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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no: 43621/17

In the matter between:

The Chamber of Mines of South Africa Applicant

and

Minister of Mineral Resources First Respondent

FILING SHEET

Presented for service and filing: Applicant's replying affidavit.

Dated at **Pretoria** on this the **18th** day of **August 2017**.

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IN THE HIGH COURT OF SOUTH AFRICA
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Case no: 43621/17

In the matter between:

The Chamber of Mines of South Africa Applicant

and

Minister of Mineral Resources Respondent

REPLYING AFFIDAVIT

I, the undersigned,

TEBELLO LAPHATSOANA CHABANA

hereby say on oath that:

PART 1: INTRODUCTION

1 Deponent and high level reply

1.1 I am the Senior Executive: Public Affairs and Transformation of the Chamber of Mines of South Africa. I deposed to the founding affidavit on behalf of the applicant. As stated therein, I am duly authorised to represent the applicant in this application.

1.2 The contents of this affidavit are within my personal knowledge, unless the contrary appears from the context, and are to the best of my knowledge and belief both true and correct.

1.3 I have read the Respondent's answering affidavit and reply thereto as set out below.

1.4 I am advised that it is not necessary to reply to the allegations in the answering affidavit to the extent that it would only serve to join issue and therefore only deal with those paragraphs of the answering affidavit which merit a reply.

1.5 Save where the contrary is stated, averments that contradict the founding and supporting affidavits are denied. In addition, allegations not dealt with should be considered to be denied.

1.6 Words or phrases defined in paragraph 17 of the founding affidavit bear the same meaning in this affidavit.

1.7 I shall in this paragraph, by way of introduction and summary, deal with the following matters:

1.7.1 The Minister mostly attacks the Chamber instead of dealing with its legal arguments. He thereby seeks to divert attention away from the absence of any cogent response to those legal arguments. He also suggests that this dispute is about conflicting objectives and outcomes when the dispute is

actually about conflicting interpretations of the MPRDA and the nature and extent of his powers.

1.7.2 The Minister has deliberately misunderstood the Chamber's complaint about lack of consultation and has sought to answer a case that was not made out in the founding affidavit. He in any event concedes that the Chamber was not consulted on the ownership element, which constituted a major departure from the draft 2017 Charter published for comment.

1.7.3 Much emphasis is placed in the answering affidavit on the Chamber's alleged past conduct and acceptance of certain aspects of the 2004 and 2010 Charters. These allegations (which are factually incorrect) are legally irrelevant. There is no such thing as lawfulness by estoppel. The fact that the Chamber (or any other interested person for that matter) has not previously challenged some requirement which appeared in earlier charters and now appears the 2017 Charter is entirely irrelevant to the issue whether or not such requirement is lawful. It is trite law that the question whether or not a functionary has lawfully exercised a power is an objective one.

1.7.4 The Minister also seeks to side-step the complaint that he has exceeded his powers by the unconvincing statement that he and his department have always implemented the charter in a benevolent and flexible manner and will continue to do so.

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This of course does not render the provisions either within his powers or render them lawful. An unlawful provision of the 2017 Charter cannot be rendered lawful by the simple expedient of exercising a non-existent discretion either not to apply it, or to apply it "flexibly". Indeed, such an approach merely emphasises the threat to the rule of law presented by an approach that a functionary can simply decide which aspects of a "law" he wishes to enforce.

1.7.5 The Minister has failed dismally to answer direct legal challenges such as the fact that he has sought to change the MPRDA definition of persons who stand to benefit from the Charter's provisions and that he has impermissibly sought to impose a tax. In response to this challenge the Minister simply asserts, without proffering any reasons, that he has the power to do so.

1.7.6 The Minister's view is that the 2017 Charter is law and that he can easily and expeditiously change the law as and when the occasion arises. There is no foundation in law for this astonishing proposition.

2 Anti-transformation rhetoric

2.1 A remarkable feature of the Minister's answering affidavit is his unbridled *ad hominem* attack, and the intensity of his attack, on the Chamber. Not only is it alleged that the Chamber is anti-transformation,

it is alleged that the Chamber seeks to subvert the legislative objects and underpinning values of the MPRDA (AA par 43) in respect of transformation. The allegations to this effect range from referring sarcastically to the Chamber's *mantra* of being committed to transformation (AA par 43), saying that the Chamber pays lip-service only to the objectives in the MPRDA and that it is reluctant to constructively or meaningfully engage, to the allegation that "its conduct *intentionally* subverts those very (transformational) processes" (AA par 55) and "is geared toward *actively* subverting those transformational objectives" (AA par 350).

2.2 These accusations are wholly untrue and unfair, as demonstrated below in response to the specific allegations in the answering affidavit. It is, in fact, a scurrilous political response to a legitimate legal challenge to the 2017 Charter. That response is unworthy of a Minister in a democratic state, founded on the rule of law and the values set out in section 1 of the Constitution. The logical corollary to that approach is that, in the interest of transformation, the Minister should be allowed to act unlawfully and that any opposition to such conduct should be branded as subversive of the legislature's objectives. The dangers inherent in that attitude are obvious.

2.3 It is equally untrue, and a deliberate distortion of the nature of the dispute between the parties, that the Chamber brought this application because of a difference in imperatives and that the dispute is about the

objectives and outcomes of the 2017 Charter (see for e.g. AA par 60). As is clear from the affidavits filed, the dispute between the parties concerns the interpretation of section 100(2) of the MPRDA and the 2017 Charter and legal questions about the nature and ambit of the Minister's powers and the Charter.

2.4 Related to the "anti-transformation" rhetoric is the Minister's repeated statements that the DMR on the one hand did all it could to engage with and accommodate the Chamber but that in response the Chamber was obstructive and uncooperative, and that it "recanted" (par 111) or "reneged" (par 112) on agreements. As set out below in my specific responses, the Minister's version is self-serving and inaccurate, but in any event irrelevant to the legal issues in dispute. It is little more than a deplorable attempt to create "atmosphere".

2.5 The Minister's attack on the Chamber is without any factual basis, as shown below. The inescapable inference is therefore that it is part of a strategy aimed at diverting attention from the Chamber's legal challenges because the Minister simply has no answer to them.

3 Consultation processes in the period 2004 to 2017

3.1 Another feature of the answering affidavit is the protracted historical overview (from pp 343 to 406, paragraphs 8 to 133), spanning a period of almost 20 years from 1994 to 2017, but which is not in response to allegations made in the founding papers and accordingly irrelevant.

3.2 The apparent purpose of the long background section is, in part at least, to support the Minister's conclusion in paragraphs 134-136 of the answering affidavit (pp 406 - 407) that "the Chamber's allegations that the conduct of the Department and the Minister was unilateral and devoid of consultation are clearly incorrect", "unfortunate" and "questionable".

3.3 The Minister has, however, misconstrued the Chamber's case. I stated in paragraph 38 of the founding affidavit that the Chamber will contend in the judicial review application to be instituted after receipt of the record in that matter, that the decision to publish the 2017 Charter was procedurally unfair. I made the limited statement "for present purposes" that there was no consultation with the Chamber on the *ownership* aspects of the 2017 Charter which I listed, without elaboration, in paragraphs 38.1 - 38.8 of the founding affidavit. The Chamber has never contended, as the Minister suggests, that it was not consulted on *any* aspect of the 2017 Charter. Once again the Minister has sought to avoid answering the case actually made out by the Chamber by responding to a case not made by the Chamber.

3.4 The simple answer to the Minister's account of the consultation processes in respect of the 2004, 2010 and 2017 Charters (which are in any event factually incorrect or incomplete as set out below) and his conclusion mentioned above, is therefore that the Chamber did not state in the founding affidavit that the process was "devoid" of

consultation but rather that the Chamber was not consulted on the above-mentioned ownership aspects in the 2017 Charter and that it would make out its case in respect of procedural unfairness in the review application.

3.5 The Minister did not respond directly to paragraph 38 of the founding affidavit. He did, however, admit in paragraph 118 of the answering affidavit that "all the elements in the draft charter were discussed with the chamber, except for that of ownership and the chamber's notice of 'once empowered always empowered'". In the result the Minister has effectively conceded correctness of the Chamber's contentions regarding an absence of fair process.

3.6 In view of the serious nature and extent of the accusations levelled at the Chamber in the answering affidavit in the context of the consultation process preceding the publication of the 2017 Charter, namely of having been obstructive, uncooperative, having recanted or reneged on agreements and subverting the objects of transformation, the Chamber is however required to respond to these allegations in this reply and I do so below.

4 The Chamber's alleged past conduct

4.1 A further theme in the answering affidavit is the allegation that the 2017 Charter is very similar to the 2010 and 2004 Mining Charters (it is alleged to be an "incremental build-on", in for e.g. AA par 106) and that the Chamber, in the latter Charters, had agreed to matters that it is

currently contesting (see for e.g. AA paras 140.3 and 141, 142). This allegation is also used in support of the allegation that, in launching these proceedings, the Chamber was opportunistic and anti-transformation. As I have already stated, this 'spin', that the Chamber is acting in an anti-transformative manner, is little more than political rhetoric and a case of playing the man instead of the ball. Apart from the fact that it is factually incorrect, it has no bearing on the legal issues before the court.

4.2 The legal question which would arise if the Minister's allegation that the Chamber has in the past accepted certain propositions under the 2004 and 2010 Charters were correct (which it is not), is whether such past conduct has any legal relevance for purposes of the present interdict application. The answer is clearly that, from a legal perspective, what the Chamber has or has not done in the past in respect of the 2004 and 2010 Charters is legally irrelevant for purposes of the current application to interdict the implementation of the 2017 Charter. I am advised that there is no such thing as "lawfulness by estoppel". These allegations therefore do not advance the Minister's case in any way and it is difficult to believe that the Minister thought otherwise.

5 Alleged benevolence of the Minister

5.1 The allegation is made a number of times in the answering affidavit that the Department and the Minister have always applied the Charter flexibly and sensibly and that they will continue to do so in future (see

for e.g. AA par 140).

5.2 Besides the fact that the statement is denied, it is submitted that one can never test the legality of legislation, administrative action or policy instruments of government by assuming that the Minister or officials concerned will apply them in a benevolent or "flexible" manner, whatever that might mean. Such an approach is not in accordance with the rule of law. In any event, Ministers come and go.

5.3 This also raises another issue. On the Minister's view that the 2017 Charter is law, he does not on the wording thereof have the discretion which he says he does and he does not have the power which he thinks he has to decide not to enforce certain provisions of the Charter, or even of the MPRDA.

6 The ambit of the Minister's powers

6.1 A central dispute in this matter is the nature and ambit of the Minister's powers under section 100(2) of the MPRDA and the legal nature and function of the Charter.

6.2 I have set out the Chamber's case in paragraphs 20 to 37 and 39 to 40 of the founding affidavit.

6.3 The Minister's response, set out in *inter alia* paragraphs 41 to 42, 137 to 145 and 201 of the answering affidavit, is that the Charter is binding law. I note in this regard that the Minister again caricatures the Chamber's case by stating that the Chamber says that the Charter "has

no legal force" and is "an aspirational document that operates as a mere non-binding guideline".

6.4 I deny that the Charter is law. I am advised that national or provincial Acts and regulations are legislative instruments whereas documents setting out governmental policy are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Where it is not reflected in the Act, as in the case of the Charter (by virtue of the wording of section 100(2)(a)), it nonetheless remains a statement of policy which cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between legislature and executive will disappear.

6.5 The Minister contends in one breath (a) that the charter is binding law and (b) that the legislature contemplated that the charter would be "a convenient and flexible mechanism enabling the Minister to respond to a fluid and constantly evolving situation ..." which would be "much easier and purposefully practical to update" and which could be "amended as time passed and the situation changed" with "flexibility and expeditiousness" (see for e.g. AA paras 41 and 42).

6.6 It cannot be both. The Charter is either a law, and has to conform to the requirements for making and amending legislation, or it is policy which can be implemented with flexibility taking into account constantly evolving circumstances but which cannot override, amend or be in

conflict with the MPRDA and other laws. The Minister's case, which amounts to saying that he can easily and expeditiously change the law as and when the occasion arises (see for e.g. AA par 143), has no foundation in our law.

6.7 To the extent that the Minister implies that the Charter is subordinate legislation, this is specifically denied. There is no indication in the wording of section 100(2) that the legislature intended a delegation of legislative power to the Minister, and no basis exists for the Minister to elevate the policy determinations envisaged in section 100(2)(a) (or for that matter in sections 100(1)(a) and (b)) to the level of subordinate legislation. It is submitted that section 100(2) intends the Charter to function as a published (and thus transparent) policy statement which guides the exercise of the Minister's discretion in applying certain sections of the MPRDA, as set out paragraphs 20 to 37 and 39 to 40 of the founding affidavit.

7 Inadequate answers to issues raised in the founding affidavit

7.1 Introduction

As I have stated, the answering affidavit deals with a number of matters not raised in the founding affidavit. On the other hand, it contains inadequate answers to issues pertinently raised in the founding affidavit. These are dealt with more fully below in the ad seriatim response. Suffice it, at this juncture, to point out the following two examples.

7.2 **The different definition of Historically Disadvantaged South African ("HDSA")**

7.2.1 I stated in paragraph 7.1 of the founding affidavit that the Minister has replaced the definition of "historically disadvantaged person" in section 1 of the MPRDA and the term "historically disadvantaged South Africans" in section 100(2)(a) with his own definition of "Black Person".

7.2.2 There is no direct response to paragraph 7.1 of the founding affidavit.

7.2.3 In paragraph 160 of the answering affidavit, the Minister remarks that the definition of "Black Person" in the 2017 Charter accords with the definition of "black people" in the BBBEE Act.

7.2.4 It is submitted that it is quite irrelevant that the manner in which the Minister defines "Black person" in the 2017 Charter is similar to the way in which it has been defined in the BBBEE Act. The MPRDA is the empowering legislation and section 100(2)(a) provides for the development of the Charter to benefit HDSAs / HDPs as defined in the MPRDA. The Minister is not authorised to adopt another definition of his liking in the Charter which is not in accordance with the empowering legislation, whether it coincides with a definition in another Act or not. It is irrelevant whether or not the new definition

accords with the BBBEE Act. The MPRDA is the empowering statute and it has a different definition.

7.3 **The tax aspect**

7.3.1 The Minister did not answer two of the most pertinent points raised in the founding affidavit with respect to tax, namely that:-

(i) he has imposed a tax; and

(ii) he has no power to impose such a tax and that the new body created by the 2017 Charter has no power to receive such a tax.

7.3.2 In fact, the Minister appears to concede that he has imposed a tax and asserts, without any cogent explanation, that he has the power to impose it. That bald assertion is obviously wrong and the Minister must surely know that it is wrong.

7.4 **Technical deficiencies**

7.4.1 Finally, I point out that the Minister, who is supposed to administer the MPRDA, has in various places in the answering affidavit quoted the pre-7 June 2013 versions of various provisions of the MPRDA:

(i) para 30: definition of historically disadvantaged person, paragraph (c);

(ii) para 33: section 17(1);

(iii) para 38: section 100(2)(a). This is astounding, considering that this is the provision on which the Minister relies to empower him to develop a reviewed Charter;

(iv) para 39: definition of broad-based economic empowerment where para (iv) is in fact para (v);

(v) para 77: section 3 does not provide that mineral resources "*belong to the State*"; indeed, it was held in the *Agri SA* judgment of the Constitutional Court that the state has not acquired these resources and that the *cuis est solum* principle has survived.

7.4.2 The Minister has also mis-cited certain sections, e.g.:

(i) para 152: s19(d) which is in fact s19(1)(d);

(ii) para 153: s23(h) which is in fact s 23(1)(h); and

(iii) para 167: s23(h) which is in fact s 23(1)(h).

7.5 I shall now turn to responding to the specific allegations in the answering affidavit *ad seriatim*. I shall repeat the main headings of the answering affidavit (italicised) for ease of reference.

PART 2: AD SERIATIM RESPONSE

8 **Ad paragraphs 1 – 7**

Save to deny that the facts set out in the answering affidavit are true and correct and that the Minister's submissions of law are correct, the contents of these paragraphs are noted.

