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 DIAMONDS AND PRECIOUS METALS REGULATOR	Second Respondent

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APPLICANT'S HEADS OF ARGUMENT

"It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."[1]

[1] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC) par 58.

PART 1: THE NATURE AND PURPOSE OF THE APPLICATION

1 This is an application for the judicial review and setting aside of certain clauses ("*the challenged clauses*") of the 2018 Mining Charter[2] ("the 2018 Charter") under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") *alternatively* for an order declaring that they are inconsistent with the principle of legality enshrined in section 1(c) of the Constitution, 1996 and setting them aside.[3]

2 The Minerals Council's application is based on -

2.1 the main grounds of review of the challenged clauses;[4]

2.2 the grounds of review in respect of the challenged clauses under the ownership element;[5]

2.3 the grounds of review in respect of the challenged clauses under the non-ownership element;[6] and

2.4 the grounds of review in regard to the clauses seeking to apply the 2018 Charter to licences granted under the Precious Metals Act, 2005 and the Diamonds Act, 1986;[7] and

2.5 the grounds of review in regard to the clause regarding non-compliance with the 2018 Charter.[8]

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[2] In these heads, we use the definitions set out in par 4 of the founding affidavit, p 10. The founding, supplementary, answering and replying affidavits will be referred to as FA, SA, AA and RA.

[3] Amended Notice of Motion, p 1-3.

[4] FA part 2, pp 27-45 and, in particular, par 71, pp 44-45.

[5] FA part 3, pp 45-69.

[6] FA part 4, pp 69-87.

[7] FA part 5, pp 87-92.

[8] FA part 6, pp 92-96.

3 The underlying dispute between the parties is based on their divergent views about the ambit of the Minister's powers under section 100(2) of the MPRDA and the legal nature and role of the 2018 Charter in the context of the MPRDA. These questions are also determinative of the main grounds of review. The matter, therefore, in the first instance concerns the nature of the 2018 Charter and whether it constitutes law or policy.

4 The Minister's position is that he has the power to make laws *via* the 2018 Charter which is virtually unbridled. Not only has he characterised what is in truth a policy document as a law, but he has also seen fit to attempt to regulate topics which are the subject-matter of other legislation, for example the Precious Metals Act, 2005, the Diamonds Act, 1986 and the Mine Health and Safety Act, 1996.

5 The Minister does not point to any section in the MPRDA which empowers him to regulate such subject-matter. Instead, he refers generally to the objects of the Act and the 2018 Charter[9] as if the 2018 Charter were a parallel piece of legislation, in which the Minister is free to give effect to the objects of the MPRDA in any way he deems fit, and in which he may contradict, amend or supplement the provisions of the MPRDA. As set out below, this approach is fundamentally misconceived. As also set out below, the 2018 Charter can only be applied in terms of, and in the manner contemplated in, the substantive provisions of the MPRDA and it cannot contradict, amend or supplement the provisions of the Act or any other legislation (whether it is a policy or subordinate legislation). The Minister's response to the criticism that he is not empowered to regulate matters which fall under other Acts, is that he is simply reinforcing those obligations,

[9] AA paras 259-261, p 391.

which is clearly incorrect. The fact that another law imposes particular obligations upon those subject to it cannot be a basis for a contention that the Minister therefore has the power to impose similar obligations in the absence of any corresponding power under the MPRDA. It is submitted that a finding that the 2018 Charter amounts to legislation would create a constitutional problem of significant dimensions, since the provisions of the 2018 Charter conflict with the MPRDA as well as with other legislation.

6 What is alarming is that the record shows that the Minister's own legal advisors advised him that he lacked the authority to publish the 2018 Charter (or parts thereof) until and unless the MPRDA amendment bill was passed (including an amendment to section 100 of the MPRDA). He chose, however, not to follow the advice.

7 Various interested and affected parties made submissions to the Minister during the public consultation process preceding the publication of the 2018 Charter. Some were very extensive. They *inter alia* pointed to the legal impediments and constraints as well as the consequences of the proposed clauses. It appears from the answering affidavit that the Minister also ignored them. He failed to confirm in the answering affidavit that he had considered these submissions and contented himself with a statement that he had approved the 10-page recommendation in support of the publication of the 2018 Charter and a 3-page recommendation in support of the publication of the "implementation guidelines". The inference that he also did not consider these submissions is therefore justified.[10] Incidentally, the recommendation to approve the publication of the

[10] See SA paras 5 to 7, pp 465-466; AA paras 34-55; RA par 37, p 1862.

2018 Charter was not attached to the record and only came to light (without its annexures) as part of the Minister's answering affidavit. It proved to be little more than a summary or explanatory note of the main features of the 2018 Charter.[11] It contains no reference at all to the numerous submissions which form part of the Rule 53 record[12] and contains numerous inaccuracies.[13]

8 The alarming prospect of a regulator who believes that he has an untrammelled power to legislate by creating laws which constitute neither national, nor provincial, nor subordinate legislation is compounded in this case by the Minister's apparent failure to take other viewpoints into consideration about the limits of his power and the effect of enforcing what he believes are legally enforceable requirements of the 2018 Charter.

9 Another feature of the Minister's response which requires comment at the outset is the tactic of engaging with irrelevant and technical matters instead of squarely meeting the case of the Minerals Council. For example, the Minister raised a plea of non-joinder,[14] he dealt in detail with the process whereby the 2018 Charter was developed although there is no complaint about procedural fairness[15] and he questioned the Minerals Council's commitment to transformation[16] as well as its representation of the industry.[17] None of these matters has any bearing on the

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[11] RA par 38, p 1863.

[12] See pp 1002, 1003 and 1004.

[13] RA par 40, pp 1863-1866.

[14] AA paras 9 to 33, pp 484-492; RA paras 22-32, pp 1853-1860.

[15] AA paras 34 to 55, pp 492-499; paras 66 to 69, pp 503-504; RA paras 33 – 42, pp 1860-1866.

[16] AA paras 58 to 60, pp 500-501; RA paras 43-48, pp 1866-1870.

[17] AA paras 61 to 65, pp 501-503; RA paras 49-52, pp 1869-1870.

merits of the matter. We submit in this regard that -

9.1 the review application raises important issues of law;

9.2 the outcome of the application will have a profound impact on the mining industry;

9.3 the Minerals Council, its members, the ailing mining industry generally and investors alike require regulatory certainty as soon as possible, so that there is clarity on the legal framework within which right holders may exercise their rights and the limits of the regulatory powers of the Minister and his functionaries.

PART 2: JOINDER

10 General principles

10.1 Non-joinder is the failure of a plaintiff or applicant to join a *particular* defendant or respondent with another whom he is suing, *in circumstances in which the law requires that both should be sued together.*

10.2 There is thus a distinction between a joinder of necessity (where the law requires that parties be sued together) and a joinder of convenience. A failure to join a necessary party to proceedings amounts to non-joinder. A failure to join an interested party who is not a necessary party, but could be joined for convenience, is not a non-joinder.

10.3 The test for determining whether a particular respondent is a necessary party is whether or not it has a "direct and substantial interest" in the subject matter

of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.[18]

10.4 The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea.[19] Even a financial interest, not amounting to a legal interest, is insufficient.

11 In the present matter, the Minister has failed to identify the *necessary* parties that ought to have been joined to these proceedings out of a vast pool of what he refers to as "*stakeholders*", as appears from the following passages in the answering affidavit:

11.1 In paragraph 9 of the answering affidavit, reference is made to the "*material non-joinder of other stakeholders*"; in par 15 to "*the range of stakeholders now goes far beyond only mining right holders*"; and in par 17 a similarly vague statement is made that: "*the Council ... appears not to appreciate that this application directly affects the interests of many others*".

11.2 In paragraph 22 of the answering affidavit, the Minister alleges that: "*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*".

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[18] *Gordon v Department of Health, Kwa Zulu-Natal* 2008 (6) SA 522 (SCA) at 529C; *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) at par 21. See in general Erasmus *Superior Court Practice* D1-124 ff and the cases cited there.

[19] *Judicial Service Commission v Cape Bar Council* 2013 1 SA 170 (SCA) at 176I-177A.

11.3 Further "*stakeholders*" are stated in paragraph 19 of the answering affidavit to include those who were allegedly consulted in previous processes (mentioned in the course of some 16 pages of annexure A2), including financial institutions, black business organizations, established business entities, political organizations and trade unions.

11.4 Yet further stakeholders are stated in paragraph 32 of the answering affidavit to include those who were consulted for purposes of the 2018 Charter such as the 21 attendees of a meeting held on 3 April 2018 listed in annexure A9.

11.5 In paragraph 33 of the answering affidavit, the Minister concludes that the Council's application is made for material non-joinder "*of the stakeholders mentioned above*".

12 In addition to not identifying the necessary parties with any certainty, the Minister has also failed to identify the specific "direct and substantial interest" which would be affected by the order of this court. It is, with respect, hopelessly insufficient merely to allege that *interests* of *stakeholders* would be affected. It is not for the applicant to make out a case that no interests would be affected. It is submitted that the plea based on non-joinder has simply not been properly raised.

13 The vast array of potentially interested parties that the Minister suggests ought to have been joined are in any event not *necessary* parties. The Minister who took the decision to publish the challenged clauses is a *necessary* party and he is before the court. If it were otherwise, an applicant would in every application in which an interpretation of a law was sought or in which the validity of a law or regulation were challenged, have to join every person or group consulted in the

legislative process preceding its adoption or who are affected by that law. That has never been the law or the practice of our courts. Two examples would suffice:

13.1 In *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others* 2000 (2) SA 674 (CC) an application was brought by the Minister of Health, the Minister of Agriculture, certain functionaries in the Departments of Health and Agriculture, the Pharmaceutical Manufacturers Association of South Africa and the Crop Protection and Animal Health Association for the setting aside of a proclamation issued by the President that purported to bring into operation the South African Medicines and Medical Devices Regulatory Authority Act, 132 of 1998. The Act provides that the manufacture, sale and possession of medicines for human and animal use be controlled through a system of scheduling substances and regulating the manufacture, the sale and possession of substances in the various schedules. The complaint was that the regulatory base necessary for the operation of the Act was not in place when Proclamation R49 was published because schedules had not been made to replace the repealed schedules of the 1965 Act, and other essential regulations contemplated by the Act had not been made. It was not suggested that all "stakeholders" involved with the manufacture, sale and possession of medicines for human and animal use, had to be joined.

13.2 In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (1) BCLR 1 (CC), the Minister of Health had in terms the Medicines and Related Substances Act 101 of 1965 promulgated "Regulations relating to a

Transparent Pricing System for Medicines and Scheduled Substances". An application was brought to set aside these regulations. The applicants were the Pharmaceutical Society of South Africa (PSSA), which is a society representing a number of companies owning and operating different types of pharmacies, the United South African Pharmacies, an association representing approximately 60% of all retail pharmacies, and five others, all companies conducting business as operators of pharmacies. Again, not all owners or operators of pharmacies were joined as applicants or respondents, nor was it necessary to do so. In both applications the Minister of Health and the chairperson of the Pricing Committee on whose recommendation the regulations were made were cited as respondents. On the Minister's argument all pharmacy owners, all manufacturers of pharmaceutical products and all purchasers of such products should have been joined.

