IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No 41661/15

In the matter between:

THE CHAMBER OF MINES OF SOUTH AFRICA Applicant

And

MINISTER OF MINERAL RESOURCES First Respondent

And

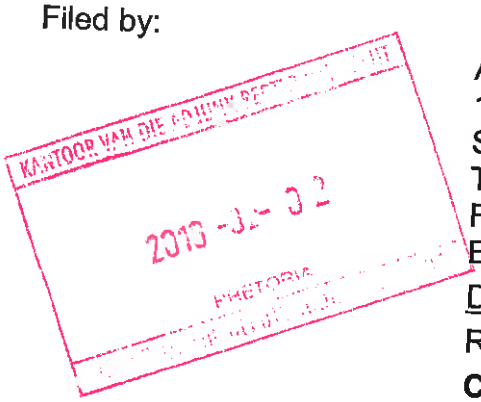
DIRECTOR – GENERAL, DEPARTMENT OF MINERAL RESOURCES Second Respondent

---

FILING NOTICE

Document: Applicants Heads of Argument

Filed by:



NORTON ROSE FULBRIGHT SOUTH AFRICA INC
Attorneys for Applicant
15 Alice Lane
Sandton
Tel: (011) 685 8829
Fax: (011) 301 3261
Email: andre.vos@nortonrosefulbright.com
Denushka.naidoo@nortonrosefulbright.com
Ref: CM1251/ Mr AP Vos/ Ms D Naidoo

C/O MOTHLE JOOMA SABDIA INC
Ground Floor, Duncan Manor
Cnr Jan Shoba and Brooks Streets
Brooklyn, Pretoria
Tel: (012) 362 3137
Fax: 086 650 4579 / 086 564 7375
Ref: Mr E Jooma / im / NOR1.0104

To: The Registrar of the above Honourable Court
Pretoria

And

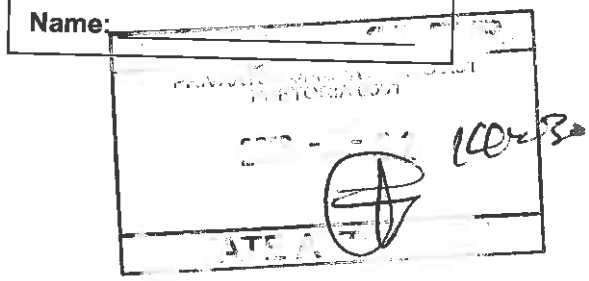
To: **The State Attorney**
Attorney for the First and Second Respondents
8th Floor, Manaka Heights
167 Thabo Sehume Street
Pretoria
Tel: 012 309 1627
Fax: 012 328 2663
Ref: SP Mathebula

Acknowledge receipt hereof on

this _____day of **FEBRUARY 2016**

Sign: _____

Name: _____



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case 41661/15

In the matter between:

THE CHAMBER OF MINES OF SOUTH AFRICA Applicant

and

MINISTER OF MINERAL RESOURCES First Respondent

DIRECTOR-GENERAL, DEPARTMENT OF MINERAL RESOURCES Second respondent

---

APPLICANT'S HEADS OF ARGUMENT

TABLE OF CONTENTS

AN INTRODUCTION TO THE APPLICATION

An application by agreement

1. This case is brought by agreement between the Chamber of Mines, the Minister of Mineral Resources and the Director-General of the Department of Mineral Resources *(DMR)* in order to obtain certainty regarding the empowerment obligations of mining rights holders.

2. The application is in this sense an instance of industry co-operation towards transformation of the mining industry. This commitment to equitable access to the nation's mineral resources, founded in the values of the Constitution of the Republic of South Africa, 1996 (*the Constitution*), has been the bedrock of the mining industry since the promulgation of the Mineral and Petroleum Resources Development Act 28 of 2002 (*MPRDA*).

3. The parties seek the court's pronouncement on:

   3.1. the content and nature of the obligations of a mining right holder arising from the BEE ownership provisions of the Mining Charter contemplated in section 100(2) of the MPRDA; and

   3.2. the scope of the powers and duties of the state in enforcing the Mining Charter provisions.

The relevant provisions of the MPRDA

4. Although it is the Charter provisions that are the source of contention between the parties, the mining rights holders' obligations must ultimately be determined through an interpretation of four sections of the MPRDA:

4.1. Section 23(1)(h), which provides that the Minister must grant a mining right if the granting of the right will further the objects referred to in section 2(d) and (f) and be in accordance with the charter contemplated in section 100.

4.2. Item 7(2)(k) of Schedule II, which requires an applicant for conversion of an older order mining right to submit documentary proof of the manner in which it will give effect to the objects referred to in section 2(d) and (f).

4.3. Section 2(d) and (f), which say that the objects of the Act are to:

"(d) *substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources"* and

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

(the above is the original unamended sections as they existed at the time of both of the Charters).

4.4. Section 100(2), which provides:

"*(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 [the MPRDA] 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.*

(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.*"

5. Whatever obligations may arise from the Charter must be sourced in these sections. Put differently, an obligation that is not imposed by these sections (or another section of the MPRDA) has no statutory basis and can accordingly not lawfully be imposed.

6. Similarly, the dispute about the state's powers of enforcement of the Charter obligations must be resolved by interpreting the following four sections of the MPRDA:

6.1. Section 3(2), which provides that the State, acting through the Minister, may, as custodian of the nation's mineral resources

"grant, issue refuse, control, administer and manage" any mining right".

6.2. Section 47, which provides for the minister's power to suspend or cancel mineral rights if the holder is "*conducting any mining operation in contravention of the Act*" or "*breaches any material term or condition of such right*".

6.3. Section 98, which provides that a person is guilty of an offence if he contravenes or fails to comply with any condition issued, given or determined in terms of the Act, or any other provision of the Act.

6.4. Section 107, which provides for the matters in respect of which the Minister may issue regulations.

The Mining Charter under consideration

7. The Charter that is the subject of this application is itself also a product of industry co-operation towards achieving the constitutional commitment to equality as contemplated in the MPRDA.

8. Although it was the Minister who was, under the MPRDA, required to develop the Charter, it was done in consultation with all industry stakeholders. The Original Charter[1] accordingly contains the mutual

---

[1] The Original Charter, FA3 p 114. We refer to this Charter as the "Original Charter". We refer to the Charter published in 2010 as the "*2010 Charter*". When we refer to "*the Charter*", we refer to both.

undertakings to which all industry stakeholders agreed in 2003. The undertakings were aimed at creating an enabling environment for the empowerment of HDSAs. The stakeholders undertook, among other things, to reach a target of 26% HDSA ownership of mining industry assets over a period of ten years. The Minister, in turn, would in applying the Charter be guided by the Scorecard for the Broad Based Socio-Economic Charter for the South African Mining Industry (including the Charter) (*the Scorecard*) included as an Annexure to the Charter.[2] The Scorecard would facilitate the application of the Charter. Progress in implementing the Charter could be measured in two ways – in line with either the specific targets in the Charter, or the targets set by mining companies themselves.[3]

9. In 2010, however, the Minister unilaterally published a new Charter. The 2010 Charter contained new rules for BEE ownership, and attempted to arrogate to the Minister new enforcement powers not authorised by the empowering legislation. It was when government threatened to use these unlegislated enforcement powers to compel compliance with the new rules that a dispute arose between government and mining companies about the interpretation of the ownership rules in the Charter, and about government's power to enforce those rules.

---

2 The Scorecard, FA3 p 109 to 112

3 The Scorecard, FA3 p 109 Introduction

The questions for determination

10. It is common cause that the disputes that arose between the parties and that must be determined by this court raise the following four questions:

    10.1. Does a mining company have a perpetual and recurring obligation to meet a 26% ownership target after the grant of a mining right or the conversion of an old order mining right?

    10.2. Can the Minister use the enforcement powers in the MPRDA to compel compliance with the 26% target?

    10.3. How is compliance with the 26% HDSA target to be calculated?

    10.4. Are the contested provisions of the 2010 Charter identified by the parties *ultra vires* and void?

11. The answers to these questions are matters that involve an interpretation of the relevant provisions of the MPRDA in line with the Constitution so as to give effect to the governmental purpose of achieving transformation of the industry. It also requires a proper interpretational approach to the Charter provisions in order to understand their scope within the framework of the MPRDA and the powers given to the Minister in terms of that Act.

12. An analysis of the BEE ownership rules in the Charter and the effect of non-compliance with those rules must accordingly be preceded by a consideration of the relevant constitutional provisions, the empowering legislation, and an analysis of the scope of government's power to create

new rules and more extensive powers of enforcement by way of regulation.

13. In considering the relevant provisions of the Constitution, the court must have regard to both the constitutional value of equality, on the one hand, and the principle of legality and the separation of powers, on the other. This in turn requires a determination of the proper scope of each of the different levels of public power that may be exercised to achieve the government's transformational goal: the legislature's power to make BEE laws in the mining industry; government's policy-making powers to regulate BEE ownership requirements and the consequences of non-compliance with those requirements; and the regulator's powers of enforcement.