BACKGROUND AND STATUTORY FRAMEWORK

THE CONSTITUTION AND THE MPRDA

Ad paragraphs 8 – 43

9 The provisions of the Constitution and the MRPDA referred to or quoted in these paragraphs are admitted insofar as they accord with the text thereof and subject to what I have pointed out above regarding the erroneous quotation by the Minister of pre-amendment sections. Their interpretation is a matter for argument.

10 **Documents and processes preceding the promulgation of the MPRDA**

10.1 Insofar as reference is made in these paragraphs to documents and processes which preceded the promulgation of the MPRDA, I wish to respond as set out in this paragraph and the next paragraph and, in this regard, refer to the confirmatory affidavit of Mr Roger Baxter filed herewith.

10.2 To the best of my knowledge neither the DMR Minister (Mr Zwane), or

the DG (Mr Mokoena), DDG (Ms Dlamini), DDG (Mr Raphela) or the previous DDG (Mr Mabuza) were involved in any of the significant discussions:

10.2.1 between the Chamber and the ANC in 1992, following the unbanning of the ANC;

10.2.2 about the Green and White Papers on Minerals Policy in 1998;

10.2.3 about the first Minerals Bill in 2001;

10.2.4 about the draft MPRDA in 2002;

10.2.5 about the first Mining Charter in 2002; or

10.2.6 that led to the finalisation of the MPRDA or the 2004 Charter.

10.3 They accordingly have no knowledge of the significant changes and concessions that were made by the Chamber and its members to help normalise South Africa's minerals policy and mining laws. This lack of knowledge blinds the current Minister and his entire current leadership team to the significant processes and outcomes in the first ten years of discussions.

10.4 In the minerals policy reform process, the ANC focused on opening up access to mining and prospecting activities to all South Africans, on encouraging greater value addition to the country's mineral resources and on encouraging greater sharing of the benefits of the mining sector. This included demands by the ANC that the Roman Dutch principle of

private ownership of minerals rights should be changed to state ownership, as envisaged in the Freedom Charter.

10.5 The Chamber and its members actively contributed towards the normalisation of the mineral rights regime. Instead of opposing or resisting it, the Chamber and its members chose to work with the ANC-led government to effect changes that would open up access to the industry, guarantee security of tenure to promote investment and assist towards undoing the country's apartheid legacy of exclusion.

10.6 The final agreement reached with the Chamber and its members was for the new MPRDA to encapsulate the key principle of state custodianship of the minerals of the country, and for a process of conversion of old order rights into new order rights with guaranteed security of tenure, in line with a model followed in many other mining jurisdictions.

10.7 Part of this process were the discussions on a transformation charter for the mining sector in which the Chamber played a positive transformational role as set out below.

11 The pathfinding process towards the development of Mining Charter 1 and the key role played by the Chamber

11.1 Some of the Chamber's members had already started the transformation process by selling assets to HDSA's even before any charter had been developed and there was early recognition by the

industry that transformational change was an important process towards normalising South Africa's economy and democracy.

11.2 Early discussions on a transformation charter for the mining sector started in 2001 between the then Department of Minerals and Energy (DME) and the Chamber. This was part of the minerals policy reform process, in which the Chamber was intricately involved.

11.3 The Chamber developed an understanding of the process of transformation that had been adopted by the Malaysian government and the USA affirmative action policies. These countries' policies and programmes provided valuable lessons for South Africa, with special emphasis on education, skills development and high levels of economic growth in the Malaysian model.

11.4 Further serious discussions were held in early 2002 with the Chamber and DME both producing their own versions of what a charter could look like. Other stakeholders were also brought into the process including the NUM, the Department of Trade and Industry and the Royal Bafokeng (representing communities). The broad framework of what was discussed included a number of key pillars around ownership, procurement, skills development, beneficiation and housing and living conditions.

11.5 On 26 July 2002, an unmandated rough government charter proposal was leaked to the media, resulting in a blood bath on the capital markets, with some 6,9% of the market capitalisation of the mining

companies being wiped out in less than two trading days. The key area of fallout was an unmandated proposal of 50% plus 1 share to BEE shareholders. This issue had never been discussed with other stakeholders and the DME and a media statement on 30 July 2002 stated that "In conclusion, it must be further noted that the leaked document was a draft to stimulate debate and discussions on the matter amongst the aforementioned parties and does not in any way represent official Government policy or position". The principals of the stakeholders assembled very quickly and agreed to a negotiation process to finalise the Charter. The negotiating teams were flown to Mbulwa, an Anglo American property in Mpumulanga, where a week of detailed negations were held and a final draft Charter produced.

11.6 On the 11th of October 2002, the principals of the stakeholders signed the final Mining Charter, acknowledging that this Charter reflected the collective agreement of the stakeholders to progress transformation in a pragmatic, economically feasible and sensible manner.

11.7 Stakeholder roadshows were then conducted to North America, the UK and Australia, where the stakeholders (which then included the Treasury) engaged the global investment community, to explain what the Charter was all about. Stakeholders not only explained the Charter but supported the jointly developed document and defended it.

11.8 The first mining charter was the first path-finding and substantive transformation charter produced in South Africa and it set the course for

the development of the DTI Codes of Good Practices and for the development of charters in other sectors. The mining charter contained seven key pillars and was 12 pages in length. The first other charter, the liquid fuels charter, was produced in 2002 and was two pages in length.

12 **Ad paragraphs 21 and 22**

12.1 The sweeping statement in paragraph 21 of the answering affidavit that the "*long-established and well-entrenched participants in the industry*" do not fully appreciate the "*seismic*" effect that the MPRDA had on the mining industry as well as the innuendo that they resist the changes brought about by the MPRDA, is denied for the reasons set out above. The statement is in any event irrelevant.

12.2 The reference to "land owner" in paragraph 21.2 of the answering affidavit should be to the erstwhile "mineral rights holder".

12.3 It is not clear why the Minister found it necessary to make mention of the *Agri SA* case in paragraph 22 and whether the suggestion is that the Chamber's (perceived) challenge is bound to fail just like Agri SA's (perceived) challenge failed. In any event, the content of paragraph 22 is as inaccurate as many other allegations in his affidavit.

12.4 It is incorrect that Agri SA "challenged the MPRDA" and it is incorrect that it did so "by alleging that it amounts to a deprivation and/or expropriation of its members' alleged rights". It is clear from the

reported judgments that Agri SA did not challenge the constitutionality of the MPRDA at all. The matter also did not concern the "alleged rights" of Agri SA's members. Agri SA took cession of a claim instituted by a company (Sebenza) in terms of item 12 of Schedule II to the MPRDA read with regulation 82A. Item 12 provides that any person who can prove that his or her property has been expropriated in terms of any provision of the MPRDA may claim compensation from the State. The claim was rejected by the DG, and Agri SA then issued summons for the determination of compensation. The Constitutional Court found that Sebenza's mineral rights had indeed been taken but dismissed the action on the basis that there had been no expropriation.

12.5 It is ironic that the Minister now states in paragraph 21.3 of the answering affidavit that the MPRDA "*vested*" the rights in the mineral resources in the state and in paragraph 77 that they "*belong to the State*".

13 **Ad paragraph 27 and 28**

13.1 Section 2 of the MPRDA also includes the objects in subparagraphs (e) and (f) which the Minister has omitted and which are to:

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

13.2 I am advised that the objects of an Act do no operate *in vacuo* and impose no independent obligations in the absence of substantive provisions in the Act. Similarly, the long title and preamble do not impose substantive obligations. Once the objects are translated into and given concrete form in substantive provisions by the legislature, effect must be given to these substantive provisions.

13.3 In the case of the MPRDA, express reference is made to specific objects of the Act in substantive provisions such as sections 12(3)(d), 17(1)(f), 17(4), 23(1)(h), 55(1) and item 7(2)(k) in Schedule II of the MPRDA. I refer in this regard to the contents of Part 2 of the founding affidavit. Outside of these substantive provisions, the objects of the MPRDA only serve as an aide in the interpretation of the substantive provisions as provided in section 4 of the MPRDA.

14 **Ad paragraphs 29 and 30**

14.1 Save to state that the Minister quoted the pre-amendment version of the definition of "*historically disadvantaged person*" in section 1 of the MPRDA, I admit that the MPRDA defines HDP.

14.2 As I stated in paragraph 7 of the founding affidavit, the Minister has replaced the definition of *"historically disadvantaged person"* (HDP) in section 1 of the MPRDA and the term "*historically disadvantaged South Africans*" (HDSA) in section 100(2)(a) - for whose benefit the Charter contemplated in section 100(2)(a) was to be developed - with his own definition of *"Black Person"*. The definition of *"Black Person"*

impermissibly widens the scope of those who may benefit from the provisions of the Charter to include not only persons or communities disadvantaged by unfair discrimination before the Constitution took effect, but also Africans, Coloureds and Indians who became citizens of the Republic of South Africa by naturalisation on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date.

14.3 As stated above, it is irrelevant that the new definition accords with the definition of "black persons" in the BBBEE Act. The empowering legislation *in casu* is the MPRDA and the term HDP is defined in the MPRDA.

14.4 I respectfully submit that once it is found that the Minister, in this pivotal definition, acted outside of the parameters of the MPRDA, the Charter already stands to be reviewed and set aside. This is so whether section 100(2)(a) intended the Charter to be a formal statement of policy or whether it intended to elevate it to subordinate legislation because, in both cases, the Minister cannot act outside of what is authorised by the MPRDA.

15 **Ad paragraphs 33 – 35**

15.1 It is correct, as stated in paragraphs 33 and 34 of the answering affidavit, that section 17(4) provides that the Minister may, having regard to the type of mineral concerned and the extent of the proposed prospecting project, request the applicant to give effect to the object

referred to in section 2(d).

15.2 The Minister's statement in paragraph 35 that he *invariably* requires an applicant for a prospecting right to do so, is a concession that he does so without having regard, in each individual case, to the mineral concerned and the extent of the project and, accordingly, that he acts unlawfully. It demonstrates that the Minister is not aware of the nature and limits of his powers.

16 **Ad paragraphs 41 to 42**

16.1 The correctness of the contentions in these paragraphs is denied.

16.2 I refer in this regard to the content of paragraph 6 above, as well as to paragraphs 20 to 37 and 39 to 40 of the founding affidavit, the contents of which are repeated.

17 **Ad paragraph 43**

17.1 I deny that the Chamber is not committed to transformation and refer in this regard to the contents of paragraphs 2, 10 and 11 above.

17.2 No conduct is identified whereby the Chamber has allegedly "subverted" the "legislative objects and underpinning values" of the MPRDA. The suggestion seems to be that the offending conduct is that the Chamber brought the present application. It is indisputable that the Chamber is constitutionally entitled to have the present dispute, which can be resolved by the application of law, decided in a fair public

hearing before a court in terms of section 34 of the Constitution.

2004 CHARTER

18 **Ad paragraphs 44 - 54**

18.1 I was personally involved in the consultations with the department about the 2017 Charter together with, amongst other persons, Mr Baxter, whose confirmatory affidavit is filed herewith. In respect of the consultations about the 2004 and 2010 Charters, I again refer to the confirmatory affidavit of Mr Baxter, filed herewith.

18.2 As stated above, neither the Minister nor the current DG or DDG were in any way involved with or present at the time of the development of the 2004 Charter. They have no knowledge of the facts set out in these paragraphs.

18.3 I have already dealt with the manner in which the first Charter was developed and refer in this regard to the contents of paragraphs 10 and 11 above and to the confirmatory affidavit of Mr Baxter mentioned above.

18.4 The assertion in paragraph 45 that the Minister in conjunction with the department developed a draft of the charter which was ultimately gazetted for "consultation" with other stakeholders is factually incorrect and is denied. The 2002 draft government Charter was an unmandated document that was leaked to the media (it was not gazetted) and as indicated in paragraph 11.5 above the DME denied that this was either

a government policy or position. The 2002 mining charter was the product of substantial negotiations (at times until late at night), as demonstrated in paragraph 11 above. The stakeholders did not only include those mentioned in paragraph 45 but also the Royal Bafokeng Nation representing communities and the Department of Trade and Industry.

18.5 As stated, the 2004 Charter was negotiated in consultation with the Chamber, as was the 2010 Charter. The Chamber had a legitimate expectation that a similar process would be followed in respect of any further permissible review.

18.6 I point out, in relation to paragraphs 49 to 53, that the contemplated review in the 2004 charter was a review after the first 5 years to determine "*what further steps, if any, need(ed) to be made to achieve the target of 26%*". See also the quote at paragraph 50 which makes it clear that the reference to an increase of HDSA participation was made in the context of the position as at the end of year 5, "*in pursuance of the 26 per cent target*". The review was a review of the implementation rather than of the content of the Charter. The charter would operate for ten years after which it would cease to apply, section 100(2)(a) of the MPRDA envisaged the development of only one Charter and that within six months of the taking effect of the MPRDA. The contents of these paragraphs are accordingly denied to the extent that it is alleged that any other review was contemplated.

18.7 Save as set out above and in paragraphs 10 and 11, the contents of these paragraphs are denied.

2009 ASSESSMENT

19 **Ad paragraph 55**

19.1 The allegation in this paragraph that the Chamber opposed the collection of information is one-sided and incomplete. The Chamber initially refused to provide such information to the DMR as it was outside of the ambit of the targets contained in the first mining charter. The Chamber wanted to know why the DMR expanded the scope of the assessment to parameters beyond the targets in the Charter and whether the DMR was doing a fair assessment of the *actual* progress made on the *actual* charter targets.

19.2 I deny the baseless and unfair remark that "*this exemplified a consistent approach adopted by the Chamber in relation to these issues of transformation over the years in terms of which the chamber pays lip-service to the objectives in the MPRDA (enshrined in critical respects in the charter) and the over-arching constitutional values, but it's (sic) conduct intentionally subverts those very processes*".

19.3 As set out above, the Chamber is fully committed to the constitutional and legislated imperatives of driving transformation. As shown above, the Chamber has played an integral role in the reform of South Africa's minerals policies since 1992 and has contributed positively to the

reform agenda throughout the process. It goes without saying, however, that the Chamber also has the right to expect lawful, reasonable and procedurally fair conduct by the Minister and departmental officials. Regulatory certainty and fair administration of laws are of the utmost importance to sustain the mining industry.

20 **Ad paragraph 56 - 58**

20.1 The Chamber did not and does not accept the correctness of the report annexed as 'AA21', which has not been properly proven, but on the correctness of which the Minister relies in these paragraphs. The fact is that the DMR did not conduct the 2009 assessment on the basis of the contents of the 2004 Mining Charter, and painted the industry as "non-compliant" based on extra criteria that were not in the Charter. For example, the Moloto report concluded the ownership section on the basis of a calculation done by Empowerdex using the DTI BBBEE Codes methodology, which is different to the mining charter methodology.

20.2 The 2004 Mining Charter was focused on opening-up access for HDSAs to participate in the mining industry through all the pillars of the charter, including the ownership element. The focus on net value in the hands of the HDSA shareholders by the DMR was not the primary focus at that time and was not discussed. The focus was to achieve access to ownership and to help create a critical mass of black economic empowerment that would become self-perpetuating. The mining

companies met their commitment (as quoted in paragraph 50 of the answering affidavit) to facilitate access to ownership with over R100 billion in empowerment transactions concluded in the first five years of the Charter.

20.3 Mention is made in paragraph 57 of the commodity boom but no reference is made to the 2008 global financial crisis. BEE transactions had to be funded and the funding mechanisms employed tended to be geared to stock market performance. The 2008 global financial crisis which sent mining shares into a tailspin had a negative impact on many BEE structures. This was beyond the control of the mining companies, but they are nonetheless blamed therefor by the DMR.

21 **Ad paragraph 59**

21.1 The suggestion that the Chamber secretly developed its own assessment report and that the report painted a rosy picture of the industry's progress as if this was not reflective of reality, is again a misstatement of the facts and is denied. I refer in this regard to the confirmatory affidavit of Mr Baxter.

21.2 The Chamber did get its own assessment done, a copy of which is annexure 'AA22' to the founding affidavit, but the specific purpose of the assessment was to ensure that the Chamber had the facts on the progress actually made, as measured against the *actual* targets in the 2004 Charter, rather than the DMR's list of issues that went far beyond the actual charter targets.

21.3 The Chamber assessment focused solely on the Charter targets and showed that the industry had made significant progress on all fronts.