14 It is submitted that the Scholes Judgment on which the Minister relies to substantiate his plea of non-joinder, does not assist him:

14.1 The present matter is distinguishable from the Scholes judgment.[20] Scholes was a single person who applied for far-reaching relief. The Minerals Council on the other hand represents a substantial number of holders of rights, as set out in paragraph 5 of the founding affidavit. The current litigation can be described as representative litigation. The Minerals Council also does not seek to strike the whole of the 2018 Charter down but seeks the review only of the challenged clauses. On the Minerals Council's argument, individual

[20] *John Hulme Scholes and another v Minister of Mineral Resources,* unreported judgment dated 30 June 2017 given in this division under case nr 0642/2015 by Mokoena AJ.

rights holders are bound to comply with the empowerment obligations stipulated in their individual mining rights and will remain so bound. Applicants for future rights have to comply with the amended Charter, provided that such amendments are *intra vires*.

14.2 Ironically, the Scholes judgment emphasised the key role played by the Chamber of Mines (now known as the Minerals Council, who is the applicant in this matter). The background is that Scholes brought an application to consolidate his application with the Chamber's then pending application. The Scholes consolidation application was dismissed. In the main Scholes application the Minister raised an objection of non-joinder. In par 16 of his judgment Mokoena AJ stated that: "... *the Chamber of Mines is one of the most important role players...*". In par 21 he quoted a number of passages where Rabie J, who had dismissed the consolidation application, dealt with the unique position of the Chamber: "*the Chamber not only represents mining rights holders but it is itself a signatory to the Original Charter that is the subject of the disputed interpretation and regards itself as the government's partner in the "shared vision" for the mining industry that forms the back drop to the Charter*". Mokoena AJ found that the requirements of joinder differed from those of consolidation and that Scholes could not have used rule 11 (consolidation) to join the Chamber.

14.3 However, instead of then holding that Scholes should have joined the Chamber, Mokoena J held (in par 23) that the relief sought by Scholes, if granted, would adversely affect the rights of *those stakeholders* (without identifying them) who are not parties to these proceedings. In this regard he

seems to have accepted that "*some of the stakeholders who participated in the development and adoption of those Charters*" (par 14) are entitled, on that basis alone, to be *parties*. The judgment is, with respect, clearly incorrect and confuses a joinder of necessity with a joinder of convenience. It does not follow in logic or in law that a party who is entitled to be consulted during the development process of a policy or even a law, must, of necessity, be joined when a provision of that policy or law is challenged, as the Minister now also seems to suggest in paragraphs 23 to 31 of the answering affidavit. The Minister has been at pains in this matter to emphasize that *hundreds of stakeholders* were consulted (inter alia in paragraph 67 of the answering affidavit). The suggestion that they should all have been joined is legally untenable and practically impossible. All reviews of administrative actions affecting the general public (for example a decision to close a national highway for safety reasons) would become hopelessly mired in a protracted process of joining all persons who might possibly use the road in question.

14.4 It is submitted that the Scholes judgment is also, with respect, internally contradictory. The court held in par 30 that "*those parties who have a direct and substantial interest in this matter and whose rights may be adversely affected by the order of this court are entitled to be notified of this proceedings and ...upon receipt of such notice elect either to participate or abstain*". In par 36 the court furthermore expressed the view that the rules of Court permit parties to bring an application for a directive as to how to go about identifying parties that may be adversely affected. Instead of so ordering, however, the court then granted an order upholding the non-joinder plea and ordered Scholes "*to join the parties having direct and substantial interest in this*

matter", without identifying who they were. The court will be requested not to follow the judgment.

15 Parties who would qualify to be joined on the basis of convenience are entitled to bring an application to intervene should they take the view that their interests or viewpoints are not sufficiently represented by the existing parties. The present application has received substantial coverage in the press and would most likely have come to the attention of such potentially interested parties. That is exactly what happened in case nr 71147/2017, to which the Minister refers in paragraph 23 of his answering affidavit, when a number of parties applied for and were granted leave to intervene as applicants in the review application of the 2017 Charter brought by the Minerals Council. Incidentally, the intervening parties sought an order setting aside the 2017 Charter on procedural grounds, i.e. on the basis that they were not properly consulted prior to its publication. No application for intervention has been received by any of them or by any other party in the present matter.

16 The Minerals Council has in the present matter, in addition, given notice in terms of Rule 16A(1)(a) (on 27 January 2020) inasmuch as the matter raises constitutional issues.[21] This affords potentially interested parties the procedural rights set out in Rule 16A. The Minerals Council has not received any reaction to the Rule 16A notice.

17 The non-joinder plea accordingly stands to be dismissed with costs.

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[21] Annexure RA1.

PART 3: THE MAIN GROUNDS OF REVIEW OF THE CHALLENGED CLAUSES

18 The key complaint is excess of power.

19 The Minerals Council contends that the Minister has exceeded his powers under section 100(2) and impermissibly sought to legislate through the backdoor by way of the 2018 Charter, in contravention of the doctrine of the separation of powers.[22] The Minister in his answering affidavit drew the battle lines by contending that the 2018 Charter is law.

20 The Minister's legislative intent is discernible in the 2018 Charter's self-proclaimed general application. It for e.g., provides that: "a *mining right holder must comply with the following*",[23] "*a mining right holder is required to...*",[24] "*a mining right holder must*",[25] "*mining companies must*".[26] Clause 7.1 is explicit about the applicability of the 2018 Charter to "*existing mining rights, pending mining right application(s), new mining rights, existing licences and permits etc*". Clause 7.2. goes further and provides that "*for mining right holders, the Ownership and Mine Community Development elements are ring-fenced, requiring 100% compliance at all time*".[27] Clause 9 of the 2018 Charter goes even further. It provides that "*A mining right holder who has not complied with the ownership element 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*

[22] FA par 16, p 22-23.

[23] FA4, Clause 2.1, p 181.

[24] FA4, Clause 2.2, p 185.

[25] FA4, Clause 2.3, p 189; clause 2.4, p 190; clause 2.5, p 192.

[26] FA4, Clause 2.6, p 193.

[27] FA4, Clause 7, p 201.

93, read in conjunction with section 47, 98, and 99 of the Act."[28]

21 Instead of functioning as a formal policy guiding the exercise of the Minister's discretion in administrative decision-making under the MPRDA (as set out more fully below), the 2018 Charter purports to operate as if it were a law of general application. It purports to impose legal obligations, by decree, on mining right holders, to be complied with at all relevant times, in conflict with or in addition to those set out in the MPRDA and the regulations or in other legislation.

22 The 2018 Charter thus purports to be generally applicable to all existing holders despite the fact that rights have been granted to them on particular terms and conditions, including as to their empowerment obligations and despite the fact that the MPRDA makes no provision for the imposition of further obligations on mining right holders.

23 The main grounds of review[29] of the challenged clauses of the 2018 Charter are thus that the challenged clauses are -

23.1 unconstitutional in that the Minister lacked the power to publish the 2018 Charter in the form of what purports to be a legislative instrument and, in doing so, offended against the doctrine of separation of powers; and

23.2 unauthorised by section 100(2) of the MPRDA generally and were born of an error of law in that the contents and scope of the challenged clauses go far beyond what is contemplated in section 100(2)(a) of the MPRDA and in some cases beyond the scope of the MPRDA itself. They do not merely set out a

[28] FA4, Clause 9, p 202.

[29] FA par 71.1, p 45.

framework for targets and a timetable for effecting the entry of HDSA's into the mining industry and how the objects of the Act *can* be achieved; they seek to regulate mining right holders in all kinds of ways. In doing so they impermissibly override, amend and conflict with the MPRDA and other legislation.

24 We submit that the inquiry must accordingly start with an assessment of the nature and ambit of the Minister's powers under s 100(2) of the MPRDA, and the nature and purpose of the 2018 Charter in the context of the MPRDA.

25 The main dispute in this regard is the Minister's and the Minerals Council's fundamentally divergent views on whether the charter contemplated in section 100(2) ("the Charter") constitutes the expression of formal policy (as the Minerals Council contends) or whether it is "law" (as the Minister contends). A related question is whether the development of the Charter constitutes administrative action which stands to be reviewed on the grounds set out in the PAJA or whether it stands to be tested against the principle of legality.

26 We deal with these aspects in this part of the heads under the following headings:

26.1 The wording and statutory context of section 100(2) of the MPRDA;

26.2 The 2018 Charter is a formal policy;

26.3 The Minister's view that the 2018 Charter is law:

26.3.1 does not accord with the wording of section 100(2);

26.3.2 offends against the doctrine of separation of powers;

26.3.3 offends against the rule of law;

26.3.4 relies upon a direct invocation of the Constitution, which is impermissible;

26.4 PAJA review; and

26.5 Legality review.

The wording and statutory context of section 100(2)

27 The starting point of the enquiry must be the wording of section 100(2) of the MPRDA, properly interpreted in its statutory context and with due regard to fundamental principles of constitutional law, including the separation of powers and rule of law.

28 The MPRDA was assented to on 3 October 2002 and took effect from 1 May 2004. It is common cause that it constituted a radical departure from the previous system of mineral and mining law applicable in South Africa.

29 The objects of the MPRDA, set out in section 2 thereof, are to:

> "(*a*) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;
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> (*b*) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;
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> (*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;
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> *[Para. (d) substituted by s. 2 of Act No. 49 of 2008.]*

(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;

[Para. (e) substituted by s. 2 of Act No. 49 of 2008.]

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

(g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;

(h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and

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

30 The objects of an Act serve as an aide in the interpretation of the provisions of the Act.[30] In the case of the MPRDA, section 4 expressly provides that:

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

31 The objects of an Act do not, however, operate *in vacuo* and do not impose independent obligations or confer additional powers in the absence of substantive provisions in the Act. Similarly, the long title and preamble do not impose substantive obligations, nor do they confer substantive powers. Once the objects are translated into, and given concrete form in, substantive provisions by the legislature, effect must be given to these substantive provisions, properly

[30] LM du Plessis states the following about such statements of the objects of an Act: "This means that specific provisions of a statute always have to be read and reconciled with interpretive directives *such as statements of the objects of an Act*, interpretive guidelines, guiding principles and/or provisions piloting the application of an Act." See LAWSA Vol 25(1) *Statute Law and Interpretation* Par 361 s.v. 'Systematic Interpretation: The preamble, statements of purpose and the long title'.

interpreted in view of the objects.

