against this backdrop that the consultation process that led to the development of the 2018 Charter began.

38. Consultations soon began with what were known as "*social partners*". The range of attendees is apparent from page one of the minutes of the MCTT meeting dated 3 April 2018, to which I have already referred above.

39. During April and May 2018, the Minister led extensive consultative workshops at various locations, including:

 39.1. Mpumalanga Province in Klarinet, Emalahleni on 6 April 2018;

 39.2. Limpopo Province in Lephalale and Burgersfort on 12 and 13 April 2018;

 39.3. Western Cape Province in Saldhana Bay on 24 April 2018;

 39.4. Northern Cape Province in Khathu on 4 May 2018;

 39.5. North West Province in Klerksdorp and Rustenburg on 10 and 11 May 2018;

 39.6. Eastern Cape Province in King Williams Town on 18 May 2018;

 39.7. Gauteng Province in Merafong on 22 May 2018;

 39.8. Free State Province in Welkom on 25 May 2018; and

 39.9. KwaZulu Natal Province in Newcastle on 31 May 2018.

40. In all, eleven mine community consultations were held, involving some 2,846 people across all nine provinces. In concluding the extensive consultation process with mine communities on 26th May 2018, the Minister reassured mine communities that their invaluable input and comments on the Mining Charter will be taken on board and assist in the formulation of the Charter content. This was also a build up to the Minister Charter summit that was held in July 2018.

41. On 6 June 2018, the DMR published a comprehensive report, entitled "*Mine Communities' Consultations on the Reviewed Broad-Based Socio-Economic*

Empowerment Charter for the South African Mining and Minerals Industry". A copy is attached, marked "**AA11**". This report makes clear the extent to which the DMR had already consulted with stakeholders even before the Draft 2018 Charter was released for public comment.

42. At least two points in this report bear emphasis:

    42.1. The table, in part 2 on pages 4 to 25, lists several hundred stakeholders who had participated in the consultation exercises to date.

    42.2. Part 3 (pages 25 to 32) summarises some of the views yielded from the consultation exercises. Contrary to what is suggested in paragraph 16 of Mr. Chabana's supplementary founding affidavit, the fact that a view was recorded by the DMR does not signify that it shared that view. That quite plainly could not be the case, since the views recorded in Part 3 of this report are often widely divergent.

43. I also refer to table dated June 2018, which summarises in more detail the views of various consultees elicited from consultations at various centres across South Africa. A copy of that table is in annexure "**AA12**". What is striking about the feedback which this table summarises is the extent to which the vast majority of consultees appeared to regard themselves as marginalised or excluded from the mining industry, and therefore from the benefits of South Africa's mineral resources.

44. A detailed summary document, entitled "*Mine Communities' Consultation Report on the Review of the Mining Charter, 2017*", was presented to the Minister. A copy, marked "**AA13**", is attached. It records, in paragraphs 2.3 to 2.5, the range of consultation sessions held, and, in paragraph 3, summarises the various

views expressed. My signature, dated 6 July 2018, appears on page 12 of this document, thus signifying that I have read and considered its content.

45. The consultation process led to the preparation of a Draft Mining Charter, 2018, and to its publication in the *Government Gazette* on 15 June 2018. I attach a copy, marked "**AA14**". In the notice by which the Draft Mining Charter, 2018 was published, I invited written submissions from interested and affected persons, to be submitted within thirty days to Ms. Sibongile Malie, Director: Mineral Policy Development in the DMR. During the course of July 2018, I extended that deadline until 31 August 2018. I refer, in this regard, to a contemporaneous media report, a copy of which is annexed and marked "**AA15**".

46. Subsequent to the publication of the Draft Mining Charter, 2018, the Minister convened the Mining Charter Summit in July 2018. All industry stakeholders, including the Chamber, unions and mining communities actively participated in the summit discussions.

47. On 31 August 2018, the last day for submissions, the DMR issued a press release. A copy, marked "**AA16**", is attached. It reflects the breadth and extent of the consultation process, and the importance of that process. It concluded by quoting me, as follows:

"This followed over three months of consultations with stakeholders, including organised labour, organised business as well as consultations with communities in eleven areas across the country's nine provinces, which culminated in a Mining Charter Summit in July."

48. Submissions were made and received throughout the period announced in the *Gazette* and until the end of the extended period announced by the Minister.

Most submissions were made by email; some were posted; and a few were hand delivered. Some stakeholders were also invited to provide further explanations. In this regard, I refer by way of an example to an email dated 17 April 2018 from Ms. Malie to Ms. Ntsiki Adonis-Kgame, Director: Mining at ENS (annexure "**AA17**"), inviting her to participate. Many other similar emails were sent.

49. The process of assessing feedback and drafting the text of the 2018 Charter involved various individuals from the DMR and the Regulator. Ms. Malie had primary responsibility for collating and assessing feedback. The distribution of the workload between members of the drafting team is illustrated in a task schedule (for 3 to 8 September 2018) and a "*to do*" list, copies of which are to be found in annexure "**AA18**". The drafting team included all of the following individuals:

    49.1. Ms. Ntokozo Ngcwabe: Deputy Director General, Mineral Policy and Promotion, DMR;

    49.2. Ms. Susan Malebe: Deputy Director General, Mineral Regulation, DMR;

    49.3. Mr. Mosa Mabuza: CEO, Council for Geoscience;

    49.4. Mr. Cecil Khosa: CEO, SADPMR;

    49.5. Ms. Sibongile Malie: Director, Mineral Policy Development, DMR;

    49.6. Ms. Sibongile Kunene: Regional Manager, Mineral Regulation, DMR;

    49.7. Ms. Modilati Malapane: Chief Director, Mineral Regulation, DMR;

    49.8. Mr. Pieter Alberts: Chief Director, Legal Services, DMR;

    49.9. Ms. Linda Nkhumishe: Manager, SADPMR;

    49.10. Mr. Kagiso Menoe: Director, Beneficiation Economics, DMR;

49.11. Ms. Kalipa Kewuti: Deputy Director, Mineral Regulation, DMR;

49.12. Mr. Rendani Muthige: Deputy Director, Mineral Policy Development, DMR;

49.13. Mr. Mthokozisi Mtshali: Deputy Director, Mineral Policy Development, DMR;

49.14. Mr. Sibusiso Kobese: Deputy Director, Mineral Policy Development, DMR;

49.15. Ms. Swazi Twala: Deputy Director, Beneficiation Economics, DMR;

49.16. Ms. Jeaniffer Ntome: Assistant Director, Mineral Policy Development, DMR;

49.17. Ms. Mukondi Ndou: Assistant Director, Mineral Policy Development, DMR;

49.18. Mr. Joseph Mphafudi: Transformation Officer, SADPMR;

49.19. Mr Ntiyiso Maluleka: Intern, Mineral Policy Development, DMR; and

49.20. Mr. Ntsundeni: Intern, Mineral Policy Development, DMR.

50. I undertake to procure confirmatory affidavits from the key individuals who participated in this process, being Ms. Ngcwabe, Ms. Malebe, Mr. Mabuza, Mr. Khosa, Ms. Mailie, Mr. Malapane, Mr. Alberts, Ms. Nkhumishe, Mr. Menoe, and Mr. Kobese. I also undertake to file these confirmatory affidavits either with, or as soon after the filing of this answering affidavit, as is reasonably practicable.

51. Several documents provide a record of participation by stakeholders and their contributions:

51.1. Annexure "**AA19**": this is a record of workshops held with various stakeholders, including Solidarity, NUMA, UWASA and SADPMR, between August and September 2018;

51.2. Annexure "**AA20**": this is a record of breakaway sessions held with various stakeholders, including SA Junior Mining Fund, the Association of Designers and Jewellers and the Jewellery Council of South Africa, in July 2018;

51.3. Annexure "**AA21**": this is a list, dated September 2018, of individuals and entities who made written submissions.

52. The Minister attended some of the working sessions and break-away sessions. For example, he was present at the sessions in Magaliesburg, Mount Grace Hotel (3 to 7 September 2018) and Pretoria East, Farm Inn Hotel (13 September 2018). He was briefed on the overall progress made with industry stakeholders and he would provide the required direction.

53. Annexure "**AA22**" and "**AA23**" sets out the various contributions made by stakeholders, with some assessment of those contributions by the DMR. This document was compiled in September 2018.

54. The Draft Mining Charter, 2018 was presented to and supported by Cabinet on 19 September 2018. There then followed a recommendation document, compiled by various members of the DMR (annexure "**AA24**" hereto). Part 1 of that document explains that its purpose is to seek and obtain my approval to gazette the Draft Mining Charter, 2018. It concludes with a recommendation that I approve the publication of the Draft Mining Charter, 2018. As is apparent

from my signature on page 15 of that document, that is what I did, on 26 September 2018.

55. That document was followed by a parallel recommendation document in respect of the Implementation Guidelines (annexure "**AA25**" hereto), which I signed on 13 December 2018.

CHAPTER 2

AD PART 1 OF THE FOUNDING AFFIDAVIT (PARAGRAPHS TO 28 TO 71)

56. Part 1 of Mr. Chabana's affidavit is largely devoted to identifying the parties; explaining the role of the Council and its alleged commitment (since 1992) to transformation. He provides (in paragraphs 11 and 12) a very brief account of some of the interactions which preceded the development of the 2018 Charter, and then (in paragraphs 15 to 15.5) a rather more detailed account of the significance, to the South African economy, of mining. Next, he mentions the judgment of the Full Bench in *Chamber of Mines v. Minister of Mineral Resources and Others* [2018] 2 All SA 391 (GNP) (paragraphs 16 to 20), and then deals with the grounds of review (paragraphs 21 to 27). Last, he mentions several meetings with the DMR which, he says, were intended to avert the need for the present application (paragraphs 27.1 to 27.3).

57. In the paragraphs that follow, I deal with the main themes in Part 1 of Mr. Chabana's affidavit. I address Mr. Chabana's contentions, in paragraph 18 and elsewhere, regarding the Minister's powers under section 100(2) of the MPRDA in Part 2 of this Chapter.

(i) The Council and its alleged commitment to transformation

58. Mr. Chabana makes much of what he alleges to be the Council's commitment to transformation. He deals with this, in particular, in paragraphs 8 to 13, where he states, amongst other things:

58.1. The Council and its members "*have given concrete and substantial expression to that commitment [to transformation]*" (paragraph 8)

58.2. Its members have "*made significant progress on all elements of the Original Charter*" (paragraph 9), as demonstrated by annexures "**FA7(1)**" and "**FA7(2)**".

59. I do not wish to suggest that the Council is not sincere in its belief that it is committed to transformation. But I do wish to point out that the evidence indicates that it has not embraced transformative measures as fully as it might. Several examples suffice:

59.1. In 2009 the DMR undertook a comprehensive review, intended to measure progress of the industry towards meeting the objectives set out in the Original Charter. I attach a copy, marked "**AA26**". It identified shortcomings in the manner in which the industry had implemented the various aspects of the Charter, namely, ownership, procurement, employment equity, beneficiation, human resource development, mine community development, and housing and living conditions. It found that, in these respects, the industry had not embraced "*the spirit*" of the Charter.

59.2. In 2010, various stakeholders (including the Chamber of Mines) signed a Declaration entitled "*Sustainable Development and Growth of the Mining*

Industry, 2010". I attach a copy, marked "**AA27**". Its Preamble (on page 1 thereof) states the following:

> "In addition, stakeholders *recognise* the transformation backlog in the industry, the unsatisfactory pace of which has fuelled socio-economic developmental disparities, influenced workplace inequity, and aggravated the plight of mining areas. Meaningful economic HDSA participation has also been detrimentally affected."

59.3. Another review followed in 2015. It, too, recorded disappointing results. A copy of that review is attached and marked "**AA28**".

59.4. The Chamber, for its part, commissioned two "*rival*" evaluations, the first in 2009 and the second in 2015. I attach, marked "**AA29**", a document which summarises the Chamber's findings. It is of little, if any, significance that the conclusions yielded in the Chamber's two evaluations differ from those in the DMR's assessments.

60. It is precisely because the DMR's assessments found that there was insufficient engagement by the mining industry with transformation that the 2010 Charter (and subsequently, the 2017 Charter) was developed. The DMR's experience, since the adoption of the Original Charter, has unfortunately shown that there was relatively little voluntary engagement with transformation by industry, and such engagement as there had been was generally limited to the more obvious (and easily measurable) aspects of transformation, such as ownership. It generally failed to have regard to the less tangible, but equally important transformative objectives, such as increasing meaningful participation in the mining industry by communities.

(ii) The Council does not represent the whole industry

61. Mr. Chabana alleges, in paragraph 5.6, that the Council "*represents the*

industry". The Council's list of members appears in annexure "**FA5**". It is plain from that list, and also from its constitution (annexure "**FA6**") that the Council does not, in fact, speak for the <u>whole</u> industry.

62. For example, it would appear from these two annexures that the Council does not generally speak for junior or small-scale miners. Their voices were heard, in the consultation process that led to the development of the 2018 Charter, by other representative bodies, such as SAMDA (the South African Mining Development Association). I refer again to the attached minutes of the DMR's Transformation Task Team's meeting of 3 April 2018. The attendees listed at 14 and 15 of the attendance register on the first page are identified as SAMDA members. It is apparent at several junctures in these minutes that SAMDA's representatives were not *ad idem* with the Chamber on various key issues. This is also apparent from the minutes of various other meetings held before the Draft 2018 Charter was released for comment, most notably the meeting held on 2 May 2018 (annexure "**AA30**"). At that meeting, there were widely differing submissions as to ownership and employment equity. An even more stark lack of common ground with the Chamber's views is evident from the submission to the Minister (annexure "**AA31**") pursuant to the Junior Indaba, held on 5 and 6 June 2018, attended by over 200 junior miners. Their submission included the following:

> "It is not hard to see how the odds are stacked against both the young aspiring soccer stars and the wannabe explorers. One's odds would be better at Sun City winning a Jackpot, than that of either of our 'heroes'.
>
> But, despite the many challenges, a few (less than one in a thousand) do make it to the next phase mine (development). This phase requires huge investment, focus and even more commitment. In the soccer analogy, these few rising stars should not be held back by legacy, social or community distractions. Every single cent, every single minute and all of our energy needs to be deployed to achieve success!"