21.4 This was the key reason for the differences between the DMR assessment (also known as the "Moloto assessment") and the Chamber assessment. Other reasons included interpretational differences, such as that Moloto only looked at "right by right" HDSA ownership whereas the Charter allowed ownership also to be captured at controlling company level. There are also examples where Moloto used the wrong denominator. For example, on the upgrading of hostels commitment, Moloto stated that only 9% of companies had achieved the target. Not all mining companies use hostels but the total number of mining companies used in their survey were unfortunately included in the denominator. If the proper number of mines with actual hostels had been used, the result would have been that over 50% of companies had done their conversions.

21.5 In the case of the health and safety part of the assessment, the position is as follows, and in which regard I refer to the affidavit of Mr Sietse van der Woude filed herewith:

21.5.1 The Chamber produced an annual report on the health and safety elements of the Charter and shared it with the DMR and unions through the Mine Health and Safety Council. On average, a representative sample of the industry consistently scored above 90%.

21.5.2 There were never any comments of substance on the report from the other stakeholders to say that the Chamber's methodology or conclusions were wrong. Both the representatives of the DMR and the unions said that transformation issues were dealt with by other colleagues in their organizations (which, incidentally, shows that these elements do not belong in the Charter).

21.5.3 The targets on the health and safety elements were all 100%. The Chamber regarded 99%, as 99% compliance (an excellent performance), whilst the DMR considered 99% as a failure because it is below 100%. This interpretation is highly unfair because it gives no recognition to the progress made.

21.6 It is accordingly submitted that it was the DMR's assessment which was not reflective of real progress made, as measured against the actual targets set in the 2004 Charter.

2010 STAKEHOLDERS' DECLARATION

22 **Ad paragraphs 60 – 65**

22.1 I deny that the Chamber had other "imperatives" regarding the effectiveness of the implementation of the 2004 charter, whatever this statement may mean.

22.2 I admit that consultations took place in 2010 as alleged and that the MIGDETT representatives signed a joint declaration annexed to the

founding affidavit marked 'AA23'. This was the outcome of a nine month consultation process.

22.3 The statement that the element "sustainable development and growth" constituted the commitment to utilise SA based facilities for analysis, and research and development is not correct.

2010 CHARTER

23 **Ad paragraphs 66 - 81**

23.1 I admit that the 2010 Charter was published on 20 September 2010.

23.2 The contents of these paragraphs are admitted insofar as they accord with the contents of the 2010 Charter.

23.3 It is not correct, as the Minister states in paragraph 73, that the intended beneficiaries of the charter were restricted to natural persons. That much is apparent from the definition in the MPRDA of "historically disadvantaged person".

23.4 I disagree with the statement in paragraph 79 that it could never have been the intention of the 2004 Charter that beneficiation could satisfy in full the requirement of HDSA ownership. No limit was placed upon the degree of offset.

23.5 The fact that the 2010 Charter stated that the Minister may amend the Mining Charter as and when the need arises does not mean that the Minister has the power to do so. He could not thereby create the power

for himself to do so where no such power is conferred on him by the MPRDA. The reference in the last paragraph of paragraph 4.7 of the 2004 Charter relating to a review of that Charter after 5 years was not a reference to the potential amendment of that document, but instead to a review of the progress made in implementing the 26% ownership target.

CHAMBER'S ACCEPTANCE OF THE 2010 CHARTER

24 **Ad paragraphs 82 - 85**

24.1 I admit that the amendments to the 2004 Charter reflected in the 2010 Charter were effected in consultation with stakeholders, through a process of open and extensive communication between the DMR and all stakeholders, as reflected in the Chamber's 2010 annual report quoted in paragraphs 83 and 84.

24.2 I deny that the Chamber's commitment to comply with the 2010 Charter can be viewed as an admission of the legal nature of the Charter.

2015 ASSESSMENT

25 **Ad paragraph 86**

25.1 The Minister's allegation in paragraph 86 that "*the DMR commenced with an assessment of the effectiveness of the implementation of the 2010 mining charter in 2014*" is incorrect and is denied.

25.2 The DMR initiated a MIGDETT process to plan for the assessment that would commence in 2015 because the mining company data would only be submitted to the DMR on 31 March 2015.

26 **Ad paragraph 87**

26.1 The allegation by the Minister that "*the Department struggled to get the co-operation of the mining companies*" is again one-sided and a misrepresentation of the complexity of the issue.

26.2 The DMR wanted the companies to re-submit their 2013 data in electronic format on the basis of a template that had not been agreed and which was way outside of the scope of the 2010 Charter.

26.3 For the 2013 and 2014 data, the Chamber asked its members to provide the DMR with the necessary charter-specific information and, on a voluntary basis, to provide the additional information to the DMR.

27 **Ad paragraph 89**

27.1 The allegation that the Chamber representatives did not understand the need for monitoring and compliance or how the templates were to be completed is factually incorrect and is denied.

27.2 The DMR template went way beyond the specific targets set out in the 2004 Charter and excluded the continuing consequences of previous deals.

27.3 Not only did the Chamber representatives fully understand the template, they openly disagreed with certain parts thereof. The Chamber officials' disagreement with the DMR template should not be construed as a lack of understanding of the need for monitoring and compliance.

27.4 The Chamber nevertheless helped to arrange meetings between the DMR and its members to explain the templates.

27.5 Paragraphs 89.1 – 89.6 confirm the discussions and disagreement that the Chamber had with the DMR on the template and that "*the representatives at the Chamber of Mines requested the Department to align the Mining Charter questionnaires exclusively to the requirements as stipulated in the Mining Charter*" (see AA par 89.1.2).

27.6 Despite the Chamber's submission to the DMR, the parties were unable to reach agreement on whether continuing consequences could be taken into account. This issue, by agreement, ultimately became part of the Chamber's application for declaratory relief which was postponed in 2016 and has been re-enrolled for hearing in November 2017.

27.7 I deny that the issue about the template which endeavoured to introduce elements not included in the 2010 Charter was a "minor matter". It was and is one of serious concern to the Chamber.

28 **Ad paragraphs 92 - 96**

28.1 I deny the correctness of the Minister's "considered view" that only 6% of the mining right holders met the requirements of the Charter.

28.2 This paragraph demonstrates why such statements should be treated with circumspection. As appears from these paragraphs, based on a difference in interpretation on one issue (of how continuing consequences of previous deals were to be dealt with), there was either 70% compliance (according to the mining companies) or 6% compliance (according to the DMR).

28.3 Despite the commitment of the DMR to share the findings of the 2014 assessment report in April 2015 prior to publication, none of the stakeholders were actually given a report before the Minister's media conference.

28.4 Although the chamber did not alert the DMR that it was drawing up its own assessment, it had raised its serious concerns with the DMR that the DMR's template for the survey went way beyond the actual scope of the charter. When the DMR refused to focus only on the charter targets, the Chamber realised that it would need to make its own assessment just based on the charter targets.

DRAFT 2017 CHARTER

29 **Ad paragraph 106**

29.1 It is correct that stakeholders did not have sight of the content of the 2017 draft charter before it was presented at the meeting in March 2016 and where stakeholders were to make submissions. In a meeting of MIGDETT on 31 March 2016, the DMR did present an onscreen

presentation of their views on a charter. They refused to provide any copies to the Chamber (or other stakeholders) and the cell phones and laptops of all stakeholders were removed by the DMR before the meeting (to prevent any copies being made). The DMR simply stated this meeting was confidential and information sharing. There was no opportunity for stakeholders to give any substantive input. This type of clandestine disclosure is not the normal process followed in MIGDETT where documents are shared and properly negotiated.

29.2 The comment that there was "nothing revolutionary" or "draconianly different" is incorrect, as appears from the contents of the founding affidavit. Changing the definition of HDSA to Black persons (a newly defined term) which included Africans, Coloureds and Indians who became citizens of the Republic of South Africa by naturalisation on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date, and excluded white women, is but one example of a revolutionary change.

29.3 I deny that the 2017 Charter was a mere incremental build-on to the 2010 Charter.

29.4 **Ad paragraph 108:**

As set out below, the Minister only advised the Chamber of the publication on the day that the draft was published for public comment, during a meeting on another matter. The Chamber indicated to the Minister that this was not how the matter had been dealt with in the

past. The Minister then tried to have the *Government Gazette* withdrawn but was informed by his officials that this was not possible.

2017 CHARTER

30 **Ad paragraph 109**

30.1 While the DMR did invite interested parties to make written submissions within a month, they had jettisoned the traditional negotiation process with all key stakeholders in favour of an approach where the DMR would be the sole adjudicator of what comments would be included or excluded in the next version of the Charter.

30.2 The DMR cherry-picked ideas from different stakeholders and there was never an opportunity for all the stakeholders, under a tripartite forum like MIGDETT, to thrash out the different ideas, discuss the interlinkages and come to a workable understanding on key issues. These tripartite forums had historically played a key role in enabling all the stakeholders to have a proper view of the realistic trade-offs that were possible to create a workable charter. The lack of such a proper tripartite MIGDETT process seriously undermined the consultation process.

31 **Ad paragraph 110**

31.1 The Minister in this part of his affidavit incorrectly conflates the negotiations about the declaratory order litigation and the consultation process about the review of the Mining Charter. While a 5-a-side

Chamber-DMR task team was setup, its primary task was to resolve the declaratory order dispute. It was not set-up as a consultation forum for the review of the mining charter. All of the meetings of this 5-a-side Chamber-DMR task team in 2016 were focused on the resolution of the declaratory order dispute.

31.2 In this regard, the following chronology of events (as per the attached table) is important, and in which regard I refer to the confirmatory affidavit of Mr Baxter:

31.2.1 The declaratory order process had been agreed by DMR Minister Ramatlhodi on 31 March 2015.

31.2.2 On 8 September 2015, President Zuma asked the Chamber to consider engaging DMR in a negotiation process to resolve the declaratory order issue, outside of the courts. The Chamber office bearers had an introductory meeting with DMR Minister Zwane on 23 October 2015 and the first full DMR-CoM 5-a-side task-team meeting to try and resolve the declaratory order disagreement was held on 5 December 2015. This was **not** a discussion about the review of the Mining Charter.

31.2.3 On 15 April 2016, in a meeting between the Chamber office bearers (the President and two vice Presidents), the Chamber CEO and other Chamber member CEOs, and Minister Zwane, the Minister announced that the draft Reviewed Mining

the DMR proposals in the draft reviewed mining charter. It was agreed that the 5-a-side team on the declaratory order dispute should meet to finalise the so-called V8 Agreement and the letters to each company (discussed more fully below in response to paragraph 111).

31.4.2 Three further meetings of the Chamber-DMR task team on resolving the declaratory order process were held on 18, 23 and 28 January 2017. At these meetings, the focus point was resolving the declaratory order dispute with a focus on the V8 agreement, potential wording of the relevant letters and how this could be reflected in the charter. The Chamber, given their concerns about the non-ownership elements in the draft reviewed mining charter, used the opportunity to raise concerns on these matters, but this took less than one fifth of the time used for these meetings. Despite requests by the Chamber for detailed motivations on a number of the targets in the non-ownership elements of the draft RMC2017, none was given. For example, the DMR agreed to provide a full motivation for the establishment of the MTDA, but nothing was forthcoming.

31.4.3 Unfortunately, on 28 January 2017, the DMR provided a set of brand new ideas, given on a memory stick to the Chamber at the end of the meeting, that would limit continuing

consequences, and were contrary to all the Chamber-DMR 5-a-side task team declaratory order discussions that had taken place in 2016. These were brand new DMR points that had never been discussed before. The Chamber wrote to the acting DG, Mr Msiza, and expressed serious concern about the DMR tabling brand new ideas at the 11th hour which was tantamount to negotiating in bad faith.

31.4.4 On 9 February 2017, the Chamber President and CEO met with the DMR Minister, Deputy Minister and acting DG at the Mining Indaba in Cape Town. The Chamber had requested the meeting. The Chamber made two direct points to the DMR. The first was the Chamber's significant concern regarding the DMR introducing brand new concepts into the declaratory order negotiation process at the 11th hour. The second was the Chamber's serious concerns about the non-ownership elements in the draft reviewed mining charter, and the fact that the DMR had not taken on board any of the Chamber's concerns submitted to the DMR in 2016.

31.4.5 On 17 February 2017, the Chamber-DMR 5-a-side task team met in one last effort to try and reach agreement on the declaratory order dispute. The Chamber would not accept the DMR's two new inputs made at the 11th hour and the DMR would not agree to withdraw these ideas. There was

effectively no agreement. The Chamber used the opportunity to reiterate concerns on the non-ownership elements, but none of these were taken on board by the DMR.

31.4.6 On 20 March 2017, the Chamber office bearers and CEO were asked to meet the Minister and his team for a final discussion on the critical issues in the declaratory order. Despite the Minister's invitation, he did not attend and the meeting was chaired by the Deputy Minister. No progress was made with the DMR who refused to budge on the newly added points in the declaratory order process. The Chamber reiterated concerns that the DMR had not taken on board any of the Chamber's substantive concerns on the non-ownership issues in the draft reviewed mining charter.

31.4.7 No further meetings were held between the Chamber office bearers and DMR Minister.

31.5 The DMR published its unilaterally developed 2017 Mining Charter on 15 June 2017. I reiterate, as is clear from what has been set out above, that there was no consultation on the ownership issues listed in paragraph 38 of my founding affidavit. In fact, as set out below in response to paragraph 118, the Minister concedes it. The matters of mining companies having to contribute 1% of turnover to their BEE shareholders on an annual basis, or that the BEE shareholders should be debt free within 10-years or that other shareholders would have to

write this off as an impairment were never discussed with the Chamber.

31.6 In addition to the ownership element, the Chamber was also not consulted on the following matters which it saw for the first time in the 2017 Charter:

31.6.1 the health, safety and environment elements;

31.6.2 the research and development spend target related to historically black academic institutions;

31.6.3 beneficiation;

31.6.4 housing and living conditions;

31.6.5 the scorecard;

31.6.6 the 12-month transition period (we commented on a period of 3 years or more (i.e. 5 years), based on the 2016 draft).

31.7 The Chamber then announced that it would apply for an urgent interdict to have this Charter suspended and then reviewed. The Chamber also applied to the honourable deputy Judge President of the Gauteng High Court for a date for the hearing of the Chamber's declaratory order application and the matter was re-enrolled for November 2017.

31.8 The allegations about the alleged consultations regarding the 2017 Charter in the answering affidavit are denied insofar as they do not accord with what I have set out above.

N.T

32 **Ad paragraphs 111 and 112**

32.1 I deny the correctness of the contents of both paragraphs 111 and 112.

32.2 At the Chamber-DMR principals meeting held on 19 July 2016, the parties were in agreement on a proposal that the best way to resolve the declaratory order dispute would be for an agreement to be reached between the Minister and the Chamber on a set of principles as to how the continuing consequences of previous deals could be recognised by the DMR (the so called V8 (version 8) agreement), that letters to each company affected would need to be written by the Minister recognising the continuing consequences and that the agreement would need to be reflected in the Charter.

32.3 When the extent of the problem was discussed at the meeting, the Chamber indicated to the DMR that it knew of at least 8 major mining companies that were affected, which companies had multiple mining rights. It was clear that the DMR understood that this was a material issue affecting multiple mining companies. Why else would the Chamber have taken up the issue? It was agreed at the meeting that a more detailed analysis of the problem and a survey was required. The parties therefore agreed that the Chamber would revert with a list of mining companies and their affected mining rights.

32.4 The Chamber's survey showed that 19 companies controlling over 100 mining rights were affected. The Chamber CEO, with consent of the relevant Chamber members, accordingly provided a detailed draft list of

mining companies and the rights affected to the DDG of the DMR on 24 September 2016. This list contained the details of 19 affected companies which control over 100 mining rights.

32.5 At no stage following the submission of this information did the DMR, in any of the subsequent meetings in 2016 or 2017, raise any concern regarding the scale of the problem. In fact, this is the first time that the issue has been raised (in the answering affidavit).