32 In the case of the MPRDA, rather unusually, a number of the substantive provisions make express reference to objects[31] of the Act. See in this regard sections 12(3)(d)[32], 17(1)(f)[33], 17(4)[34], 23(1)(h),[35] 55(1),[36] 100(2) and item 7(2)(k)[37] in Schedule II of the MPRDA.

33 An analysis of these sections of the MPRDA shows that they all require that an assessment be made by the Minister, as part of some decision-making process contemplated in the Act, as to whether, or the extent to which, an applicant has given effect to the objects of the MPRDA mentioned in sections 2(c), (d), (e), (f) and/or (i) thereof. Except for section 55, all these sections deal with applications made to the Minister.

34 As can be seen from section 2, the objects of the MPRDA are framed in broad

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[31] The objects mentioned in sections 2(c), (d), (e), (f) and/or (i) of the Act

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

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

[34] S 17(4) provides: "(4) The Minister may, having regard to the type of mineral concerned and the extent of the proposed prospecting project, request the applicant to give effect to the object referred to in section 2 (*d*)."

[35] S 23(1)(h) provides: "(1) Subject to subsection (4), the Minister must grant a mining right if— ... (*h*) the granting of such right will further the objects referred to in section 2(*d*) and (*f*) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan."

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

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

and general terms, as objects usually are. In the absence of guidelines, the Minister would thus have a completely unfettered discretion in making an assessment as to whether an applicant has given effect to the relevant objects of the Act. In addition, it would be impossible for applicants to predict what factors would weigh with the Minister and what the outcome of their applications are likely to be. This would all be contrary to the rule of law.

35 It is submitted that it is for this reason, and in this context, that the legislature enacted section 100(2) of the MPRDA which, as amended, provides that:

> "(a) To ensure the attainment of the Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework 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."[38]
>
> (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."

36 Section 100(2)(b) requires that the Charter should be "developed" to set a framework for targets and a timetable and set out how the objects referred to in those sections *can* be achieved. That is language indicative of a policy, not of legislation.[39]

37 The Charter itself is only expressly referred to in three sections of the MPRDA

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[38] Amendment Act 49 of 2008 inserted the phrases "into and active participation" and "and the beneficiation of such mineral resources" with effect from 7 June 2013. This coincided with similar amendments to the objects in sections 2(d) and (e) of the MPRDA.

[39] Compare s 85(2)(b) of the Constitution which uses the same word ("developing") when referring to national policy. See also section 25(1) of The South African National Roads Agency Limited and National Roads Act, 1998, which requires SANRAL to act *"within the framework of government policy"*.

(apart from section 100(2)), to wit:

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

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

38 There are no other provisions in the MPRDA which refer to or require compliance with the Charter. And there is no provision in the MPRDA which requires general compliance at all times with whatever is contained in the Charter as amended from time to time or authorises the Minister to require it in this manner.

39 The legislature, in the above-mentioned substantive provisions of the MPRDA,[40] prescribed when and to what end the Minister must assess whether an applicant has given effect to the specified objects referred to in section 2 of the MPRDA. It serves no purpose for the Minister to make general statements regarding the objects of the Act and the 2018 Charter as if the MPRDA does not contain these specific substantive provisions.

40 This specificity may be illustrated with reference to the MPRDA provisions

[40] See sections 12(3)(d), 17(1)(f), 17(4), 23(1)(h), 55(1), 100(2) and item 7(2)(k) in Schedule II of the MPRDA.

pertaining to mining rights and conversions of old order mining rights into mining rights:

40.1 Section 22 provides that an applicant for a mining right must apply therefor in the prescribed manner.[41] Part B of the application form (prescribed in the regulations) *inter alia* requires information on "OWNERSHIP OF PARTICIPATION BY HISTORICALLY DISADVANTAGED SOUTH AFRICANS (HDSA)". It also requires that the application must be accompanied by the prescribed social and labour plan.[42]

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

40.3 Section 23(1)(h) is thus a jurisdictional requirement for the grant of the mining right by the Minister. It directs the Minister, when considering an application for a mining right, to assess whether the granting of the right will further the objects in sections 2(d) and (f) of the MPRDA etc. when deciding whether or not to grant a mining right to an applicant. By implication, an *applicant* for a mining right must satisfy the Minister that the granting of the right will further the objects referred to in section 2(d) and (f), in accordance with the charter contemplated in section 100 and the prescribed social and labour plan.

40.4 It is clear therefore that the requirements to be met by an applicant in applying

[41] See regulations 2 and 10.

[42] See regulation 46.

for a mining right (or for that matter lodging an old order right for conversion) are those that prevail at the time the application (or lodgement) is considered.

40.5 If the Minister is satisfied that the grant of such right would further the objects referred to in sections 2(d) and (f), in accordance with the charter contemplated in section 100(2) and the prescribed social and labour plan, he must grant the right. There can accordingly be no suggestion that this section imposes a general duty on all *holders* of mining rights to comply with the provisions of future Charters. This outcome does not emasculate or defeat the purposes of the Charter. It is up to the Minister firstly to decide whether the grant of the application will be in accordance with the Charter and secondly to impose such conditions in the mining right as are reasonably required to meet that requirement. If he fails to do so he cannot thereafter seek to impose additional obligations on the mining right holder via the Charter as amended from time to time.

40.6 In the case of conversions of old order mining rights, item 7(3) In Schedule II provides that the Minister must convert an old order mining right into a mining right if the holder (as defined in Schedule II) complies with item 7(2) including item 7(2)(k) which, from 7 June 2013, provided that the holder of the old order right (i.e. the "applicant" for the conversion) must lodge:

> "(k) documentary proof of the manner in which the holder of the right will give effect to the object referred to in section 2(d) and 2(f)."[43]

40.7 In granting the mining right, the Minister is authorised to impose (*intra vires*)

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

terms and conditions. Section 23(6) of the MPRDA provides that the mining right is subject "*to this Act,*[44] *any relevant law, the terms and conditions stated in the right and the prescribed*[45] *terms and conditions*".

40.8 The Minerals Council has attached to its founding affidavit, the standard mining right and standard converted mining right.[46] As appears from these documents, they contain a recordal of the specific empowerment agreement (which is placed before the Minister as part of the applicant's application and on which the Minister relies for the grant of the right) and imposes an obligation on the holder to honour such agreement by way of a term.[47] The holder's obligation to give effect to the objects in sections 2(d) and (f) in accordance with the charter is concretised and individualised in this manner, within the four corners of the legislation.

40.9 Once granted, the holder of the right is obliged to comply with the provisions of the Act[48] and the terms and conditions stated in the mining right.[49] The holder is thus obliged to comply with the specific empowerment agreement it entered into as a term of its right.

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[44] "this Act" is defined in section 1 of the MRPDA to include the regulations and any term or condition to which any *inter alia* right issued is subject. It does not include the Charter.

[45] No terms and conditions have been prescribed.

[46] See FA8(1) and 8(2), pp 389 and 401.

[47] The standard term 17 (p 389) reads: "in the furthering of the objects of this Act, the Holder is bound by the provisions of an agreement or arrangement dated ... entered into between the holder / empowering partner and ... (the empowerment partner) which agreement or arrangement was considered by the Department for the purposes of compliance with the requirements of the Act and/or Broad Based Economic Empowerment Charter developed in terms of the Act and such agreement shall form part of this right".

[48] See ss 23(6) and 25(2) of the MPRDA

[49] See section 23(6) of the MPRDA. The holder also has to comply with the provisions of its approved social and labour plan.

40.10 After the grant, the holder has the obligation in terms of sections 25(2)(h) and 28(2)(c) to report on its compliance with these provisions and documents.

40.11 If the holder fails to comply with the terms of its right, the Minister is authorised to invoke the provisions of section 47. We deal below with section 47 which is, with respect, misunderstood by the Minister.

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

41.1 a holder cannot be required thereafter to comply with new Charter provisions introduced after the grant of the right - the MPRDA does not require it as shown above;[50] and

41.2 a failure to do so cannot be penalised by a revocation or cancellation of the mining right – the MPRDA does not permit it. The decision-maker is *functus officio* and may not amend or revoke his decision in the absence of clear statutory authority to do so, and there is none. Section 47 of the MPRDA upon which the Minister apparently relies, does not constitute such authority as set out more fully below.

The Charter is a formal policy

42 It flows from the contextual analysis of section 100(2) above that the Charter is intended to guide the Minister's discretion, on the basis of a published document,

[50] This argument was upheld by the full bench of this Court (per Barrie AJ) on 4 April 2018. See FA par 89, p 52.

when he takes decisions under those sections of the MPRDA[51] which require that an assessment be made as to whether, or the extent to which, an applicant has given effect to the objects referred to in section 2(c), (d), (e), (f) and/or (i) of the MPRDA.

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

44 The Minerals Council accordingly contends -

44.1 that the Charter is intended to function as a formal guideline or formal statement of policy, mandated by section 100(2) of the MPRDA;

44.2 which must be applied by the Minister;

44.3 in terms of, and in the manner contemplated in, the substantive provisions of the MPRDA.

45 A policy, formal or otherwise, is not legislation. The statements of Harms JA in *Akani* are apposite in this regard:[52]

> "I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the

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

[52] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 SCA par 3. See also paras 7 and 9.

separation between legislature and executive will disappear. Cf *Executive Council, Western Cape Legislature, and others v President of the Republic of South Africa and others* 1995 (4) SA 877 (CC) paragraph 62."

46 Policy could thus never be applied so as to have the force of law; and even less can the Minister proclaim the policy to be a law.

The Minister's case that the Charter is law

47 The Minister's firstly contends[53] that the Charter is "*binding*" because, if it were otherwise, the Minister would be incapable of achieving the purposes set out in section 100(2). The argument is with respect wrong:

47.1 Section 23(1)(h) provides the mechanism by which the purposes of section 100(2) may be achieved without the Charter impermissibly being elevated to a law or being proclaimed as independently legally binding upon right holders.

47.2 The Minister can impose binding obligations for the duration of the mining right by imposing conditions in an individual grant, to the extent that he is authorised to do so by the Act. *Non constat* that the Minister can from time to time by way of further Charters, in the absence of a statutory power authorising him to do so, set new targets and requirements for holders in general as if he were the legislature and then cancel existing rights if the holders fail to comply with these new targets or requirements (and which cancellation power, incidentally, is located in the self-same charter and not in the empowering statute). The executive cannot confer powers on itself.