14. In these submissions we first consider this constitutional, legislative and regulatory framework, before dealing with the four questions in dispute.

THE LEGISLATIVE BACKGROUND

The Constitution and the MPRDA

15. The starting point to interpreting the MPRDA and its references to the Charter is to understand the transformational purpose of the MPRDA as grounded in the Constitution.

The transformational purpose of the MPRDA

16. It is clear from the long title of the MPRDA that, at heart, it is a statute with the aim of transforming the industry – an Act which aims:

> *"to make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources; and to provide for matters connected therewith."*

17. Its preamble restates the legislature's commitment in passing the legislation to "*eradicating all forms of discriminatory practices in the mineral and petroleum industries*" and its consideration of the "*State's obligation under the Constitution to take legislative and other measures to redress the results of past discrimination*".

18. In Bengwenyama[4], the Constitutional Court said the following regarding the constitutional foundations of the MPRDA:

---

4 Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (Bengwenyama-ye-Maswati Royal Council Intervening) 2011 (4) SA 113 (CC)

"Equality, together with dignity and freedom, lie at the heart of the Constitution. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of substantive equality the Constitution provides for legislative and other measures to be made to protect and advance persons disadvantaged by unfair discrimination. The Constitution also furnishes the foundation for measures to redress inequalities in respect of access to the natural resources of the country. The Mineral and Petroleum Resources Development Act ("Act") was enacted amongst other things to give effect to those constitutional norms."[5]

19. The Court expanded on this in Agri-SA[6]:

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

That legislative intervention was in the form of the Mineral and Petroleum Resources Development Act. (MPRDA)"

---

5 Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (Bengwenyama-ye-Maswati Royal Council Intervening) 2011 (4) SA 113 (CC) para 3

6 Agri South Africa v Minister for Minerals and Energy (CCT 51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC) para 1

20. The Charter also refers in terms to the provisions of the Constitution by recognising in its preamble:

> *"the imperative of redressing historical and social inequalities as stated by the Constitution of the Republic of South Africa, in inter alia section 9 on equality (and unfair discrimination) in the Bill of Rights."*

21. The constitutional right to equality is not, however, the only constitutional principle relevant to the interpretative exercise in question. This court must also be guided in its consideration of the relevant provisions of the MPRDA and the Charter by the principle of the rule of law and the doctrine of separation of powers.

The constitutional principle of legality

22. The rule of law, or the principle of legality, is one of the founding principles of our Constitution.[7] The Constitutional Court said the following regarding the constitutional control of public power in Affordable Medicines Trust:[8]

> *"[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 . . . is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It*

---

7 Section 1(c) of the Constitution

8 Affordable Medicines Trust and others v Minister of Health of RSA and others 2006 (3) SA 247 (CC)

> *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."*

23. In the present case, this principle demands a strict analysis of whether the powers of the executive for which the respondents contend in relation to the Charter are conferred upon them by the MPRDA. In what follows we show that the powers on which the respondents rely are not authorised by the MPRDA.

The constitutional doctrine of separation of powers

24. The doctrine of separation of powers, although not expressly contained in the text of the Constitution, forms part of the constitutional architecture.[9] The Constitution had been certified as being compliant with Constitutional Principle VI of the Interim Constitution of 1993 which provided that:

> *"There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."*

25. The doctrine essentially ensures the functional independence of the three branches of government, namely, the legislature, the executive and the judiciary, and recognises a *"division of tasks between those institutions*

---

9 National Treasury and others v Opposition to Urban Tolling Alliance and others (Road Freight Association as applicant for leave to intervene) 2012 (6) SA 223 (CC) at para [44].

which make the law, those which implement the law and those which enforce the law."[10] The very rationale for the doctrine is to "*secure the freedom of every citizen by seeking to avoid an excessive concentration of power*".[11]

26. In the present enquiry, the role of the doctrine is to test the proposition whether executive policy-making functions have been employed to arrogate for the regulator greater enforcement power than the legislature had intended. We show in these submissions that the executive's attempt to give the regulator greater powers of enforcement than those intended by the legislature is in breach of the doctrine of separation of powers.

The MPRDA provisions relevant to the transformation of the industry

The empowering provision

27. The legislative source of the Charter is section 100(2) of the MPRDA.[12] This section forms the anchor for any interpretative enquiry into the scope of the Charter provisions.

28. Section 100 is entitled "*Transformation of minerals industry*". It deals with three instruments which the Minister was required to "*develop*": a housing and living conditions standard for the minerals industry, and a code of

---

10 Tlouamma and others v Mbete, Speaker of the National Assembly of the Parliament of the Republic of South Africa and another [2016] 1 All SA 235 (WCC) para 60

11 Pius Langa, "The separation of powers in the South African Constitution" (2006) 22 SAJHR 2 at 4, quoted with approval in Tlouamma and others v Mbete, Speaker of the National Assembly of the Parliament of the Republic of South Africa and another [2016] 1 All SA 235 (WCC) para 62

12 As quoted in paragraph 4.4 above

good practice for the minerals industry, both of which had to be developed within five years of the coming into effect of the MPRDA on 1 May 2004 and a broad-based socio-economic empowerment Charter, which had to be developed within six months. That period expired on 31 October 2004.

29. The Act contains a definition for *"broad based economic empowerment"* (sic) in section 1 in the following terms:

> *"**broad based economic empowerment**" means a social or economic strategy, plan, principle, approach or act which is aimed at—*
>
> *(a) redressing the results of past or present discrimination based on race, gender or other disability of historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries; and*
>
> *(b) transforming such industries so as to assist in, provide for, initiate or facilitate—*
>
> *(i) the ownership, participation in or the benefiting from existing or future mining, prospecting, exploration or production operations;*
>
> *(ii) the participation in or control of management of such operations;*
>
> *(iii) the development of management, scientific, engineering or other skills of historically disadvantaged persons;*

(iv) the involvement of or participation in the procurement chains of operations;

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

(vi) the socio-economic development of communities immediately hosting, affected by supplying of labour to the operations; and

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

30. Section 100(2)(a) explains that the purpose of the Charter is to:

> *"ensure the attainment of Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution".*

31. The section provides that government's objectives of redressing past discrimination are to be given effect to in the Charter first, by effecting *entry* into and active *participation* by HDSAs in the industry, and second, by allowing such South Africans to *benefit* from the exploitation of mineral resources.[13]

---

[13] Section 100(2)

32. The ambit of what the Charter is to achieve in terms of entry (and active participation) by, and benefit for HDSAs is consistent with the objects of the MPRDA, which include among them to

> *"substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter into the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources."*[14] *(own emphasis)*
>
> (the above is the original unamended section as it existed at the time of both of the Charters).

33. As to how the Charter should ensure entry and participation of HDSAs, section 100 specifics that the Charter should:

- set "*the framework for targets" and*
- the "*timetable*"

for effecting the entry of HDSAs into the mining industry.

34. Section 100(2)(b) in addition requires that the Charter must set out, amongst other things, how the objects in section 2(c),(d),(e), (f) and (i) can be achieved.

35. The provisions of section 100 can accordingly be distinguished from section 107:

---

[14] Section 2(d)

35.1. Section 107 bestows on the Minister a general and open-ended power to *"make regulations"*, by notice in the Government Gazette on a range of issues listed in that section. Section 100 imposes duty on the Minister to "*develop*" three specific policy documents. Section 107 empowers the Minister to make subordinate legislation; section 100 requires of the Minister to make policy on the identified issues.

35.2. Each of the two provisions has a specific timeframe. The duty to develop the policy documents mentioned in section 100 is a "once-off" power that must be exercised within a cut-off period. The listed policies are aimed at the legislative object of realising "*transformation*" of the industry with a focus on facilitating "*entry*" into the industry – a project which ought not in principle to continue in perpetuity. Section 107 is open-ended and permits the Minister to exercise the regulatory powers whenever they are required.

The objects of the MPRDA

36. Section 2 of the Act includes a number of objects that could be seen as "*transformational*".[15] Some of the objects are mutually reinforcing, while

---

15 "2. *Objects of Act.—The objects of this Act are to—*
(a) *recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;*
(b) *give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;*
(c) *promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;*

others are potentially conflicting and require that an appropriate balance be struck between them.

37. The objects of the MPRDA that are relevant to this enquiry are subsections 2(d) and (f), namely to

37.1. *"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";* and

37.2. *"promote employment and advance the social and economic welfare of all South Africans".*

The radical transformation pivotal to the MPRDA

(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;

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

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

(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."

38. This transformational objective of the MPRDA to achieve equitable access was in the first place achieved through the introduction of a radical change that did away with the very concept of private ownership within the mining industry.

39. In giving meaning to concepts of empowerment with reference to "*entry to the industry*" and "*benefits*" that could be gained from the exploitation of mineral resources, regard must accordingly be had to the changed nature of mineral resources and mining rights under the MPRDA at the time the Charter was developed.