63. These are just a few examples of why it is that the Council speak, at best, for only a part of the mining industry.

64. The need for engagement with the wide body of stakeholders has been clear for more than two decades. The MPRDA and subsequent mining-related legislation stem from the 1998 White Paper "*A Minerals and Mining Policy for South Africa*". A copy of the White Paper is attached and marked "**AA32**". It includes (in part 1.4) a section specifically devoted to small-scale miners. It noted, in part 1.4.1, some of the challenges faced in South Africa by small-scale miners, and, in part 1.4.2, established the Government's intention to:

> "... encourage and facilitate the sustainable development of small- scale mining in order to ensure the optimal exploitation of small mineral deposits and to enable this sector to make a positive contribution to the national, provincial and local economy."

65. It is against this backdrop that I deny the allegation in paragraph 5.4 that the Council is "*the principal advocate of major policy decisions endorsed by the mining companies*". That is true only to the extent of those companies which it in fact represents.

(iii) Interactions which contributed to the development of the 2018 Charter

66. Mr. Chabana, in paragraph 11 and 12, provides a brief account of some of the interactions that preceded the development of the 2018 Charter. Whilst I do not deny the events that he alleges, it is striking that he makes almost no mention of the various categories of other stakeholders who also participated in the development of the 2018 Charter. They merit no more than a passing reference, in paragraph 12 of the founding affidavit.

67. I refer, however, to the rather more detailed account which I provided in Chapter 1 of this affidavit, of the process of discussion and consultation which took place both before and after the publication for comment of the Draft 2018 Charter, including workshops, breakaway sessions, written submissions, follow-up sessions and many other interactions that resulted in hundreds of stakeholders' being consulted.

(iv) Significance of signing the Original Charter

68. Mr. Chabana points out, in paragraph 5.6, that the Chamber was a signatory to the Original Charter. This is correct. The fact that the DMR and the Minister sought to obtain signatures to the Original Charter demonstrates an important point: namely, that they sought to obtain a large measure of consensus from various participants (broadly understood) within the mining industry the process of "*developing*" the Charter. This is explicitly recorded in its Preamble:

> "The signatories have developed this Charter to provide a framework for progressing the empowerment of historically disadvantaged South Africans in the Mining and Minerals Industry"

69. There was no express or implied obligation for the Minister to elicit the support of signatories to the Original Charter. Section 100(2) of the MPRDA requires the Minister (and no-one else) to "*develop*" the Charter. At most, there was an obligation to consult. The Minister and the DMR did so, and did a lot more than this.

(v) The Original Charter included an express commitment to "*review[] this Charter if required*"

70. There is a second point of some significance from the fact that the Council was a signatory to the Original Charter. It ends (in clause 4.14) with an express commitment to keep the (Original) Charter under review, in these terms:

> "It is recognised that the achievement of the objectives set out herein entails an ongoing process. ...
>
> Parties hereto agree to participate in annual forums for the following purposes:
>
> - Monitoring progress in the implementation of plans;
> - Developing new strategies as needs are identified;
> - Ongoing government/industry interaction in respect of these objectives;
> - Developing strategies for intervention where hurdles are encountered;
> - Exchanging experiences, problems and creative solutions;
> - Arriving at joint decisions;
> - Reviewing this Charter if required" (my underlining)

71. This commitment, and in particular the underlined words, plainly foreshadow that the Charter would not be fixed in time, and that it would, of necessity, be reviewed. The word reviewed, as used in clause 4.14, means "varied or amended". Any lesser meaning would make the commitment in clause 4.14 somewhat meaningless. As my predecessor, Mr. Zwane explained in paragraph 53 of his answering affidavit in the application launched on 7 August 2017 by the Chamber of Mines under case number 43621/17:

> "Going forward, the 2014 charter, in its terms envisaged that its provisions had to be reviewed. This was to assess compliance with the 2004 charter and to cater for the inevitable adjustments and new situations and circumstances that would arise in the future, and lessons learned from the past"

72. I share the same view and interpretation of the commitment by signatories (including the Council) in clause 4.14 of the Original Charter.

73. The Chamber is also one of the signatories to the Stakeholders' Declaration of 2010. That document includes a commitment to "*finalise the review of the Mining Charter by August 2010*". The fact of this specific commitment was alleged in paragraphs 62 and 63 of the answering affidavit deposed to by my predecessor, Mr. Zwane, in the application under case number 43621/17. Those allegations were addressed by Mr. Chabana in paragraph 22 of his replying affidavit. He did not deny this commitment to "*finalise the review of the Mining Charter by August 2010*".

74. The Chamber of Mines, in its 2009/2010 Annual Report made express reference to the manner in which the Original Charter was amended. A copy of that Report is attached and marked "**AA33**". It stated, on page 12:

> "In an effort to reposition the South African mining industry, the sector has identified strategies to address identified shortcomings, <u>signed a joint mining declaration</u> with 13 commitments, <u>and amended the Mining Charter</u>"

75. I have stressed these points, because they demonstrate the extent to which the Council has subsequently changed its position.

76. In paragraph 18.6 of its replying affidavit in the application under case number 43621/17 (in response to the passage I quoted above) Mr. Chabana said the following:

> "The review was a review of the implementation rather than of the content of the Charter. The charter would operate for ten years after which it would cease to apply, section 100(2)(a) of the MPRDA envisaged the development of only one Charter and that within six months of the taking effect of the MPRDA. The contents of these paragraphs are accordingly denied to the extent that it is alleged that any other review was contemplated"

77. I cannot speak for what was contemplated by those who participated in the process by which the Original Charter was developed. But I can assert with some confidence that the meaning for which Mr. Chabana contended in the paragraph quoted immediately above is not one that emerges from an objective interpretation of clause 4.14 of the Original Charter, having regard to the ordinary rules by which statutes and comparable instruments are to be interpreted.

AD PART 2 OF THE FOUNDING AFFIDAVIT: THE COUNCIL'S SUBMISSIONS REGARDING THE INTERPRETATION OF SECTION 100(2) OF THE MPRDA (PARAGRAPHS 28 TO 71.2)

78. The main focus of Part 2 of the founding affidavit is the Council's submissions in relation to the powers conferred upon the Minister by section 100(2) of the MPRDA. Mr. Chabana alleges, in particular:

    78.1. the Charter is a "*formal policy document*" which cannot contradict, conflict with or go further than the MPRDA (paragraphs 42 to 47);

    78.2. the Charter is not law (paragraphs 47 to 50);

    78.3. there is no express or necessary implication of delegated law-making power to the Minister, and the Minister's view therefore conflicts with the separation of powers (paragraphs 51 to 57.2).

79. Each of these allegations amounts to a submission as to the proper interpretation of a section in an Act of Parliament. Each, therefore, is more properly a matter for legal argument, to be set out and responded to in the parties' respective heads of argument. I therefore confine my responses in this Part to some of the main points that are to be developed in legal argument in due course.

80. Mr. Chabana accepts, in paragraph 28 of the Chamber's founding affidavit in the application under case number 43621/17, that the mandate to "*develop*" a Charter in section 100(2) "*does not fall into a well-known juristic niche*". He makes the same point in paragraph 29 of the founding affidavit in this application. I agree. That power appears to be of a *sui generis* nature.

81. He also accepts (paragraph 29) that the nature, purpose and scope of the Charter must accordingly be found "*within the four corners of the MPRDA*". I agree with that too.

82. A purposive interpretation of section 100(2) yields the conclusion that the Charter which it contemplates must necessarily be of a binding character. Were that not so, whatever Charter were drafted by the Minister would be incapable of achieving the purposes set out in section 100(2). Those purposes include to <u>ensure</u> the attainment of the Government's stated objectives of redressing historical, social and economic inequalities. They also include the objective of "*set[ting] the framework for targets and time table*" for effecting the entry into and active participation of historically disadvantaged South Africans in the mining industry. Targets become mere aspirations if they are not of a binding quality; and the purpose of <u>ensuring</u> any particular result would be frustrated were the Charter not to have (some) teeth.

83. I, as with my predecessors, understand that the transformative purposes intended by section 100(2) necessarily require, first, that the Charter be binding, and second, that it be amendable to review and variation from time to time. The latter proposition emerges from the fact that transformation is not a static goal, nor is the manner in which it is understood and interpreted fixed in time. It therefore follows that as society changes, so too might the manner in which

transformative goals are articulated. Thus understood, the power conferred by section 100(2) is necessarily of an organic nature.

84. As I have already explained, the Chamber appears in the past to have held much the same view. This is apparent from the fact that it subscribed to the Original Charter and thereby endorsed its express commitment to the subsequent review of the Original Charter. That view is also evident from the Chamber's subscription to the 2010 Stakeholders' Declaration.

85. Mr. Chabana provides no compelling justification for his contention that the Charter is a mere policy instrument, and certainly none that emerges from a purposive interpretation of section 100(2) of the MPRDA. For the reasons I have set out above, I deny that this section contemplates anything less than a Charter of a legally binding character, and I consequently deny that the 2018 Charter is a mere policy instrument.

Ad paragraph 28 to 71.2

86. I deny the interpretation suggested by Mr. Chabana in paragraphs 39, 42, 55, 56 and elsewhere of the powers conferred by section 100(2).

87. I deny the interpretation suggested by Mr. Chabana in paragraphs 43 to 46 and 58 to 62 and elsewhere of the proper role of the Charter, and his allegations in paragraphs 47 to 50 concerning the Charter's legal status.

88. Every other allegation or submission in the paragraphs under reply concerns propositions of law, not fact. They will be addressed in the respondents' heads of argument and in oral submissions to this Court.

AD PART 3 OF THE FOUNDING AFFIDAVIT: OWNERSHIP ELEMENT AND DISPOSAL OF BEE SHAREHOLDING (PARAGRAPHS 72 TO 145)

89. In this Part, the Council takes issue with clause 2.1 (introductory sentence), and clauses 2.1.1.2, 2.1.1.4, 2.1.1.5, 2.1.1.6 and 2.1.6. Its primary complaint is set out in paragraph 74 of the founding affidavit: namely, that the Minister is not empowered to make or impose new obligations on holders of existing mining rights outside the scope of the MPRDA and its regulations. Mr. Chabana, in paragraph 74, then identifies the various grounds of review upon which the Council relies.

90. I do not accept that any of the clauses of the Charter to which the Council takes issue fall to be reviewed and set aside. For ease of reference, I address the Council's complaints in the sequence in which they appear in the founding affidavit.

(i) Clause 2.1 (paragraphs 75 to 85)

91. The Council takes issue with clause 2.1, which ends with the words "*a mining right holder must comply with the following*".

92. The Council's primary complaint, variously articulated in paragraphs 75 to 87, is that this clause impermissibly seeks to impose new obligations on mining right holders. Inherent in this complaint are the contentions, first, that the MPRDA and its Regulations are exhaustive of the obligations of a mining right holder (paragraph 78); and second, that the Minister is *functus officio* once he or she has made a decision to grant a mining right (paragraph 81).

93. With respect, Mr. Chabana overlooks a number of important considerations.

93.1. First, one of the hallmarks of mining rights is that they are usually of a very long duration. An initial grant may be for as long as 30 years, and renewals may be for further periods of up to a 30 years. On the Council's version, the only time when the targets contemplated by section 100(2) of the MPRDA might be applied to a mining right are at the outset, when the right is granted. If that were so, the Minister's power to develop (and, by implication, to review from time to time) a Charter intended to set transformative targets, would be of very limited effect. That, I contend, could not possibly have been the legislative intention in drafting section 100(2) of the MPRDA, least of all when regard is had to the organic nature of any measures intended to address historic disadvantage. To take one obvious social example: the population of South Africa today is around 56.72 million; in 2002, when the MPRDA was enacted, it was around 47 million. It would be meaningless to fix transformative measures, once and for all, in the past.

93.2. Second, the Council seemingly gives no weight to section 3(1) of the MPRDA, which provides that

> "Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans."

93.3. I submit that one consequence of the State's legal custodianship is the necessity for it to continue to exert some control over mineral resources after a mining right has been granted, in much the same way that land owners are not immune from regulatory, environmental and other controls by local authorities after they have acquired title to that land. That custodianship, I submit, is a material consideration which falls to be taken into account when interpreting the Act, in the manner required by section 4. It also, I contend, is of material importance in interpreting the true limits of the powers conferred by section 100(2) of the MPRDA.

94. With these considerations in mind, it is instructive to consider the provisions of the MPRDA to which Mr. Chabana makes reference. As he points out in paragraph 79.2, section 23(1) requires the Minster to grant a mining right if various conditions are satisfied. Included in that list is section 23(1)(h), which provides as follows:

"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."

95. The objects set out in sections 2(d) and (f) read as follows:

"(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;

...

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

96. Neither object would be capable of fulfilment if the mining right holder's obligations were fixed in time as at the date when the right was granted, without any regard being had to subsequent changes in the society to which the MPRDA's transformative considerations apply. Thinking about transformation has developed in the seventeen years since the MPRDA was enacted, and it will no doubt continue to evolve over the lifetime of a mining right with a duration of up to 30 years. Those changes in thinking are reflected in successive

versions of the Charters. If regard could not be had to changes in society, the objects of section 2(d) and (f) would not be satisfied.

97. It is precisely for these contextual reasons that I contend, elsewhere in this affidavit, that the Minister's powers in section 100(2) to "*develop*" a Charter falls to be understood in an organic manner, thus including the power to review and amend the Charter from time to time.

98. Save as is consistent with the aforegoing, I deny the remaining allegations in paragraphs 75 to 85.

(ii) The order granted in previous litigation (paragraphs 86 to 92)

99. Mr. Chabana, in paragraphs 86 to 89 of the founding affidavit, deals briefly with the "*once empowered, always empowered*" principle. It stands in contradistinction to the views of previous Ministers, under previous Charters, that a mining right holder has a continuing obligation to maintain a 26% (now 30%) HDSA ownership level throughout the lifetime of a mining right. He also deals with the judgment under case number 41661/2015, in which a majority found in favour of the Council's view.

100. That finding, with the greatest of respect, is of no particular significance in relation to the hearing of this application. As Mr. Chabana pointed out in paragraph 89, the judgment was (at the time when he deposed to his affidavit) subject to an application for leave to appeal. The application has subsequently been granted. It is against this backdrop that the State Attorney, acting for the first and second respondents, has written to the Deputy Judge President to request that this application be heard by a Full Bench. I attach a copy of his

letter, marked "**AA34**". This request was made in order to ensure that the court hearing this application is able to consider every material issue without being bound by which was held in the judgment under case number 41661/2015.