47.3 In any event, to cast the dispute as being about whether the Charter is "legally binding" or "legally enforceable" is unhelpful. As set out in the founding

[53] AA paras 82, 83, 85, pp 508-509.

affidavit, the Minerals Council's case is that the 2018 Charter is a formal guideline or statement of policy, mandated by section 100(2) of the MPRDA, which must be applied in terms of, and in the manner contemplated in, the substantive provisions of the MPRDA. The Minister must for example apply the Charter when deciding whether or not to grant a mining right, by virtue of the provisions of section 23(1)(h) of the MPRDA, as shown above. It is imperative that the Minister takes this jurisdictional fact into account when granting a mining right. The MPRDA does, in this sense, enjoin or bind the Minister (and his delegates) to apply or enforce the provisions of the Charter. It would accordingly be lawful for him to apply the Charter when deciding whether or not to grant a mining right and unlawful not to take it into account because section 23(1) requires it. However, it does not follow that the Charter is a law or has the force of law and create legally enforceable obligations independently of the substantive provisions of the MPRDA. It also does not follow that the Minister has legislative powers in terms of which he can impose new obligations upon holders, supplement or amend the MPRDA, override other legislation, and provide for the application of the Charter in any manner other than that contemplated in the MPRDA.

48 The Minister further contends[54] that the Charter is subordinate legislation of a *sui generis* type. We submit that this contention is also incorrect and deal with it more fully below.

49 **The Minister's view does not accord with the wording of section 100(2)**

[54] AA par 294, p 574.

49.1 First, there is no express indication in the wording of section 100(2) that the legislature intended a delegation of legislative power to the Minister.

49.2 No basis accordingly exists for the Minister to elevate the policy determinations envisaged in section 100(2)(a) (or for that matter in sections 100(1)(a) and (b)) to the level of subordinate legislation.

49.3 It is submitted that section 100(2) intends the Charter to function as a published (and thus transparent) policy statement which guides the exercise of the Minister's discretion in applying certain sections of the MPRDA, as set out above.

50 **The Minister's view offends against the doctrine of separation of powers**

50.1 Second, an interpretation of section 100(2) as implicitly affording the Minister unbridled powers to prescribe any such binding measures as he, in his sole discretion, deem appropriate in order to achieve the objects of sections 2(c), (d), (e), (f) and (i), such as he has sought to exercise in publishing the challenged clauses, would render the section unconstitutional as being in contravention of the rule of law and the doctrine of separation of powers between the legislature and the executive, and should be avoided.

50.2 Indeed, the Minister's contentions that the 2018 Charter is law and that he is entitled to make and change such law, completely disregard the doctrine of separation of powers.[55]

50.3 The basic point of departure should be that:

[55] Pius N Langa *The Separation of Powers in the South African Constitution* 2006 SAJHR 2.

50.3.1 The legislative authority of the national sphere of government is vested in Parliament, as set out in sections 43(a) and 44 of the Constitution, 1996. In terms of sections 44(1)(a)(ii) and (iii), the National Assembly has the power to pass legislation with regard to any matter (subject to certain exclusions which are not relevant for present purposes) and to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body[56] in another sphere of government (i.e. in the provincial or local sphere).

50.3.2 The executive authority of the Republic is vested in the President by section 85 of the Constitution, 1996. He exercises the executive authority, together with other members of the Cabinet[57] (consisting of the Deputy-President and Ministers[58]), by -

> "(2)(a) implementing national legislation, except where the Constitution or an Act of Parliament provides otherwise;
>
> (b) developing and implementing national policy;
>
> (c) co-ordinating the functions of state departments and administrations;
>
> (d) preparing and initiating legislation; and
>
> (e) performing any other executive function provided for in the Constitution or in national legislation."

50.4 The third branch is the judiciary, which need not be discussed further in this application.

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[56] The Minister is not a "legislative body" but part of the national executive.

[57] See section 91(1) of the Constitution.

[58] The Ministers are responsible for the powers and functions of the executive assigned to them by the President, in terms of section 92(1) of the Constitution.

50.5 There is thus a separation of powers between the legislative, executive and judicial branches of government. It is trite that the doctrine of separation of powers is a cornerstone of our constitutional dispensation. It entails that each branch of government must perform its constitutionally allocated function, consistently with the Constitution and that the branches of government may not usurp one another's powers. As stated in the *Heath* case:[59]

> "[22] In the first certification judgment this Court held that the provisions of our Constitution are structured in a way that makes provision for a separation of powers.[39] In the *Western Cape* case[40] it enforced that separation by setting aside a proclamation of the President on the grounds that the provision of the Local Government Transition Act,[41] under which the President had acted in promulgating the Proclamation, was inconsistent with the separation of powers required by the Constitution, and accordingly invalid. It has also commented on the constitutional separation of powers in other decisions.[42] There can be no doubt that our Constitution provides for such a separation, and that laws inconsistent with what the Constitution requires in that regard, are invalid."

50.6 The doctrine of separation of powers does not preclude Parliament, as a legislative body, from delegating its power to make laws to other bodies, including the executive, but that power is subject to strict constraints in view of the above-mentioned constitutional principles.[60]

50.7 In the first instance, a delegation of plenary power to the executive to amend the source of its authority to make law or to amend Acts of Parliament will inevitably subvert the manner and form provisions of the Constitution and would allow the executive to confer power upon itself to do as it pleases. It will

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[59] *SA Association of Personal Injury Lawyers v Heath and others* 2001 (1) SA 883 (CC) par 22.

[60] See *Executive Council, Western Cape Legislature v The President of the Republic of South Africa* 1995 10 BCLR 1289 (CC); 1995 (4) SA 877 (CC)

therefore not survive constitutional scrutiny. The following statements of Chaskalson CJ are apposite: [61]

> "[51] The legislative authority vested in Parliament under section 37 of the Constitution is expressed in wide terms – "to make laws for the Republic in accordance with this Constitution". In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including, as section 16A does, the power to amend the Act under which the assignment is made.
>
> [99] We have said previously that our role as justices of this Court is not to "second guess" the executive or legislative branches of government or interfere with affairs that are properly their concern. We have also made it clear that we will not look at the Constitution narrowly. Our task is to give meaning to the Constitution and, where possible, to do so in ways which are consistent with its underlying purposes and are not detrimental to effective government. The issues raised in the present case are, however, of fundamental importance. They concern the powers of Parliament and how it is required to function under the Constitution. They concern also the validity of executive proclamations issued by the President which are intended to have the force of law. Constitutional control over such matters goes to the root of a democratic order. Adherence to the prescribed forms and procedures and insistence upon the executive not exceeding its powers are important safeguards in the Constitution. Section 16A was specifically authorised by Parliament and proclamations under that section were issued in consultation with and had the approval of the relevant committees of both Houses of Parliament. The proclamations were tabled in Parliament and could have been invalidated by resolution, and no such resolution was passed. Yet, what was done, is inconsistent with what is required by the Constitution.
>
> [100] Constitutional cases cannot be decided on the basis that Parliament or the President acted in good faith or on the basis that there was no objection to action taken at the time that it was carried out. It is of crucial importance at this early stage of the development of our new constitutional order, to establish respect for the principle that the Constitution is supreme. The Constitution itself

[61] See *Executive Council, Western Cape Legislature v President RSA supra* par 51-52, 99-101. The case related to the constitutionality of section 16A of the Transition Act which provided that "The President may amend this Act and any schedule thereto by proclamation in the *Gazette*".

allows this Court to control the consequences of a declaration of invalidity if it should be necessary to do so. Our duty is to declare legislative and executive action which is inconsistent with the Constitution to be invalid, and then to deal with the consequences of the invalidity in accordance with the provisions of the Constitution.

[101] Despite differences in their reasoning, the members of this Court are unanimous in their conclusion that, by virtue of their inconsistency with the Constitution, the provisions of section 16A of the Local Government Transition Act are invalid. The Court has further, by a majority of 9 to 2, come to the conclusion, though for different reasons, that Proclamations R58 and R59 of 1995, which were purportedly promulgated under the provisions of section 16A of the Transition Act, cannot be validated under the provisions of section 235 of the Constitution. In the result an order has to be made declaring that section 16A of the Transition Act is inconsistent with the Constitution."

50.8 Secondly, where Parliament does not seek to delegate plenary power but merely the power to make subordinate legislation, the following factors were identified by Mahomed J[62] in the same matter as crucial in considering and determining the constitutional validity of the delegation:

> "The competence of a democratic Parliament to delegate its lawmaking function cannot be determined in the abstract. In depends *inter alia* on the constitutional instrument in question, the powers of the legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegatee, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegatee and practical necessities generally."

50.9 Sachs J in the same decision formulated the factors as follows:[63]

"(a) The extent to which the discretion of the delegated authority (delegatee) is structured and guided by the enabling Act;

(b) The public importance and constitutional significance of the measure – the more it touches on questions of broad public importance and controversy, the greater will be the need for scrutiny;

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[62] *Executive Council, Western Cape Legislature v President RSA supra* par 136, pp 1289, with reference to Baxter *Administrative Law* (Juta & Co Ltd 1984) at 435.

[63] *Executive Council, Western Cape Legislature v President RSA supra* par 206, pp 1371-1372.

(c) The shortness of the time period involved;

(d) The degree to which Parliament continues to exercise its control as a public forum in which issues can be properly debated and decisions democratically made;

(e) The extent to which the subject-matter necessitates the use of forms of rapid intervention which the slow procedures of Parliament would inhibit;

(f) Any indications in the Constitution itself as to whether such delegation was expressly or impliedly contemplated."

50.10 We accordingly submit:

50.10.1 On a conspectus of the statutory framework and the wording of section 100(2), the Charter was not intended by the legislature to be subordinate legislation. It was also not in fact enacted as subordinate legislation and was not made as regulations in terms of section 107 of the MPRDA. It was "developed" by the executive under section 100(2) as a formal policy, in the course of implementing the MPRDA, as contemplated in section 85(2)(a) and/or 85(2)(b) of the Constitution.

50.10.2 Furthermore, the doctrine of separation of powers precludes an interpretation of section 100(2) which confers plenary law-making powers on the Minister because such an interpretation of section 100(2) would render it unconstitutional. In this regard it is important to bear in mind that the Minister does not appear to conceive of any limit to his power to legislate under section 100(2). He has indeed sought to legislate under that section on a range of topics – for example health and safety – which are not regulated by the MPRDA at all.

50.10.3 An interpretation of section 100(2) as conferring subordinate legislative powers on the Minister would render it unconstitutional, and should be avoided, in view of:

(i) the wide and unqualified nature and ambit of the purported delegation;

(ii) the subject-matter to which it relates;

(iii) the degree of delegation;

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

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

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

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

50.11 It is submitted that such an unconstitutional interpretation should be avoided and that section 100(2) should accordingly not be interpreted as empowering

the Minister to legislate. The latter interpretation is supported by the wording and structure of the MPRDA and is in conformity with the constitutional norm of separation of powers.

51 **The Minister's view offends against the rule of law**

51.1 The Minister's interpretation of his powers, in conjunction with his contention that the 2018 Charter is law, amounts to an argument that he is vested with an untrammelled power to legislate. This is untenable.