40. The fundamental change introduced by the MPRDA in this regard was that it recognised mineral resources as the common heritage of all the people of South Africa.[16] The Act gives the State the role of being the custodian of mineral resources.[17] The Constitutional Court in Sishen Iron Ore[18] described the fact that the MPRDA dispensed with the notion of mineral rights held by private persons and placing mineral resources in the hands of the nation as a whole as "*pivotal*" to achieving the MPRDA's objects of eradicating discrimination and redressing inequality. In interpreting the Charter provisions aimed at achieving these objects, this must remain at the heart of the analysis.

---

16 Section 3(1)

17 Section 3(2)

18 Minister of Mineral Resources and others v Sishen Iron Ore Company (Pty) Ltd and another 2014 (2) SA 603 (CC) para 10

41. Within this new regime established by the MPRDA, only limited real rights are available for application by mining companies.[19] These rights are described by the courts as being in the "*gift of the State*[20]".

42. The MPRDA provides that the State, acting through the Minister, would have the following powers in relation to these "*gifts*":

> "*to grant, issue, refuse, control, administer and manage any . . mining right*"[21]

43. As a corollary to these powers being given the Minister, a duty was imposed on the Minister to -

> "*ensure the sustainable development of South Africa's mineral and petroleum resource within a framework of national environmental policy, norms and standards while promoting economic and social development.*"[22]

44. It is this executive power over mining rights that is at the heart of the interpretative questions before this Court. Essentially, it must be determined what the legislature, in the course of its radical transformation of the concept of mining rights, empowered and required the executive to

---

19 Section 5(1)

20 Minister of Minerals and Energy v Agri South Africa 2012 (5) SA 1 (SCA) at para 82, 113; Agri South Africa v Minister for Minerals and Energy 2013 (4) SA 1 (CC) para 20

21 Section 3(2)

22 Section 3(3)

do in relation to broad-based socio-economic empowerment in granting mining rights (and other limited real rights) under the Act.

45. The MPRDA provides for two ways in which mining rights may be acquired under the Act – first, on application for a new mining right in terms of section 22, and second, by way of conversion of an old order mining that was in force immediately before the MPRDA took effect in terms of item 7 of Schedule II to the MPRDA. We consider each in turn.

The power and duty to grant mining rights

46. Section 23(1)(h) of the MPRDA provides that the minister *must* grant a mining right if, among other things:

> *"(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."*

47. Before granting an application for a mining right, the Minister must accordingly satisfy himself that the grant of such right would further the objects referred to in section 2(d) and (f) and would be in accordance with the charter and the prescribed social and labour plan.

48. It is not clear what the words *"in accordance with the charter"* in section 23(1)(h) of the MPRDA mean. Although the section in question does not in express terms require compliance with the charter where the grant of an application for a mining right would be inconsistent with the charter contemplated in section 100, it would clearly not be *"in accordance"* with such charter if it were inconsistent with the charter.

49. The requirements to be met by a successful applicant in applying for a mining right are those which prevailed at the time the application was made. In addition, whether or not the applicant complies with the requirements is assessed once off, and at the time the application is met – and not on a recurring or continuous basis thereafter.

50. This is apparent when regard is had to the nature of the list of requirements in section 23 – they all require an assessment, upfront, of the ability of the applicant, if granted the right, to mine the mineral optimally and sustainably, and within the requirements of the Act. This type of assessment is clearly made at the time the application is considered, with reference to such information as is available at that time.

51. It was of course competent for the legislature to have provided in the MPRDA that after the grant of a mining right the holder of such right would be required to continually meet the requirements in section 23 – including not only the requirements contained in the charter contemplated in section 100 of the MPRDA at the time of the granting of the mining right, but also to meet any additional requirements which might be introduced into the charter by way of amendment. The legislature did not however choose to do so. There is nothing in the language of section 23, and in particular subsection (1)(h), which imposes such an obligation upon the successful applicant for a mining right.

The power and duty to convert mining rights

52. Item 7(3) provides that the Minister *must* convert the old order mining right into a mining right if the holder of the old order mining right has, among other things, complied with the requirements of subitem (2).

53. Subitem (2) includes among its requirements the provisions of item 7(2)(k), namely that the holder of an old order mining right must lodge the right for conversion, along with:

> *"an undertaking that, and the manner in which, the holder will give effect to the object referred to in section 2(d) and (f)".*

54. This provision involves even more clearly an upfront and once-off consideration. The Minister has no power under the Act to refuse an application for conversion where a feasible undertaking has been given. This is also clear when the wording and contents of item 7(2)(k) is compared with the wording of section 23(1(h).

The effect of the grant or conversion of a mining right

55. The grant or conversion of a mining right by the Minister or his delegate is an administrative act. Once performed, the decision-maker is *functus officio* and may not revisit his decision save where the MPRDA (and perhaps, in limited circumstances, the common law) permits him to do so.[23] This reaffirms the conclusion that the Minister's assessment of

---

23 Daniel Malan Pretorius 'The Origins of the *Functus Officio* Doctrine, with Specific Reference to its Application in Administrative Law' (2005) 122 SALJ 832 quoted with

compliance with section 23(1)(h) is once-off and made at the time of the application only.

56. The *functus officio* doctrine dictates that once the decision has been taken by the administrator, the administrator cannot *mero motu* correct that decision at the cost of the parties whose rights would be negatively affected by such action. Baxter describes this doctrine as follows:

> *"Indeed, effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the other hand, where the interests of private individuals are affected we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment. Thus when an administrative official has made a decision which bears directly upon an individual's interests, it is said that the decision-maker has discharged his office or is functus officio."*[24]

57. This principle is also recognised in section 103(3) of the MPRDA, which provides the following:

> *"The Minister, Director-General, Regional Manager or officer may at any time –*
>
> . . .

---

approval in Retail Motor Industry Organisation v Minister of Water & Environmental Affairs (145/13) [2013] ZASCA 70, at paragraph 23

[24] Baxter: Administrative Law (1984), quoted with approval in Retail Motor Industry Organisation v Minister of Water & Environmental Affairs (145/13) [2013] ZASCA 70, at paragraph 24

(b) withdraw or amend any decision made by a person exercising a power or performing a duty delegated or assigned in terms of subsection (1)(2) or (3) as the case may be: Provided that no existing rights of any person shall be affected by such withdrawal or amending of a decision" (Emphasis added).

58. Accordingly, in the absence of a clear statutory power, a mining right once granted or converted cannot be revoked or cancelled where the empowerment requirements have changed after the fact.

59. Quite apart from the presumption against retrospectivity when interpreting ambiguous statutory provisions, there is nothing in the MPRDA which provides, either expressly or by necessary implication, that once a mining right has been granted to an applicant, the applicant will, in order to retain such right, have to meet new requirements set out in an amended charter (or a charter other than the one contemplated in section 100) or an amended social and labour plan.

60. In the absence of a specific legislative provision that requires compliance with amended charter requirements, the holder's rights and obligations are effectively regulated by section 23(5) and (6).

61. These sections provide that the mining right if granted takes effect on the effective date, is subject to the Act and the terms and conditions that are prescribed or stated in the right, and remains valid for the entire period of the right, up to 30 years.

The Minister's power to cancel or suspend

62. Section 47(1) permits the Minister, subject to a number of procedural safeguards, to cancel or suspend any mining right or old order mining right in a limited number of instances. Those relevant to the present case include where the holder

62.1. is conducting a mining operation in contravention of the Act; or

62.2. breaches any material term or condition of the mining right.

63. The "Act" is defined in section 1 as including the regulations and any term or condition to which any right granted under the Act is subject.

64. If the Minister invokes the procedures in section 47, and these ultimately result in cancellation, section 56(e) provides that the right lapses. It is only in the circumstances in section 47 that the Minister has the power to cancel or suspend a mining right.[25]

65. In relation to the first instance that could result in suspension or cancellation – namely, where a contravention of the Act is alleged under section 47(1)(a) – the following must be noted:

65.1. A "*mining operation*" is defined in section 1 as "*any operation relating to the act of mining and matters directly incidental*

---

25 Section 51 provides for a process of corrective measures in the event that a holder of a mining right fails to mine a mineral resource optimally. Non-compliance with a notice to take corrective measures may ultimately result in the suspension or cancellation of a mining right. But this provision does not find application in the present case.

thereto". To "*mine*" is defined in section 1 as "*the mining of any mineral, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto in or under the relevant mining area*". The *"mining area"* is in turn defined as "*the area on which the extraction of any mineral has been authorised and for which that right has been granted*". It is accordingly clear that this provision has in mind a specific mining-related contravention of an operational kind (or something "*directly*" incidental thereto), and not a potential contravention relating to ownership of the industry asset, BEE transactions or the transformation provision of the Act.

65.2. But even if this were not the case, the provisions of section 47 read as a whole make it clear that it cannot be used in the case of a notional "non-compliance" with the transformational provisions of the Act.

65.3. Before acting under this section, the Minister must in terms of section 47(2) give written notice to the holder indicating the intention to suspend or cancel, giving the reasons for considering suspension or cancellation, and giving the holder an opportunity to show why this should not be done.