101. Save as is consistent with the aforegoing, I deny the remaining allegations in paragraphs 86 to 92.

(iii) Renewals of existing mining rights (paragraphs 93 to 97)

102. The Council alleges, in paragraph 96, that the Minister has no power to require compliance with further requirements as a pre-condition for the granting of a renewal, and that the provisions of the Charter therefore go beyond section 24 of the MPRDA. He continues, in paragraph 97, to allege that clauses 2.1.1.2, 2.1.1.5, 2.1.1.6 and 2.1.6.2, go beyond the Minister's powers.

103. I deny that this is so.

104. Section 24(3) of the MPRDA provides as follows:

> "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 plan; and
>
> (d) conditions of the environmental authorisation."

105. I have already explained, above, that the Charter comprises "*any other law*", as contemplated by section 24(3)(a) since it is an "*enactment having the force of law*" as the word "*law*" is defined in the Interpretation Act 33 of 1957. Consequently, and contrary to what Mr. Chabana alleges, it is entirely appropriate for the Minister, in considering a renewal application, to consider

whether the applicant has complied with the Charter, including in its incarnations subsequent to the initial grant (or previous renewal) of the mining right.

106. This conclusion, I suggest, is fortified by the fact that section 24(3) of the MPRDA contemplates renewals for up to 30 years. I refer, in this regard, to the annexures "**AA35**", which provides a list (with identificatory particulars of mining right holders redacted) the duration of mining rights granted in the Free State. The length of the mining rights will be apparent.

107. On the Council's version, a mining right holder might in effect be required – for up to 60 years – to comply with nothing more demanding than the Charter requirements that were in force at the time when the mining right was first granted, more than half a century ago. That interpretation, with respect, cannot possibly be what parliament intended when it enacted section 100(2) of the MPRDA.

108. I therefore deny that there is any basis for impugning clauses 2.1.1.2, 2.1.1.5, 2.1.1.6 and 2.1.6.2 of the 2018 Charter.

109. Save as is consistent with the aforegoing, I deny the remaining allegations in paragraphs 93 to 97.

(iv) Transfers of existing mining right (paragraphs 98 to 105)

110. Mr. Chabana contends that clause 2.1.1.4 falls to be reviewed and set aside. It clause provides as follows:

> "The recognition of continuing consequences, in respect of an existing mining right, shall not be transferrable and shall lapsed upon transfer of such mining right or part thereof"

111. "*Continuing consequences*" is a reference to the proposition established in clause 2.1.1.1:

> "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"

112. Mr. Chabana relies upon section 11(2)(b), read with section 23 of the MPRDA, for the propositions (set out in paragraphs 104 and 105 of the founding affidavit):

    112.1. that the Minister is not empowered to impose additional requirements upon a cessionary or transferee;

    112.2. that this is in effect what clause 2.1.1.1 does, and

    112.3. that clause 2.1.1.1 therefore falls to be reviewed and set aside.

113. I deny these allegations. With respect, the sections of the MPRDA upon which Mr. Chabana relies in fact demonstrate the contrary.

114. Section 11(2)(b) deals with the Minister's power to consent to the cession, transfer or other disposition of a mining right. It provides as follows:

> "(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."

115. The cross-reference to section 23 is important. I have dealt with it, and in particular, section 23(1)(h), above. That section deals with factors that are relevant in considering the granting of an application for a mining right. Section 23(1)(h) refers to the following criteria:

"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."

116. If, as I have explained above, it is correct that section 23(1)(h) brings into consideration the Charter in its present form (including, therefore, clause 2.1.1.1 of the 2018 Charter), then by force of the same reasoning it follows that the Minister has the same power when considering an application under section 11 of the MPRDA for permission to transfer, cede or otherwise dispose of a mining right.

117. I therefore deny that clause 2.1.1.4 is reviewable on any of the grounds identified by Mr. Chabana.

118. Save as is consistent with the aforegoing, I deny the remaining allegations in paragraphs 98 to 105.

(v) Ownership: clause 2.1.6 of the Charter (paragraphs 106 to 111)

119. Mr. Chabana complains that clause 2.1.6 appears, from its heading, to deal not only with new mining rights but also to existing mining rights, and contends that the reference to existing mining rights is in error. He gives several reasons (in paragraphs 107 to 109) for this contention.

120. I deny that the reference to "*existing rights*" is in error. The heading to clause 2.1.6 correctly reflects the Minister's intention.

121. The allegations in paragraphs 106 to 111 are matters for legal argument.

(vi) Ownership: clause 2.1.3 to 2.1.7 of the Charter (paragraphs 112 to 113)

122. Mr. Chabana, in paragraphs 112 to 113, makes reference to the substantive content of clauses 2.1.3, 2.1.4, 2.1.5, 2.1.6, 2.1.7 and clause 7.2 and the

Scorecard. He explains that the Council seeks the review of these clauses, on the grounds set out in the sub-paragraphs that follow.

123. I deny that there is any basis for the review of these clauses.

(vii) Ownership: manner of distribution of 30% ownership (paragraphs 114 to 115)

124. Mr. Chabana takes issue with clauses 2.1.3.2 and 2.1.4 of the Charter, which require a specific distribution of the 30% shareholding. He does so on the basis that there is no section in the MPRDA which authorises the Minister to make such a provision.

125. I dispute the correctness of these contentions on at least two bases.

126. First, section 100(2) is framed in wide terms and requires the Minister to:

> "develop a broad-based socio-economic empowerment Charter that will set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources"

127. The wideness of these terms necessarily require the Minister to use his discretion to establish what falls within their parameters. If, as the Council now contends, express authorisation for every conceivable exercise of the powers conferred by section 100(2) were also required, that section would serve no useful purpose. This cannot therefore have been what the legislature intended.

128. I note that Mr. Chabana does not allege that clauses 2.1.3.2 and 2.1.4.2 also go beyond the limits specified in section 100(2), for this reason.

129. That, then, leaves the complaint (in paragraph 115) that clauses 2.1.3.2 and 2.1.4 constitute a fettering (if not an exclusion) of the Minister's discretion. I deny that this is what these clauses do.

130. There are sound and practical justifications for requiring a specific distribution. In the past, mining companies tended to "*empower*" simply by granting equity to BEE companies, whilst ignoring communities or employees. This was the product of a very narrow conception of transformation. It fell far short of the object, in section 2(d) of the MPRDA, of "*substantially and meaningfully expand[ing] opportunities for historically disadvantaged persons*". It is against that backdrop that the 2018 Charter now makes requirements for a specific distribution. I therefore deny that clauses 2.1.3.2 and 2.1.4 exceed the permissible limits of the powers conferred upon the Minister by section 100(2) of the MPRDA.

131. Second, the Council, in its comments on the Draft 2018 Charter (at paragraph 7.3.2 on page 26), had this to say in relation to the principle of distribution, as set out in clause 2.1.3.2:

> "The MCSA acknowledges the shareholding distribution as proposed of 8% / 8% / 14% as a policy choice, even though the MCTTT had proposed a distribution of 5% / 5% / 20%."

132. In other words, the Council then had no objection to the principle that the Minister could prescribe how the 30% BEE shareholding should be distributed; it simply disagreed with the spread proposed by the Minister. Nowhere does Mr. Chabana explain the Council's sudden apparent *volte-face* on the principle of distribution. His failure to do so calls into question the plausibility of the Council's present stance.

133. I therefore deny that there is any coherent basis for the Council's objection to those clauses which require a specific distribution of shareholding.

134. Save as is consistent with the aforegoing, I deny the remaining allegations in paragraphs 114 and 115.

(viii) Ownership: obligation to retain 30% ownership at all times (paragraphs 116 to 126)

135. The Council takes issues with clauses 2.1.5.2 and 7.2 of the 2018 Charter, and its Scorecard.

136. Clause 2.1.5.2 provides as follows:

> "The prescribed minimum 30% target shall apply for the duration of the mining right"

137. And clause 7.2 provides as follows:

> "For Mining right holders, the Ownership and Mine Community Development elements are ring-fenced, requiring 100% compliance at all time"

138. The Council contends that these clauses are reviewable on two main grounds:

138.1. first, by reason that the Minister is not empowered to impose a continuing obligation to maintain a minimum HDP ownership level (paragraph 116); and

138.2. second, because these clauses, when read with clause 2.1.6.1, are not clear and fall to be set aside for vagueness.

139. I address each point in turn.

140. The vagueness point is set out in paragraphs 117 to 119 of the founding affidavit. The essence of this complaint appears to be that the rule stated in clauses 2.1.5.2 and 7.2 appears to be subverted by clause 2.1.6.1, which recognises the consequences of empowerment deals. This, Mr. Chabana alleges, is because

clause 2.1.6.1 "*apparently detracts from this obligation*". I deny that this is so. I am advised that, where possible, clauses within the same instrument should be read in a manner that upholds the validity of each clause. Read together, clauses 7.2, 2.1.5.2 and 2.1.6.1 contemplate three scenarios: first, where the right holder is factually compliant with the minimum target; second, where the right holder is not factually compliant with the minimum target; and third, where the right holder is not factually compliant with the minimum target (by reason of the disposal of a BEE shareholding) but is nonetheless deemed to be compliant. Clause 2.1.6.1 makes provision for the third scenario.

141. The lack of power point is set out in paragraphs 119 to 125 of the founding affidavit. Here, Mr. Chabana contends that the Minister does not have the power to require a mining right holder to "*top up*" its HDP ownership if, for whatever reason, its HDP ownership falls beneath the minimum level prescribed by the Charter.

142. Mr. Chabana then sets out several sub-components of this argument.

143. First, he contends, in paragraph 122, that the majority of the Gauteng High Court has already pronounced on this point. I repeat what I said above in this regard.

144. Second, he alleges (paragraph 124) that the Minister confuses quotas with empowerment. I deny that this is so. This a genuine empowerment objective, plainly reconcilable with section 100(2), since its obvious (and only) purpose is to ensure meaningful participation by black people (including communities and workers) throughout the lifetime of the mining right.

145. Third, he alleges that the Council's interpretation of the MPRDA is in line with the objectives of the MPRDA, including "*the expansion of opportunities for HDPs*

to invest in the mining industry" (paragraph 123). He goes on to allege that the requirement of a 30% HDP shareholding at all times (save in the circumstances in clauses 2.1.6.1.1. to 2.1.6.1.4) is irrational. Mr. Chabana gives several reasons:

145.1. First (paragraph 123.1), to subject HDP shareholders or others to "*lock-ins*", whether for a third of the duration of the mining right or longer, would reduce the value of their investment. I deny that this is so. The MPRDA does not lock in any participant, nor is "*investment*" the primary purpose of these transformative purpose of these measures. An HDP shareholder or other economic participant enters into this venture on the basis of an agreement with the mining right holder. That agreement is concluded in a commercial context and at arm's length. The duration is part of the price of the bargain. It is open to mining right holders to protect themselves by contracting with BEE partners on the basis that they must remain in place for a specified period, or by contracting for a right of first refusal in favour of the company, should the shareholder decide to sell.

145.2. I deny that the mechanism described by Mr. Chabana would reduce the value of an investment. Far from it: the duration is part of the bargain. Lock-ins are, in any event, not an unknown phenomenon in relation to the measures intended to redress historical disadvantage. Reconstruction and Development (RDP) houses, for example, are provided at a price below their true market value, but subject to the condition that they cannot be sold for a certain amount of time. That is also a "*lock-in*", to adopt Mr. Chabana's term.

145.3. Next, Mr. Chabana submits (paragraph 123.2) that, if there were not lock-in arrangements, mining companies would suffer such cost, uncertainty and administrative burden that might serve as a disincentive to investment in the mining industry. I deny this allegation. For the reasons I have already explained, lock-in arrangements are part and parcel of the bargain by which HDP owners are likely to acquire ownership. That, in itself, addresses Mr. Chabana's point in the alternative.

145.4. Last, Mr. Chabana (in paragraphs 124 to 125) makes several points regarding the advisability of adopting the measures contemplated by the clauses at issue. With respect, the Council's views as how better these clauses may have been worded are irrelevant. They do not make out any case for review.

146. Mr. Chabana, in any event, misses the real point that the requirement of a 30% minimum is clearly a "*target*", as contemplated by section 100(2) of the MPRDA. It is imposed in order to prevent dilution of BEE ownership. It is intended to change the racial profile of the industry. This, I submit, is exactly what the Charter is intended to facilitate.

147. Leaving aside the pending appeal (to which reference is made above), the answer to this complaint lies in my contention that a mining right holder is not bound solely by the Charter as it stood when the mining right was granted. The Charter, on the proper interpretation of section 100(2) of the MPRDA, is necessarily of an organic nature. There is therefore no reason why the Minister may not require a mining right holder to "*top up*" its HDP ownership.

148. Save as is consistent with the aforegoing, I deny the remaining allegations in paragraphs 116 to 125.

(ix) Ownership: beneficiation equity equivalent against the ownership target (paragraphs 126 to 145)

149. Mr. Chabana deals with the provisions in the Original Charter, and in the 2010 and 2017 Charters, that dealt with off-setting. Perhaps unsurprisingly, he contends (in paragraph 130) that the provisions in the Original Charter were "*rational and reasonable*". He then takes issue with the manner in which off-setting was dealt with in the 2010 Charter (paragraphs 131 to 133), 2017 Charter (paragraph 134) and the 2018 Charter (paragraphs 135 to 145).

150. The Council's allegations in relation to the previous Charters, with respect, are of no relevance to the grounds of review upon which it now relies. I therefore address only the contentions that relate to the 2018 Charter, save to the extent that there is some relevance in a comparison between those contentions and the Council's views in relation to previous Charters.

151. Mr. Chabana advances a number of complaints:

151.1. first, that the definition of "*beneficiation*" in the Charter is unauthorised, because that term is defined in section 1 of the 2018 Charter (paragraph 135);

151.2. second, the 11% off-set provided for by the 2010 Charter is now reduced to 5% and may only be claimed against a maximum of 5% of the BEE entrepreneur shareholding (paragraph 136): this, he says, amounts to an attempt retrospectively to "*extinguish*" credit or offsets conferred by the

Original Charter and even the curtailed ones in the 2010 Charter (paragraph 138);

151.3. third, that the meaning of clause 2.1.7.1.2 of the 2018 Charter is unclear (paragraph 137).