51.2 Even if, contrary to the submissions made above, section 100(2) were to be held to constitute a proper delegation of subordinate legislative powers to the Minister and the 2018 Charter were held to have been intended and passed as subordinate legislation, which remain denied:

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

51.2.2 the nature, purpose and permissible scope of the 2018 Charter all still fall to be determined by the provisions of the MPRDA, which is the empowering legislation;

51.2.3 the 2018 Charter still cannot conceivably conflict with, amend or supplement other provisions of the enabling statute (the MPRDA) and other national legislation.

51.3 The Minister's justification that the challenged clauses are "declaratory" of rules already prescribed by the MPRDA or other legislation is untenable. The

fact that another law imposes particular obligations upon those subject to it cannot be a valid basis for a contention that the Minister therefore has the power to impose similar obligations, in the absence of any corresponding power under the MPRDA. On that argument, the Minister could impose VAT obligations on rights holders.

52 For the reasons set out above, it is respectfully submitted that the Minister's arguments are without merit in that they simply do not accord with the provisions of the MPRDA.

53 **Direct invocation of the Constitution not allowed**

53.1 Insofar as the Minister suggests that the Constitution produces binding transformational obligations which rights holders must meet or that the Constitution empowers him to impose the transformational obligations contained in the 2018 Charter, this is incorrect.

53.2 The Constitutional Court has held that once legislation is passed to fulfil a constitutional right,[64] the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or a supporting role.[65]

53.3 The Constitutional Court in *My Vote Counts NPC*[66] held that subsidiarity denotes a theoretical ordering of institutions, of norms, of principles, or of

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

[65] *My Vote Counts MPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) [50], [53], [55] and [56].

[66] *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC)

remedies, and signifies that the central institutional or higher norm, should be invoked only where the more local institution, or concrete norm or detailed principle or remedy, does not avail. The word has been given a range of meanings in our constitutional law.[67] The Court held that the most frequent invocation of subsidiarity has been to describe the principle that limits the way in which litigants may invoke the Constitution to secure enforcement of a right.[68]

53.4 Fundamentally, the principle holds that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation to give effect to that right.[69] Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or a supporting role.[70]

53.5 In relation to the Labour Relations Act 66 of 1995, the Constitutional Court said the following:

> "[55] Second, the court has applied the principle to legislation Parliament adopts with the clear design of codifying a right afforded by the Bill of Rights. After Parliament enacted the Labour Relations Act (LRA), the High Court in Naptosa refused to allow a litigant to rely directly on the fair labour practices provision in the Bill of Rights. It had to rely instead on the unfair labour practice provisions in the statute, or challenge the statute itself. Conradie J said he could not 'conceive that it is permissible for an applicant, save by attacking the constitutionality of the LRA, to go beyond the regulatory framework which it establishes'. He also stated that it was inappropriate, in a highly regulated statutory environment like labour law, to ask a court to fashion a remedy

[67] At [46]

[68] At [50]

[69] At [53]

[70] At [54]

'which the legislature has not seen fit to provide'.

[56] This approach was first quoted with approval in this court in a context unrelated to employment rights, then adopted and endorsed unanimously in a case about labour relations, Sandu. Even though national regulations had been enacted providing for collective bargaining, the applicant sought to rely directly on the provisions of s 23(5) of the Bill of Rights to found a more encompassing duty to bargain. The court disallowed this. It held that where legislation has been enacted to give effect to a constitutional right, 'a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard'. If the legislation is wanting in its protection of the right, then that legislation 'should be challenged constitutionally'." [71]

53.6 We accordingly submit that absent a direct challenge that the MPRDA fails to give effect to particular provisions of the Constitution, the Minister cannot bypass the provisions thereof and contend that rights holders have transformational obligations arising from the Constitution or that the Constitution empowers the Minister to impose transformational obligations by way of the 2018 Charter.

PAJA review

54 The question we consider in this paragraph is whether the development and publication of the 2018 Charter constitute *administrative action* for purposes of PAJA.

55 As set out above, the Minerals Council contends that the Charters (including the 2018 Charter) constitute a formal expression of policy. However, because the development and publication thereof take place in terms of, and is mandated by, section 100(2) of the MPRDA, the decision to do so may constitute administrative

[71] See too the majority judgment at [160], [161], [163], [164], [165] and [166].

action because PAJA defines administrative action *inter alia* as a decision taken by an organ of state such as the Minister when exercising a public power or performing a public function in terms of any legislation.

56 The question whether PAJA applies to the Minister's action (to develop and publish the Charter in terms of section 100(2) of the MPRDA), depends in particular on –

56.1 whether the action falls within one of the nine exclusions listed in subsections (aa) – (*ii*) of the definition of administrative action in PAJA; and

56.2 if not specifically excluded, whether it falls within the definition of administrative action in section 1 of PAJA.

57 We firstly deal with the latter question.

58 **Definition of administrative action**

58.1 Administrative action is defined (in relevant part) in section 1 of PAJA as *"any decision taken ... by – (a) a organ of state, when – ... (ii) exercising a public power or performing a public function in terms of legislation ... which adversely affects the rights of any person and which has a direct, external legal effect..."*.

58.2 The only element susceptible to any debate is whether the action of developing and publishing the 2018 Charter under section 100(2) *"adversely affects the rights of any person"*.

58.3 On the Minister's version, there is no doubt that the 2018 Charter affects the rights of all rights holders immediately upon the publication thereof.

58.4 On the Minerals Council's version, the 2018 Charter will affect the rights of applicants (for e.g., in that they have to enter into empowerment agreements in order to be granted rights) and of holders of rights (through the imposition of terms and conditions relating to empowerment) when it is applied by the Minister, as he must, at the time of deciding whether to grant the mining right. The 2018 Charter thus, at the least, has the capacity to affect legal rights and that has been held to be sufficient for this part of the definition of administrative action as appears from the following statement by the SCA in *Greys Marine Hout Bay (Pty) Ltd v Min of Public Works:*[72]

> "[23] While PAJA's definition purports to restrict administrative action to decisions that, as a fact, "adversely affect the rights of any person", I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on section 33 of the Constitution. Moreover, that literal construction would be inconsonant with section 3(1), which envisages that administrative action might or might not affect rights adversely.[7] The qualification, particularly when seen in conjunction with the requirement that it must have a "direct and external legal effect",[8] was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."

59 **Is the development and publication of the 2018 Charter specifically excluded from the definition of administrative action in PAJA**

59.1 The exclusion relevant for present purposes is contained in subsection (aa) of the definition of administrative action in PAJA. It excludes *"the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h),*

[72] [2005] 3 All SA 33; 2005 (6) SA 313 (SCA) paras 21-25

(i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 97, 98, 99 and 100 of the Constitution".[73]

59.2 Section 85(2) is relevant for present purposes. The powers listed in sections 85(2)(b) to (e)[74] are excluded but not those in section 85(2)(a). Section 85(2)(a) refers to the executive power of *"(a) implementing national legislation"*. This is, expressly, not excluded from administrative action.[75]

59.3 In the *SARFU*[76] matter, it was held that the distinction between executive and administrative action comes down to a distinction between the implementation of legislation, which is administrative action, and the development of policy, which is not.[77] The difficulty with section 100(2) is that it has elements of both: it requires the Minister, who is the member of the executive authority responsible for mineral resources,[78] to implement the legislation (section 100(2) of the MPRDA) by developing a formal policy in terms thereof.

59.4 It is submitted that the judgment of the Constitutional Court in *Ed-U-College*[79] is of considerable assistance in this regard. In that matter, the Constitutional

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[73] The majority of these sections (except sections 85, 92(3), 99 and 100) deal exclusively with powers of the President.

[74] To wit, "(b) developing and implementing national policy; (c) co-ordinating the functions of state departments and administrations; (d) preparing and initiating legislation; and (e) performing any other executive function provided for in the Constitution or in national legislation."

[75] It was held in *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd & Others* 2006 (2) SA 311 (CC) that the omission of section 85(2)(a) was deliberate.

[76] *President of the RSA v South African Rugby Football Union* 2000 (1) SA 1 (CC).

[77] The judgment explains (at para 143) that where the line is drawn will depend primarily upon the source of the power, the nature of the power, its subject matter, whether it involves the exercise of a public duty and whether it is related to policy matters or the implementation of legislation.

[78] See sections 91(1) and 92(1) of the Constitution.

[79] *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College* (PE) 2001 (2) SA 1 (CC); 2001 (2) BCLR 118 (CC)

Court refined the distinction between decisions related to the formulation of policy and those related to the implementation of legislation. The court stated as follows (with reference to a passage in the *SARFU* judgment):

> "It should be noted that the distinction drawn in this passage is between the implementation of legislation, on the one hand, and the formulation of policy on the other. Policy may be formulated by the executive outside of a legislative framework. For example, the executive may determine a policy on road and rail transportation, or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action."[80]

59.5 Given that the Minister is expressly mandated by section 100(2)(a) of the MPRDA to develop the Charter, which is intended to facilitate the implementation of that Act, it is submitted that the development of the 2018 Charter constitutes the formulation of policy in the narrow sense, which is closely related to the implementation of the MPRDA and that it accordingly constitutes administrative action.

59.6 The application of the factors identified in *SARFU* provides further support for the submission that the development of the 2018 Charter is the formulation of policy in the narrow sense which is intended to facilitate the implementation of the act and accordingly administrative in nature:

59.6.1 The source of the power is section 100(2)(a) of the MPRDA.

59.6.2 The nature of the power is administrative insofar as it is mandated by section 100(2)(a).

[80] *Ibid* at para 18

59.6.3 The subject matter is the "development" of the Charter which must *"set the framework for targets and time table for effecting entry into and active participation of historically disadvantaged South Africans in the mining industry..."* and which *"must set out, amongst others, how the objects referred to in section 2(c), (d), (e), (f) and (i) can be achieved"*. This is language indicative of the development of policy and, at the same time, it indicates that the Charter is closely related to the implementation of the stated objects of the Act.

59.6.4 The development of the 2018 Charter can be said to involve the exercise of a public duty under and in terms of section 100(2)(a).

59.6.5 The last factor is whether it is related to policy matters or the implementation of legislation. The 2018 Charter is related to both but, as stated above, it falls into the narrow category of policy which is closely linked to the implementation of legislation, and therefore constitutes administrative action.

Legality review

60 In relation to administrative action, the principle of legality was enshrined in section 33 of the Constitution (as read with PAJA). In relation to legislation and to executive acts that do not constitute administrative action, the principle of legality is necessarily implicit in the Constitution.

61 In the event that the development of the Charter is held not to constitute "administrative action" as defined in PAJA, it is beyond dispute that the Minister's powers are constrained by the principle of legality enshrined in section 1(c) of

the Constitution. This principle entails that the Minister may exercise no power and perform no function beyond that conferred upon him by law.[81] It acts as a safety net to give the court some degree of control over action that does not qualify as administrative under PAJA, but nonetheless involves the exercise of public power.[82]

62 With regard to the scope of legality review, it is useful to call to mind the following statements of Navsa JA in *Democratic Alliance and others v Acting NDPP and others*:[83]

> "Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution (and that need not be decided in this case), the Constitution is the supreme law and the common law, insofar as it has any application, must be developed consistently with it and subject to constitutional control.