65.4. Significantly, the Minister must in terms of section 47(3) "*direct the holder to take specified measures to remedy any*

contravention, breach or failure". The remedial measure that would correct the contravention must accordingly be of the kind that falls within the powers of the Minister to direct. There is, however, no specific power given to the Minister to direct any mining right holder, or converted mining right holder, to comply with the provision of section 2(d) and (f) or the Charter. These provisions do not confer on the Minister any such powers. The provisions of section 47(c) can accordingly find no application in the present case.

66. The only conceivable application of section 47 to instances of non-compliance with empowerment requirements would be if the circumstances in section 47(1)(b) can be invoked. That section applies where the mining right holder has contravened a "*material term or condition*" of a mining right. If, in a particular instance, a mineral right had been granted on the condition that particular empowerment commitments would have to be given, or on the basis that a particular undertaking given was incorporated as a term of the mining right and stated in the right in terms of section 23(6), then a breach of such a term or condition could conceivably lead to the Minister invoking the provision of section 47 in order to indicate the ministerial intention to suspend or cancel. The minister would be entitled in these circumstances to direct a mining right holder in terms of section 47(3) to take "*specific measures*" to remedy the breach of the term or condition.

67. This application is, however, not concerned with breaches of terms and conditions of mining rights granted in particular instances. There is also no scope to re-construct the requirements of the Charter as unilateral terms and conditions imposed on rights holders.

68. In Mawetse,[26] the SCA held that the "*terms and conditions*" subject to which the right – in that case, a prospecting right – is issued, are not matters of agreement between the parties. No consensus between the mining right holder and the regulator is required. The Court held that the granting of the right was a unilateral administrative act, and that the Minister could impose terms and conditions arising out of the section 2(d) objects of the MPDRDA, albeit that those would have to be authorised by the relevant legislation. [27]

69. The minister's powers to impose terms and conditions in relation to BEE ownership on prospecting rights are, however, not identical to the Minister's powers over mining rights.

70. The implications of Mawetse for prospecting rights holders, must accordingly be distinguished in the case of mining rights holders on the following basis:

---

26 Minister of Mineral Resources and others v Mawetse (SA) Mining Corporation (Pty) Ltd [2015] 3 All SA 408 (SCA)

27 Minister of Mineral Resources and others v Mawetse (SA) Mining Corporation (Pty) Ltd [2015] 3 All SA 408 (SCA) para 22 to 27

70.1. First, the crucial provision, according to the SCA in Mawetse, that renders BEE compliance a potential condition for the granting of the prospecting right, is the provision of section 17(4) which entitles the Minister to request the prospecting right holder to comply with section 2(d). No equivalent provision exists in relation to mining rights under section 23, or under item 7 of Schedule II. There is accordingly no "*request to comply*" with section 2(d) or any other BEE provision that allows the minister to trigger conditions by way of a section 2(d) request in a manner equivalent to what is contemplated in section 17(4).

70.2. The terms and conditions that may apply to a prospecting right are also different from the terms and conditions that may apply to a mining right. Section 17(6) specifies that the prospecting right is subject to the Act, any other relevant law and the terms and conditions "*stipulated in the right*". This must be contrasted with section 23(6) which refers to a mining right being subject to the Act, any relevant law, the terms and conditions "*stated in the right and the prescribed terms and conditions*". The Act accordingly allows for terms and conditions for mining rights to be prescribed by regulation, whereas no such provision exists in the case of prospecting rights.

70.3. The "*prescribed terms and conditions*" for mining rights are those contained in the regulations to the MPRDA, in particular, those

contained in regulation 10 and 11. It appears from those regulations that it is, in particular, the contents of the mining work programme that become *terms* of the mining right in terms of regulation 11(2). The regulations dealing with the mining work programme do not deal with section 2(d) or the Charter provisions.

70.4. While regulation 12 refers to the possibility of further "*terms and conditions*" the regulation does not have in mind any unilateral conditions imposed by the Minister as suggested by the SCA in Mawetse. Instead, what the regulation specifically provides for, are terms and conditions to which the parties "*agreed*" and which are "*approved by the Minister*".

70.5. The Minister has accordingly not, even by way of regulation, in fact provided for terms and conditions that may be unilaterally imposed in respect of mining rights.

70.6. One upshot of this is that it retains a symmetry between the conditions that may imposed on new mining right applications (in respect of which the regulations contemplate only conditions by agreement), and conversions of old order mining rights (in respect of which the transitional provisions provide only for the provisions of *undertakings* by the mining right holder in respect of the section 2(d) and (f) objects of the Act).

71. Despite the decision in Mawetse, there is accordingly no scope to argue for a unilateral imposition of terms and conditions by the Minister arising out of section 2(d) or the Charter in the case of mining rights.

72. There is accordingly no basis on which to invoke section 47(1)(b) as ground of cancellation or suspension due to non-compliance with the BEE empowerment provisions.

The enforcement powers under the MPRDA

73. The MPRDA does not grant the Minister any general powers of enforcement of the Charter provisions. It also grants the Minister no general powers to suspend or cancel the mining right other than those discussed above.

74. Section 107 confers on the Minister general powers of regulation over the matters listed in the section. Section 107(3) provides that those regulations may provide that any person contravening the regulations in question be guilty of an offence. But the Charter is not a regulation made under section 107, and the list of matters which can lawfully be the subject of regulation by the Minister is entirely silent on the transformational objectives of the Act generally, or the provisions of the Charter specifically.

75. The legislature clearly did not intend to give the Minister any residual powers of regulation over and above those specifically provided in the Act, and in particular not in relation to the grant of mining rights in line with BEE empowerment policies.

Reporting on charter compliance

76. The only obligation that the MPRDA imposes on the *holder* of a mining right, as opposed to an applicant for a mining right, with specific reference to either section 2(d) or the charter, is a reporting obligation. It is stated as follows in section 25(2)(h):

> *"submit the prescribed annual report, detailing the extent of the holder's compliance with the provisions of section 2(d) and (f), the charter contemplated in section 100 and the social and labour plan."*

77. This is also referenced in section 28(2)(c) which says that the holder of a mining right must submit an annual report detailing the extent of the holder's compliance with the provisions of section 2(d) and (f), the charter contemplated in section 100 and the social and labour plan.

THE CHARTERS

78. It is against this legislative background that the provisions of the Charter must be considered.

The Original Charter

79. The Minister initiated a process of consultation with industry stakeholders in order to reach agreement on the contents of the charter contemplated in section 100(2) of the MPRDA. Those stakeholders agreed to a charter that embodied their "*shared vision*" on 11 October 2003.

The stakeholders' shared vision

80. It was the vision of the parties that all the actions and commitments contained in the Original Charter would be:

> *"in the pursuit of a shared vision of a globally competitive mining industry that draws on the human and financial resources of all South Africa's people and offers real benefits to all South Africans. The goal of the empowerment charter is to create an industry that will proudly reflect the promise of a non-racial South Africa."*

81. The preamble of the Original Charter recognised, amongst other things, the mining industry's stated intention to adopt a "*proactive strategy of change to foster and encourage black economic empowerment (BEE) and transformation at the tiers of ownership, management, skills development, employment equity, procurement and rural development*".

82. The government, in the preamble, specifically noted that its role would be facilitative, that it would allow market forces to play a key role in the ownership profile of the industry and that it was not its intention to nationalise the industry.[28]

83. It further noted specifically that socio-economic challenges facing the industry would only be addressed when South Africa's mining industry

---

28 Original Charter p 113

succeeded in the international market place where it must seek a large part of its investment and sell its product. [29]

84. The preamble stated categorically that the transfer of ownership in the industry must take place in a transparent manner and for fair market value.[30]

85. It was agreed by the signatories to the Original Charter that government's regulatory framework and industry agreements would strive to facilitate the objectives of this charter.

86. These provisions accordingly all point to commitments in the Charter that:

86.1. were based on co-operation between government and industry;

86.2. envisaged a facilitative role for government; and

86.3. were rooted in sound market economics.

The undertakings in the Charter

87. In line with this approach, the charter commitments were phrased in the form of "*undertakings*".[31] The stakeholders undertook to create "*an enabling environment*" for the empowerment of HDSAs and did so by making a number of specific commitments that addressed the different

---

29 Original Charter p 113

30 Original Charter p 113

31 Original Charter p 114 para 4

aspects of empowerment as contemplated in the MPRDA – human resource development, employment equity, migrant labour, mine community and rural development, housing and living conditions, procurement, ownership and joint ventures, beneficiation, exploration and prospecting, state assets, licensing, financing, the regulatory framework and industry agreement and consultation, monitoring, evaluation and reporting.

The ownership undertaking

88. The relevant undertaking for present purposes is the "*Ownership and Joint Ventures*" commitment in paragraph 4.7 of the Original Charter.[32] In making this commitment, both government and industry recognised that one of the means of effecting the entry of HDSAs into the mining industry and of allowing HDSAs to benefit from the exploitation of mining and mineral resources is by encouraging greater ownership of mining industry assets by HDSAs. [33]

---

32 Original Charter p 116 para 4.7

33 Original Charter p 116 para 4.7

The 26% target for HDSA ownership

89. In order to increase participation and ownership by HDSAs in the mining industry, mining companies agreed that each company would achieve 26% HDSA ownership of mining industry assets within 10 years.[34]

90. The parties agreed that both active and passive involvement of HDSAs would be recognised. Passive involvement was defined as "*greater than 0 percent and up to 100 percent ownership with no involvement in management, particularly broad based ownership like ESOPs [employee share option schemes]*".