152. It appears to me that the second complaint – namely, the retrospectivity issue – is the Council's primary complaint. In this regard, Mr. Chabana raises several points:

152.1. First, the Council's members have relied upon credits or offsets when entering into empowerment transactions and more generally in planning their affairs. They would therefore be materially prejudiced if they were retrospectively to be deprived of those credits or offsets (paragraph 139). Mr. Chabana, with respect, fails to have regard to clause 2.1.7.1.2 of the 2018 Charter, which provides the following:

> "An existing mining right holder [*who*] claimed the eleven (11) percentage points beneficiation offset prior to the commencement of Mining Charter, 2018, shall retain the offset for the duration of the mining right."

152.2. The harm of which Mr. Chabana complains therefore does not arise, nor does any question of retrospectivity.

152.3. Second, Mr. Chabana contends that "*retrospective amendments*" render the law uncertain (paragraph 140). Mr. Chabana is surprisingly coy about <u>what</u>, exactly, it is that he alleges has been amended. On his version, it can only be an aspect of the law that had been amended. (I am unaware of any objection to the amendment, with retrospective effect, of a policy instrument, nor can I conceive of how such an amendment would affect a mining right holder). This unstated but obvious premise, of course, contradicts the Council's insistence, elsewhere in the founding affidavit, that the Charter does not constitute anything more than a "*policy*" instrument, and most certainly not one which constitutes law. What is clear, however, is that clause 2.1.7.1.2 protects the position of those mining right holders who have already claimed the 11% offset prior to the commencement of the 2018 Charter. Those who had not already made such a claim do not stand to be deprived of anything.

152.4. Third, the retrospective "*withdrawal*" of "*compensating advantages conferred in earlier Charters*" is not authorised by section 100(2) of the MPRDA (paragraph 141). There are at least three responses to Mr. Chabana's complaint.

152.4.1. First, for the reasons set out elsewhere in this affidavit, section 100(2) does not freeze the application of Charter requirements to the incarnation of the Charter that was in force and effect at the time when the mining right was granted. If that were so, a mining right, granted for 30 years and renewed for a further 30, could be immune from any subsequent development of the Charter for over half a century. This is plainly not what the legislature intended.

152.4.2. Second, Mr. Chabana again contradicts his earlier position that the Charter amounts to no more than a "*policy instrument*". That contention is also contradicted by his admission, in paragraph 130 of the founding affidavit, that the off-setting provisions in the Original Charter, were "*rational and reasonable*" (paragraph 130). On the force of Mr. Chabana's own reasoning, if the 2018 Charter (because of the limits of the Minister's power under section 100(2) of the MPRDA) is no more than a policy instrument, then the same must also be true of the Original Charter. If that is indeed so, then it is difficult to see (on the force of Mr. Chabana's argument) how the Original Charter could legitimately have made any provision for off-setting, let alone provisions which the Council now regards as "*rational and reasonable*". A mere "*policy instrument*" does not have the effect of "*withdrawing*" an "*advantage*" already enjoyed by a mining right holder.

152.4.3. Third, section 100(2) is worded in broad terms which make plain that the intention of the legislation was not that every provision of the Charter should be authorised in express terms. It is sufficient if each such provision can be related back to the broad terms in which section 100(2) is worded. Legal argument will be addressed to the question of how section 100(2) is to be interpreted.

153. Mr. Chabana, in paragraph 143, raises a further complaint, namely, that there is no rational basis for the reduction of the limit of the beneficiation offset from 11% of the 26% ownership target (in relation to existing rights) or 5% of the 30% ownership target (in relation to new rights). He raises a number of points in apparent support of this contention:

153.1. First, he contends, a mining right holder "*should*" be able to offset 100% of its 26% or 30% target. The apparent basis for this contention is an alleged potential inequality between (a) a holder which satisfies the 26% ownership target but which has no beneficiation obligations, and (b) a holder which does not satisfy the 26% ownership target but which has substantial beneficiation projects against which to off-set the ownership target (paragraph 143).

153.2. Second, he contends, the 2018 Charter gives no indication of how the 11% or the 5% is to be calculated. Consequently, a mining right holder does not know, simply by looking at the 2018 Charter, whether it has reached either target (paragraph 143).

154. Again, several points can be made in response to these allegations.

154.1. First, to permit mining right holders to off-set 100% of their targets would defeat the whole purpose of transformation, being to bring historically disadvantaged South Africans into the mainstream mining economy. If 100% off-setting were permissible, one could end up with 100% white owned companies and no black participation.

154.2. Second, the Minister set the value at 11% based on what he had previously been advised by the mining industry: namely, that beneficiation is not its core business and that they should therefore not be required to carry out beneficiation. Retrospective benefit is not recognised for off-setting purposes: it only applies to those who started beneficiation programmes after the publication of the Charter, thus adding to the size of the economy and creating additional employment which would not have existed prior to the introduction of this provision.

154.3. Third, when the 2004 Charter was introduced, it was envisaged that in the first five years, mining right holders would focus primarily on the BEE transactions, so as to reach a level of 15%. The DMR selected 11% as the ceiling for the permissible beneficiation offset, so as not to erode the protection given by the Companies Act 1973 to minority shareholders.

154.4. Fourth, the DMR has now decided to reduce that level to 5%. There is nothing irrational or arbitrary about that decision. Previous Charters did not make provision for a minimum ownership percentage for employees and communities. Those minimum ownership requirements were introduced in the 2018 Mining Charter. The first reason considered the fact the percentage availed to the BEE entrepreneur, in cases where the mining right holder uses the full 11% offset, would only have access to an ownership stake of 9% maximum. This is down from an ownership stake of just under 15% in the previous mining charters, thus reversing the transformation agenda that the charter is seeking to address.

154.5. Fifth, the uptake of the beneficiation offset is, in any event, very low. In practice, it has been used by entities from the granite sector and at most two from the ferrochrome sector. Mining communities and workers are usually passive participants in the mining industry. The DMR had regard to the increase in community and worker unrest in considering that the ownership stake allocated those sectors be maintained. To this end, the Minister decided to reduce the beneficiation offset provision to 5%.

154.6. Sixth, I deny that the 2018 Charter gives rise to any uncertainty as how to calculate and apply the off-setting provisions. The Implementation Guidelines explain the method of calculation. Clause 4.4 states that the 5% offsetting "*shall be implemented considering the provisions below*", and the detailed provisions of clauses 4.4.1 to 4.4.5 then follow. In view of the alleged certainty in this regard, clause 4.4.4 bears repetition in full:

"4.4.4 Example of Calculation of Equity Equivalent

(a) If the ownership equity of a mining right holder's company or asset is valued at R100 000, the mining right holder will be eligible to claim maximum beneficiation equity equivalent credits equal to R5 000.

(b) Contribution to the total beneficiation equity equivalent credits is calculated using the formula below:

A B + C .... formula i)

Where A is the total monetary value of the beneficiation equity equivalent.

B is the monetary value of activities undertaken before the commencement of the Mining Charter, 2018.

C is the monetary value of all planned activities against beneficiation equity equivalent credits. Contribution of the monetary value of these activities will not be capped.

(c) Table F contains an example of a list of activities against which a mining right holder may claim ownership.

(d) Activity 1: a mining right holder has invested in beneficiation plants before commencement of the Mining Charter, 2018 whose time adjusted value is R400. Using the formula i), contribution of this investment to B is R400.

(e) Activity 2: a mining right holder plans to beneficiate ore worth R100 per year over a ten-year period. The total contribution of this activity to C will therefore be R1 000.

(f) Activity 3: a mining right holder plans to sell some of its mineral ore or mineral products to independent Historically Disadvantaged Persons owned beneficiation entities at a discount to mine gate price. The discount amounts to R360 per year and plans to sell at the same time-adjusted total discount over a ten-year period. This sums up to R3 600 which is the contribution of this activity to C."

154.7. Table F, which follows immediately after clause 4.4.4., provides examples:

Table (F): Monetary value of activities against which beneficiation equity equivalent is claimed:

	Beneficiation Activities		Over 10 years
	Beneficiation plants worth (pre-Mining Charter 2018)		N/A
	B	R400	N/A
2	Portion of a mining right holder's production, that the mining right holder beneficiates as part of its operating activities	R100/year	R1 000
3	Supplies mineral ore to Historically Disadvantaged Persons owned beneficiation entities at a discount to the mine gate price	R360/year	R3 600
	C (ie. R1 000 + R3 600)		R4 600
	A= B+C (ie R400 + 4 600)	R5 000	

155. I therefore dispute and deny that there is any basis for the grounds of review upon which Mr. Chabana relies.

156. Save as is consistent with the aforegoing, I deny the remaining allegations in paragraphs 126 to 145.

AD PART 4 OF THE FOUNDING AFFIDAVIT: NON-OWNERSHIP ELEMENTS (PARAGRAPHS 146 TO 184)

157. In Part 4 of the founding affidavit, Mr. Chabana sets out a wide variety of complaints in relation to those aspects of the 2018 Charter that impose procurement obligations on rights-holders. He does so in the following sequence: (i) mining goods; (ii) services; (iii) verification of local content; (iv) enterprise and supplier development; (v) research and development; and (vi) processing of samples. For ease of reference, I set out my answer to Mr. Chabana's allegations in the same order.

158. Mr. Chabana, in paragraph 147, summarises the essence of the Council's complaints: namely, that the Minister has set "*unachievable targets*", which 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"

159. Two points need be made in answer from the outset:

159.1. First, Mr. Chabana seemingly does not appreciate that, in many respects, it does not follow that non-compliance with every aspect of the procurement requirements means that the right-holder will be visited with "*severe sanctions*". This alleged fear is more illusory than real. I explain why this is so below.

159.2. Second, Mr. Chabana over-inflates the necessity for scientific evidence in order to avert a finding of irrationality. I am advised that it is not required that this Court should agree, in every respect, with the precise determinations made by the Minister in the exercise of his discretion under section 100(2) of the MPRDA. Nor is it required that the evidence which underpinned those decisions should lead ineluctably to only one conclusion. I am advised that Mr. Chabana therefore exaggerates the requirements for a rationality challenge.

(i) Procurement of mining goods (paragraphs 148 to 164)

160. The Council takes issue with clause 2.2.1 of the 2018 Charter and contends (paragraph 164) for a variety of reasons that it is *ultra vires* the MPRDA and therefore contrary to section 6(2)(e)(vi) of PAJA and also contrary to section 1(c) of the Constitution. I deny that this is so. As part of this complaint, the Council also takes issue with the definitions of "*South African manufactured goods*", "*local content*" and "*youth*" (in the definitions section of the Charter), and clause 2.2.3 (which deals with verification of local content). Mr. Chabana's complaints, in broad summary, are that the requirements set out in clause 2.2.1 are beset by a number of difficulties, including:

160.1. first, that clause 2.2.1 is void for vagueness and premised on an assumption that relevant manufacturers are in fact able to produce the mining goods (paragraphs 153 to 154);

160.2. second, there is no reason to believe that the Minister was in possession of credible evidence, when he imposed these requirements, that companies are currently able to provide the requisite mining goods (paragraph 155);

160.3. third, the definition of "*South African manufactured goods*" is unclear and incapable of implementation, in part because of difficulties in the ascertainment of "*local content*" and in part because its definition is also unclear (paragraphs 156 to 162);

160.4. fourth, clause 2.2.1 "*impacts negatively* on South Africa's international trade obligations (paragraph 163).

161. I address each point in turn.

(a) There is no uncertainty as to whether manufacturers can provide mining goods in conformity with the requirements of clause 2.2.1 of the 2018 Charter

162. This complaint is set out in paragraphs 153 and 154 of the founding affidavit. Clause 2.2.1 provides as follows:

> "2.2.1.1 A minimum of 70% of total mining goods procurement spend (excluding non 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 on 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."

163. The essence of the complaint is that a mining right holder might find itself in breach of the 2018 Charter if, due to unavailability of a manufacturer, it is unable

to comply with the procurement obligations. Mr. Chabana alleges that this state of affairs is contrary to the rule of law, set out in section 1(c) of the Constitution.

164. The Council's complaints (which I address below) are, in many respects, the same or very similar to its complaints in respect of clause 2.2.2 (which concerns procurement of services). I therefore explain, in some detail, the process by which the DMR settled on the present formulation of clause 2.2.1, since that process is directly relevant to understanding the way in which the decision was taken to formulate the requirements in clause 2.2.2.

The reasoning process

165. Much of the process that I describe below was informed by research undertaken or led by Mr. Kagiso Menoe, DMR Director: Beneficiation. A confirmatory affidavit deposed to by Mr. Meneo accompanies this affidavit.

166. The starting point in the reasoning process was to consider clause 2.2 of the 2010 Charter, a copy of which is to be found in annexure "**FA2**" to the founding affidavit. Clause 2.2, in part, requires the following

> "- Procure a minimum of 40% of capital goods from BEE entities by 2014;
>
> "- Ensure that multinational suppliers of capital goods annually contribute a minimum of 0.5% of annual income generated from local mining companies towards socio-economic development of local communities into a social development fund from 2010;
>
> - Procure 70% of services and 50% of consumers goods from BEE entities by 2014
>
> The targets above are exclusive of non-discretionary procurement expenditure" (my underlining)

167. As the two underlined passages make clear, there have been Charter requirements governing procurement of goods and services since 2010. We

were concerned, however, by the findings in the 2009 Mining Charter Assessment, which was compiled by the Policy Unit of the DMR. That assessment was based on research undertaken by Moloto Incorporated, an external research company. I attach a copy of the Moloto Report, marked "**AA36**".

168. What the 2009 Assessment showed is that mining companies tended to procure "*non-core items*", such as stationery and catering from BEE entities, but not "*core*" items, such as buying drill bits, conveyer belts or pipe (goods), or, for that matter, core services, such as drilling and mining. This is reflected in the following passage, taken from the second page of the Executive Summary in the 2009 Assessment:

> "The DMR has undertaken this assessment to determine the extent to which the objectives of the Mining Charter have been achieved. In particular, the report records progress made against each element of the Charter. Contrary to the good progress made in terms of compliance with HDSA participation in management, examination of other elements paints a gloomy picture."