32.6 The accusation in paragraph 111 that the Chamber "suddenly" produced over a hundred companies is accordingly incorrect and is denied. As stated, it was agreed at the meeting of 19 July that the Chamber would revert with more information, which it did. The Chamber's list indicated that 19 companies which controlled over a 100 mining rights were affected; not 100 companies. What is of even more concern is that the alleged list of "100 companies" produced by the Chamber is said in paragraph 112 to have changed the department's thought processes, but that this was never mentioned by the department in any of the subsequent discussions.

32.7 The allegation in paragraph 112 that the Chamber "suddenly reneged" on the joint technical proposal is thus denied. It is also denied that this would have happened at the meeting of 19 July 2016. As stated, it was only agreed at this meeting that the Chamber would conduct a more detailed analysis and survey of the problem. That information was then provided to the DMR on 24 September 2016.

33 **Ad paragraph 117**

Afrisam is not a member of the Chamber of Mines, nor was it a member in 2016.

34 **Ad paragraph 118**

34.1 I note the Minister's concession that ownership and the 'once empowered always empowered' issues were not discussed with the Chamber.

34.2 Paragraph 118 is also an acknowledgment by the Minister that there was a separate Chamber-DMR bilateral 5-a-side process. However, as stated above, that process was focused on resolving the *declaratory order* dispute on continuing consequences. As set out above, the DMR conflates the declaratory order process with the process to review the charter.

34.3 As also set out above, the Chamber submitted detailed submissions to the DMR on the DMR's draft charter that was published on 15 April 2016. As mentioned, two bilateral meetings were held between the DMR and Chamber in 2016 on this Charter but both meetings fell far short of meaningful consultation.

34.4 The Minister's statement that all elements in the draft charter were discussed (except for ownership and "once empowered always empowered") with the Chamber is therefore also incorrect and misleading, as the DMR provided very little feedback on the Chamber inputs in the two meetings in 2016.

34.5 The fact remains, as stated above and in paragraphs 38.1 – 38.8 of the founding affidavit, that *several* elements included in the final charter

published on 20 June 2017 were unilaterally developed and never formed the subject of any discussions or consultations with the Chamber.

34.6 Save as set out above, the allegations in this paragraph are denied.

35 **Ad paragraph 122**

35.1 I have already dealt with this proposed meeting in paragraph 31.2.7 above. It was part of the process to resolve the issues underlying the application for declaratory relief.

35.2 The contents of this paragraph are denied insofar as they do not accord with what has been set out in the above-mentioned paragraph.

36 **Ad paragraph 123**

I have already dealt with this meeting in paragraph 31.4.1 above.

37 **Ad paragraphs 124 to 125**

37.1 I have already mentioned these meetings in paragraph 31.4 above. As stated, the purpose of the meetings of 18 and 23 January 2017 was for the Chamber-DMR team dealing with the declaratory order dispute to progress the issue. Some of the non-ownership elements of the draft charter were also discussed.

37.2 The letter annexed as AA39 is dated 26 January 2017 and was in reaction to the meeting held on 23 January 2017 (not the one of

18 January). The primary point of contention in the meeting held on 23 January 2017 was the DMR's introduction of two brand new issues into the discussion on the declaratory order process which they did by giving the Chamber a memory stick containing the proposals at the end of the meeting. These 11th hour substantial changes are what effectively scuppered the discussions. The letter by the Chamber CEO (Mr Baxter) to the DMR on 26 January 2017 (AA39), was meant to express deep concern regarding the DMR's introduction of the two new issues into the declaratory order discussion at this late stage. The Chamber also used the opportunity to express its unhappiness on the other non-declaratory order issues.

37.3 It is alleged in paragraph 124 that the DMR "*presented its thinking*" on the content of the near final charter on 18 January. It should be noted that the Chamber was never given a single draft document showing the DMR's work on the draft reviewed charter. The Chamber has only seen the first draft which was published on 15 April 2016 and the Final Reviewed Charter which was published in the Government Gazette on 15 June 2017. No other charter specific documents or drafts (outside of the declaratory order discussion) were shared with the Chamber.

37.4 It is also noted that, although the Minister alleges that the DMR shared the information on the near-final draft charter, the DMR added many other new ideas that were never discussed with the Chamber and which appeared for the first time in the final charter. I reiterate that a number

of significant issues that were included in the final Charter had never been discussed with the Chamber, and that there had never been an opportunity for all the stakeholders to meet and thrash out the different options. The DMR simply cherry-picked different stakeholder inputs without understanding the interactions or economic impact on the mining sector.

38 **Ad paragraph 126**

The Chamber consistently disagreed with the table produced by the DMR. No agreed minute of this meeting was ever produced.

39 **Ad paragraph 127**

39.1 The statement in this paragraph that "the final joint technical committee meeting (comprising chamber and Department representatives) was held on or about 23 March 2017" is incorrect.

39.2 The meeting referred to was actually the final Chamber-DMR Principals meeting which was held at the invitation of the Minister on 20 March 2017. Despite the fact that the Minister specifically invited the Chamber President, he did not come to the meeting and left it to the Deputy Minister. Nothing was achieved or agreed at the meeting.

40 **Ad paragraph 128**

40.1 Save to admit that the Chamber sent the letter annexed to the founding affidavit as AA42 to the Acting DG of the department, the contents of this paragraph are denied. I deny, in particular, that the letter was in any way illustrative of "*ongoing engagement, consultation and interaction between the Department on the one hand and the chamber on the other*". It demonstrates the contrary.

40.2 The letter expresses significant unhappiness with the DMR's lack of input or substantiation on a number of key topics. It reads as follows:

> "Thank you for your letter dated 20 March 2017, which reflected the request by the DMR for further input on three important elements of the DMR's reviewed Mining Charter. In the short space of time available we have done our best to provide our point of view on the three areas and why we believe the DMR's targets are either not practical or not necessarily possible. Let me state at the outset that the DMR has not provided any documented substantiation on any of the proposed targets for employment equity or capital and consumable goods targets, nor has the DMR provided the expected written substantiation of why the DMR believes the Mining Transformation Development Agency should be established, its proposed modus operandi or governance structures."

40.3 It is noted that, despite the request for substantiation, it was never provided to the Chamber. The DMR ignored these inputs and published even more draconian targets in the final 2017 Charter published on 20 June 2017.

41 **Ad paragraphs 130 and 131**

41.1 The contents of these paragraphs are denied.

41.2 The simple fact, as demonstrated above, is that the DMR did not meaningfully consult with the Chamber on material aspects of the draft reviewed mining charter. As stated, the Minister has conflated the bilateral engagement process on resolving the declaratory order dispute with the draft reviewed mining charter process.

41.3 None of the Chamber's substantive inputs on key issues were incorporated by the DMR in the final 2017 Charter.

41.4 In addition, as stated, the DMR included a number of new concepts (such as the 1% of turnover going to BEE shareholders on an annual basis) in the final 2017 Charter, without ever having engaged the one key stakeholder that will have to carry this cost. This does not constitute meaningful consultation.

41.5 The fact that the DMR never provided any substantive written explanation on why it was deemed necessary to establish the MTDA, the extra levies, etc., demonstrates the lack of commitment by the DMR to a proper engagement process with the Chamber.

N.7

CHAMBER'S CLAIM THAT THERE WAS NO CONSULTATION IS INCORRECT

42 **Ad paragraphs 134-136**

42.1 The contents of these paragraphs are denied.

42.2 I have already stated that the Minister has misconstrued the allegations in paragraph 38 of the founding affidavit and sought to answer a case that was not made. I refer in this regard to the contents of paragraph 3 above.

42.3 As also stated above, in view of the serious nature and extent of the accusations levelled at the Chamber in the answering affidavit, the Chamber was, however, constrained to respond to these allegations in this reply. This is again illustrated by the tone of paragraph 134 where the Minister asserts that the chamber's allegations regarding a lack of consultation are "*unfortunate*", "*questionable*" and seeks to *"take advantage of a negative media spin against the department*". As shown above, there is no basis for these statements.

42.4 I am advised that a fair administrative procedure depends on the circumstances of each case. Having regard to the nature and extent of the Charter, its profound effect on the mining industry and the absence of guidelines about the content of the Charter in the MPRDA, intensive bilateral and tripartite negotiations and true engagement on the contents thereof were required, in a process truly aimed at seeking

consensus. Indeed, the history of the consultations preceding the 2004 and 2010 Charters shows that this is exactly how the department, for these very reasons, developed the previous iterations of the charter.

42.5 As shown above, the nature and quality of the consultations in the present instance fell far short of meaningful consultation. It is formalistic and ill-conceived for the Minister simply to count the number of meetings and, on the basis thereof, to submit that there was meaningful consultation.

42.6 I accordingly submit that the Chamber and their members have been denied their right to a fair administrative procedure guaranteed by section 3 of PAJA as read with section 33 of the Constitution, 1996 and that there are reasonable prospects that the 2017 Charter stands to be reviewed and set aside on this basis.

LEGAL ENFORCEABILITY OF THE CHARTER

43 **Ad paragraphs 137 - 145**

43.1 I have already dealt with this topic in paragraphs 20 to 37 and 39 to 40 and 42 of the founding affidavit and in paragraph 6 above, to which I refer the court. The matter will be addressed further in argument.

43.2 The provisions of the MPRDA quoted in these paragraphs are admitted but the interpretation contended for by the Minister is denied.

43.3 Save as set out above and in the above-mentioned paragraphs of the founding affidavit, the correctness of the contents of these paragraphs is denied.

43.4 It remains specifically to deny or comment on the following allegations:

43.5 **Paragraph 139.5**:

43.5.1 The definition in section 1 of the MPRDA of "this Act" as quoted in this paragraph does not include the Charter.

43.5.2 If it were included, it would be an unconstitutional delegation of legislative power to the executive to pass national legislation (i.e. to make part of the Act).

43.6 **Paragraph 139.6**:

43.6.1 The correctness of the contents of this paragraph is denied.

43.6.2 The fact that the standard prospecting or mining right contains a clause that the holder is bound to the terms of an agreement entered into with an empowerment partner, means that the holder is bound to give effect to section 2(d) in the manner and form concretised in the agreement. This clause does not say, and it does not mean, that the holder is bound to the Charter.

43.6.3 I also point out in this regard that the definition of "holder" includes holders of reconnaissance permissions, mining permits and retention permits, in regard to which there are no

empowerment requirements in the MPRDA. The Minister has provided no answer to this.

43.7 **Paragraph 140.1**:

I deny that a compliance notice may be issued in respect of alleged non-compliance with the Charter and refer in this regard to the provisions of 47(1) as read with the definition of "this Act" which does not include the Charter.

43.8 **Paragraph 140.3 to 142:**

43.8.1 I deny that the Chamber views, or has viewed, the 2004 or 2010 Charters as law but it is in any event irrelevant whether or not the Chamber does or did so.

43.8.2 I have set out the legal position in paragraph 6 above and in paragraphs 20 to 37 and 39, 40 and 42 of the founding affidavit.

43.8.3 At the end of "full and proper consultative processes", the Chamber signed the 2004 charter and 2010 declaration, respectively, thereby indicating its agreement with the result thereof. This did not, and could not, elevate the 2004 or 2010 charters from being a formal policy (accepted by the Chamber) to being a law.

43.9 **Paragraph 143:**

I deny that the Minister can make and amend the law as when he deems it prudent or as and when the occasion arises, and refer in this regard to the contents of paragraph 6 above.

43.10 **Ad paragraphs 144 and 145**

43.10.1 The Minister has a surprisingly unnuanced view of the relevant sections of the MPRDA and of the Charter. In his view, the transformational objects of the Act (see AA par 139.2) (but, incidentally, not the other objects of the Act) as well as the Charter are all said to be "legally binding" in the sense of being legally enforceable and "produce obligations which the right holders must meet". "Non-compliance" with any aspect thereof at any time is non-compliance with the MPRDA, and is subject to the sanction in section 47. In addition, the Chamber's disagreement with these legal propositions is branded as indicative of its being against transformation.

43.10.2 This view does not accord with the structure or content of the MPRDA. As explained above in paragraph 6 and in paragraphs 20-37 and 39-40 and 42 of the founding affidavit, the objects of the Act produce obligations which applicants for rights / holders must meet inasmuch as they have been incorporated in the substantive provisions of the Act, as they

have in, for e.g., sections 12(3)(d), 17(1)(f), 17(4), 23(1)(h), 55(1) and item 7(2)(k) of Schedule II of the MPRDA.

43.10.3 It is clear from these sections that the applicants contemplated in sections 12, 17, 23 and item 7 *must*, as part of the grant criteria, satisfy the Minister that they have given / will give effect to section 2(d) and/or (f) of the MPRDA. If an applicant entered into an agreement with an empowerment partner to satisfy this criterion, compliance with such agreement is required as part of the right granted, and the holder must report on its compliance with it.

43.10.4 There are clearly many ways in which effect could be given to these objects of the Act which are formulated, as objects are, in broad and general terms. The Charter is intended to assist the Minister in assessing whether an applicant / holder has given effect to these objects (i.e. it is intended to guide the Minister, who remains the decision maker). It does not, however, operate outside of this structure and outside of these provisions of the MPRDA as if it is a standalone law of general application which can confer obligations on holders which must be complied with at all times and which can supplement or amend the MPRDA, and even override other legislation.

43.10.5 Just as the objects in section 2 were incorporated in certain substantive sections (as set out above), they were **not**

incorporated in others. I refer in this regard, by way of example, to -

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

(ii) sections 18 and 24 dealing with renewals, which similarly have no reference to any of the objects of the Act or the Charter.

43.10.6 The Minister has provided no answer to these submissions.

EFFECT OF 2017 CHARTER ON NEW AND EXISTING RIGHTS

EFFECT ON EXISTING RIGHTS

44 **Ad paragraphs 146 – 148**

The provisions of the 2004 and 2010 Charters mentioned in these paragraphs are admitted to the extent that they accord with the terms of the said Charters.

45 **Ad paragraphs 157 to 159**

45.1 The correctness of the contents of these paragraphs is denied. I refer in this regard to the contents of paragraphs 20 to 37 and 39, 40 and 42 of the founding affidavit and to paragraphs 6 and 53.10 above.

45.2 There are no annexures **DMR3** and **DMR4** to the answering affidavit. I assume the Minister refers to annexures **AA44 - AA47** which are all one-page extracts from the department's template of standard terms and conditions of prospecting or mining rights.

45.3 I furthermore assume that the Minister refers in paragraph 159 to clause 16 (in some cases clause 17) of these templates, which occur under the heading "*Provisions relating to section 2(d) of the Act*".

45.4 This clause in each case provides that "*the holder is bound by the provisions of an agreement or arrangement dated ... entered into between the Holder/empowering partner ... which agreement or arrangement was taken into consideration for purposes of compliance with the requirements of the Act and or Broad Based Economic Empower Charter developed in terms of the Act and such agreement shall form part of this right*".

45.5 It is submitted that the clause means simply that the holder is bound to the terms of the agreement on which it relied for purposes of complying with the granting criterion of showing that, and how, it was going to give effect to the objects of the Act (see for e.g. s 23(1)(h)). The holder must thus give effect to section 2(d) in the manner set out in the agreement. This accords with the Chamber's view of the role and function of the objects in section 2 and the Charter in the context of the Act.

46 **Ad paragraph 160**

46.1 I deny that there are "empowering provisions" in the Charter. The empowering provision for the Charter is section 100 and it refers to "*historically disadvantaged South Africans*".

46.2 As stated above, it is irrelevant that the new definition of "*black person*" accords with the BBBEE Act. The MPRDA is the applicable empowering statute and it has a different definition.

47 **Ad paragraph 169-173**

47.1 The correctness of these paragraphs is denied, save as set out below.

47.2 It is correct that a mining right may be cancelled or suspended but it may only be done in the limited circumstances mentioned in section 47(1) of the MPRDA.

47.3 I did not, however, allege in paragraph 42.5 of the founding affidavit that the Minister is not empowered to cancel a mining right at all. It is clear from the context that I alleged that under the MPRDA as it stands, once an applicant has complied with the granting criteria in section 23(1) including 23(1)(h) and a mining right has been granted at a certain point in time, such mining right cannot afterwards lawfully be cancelled or suspended in terms of section 47(1) of the MPRDA or amended *based on new requirements*.

47.4 It should also be noted that the transitional provisions do not apply to existing prospecting rights, as appears from clause 2.11(a) of the 2017 Charter.