Calculation of compliance, offsets and shortfalls

91. The stakeholders agreed that the currency of measure of transformation and ownership would, *inter alia*, be market share as measured by attributable units of South African production controlled by HDSAs.

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

93. Where a mining company had achieved HDSA participation in excess of any set target in a particular operation, then such excess may be utilised to offset any shortfall in its other operations.

---

34 Original Charter p 116 para 4.7 4th bullet

94. That there would be capacity for offsets which would entail credits/offsets to allow for flexibility.[35]

95. The following was accordingly clearly understood:

95.1. calculation of compliance with the 26% target was flexible;

95.2. credits and offsets would be allowed across all transactions; and

95.3. the very references to the existence of "excess", "credits" and "offsets" show the parties' understanding that compliance would be determined once-off at a particular cut-off date, rather than an on-going and recurring obligation that was tested and re-tested perpetually.

The underlying economics of the Original Charter undertakings

96. All stakeholders accepted that transactions would take place "*in a transparent manner and for fair market value*".[36]

97. In relation to financing participation in the industry, the industry agreed to assist HDSA companies in the amount of R100 billion within the first five years.[37] This represented the 15% HDSA ownership necessary to enable

---

35 Original Charter p 116 para 4.7

36 Original Charter p 117 para 4.7

37 Original Charter p 117 paragraph 4.12

lodgement of old order mining rights for conversion in terms of Item 7 in Schedule II to the MPRDA.[38]

98. Beyond that R100 billion commitment, it was agreed that HDSA participation would increase based on "*a willing seller-willing buyer basis, at fair market value, where the mining companies are not at risk*".[39]

99. Government agreed to consider special incentives to encourage HDSA companies to hold on to newly acquired equity for a reasonable period.[40]

100. It is clear from these provisions that there was consensus at the time that:

100.1. That there would be no ring-fencing or lock-in provisions, and in particular no requirement that such provisions must be used;

100.2. To the extent that it was beneficial for HDSAs to hold on to their equity, this would be encouraged through incentives;

100.3. The first tranche of transactions necessary to enable participation by HDSAs in the course of the conversion of old order mining rights would be funded entirely by industry in the amount of R100 billion.

100.4. Thereafter, empowerment transactions relating to new applications for mining rights would be conducted on a willing-

---

38 Founding affidavit p 24 para 2.2.6 subparagraph(5)

39 Original Charter p 117 paragraph 4.12

40 (fourth bullet point under the subheading "Passive Involvement").

buyer-willing-seller basis, founded on market economics and in a manner that would avoid risk to the company – including the risk of dilution.

The review commitment

101. The stakeholders agreed to meet halfway through the target period – after five years – to review the progress and to determine what further steps, if any, needed to be made to achieve the 26% target.

102. In addition to the five-year review commitment, the signatories to the Original Charter also agreed to a number of consultation, monitoring, evaluation and reporting mechanisms in respect of the charter.[41]

103. It is clear from these commitments that there was an understanding between the parties that there was flexibility in the manner in which the parties would approach the target. Such flexibility is implied by references to "*developing new strategies*", and exchanging problems and solutions. Ultimately it was clear that these changes would still be made through "joint decisions".[42] No provision was made, however, for retrospective changes being made to the ownership requirements at this point.

---

41 Original Charter p 118 paragraph 4.14

42 Original Charter p 118 paragraph 4.14

A reporting obligation

104. Under the Charter the only enforceable obligation was the agreement to report on an annual basis on holders' progress towards reaching the targets. Their annual reports would be verified by their external auditors.[43]

105. This obligation was enforceable because it was a reflection of the reporting requirements in sections 25(2)(h) and 28(2)(c) of the MPRDA mentioned above.

The scorecard

106. The scorecard included as an annexure to the Charter is intended to "*give effect*" to the Charter provisions.[44] In particular, it was intended to "*facilitate the application of the Charter*" particularly in relation to the conversion of the old order rights into mining rights. Because the scorecard itself is just a tool for implementation, it has limited interpretative value.

107. It does, however, usefully remind the reader that the first five years of the ten-year target had been focused in particular on the conversion of old-order rights – a regime in respect of which the Charter obligations were even more curtailed. It also shows clearly the aspirational nature of the targets to which the parties had agreed.

---

43 Original Charter p 118 paragraph 4.14

44 Scorecard to the Original Charter FA3 p 109

The 2010 Charter

108. By 2010, more than halfway through the ten-year period, a new Minister published a new Charter. She did so unilaterally by publishing it in the form of a regulatory instrument in September 2010.[45]

The Minister's rationale for the 2010 Charter

109. The rationale for the publication of the 2010 Charter at the five-year mark is explained as follows in the preamble:

> *"In line with this provision, the DMR has concluded a comprehensive assessment to ascertain the progress of transformation of industry against the objectives of the Charter in the mining industry. The findings of the assessment identified a number of shortcomings in the manner in which the mining industry has implemented the various elements of the Charter, [including] ownership. To overcome these inadequacies, amendments are made to the Mining Charter of 2002 in order to streamline and expedite attainment of its objectives."*[46]

110. The respondents now claim that the "*inadequacies*" were that community participation in HDSA ownership holding was limited, that the debt repayment capabilities were compromised because of the lack of dividend

---

45 2010 Charter FA4 p 119

46 2010 Charter p 119

outflows and the at the HDSA entities needed strengthening of their voting rights.[47]

111. The changes introduced in the 2010 Charter, however, were not rationally related to these perceived "*inadequacies*". They went much further. These "inadequacies" in any event did not justify the departure from the Charter principles, the continuing consequences limitation, or the introduction of new penalty provisions in the 2010 Charter.

The ownership requirement in the 2010 Charter

112. The 2010 Charter retained the target of 26% BEE ownership, inaccurately as a "*stakeholder commitment*". The stakeholders indeed did commit to a target of 26% in the Original Charter. The 2010 Charter, however, departed from the Charter principles on which that commitment was premised.

113. The 2010 Charter introduced the following proviso:

> *"The only offsetting permissible under the ownership element is against the value of beneficiation, as provided for by section 26 of the MPRDA and elaborated in the mineral beneficiation framework.*
>
> "*The continuing consequences of all previous deals concluded prior to the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002 would be included in calculating such credits/ offsets in terms of*

---

47 Answering affidavit p 255 para 181-182

market share as measured by attributable units of production."[48]

114. "*Meaningful economic participation*" is defined to include as "*key attributes*":

> "– *BEE transactions shall be concluded with clearly identifiable beneficiaries in the form of BEE entrepreneurs, workers (including ESOPs) and communities;*
>
> - *Barring any unfavourable market conditions, some of the cash flow should flow to the BEE partner throughout the term of the investment, and for this purpose, stakeholders will engage the financing entities In order to structure the BEE financing in a manner where a percentage of the cash-flow is used to serve the funding of the structure, while the remaining amount is paid to the BEE beneficiaries. Accordingly, BEE entities are enabled to leverage equity henceforth in order to facilitate sustainable growth of BEE entities;*
>
> - *BEE (sic) shall have full shareholder rights such as being entitled to full participation at annual general meetings and exercising of voting rights, regardless of the legal form of the instruments used;*
>
> - *Ownership shall vest within the timeframes agreed with the BEE entity, taking into account market conditions."*[49]

115. In paragraph 2.3 of the 2010 Charter, dealing with *beneficiation*, the Minister also introduced the following limitation:

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

---

48 2010 Charter p 122 para 2.1

49 2010 Charter p 121

116. The 2010 Charter accordingly materially limited the ability that mining companies had under the Original Charter to offset the value of empowerment transactions in order to meet the 26% target.

117. The continuing consequences limitation imposed by the 2010 Charter meant not only that the consequences are limited to offsets or credits arising from the value of beneficiation, but also that they are limited to deals concluded prior to the promulgation of the MPRDA. This naturally affects the ability of the mining companies to meet the target by 2014 – including even those mining companies that had already met the target based on the principles contained in the Original Charter.

The reporting requirement under the 2010 Charter

118. While the reporting requirement in the 2010 Charter remained the same in its content,[50] the Department would now monitor and evaluate compliance, taking into account the "*impact of material constraints which may result in not achieving set targets*".

119. Most significantly, however, it stated that

> "*non-compliance with the provision of the Charter and the MPRDA shall render the mining company in breach of the MPRDA and subject to the provisions of section 47, read in conjunction with section 98 and 99 of the Act.*"[51]

---

50 2010 Charter p 125 para 2.9

51 2010 Charter p 125 para 3

120. The Minister is not empowered by section 100 to render, by way of Charter provisions, a mining right holder in breach of provisions of the MDRA. Section 100 also does not authorise the Minister to extend the scope of section 47, 98, or 99.