169. We then looked to the 2015 Mining Charter Assessment, of which Mr. Menoe is a co-author. Here, the DMR assessed progress relative to the implementation of the 2010 Charter. Most mining companies reported that they were compliant. However, in order to make a more meaningful assessment of that progress, we introduced a distinction between weighted and non-weighted data. Non-weighted data is the data as it was reported by the various mining companies. Weighted data, on the other hand, take into account the number of employees of each reporting company. Weighting therefore has the result that the more employees each has reporting company has, the greater the weight given to the

data reported by that company. The weighting process is demonstrated on page 10 of the 2015 Assessment.

170. Once weighting was taken into account, it became apparent that the industry was doing well insofar as procurement was concerned. This conclusion is reflected in the following paragraph, from section 4.4 (on Procurement) in the 2015 Assessment:

> "The percentage of right holders meeting the 40% target is 39.1% when the data is not-weighted (Figure 9). Figure 10 shows that 81.6% of mining right holders (weighted) met the 2014 target of spending 40% of their total expenditure on capital goods sourced from BEE entities. Furthermore, 14.6% (weighted) procured less than 10% of their capital goods from BEE entities."

171. I invite attention to Figure 9, which is to be found on page 21 of the 2015 Assessment. The sum of the entities in the red box is 39%, whereas, as Figure 10 on the same page demonstrates, the sum becomes (with weighting) around 82%.

172. The 2015 Assessment also reflected similar conclusions in relation to other aspects of procurement governed by the Charter. I mention, by way of example, Consumables (page 23 of the 2015 Assessment):

> "On procuring consumables from BEE entities, the not-weighted data shows that 57.8% of rights met the 2014 target of 50% (Figure 13). <u>There is, however, a marked increase when weighing the data with employment, with mining right holders meeting the target increasing to 82.7%</u> (Figure 14)."

173. It was against this backdrop that we considered making incremental adjustments to the procurement targets in the 2018 Charter. This process of incremental adjustment is inherent in the organic nature of a "*target*" contemplated by section 100(2) of the MPRDA. In considering these adjustments, we had regard to the conclusions in the 2015 Assessment. They showed that most companies were

able to comply with existing procurement targets. This, in turn, demonstrated two other propositions: first, that the existing targets were not unattainable, and second, that over time, most companies had adjusted their procurement spends to meet these targets. We also had regard to the need for consonance with other instruments, notably the Beneficiation Strategy, which was approved by Cabinet in 2011. I attach a copy, marked "**AA37**" and invite attention, in particular, to item (iii) on page 9.

> "The procurement provisions of the Mining Charter (as amended in 2010) are already in force, creating the basis for rapid demand expansion for locally manufactured capital and consumable goods as well as services required to sustain the mining industry."

174. Whilst the intention in drafting the 2010 Charter had been to stimulate the local market to produce mining goods and for mining services, it did not make express provision for the procurement of locally manufactured goods and services in its scorecard. It was against this backdrop that we imposed the procurement requirements in the 2018 Charter.

What if some goods are not available from South African manufacturers?

175. A key part of Mr. Chabana's case is that mining right holders face the risk of "*severe penalties*", and that this risk might materialise through no fault of their own by reason that certain goods cannot be procured from South African manufacturers.

176. It is, with respect, easy to exaggerate this risk.

177. First, it must be understood what weighting is allocated to these elements. This is best understood by considering the Scorecards in the Charter. The first, on page 36, specifies the weighting given to each element. From this, it is apparent

that "*Procurement supplier & Enterprise Development*" makes up 40% of a mining right holder's score.

177.1. The "*Procurement supplier & Enterprise Development*" scorecard is to be found on page 39 of the Charter. It represents procurement of goods, services, research and development and sample analysis. Percentages represent percentages of the company's total spend for the year in question. This scorecard summarises what is set out in clause 2.2.1 and elsewhere.

177.2. The second row identifies the element description as "*total procurement budget spend on goods and services*". The third row, which qualifies the first, second and third columns, identifies a compliance target of "*procure 70% locally manufactured goods with 60% local content*". (I return to this table when I address the Services elements, in the section that follows below).

177.3. The three columns which address the procurement element are significant for a number of reasons:

177.3.1. First, each carries a score of only 5%: and the total for the three is just 15% of the 40% allocated to inclusive procurement.

177.3.2. Second, women owned companies and youth owned companies fall into the <u>same</u> category, the total allocated to which is just 5%.

178. What this illustrates is that, even if a mining right holder is unable to procure mining goods from <u>any</u> women or youth owned companies, the maximum extent of that prejudice is only 5% of the 40% allocated to procurement. The impact of that prejudice is apparent from annexure A, on page 44 of the Charter. What

this illustrates, in the second column, is five scoring bands, each of which is deemed to be "*compliant*". It is only the second five bands, in the lower part of that annexure (in red), where either the ring-fenced elements are missing, or where they are met but the score yielded from the Scorecard is less than 50%. The loss of 5%, allocated to women- and youth-owned companies, is therefore of minimal significance.

179. Second, the 2018 Charter allows mining right holders to make up for deficiencies in their procurement spend.

179.1. Clause 2.2.4.1.1 provides as follows:

> "Up to 30% of the total procurement budget on mining goods (excluding nondiscretionary expenditure) may be offset against supplier development."

179.2. Off-setting means a mining right holder may subtract what it spent on enterprise and supplier development from its target for the year in question.

179.3. Clause 2.2.6.2 makes provision for an exemption from the sample analysis requirement (set out in clause 2.2.6.1) upon prior written consent from the Minister.

180. Third, clause 6.1 of the 2018 Charter provides as follows:

> "A mining right holder must report its level of compliance with the Mining Charter, 2018 annually, as provided for by section 28(2)(c) of the MPRDA. <u>The Department shall monitor and evaluate implementation, cognisant of the impact of material constraints that may result in the non-achievement of the set target</u>."

181. What this shows is that, even if a mining right holder is non-compliant with any aspect of the 2018 Charter, the DMR is required to have regard to "*material*

constraints". This, it appears, is likely to include the possibility that there are or were no women- or youth-owned companies that provided mining goods required.

182. What, then, if some goods simply cannot be procured from South African manufacturers? I accept (and understood at the time of devising the 2018 Charter) that this case might arise. It is for that reason that the DMR set the limit at 70% and not higher. Assume, for example, that the capital goods required by a mine in the first year of its operation <u>all</u> came from overseas. This would mean that 100% of the total mining goods procurement budget, in that year, would be spent on goods that did not comply with the definition of "*South African manufactured goods*". But even in this case, as the Scorecard makes clear, the mining right holder would still lose only 15% of the total of 40% that is allocated to all of the elements set out in this scorecard. This would not place that mining right holder in immediate danger of being regarded as non-compliant.

(b) There is no evidence that the Minister had credible evidence, when he devised the Charter, that companies were *currently* providing mining goods to meet the specifications in the Charter

183. This complaint is set out in paragraph 155 of the founding affidavit.

184. I deny the absence of credible evidence. I refer, amongst others, to some of the evidence that was considered in the process led by Mr. Menoe of formulating clause 2.2.1, which was shared with me at the time.

    184.1. A report by Judith Fessehaie, entitled "*Regional Industrialisation Research Project: Case Study on the Mining Capital Equipment Value Chain in South Africa and Zambia*". A copy is attached to this affidavit and marked "**AA38**". This report is a Working Paper published by the

University of Johannesburg. It shows that South Africa has a domestic mining goods sector that is exporting to other countries within the SADC region. This strengthened the case for the requirement of locally manufactured goods and services.

184.2. A report, by M. Walker, entitled "*Unpacking the Nature of Demand and Supply Relationships in the Mining Capital Goods and Services Cluster: The Case of PGMs*". I attach a copy, marked "**AA39**". This report shows that a distinctive feature of Original Equipment Manufacturers (OEMs) operating in South Africa is that they are export-oriented (page 8). It also provides useful guidance on the cost of starting mining operations (pages 10ff). It shows local manufacturers of mining goods and services that shows domestic capacity to manufacture mining goods and services.

184.3. A report by the OECD's Working Party of the Trade Committee, entitled "*Local Content Policies In Minerals-Exporting Countries Part 2: Case Studies*". I attach a copy, marked "**AA40**". This report shows that local content requirement is in line with other major mining jurisdictions, such as Canada and Australia.

184.4. There were extensive deliberations by the drafting team. The Minister was directly involved and briefed of progress made with the engagement process. Submissions were written for Ministers' approval at intervals described above.

(c) The definition of "*youth*" in the 2018 Charter is different from the definition in other instruments

185. This complaint is set out in paragraph 150 of the founding affidavit.

186. Mr. Chabana alleges that the definition of "*youth*" in the 2018 Charter (South African citizens aged between 18 and 35 years) is different from the definition in the National Youth Policy, the National Youth Commission Act 65 of 2008 and the Youth Development Strategy (in each case, persons aged between 14 and 35 years). This difference, Mr. Chabana alleges, will "*result... in confusion*". This, with respect, is rather different from what the Council said on page 36 of its written submissions of the Draft 2018 Charter: namely, there is a "*slightly different age range*" in the definitions of "youth". At that point, it seemed that nothing turned on this slight difference. A copy of the Chamber's written submissions is attached, marked "**AA41**".

187. I deny the alleged confusion. It is hardly unprecedented that different instruments might define the same word in different ways. There is no overriding requirement that they ought not to do so. The reasons for the difference are obvious: whilst it makes sense that the recipients of the benefits conferred by the National Youth Policy, the National Youth Commission Act 65 of 2008 and the Youth Development Strategy might be younger than eighteen, it is exceedingly unlikely that someone aged younger than 18 might own a company that provides mining goods or provide mining services. On the Chamber's own logic, it would be irrational to define "*youth*", for the purposes of the 2018 Charter, as someone younger than 18.

(d) The definition of "*South African manufactured goods*" is unclear and incapable of practical application

188. This complaint is set out in paragraph 156 of the founding affidavit. Mr. Chabana gives two main reasons.

189. First, he alleges in paragraphs 157 and 168 of the founding affidavit that it may be impossible for a holder to establish that goods have a "*minimum of 60% local content*", given that he or she would necessarily have to rely on information provided by the manufacturer. He also points out that there is no requirement that a manufacture should even possess this information at the point of sale.

190. Second, he alleges (in paragraph 159 of the founding affidavit) that it is not clear what components go towards the "*60% local content*": in particular, whether it is raw material, labour, technology or capital. He also asks rhetorically, what if the labour and capital are foreign?

191. I deny that these requirements are incapable of implementation. Mr. Chabana loses sight of several important points:

191.1. First, clause 5.4.4 of the Implementation Guidelines provides that no verification certificates from the SABS will be required during the first two years of the transitional period. The purpose of this clause is to provide a sufficient period of time in which a mechanism can be put in place for the SABS to perform such verifications.

191.2. Second, it is inherently to the advantage of a local manufacturer to keep these records, since by doing so the local manufacturer may attract the transformational benefits and advantages which the 2018 Charter is intended to provide. It is therefore extremely unlikely that a local manufacturer would not keep those records.

191.3. Third, I deny the alleged lack of clarity in the definition of "*South African manufactured goods*" in the 2018 Charter. As Mr. Chabana points out, the definition (by the use of the word "*or*") contemplates two different means by which the "*minimum of 60% local content*" may be achieved. Even if Mr. Chabana is correct in his assertion that the target is more likely to be achieved during assembly than in manufacturing, this hardly makes the definition unclear.

191.4. Fourth, Mr. Chabana has apparently not had regard to clause 5.2 of the Implementation Guidelines, which gives specific directions on how to calculate local content. I quote clause 5.2 in full, so as to illustrate the fallacy of the contention that it is not clear how to calculate local content:

"5.2 Calculation of local content

5.2.1 Percentage local value add for a mining goods (i.e. capital good, component or consumable) will be calculated using the formula below:

$A = \frac{(B-C)}{B} \times 100\%$ ...formula 1)

Where, for the purposes of formula 1:

A is the percentage local value add.

B is the sales price of the capital good, component or consumable in Rands (excluding profit mark-up, intangible value such as brand value and indirect overheads).

C is the value of the imported inputs/components used in the assembly or manufacturing of the capital good, component or consumable.

5.2.2 The Rand value of sales price of the capital good, component or consumable (T) will exclude:

5.2.2.1 Profit Mark-up;

5.2.2.2 Intangible value such as brand value; and

5.2.2.3 Indirect Overheads.

5.2.3 Overhead costs that are a major cost driver for producing the mining good such as electricity in a foundry can be included in the calculation of the sales price as they are direct overhead costs. These costs must be apportioned accordingly per product produced.

5.2.4 Mining goods whose percentage local value add is 60% or greater will be considered South African manufactured goods.

5.2.5 Mining goods whose percentage local value add is below 60%, the mining goods will be deemed not to be manufactured locally and thus the right holder will be unable to claim any points under this sub-element."

191.5. The local content initiative reflects the imperative of section 217(2) of the Constitution, which provides as follows:

"2. Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for -

a. categories of preference in the allocation of contracts; and

b. the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination."

(e) The element "*impacts negatively*" on South Africa's international trade obligations

192. This complaint is set out in paragraph 163 and annexure "**FA10**" of the founding affidavit. Despite the wide array of international legal instruments set out in annexure "**FA10**", the whole argument attracts just one sentence in the founding affidavit, ending with the non-committal allegation that the procurement element "*impacts negatively*" on South Africa's international trade obligations. I deny that this is the case. Legal argument will be addressed to the various propositions of law, set out in annexure "**FA10**".

193. The whole of annexure "**FA10**" is premised on the assertion that the 2018 Charter is unconstitutional on the grounds set out in paragraphs (1) to (14) of that annexure. Even if that were so (which I deny), the only point of any conceivable relevance in the present application is that which might arise from section 233(b) of the Constitution. Nowhere in the notice of motion (as amended) does the Council rely upon section 233(b) as founding any of the various grounds of review upon which it relies.

Ad paragraph 148

194. For the reasons set out above, I deny that the definition of "*South African manufactured goods*" is unclear.

195. Mr. Chabana's insistence on "*comprehensive studies*" exaggerates the standard that should be applied to the development of the Charter, and therefore also the standard that is applicable on review.

Ad paragraph 149

196. I deny the alleged conflict between the applicable codes in terms of the BBEEA and the 2018 Charter.

Ad paragraph 156

197. I deny the alleged lack of clarity in the definition of "*South African manufactured goods*".

Ad paragraphs 157 to 162

198. I deny that the local content requirements are, for the reasons alleged by Mr. Chabana in the paragraphs under reply, incapable of implementation, and therefore that they are unlawful. I repeat what I have said above in this regard.