48 **Ad paragraph 174 - 175**

48.1 The correctness of these paragraphs is denied.

48.1.1 I have already dealt with the nature and extent of the Minister's powers under section 100(2)(a).

48.1.2 The review contemplated in the 2004 Charter relates to the further implementational steps not to changes or amendments to the content of the Charter, whether to increase the 26% target or otherwise.

48.2 I specifically deny that mining rights confer, or can confer, any powers on the Minister.

49 **Ad paragraphs 177 – 179**

49.1 These issues will be argued in the application for declaratory relief, which has been set down for November 2017. Suffice it for present purposes to say that they are denied.

49.2 I do not know what the Minister means by a "regulatory vacuum". The MPRDA was preceded by the Minerals Act 50 of 1991 which regulated the exercise of mineral rights. Insofar as reference is made to the

regulation of transformation, I admit that the Minerals Act did not have transformational requirements.

50 **Paragraphs 182 to 188**

50.1 These paragraphs fail to provide clarity.

50.2 In fact, the contents of paragraphs 186 and 188 are in conflict.

50.3 In paragraph 186, the Minister states that the recognition of historical transactions will be dispensed with "*for future applications for mining and prospecting rights and the renewal of such rights*".

50.4 In paragraph 188, he states that "*historical transactions are recognised for the reporting period up to the date of publication of the 2017 charter. But after the publication of the 2017 charter, the BEE shareholding of 30% must be met, and to facilitate this the 12-month transitional period is provided for.*"

50.5 The position thus remains unclear.

51 **Paragraph 189**

51.1 The question whether the Minister's or the Chamber's view regarding "once empowered, always empowered" is correct, is a legal issue.

51.2 The Minister's remarks are incorrect and, in any event, irrelevant to the legal dispute. The remainder of the paragraph is denied.

52 **Ad paragraph 190**

52.1 The Minister's interpretation of the 2004 and 2010 Charters is incorrect and is denied. At no stage in the negotiation of the first mining charter was the concept of mining companies having to sustain the HDSA ownership at 26% discussed or agreed. The primary focus of the first charter, as stated, was to create access to ownership and to create a critical mass of HDSA that could become self-perpetuating.

52.2 The 2004 Charter states the following under '*ownership*':

"*In order to increase participation and ownership by HDSA's in the mining industry, mining companies agree:*

- *To achieve 26% HDSA ownership of the mining industry assets in 10 years by each mining company*".

52.3 Similarly, the 2010 revised mining charter's wording is as follows:

"*2. 1 Ownership*

Effective ownership is a requisite instrument to effect meaningful integration of HDSA into the mainstream economy. In order to achieve a substantial change in racial and gender disparities prevalent in ownership of mining assets, and thus pave the way for meaningful participation of HDSA for attainment of sustainable growth of the mining industry, stakeholders commit to:

- *Achieve a minimum target of 26 percent ownership to enable meaningful economic participation of HDSA by 2014*".

52.4 In essence, the Chamber's interpretation is that mining right holders would seek to achieve the 26% ownership target by the 2014 deadline

for purposes of complying with the granting requirement in section 23(1)(h) of the MPRDA. There was never any requirement for mining right holders to sustain this 26% level. Some HDSA shareholders decided to sell their equity and migrate into other sectors, while other HDSA shareholders were not able to sustain their ownership level as a result of not being able to follow their rights during equity raising exercises. Where such sales or dilution have taken place, the mining right holders count the continuing consequences of those previous deals in the measurement of their HDSA ownership level.

53 **Ad paragraph 193 – 196**

53.1 Different factual scenarios exist:

53.1.1 Some HDSA structures that were agreed with mining companies, and ultimately approved by the DMR, had lock-ins of the HDSA shareholders.

53.1.2 In other cases, the DMR applied a rigid methodology to HDSA companies and prevented them from selling equity to reduce their debt.

53.1.3 In yet other cases, the DMR refused to approve lock-in agreements in the first instance.

53.2 The Minister's view that HDSA shareholders should, if they want to sell, just approach other HDSA buyers is simplistic. It presupposes that there are always willing and able HDSA buyers available in the market place.

It also, in effect, creates a potentially less liquid two-tier share market, one for normal stock market trades and one for HDSA equity trades.

53.3 In any event, the Charter does not *require* that an exiting HDSA *must* sell to another HDSA and it may well be impossible to reach agreement on such clauses. Moreover, *shareholders* cannot be compelled to lock themselves in or to sell their shares in a particular manner, because they are shareholders, not holders of mining or prospecting rights.

53.4 The reliance on such (lock-in) agreements, which may or may not exist and which may or may not be entered into, is therefore no answer to the Chamber's assertion in paragraph 43.10.2 that if holders 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 mining companies in particular.

53.5 I reiterate that the view taken by the Minister in this paragraph confuses empowerment with quotas. It is submitted that HDSAs should be entitled to sell their shares should they, for e.g., decide that mining is an unrewarding industry to invest in. I deny that what the Chamber is arguing for undermines the objectives of empowerment. The objective has never been a quota.

54 **Ad paragraph 197**

I deny the allegation of "ownership by the state of South Africa's mineral resources".

55 **Ad paragraph 199**

The denial in this paragraph is incomprehensible in view of the contents of clause 2.1.2.6 of the 2017 Charter.

56 **Ad paragraph 201**

The fact that the charter is enabled by the MPRDA does not mean that it is a law.

57 **Ad paragraph 204**

57.1 The statement that the reference to the Companies Act is "all but a fallacy" is puzzling, since there are clear conflicts between that Act and the 2017 Charter. This issue will be elabotated on further in argument, but for present purposes it suffices to point out that the creation of a racially defined class of shareholder with different rights and obligations from other shareholders is wholly inconsistent with section 37(1) of the Companies Act and the unequal and unfair treatment of black person shareholders in respect of their right to dispose of their shares in the open market is likely to result in oppresive conduct as contemplated in section 163 of the Company's Act.

58 **Ad paragraphs 213 and 214**

I note that the Minister here refers to the concept of HDSAs in the MPRDA which, for example, includes women but which definition has (impermissibly) been substituted in the 2017 Charter by one which excludes white women.

59 **Ad paragraphs 215 and 216**

In these paragraphs, the Minister disregards the fact that, according to paragraph 188 of his affidavit, historical transactions are recognised until the date of publication of the 2017 charter. On this construction, much more than a 4% "top-up" would have to be effected to attain 30% black shareholding within 12 months. In the case of prospecting rights, there is no transitional period at all.

60 **Ad paragraph 218**

60.1 I deny that the reference to the principles of company law is "*misplaced in law*". As stated, there are clear conflicts between the 2017 Charter and the Companies Act.

61 **Ad paragraph 220**

61.1 On the Minister's construction of the Charter as "binding law", he has no discretion in terms thereof to extend the 12-month transitional period.

61.2 The question is not whether the 2017 Charter "envisages the continued involvement of the HDSA", the question is whether or not the MPRDA envisages it.

62 **Ad paragraph 221**

I deny that there was "extensive" or "vigorous consultation" with the Chamber or its members and refer to what has been set out above in this regard.

63 **Ad paragraph 226**

63.1 As stated, a prospecting right or mining right provides that that the holder is bound to the empowerment agreement it has concluded. This means that the holder must give effect to the objects of section 2(d) of the MPRDA in the form and manner set out in the concrete agreements.

63.2 Save as set out above, the content of this paragraph is denied.

64 **Ad paragraph 232**

64.1 I have already dealt with the Minister's erroneous view of his powers under section 17(4) and his concession that he *invariably* makes requests in terms thereof, i.e. without having regard to the type of mineral concerned or the extent of the proposed prospecting project as is required by section 17(4) in the case of non-strategic minerals (read with 17(1)(f)).

64.2 His view in this paragraph, that, in the absence of having prescribed any strategic minerals in terms of section 17(1)(f), this subsection applies to all minerals and that all holders would have to give effect to the object in section 2(d) , is equally incorrect.

65 **Ad paragraph 235**

The references to "HDSA or black persons ...." are confused and confusing.

66 **Ad paragraph 237**

This response is incomprehensible. The vesting provisions of paragraph 2.1.1.6 of the 2017 Charter do not in any way address the anomaly of having materially different black person ownership requirements in the case of applications for prospecting rights and for mining rights respectively.

67 **Ad paragraph 243**

68 Paragraph 2.1.1.6 does not deal with 2.1.1.1 where reference is made to 50 + 1% in respect of new prospecting rights.

69 The debt which has to be "written off" is not a debt due to the mining right holder but to the lender which financed the acquisition of the shares by the black shareholder or to the vendor shareholder.

70 **Ad paragraph 248**

The Chamber did not contend that there was 38% black ownership in the mining industry. The statement related to the Chamber's membership.

BENEFICIATION

71 **Ad paragraph 262**

The DMR has had over a decade to put in place a process and mechanism to determine the offset of each mineral value chain as this element has been included the Original Charter (2004) and 2010 Charter

SALE OF MINING ASSETS

72 **Ad paragraphs 264 – 268**

72.1 Paragraph 267 misinterprets what the Chamber says about holders of existing options or existing rights of first refusal.

72.2 The Minister does not answer the Chamber's submissions that the right of first refusal conflicts with section 11(2) whereby, if any applicant satisfies the requirements of section 11(2), the Minister *must* grant consent to transfer the right.

PART 3: NON-OWNERSHIP ELEMENTS

PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT

Mining Goods

73 **Impossibility of determining South African Manufactured Goods (AA paras 289-294)**

73.1 The Chamber complained, at paragraph 80 of the founding affidavit, that a Holder will not be able to establish whether the mining goods it procures are "*South African Manufactured Goods*" for the purposes of satisfying the mining goods procurement element. This is because the definition of "*South African Manufactured Goods*" in the 2017 Charter requires the exclusion of profit mark-up, intangible value (such as brand value) and overheads when determining whether mining goods are "*South African Manufactured Goods*". Apart from the fact that it is irrational to exclude brand value from the determination of the value of goods, the complaint was that a Holder has no access to the aspects of value identified in the 2017 Charter and would therefore not be able to say whether it has in fact procured "*South African Manufactured Goods*" and thus complied with the 2017 Charter.

73.2 To this the Minister responds by saying that the SABS will determine whether mining goods are "*South African Manufactured Goods*" as defined in the 2017 Charter (AA para 293). The Minister arrives at this conclusion *via* the verification provisions of the 2017 Charter (at

paginated page 145). These provide that a Holder must furnish to the Department, by way of a certificate from the SABS, proof of local content. This is so even if, on the 2017 Charter, the obligation to "*verify*" local content is on the supplier. Quite how verification and proof are supposed to work under the Charter remains unclear.

73.3 At any rate, the notion that the SABS can lawfully determine whether mining goods are "*South African Manufactured Goods*" has no foundation. The SABS is a statutory body whose functions and objects are set out in sections 4 and 5 of the Standards Act 8 of 2008. Those objects and functions do not include certifying whether mining goods are "*South African Manufactured Goods*" for purposes of the 2017 Charter. On the contrary, the mission of the Standards Act is set out in its preamble as:

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

73.4 The rendering of "*conformity assessments*", upon which the Minister relies as empowering the SABS to issue certificates for the purposes of the 2017 Charter (AA para 293.3), does not empower the SABS to issue those certificates. This is because section 4(b) of the Standards Act limits conformity assessments to matters related to "*standards*".

Section 4(b) of the Standards Act provides that one of the objects of the SABS is to:

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

73.5 Nor does the Minister have the power to assign functions to the SABS. That power is by section 4(k) reposed in the Minister of Trade and Industry. In short, the SABS has no power to certify whether mining goods are "*South African Manufactured Goods*". Nor could it be within its expertise to make that determination, given the definition of "*South African Manufactured Goods*" with its surprising exclusion of the other aspects of value.

73.6 If, therefore, the SABS cannot and does not have the power to determine whether mining goods are South African Manufactured Goods, then the Chamber's complaint that it is impossible for Holders to make that determination remains unanswered by the Minister.

73.7 The problems do not however stop there. In terms of the 2017 Charter, the "*responsibility to verify local content lies with the supplier of goods and/or services*" (paginated page 145). If the SABS' participation is excluded (because it has no power), and only the say so of the supplier will do, then there is no independent way of determining the truth of the "verification" (an inapt word) by the supplier. In short, the whole

scheme set up by the 2017 Charter in this regard is ill-conceived and without any means of proper implementation.

73.8 There therefore remains an insuperable difficulty in determining what constitutes "*South African Manufactured Goods*". And if that is so, how can a Holder be expected to comply with such an unclear and, on the scheme of the 2017 Charter, unverifiable concept? The Minister has with respect displayed a comprehensive misunderstanding of the very scheme he has set up. If he does not understand how the scheme is to work practically, how can a Holder, which will be punished if it does not comply with the 2017 Charter, do so?

73.9 For all these reasons, I respectfully submit that there is no meaningful answer to the Chamber's complaint in relation to this element.

74 **Ambiguity in "must be set aside" (AA paras 295-297)**

74.1 The Chamber contended (at FA paras 79-83) that the idea that certain percentages of "*procurement spend*" on mining goods "*must be set aside*" was unclear. It could mean that the Holder must actually spend the relevant percentage or that it was enough that it simply set aside that percentage for expenditure. The latter meaning would be more appropriate if, as is the case, there is no knowledge whether South African Manufactured Goods will in fact be available on the market. The former meaning would make sense if in fact those goods were known to be available at the time the 2017 Charter was published. But since there was and still is no such knowledge, it remains quite unclear

just what complying with the element requires. Does it require actual spending or merely setting aside?

74.2 To this the Minister (who does not know whether there is the relevant capacity) gives the unhelpful answer that "*setting aside*" means whatever "*best fits*" with the objects of the Charter (a circularity) and the MPRDA (AA para 297). This is a stark demonstration of the problem already stated: the Minister confesses, in effect, to not knowing what the phrase means. This is astounding, coming as it does from the Minister, who expects Holders to know what the phrase means.

74.3 The Minister has again simply failed to come to grips with the difficulties thrown up by the badly-worded and in many parts incomprehensible 2017 Charter. This element is an affront to the rule of law.

75 **Unfair operation of the 2017 Charter (AA paras298-299)**

75.1 The Chamber contended (at FA para 82) that if "*set aside*" meant actually spending the relevant percentages, and there was no capacity to meet that obligation, then a Holder would be in breach of the 2017 Charter, be subject to penalties, and that this would be unfair.

75.2 The Minister's answer (AA paras 298-299) is that he is empowered by clause 2.9 of the 2017 Charter, in monitoring a Holder's implementation of the 2017 Charter, to "*take into account the impact of material constraints which may result in not achieving the set target*". But this simply means that, at the time of publishing the Charter, the Minister

had no idea whether the capacity existed or not. This is an irrational exercise of the Minister's power under section 100(2) of the MPRDA. The Minister's repeated retort that he has no obligation to prove that the requirements imposed upon Holders by the 2017 Charter are capable of being met simply demonstrates the Minister's misconception of the law. Further argument in this regard will be advanced at the hearing of this matter.

76 **The meaningless phrases in the 2017 Charter (AA paras 300-302)**

76.1 The Chamber complained (at FA para 84) that it was simply impossible to make sense of the phrase "Black Owned Companies with a minimum of 50%+1 vote female Black Person owned and controlled and/or 50%+1vote Youth owned and controlled" in this element. This phrase occurs in that part of the element which requires "mining goods procurement spend" be "set aside" for procuring mining goods from the entity whose definition is attempted in the phrase.

76.2 I have attempted, once again, to make sense of the phrase, and have to confess that I do not understand it. Nor would any person reading it, especially Holders who are expected to be bound by it. The Minister, for his part, does not even attempt to say what the phrase means. If it were so clear, one would have expected him to say what it means. Instead he says, unhelpfully, that the phrase must be made sense of in its "*context*" (AA para 302). One asks, what does its context reveal it to mean? There is no answer from the Minister in this regard.

76.3 The Minister goes on, irrelevantly, to contend that because the Chamber did not previously raise concerns about the phrase, it cannot now pretend not to know what it means. Whether true or not, this is beside the point, namely: what does the phrase mean, if anything? The Minister's contention is troubling, since it discloses a fundamental misconception of the principle of legality and the requirement that laws (as the Minister asserts the 2017 Charter to be) must be comprehensible. The response that although the Minister cannot say what the provision means the Chamber must know the answer to the riddle – and therefore cannot complain - because it has not previously objected is truly astonishing.