121. As discussed above, section 47 does not in fact extend to instances of non-compliance with the Charter. Those instances of non-compliance with the Act for which provision is made in section 47 do not find application in relation to BEE ownership requirements.

122. Even to the extent that a mining right could have been made subject to particular terms and conditions relating to BEE ownership -- either by way of an undertaking or an agreement between the parties as contemplated in the MPRDA Regulations – those ownership rules would not logically have been the ones contained in the 2010 Charter. This provision could accordingly not logically or lawfully impact on the position of a right holder who had applied for an mining right or the conversion of the right prior to the publication of the 2010 Charter.

123. The imposition after the fact of new, and more onerous, Charter provisions, and the attempt at the retrospective enforcement of those provisions on pain of penalties which there was no power to impose, is at the heart of the dispute between the parties.

Administrative justice and a new charter

124. Even if the Minister were entitled to develop a new Charter, he still had to comply with section 6 of the MPRDA, which provides for any administrative decision-making to be lawful, reasonable and procedurally fair, in doing so.

125. In terms of section 6, the Minister, in developing a new Charter, ought to have acted fairly and could not retrospectively change the empowerment rules applicable to existing mining right holders. At best, the new Charter could apply to application for mining rights going forward.

126. Existing holders of mining rights had entered into empowerment transactions (at great cost) in reliance on the Original Charter and in order to satisfy the 26% HDSA ownership requirement. They had submitted empowerment structures and mining work programmes to the respondents as part of the mining right grant or conversion process. Their conversions and applications for mining rights were granted on the basis of those transactions.

127. Moreover, the Original Charter was based on a negotiated position and accordingly a common understanding between the state and industry stakeholders. This means that the respondents granted and converted rights to existing holders of mining rights well-knowing that the obligation was not a continuous and on-going one. They knew very well that existing mining rights holders did not have, and would not have had, an

expectation of the continuous 26% requirement for which the respondents now contend at the time that the applied for, and were granted mining rights based on their compliance with the provisions of the Original Charter.

128. To change the rules of empowerment ownership in the 2010 Charter, and to purport to make it retrospectively applicable and enforceable in these circumstances was unlawful, unreasonable and procedurally unfair.

129. The dispute between the parties about the nature of their respective empowerment obligations that arose when attempts were made to enforce the government's new approach to BEE ownership requirements as reflected in the 2010 Charter ought to be considered against this background. We consider each of the disputed questions in turn.

THE FIRST QUESTION: THE NATURE OF THE 26% OBLIGATION

130. The first question is about the nature of the 26% ownership obligation on holders of mining rights – either granted under section 23 or converted under item 7 of schedule II.

131. The government says that the Charter imposes an enforceable obligation that require of both categories of mining right holders to replenish, on a recurring and continual basis, any diminution in the 26% HDSA ownership level.

132. The applicant takes the view that there is no binding obligation on mining right holders to replenish, on a recurring and continual basis, the 26%

HDSA ownership requirement. Instead, the requirement must be met, and assessed at the point of application for the right, or for conversion of the right.

The nature of the Charter and the purpose of the targets

133. It is clear that the Charter was always intended to be the result of a co-operative and consultative process between industry stakeholders.

134. This in itself does not, however, have much impact on the resolution of the question in dispute. While the political implications of the turn of events that led to the 2010 Charter and its midstream policy change away from existing industry agreements may well be significant, they do not progress the legal queries.

135. The question in law is not so much whether or not the industry players had agreed to the 26% target in the Charter, to its method of calculation or to the consequences of non-compliance. The Minister had the statutory authority to "*develop*" it under section 100(2) and could notionally have done so without any consultation from the outset.

136. The more important legal question is whether the nature of the Charter obligations was such that the state could compel compliance with them, and what the consequences of non-compliance would be.

137. The nature of the Charter is clear from its language and from the statutory provisions that authorise it – it is no more than government policy,

developed in conjunction with industry stakeholders. The Minister was in terms required by section 100 to develop the "*framework for targets*" and the "*timetable*" for HDSA entry into the profession. The purposes of this framework policy was to assist the Minister in assessing whether an applicant for a right had complied with the commitments made and undertakings given in the Charter.

138. The Minister, when called upon to exercise a discretion in the grant of a mining right (or one of the other rights that required a similar exercise of discretion) would be assisted by the provisions of the Charter in exercising that discretion rationally and fairly with reference to the frameworks and targets contained therein. The fact that the Charter had been agreed upon between the industry role-players would grant a moral authority and fairness to a process of conversion of rights and applications for rights that promised to be highly contested and contentious and make compliance more likely.

139. The applicants for mining rights and for conversions of rights would, on the other hand, rely on the Charter for certainty in their corporate affairs. They would design the empowerment transactions required by the state with reference to the charter, and make their financing arrangements and the restructuring their corporate affairs with the certainty that the Minister "*must*" grant their conversions or applications for mining rights if their applications were "*in accordance*" with the provisions of the Charter and section 2(d) and (f).

Charter undertakings and the consequence of breaching them

140. The commitments made and the undertakings given in the application process by individual applicants were varied, occasionally complex and ultimately either successful or unsuccessful in realising through the resulting empowerment transactions entry for HDSAs into the mining industry, participation in the affairs of the mining right holder and enjoyment of the benefits of the rewards of empowerment.

141. Whether or not the empowerment transaction resulted in any financial reward for the HDSA participants differed from deal to deal, and depended to a large extent – as the Original Charter intended – on market forces, business acumen of the dealmakers involved, and sometimes on good fortune.

142. The question is whether the success or failure of a particular empowerment transaction to achieve long-term changes in the demographics of ownership can, however, result in the suspension or cancellation of the mining right of the holder who proposed it. There is nothing in the MPRDA that suggests that it can. Unless the undertakings underlying the particular BEE ownership deal had in fact been rendered terms or conditions of the mining right, there can be no legislative basis on which this result can follow.

Once a right holder, always a right holder

143. Non-compliance with the 2010 Charter (or for that matter the Original Charter) can in itself not lead to the cancellation of the mining right or its suspension.

144. This is not only so because of the precarious statutory authority for the 2010 Charter, or because it represented a departure in the industry's agreements on industry transformation. It is in the first instance because, once given, a mining right can only be taken away in very limited circumstances circumscribed by statute, and certainly not for non-compliance with the Charter.

145. A mining right holder must comply with the MPRDA in conducting its mining operations within the mining area over which the right was granted, comply with environmental laws and regulations within the ambit of its environmental authorisation, and refrain from submitting false, fraudulent, incorrect or misleading information when it is called upon to submit information under the Act. If the holder breaches one of these rules, its conduct may be met with the full force of the minister's power to suspend or cancel its mining right under section 47.

146. For present purposes, as mentioned above, a mining right holder may also be met with the consequences of section 47 if it had given certain undertakings that were incorporated within the terms and conditions of the mining right, and which it then breached. Such terms and conditions could

conceivably and lawfully relate to targets in the Charter, or to the transformation goals in section 2(d) or 2(f), and could in principle have been incorporated either in the course of a conversion of a mining right as contemplated in item 7(2)(k), or by agreeing to such a term or condition as contemplated in section 23(6) read with regulation 12, if the Minister approved such a condition. It would also be uncontroversial that such a term or condition would have to be honoured.

147. But this application is not concerned with the question whether or not any of the applicant's members have breached an empowerment undertaking incorporated as a term of its mining right. Those mining rights are not before this Court and if the respondents believe that any particular mining right holder is in breach of an empowerment term of its mining right, appropriate action should be taken under section 47.

148. The question is whether, absent such incorporated terms and conditions, there is a basis on which the minister may enforce the Charter obligations by way of section 47, across the board, and in relation to all mining right holders. There is no basis for the government to approach Charter obligations on this basis. There is in particular no legislative power for the minister to enforce these obligations by cancelling or suspending a mining right. The respondents have pointed to no provision of the MPRDA that can source such a power..

There is no perpetual or recurring obligation

149. Leaving aside the fact that non-compliance with the BEE targets cannot in law jeopardise a holder's mining right, it is in any event not correct to approach the ownership target as a perpetual and recurring obligation that must continually be met.

The MPRDA does not provide for it

150. The respondents contend for a perpetual and recurring obligation without any reference to the MPRDA or to either Charter that justifies such an approach. The Charters clearly contemplate no such on-going obligation. The suggestion of a perpetual and recurring 26% empowerment obligation is made as a result of a midway shift in the Minister's empowerment aspirations.

151. The respondents have made no attempt to identify the legal provision that would either authorise, or regulate, a perpetual and recurring obligation to establish, and re-establish on a continual basis, 26% HSDA ownership over the life of the mine.

152. The Chamber's interpretation – namely that compliance with the 26 % ownership requirement must be assessed at the point of application or conversion – is not only in line with the language of the MPRDA, but is also in line with the objectives of the MPRDA.

153. The respondents' argument does not appear to be that there is such a requirement because the language of the MPRDA justifies such a conclusion, but rather that there should be such an obligation.