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[81] See *Fedsure supra* paras 1 – 60, esp paras 40, 54, 56, 58 and 59. "There is no provision in the interim Constitution which expressly states that where a local government acts ultra vires its empowering statute, it acts unconstitutionally, but it seems that the proposition must be correct" (par 54). See also *Pharmaceutical Manufacturers Association of South Africa and another: In Re Ex Parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) paras 37–45; *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) par 64; and *South African National Roads Agency Ltd v City of Cape Town* [2016] 4 All SA 332 (SCA) par 8; 75: "A repository of power may not exercise any power or perform any function beyond that conferred upon it by law and must not misconstrue the nature and ambit of the power".

[82] In *Affordable Medicines Trust and others v Minister of Health and others* 2006 (3) SA 247 (CC) (2005 (6) BCLR 529) the Constitutional Court, with reference to its earlier decision in *Fedsure Life* stated the following (paragraph 49): "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."

[83] [2012] 2 All SA 345 (SCA).

> [30] Importantly, the Constitutional Court in *Pharmaceutical Manufacturers* (*supra*) held that the grounds of review articulated in the well-known case of *Shidiack v Union Government* (*Minister of the Interior*) 1912 AD 642 at 651–652 are "*consistent with the foundational principle of the rule of law enshrined in our Constitution*" (paragraph 83) and that the rule of law also requires rationality as a prerequisite for the validity of the exercise of all public power (paragraphs 85–86).
>
> [31] Section 1(*c*) of the Constitution proclaims the supremacy of the Constitution and the concomitant supremacy of the rule of law. In fulfilling the constitutional duty of testing the exercise of public power against the Constitution, courts are protecting the very essence of a constitutional democracy. Put simply, it means that each of the arms of government and every citizen, institution or other recognised legal entity, are all bound by and equal before the law. Put differently, it means that none of us is above the law. It is a concept that we, as a nation, must cherish, nurture and protect. We must be intent on ensuring that it is ingrained in the national psyche. It is our best guarantee against tyranny, now and in the future."

63 It is thus accepted by our courts that section 1(c) of the Constitution empowers them not only to review executive action on grounds of excess of power but also on grounds of irrationality.[84] In respect of the review grounds that the Minister exceeded his powers or acted irrationally, it would thus make little practical difference whether the development and publication of the 2018 Charter constitutes administrative action or executive action because his conduct would be reviewable on either basis.

64 Once it is found that in developing and publishing the 2018 Charter the Minister exceeded his powers by legislating in contravention of the separation of powers or by acting outside of the scope of the empowering statute or irrationally, the challenged clauses would stand to be reviewed and set aside either on the basis of section 33 of the Constitution and PAJA (if it is found to be policy in the narrow sense and thus administrative action) or in terms of the principle of legality (if it

[84] *Democratic Alliance and others v Acting NDPP and others* [2012] 2 All SA 345 (SCA).

is found to be policy in the wide sense, subordinate legislation or a *sui generis* enactment). The Minerals Council relies on both these bases in the alternative.[85]

Conclusion on main grounds of review

65 It is submitted for the reasons set out above that the challenged clauses are accordingly -

65.1 unconstitutional in that the Minister lacks the power to publish the 2018 Charter in the form of what purports to be a legislative instrument and, to the extent that he sought to do so and usurped the functions of the legislature, he offended against the separation of powers, which is entrenched as part of the rule of law in section 1(c) of the Constitution, so that the challenged clauses fall to be set aside in terms of the principle of legality implicit in the Constitution and/or under section 6(2)(a)(i), 6(2)(f)(i), 6(2)(d) and/or 6(2)(i) of PAJA;

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

PART 4A: GROUNDS OF REVIEW IN RESPECT OF CLAUSES UNDER THE OWNERSHIP ELEMENT (clause 2.1.1 of the 2018 Charter)

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

[85] Founding affidavit par 97-102, pp 50-52.

the principle reflected in the order and judgment in clause 2.1.1.1 thereof by providing that "*An existing mining right holder who has achieved a minimum of 26% BEE shareholding shall be recognised as compliant for the duration of the mining right*". To remain "compliant", however, the Implementation Guidelines[86] provide that such holders must submit annual reports on their current BEE shareholding, meaningful economic participation and their shareholders' rights. This is already an erosion of the principle set out in clause 2.1.1.1 of the 2018 Charter.

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

67.1 clause 2.1.1.2 provides that "*such recognition will not be applicable upon renewal*";

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

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

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

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

68 It is submitted that the principle remains that, unless authorised to do so by the MPRDA or unless specified in the terms and conditions stated in the right as referred to in section 23(6) of the MPRDA, the Minister has no power after grant, to impose, through the 2018 Charter, new obligations on holders of existing rights in the case of renewals and transfers of their existing mining rights.

Renewals of existing mining rights

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

70 Section 25(1) provides that:

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

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

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

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

(*b*) in the prescribed manner; and

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

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

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

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

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

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

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

(*b*) the mining work programme;

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

(*d*) conditions of the environmental authorisation.

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

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

72 A plain reading of section 24 shows that the Minister has no power, by way of the 2018 Charter or otherwise, to require compliance with further requirements set out in revised Charters from time to time as a pre-condition for the granting of a renewal. Section 24(3) contains no reference to the Charter. There is little doubt that the onerous re-empowerment requirements in the 2018 Charter in the case of renewals go further than those imposed under section 24 of the MPRDA and afford the Minister greater powers than those set out in the MPRDA when he decides whether or not to grant the renewal of an existing mining right.

73 The provisions of clauses 2.1.1.2, 2.1.1.5 and 2.1.1.6 as well as 2.1.6.2, insofar as they purport to oblige an existing holder of a mining right to comply with the new requirements of the 2018 Charter relating to ownership upon renewal of a

mining right, are accordingly clearly beyond the powers of the Minister. The non-recognition of renewals is furthermore contrary to the object of security of tenure contained in section 2(g) of the MPRDA (which includes continuity of tenure by way of renewals) and contradicts section 24(3), which does not include re-empowerment as a jurisdictional fact for compulsory grant of renewal applications. The aforesaid clauses are accordingly not authorised by the provisions of the MPRDA and stand to be reviewed and set aside in terms of sections 6(2)(a)(i) and/or 6(2)(f)(i) of PAJA, alternatively in terms of the principle of legality.

Transfers of existing mining rights

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

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

> "(1) A prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies.
>
> (2) The consent referred to in subsection (1) must be granted if the cessionary, transferee, lessee, sublessee, assignee or the person to whom the right will be alienated or disposed of—

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

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

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

77 Section 11(2)(b) provides that the consent must be granted if the person or entity acquiring the right (the cessionary, transferee, lessee, sublessee, assignee or the person to whom the right will be alienated) satisfies the requirements of section 23. It is clear that not all subsections of section 23 are relevant. Some (for e.g. 23(3)) impose obligations on the Minister.

78 It is submitted that subsection 23(1)(h) is not applicable because, in its terms, it relates to the point in time when the right is granted. It provides that "*the Minister must grant a mining right if ... (h) the granting of such right will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan*". In the case of a transfer, the right has per definition been granted already so that section 23(1)(h) cannot be applied at the stage of an application for consent to transfer the right. As explained above, if the Minister is satisfied that the granting of the right will further the stated objects, he imposes a term in the mining right to bind the holder to comply with the provisions of its empowerment agreement. The transferee will become bound to honour that term of the mining right upon taking transfer of that mining right unless application is made in terms of section

102 of the MPRDA to amend the right by replacing the empowerment clause with an amended empowerment clause.

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

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

81 In instances where a mining right is sold to a company holding more than one right, the provisions of clause 2.1.1.4 will have far-reaching consequences in respect of the other rights it holds. By way of example, where the transferee, in order to take transfer of a specific right, has to amend the structure of its shareholding in order to comply with the new requirements contained in the 2018 Charter, this will render it in breach of its empowerment obligations in the case of other rights it holds.

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

PART 4B: OWNERSHIP: DISPOSAL OF BEE SHAREHOLDING IN RESPECT OF EXISTING MINING RIGHTS (clause 2.1.6 of the 2018 Charter)

83 Clause 2.1.6 of the 2018 Charter refers in its heading not only to *new mining rights* but also to *existing mining rights*. It is submitted that the reference to existing mining rights in the heading is an error.

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

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

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

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

86.2 clause 2.1.6 (disposal of BEE shareholding), on the other hand, provides that where BEE shareholding is disposed of, a mining right holder's empowerment credentials shall only be recognised if *inter alia* in terms of clause 2.1.6.1.1 it is compliant with the requirements of the 2018 Charter (which is 30%) at the time of the disposal.

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

88 The Minister denies that the reference to existing mining rights in the heading is erroneous, without furnishing any explanation for his stance.[87]

PART 4C: OWNERSHIP: NEW MINING RIGHTS and DISPOSAL OF BEE SHAREHOLDING IN RESPECT OF NEW MINING RIGHTS (clauses 2.1.3 to 2.1.6 of the 2018 Charter)

Introduction

89 Clauses 2.1.3 to 2.1.6, as read with clause 7.2 and the Scorecard of the 2018 Charter, deal with the following main topics in relation to new mining rights:

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

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

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

[87] AA paras 119-121, p 517; RA par 70, p 1879.

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

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

89.6 Clause 2.1.6.2 furthermore provides that the recognition of consequences of previous deals shall not be claimed against future mining rights or mining right renewal applications.

90 It is submitted that the clauses mentioned above stand to be reviewed on the grounds set out below.

Minimum of 30% BEE shareholding and manner of distribution of 30% ownership (clause 2.1.3 and 2.1.4)

91 There is no section in the MPRDA which authorises the Minister to prescribe the minimum shareholding or the specific distribution of shareholding in the case of all companies holding new mining rights, as he seeks to do in clauses 2.1.3.1, 2.1.3.2 and 2.1.4.

92 The Minister[88] does not give a single reason for his decision to set the shareholding of Black persons in mining right holders at 30% or to require the specific distribution of the 30% shareholding. His response[89] to this complaint is that section 100(2) is framed in wide terms and that he has a discretion to establish what falls within its parameters. Assuming for the sake of argument that he is correct, he has still failed to say on what rational basis he has exercised his discretion. The only conclusion is that it is irrational or arbitrary.

93 Furthermore, as stated above, the 2018 Charter is intended to guide the Minister's discretion but cannot exclude the exercise of his discretion by prescribing the specific percentages in this manner.