Ad paragraphs 148 to 164

199. Save as is consistent with the aforegoing, I deny the remaining allegations in paragraphs 148 to 164

(ii) Procurement of services (paragraphs 165 to 170)

200. Mr. Chabana, in section (ii) of Part (iv), raises a number of complaints in relation to the services requirements set out in clause 2.2.2 of the 2018 Charter. The key provision is clause 2.2.2.1, which provides as follows:

"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."

(a) What if there are no companies controlled by women, Historically Disadvantaged Persons or youth?

201. Mr. Chabana raises this rhetorical question in paragraph 167, what if there are no companies controlled by women, HDPs or youth? The unstated premise is that it might, by reasons of unavailability, be impossible for a right holder to comply with clause 2.2.2.

202. This is much the same complaint that the Council raised in relation to the procurement of goods element. I therefore repeat what I have already said above. Moreover, Mr. Chabana apparently fails to appreciate the nuanced manner in which clause 2.2.2 is intended to operate. Clause 2.2.2.2 provides that the procurement targets relative to services must be complied with "*progressively within a period of five (5) years, as outlined in the transitional arrangements*". It is therefore not required of mining rights holders that they comply with these targets in full from the first day of operation of the 2018 Charter.

203. Mr. Chabana also contends (in paragraph 167) that the definition of services "*is wide*". I agree: it is. It includes many activities, such as accounting and legal services, that are not specific to the mining industry.

204. Mr. Chabana alleges that the wideness of this definition raises "*potential difficulties of compliance*" (also paragraph 167). I disagree. The wideness of the definition in fact broadens the scope for mining right holders to meet the overall procurement services requirement if, for example, women- or youth-owned entities freely provide one service but not another.

205. I deny that the right holder would be in breach of the 2018 Charter for the reason alleged by Mr. Chabana. This, like so many of the Council's complaints in the founding affidavit, is something of an exaggeration. Mr. Chabana also fails to appreciate that procurement of services is not a weighted element and, for the reasons I have already explained above, the 2018 Charter gives right holder other means of ensuring compliance.

(b) The Minister did not know, before publishing the 2018 Charter, if the targets could be satisfied

206. This complaint is set out in paragraphs 168 and 169. It replicates the same complaint made in respect of the procurement of goods element.

The proper test

207. Mr. Chabana alleges that the test before this Court is as follows:

> "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"

208. With respect, Mr. Chabana sets up a false distinction between "*full information*" and "*no information*". This is not the test for the legality of clause 2.2.2. As I have already pointed out above, Mr. Chabana exaggerates the test upon review. I note that elsewhere, in paragraph 169, Mr. Chabana suggests a more

measured requirement: namely, that the Minister must have been satisfied on reasonable grounds that it is possible for right holders to comply with these requirements. This is exactly what I did.

The process by which the DMR devised the requirements of clause 2.2.2

209. I refer again to the process, which I described in some detail above, by which the DMR developed its thinking from the targets in the 2010 Charter, having regard to the 2009 and 2015 Assessments, to the mining goods procurement target in clause 2.2.1 of the 2018 Charter. The process also informed the way in which the DMR approached the services procurement target in clause 2.2.2 of the 2018 Charter.

The change from "from BEE entities" to "from South African based companies"

210. I point out, too, that the previous requirement (in the 2010 Charter) was "*70% of services and 50% of consumer goods <u>from BEE entities</u>*". Now, the percentage required is stipulated in relation to "*South African based companies*". This distinction is important, because the evidence (which I have already described above) showed that there was a substantial degree of compliance with the existing targets. By their very nature, BEE entities are (almost inevitably) South African based. By shifting the requirement to "*South African based companies*", the Minister has in fact expanded the range of companies from which services may be procured. A foreign-owned company, for example, may be counted within this category, provided that it is based in South Africa. By widening the target zone from "*BEE entities*" to "*South African based companies*", the DMR has in fact made it easier for companies to comply with the services procurement element. This is particularly important for the smaller companies which, as is

reflected on page 22 of the 2015 Assessment Report, had the lower rates of compliance with previous targets. As was there stated:

> "The level of population that have not met the minimum thresholds dropped from 66.8% to 35.1% when the data is weighted. This clearly indicates that the mining right holders not yet meeting the requisite thresholds are concentrated among the smaller employers."

211. The 2004 Charter, in clause 4.2, set a target of 10% women participation in the mining industry within five years. This Charter was never taken on review. It was also signed by the Council. From this, the DMR was justified in assuming that this target, at least, was attainable.

Evidence of capacity

212. Insofar as capacity is concerned, we had regard to the following evidence:

212.1. First, a website called Blackpages, at https://www.blackpages.africa. I attach, marked "**AA42**", a screenshot of its homepage. As this makes clear, Blackpages is a procurement portal for black-owned companies. It states:

> "Blackpages is an online enterprise and supplier development portal connecting big business to smaller black enterprises to transform procurement in South Africa. In addition, meaningful development assistance is provided to Blackpages members via online learning, mentoring and financing platforms."

212.2. This webpage shows that there are black-owned companies that provide services and mining goods.

212.3. Second, the procurement portal on the website of AngloGoldAshanti, at https://www.anglogoldashantiprocure.co.za/CompaniesIndex.aspx?IndustrySectorID=23). I attach, marked "**AA43**", a screenshot of its homepage. From this website, it was deduced that mining companies have in the past untaken supplier development to meet the procurement requirements of Charter.

212.4. Third, two submissions received from Women in Mining South Africa (WIMSA), copies of which are attached and marked "**AA44**" and "**AA45**". According to their website (see https://wimsa.org.za) they have in excess of 2,000 members, all of them women. I attach, marked "**AA46**", a screenshot of its homepage.

Ad paragraph 167

213. I deny the "*insuperable difficulties*" alleged in paragraph 167.

Ad paragraph 168

214. I deny the allegation that I did not know, before publishing the 2018 Charter, whether the targets in this sub-element could be satisfied. I refer, in this regard, to what I have set out above.

215. I deny that there is any basis for this Court not to be satisfied in the respects alleged in this paragraph.

Ad paragraphs 165 to 170

216. Save as is consistent with the aforegoing, I deny the remaining allegations in paragraphs 165 to 170.

(iii) Verification of local content

217. Mr. Chabana addresses the element of local content in clause 2.2.3 of the 2018 Charter, and raises a number of complaints.

(a) The SABS is neither mandated, nor able, to certify "*local content*" in mining goods

218. Mr. Chabana points out, in paragraph 173, that the SABS's objects and functions, set out in sections 4 and 5 of the Standards Act, 2008, do not include certifying whether mining goods have "*local content*", and, in any event, that its Board was dissolved in 2018.

219. There are several points to be made in answer.

219.1. First, Mr. Chabana fails to appreciate that clause 2.2.3.2 permits the Minister to designate any other entity besides the SABS to certify local content. Whilst there are, at present, no other designated entities, others will likely follow in due course.

219.2. Second, I refer to the attached SABS pamphlet, entitled "*Local content putting South Africa first*", where (in part 4) the process of establishing local content is explained. A copy of that pamphlet is attached and marked "**AA47**". I also refer to article published online at https://www.multotec.com/en/news-articles/multotec-first-up-for-sabs-local-content-verification on 17 August 2018. A copy is attached, marked "**AA48**". The first two paragraphs speak for themselves:

"Leading South African mineral processing equipment manufacturer Multotec has taken the pioneering step of having its local content verified by the South African Bureau of Standards (SABS), in line with the requirements of the draft Broad-Based Socio-Economic Empowerment Charter for the Mining and Mineral Industry, 2018.

At the end of the verification assessment in July, Multotec Group chief operating officer Jannie de Jonge commended the work of the technical teams from the SABS and Multotec, who had pursued the creation of this "prototype" process as a starting point for promoting local content in mining goods."

219.3. What this evidence demonstrates is that the SABS already has the capacity to verify local content requirements.

(b) The Minister does not have the power to assign functions to the SABS

220. Mr. Chabana complains that the Minister purports, in clause 2.2.3.2 of the 2018 Charter, to assign a function to the SABS. This, says Mr. Chabana, he cannot do.

221. Even if Mr. Chabana is correct in this regard, negotiations with SABS are currently underway.

Ad paragraphs 171 to 177

222. Save as is consistent with the aforegoing, I deny the remaining allegations in paragraphs 171 to 177.

(iv) Enterprise and supplier development

223. Clause 2.2.4.2 of the 2018 Charter provides as follows:

> "2.2.4.2.1 Up to 10% of the total procurement budget on services (excluding nondiscretionary expenditure) may be offset against supplier and enterprise development.
>
> 2.2.4.2.2 Percentages referred to in 2.2.4.1.1 and 2.2.4.2.1 must be implemented as follows:
>
> (a) Supplier and Enterprise Development must be invested only in a Historically Disadvantaged Persons owned and controlled company with a turnover of less than R50 million per annum;
>
> (b) Investment on Supplier Development may not be claimed as expenditure on Enterprise Development;
>
> (c) There must be a written agreement between a mining right holder and the recipient Supplier or Enterprise being developed; and
>
> (d) The contract between a mining right holder and the recipient supplier must be for a minimum of 5 years."

224. I have quoted this clause in full so as to illustrate that enterprise development may operate as an off-set against the services procurement element.

225. The Council, on page 40 of its submission on the Draft 2018 Charter, made the following submission in relation to what is now clause 2.2.4.2.2(d):

> "Five years as a supplier or enterprise development beneficiary is too long. This will limit opportunities for more enterprises to be developed and assisted by the right holder. A developmental programme cannot be longer than three years." (my underling).

226. This submission represented an apparent misunderstanding of what is required. The 2018 Charter does not contemplate a "*developmental programme*". It contemplates a contract.

227. The Council, now in an unnumbered paragraph immediately after paragraph 177 of the founding affidavit, makes much the same point: namely, that this period is too long in that it will "*limit opportunities for more enterprises to be developed*". In the absence of any elaboration upon this point by Mr. Chabana (for example, as to the extent to which this period is "*too long*" or why it is irrational), it is impossible to discern any coherent basis for a rationality challenge.

228. Mr. Chabana also fails to appreciate that the purpose of clause 2.2.4.2 is to help to establish a wider spread of service providers, from which Charter-compliant services can in due course be procured. I refer, by way of an example, to the procurement section of Harmony's website

(to be found at:

http://financialresults.co.za/2013/harmony_ir2013/harmony_wwoc2013/1-procurement.php).

I attach, marked "**AA49**", a screenshot of this page.

229. I refer, in particular, to the following:

"In phase 1 (complete), we developed a database of local 100% black-owned suppliers and documented their competencies. The business development centres alert these suppliers to new opportunities from Harmony and assist them with tender and vendor processes. We also provide support to these suppliers in executing their orders to ensure efficiency, and in forming joint ventures with traditional suppliers

Phase 2, which is under way, incorporates skills assessments, business development, providing business facilities and administrative support to local 100% black-owned suppliers. To date, 55 suppliers have benefited from this service.

To broaden our database, advertisements in local newspapers during the review period attracted over 540 suppliers. Similar advertisements as the one below will be placed in local newspapers in other areas where Harmony operates."

230. This illustrates that, by pro-active means, supplier procurement targets can be met, including by engaging in supplier development programmes. The 2018 Charter permits mining right holders to offset up to 30% of the total procurement budget on mining goods (clause 2.2.4.1.1) and up to 10% of the total procurement budget on services (clause 2.2.4.2.1) against supplier and enterprise development. The purpose of supplier and enterprise development is articulated in clause 2.2.4 as follows:

"The purpose for implementing supplier and enterprise development is to strengthen local procurement; enhance the ease and cost competitiveness of sourcing mining goods and services and build South Africa's industrial base in critical sectors of production and value addition"

231. I therefore deny that this sub-element is *ultra vires* the MPRDA (Mr. Chabana does not, in any event, say why it is), or void for vagueness (ditto), or contrary to section 1(c) of the Constitution.

Ad paragraph 177

232. Save as is consistent with the aforegoing, I deny the remaining allegations in paragraph 177.

(v) Research and development

233. Clause 2.2.5 of the 2018 Charter provides as follows:

> "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."

234. Mr. Chabana, in paragraph 179 of the founding affidavit, states that the Council is "*in broad agreement with the policy of this sub-element*". This represents something of a *volte-face* from what it said on page 41 of its submissions on the Draft Charter:

> "The MCSA's initial submission was that R&D is not a topic that forms part of s100(2) and therefore cannot be dealt with in the Charter and is ultra vires. It does not deal with transformation in s100(2)(a) or with any of the objects in s100(2)(b). However, the MCSA agreed to include R&D during the MCTTT negotiations, but now it seems that the draft 2018 Charter brings back a requirement, in a slightly different format, that all social partners proposed to exclude from the Charter."

235. Nowhere does Mr. Chabana explain why the Council has abandoned its previous position. He does, however, take issue with it on the following basis. It may be necessary (he contends in paragraph 179), to spend more than 30% of a research and development budget on non-South African entities if no South African entity can, in fact, undertake the research and development in question. In this scenario, it would be irrational to regard the mining right holder as in breach of the 2018 Charter, and all the more so if that expenditure is the development on one's own expertise or technology.

236. There are several answers to Mr. Chabana's point:

236.1. First, I refer to Table C55 on page 32 of the "*South African national survey of research and experimental development*", being a statistical report for

2015/2016 published by Statistics South Africa. This report played a significant role in formulating the requirements of Clause 2.2.5. A copy of pages i, ii and 32 of this report is attached and marked "**AA50**". This table, in the last column records and compares for the years 2013/2014, 2014/2015 and 2015/2016, total in-house plus outsourced research and development collaboration expenditure (excl. VAT) within South Africa as against expenditure outside South Africa. It reflects the following:

236.2. In 2013/2014, the total spent was R4,116,730, of which R3,445,916 was spent within South Africa. That expenditure (R3,445,916 /R4,116,730) constitutes 83% of the total.

236.3. In 2014/2015, the total spent was R4,011,086, of which R2,653 929 was spent within South Africa. That expenditure (R2,653,929/R4,011,086) constitutes 66% of the total.

236.4. In 2015/106, the total spent was R2,499,756, of which R2,193,307 was spent within South Africa. That expenditure (R2,193,307/R2,499,756) constitutes 87% of the total.