The MPRDA focuses expressly on once-off assessment

154. The purpose of the Charter is expressly to address the question of compliance with the BEE empowerment requirements at *a* point – the point of entry into the industry, assessed at the time of application or conversion.

155. This is in explicit terms what the wording of the MPDA and the Charter say, and what the legislature had in mind. The effect of imposing a perpetual and recurring obligation would be to shift the focus of the enquiry as to the BEE ownership status from one point of assessment to various unidentified points in the course of the life – and ultimately death – of the mining right. There is no legislative basis for why and how this should be done.

The requirements that HDSA participants must "benefit"

The expansion of opportunities to benefit

156. It is so that section 2(d) speaks not only of meaningful opportunities to enter the industry, but that it also requires that benefits must accrue to HDSA participants. As a matter of regulatory economics there is very little that can usefully be done by way of the allocation of limited real rights that can ensure that the HDSA right holder will ultimately receive economic

benefits, other than to compel the holder to create those benefits even where none in fact accrued.

157. Whereas a mining right can be *"in the gift of the state"*, economic benefit in itself cannot be gifted. It is for this reason that even the MPRDA – hailed as instruments of radical transformation of the mining industry – only promises in section 2(d) the *"expansion of opportunities"* to enter, to actively participate, and to benefit from the rights. It does not promise the benefits itself.

158. The mining right holder can and must expand those opportunities at the point at which it applies for the mining right (or for its conversion), and must make firm undertakings in this regard. And the minister, when considering whether to convert rights, or to grant mining rights on application, must consider those undertakings, and will not grant the mining right if they are, on the face of it, unlikely to result in the achievement of the transformational goals in section 2(d) and (f) or the targets in the Charter. This is the very purpose of the Minister's assessment of the information submitted by the applicant for a right or for conversion.

159. But the Minister can, at that point, do no more than grant or refuse the right, or grant it subject to conditions.

Assessing empowerment at point of entry

160. Once the HDSA shareholder has entered in the industry by way of an empowerment transaction which the mining right holder undertook to conclude, that aspect of the empowerment goal has been achieved. Where a mining right holder has complied with its HDSA obligations by meeting the 26% ownership target, it will have empowered the HDSA participants in question even if they realise their investments and withdraw.

161. The HDSA shareholders must, of course, be able to participate fully, and so voting rights and management arrangements and other structures that ensure participation can be, and are, scrutinised on application. But trying to ensure "*benefits*" by regulating not only the entry of HDSA participants into the industry, but by also attempting to regulate HDSA participants at the point of exit (and possibly at various points along the way) has no basis in law.

162. The argument that the objects of sections 2(d) of the MPRDA are not fulfilled by a mining company if it does not continuously replace one HDSA investor with another, ignores entirely the empowerment and transformational benefits achieved by the departing HDSA investors. It confuses quotas with empowerment objectives.

163. All industry stakeholders, when they participated in the policy-making process that resulted in the Original Charter, had agreed that beyond the

point of entry, fluctuations in shareholding should be left to market forces. This was as a sound approach for the reasons that follow.

Benefits must be "substantial and meaningful"

164. Even if it were required of the Minister to ensure that the HDSA entrants receive a substantial and meaningful benefit and not merely the opportunity to benefit, this requirement must be interpreted to mean – at the very least – that the ownership must in fact be valuable in the hands of the HDSA entrant.

165. When considering ownership from the point of view of the HDSA entrant – as one must to assess its value – it is clear that the respondents' approach to a perpetual and recurring ownership requirement will reduce the value of the HDSA share, and through it the benefit that accrues to the HDSA entrant.

The changing benefits over the life of the mine

166. HDSA shareholders, like all shareholders, will wish to exit their investments when market conditions are to their advantage. Assuming that this is so, the question is which HDSA shareholder will wish to take their place? In particular, an HDSA buyer will have to be found who is willing to buy into the business without regard to the stage, or economic state, of the business operation. The respondents postulate not just that such an HDSA owner exists, but that he or she would be willing to buy precisely at a time that those shares would be unattractive to any other

buyer on the open market. The current depressed market for minerals such as platinum, iron ore, and coal, demonstrates this. This cannot be the kind of "*empowerment*" that the MPRDA intended.

167. The respondents' entire conception of a perpetual HDSA shareholder "top-up" is blind to the fact that such shareholding may or may not be beneficial, depending on the timing of the transaction.

168. In particular, it does not take into account the fact that the mining right in question is awarded for a fixed period, and that it relates to a particular mining operation over the life of a mine. The value of the mining operation is not static over the period of that right, or over the life of a mine.

Realising the value of HDSA ownership

169. The value of an HDSA ownership share is fundamentally linked to the manner in which empowerment transactions are structured and financed. It is only in the course of such transactions, when application is made for the right or for conversion of the right – that shares can be issued to HDSA shareholders at a cost below their market value. This "added value" is produced both through financing mechanisms which effectively subsidise the cost of borrowing the funds necessary to finance the empowerment transaction, and the value at which the shares are issued.

170. After the initial transaction, and once the share transactions are subject only to market forces, there is little or no additional value that can be

added to the value of the shares. The respondents' argument makes no provision for the economics of the share value of a listed company.

171. Since HDSA shares acquired after the initial BEE transactions are acquired at market value (which will take into account the fact that the disposal of the shares is restricted), with no added value accruing to the new HDSA shareholder, there is simply no incentive for the new HDSA to purchase the shares on offer.

172. Fundamentally, the value for an HDSA shareholder realises only at the point of exit, precisely because the mineral right holder facilitated the entry of HDSA shareholders upfront. In particular – in the context of value being added to those shares through financing arrangements and in the course of the BEE transactions – the particular value for an HDSA shareholder lies in realising the difference between the added value allocated to the share at the point of entry, and the market value at the time of exit.

173. Importantly, the respondents' contentions overlook entirely the fact that listed shares cannot generally be encumbered in the manner suggested by the respondents, and that the racial identity of the shareholder is not ascertainable by the listed company.

The use of ring-fencing and lock-ins

174. The respondents suggest that the applicants concern about the loss of shareholder value ought to have been addressed by mining right holders through ring-fencing and shareholder lock-ins.

175. If HDSA shareholders or other economic participants in mining companies were to be subjected to "perpetual lock-ins", it would reduce the value of their investment, materially impair the investment opportunities available to non-HDSAs and discourage investment by HDSAs.[52]

176. Conversely, if mining companies were not to subject HDSA owners to perpetual or lengthy lock-in arrangements and were required to continually replace departing HDSA investors, the resultant cost, uncertainty and administrative burden would provide a material disincentive to investment in the mining industry in general and in mining companies in particular.

177. It is essentially the respondents' argument that a continuous 26% empowerment obligation ought not to have resulted in the dilution of the HDSA ownership of mining companies at any point. Principally they propose that mining companies could have locked in HDSA shareholders by commercial ring-fencing and by insisting that the shares be sold to another HDSA.

Cannot ring-fence or lock in retrospectively

178. Even if ring-fencing and lock-in provisions could have been an appropriate response to a perpetual, recurring 26% ownership requirement, it is clear on the evidence that on any version of the facts, no perpetual recurring requirement in fact existed at the time.

---

52 Founding affidavit p 75 para 4.9

179. There were no regulations or rules regarding the lock-in principle. The respondents neither requested, nor required, perpetual lock-in clauses in proposed BEE transactions. The DMR gave inconsistent guidance to applicants across the industry in this regard, with some companies being guided to temporary lock-ins, while others were asked to remove lock-in clauses.[53]

180. It is clear that mining companies that were not aware of the unilateral policy change that now contemplated a perpetual and recurring obligation that would be continuously assessed across the life of the mine, could not have protected against the risk of dilution by utilising ring-fencing and lock-in provisions.

181. The risk of dilution arises only now, as the Minister attempts to shift the goalposts. It is this fundamentally inequitable result, and the devastating economic consequences that follow, which the Chamber asks this court to consider in declaring what the proper meaning and ambit of those obligations are.

The respondents' vision of encumbered HDSA shares

182. On the respondents' approach, accordingly, not only must HDSA shares be traded from HDSA to HDSA at market value (in order to avoid dilution), but these shares must also be burdened with lock-in agreements and restrictions on their sale. These two considerations taken together make it

---

53 Replying affidavit p 345 para 23.1-p 346 para 23.6

questionable whether HDSA shareholders could be found to purchase HDSA shares when the original HDSA shareholders – presumably for sound financial reasons – exit from the deal.

183. The HDSA buyer that one must postulate for purposes of the respondents' argument is not only one who is willing to buy at no more than market value and subject to conditions that reduce the value of the shares in their hands, but also one who forsakes better options existing on the open market – in this industry or another – which would logically be more attractive, in favour of the encumbered market value share bought from the initial HDSA shareholder.

184. In reality, this postulated willing HDSA buyer is likely to be rare. In fact, the restrictions which the respondents propose ought to be imposed on HDSA shareholders, would have the result that an HDSA stake may never be monetised, therefore preventing the full or indeed any value of those stakes being realised, or that the HDSA stakeholder has only specific windows of opportunities to monetise such stakes.