94 Clauses 2.1.3.1, 2.1.3.2 and 2.1.4 accordingly stand to be reviewed and set aside in terms of the principle of legality and/or sections 6(2)(a)(i) and (f)(i) of PAJA.

Obligation to retain 30% at all times and the apparent exception to the rule (clause 2.1.5.2 read with clauses 7.2 and 9.1 and clause 2.1.6)

95 It is submitted that the provisions of the 2018 Charter that require that the minimum 30% target shall apply for the duration of a mining right, as embodied in clauses 2.1.5.2 and 7.2 as well as in the Scorecard, also stand to be reviewed on the basis of the lack of power of the Minister in terms of section 6(2)(a)(i) and/or 6(2)(f)(i) of PAJA and error of law in section 6(2)(d) of PAJA *alternatively* on the basis of the principle of legality. The Minister is simply not empowered by the MPRDA to decree by way of the 2018 Charter that a holder of a new mining

[88] AA par 124-131, pp 518-519.

[89] AA par 127, p 518.

right has a continuing obligation to maintain the minimum HDP ownership level (which has now been increased to 30%), and (when read with clause 9.1) that a failure to be 100% compliant at all times constitutes a contravention of the 2018 Charter and is subject to the provisions of sections 93, 47, 98 and 99 of the MPRDA.

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

97 Whether this is the correct meaning of the above-mentioned clauses is not clear, because the obligation to maintain 30% is not expressly made subject clause 2.1.6.1. The interpretation of clause 2.1.6 is further complicated by the fact that it purports in its heading to apply also to existing rights, as set out above.

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

99 The main issue remains whether or not, once a party which applies for a mining right has satisfied the Minister that the granting of the right will be in accordance with the 2018 Charter, that party is obliged, after the right has been granted (therefore, as mining right holder), to "top up" the 30% HDP ownership target, if for one reason or another it falls below that level, such as where a holder entered into a transaction which achieved a minimum of 30% HDP shareholding, but where the HDP partner/s has/have exited the transaction, or where the contract between the holder and the HDP Partner/s has lapsed or was cancelled due to breach, or where the previous HDP Partner/s transferred its/their shares to a person/s other than an HDP Person. The Minister's view is that a mining right holder is not bound solely by the Charter as it stood when the mining right was granted.[90]

100 As stated above, there is nothing in the language of section 23 which imposes such an obligation upon the successful applicant for a mining right. The MPRDA particularly does not oblige the holder to restore the percentage ownership by HDPs to the target (now 30%) referred to in the 2018 Charter where such percentage falls below this level after the grant of the holder's mining right.

101 As pointed out above, the majority of the full bench of the Gauteng High Court in Pretoria has held that there is no such obligation in the MPRDA. It is submitted that it is irrational that the 2018 Charter implements the *"once empowered, always empowered"* principle in relation to existing rights (albeit only to the extent set out in clause 2.1.1) but does not also implement it in respect of new mining rights (except, apparently, in the circumstances set out in clause 2.1.6).

[90] AA par 147, p 523. RA par 72, pp 1880-1881.

Incidentally, an old order mining right converted after 26 September 2018 will also rank as a new mining right governed by clause 2.1.3. The same principles apply in both cases.

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

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

104 It is submitted that the MPRDA does not authorise the imposition of new requirements by way of the Charter after grant or conversion in respect of existing

rights (upon renewal or transfer) or in respect of new rights (as qualified or not) and that the manner in which the Minister has sought to do so is not in accordance with the rule of law and is *ultra vires*, irrational and unreasonable.

105 The clauses mentioned above accordingly stand to be reviewed on the basis of the principle of legality alternatively section 6(2)(a)(i), 6(2)(e)(i), 6(2)(f)(i), 6(2)(f)(ii)(aa) and (bb), 6(2)(h) and/or 6(2)(i) of PAJA.

Renewals and transfers of new rights

106 Clause 2.1.6.2 furthermore provides that the recognition of consequences of previous deals shall not be claimed against future mining rights or mining right renewal applications.

107 It is submitted for the reasons already set out in part 4A above that the provisions of the MPRDA similarly do not authorise the imposition of new requirements by way of the Charter upon renewal or transfer of new rights (as qualified or not) and that the manner in which the Minister has sought to do so in the 2018 Charter is not in accordance with the rule of law and is ultra vires, irrational and unreasonable.

108 The clauses mentioned above accordingly stand to be reviewed on the basis of the principle of legality alternatively section 6(2)(a)(i), 6(2)(e)(i), 6(2)(f)(i), 6(2)(f)(ii)(aa) and (bb), 6(2)(h) and/or 6(2)(i) of PAJA.

PART 4D: OWNERSHIP: BENEFICIATION EQUITY EQUIVALENT AGAINST THE OWNERSHIP TARGET

109 Both the Original Charter and the 2010 Charter made reference to the continuing consequences of empowerment deals. The 2017 Charter, without expressly referring to "continuing consequences", in paragraph 2.1.1.13 only made provision for off-setting under the ownership element against the value of beneficiation.[91] The 2018 Charter has now, once again, changed the parameters of claiming off-sets under the ownership element against the value of beneficiation.

110 Beneficiation is defined in section 1 of the MPRDA. The 2018 Charter, however, adopts a different definition "for purposes of the Mining Charter". This is unauthorised. It appears that the Minister does not dispute this.[92]

111 The beneficiation offset afforded under previous Charters to mining companies that undertake beneficiation is retained to an extent in the 2018 Charter. It is not, however, available to holders of licenses or permits issued under the Diamonds Act, 1986 or the Precious Metals Act, 2005. In addition, the eleven percent offset provided for under the 2010 Charter is reduced (apparently in the case of new rights) to five percent and may only be claimed against a maximum of five percent of the BEE entrepreneur shareholding (clause 2.1.7.1.1). To qualify for the offset, the mining right holder must submit a beneficiation equity equivalent plan with the Minister as well as meet the criteria set out in the Guidelines. The Minister

[91] The relevant provisions of the Original Charter and 2010 and 2017 Charters are set out in the FA paras 127-134, pp 66 – 70.

[92] AA paras 151 and 152, pp 524-525.

must, in turn, consider and approve the plan within 60 days from the date of submission thereof. (See clauses 4.4.3 and 4.4 of the Implementation Guidelines.)

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

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

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

115 It is submitted that it is a core principle of the rule of law that persons subject to the regulation should be able to plan their affairs on the basis of existing laws and policies. Retrospective amendments make it impossible to do so and render the law uncertain. It is inconsistent with the principle of legality to retrospectively

deprive holders of benefits of the continuing consequences of empowerment transactions conferred by the Original Charter, without making proper provision for transitional measures. In particular, it is unauthorised as well as irrational to introduce new requirements with which empowerment transactions have to comply, because they render compliant transactions non-compliant overnight and extinguish substantial benefits conferred by past transactions without any transition.

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

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

118 A further issue is that there is no rational basis for the limitation of the beneficiation offset to 11% of the 26% ownership target (in relation to existing rights) or to 5% of the 30% ownership target (in relation to new rights). The 11% and 5% are entirely arbitrary and irrational. A mining right holder should be able to offset 100% of its 26% or 30% ownership target through its beneficiation projects. This limitation would lead to unequal treatment between a mining right

holder which satisfies the 26% ownership target but has no beneficiation obligations, on the one hand, and a mining right holder which does not meet the 26% ownership target but nevertheless has substantial beneficiation projects to offset against the ownership target. The 2018 Charter furthermore does not give any indication of how the 11% or the 5% is to be calculated. That is to say, a mining right holder will not know, simply by looking at the 2018 Charter, whether it has reached the 11% or 5% target, or indeed what percentage its beneficiation projects have reached *vis-à-vis* the 26% or 30% ownership target. The beneficiation element is accordingly impermissibly vague and does not meet the most basic requirements of the rule of law.

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

120 The majority of the full bench of the Gauteng High Court, Pretoria has already granted an order (par 2.5, p 57 of the judgment) declaring that the 2010 Charter did not retrospectively deprive holders of mining rights of the benefit of (a) the capacity for offsets as referred to in clauses 4.7 and 4.8 of the Original Charter, or of (b) the continuing consequences of empowerment transactions concluded by them after the coming into force of the MPRDA as referred in clause 4.7 of the Original Charter or of (c) the right to utilise an excess of any set target to offset any shortfall in other operations, as referred to in clause 4.7 of the Original Charter or of (d) the entitlement to offset the value of the level of beneficiation

achieved by the holder against its HDP or HDSA ownership commitments, as referred to in clause 4.8 of the Original Charter. The said judgment and order are, however, subject to an application for leave to appeal.

PART 5: NON-OWNERSHIP ELEMENTS

The Minister did not assess the ability to meet the targets set in the mining goods sub-element

121 In its founding affidavit, the Minerals Council stated that the Minister did not have credible evidence that it would be possible for all parties affected to comply with the mining goods element.[93] There are various sub-strands to this averment:

121.1 First, there were no comprehensive studies conducted proving that the local content requirement in the definition of "South African manufactured goods" in the 2018 Charter could be met by local manufacturers.[94]

121.2 To this the Minister simply replied that the Minerals Council "*exaggerates the standard to be applied to the development of the Charter, and therefore also the standard that is applicable on review*".[95] In other words, the Minister simply sidestepped this factual averment by giving what is a purely legal (and wrong) answer.

121.3 Second, there were no credible studies produced, before the 2018 Charter was published, showing that the HDIs, women, youth and BEE-compliant

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93 FA paras 148 to 164, pp 75 to 79.

94 FA para 148, p 75.

95 AA para 195, p 547.

companies from whom mining goods must be procured are in a position to meet the demand for mining goods as set out in clause 2.2.1 of the 2018 Charter.[96]

121.4 In answer to this, the Minister relies on a report by Ms Fessehaie which he says shows that "*South Africa has a domestic mining goods sector that is exporting to other countries within the SADC region.*"[97] He also refers to a report by M Walker, which according to the Minister shows "*domestic capacity*".[98] It is neither domestic nor export capacity that is in issue in this context (although it is put in issue elsewhere), but the capacity of HDIs, women, youth and BEE-compliant companies to meet the demand for mining goods. Therefore this was a non-answer from the Minister.

121.5 Third, the failure to set up mechanisms for determining local content in mining goods and institutions which will apply those mechanisms, coupled with the failure to impose an obligation on manufacturers to do determine local content, means that a holder will be punished for not complying with this requirement through no fault of its own.[99] The local content requirement is accordingly incapable of implementation.

121.6 To this the Minister says that clause 5.4.4 of the Implementation Guidelines provides that the SABS will have two years within which to construct a

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96 FA para 155, p 77.

97 AA para 184.1, pp 541-542.

98 AA para 184.2, p 542.

99 FA paras 157 to 161, pp 78 to 79.

mechanism for determining local content.[100] Therefore, it is said, there will be the relevant infrastructure within two years.