76.4 I submit, therefore, that the complaint as to acute opacity of the phrase remains, and the Minister's obfuscation by reference to irrelevant and doubtful history does not absolve him of the irresponsibility of drafting a charter (which he insists is "law") without any idea of what it means. The phrase is meaningless and on that account contrary to the rule of law.

77 **Minister did not assess capacity of Black Owned Companies to supply mining goods (AA paras 303-311.2)**

77.1 It is important to be clear how this complaint was raised. The Chamber said there was no evidence that current suppliers of mining goods qualified as Black Owned Companies (FA para 85). The Chamber then contended that what the Minister should have done was to require

suppliers of mining goods to qualify themselves as Black Owned Companies if they wanted to supply to Holders (FA para 85). This is for the obvious reason that if there are in fact no Black Owned Company suppliers, then the obligation on a Holder to procure mining goods from them would be incapable of implementation.

77.2 Against this the Minister advances a welter of points.

77.3 First, the Minister says that, in its presentation submitted to the Minister (FA annexure "FA11"), not on the 2017 Charter as it now reads, but on a previous and substantially different draft of 2016 ("the Draft Reviewed Mining Charter 2016"), the Chamber expressed the view that "*there is domestic HDSA supplier capacity for mining goods*" (AA para 304.1). The Minister then goes on to quote FA11, which as I say relates not to the 2017 Charter but to the Draft Reviewed Mining Charter 2016. He quotes FA11 as evidence for the proposition italicised above. But FA11 has nothing to do with (and is no evidence of, capacity to meet the mining goods procurement target in) the 2017 Charter. A cursory acquaintance with the facts would have disclosed this to the Minister. The facts are these:

77.3.1 On 15 April 2016, the Minister published the Draft Reviewed Mining Charter 2016 (which I attach as annexure "**RA1**"). It contained procurement targets. But it divided these, in clause 2.2, into "*capital goods*" and "*consumables*". In relation to

capital goods, the Draft Reviewed Mining Charter 2016 provided in clause 2.2(a) that:

> "A mining right holder must procure a minimum of 60% locally manufactured capital goods from BEE compliant manufacturing companies." [Emphasis added]

77.3.2 Commenting on this, the Chamber, on page 7 of FA11 (relied on by the Minister) said the following (selectively left out by the Minister):

> "Investment costs to set up manufacturing for **capital goods** not commercially sustainable." [Emphasis original]

77.3.3 This was a comment on the distinction drawn in the Draft Reviewed Mining Charter 2016 between capital goods and consumables. The Chamber was there saying that investment costs for setting up manufacturing for capital goods were not commercially sustainable.

77.3.4 It was only in relation to consumables and services that the Chamber said, on page 7 of FA11, in the words misleadingly quoted by the Minister, that:

> "Consumables and parts of the mining equipment **can be produced** economically in SA." [Emphasis original]

77.3.5 And that:

> "SA industry **has the expertise**, funding support and baseline off take." [Emphasis original]

77.3.6 And that:

> "Our expertise developed for local produced consumables and services can be exported. [Emphasis added]

77.4 It will be readily apparent from all this that in FA11 the Chamber was commenting on the Draft Reviewed Mining Charter 2016 whose target for capital goods was 60%. It said that this could not be met. By contrast, the 2017 Charter collapses the capital goods/consumables distinction and raises the target to 70%, whereas in the Draft Reviewed Mining Charter 2016, 70% was confined to consumables.

77.5 It will also be clear that when the Chamber commented in FA11 that consumables can be produced economically in South Africa, it said this in reference to the consumables target only, and not, as the Minister suggests misleadingly at AA para 304.1, to capital goods. In relation to the capital goods target (set at 60% in the Draft Reviewed Mining Charter 2016), the Chamber said that this was not "*commercially sustainable*".

77.6 The Minister is therefore wrong, and had he read the founding papers carefully would have known that he was wrong, in asserting that the Chamber said that there was capacity to meet the 2017 Charter mining goods target of 70%. The statements on which the Minister relies say no such thing. There is therefore no evidence, contrary to the Minister's assertions, that there is capacity to meet the 70% mining goods target in the 2017 Charter.

77.7 Second, at paragraph 304.2 of the answering affidavit, the Minister then relies on annexure AA50 to the answering affidavit (page 1386), which he does not number in his answering affidavit. He says (at AA paragraph 304.2) that AA50 demonstrates "*the chamber's view that there is sufficient HDSA supplier capacity for meeting the mining goods target*" in the 2017 Charter. AA50 demonstrates no such thing. AA50 has nothing to do with the 2017 Charter.

77.8 The Minister relies on AA50 (at AA para 304.2.1) for the proposition that, in relation to the 2014 procurement target for capital good and consumables, the Chamber reported that it had "*achieved well*". This has nothing to do with the 2017 Charter procurement target of 70% for mining goods. As AA50 states, the entry "*achieved well*" related to a 40% target for capital goods. Therefore when the Minister cites this as evidence of capacity of local industry to meet a capital goods procurement target of 70%, without mentioning the differences in the targets, he is not telling the whole story to the Court. There is a world of difference between "*achieving well*" a target of 40% and an ability on the part of the supplier to meet the target of 70% in the 2017 Charter. The Chamber was right in its contention making the latter point. To this, the Minister's "data" are at best irrelevant and at worst an attempt to obfuscate matters. But there is also a key difference. The 40% target in 2010 charter for capital goods from HDSA companies, is significantly different to the RMC2017 which requires 70% from black companies

manufactured in South Africa. So not only was the target nearly doubled, but local content requirements were also added.

77.9 Similarly, when the Minister says (at AA para 304.2.2) that, in relation to services, the Chamber reported on the 2014 targets "*good progress made*", he is referring to matters completely extraneous to mining goods (with which he is dealing in para 304.2).

77.10 Third, the Minister says (at AA para 304.3) that "*several prominent chamber members*", whom he has "*chased up*" "*in the past several weeks*" reported (in annexures AA52 to AA56 to the answering affidavit) that they had complied with "*the 2010 charter procurement targets*". In many instances, he says, "*they claim to have exceeded those targets*". With great respect, this is pettifoggery, having regard to the differences between the 2010 and 2017 Charters. At any rate, it helps to look at the Minister's irrelevant – and hearsay - evidence:

77.10.1 Annexure AA52 has nothing to do with the Minister's allegation about availability of local capacity to meet the 70% mining goods requirement. It deals with ownership.

77.10.2 Annexure AA53 is not self-explanatory and the Minister has not sought to explain the meaning of the figures therein contained. In the absence of an explanation, the annexure does not advance his case.

77.10.3 Annexure AA54 reflects that in 2013 the relevant entity "*achieved*" 51% of "*capital spend*" as against a target of 30%. In the same year the entity achieved 56% of "*consumables spend*" as against a target of 40%. These are 2013 figures, divided into capital and consumable goods, and measured against different targets. They are not, as the Minister seems to assert, an indication of capacity on the part of suppliers to meet the 70% target in the 2017 Charter. They are therefore beside the point.

77.10.4 Annexure AA55, which consists of two pages of unexplained and incomplete data, simply reflects that in 2016 the entity concerned achieved an overall 77% "*compliance*" in relation to goods. What one does not know, from the selection, is what the 77% is a percentage of. Is it 77% of the 2010 target? Is it 77% which meets or goes beyond that target? One will not be able to glean this from AA55. More important, however, is whether AA55 (whatever it may mean) is representative of the whole industry. That is, assuming that AA55 shows that the party there concerned met the 70% target in 2017 Charter, the question remains whether AA55 (if it reflects that) is a statistically significant or relevant representation of the industry's ability to meet the 70% mining goods procurement requirement in the 2017 Charter. On that, the critical question,

AA55 is of no assistance at all. Nor is the Minister's answering affidavit.

77.10.5 AA56, a "*spend report*" (see paginated page 1410), reflects (on paginated page 1411) that, in financial year 2014, 66.99% as against a target of 40% was spent on "*capital goods*". It also reflects that, in financial year 2015, 63.55% as against as target of 40% was spent on "*capital goods*". There are also separate entries for "*consumable goods*" for these respective years (65.65% for 2014 and 73.98% for 2015), both of which are above the target of 50% in both years. The same objections as raised above apply to the deployment of these figures by the Minister. First, they relate to lower targets (40% and 50%) as opposed to the 2017 Charter target of 70%. Second, there is no evidence that they are statistically significant in relation to the 2017 Charter procurement target of 70%. They tell us nothing about whether there is capacity on the part of suppliers to meet the 2017 Charter procurement target. Again, because the RMC2017 capital goods target includes a substantial local content requirement that was not these in the 2010 charter (ie the goods have to be made in SA by black owned companies.)

77.11 Whatever else these five examples might show, they certainly do not demonstrate, as the Minister tries to assert, that any or a significant

number of members of the Chamber have said that there is in the market a capacity to provide mining goods to the satisfaction of the 70% target. In short, what the Minister has sought to produce in this regard is quite irrelevant, even if it is true in relation to other targets in the 2010 Charter.

77.12 Fourth, the Minister says that the Chamber asserts that it has been able to comply with the 2010 Charter, but cannot comply with the 2017 Charter because it says there is no capacity to meet the 2017 target. This, the Minister says, is wrong because he does not have to show that suppliers can meet the 2017 Charter procurement target (AA para 306). This is a woefully mistaken view of the law. The Minister cannot set targets (he calls them "law") when he has no idea whether they are practicable or not. It is irrational to do so. There is therefore nothing "*contradictory*" in the Chamber's stance (AA para 305).

77.13 Fifth, because the Minister had used data relating to the 2010 Charter in order to prove capacity to implement the 2017 Charter, the Minister must show how that data is relevant. He does this by a wholly fallacious method of reasoning. He says that under the 2010 Charter the target for capital goods was 40%. Under the 2017 Charter the target for mining goods is 70%. But on the Minister's reasoning, this huge gap is reduced to a mere 2% (AA para 307.3).

77.14 The Minister arrives at this startling conclusion by reference to the definition of "*South African Manufactured Goods*" in the 2017 Charter.

There South African Manufactured Goods are defined, to paraphrase, as those 60% of whose "*value add*" during the assembly of manufacture is "*realised*" in South Africa. From this the Minister draws the fallacious conclusion that a Holder "*must spend an effective rate of 42% on domestic mining goods (70% of 60%)*".

77.15 There is no logic in this. Goods are either South African Manufactured Goods (as defined) or they are not. If they are, then target does not vary: the Holder must still "*set aside*" 70% of its spend on mining on South African Manufactured Goods. The target remains the same. And the question is whether South Africa has the capacity to make mining goods available to meet the spend target. Nothing that the Minister has said shows that there is any such availability. In fact, the Minister was required to do a study before publishing the 2017 Charter. He did not do that. Instead, he conducted *post-hoc* and perfunctory inquiries from the members of the Chamber for the purposes of compiling his answering affidavit. The data he received, and the other material he relies upon, are as already observed irrelevant and unhelpful.

77.16 Sixth, the Minister says that the 2017 Charter provides for transitional arrangements (AA para 308). But this does not answer the Chamber's complaint, namely that the Minister has no evidence of capacity to meet the 70% target. At best for the Minister, it might be said that he is hoping that capacity will develop over time. But there is nothing, and

certainly no study, showing that that is what he considered before publishing the 2017 Charter.

77.17 Seventh, the Minister says (at AA para 309) that the Chamber does not appreciate that the Minister will be flexible in his application of the 2017 Charter. But the 2017 Charter does not give the Minister a general discretion to apply the 2017 Charter. The Minister seems not to understand the very Charter he says is binding upon others. In fact, clause 2.10 of the Charter points to an exclusion of any such discretion.

77.18 Eighth, the Minister contends that *if* there is no supplier capacity, that is because of the Chamber's members' failure to comply with previous procurement targets (AA para 310). This is revealing. Either there is capacity or there is not. If there is, as the Minister seemed to say elsewhere in his affidavit, then he cannot blame members of the Chamber for unavailability of capacity. For if the Minister is right that there is capacity, then the question of the causes of its non-existence do not arise. In his haste to blame the Chamber, and to delegitimise its concerns, the Minister appears prepared to make contradictory factual assertions, apparently "in the alternative". Factual allegations cannot be made in the alternative.

77.19 For all the above reasons, I submit that the Minister has failed to show that he considered, before publishing the 2017 Charter, whether or not there was capacity to meet the 70% mining goods target. He has also

failed to show that, as a matter of fact, that capacity exists. The Chamber therefore persists in its allegations in this regard.

78 **The 2017 Charter incentivises anti-competitive conduct (AA paras 312-315)**

78.1 In its founding papers (paras 86-87), the Chamber complained that the 2017 Charter "*will encourage anti-competitive outcomes*". It does this by enabling Black Owned Companies, without having the requisite market power for purposes of the prohibition in section 8(a) of the Competition Act, to price excessively. This is because of the requirement that certain percentages of the mining goods procurement be from Black Owned Companies. The argument was that if this is the consequence, then, whilst not strictly a contravention of the Competition Act (because it requires market power before a contravention is shown), it was a consequence that can only be brought about by an Act of Parliament. This in turn because the element seems to be contrary to the spirit of the Competition Act. The Chamber went on to make it plain that it did not criticise this policy choice, but only that it could only be achieved through primary legislation because it had the potential effect of subverting primary legislation.

78.2 The Minister has twisted this submission (primarily about his powers) into a distasteful one, and then proceeds to demolish his version of it. He says that the Chamber assumes that that "*black-owned suppliers have a propensity to break the law*" (AA para 313). This is an extremely

disturbing, irresponsible and regrettable distortion on the Minister's part. As already stated, the complaint the Chamber raised was whether the Minister has power to publish a charter which incentivises conduct contrary to the spirit of the Competition Act. The Minister distorts the Chamber's legal submission because his aim in his affidavit is to delegitimise the Chamber's legal case by brining inflammatory political talk into the case. He does this all the while evading the legal case against him.

78.3 Furthermore, the Minister repeatedly in AA paras 312, 313 and 314 refers to unlawful collusion, whereas in FA para 86 the Chamber expressly said that its concern was that Black Owned Companies can 'without unlawful collusion' keep their prices high.

79 **Breaches of GATT and TDCA (AA paras 316-318.2)**

79.1 The Chamber complained (at paras 89 and 90) that the 70% procurement requirement with 60% local content requirement was in breach of the General Agreement on Trade and Tariffs (GATT) and Trade, Development and Co-operation Agreement (TDCA). The Chamber said that South Africa is party to both treaties and was therefore bound by them. South Africa therefore could not enact subordinate legislation or engage in administrative action that was contrary to these treaties.

79.2 The Minister says that the Chamber does not identify the relevant provisions. The relevant provision of GATT is Article XI(1), which reads:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

79.3 The internal exceptions contained in Article XI(2) of GATT do not apply to save the procurement provisions in the 2017 Charter. Therefore South Africa is bound by GATT, to which it is a party.

79.4 Similarly, Article 19 of the TDCA (an agreement with the European Community to which South Africa is a party) provides that:

> "1. Quantitative restrictions on imports or exports and measures having equivalent effect on trade between South Africa and the Community shall be abolished on the entry into force of this Agreement.
>
> 2. No new quantitative restrictions on imports or exports or measures having equivalent effect shall be introduced in trade between the Community and South Africa.
>
> 3. No new customs duties on imports or exports or charges having equivalent effect shall be introduced, nor shall those already applied be increased, in the trade between the Community and South Africa from the date of entry into force of this Agreement."

79.5 The treaties were signed by and are, as a matter of international law, binding on South Africa. The 2017 Charter is therefore a breach of

these treaties. To this the Minister says that these treaties are not "*directly enforceable or justiciable in a South African court* (AA para 318.1)". He goes on to say that the "*threshold of review*" in relation to South Africa's international obligations is whether the decision-maker took them into account (AA para 318.2). But he does not go on to say that he *did* take those obligations into account, which must mean that he did not - a ground of review on its own.

79.6 At any rate, as regards the Minister's assertion that GATT and TDCA are not directly enforceable in South Africa (whatever he means by this), I have been advised and submit as follows. First, whether that is right or wrong, it is quite irrelevant to the question whether the 2017 Charter is a breach of those two treaties. On a reading of the treaties and the 2017 Charter, it plainly is.