236.5. This data shows that, over the three years under consideration, an average of 78% of the totals spent were spend within South Africa. This fortifies the DMR's determination, in clause 2.2.5, that 70% is an attainable figure.

236.6. Second, I refer to clause 6.1 of the 2018 Charter, which imposes an annual reporting obligation on general compliance with the 2018 Charter, and to clause 5.10.1 of the Implementation Guidelines, which specifies that reporting is to include an entity's "*R&D expenditure on South African* *based research and development entities*". Mining right holders are therefore required to report annually on their research and development expenditure. It is against this backdrop that I refer, once again, to clause 6.1 of the Charter, which concludes by requiring the Department to be "*cognisant of the impact of material constraints that may result in the non-achievement of the set target*". This requirement, I submit, is sufficient to address Mr. Chabana's concern.

236.7. Third, even if a mining right holder did fail to meet the target in relation to research and development expenditure, that failing would only account for a loss of 2.5% of the total of 40% allocated to procurement. This is evidence from the Scorecard on page 39 of the 2018 Charter. The actual prejudice to a mining right holder, in the extreme scenario contemplated by Mr. Chabana, is therefore minimal.

237. I therefore deny that the requirement in clause 2.2.5 is not rationally related to the aim of the Charter, and that it is unlawful.

<u>Ad paragraphs 178 to 180</u>

238. Save as is consistent with the aforegoing, I deny the remaining allegations in paragraphs 178 to 180.

(vi) Processing of samples

239. Clause 2.2.6 provides the following:

> "2.2.6.1 A mining right holder must use South African based facilities or companies for the analysis of 100% of all mineral samples across the mining value chain.
>
> 2.2.6.2 A mining right holder may not conduct sample analysis using foreign-based facilities or companies without the prior written consent of the Minister, as prescribed in the Mining Charter implementation guideline."

240. And clause 5.11 of the Implementation Guidelines requires the following:

> "5.11.1 Where a mining right holder needs to use foreign based facilities or companies, the mining right holder must obtain the prior written consent of the Minister.
>
> 5.11.2 The request to use foreign based facilities or companies must contain the following information:
>
> 5.11.2.3 Proof that the three largest mineral sampling laboratories in the country, all mineral related science councils and academic institutions are incapable of carrying on the type of analysis."

241. Mr. Chabana makes two points:

241.1. First (in paragraph 182), the Council previously made submissions to the Minister, to the effect that there was no evidence that local companies have the capacity to perform 100% of a holder's mineral samples.

241.2. Second (in paragraph 183), Mr. Chabana complains that the requirement in clause 5.11.2.3 of the Implementation Guidelines is an attempt to "*put the* onus *on a holder to show that there is no such capacity*".

242. Each point can be answered:

242.1. As to the first point: the present target – a 100% spend on processing of samples – was already required by the 2010 Charter. This is reflected in item 8 of the 2010 Scorecard (annexure "**FA2**" to the founding affidavit), which dealt with:

> "Utilisation of South African based research facilities for analysis of samples across the mining value chain"

242.2. It required a compliance target of 100% by 2014, with the following intermediate levels: 2010 (establish baseline), 2011 (25%), 2012 (50%), 2013 (75%) and 2014 (100%). Clause 2.2.6 of the 2018 Charter therefore requires no more than the target that was required to have been attained by 2014 – some four years before the enactment of the 2018 Charter.

242.3. As to the second point: Mr. Chabana fails to say how or why the complaint lays the foundation for any ground of review. The requirement in clause 5.11.2.3 of the Implementation Guidelines arises when a mining right holder seeks permission from the Minister, under clause 2.2.6.2 of the Charter, for permission to use foreign-based facilities. As a general proposition, where a rule permits an exception, it is almost invariable for the applicant to show that he or she qualifies for that exception. It is therefore difficult to see how or why Mr. Chabana's second point goes any further towards establishing any ground of review.

243. I therefore deny that clause 2.2.6 of the 2018 Charter should be reviewed and set aside on any of the grounds upon which Mr. Chabana relies.

Ad paragraphs 181 to 184

244. Save as is consistent with the aforegoing, I deny the remaining allegations in paragraphs 181 to 184.

AD PART 5 OF THE FOUNDING AFFIDAVIT: APPLICATION OF THE 2018 CHARTER TO LICENCES GRANTED UNDER THE PRECIOUS METALS ACT, 2005 AND THE DIAMONDS ACT, 1986 (PARAGRAPHS 185 TO 201)

245. In Part 5 of the founding affidavit, Mr. Chabana makes a number of allegations in relation to the application of the 2018 Charter to licences granted under the Precious Metals Act 2005 and the Diamonds Act 1986. For ease of reference, I refer to those two Acts, respectively, as the PMA 2005 and the DA 1986. Mr.

Chabana's complaints relate to clause 4, 6.2, 7.1, 7.3, 8.7, 8.8, 8.9 and 9.2 of the 2018 Charter.

(i) The Regulator's powers under section 6(1)(b) of the PMA 2005 and section 5(2) of the DA 1986

246. First, Mr. Chabana alleges (paragraph 186) that the Regulator, in considering an application for a licence, permit or certificate under section 6(1)(b) of the PMA 2005 must "*have regard to*" to the Charter, whereas section 5(2) of the DA 1986 requires that he "*may*" do so. He then (paragraph 188) alleges that the words "*have regard to*" necessarily imply a discretion.

247. I admit these allegations. The rationale for the distinction between "*must*" in section 6(1)(b) of the PMA and "*may*" in section 5(2) of the DA 1986 lies in that fact that licences under the DA 1986 are often granted to individuals, whereas licences under the PMA 2005 are typically granted to refineries. It is not ordinarily practicable to require an individual to confirm to the requirements of the Charter, whereas the same is not ordinarily true of refineries.

(ii) The Minister does not have the power to render the Charter applicable to all licences and permits under the DA 1986 and PMA 2005

248. Mr. Chabana alleges (paragraphs 189 to 190) that the Minister does not have the power, through the MPRDA and the Charter, to determine that the Charter should apply to <u>all</u> licences or permits under the DA 1986 and under the PMA 2005. Mr. Chabana alleges, on this basis, that clauses 4, 6.2, 7.1, 7.3, 8.7, 8.8, 8.9 and 9.2 of the Charter ("*the impugned provisions*") are *ultra vires*, and unlawful and unconstitutional.

249. I deny that the impugned provisions are, for the reason alleged by Mr. Chabana or for any other reason, *ultra vires*, unlawful or unconstitutional. In order to

explain why this is so, it is necessary for me to deal with these provisions in turn.

Clause 4

250. Clause 4 (and its sub-clauses) appears beneath the heading

> "APPLICATION OF THE MINING CHARTER TO LICENCES GRANTED UNDER THE PRECIOUS METALS ACT, 2005 AND THE DIAMONDS ACT, 1986"

251. Everything that is set out in clause 4 of the 2018 Charter and its sub-paragraphs, and every cross-reference elsewhere in the Charter, is qualified by the preambular words in clause 4:

> "The Diamonds Act, 1986 and the Previous Metal Act, 2005, provide for the South African Diamond and Precious Metals Regulator (SADPMR) to have regard to the requirements of the Mining Charter, 2018 when considering applications lodged in terms of these Acts."

252. From the outset, then, the Charter recognises that it is for the Regulator alone to "*have regard to the requirements of the Mining Charter, 2018*". All that follows within clause 4 and its sub-clauses are necessarily qualified in this manner. To the extent that the literal wording may, at first sight, appear to create any inconsistency with this foundational proposition, Mr. Chabana fails to have regard to the rule of interpretation that two clauses within the same instrument are, wherever possible, to be construed in a manner that upholds the validity of both clauses.

253. Clause 4.1.4 is a good example. At first sight, it appears (from the word "*shall*") to require compliance with <u>all</u> aspects of the Charter. But that interpretation disregards clause 4.1.1 and 4.1.2.3, amongst others, which specifically limit the scope and meaning of the Charter for the purposes of clause 4 as a whole.

254. The better view, I suggest, is that everything set out in sub-clauses 4.1, 4.2, 4.3 and 4.4 serves to limit and give specific meaning to "*the Charter*" for the purposes of clause 4 as a whole. That view upholds the validity of clause 4, rather than invalidates it. On this view, what is qualified are the "*requirements of the Mining Charter 2018*" to which the Regulator may (in the case of the DA 1986) and must (in the case of the PMA 2005) have regard.

255. That process may be guided (but not in any way limited) by the table in clause 4.2 (thresholds for precious metal jewellers and precious metal beneficiators), clause 4.3 (thresholds for diamond beneficiators), and clause 4.4 (thresholds for diamond dealers and previous metal refiners). These tables, on a proper interpretation and having regard to the provisions of section 6(1)(b) of the PMA and section 5(2) of the DA 1986, provide a template for the progressive application of parts of the DMR in the discretion of the Regulator.

256. Once the proper role of clause 4 of the 2018 Charter is appreciated, then it becomes apparent that Mr. Chabana's attacks on the other of the impugned provisions is ill-founded. I deal with each briefly:

Clause 6.2

257. Clause 6.2 requires holders of licences or permits issued under the DA 1986 or PMA 2005 to report annually on compliance with the 2018 Charter to the Regulator. Self-evidently, this requirement has no meaningful content if the Regulator, in the exercise of his or her discretion under section 6(1)(b) of the PMA 2005 and section 5(2) of the DA 1986, does not require compliance with the Charter. The Regulator's powers, in this regard, necessarily also include the power to render clause 6.2 applicable.

Clauses 7.1 and 7.3

258. Clause 7.1 provides that the Charter "*applies to*" existing, pending and new rights, permits and the like under the DA 1986 and PMA 2005, and clause 7.3 provides that the ownership and inclusive procurement, supplier and enterprise development elements are ring fenced elements which require compliance 100% "*at all time*". Again, these clauses, if read in a manner consistent with section 6(1)(b) of the PMA 2005 and section 5(2) of the DA 1986, fall to be interpreted as being subject to the Regulator's discretion to render them applicable. Were that not so, clause 7.3 would preclude any discretion in regard to the application of the elements to which it refers.

Clause 8.7

259. The complaint in respect of clause 8.7 is difficult to comprehend. In paragraph 190, Mr. Chabana alleges that clause 8.7 (amongst others) seeks to

> "impose targets in respect of licence holders or to make the targets and elements of the Charter applicable to licence holders under these Acts"

260. Clause 8.7, in fact, deals with pending applications for licences or permits in terms of the DA or PMA that had been lodged with the Regulator prior to the date of publication of the 2018 Charter. It states that such applications "*must be processed in terms of the Mining Charter 2010*" or the requirements of clause 3 of the Codes of Good Practice for the Minerals Industry, "*whichever is applicable*". The final words in clause 8.7 plainly contemplate the possibility that the question of which set of requirements is applicable is to be resolved by some other legislation. In order words, clause 8.7 does not (as Mr. Chabana alleges in paragraph 190) render any Charter requirements applicable to applications

under the PMA or DA. At best, again, it is simply declaratory of requirements imposed by primary legislation.

Clauses 8.8 and 8.9

261. Clause 8.8 purports to impose a requirement, upon permits or licences renewed under the DA or PMA, within a period of twelve months from the date of renewal to comply with the 2018 Charter. But here, again, the appearance of creating a free-standing obligation is illusory. It is a standard condition in any licences or permits granted by the DA or PMA that the holder must comply with the Charter. I refer, by way of examples, to three licences granted under the PMA (all in annexure "**AA51**") and to two licences granted under the DA (both in annexure "**AA52**"). In both annexures, I have redacted the identity and other identificatory particulars of the respective licence holders. It is noteworthy that, in each these five exemplar licences, it is a condition that the holder must comply with the "*Broad Based Socio Economic Empowerment Plan as approved*".

262. Those conditions are imposed by the Regulator in the exercise of his statutory powers. Section 8(5) of the PMA gives teeth to that condition by prescribing that a precious metal beneficiation licence "*terminates in accordance with the terms and conditions under which it was issued*".

263. Clause 8.8 therefore merely replicates what is already obligatory.

264. The same reasoning applies, with equal effect, to clause 8.9.

Clause 9.2

265. Clause 9.2 proclaims the following:

> "A licence or permit holder who has not complied with the requirements of this Mining Charter shall be in breach of the Diamonds Act and the Precious Metals

Act and subject to the relevant provisions of the Diamonds Act and the Precious Metals Act"

266. This clause, as with the other impugned clauses, falls to be read in a manner consistent with section 6(1)(b) of the PMA 2005 and section 5(2) of the DA 1986. Thus understood, it is declaratory in effect and the words "*the requirements of this Mining Charter*" fall to be understood as denoting those aspects of the Charter (if any) which the Regulator has, in the exercise of his discretion under section 6(1)(b) of the PMA 2005 and section 5(2) of the DA 1986, chosen to render applicable to a licence or permit holder.

(iii) The Minister is not authorised to prescribed ownership targets for the downstream diamonds and precious metals industry, and to do so is irrational

267. Mr. Chabana sets out these arguments in paragraphs 190 and 191 of the founding affidavit.

268. "*Downstream*" is neither defined in the MPRDA, nor in the DA 1986 or PMA 2005. It therefore falls to be given the meaning used in the mining industry. It is best understood by a process of exclusion. The "*upstream*" industry includes exploring, mining and everything else that is properly to be regarded as a mining process. The "*downstream*" diamond and precious metals industry therefore refers to everything else that does not constitute an "*upstream*" activity. Refining, beneficiation and dealing in diamonds would therefore all constitute "*downstream*" activities, since each is performed only after the mining process has been completed.

269. As to Mr. Chabana's first point, he is mistaken in his view that it is the Charter which purports to extend the application of the Charter to the "*downstream*" industry, and I deny that this is the case. In fact, it is section 5(2)(a) of the DA

1986 which does so. This proposition is apparent from section 26 of the DA 1986, which lists the various kinds of licences and certificates which may be issued:

> "(a) a diamond dealer's licence entitling the holder to carry on business as a buyer, seller, importer or exporter of unpolished diamonds;
>
> (b) a diamond beneficiation licence entitling the holder to polish diamonds for the purpose of business or trade;
>
> (c) a diamond beneficiation licence entitling the holder to set unpolished diamonds in tools, implements or other articles or to crush or to alter those diamonds for the purpose of such setting or for the purpose of trade;
>
> (d) a diamond research licence entitling the holder to do applied research and tests in connection with diamonds, but not to polish diamonds for the purpose of business or trade;
>
> (e) a temporary diamond buyer's permit entitling a person who does not hold a licence in terms of this section to buy an unpolished diamond from a diamond exchange and export centre;
>
> (f) a diamond trading house licence entitling the holder thereof to facilitate the buying and selling of unpolished diamonds locally on premises registered in terms of section 47;
>
> (g) a certificate entitling a person to be in possession of an unpolished diamond obtained in a lawful manner.
>
> (h) a permit entitling a person to sell, export or import an unpolished diamond on prescribed conditions."