121.7 The problem with this is that the SABS is a statutory body whose functions and objects are set out in sections 4 and 5 of the Standards Act 8 of 2008. These objects and functions do not include determining or ascertaining whether mining goods have local content for purposes of the 2018 Charter. On the contrary, the objects of the Standards Act are set out in its preamble, namely:

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

121.8 The rendering of "*conformity assessments*", upon which the Minister appears to rely as empowering the SABS to issue certificates for the purposes of the 2018 Charter, does not empower the SABS to issue such certificates. This is because section 4(b) of the Standards Act limits conformity assessments to matters related to "standards". Section 4(b) of the Standards Act provides that one of the objects of the SABS is to:

> "provide reference materials, conformity assessment services, and related training services <u>in relation to standards</u>, including a voluntary SABS Mark Scheme proving assurance of product conformity". [Emphasis added]

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100 AA para 191.1, p 544.

121.9 Determining "*local content*" is plainly not part of determining "*standards*" and therefore not part of the SABS' mandate.

121.10 Nor does the Minister have the power, either through the 2018 Charter or the Implementation Guidelines, to assign functions to the SABS. That power is, by section 4(k) of the Standards Act, reposed in the Minister of Trade and Industry. The powers of the SABS are contained in and limited by the Standards Act. As the Court said in *Orangezicht Estates Ltd* v *Cape Town Town Council* 23 SC 297, at page 308:

> "The Court has more than once expressed the opinion that powers given to a public body for one purpose cannot be used for ulterior purposes which were not contemplated at the time when the powers were conferred."[101]

121.11 The SABS therefore cannot obtain under the 2018 Charter powers it does not enjoy under the Standards Act. Only Parliament can give it such powers.

121.12 If the SABS cannot and does not have the power to determine local content, then the Minerals Council's contention that it is impossible for holders to implement or to make sense of how this element works remains unanswered by the Minister.

122 It is clear, from all of the above, that the Minister never satisfied himself, before publishing the 2018 Charter, that the mining goods element was capable of implementation. The publication of the 2018 Charter could only be rational if, before publication, the Minister had first determined the viability of implementing the mining goods element.

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[101] This proposition was quoted with approval by the Appellate Division in *Van Eck NO and Van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A) at pp 997-998.

123 The importance of determining whether, before adopting it, it is possible to implement an instrument was emphasised in *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Part President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC). There the President had brought a law into force without the necessary regulatory infrastructure for its implementation. In setting aside the President's proclamation bringing the law into force, the Constitutional Court said at paras 87 and 89:

> "[87] In the present case, the Act was not brought into force with the appropriate regulatory infrastructure in existence or ready to be put in place. On the contrary, the founding affidavit asserts that the necessary schedules had not been determined and that the Act was brought into force in error.
>
> [89] The President's decision to bring the Act into operation in such circumstances cannot be found to be objectively rational on any basis whatsoever. The fact that the President mistakenly believed that it was appropriate to bring the Act into force, and acted in good faith in doing so, does not put the matter beyond the reach of the court's powers of review. What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner. This the President manifestly, though through no fault of his own, failed to do."

124 The same applies, we submit, in the present case. It is clear from the above that the Minister did not even attempt to determine whether the mining goods element was capable of implementation. The failure of the Minister to determine, before publishing the 2018 Charter, whether the mining goods element was capable of implementation was irrational and clauses 2.2.1 and 2.2.3 of the 2018 Charter fall to be set aside on that basis.

The Minister did not assess the ability to meet the services sub-element

125 The objections set out above in relation to the mining goods sub-element apply with equal force to the services sub-element in the 2018 Charter.[102] We only add the following.

126 In answer to the Minerals Council's challenge to the services sub-element, the Minister resorts to uninformative and in any event irrelevant websites (annexures AA2 and AA3), accessed on 8/12/2019, long after the 2018 Charter was published.[103] These websites do not show ability to meet the services sub-element.

126.1 Annexure AA42 simply states that it is a portal "*connecting*" big business with "*smaller black enterprises*". It does not show that the targets in the sub-element can be met.

126.2 Annexure AA43 is likewise of no assistance to the Minister. First, since it contains information as at 8/12/2019, it is unlikely that this information was the same as that before him when he decided to publish the 2018 Charter. This is further supported by the fact that the current version of the website (as at 14 February 2020) is different from AA43.

126.3 In any event, even the Minister makes no more of AA43 than that:

> "From this website, it was deduced that mining companies have in the past undertaken supplier development to meet the procurement requirements of the Charter."

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102 See in this regard FA paras 165 to 170, pp 80 to 82.

103 RA para 78, pp 1889 to 1891.

126.4 Other purported evidence, allegedly contained in annexures AA44 to AA46, even on the Minister's own version, show only that WIMSA has "*2000 members, all of them women.*" But this does not address the point, namely that the Minister had no information as to the ability to meet the requirements in the services sub-element.

127 The Minister's resort, *post facto*, to irrelevant websites is itself an indication that he had no information, before publishing the 2018 Charter, that the services sub-element could be met. Therefore, clause 2.2.2 of the 2018 Charter falls to be set aside on the grounds outlined above.

The research and development sub-element

128 In its founding affidavit, the Minerals Council said that it would be irrational not to take into account budget (and expenditure) on research and development more than 30% of which takes place outside the Republic, and the fruits of which are applied back in South Africa.[104] This is because clause 2.2.5 of the 2018 Charter provides that:

> "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."

129 On the research and development sub-element as it stands, 30% of such budget and expenditure (referred to above) would be excluded, which would be irrational and therefore unlawful.

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104 FA paras 178 to 180, p 85.

130 In answer to this, the Minister produced annexure AA50, about which he says the following:

> "This data shows that, over three years under consideration, an average of 78% of the totals spend were spend within South Africa. This fortifies DMR's determination, in clause 2.2.5, that 70% is an attainable figure."[105]

131 This is an obfuscating non-answer. The data to which the Minister refers is an all-sector, averaged data.[106] A single mining right holder might still not be able to meet the 70% target, even if the fruits of the research and development were applied back in South Africa. This is irrational.

132 Clause 2.2.5 of the 2018 Charter must therefore be set aside.

PART 6: THE CHARTER IN RELATION TO THE DIAMONDS ACT AND THE PRECIOUS METALS ACT

133 A number of provisions of the 2018 Charter purport to apply the 2018 Charter to applicants for licences and permits under the Precious Metals Act and the Diamonds Act. The relevant clauses of the 2018 Charter in this regard are clauses 4, 6.2, 7.1, 7.3, 8.7, 8.9, 8.8 and 9.2.[107] These clauses purport to amend section 6(1)(b) of the Precious Metals Act and section 5(2) of the Diamonds Act. Put shortly, they purport to take away the discretion that the South African Diamonds and Precious Metals Regulator enjoys under the abovementioned two Acts when deciding whether or not to grant permits and licences. They are

105 AA para 236.5, p 558.

106 RA para 80.3, p 1892.

107 FA para 190, p 89.

accordingly *ultra vires* the MPRDA since it does not authorise the Minister to amend other legislation through the Charter and must be set aside.

134 In this regard, the Court stated in *Moodley and Others v Minister of Education and Culture, House of Delegates and Another* 1989 (3) SA 221 (A) at 233-E-G:

> "It is not permissible to treat the Act and the regulations made thereunder as a single piece of legislation; and to use the latter as an aide to the interpretation of the former. Regulation 3(1) cannot be used to enlarge the meaning of s 15(1)." [Emphasis added]

135 This is what the 2018 Charter seeks impermissibly to do in relation to the Diamonds Act and the Precious Metals Act. The said clauses accordingly stand to be set aside.

PART 7: GROUNDS OF REVIEW IN REGARD TO NON-COMPLIANCE WITH THE 2018 CHARTER (clause 9 of the 2018 Charter)

136 Clause 9.1 of the 2018 Charter is *ultra vires*. It provides that a mining right holder who fails to comply with the ownership and mine community development requirements and falls within levels 6 and 8 of the Scorecard "shall be" in breach of the MPRDA and subject to the provisions of section 93 read with sections 47, 98 and 99 of the MPRDA.

137 Section 47 of the MPRDA provides that the Minister may cancel or suspend rights, permits or permissions under the MPRDA *inter alia* if the Holder is conducting any prospecting or mining operation in contravention of the MPRDA or if it contravenes a term of the right. Section 98 renders the contravention or failure to comply with the provisions of the MPRDA listed therein an offence, and section 99 sets the penalties a court may impose in case of conviction of such

offences.

138 No power to cancel or suspend is conferred upon the Minister in section 47 for not complying with the Charter, nor is non-compliance with the Charter listed as an offence in section 98. This is to be expected because, as set out above, the way the MPRDA is structured is that the Minister must be satisfied at the stage of considering whether or not to grant a mining right, that 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. If, therefore, the Minister is not so satisfied, the right will not be granted. This again serves to confirm that the Minister's idea of the Charter operating as a self-standing piece of legislation in which he can create new obligations and offences and which must at all times be obeyed, is totally misconceived.

139 We have dealt with the nature of the 2018 Charter above. It is not law and the Minister cannot by decree elevate the 2018 Charter's status to that of legislation. The Minister can also not decree that non-compliance with the 2018 Charter shall render the mining company in breach of the MPRDA and subject to the provisions of section 47 read in conjunction with sections 98 and 99 of the Act. Only Parliament, by means of appropriate amendments to the MPRDA, can render a breach of the 2018 Charter a breach of the MPRDA.

140 Section 93(1)(a) is similarly limited to contraventions or suspected contraventions of "this Act" which is defined in section 1 of the MPRDA and does not include the Charter. Section 93(1)(b) pertains to contraventions or suspected contraventions of terms or conditions of mining rights which has occurred or are occurring in the mining area or place where mining operations are being

conducted. Section 93 therefore does not encompass contraventions of the Charter.

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

PART 8: CONCLUSION

142 In the circumstances the Minerals Council and the mining companies it represents have no choice but to seek the judicial review and setting aside of the challenged clauses on the basis of PAJA and/or the principle of legality because the Minister's decision to include them in the 2018 Charter –

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

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

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

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

142.5 failed to take into account relevant considerations and information which was before the Minister were not taken into account (section 6(2)(e)(iii) of PAJA);

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

142.7 was so unreasonable that no reasonable person could have so exercised the power or performed the function (section 6(2)(h) of PAJA); and/or

142.8 was otherwise unconstitutional or unlawful as contemplated in section 6(2)(i) of PAJA in that it violates the rule of law in section 1(c) of the Constitution because the challenged clauses are vague and embarrassing in the respects pointed out above to the extent that those to whom they purport to apply cannot reasonably regulate their affairs in compliance with the 2018 Charter and in that the 2018 Charter contravenes the principle of separation of powers.

143 For all the above reasons, we submit that the Minerals Council has made out a case for the relief it seeks and pray for an order in terms of the notice of motion.

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11 March 2020