79.7 Enforceability, on which the Minister focuses (a surprising stance for a member of the Executive which signed these treaties), is another matter. And the position on that is very briefly the following. Our courts have made it clear that international law (in which the two treaties are binding on South Africa) is an obligatory guide to the interpretation of domestic legislation (see section 233 of the Constitution) and a basis for determining the legality of subordinate instruments such as the 2017 Charter. The legality and constitutionality of the 2017 Charter is to be tested by reference to South Africa's international law obligations. To this extent, therefore, the treaties are enforceable in South Africa.

79.8 The Minister therefore cannot simply slough off this challenge. It is a serious challenge, going to the root of his legal and constitutional ability to publish a charter whose effect is a breach by South Africa of its international law obligations. The challenge remains and is unanswered by the Minister.

80 **The alleged improper approach to litigation (AA paras 319-322.4)**

80.1 The Minister complains of what he calls the Chamber's "*improper approach to litigation*". One would then have expected the Minister to say what, exactly, the Chamber did wrong from a litigation perspective. What one gets, instead, is a political complaint about the Chamber. It is said that the Chamber professes to believe in transformation (which it does) and yet has contrived to object to the 2017 Charter. I cannot see how this has anything to do with a proper approach to litigation. Is the Minister suggesting that a legal objection to the validity of the 2017 Charter cannot be taken until the person taking the objection shows commitment to transformation? That is not the law of this country. At any rate, the Chamber, as it has said, is committed to transformation. But it is also committed to properly-planned, achievable and, above all, lawful transformation initiative. The 2017 Charter lacks any semblance of legality, for reasons already advanced, and the Chamber will not shrink from saying so. There is nothing improper in the Chamber's approach to this litigation. If anything, what is remarkable is the Minister's avoidance of the legal issues in the case and the twisting of

the Chamber's legal submissions so that he can deal with them politically.

Procurement of services (AA para 323)

81 The Minister says that the Chamber's submissions on procurement services fall to be dismissed on the same basis as his answers to the submissions on mining goods. In other words, the Minister has nothing to say about them. The Chamber equally has nothing to add.

Processing of samples (AA para 324-334)

82 The Chamber raised some practical concerns about the sampling requirement, according to which Holders must have 100% of their mineral samples analysed by South African Based Companies:

82.1 The Chamber said that there was no evidence of capacity to conduct 100% sample analysis in South Africa (FA para 97).

82.2 It said that the qualification that sample analysis can be conducted outside of South Africa only with the Minister's permission did not indicate the factors the Minister is required to take into account in the exercise of that discretion (FA para 98).

82.3 Finally, the Chamber said that there was no time limit within which the Minister was required to exercise his discretion if asked to waive the local sampling requirement. Any significant delay might spell disastrous consequences for the Holder concerned. The Chamber went on to say

that there were already a number of decisions outstanding from the Minister (FA para 99).

83 Against this the Minister has advanced factually baseless contentions.

83.1 First, he refers to what he considers history, and says that until 1994 local sampling capacity was "*resilient and strong*" (AA para 324). Then, after 1994, sampling began suddenly to take place overseas (AA para 325). This allegedly resulted in the closure of many sampling facilities in South Africa (AA para 35). The aim of the 100% local sampling element is to allegedly redress this (AA para 326). If anything, this supports the Chamber's contention that there is no available local sampling capacity to meet the 100% target. It is irrelevant, from a legal perspective, what the cause of the lack of capacity is. What matters is that the Minister has without knowledge of any available capacity (which the Chamber says has not been demonstrated) published a charter which requires 100% sampling to take place locally when he has no evidence that it can. This is irrational and contrary to our law.

83.2 Second, the Minister says that he is not obliged to demonstrate that there is sampling capacity in the country to meet the 100% target. On this he is wrong: the law is the other way: his decision must be rationally connected to information which is before him.

83.3 Third, the Minister seems to say ("seems" because he does not actually say) that there is such sampling capacity (AA para 333). His evidence for this undercuts his very own argument. He refers to and quotes from

annexure AA58 to the answering affidavit. The quotation on which the Minister relies does not support the Minister's contention. It talks about research and development and not to sampling. These are two different things. In any event, even if the quotation were about sampling, it simply says that the relevant capacity "*remains grossly under-utilised*". What it does not say, and what the Minister has no evidence for, is the proposition that the 100% sampling target can be met by South African institutions.

83.4 In any event, the sampling element of the 2017 Charter is not rationally connected to the purpose set out in section 100(2) of the MPRDA. The element does not effect "*the entry into and active participation of historically disadvantaged South Africans into the mining industry*". It simply requires a Holder to "*utilise South African Based Companies for the analysis of 100% of all samples*". A South African Based Company is defined in the 2017 Charter as one "*incorporated in the Republic in terms of the Companies Act and which has offices in the Republic.*" Incorporation and office are mere formalities. Companies incorporated in and with an office in South Africa may with impunity conduct sampling in other jurisdictions. Nothing in the 2017 Charter prevents this. Nothing, in short, in the sample element is designed to effect "*the entry into and active participation of historically disadvantaged South Africans into the mining industry*", as the empowering in section 100(2) requires. The sampling element is therefore unlawful and ultra vires section 100(2) of the MPRDA.

83.5 Fourth, the Minister raises the irrelevant objection that since the Chamber did not previously object to the sampling element, it cannot do so now. That has only to be stated for its absurdity to emerge. The challenge to the sampling element is as to its illegality. There is no public law estoppel in this regard.

83.6 The Chamber persists in its objections to the sampling element. It is not rationally connected to section 100(2) of the MPRDA (a legal issue); and there is no evidence of capacity to meet the target locally (a factual issue on which the Minister has once again failed to show proof).

Contribution by foreign suppliers (AA paras 337-368)

84 The Chamber raised a number of objections to the legality of this element in the 2017 Charter. The Minister has purported to answer them. But, for reasons that follow, he has failed to answer them meaningfully.

85 First, the Chamber contended that legislation imposing a tax can only be initiated by way of a money Bill, which can only be passed by Parliament (FA para 102). It was further pointed out that the Mining Transformation and Development Agency, a non-existent agency, would not be entitled to receive any resultant tax, since under section 213(1) of the Constitution all taxes must be paid into the National Revenue Fund.

86 To these simple points the Minister has advanced a number of irrelevant (and therefore evasive) arguments, including an allegation about the Chamber's alleged mine managers' forum in the Northern Cape (the

Chamber has no such creature). These allegations being irrelevant, I am advised that it is not necessary to deal with these factual allegations (at AA paras 337-347 and 350).

87 More to the point, the Minister does not even defend his usurpation of Parliamentary powers in purporting to make laws that under the Constitution can only be passed by Parliament. He contents himself with the bland and conclusory statement in AA para 349 that "*payment to the MTDA is entirely lawful*". In vain one looks for a reason why that is so.

88 The Minister says that the Chamber's submission is that this power is not contemplated in section 100(2) of the MPRDA. That indeed is part of the submission. But it is not the only part, or even the most important part: the main submission is that only Parliament can impose taxes. It is interesting to note that, on this important question as to his powers, the Minister is uncharacteristically reticent, in contrast to his comprehensive responses on irrelevant matters. The Minister has and can have no answer to the Chamber's challenge on this issue. On that basis alone, the Chamber has demonstrated a clear right to the relief it seeks.

89 Second, the Chamber contended that the 2017 Charter purports to have extra-territorial application (FA para 106). It is important to have regard to the provisions of the 2017 Charter in this regard. It says:

> "A Foreign Supplier must contribute a minimum of 1% of its annual turnover generated from local mining company/ies towards the Mining Transformation and Development Agency."

90 The question the Chamber posed was: what if the Foreign Supplier refuses to contribute, since it is not bound by South African law and can conduct business here without being bound by the 2017 Charter? It is not bound because the 2017 Charter does not apply extra-territorially and because they are not Holders. This is an elementary legal proposition which one would have expected the Minister, if he was legally advised, to know. If the 2017 Charter is incapable of enforcement against Foreign Suppliers, as it is not, then how can the Minister have published an inconsequential charter (which he says is law) acting under section 100(2) of the MPRDA?

91 In response to these difficulties the Minister says that the 2017 Charter regulates the rights of Holders and that indirect enforcement against Foreign Suppliers would be possible through Holders (FA para 354). He has imposed a direct obligation on foreign companies over which he has no jurisdiction. He seems to admit that he cannot directly enforce that obligation. But he says he can enforce it indirectly by telling South African Holders to insert in their contracts an obligation on the foreign counterpart to pay the 1% tax (AA para 354). But the 2017 Charter imposes no such obligation on South African companies. The obligation is imposed directly on Foreign Suppliers. One has only to read the 2017 Charter to see this. South African Holders would have no legal basis to insist that their foreign counterparts agree to pay a tax imposed illegally by a Minister. In short, the tax is beyond the powers of the Minister, extra-territorial, unenforceable, and contrary to all that has hitherto been understood by

lawyers. The only conclusion is that, in imposing this tax, the Minister cannot have taken legal advice or, if he did, failed to take it into account, and thereby allowed himself to act contrary to the law and to fail to take into account relevant considerations.

92 Third, the Minister seems to blame the Chamber for not setting up the MTDA (AA para 357). This is obfuscation. The real issue is whether or not the Minister could publish a charter requiring payment of money to the MTDA when it does not exist, and when, even if it existed, it would have no lawful entitlement to receive such monies. To these questions, one looks in vain in the Minister's affidavit for answers.

93 The Chamber's objections on these issues remain essentially unchallenged. The whole scheme is illegal. South African law applies only in South Africa: it cannot apply, or be enforced, outside of the Republic. Foreign Suppliers can therefore supply to South Africa without paying the tax. The tax is in any event *ultra vires* the Minister's powers as a matter of constitutional law.

94 In AA para 367 the Minister refers to a transitional period of twelve months. He does however not answer the Chamber's point (in FA para 110) that a Foreign Supplier is not a Holder so that the transitional provisions which endure in favour only of Holders do not avail a Foreign Supplier.

EMPLOYMENT EQUITY (paras 376-392)

95 The Chamber accepts employment equity and said so in its founding affidavit (FA para 121). It only raised concern about the viability of some of the targets (FA para 120). It said that it was not realistic, if mining is to continue sustainably in the Republic, to change 50% of the board of a Holder, or to change 60% of senior management, or to change 75% of middle management or 88% of junior management level. Meeting these targets immediately (i.e. within 12 months), and not over a gradual period allowing for training and up-skilling, will almost certainly lead to a disruption of mining activities in the Republic. These were specific concerns, issuing from a party which knows the industry.

96 In answer to this reasonable position, the Minister has given a long answer, effectively attacking the Chamber (AA paras 377-386). I am advised that this is all irrelevant. When the Minister attempts to answer the very specific concerns of the Chamber, he does so in generalised terms which do not address the real issues in this case.

96.1 First, the Minister attaches a very long (and on the face of it meaningless) annexure AA59. The annexure, according to the Minister, shows "*qualified graduates*" who "*are either unemployed or employed in other sectors*" (AA para 389). This is adduced to controvert the Chamber's contentions in paragraph 95 above. By this method, anything whatsoever can be proved. If the requirement is that all mining companies must have 50% black and 25% female mining

executives within 12 months, and a list such as AA59 is produced to show that those candidates exist, then anything can be proved. The list is meaningless in that regard. I must add that I do not deny (indeed I accept) that members of the Chamber can, given time, obtain such candidates.

96.2 But it is misuse of documents such as AA59 to suggest that they prove that there is the relevant capacity. All that AA59 (which merely lists graduates and other people not employed in the mining industry) shows is that there are people with some formal qualifications.

96.3 This does not show that the targets about which the Chamber is concerned can be met within 12 months. To do that a much more detailed analysis about available jobs at the mines, the fitness of the people mentioned in AA59 for those jobs, the ability of the mines to lay off current staff to accommodate the people mentioned AA59—all of that analysis would have to be undertaken before imposing this element, and insisting that in AA59 is a universal panacea to equity employment difficulties.

96.4 In any event, it is perhaps not necessary to make much of AA59 because, despite what he *ex facie* appears to adduce it for, the Minister is compelled to say that he adduces it to show that there are people with "*professional skills relevant to the mining industry*" (AA para 389). To show this is not to meet the Chamber's concern about immediate operational suitability and disruption.

96.5 Second, the Minister says that he will be reasonable and flexible in the application of this element of the 2017 Charter (AA para 388), thereby recognising that the Chamber's concerns set out above are not, as he sometimes wishes to say, self-serving or obstructive. There would otherwise be no need for flexibility if the relevant personnel were, as the Minister says, available, and it only remained for the Chamber's members to employ them in the relevant capacities. In short, the Minister must make up his mind as to whether or not AA59 proves what he says it proves.

96.6 In any event, the Minister does not have discretion (as he thinks he does) to elect not to apply or ameliorate this requirement. He keeps on referring to clause 2.9 of the 2017 Charter, which he interprets as giving him a general discretion to dis-apply the 2017 Charter. This is one of the many misunderstandings by the Minister of his own charter. Clause 2.9 is a reporting and monitoring provision, which has nothing to do with waiver by the Minister of any of the obligations he has sought to impose.

96.7 Third, and finally, the Minister returns to his favourite theme. He says that the Chamber cannot use its own non-compliance with the previous Charters (which non-performance apparently stifled the development of the relevant capacity) to complain that there are no relevantly qualified candidates for purposes of this element (AA para 390). The Chamber rejects this aspersion. The Minister has adduced *no evidence* showing

that the Chamber, or its members, is responsible for the lack of capacity to meet this element. The allegation is in any event inconsistent with the allegation that there *is* capacity. The Minister cannot allege that there *is* capacity and at the same time say that *if* there is no capacity the Chamber is to blame, buttressing this by reference to the Chamber's alleged failures "*over the last 13 years*" (AA390). The conditional allegation ("*if*") is only tenable if the Minister is wrong that (i) he considered that the relevant capacity existed and (ii) concluded that it did not.

96.8 He cannot blame the Chamber as being responsible for the lack of capacity and, at the same time, say that the Chamber is wrong in saying there is no capacity. The allegations cannot be seriously advanced consistently. The question is whether the Minister had evidence to meet the target of this element when he published the 2017 Charter. If, as is the case, he did not (AA59 being irrelevant and unhelpful), then it does not matter what the causes of the lack of the relevant capacity are.

96.9 I contend, therefore, that the Minister has failed meet the Chamber's case in relation to this element.

HUMAN RESOURCES DEVELOPMENT (paras 393-403)

97 Although the Chamber opposes the fact that it is only the mining industry which is obligated to the 5% over and above the 1% skills levy in this

element, it however supports the principle behind the element and would welcome an opportunity of debating the details with the Minister.

MINE COMMUNITY DEVELOPMENT (paras 404-407)

98 Although the Chamber opposes the vagueness of this element, it however supports the principle behind this element and would welcome an opportunity of debating the details with the Minister.

SUSTAINABLE DEVELOPMENT AND GROWTH OF INDUSTRY (AA para: 408-415)

99 The Minister contests the Chamber's assertion that this element does not fall within the purview of 100(2) of the MPRDA. The Chamber persists in its stance. The Chamber further contends that the health and safety performance sub-element (clause 2.6.2 of the 2017 Charter) formed part of aspirational goals agreed to between the stakeholders at the Mine Health and Safety Council on 14 August 2014. These goals, relating as they do to health and safety (covered by this sub-element), were not meant to form part of this sub-element but were part of the Road to Zero Harm Milestones.

100 The Chamber was not consulted by the Minister before he included occupational health and safety targets in the 2017 Charter. Nor was it ever intended that the Zero Harm Milestones should be binding. In any event, further improvement in health and safety will best be achieved through regulation *via* the Mine Health and Safety Act and collaboration

amongst tripartite stakeholders through the Mine Health and Safety Council on the implementation of the 2014 MHSC OHS Summit action plan. In this regard, I attach as annexure "**RA2**" a slide presentation by Mr David Msiza, Chairperson of the MHSC, which states the following in relation to the 2014 OHS Milestones:

> "This spirit of tripartism should prevail in all initiatives of the summit milestones."