185. In any event, even if the HDSA buyers envisaged by the respondents can be found, they are not the buyers that the stakeholders had in mind when they agreed to the principles in the Original Charter. The applicants for rights or conversions accordingly also did not have these kind of buyers in mind when they entered into the empowerment transactions that were approved by the respondents at the time of their applications.

THE SECOND QUESTION: MINISTER'S ENFORCEMENT POWERS

186. The second question is whether a failure by a holder of a mining right or converted right to meet either the requirements of the Original Charter or the 2010 Charter could constitute a contravention of "this Act" as defined in section 1 of the MPRDA.[54] If yes, the question is whether or not it would constitute a contravention of sections 47(1)(a) or 93(1)(a), or an offence for purposes of section 98(a)(viii).

187. The applicants contend that non-compliance with the Charter is not a breach of the Act, and that no contraventions of the penalty provision of the MPRDA follow.

Definition of "the Act"

188. As we mention above, "*this Act*" is defined to include the regulations, and any term or condition to which any right granted under the Act is subject.

189. The Charter is not in the nature of regulations. It is at most a policy document, and not subsidiary legislation.

190. If and only to the extent that any of the provisions of the Charter have been incorporated into as a "*term or condition*" of the mining right in question, then those terms and conditions would fall within the definition of "*the Act*". This does not, however, render a breach of those terms or conditions in breach of the three sections.

---

54 Notice of motion para 1.3 p 3

No breach of section 47(1)(a)

191. We have already considered above that, even if in violation of the terms and conditions of the mining right, a violation of section 47(1)(a) cannot be established because the violation in question would not amount to "*conducting a mining operation*" as defined, in contravention of the Act.

192. If a term of the Charter is incorporated into a mining right, then its breach may (depending on whether in constitutes by its nature an enforceable provision) constitute a breach of section 47(1)(b), but that would be a consequence of the fact of such incorporation. It has nothing to do with the fact that it is in addition a provision of the Charter.

193. This application is concerned with the enforceability of the provisions of the Charter, not with the enforceability of the terms of a mining right.

No breach of section 93(1)(a)

194. What has been said in relation to section 47(1)(a) of the MPRDA applies with equal force to section 93(1). The contravention in question must, in order to satisfy the requirements of the section occur on the area where mining operations are taking place. A failure to maintain the required HDSA ownership level cannot sensibly be said to *"occur on"* such an area.

No offence in terms of section 98

195. None of the provisions of section 98 find application to non-compliance with the Charter provisions. Those provisions are not *"directives, notices*

suspensions, orders, instructions or conditions". They are not "*other provisions of the Act*".

Item 3 of the Charter makes no difference

196. The fact that the Charter itself says in item 3 that "*non-compliance with the provisions of the Charter and the MPRDA 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*" makes no difference to the result.

197. The Charter itself cannot render non-compliance with its own provisions either a "*contravention of the Act*", or an offence under section 98.

198. The legislature has conferred on the Minister the power to create offences by way of regulation in respect of matters dealt with in section 107. But that section does not give the Minister the power of regulation over the question of BEE ownership provisions under the Act.

199. The Minister could, not, by including a provision to that effect in the Charter itself, confer upon herself this power to create such an offence.

THE THIRD QUESTION: CALCULATING 26% COMPLIANCE

200. The third question involves a determination of the question whether there has been compliance with the 26% target with reference to the provisions in the 2010 Charter that departed from the provisions of the Original Charter.

201. As pointed out in South African Mineral & Petroleum Law[55], both the Original Charter and the 2010 Charter make reference to the *"continuing consequences"* of empowerment deals. In the 2010 Charter, only empowerment deals concluded prior to the promulgation of the MPRDA are taken into account for the purposes of *"continuing consequences"*.[56]

202. The learned authors' comment further that in the Original Charter the term *"continuing consequences"* was used to describe how in practice previous deals would continue to be taken into account whenever a right holder's achievement of HDSA ownership is measured, but that pleas by the mining industry for the recognition of the continuing consequences of the achievement of HDSA ownership targets in related transactions fell on deaf ears.

203. Dale *et al* point out[57] further that paragraph 2.1 of the 2010 Charter now provides that it is only the continuing consequences of deals concluded prior to the promulgation of the MPRDA which may be included in calculating credits or offsets in terms of market share as measured by attributable units of production. When considering the question of *"continuing consequences"* in the context of the Charters, it should be

---

[55] Dale et al, *South African Mineral and Petroleum Law, Lexis Nexi, 2005 (loose leaf)* App-37 (service issue 17), para 12.3.3

[56] 2010 Charter paragraph 2.1 p 122

[57] *op. cit.* at para 12(3)(3), app-18 (8)

borne in mind that that phrase is used in both the Original and the 2010 Charters in the context of offsets.[58]

204. In the Original Charter the continuing consequences of previous deals were limited to permitting an entity to take into account, for the purposes of meeting the HDSA ownership targets, previous empowerment deals to the extent to which a *"credit"* or *"offset"* arose which could be utilised to meet the HDSA requirements on a later occasion.

205. In terms of paragraph 4.7 of the Original Charter, in order to increase participation and ownership by HDSAs in the mining industry, mining companies agreed:

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

206. In the 2010 Charter the ability of measured entities to offset in the manner contemplated by the Original Charter was materially limited. The 2010 Charter[59] provides that:

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

---

58 See definition of "passive involvement" Original Charter p 116

59 The second bullet point in paragraph 2.1

207. The continuing consequences principle (which in the original Charter related to offsets and credits) was further restricted in paragraph 2.1 of the 2010 Charter, which provides:

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

208. In the 2010 Charter therefore continuing consequences are limited not only to offsets or credits arising from the value of beneficiation, but are limited to deals concluded prior to the promulgation of the MPRDA.

209. The Minister was not, however entitled, under the guise of exercising the power conferred upon him by section 100(2)(a), to extinguish retrospectively the credits/offsets when entering into empowerment transactions.

210. In addition, the respondents cannot retrospectively introduce new requirements with which empowerment transactions have to comply. The effect of this is to deprive, retrospectively, mining rights holders of the benefits of the continuing consequences of empowerment transactions concluded by them prior to the coming into force of the MPRDA. This would render the requirements *ultra vires* the powers of the Minister and void for this reason.

211. The respondents deny that this is so.[60] They say that there has been a misunderstanding about the introduction in 2010 of the words "*prior to the promulgation*" of the MPRDA. They say that this was not intended to change the meaning of the provision as it had been in the Original Charter. The Original Charter had said that the continuing consequences of all previous deals would be included in calculating credits/ offsets.[61] They say that it was not intended that deals concluded subsequent to the conclusion of the Original Charter would be excluded from consideration and that, in fact, no one was deprived of their credits.

212. This submission cannot be accepted. The language of the provision has clearly and deliberately changed. It is partly this confusion that has necessitated this declarator. The mining right holders require clarity about the content of their obligations.

213. One of the requirements which the respondents retrospectively introduced in the 2010 Charter was the requirement that rendered compulsory the need for clearly identifiable beneficiaries in the form of BEE entrepreneurs, workers (including employee share option schemes) and communities. No such compulsory requirement existed in the Original Charter.

---

60 Answering affidavit p 251 to 252 para 167 to 169

61 Original Charter p 117 para 4.7

THE FOURTH QUESTION: ULTRA VIRES PROVISIONS OF 2010 CHARTER

214. The power of the Minister to publish the Original and the 2010 Charter is derived from section 100(2)(a) of the MPRDA. The Charters derive their juristic character from that section and from the nature of the power which was thereby conferred upon the Minister. The Minister may not elevate the status of a document published in terms of section 100(2)(a) above that contemplated by the section. To do so would be *ultra vires*.

215. There are two categories of provisions of the 2010 Charter that are *ultra vires* the powers of the Minister and accordingly void. The first are those that purport retrospectively to deprive mining right holders of benefits that had been conferred on them by the Original Charter, including:

215.1. the capacity for offsets;

215.2. the continuing consequences of empowerment transactions concluded by them after the coming into force of the MPRDA;

215.3. the right to use the excess of any target to offset a shortfall in its other operations;

215.4. the entitlement to offset the full value of beneficiation achieve by the rights holder against its HDSA ownership commitments;

215.5. all forms of ownership and participation by HDSAs and HDPs being taken into account, and not only those that fell within the

definition of "*meaningful economic participation*" in the 2010 Charter.[62]

216. The second are those that purport to render holders of mining rights who fail to comply with the Original Charter or the 2010 Charter in breach of the MPRDA and subject to the penalty provisions of the Act in sections 98 and 99.

217. Both categories ought to be set aside on the basis that they are void.

RELIEF SOUGHT

218. In the circumstances, the applicant asks that the court grants the orders set out in its notice of motion, with costs, including the costs of two counsel.

CDA LOXTON SC

NADINE FOURIE

Chambers
Johannesburg
31 January 2016

---

62 Notice of motion p 3-4 para 1.6.1 para 1.6.5