270. It is self-evident from this list that all of the activities listed constitute "*downstream*" activities.

271. The same is true of the PMA 2005. Section 6(1)(b) requires the Regulator, in considering an application under that Act, to have regard to the requirements of the Charter. The PMA 2005 contemplates refining licences (section 7), precious metal beneficiation licences (section 8) and jewellers' permits (section 9) and permits to import precious metals (section 10). All of these activities constitute "*downstream*" activities.

272. Next, Mr. Chabana's contention that it is irrational to render any part of the 2018 Charter applicable to "*downstream*" activities. This complaint, I am advised, is ill-founded, since it is not the Charter which has the effect of which Mr. Chabana complains. As I have pointed out above, he fails to appreciate that it is in fact section 6(1)(b) of the PMA 2005 and section 5(2)(a) of the DA 1986 which render the 2018 Charter applicable to "*downstream*" activities.

273. In any event, even it is found that an irrationality challenge lies in respect of the 2018 Charter because of the possibility that it can be applied to "*downstream*" activities, I deny that there is any merit in that challenge. I have already referred to the guidance set out in the tables in paragraphs 4.2, 4.3 and 4.4 of the 2018 Charter. The second column in paragraph 4.2 ("*Qualifying Criteria*") calibrates different categories of enterprises by reference to their estimated turnover, and the third and fourth columns suggest the extent to which the Charter should apply or not apply. A similar distinction is drawn in the table in paragraph 4.3. These two tables allow the Regulator, in exercising his discretion, to consider a nuanced sliding scale, by which the degree to which the 2018 Charter is applicable is related to the entity's turnover. This, with respect, is hardly irrational. Even the table in paragraph 4.4, which applies to diamond dealers and precious metal refiners and which does not establish any distinctions based on turnover, is still there to guide the exercise of discretion by the Regulator. It does not bind him or her, and there is therefore no reason why the Regular might make a decision which does not reflect what is set out in the table in paragraph 4.4.

Ad paragraphs 185 to 201

274. Save as is consistent with the aforegoing, I deny the remaining allegations in paragraphs 185 to 201.

AD PART 6 OF THE FOUNDING AFFIDAVIT: NON-COMPLIANCE WITH THE CHARTER (PARAGRAPHS 202 TO 210)

275. Mr. Chabana's primary attack, in this Part, is on clause 9.1 of the 2018 Charter, which provides as follows:

> "A mining right holder who has not complied with the ownership and mine community development elements and falls between levels 6 and 8 of the Mining Charter scorecard shall be in breach of the MPRDA and subject to provisions of section 93, read in conjunction with section 47, 98 and 99 of the Act."

276. Mr. Chabana sets out the following grounds:

276.1. first, section 47 of the MPRDA is exhaustive of the Minister's powers to cancel or suspend a mining right (paragraph 203 and 204);

276.2. second, no provision of the MPRDA vests in the Minister the power to cancel a mining right by reason of non-compliance with the Charter (paragraph 206);

276.3. third, the Charters are, in any event, neither regulations nor legislation: they are merely "*formal guidelines or statements of policy*" (paragraph 207); and

276.4. fourth, the Minister cannot by decree elevate the Charter's status to that of legislation (paragraph 208).

277. Several points need to be made in response to these allegations:

277.1. First, for the reasons set out above, the Minister is firmly (and has consistently been) of the view that the Charter is in fact of a binding nature. The Minister's power to develop the Charter is set out in section 100(2) of the MPRDA, and the imperative quality attached to the content of the Charter is derived from sections 23(1)(h), 25(2)(h), 28(2)(c), 84(1)(i), 100(2)(b). Legal argument will address these important contentions at the hearing of this application.

277.2. Second, clause 9.1 of the Charter falls to be read subject to the well-established rule of statutory interpretation, by which subordinate legislation and other instruments of a binding character are, where possible, to be read in a manner that it consistent (rather than in conflict) with primary legislation. On that reading, clause 9.1 does no more than to declare that certain categories of mining right holders will be deemed, <u>by the MPRDA</u>, not to be compliant with the Charter and therefore in breach of the Act. On that interpretation, clause 9.1. is merely declaratory.

277.3. Third, for the reasons I have already explained above, Mr. Chabana elsewhere in the founding affidavit contradicts the Council's purported view that the Charter is no more than a policy instrument.

<u>Ad paragraphs 202 to 210</u>

278. Save as is consistent with the aforegoing, I deny the remaining allegations in paragraphs 202 to 210.

AD THE SUPPLEMENTARY FOUNDING AFFIDAVIT

279. The Council filed an amended notice of motion and supplementary founding affidavit, subsequent to the filing of the Record on 31 May 2019, on 23 July 2019. In the supplementary founding affidavit, Mr. Chabana takes issue with the Record (in particular, in paragraph 7), and then raises various other complaints in relation to matters concerning ownership (primarily paragraphs 9.2 to 11.3), procurement (primarily, paragraphs 13, 16 and 17), the applicability of the 2018 Charter to licences granted under the DA and PMA (paragraphs 19 and 20), and clause 9 (paragraphs 21 and 22).

280. I address, *ad seriatim*, with the most important of these complaints:

<u>Ad paragraph 6 and 7</u>

281. I refer to the detailed explanation, set out at the outset of this affidavit, as to the process by which the 2018 Charter was developed.

<u>Ad paragraph 9.2</u>

282. I have dealt, above, with the pending appeal against the judgment of the Full Bench of the Gauteng Court.

283. I deny that the decision to publish the 2018 Charter was not authorised.

284. I also deny that the decision not to follow the views of the State Law Adviser was procedurally or substantively irrational and unreasonable, or contrary to the principle of legality. I respectfully submit that the fact that I took a different decision does not mean that I did not consider the State Law Adviser's views.

<u>Ad paragraph 9.3</u>

285. Mr. Chabana makes a vague reference to "*errors of law*" without stating what they are. It is for the Council to make out its case in the founding papers. I cannot discern what the alleged (but unidentified) errors are.

Ad paragraph 10

Mr. Chabana vaguely refers to "*these relevant considerations*". I cannot ascertain, from this vague allegation, what it is that Mr. Chabana feels was not considered.

Ad paragraph 11.1, 11.2 and 11.3

286. I repeat what I have said above in connection with clause 2.1.6 of the 2018 Charter.

Ad paragraph 13

287. I refer to what I have set out above as to the research undertaken by the DMR.

Ad paragraphs 15.1, 15.2, 15.3, 15.4, 15.5, 15.6, 15.7, 15.8, 15.9, 15.10, 15.11 and 15.12

288. I refer to what I have set out above, in Chapter One, about the process by which the 2018 Charter was developed.

Ad paragraph 16

289. Mr. Chabana states that the quoted text is "*noted*" by the DMR. But he fails to point out that what appears on page 311 of the Record is simply a recording of a submission made by a stakeholder. This is clear from heading 3 on page 309, which states: "*Summary of Mine Communities Stakeholder's [sic] Input per Charter Elements*". The extensive list of stakeholders consulted is set out on pages 288 to 309. A copy of the document is attached to this affidavit.

Ad paragraphs 19 and 20

290. I refer to what I have set out above, in Chapter One, about the process by which the 2018 Charter was developed.

Ad all paragraphs in the supplementary founding affidavit

291. Save as is consistent with the aforegoing, I deny the remaining allegations in the supplementary founding affidavit.

AD PART 7 OF THE FOUNDING AFFIDAVIT: CONCLUSION (PARAGRAPHS 211 TO 212)

292. I deny that the Council has made out a case for any of the grounds of review upon which it relies. Mr. Chabana, in paragraphs 211, summarises those grounds of review. I address each briefly as follows:

Ad paragraph 211.1

293. The Council's view as to the proper limits of the powers conferred by section 100(2) of the MPRDA are, with respect, demonstrably wrong and self-serving. I have dealt with this point in some detail elsewhere in this affidavit.

Ad paragraph 211.2

294. The proposition in paragraph 211.2 – namely, that the Minister was materially influenced by an error of law – flows from the Council's mistaken and artificially restricted view of the powers conferred by section 100(2) of the MPRDA. I persist in the view, also advanced by my predecessors in office, that section 100(2) does indeed empower the Minister to make subordinate legislation of a *sui generis* type. I therefore deny the challenge based on section 6(2)(d) of PAJA.

Ad paragraph 211.3

295. I deny the allegation in paragraph 211.3 that the Charter is inconsistent with the MPRDA or any other primary legislation, and therefore also deny the challenge based on section 6(2)(f)(i) of PAJA. I have dealt in detail with every clause of the 2018 Charter in respect of which it is alleged there is an inconsistency with the MPRDA or primary legislation. Whilst I accept that some of these clauses might have been differently or perhaps better drafted, I persist in my contention that each of those clauses, upon a proper construction is in fact declaratory of rules already prescribed by the MPRDA or other national legislation, and consequently, that none in fact transgress those limits.

Ad paragraph 211.4

296. The allegation in paragraph 211.4 that my decision to promulgate "*the challenged clauses*" was irrational, arbitrary and/or capricious, and therefore contrary to section 6(2)(e)(vi) of PAJA, is also denied. As I have pointed out elsewhere in this affidavit, Mr. Chabana at several junctures posits an evidence-based test for irrationality that is far in excess of what is in fact required in our law. The test is not that this Court would necessarily agree with every decision taken in the 2018 Charter.

297. The arbitrariness and capriciousness complaints are scarcely addressed, and they appear here to be thrown into the mix as an afterthought.

Ad paragraph 211.5

298. I have dealt with the allegations concerning considerations and information which was before the Minister, and deny the allegation in the paragraph under reply. I repeat what I have set out above in connection with the consultation

process that led to the development of the 2018 Charter. That process began even before the Draft 2018 Charter was published for comment and it continued after the extended closing date for written submissions, particularly through the many meetings with the Council.

299. It does not follow from the fact that the Council's views did not prevail that they were not considered. In respect of almost every key aspect of the Charter, there was a wide range of competing views. The Council cannot expect that its views should prevail above those of all other stakeholders.

Ad paragraph 211.6

300. The allegation in paragraph 211.6 that the decision to promulgate the challenged clauses was not rationally connected to the purposes of the empowering provision is nonsensical. I have quoted above section 100(2) and the objects (to which it makes express reference) in section 2 of the MPRDA. The transformative purpose of the empowering purpose could scarcely be any clearer. That is precisely the same purpose of the 2018 Charter.

Ad paragraph 211.7

301. Insofar as the allegation in paragraph 211.7 is concerned, I point out that I have explained, in detail, every clause which Mr. Chabana regards as "*confusing and contradictory*". A striking defect in Mr. Chabana's case is that, in respect of many of his complaints, he simply ignores the Implementation Guidelines (annexure "**FA9**"). Had he not done so, many of the alleged areas of confusion or contradiction could readily have been resolved. Clause 12.2 of the 2018 Charter provides as follows:

"The Mining Charter must be read together with the Implementation Guidelines to be gazetted within two months from the date of gazetting of the Mining Charter 2018".

302. And clause 2 of the Implementation Guidelines states the following:

"The purpose of these guidelines is to outline processes, procedures, forms and templates to facilitate compliance with the requirements of the Mining Charter, 2018."

Conclusion

303. During the course of November 2019, and just a few days before the deadline for the delivery of this affidavit, the Council published its Mining Industry Transformation Progress Report for 2019. A copy is attached, marked "**AA53**". According to its introduction, on page 7, the report is intended:

"to assess progress made by its member companies in terms of transformation as envisaged by the Charter. The assessment is based on the 2018 compliance report submissions to the DMRE by mining companies and focuses on five key transformation elements, namely Ownership, Procurement, Employment Equity, Human Resource Development and Mine Community Development."

304. My colleagues and I have not yet had sufficient opportunity to assess the data presented in this report. The DMR has previously disagreed with at least some of the Council's assessments. Consequently, and without conceding the correctness of any of the content of this report, I highlight a number of its more important aspects.

304.1. Ownership: the report claims that the industry "*has achieved 39.2% HDSA ownership*" (page 11), and that HDSA ownership increased "*by 3.2% from the 2016 ownership transformation analysis results (38.0%)*" (page 11);

304.2. Procurement: the report claims that 75.4% of expenditure on capital goods was incurred on BEE entities (against the 2010 Charter target of 40%), and 75.1% of expenditure on services (against the 2010 Charter target of 70%) (page 13).

304.3. Employment Equity: the report claims that the industry met the minimum threshold of 40% HDSA target representation (page 15). Significantly, the data recorded on page 16 reports a progressive improvement over two years:

304.3.1. Top management (including boards of directors): 58.2% in 2018 were HDSAs, compared with 49.3% in 2016;

304.3.2. Senior management (including executives): 52.8% in 2018 were HDSAs, compared with 48.3% in 2016;

304.3.3. Middle management: 61.4% in 2018 were HDSAs, compared with 49.8% in 2016;

304.3.4. Junior management: 70.5% in 2018 were HDSAs, compared with 58.0% in 2016.

304.3.5. The average rate of women representation: 19.8% in 2018, compared with 13.0% in 2016.

305. I have highlighted these points so as to illustrate that, even on the Council's own research, it appears to be clear that the industry is capable of responding to incremental increases in the targets stipulated in successive Charters. This is precisely the sort of shift that previously Charters were intended to achieve. The same is true of the 2018 Charter. Indeed, this pattern reflects the very nature of

a "*target*", as contemplated by section 100(2) of the MPRDA. The evidence of shifts from 2016 to 2018 thus contradicts many of Mr. Chabana's allegations.

306. I therefore ask that the application be dismissed with the costs of two counsel.

DEPONENT

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is, to the best of the deponent's knowledge, both true and correct. This affidavit was signed and sworn to before me at Pretoria on this 9th day of December 2019 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

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