This spirit cannot be maintained by the Minister's purported unilateral codification of what all the parties had agreed were aspirational milestones.

HOUSING AND LIVING CONDITIONS (para 416)

The Minister has failed to answer the simple objection that section 100(2) of the MPRDA does not empower him to promulgate this element. The Chamber therefore persists in its objection.

REQUIREMENTS FOR AN INTERIM INTERDICT

101 **Ad paragraph 418**

I deny that the Chamber has not met the requirements for an interim interdict.

102 **Ad paragraph 419**

I deny that the Chamber's fears are exaggerated. The Minister's belief that those fears can be alleviated by a departure from the terms of the 2017

Charter is misconceived.

103 **Ad paragraph 419**

The precipitous fall in the value of mining stock was a good measure of the shock induced in the minds of investors by the provisions of the 2017 Charter.

104 **Ad paragraph 421**

"Engagement" with the Department does not in law constitute an alternative remedy.

105 **Ad paragraph 422**

These allegations are denied.

106 **CONDONATION (Paragraphs 424-426)**

While I do not admit these allegations, the Chamber will not oppose the Minister's application for condonation.

107 **Ad paragraph 427**

I deny that there is anything improper with the approach adopted by the Chamber.

108 **Ad paragraph 434**

No such resolution is required. The Chamber's members overwhelmingly support this application, which, given the patent unlawfulness and

irrationality of the contents of the 2017 Charter, is hardly surprising. In this regard I point out that the express allegation in paragraph 14 of the Founding affidavit that I am duly authorized to represent the Chamber in launching this application and deposing to this affidavit on its behalf is not challenged by the Minister.

109 **Ad paragraph 158**

The Chamber does not acknowledge the "express and lawful application" of the 2010 Charter.

110 **Confirmatory affidavits**

I respectfully refer to the confirmatory affidavits by **Mr Ambrose Vusumuzi Richard Mabena** annexed as "**RA3**", **Mr Roger Alan Baxter**, annexed as "**RA4**" and **Mr Sietse Van der Woude**, annexed as "**RA5**" filed evenly herewith.

WHEREFORE, the applicant persists in seeking the relief set out in the notice of motion.

Chabana.

TEBELLO LAPHATSOANA CHABANA

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at **Johannesburg** on the **18th**th day of **August 2017**, the regulations contained in Government Notice No R1268 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

Matshebela

COMMISSIONER OF OATHS

Nothisa Tandiwe Matshebela
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Sandown, Sandton, 2196

Commissioner of Oaths
Ex-Officio / Practising Attorney R.S.A.

List of annexures

RA1 - Draft Reviewed Mining Charter 2016

RA2 - Slide presentation by Mr David Msiza

RA3 - Ambrose Vusumuzi Richard Mabena

RA4 - Roger Alan Baxter

RA5 - Sietse Van der Woude

"RA1"

DEPARTMENT OF MINERAL RESOURCES

NO. 450 **15 APRIL 2016**

REVIEWED BROAD BASED BLACK-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING AND MINERALS INDUSTRY, 2016.

PUBLICATION OF AND INVITATION TO COMMENT ON THE DRAFT REVIEWED BROAD BASED BLACK-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING AND MINERALS INDUSTRY, 2016.

I, **Mosebenzi Joseph Zwane, MP**, Minister of Mineral Resources, hereby publish the draft Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 (draft Reviewed Mining Charter) for public comments.

Interested and affected parties are hereby invited to submit written representations on the draft Reviewed Mining Charter. The aforesaid representations must be marked for the attention of **Ms Sibongile Malie** and hand delivered, emailed or sent by post, within 30 days of publication of this notice to the following addresses;

70 Mentjies street
Trevenna Campus
Sunnyside
0007.

or

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0001.

Email address: Sibongile.Malie@dmr.gov.za

A copy of the draft Reviewed Mining Charter, 2016 is attached hereto.

Mr Mosebenzi Joseph Zwane, MP.
Minister of Mineral Resources.

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REVIEW OF THE BROAD-BASED BLACK-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING AND MINERALS INDUSTRY

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CONTENTS

PREAMBLE

The systematic marginalization of the majority of South Africans, facilitated by exclusionary policies of the apartheid regime, prevented Black people, as defined herein, from owning the means of production and from meaningful participation in the mainstream economy. To redress these historic inequalities, and thus give effect to section 9 (equality clause) of the Constitution of the Republic of South Africa, 1996 (Constitution), the democratic government enacted, *inter alia*, the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) (MPRDA).

The objective of the MPRDA is to facilitate meaningful participation of Black people in the mining and minerals industry. In particular, section 100 (2) (a) of the MPRDA provides for the development of the Mining Charter as an instrument to effect transformation with specific targets. Embedded in the Mining Charter of 2002 is the provision to review the progress and determine what future steps, if any, need to be made to achieve its objectives.

In 2009, consistent with this provision, the Department conducted a comprehensive assessment to ascertain the progress of transformation of the 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, viz. ownership, procurement, employment equity, beneficiation, human resource development, mine community development, housing and living conditions, all of which had not embraced the spirit of the Charter to the letter. To overcome these inadequacies, amendments were made to the Mining Charter of 2002 in order to streamline and expedite attainment of its

objectives. Additionally, the review of the Charter introduced an element of sustainable growth of the mining industry, which sought to ensure sustainable transformation and growth of the mining industry.

As of 2014, the Mining Charter had been in force for a decade. This served as the opportune time to conduct a second assessment of levels of compliance by mining companies with the Amended Charter of 2010. This second assessment has revealed the following:

- Although there was a noticeable improvement in levels of compliance, there still remains a long way for the mining industry to be fully transformed.
- Notwithstanding a paucity of companies of all sizes that have fully embraced the spirit of the Mining Charter, there's an extremely varied performance that seems to suggest a compliance-driven mode of implementation, designed only to protect the "social license to operate".
- Whereas the MPRDA has transferred the ownership of the mineral wealth of our country to all the people of South Africa, under the custodianship of the State, a proliferation of communities living in abject poverty continues to be largely characteristic of the surroundings of mining operations.
- Limited progress has been made in embracing the broad-based empowerment ownership in terms of meaningful economic participation of Black South Africans. The trickle flow of benefits that ought not only to service the loan, but also include cash-flow directly to BEE partners, is vastly limited. To this end, the interests of mineworkers and communities are typically held in nebulously defined Trusts, which constrain the flow of benefits to intended beneficiaries. As a result, the mining industry has broadly been faced with increasing tensions with both workers and host communities.

It is against this backdrop that Government initiated another review process in 2015 aimed at strengthening the efficacy of the Mining Charter as one of the tools for effecting meaningful transformation of the mining and minerals industry.

The review process takes into account the need to align and integrate Government policies to remove ambiguities in respect of interpretation and create regulatory certainty. In this regard the reviewed Mining Charter is aligned to the provisions of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003) and the Codes of Good Practice (DTI Codes).

The reviewed Mining Charter introduces new definitions, terms and targets to effect alignment of the Mining Charter with the BBBEE Act and the Dti Codes. The alignment of these policies intended to ensure meaningful participation of black people as per the objects of the MPRDA and the mining charter and provide for policy and regulatory certainty sought to invest in the development of the industry.

VISION

To facilitate sustainable transformation, growth and development of the mining industry.

MISSION

To give effect to section 100 (2) (a) of the MPRDA, section 9 of the Constitution and harmonise Government's transformation policies.

DEFINITIONS

Government has identified a need to align and integrate the transformation regulatory framework in order to remove ambiguities in respect of interpretation and bring about regulatory certainty. In this regard the definitions of the terms BEE entity, Broad Based Socio-Economic Empowerment, Effective ownership, Black people and Shareholder are aligned with the provisions of the BBBEE Act and the Dti Codes.

"**BBBEE Act**" means Broad-Based Black Economic Empowerment Act 2003 (Act No. 53 of 2003) as amended;

"**Broad-Based Black Economic Empowerment**" means the viable economic empowerment of all black people, in particular women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies that include, but are not limited to-

(a) Increasing the number of black people that manage, own and control enterprises and productive assets;
(b) Facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises;
(c) human resource and skills development;
(d) achieving equitable representation in all occupational categories and levels in the workforce;
(e) preferential procurement from enterprises that are owned or managed by black people; and
(f) investment in enterprises that are owned or managed by black people;

"**Beneficiation**" means beneficiation as defined in the MPRDA;

"**BEE compliant company**" in relation to the procurement element means a company that complies with the Broad-Based Black Economic Empowerment Act 2003 (Act No. 53 of 2003) and the Codes of Good Practice (DTI Codes).

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"**Black people**" is a generic term which means Black Africans, Coloureds and Indians-

(a) Who are citizens of the Republic of South Africa by birth or descent; or

(b) Who became citizens of the Republic of South Africa by naturalisation:

(i) before 27 April 1994; or

(ii) On or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date;

"**Calendar year**" is defined as the one year period that begins on January 1st and ends on December 31st;

"**Community**" means a coherent, social group of Black persons with interest or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law;

"**Core skills and critical skills**" means skills which are a basis for a competitive edge for an organization, such as mining engineers, mechanical engineers, electrical engineers, metallurgical engineers, chemical engineers and artisans;

"**Effective ownership**" means the meaningful participation of black people in the ownership voting rights, economic interest and management control of mining entities;

"**ESOPs**" means Employees Share Ownership Scheme;

"**Labour sending areas**" areas from which majority of mineworkers both historical and current are or have been sourced;

"**Level of management**" refers to line of demarcation between various managerial positions;

"**Locally manufactured goods**" refers to goods manufactured within the Republic of South Africa.

"**Locally based companies**" refers to companies that are domiciled within the Republic of South Africa.

"**Life of Mine**" means the number of years that a particular mine will be operational;

"**Meaningful economic participation**" includes, inter alia, the following key attributes:

- BEE transactions shall be concluded with clearly identifiable partners in the form of BEE entrepreneurs, workers (including ESOPs) and communities;
- Some of the dividends should flow to the BEE partner throughout the term of the investment, and for this purpose, stakeholders must engage the financing entities in order to structure the BEE financing in a manner where a percentage of the cash-flow is used to service the funding of the structure, while the remaining amount is paid to the BEE partners. Accordingly, BEE entities are enabled to leverage equity henceforth in proportion to vested interest over the life of the transaction in order to facilitate sustainable growth of BEE partners;
- BEE partners 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 instrument used;
- Ownership shall vest within the timeframes agreed with the BEE;

"**Mine Community**" refers to communities where mining takes place and labour sending areas;

"**Mining Charter**" means the broad-based black-economic empowerment Charter for the South African Mining and Mineral Industry;

"**Ministerial Skills Development Trust Fund**" refers to a trust fund established by the Minister for essential skills development activities such as artisanal, bursaries, literacy and numeracy and reflective of the proportional representation, but excluding the mandatory skills levy;

"**MPRDA**" means the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) as amended;

"**Social Development Trust**" refers to a social development fund established by the Minister towards socio-economic development of local communities, capacity building for black suppliers of goods (Capital and Consumable) and services.

"**Shareholder**" means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register and/or a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached;

"**Small business**" means small business as defined in the National Small Business Act, 1996 (Act No. 102 of 1996).

"**Stakeholder**" refers to a person, group, organisation, or system which affects or can be affected by an organisation's actions which may relate to policies intended to allow the aforementioned to participate in the decision making in which all may have a stake.

PART A

1. OBJECTIVES OF MINING CHARTER

The Broad Based Black Economic Empowerment Charter for the South African Industry, herein referred as the "Mining Charter", is a government instrument designed to effect sustainable growth and meaningfully transformation of the mining industry. The Mining Charter seeks to achieve the following objectives:

(a) Promote equitable access to the nation's mineral resources to all the people of South Africa;

(b) Substantially and meaningfully expand opportunities for black people to enter the mining and minerals industry and to benefit from the exploitation of the nation's mineral resources;

(c) Utilise and expand the existing skills base for the empowerment of black people and to serve the community;

(d) Promote employment and advance the social and economic welfare of mine communities and major labour sending areas;

(e) Promote beneficiation of South Africa's mineral commodities.

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2. ELEMENTS OF THE MINING CHARTER

2.1 OWNERSHIP

Effective ownership is a requisite instrument to effect meaningful integration of black people into the mainstream economy. In order to achieve a substantial change in racial and gender disparities prevalent in ownership of mining assets, and thus pave the way for meaningful participation of black people for attainment of sustainable growth of the mining industry, stakeholders must:

(a) Achieve a minimum target of 26% ownership per mining right to enable meaningful economic participation of black people taking into account the provisions of section 37(2) of the Companies Act, 2008 (Act No. 71 of 2008);

(b) The 26% stake shall be allocated in not less than a minimum of 5% shares equitably distributed amongst workers (in the form of ESOPS), black entrepreneurs and the community respectively.

(c) The aforementioned minimum community participation and workers stake shall be held in Trusts created by the community and the workers respectively and registered with the Master of the High Court with jurisdiction.

(d) The trusts must be constituted in terms of the Trust Property Control Act, 57 of 1988 (Act No. 57 of 1988) as amended and report to the South Africa Revenue Services and the Department of Mineral Resources.

(e) A community and workers trust must include representation from the traditional authorities and unions respectively.

(f) Shareholders of the black empowerment stake must create Special Purpose Vehicle (SPV) to manage the 26% black economic empowerment stake.

(g) Each empowerment transaction must register an SPV.

(h) There must be a BBBEE transaction for each mining right granted and one SPV for each empowerment transaction.

(i) The mining right holders must, with the concurrence of the BEE partners, consolidate the empowerment transactions with the prior written consent of the Minister.

(j) The afore mentioned SPV must register its own Memorandum of Incorporation (MOI) to regulate the black economic participation stake amongst the black workers, black entrepreneurs and the community, consistent with relevant provisions of the Companies Act.

(k) The MOI for the SPV must address the following issues;

  (i) appointment of joint representative;

  (ii) allocation of voting rights in respect of both the special and ordinary resolutions;

  (iii) dispute resolution mechanism; and

  (iv) any other matter prescribed by the Companies Act.

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.

All existing mining right holders must align BEE transaction(s) concluded prior to the coming into operation of the amended mining charter 2010 with the reviewed mining Charter 2016. Where a BEE partner or partners have exited, BEE contract has lapsed or the previous BEE partner has transferred shares to a non-BEE company, the mining right holder must within the three years transitional period from the date of publication of the Charter review its empowerment credentials consistent with the amended 2016 mining Charter.

2.2 PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT

Enterprise development and local procurement are one of the key instruments to achieve both competitiveness and transformation of the mining industry. It also presents opportunities to expand economic growth that allows for the creation of decent jobs and widens scope for market access of South African capital goods, consumer goods and services.

To achieve this, a mining right holder must ensure that procurement policies and actual procurement is aligned to the following:

Capital goods

(a) A mining right holder must procure a minimum of 60% locally manufactured capital goods from BEE compliant manufacturing companies.

(b) 30% of the above 60% must preferably be given to small business development which are BEE compliant, a minimum of 10% of the 30% must be reserved for BEE compliant enterprise development.

Consumables

(a) A mining right holder must procure a minimum of 70% of locally manufactured consumables from BEE compliant manufacturing companies.

(b) A minimum of 30% of the 70% must be given to small business development which are BEE compliant, a minimum of 10% of the 30% must be reserved for BEE compliant enterprise development.

Services

(a) A Mining right holder must procure a minimum of 80% services from BEE compliant and locally based companies.

(b) A minimum of 40% of the 80% must be given to small business development which are BEE compliant, a minimum of 10% of the 40% must be reserved for BEE compliant enterprise development.

(c) Mining right holders must utilise South African based facilities for the analysis of 100% of each company's mineral samples across the mining value chain. A mining right holder may not conduct sample analyses using foreign based facilities without the prior written consent of the Minister.

Mining right holders shall before submitting the annual mining charter report to the Department verify local content for capital and consumer goods as provided for above with the South African Bureau of Standards (SABS); and

Multinational supplier of goods must annually contribute a minimum of 1% of annual turnover generated from local mining companies towards socio-economic development of local communities, capacity building for BEE suppliers of goods (Capital and Consumable) and services into a Social Development Trust Fund established by the Minister for that purpose.

The trustees of the Social Development Trust shall include stakeholders from organised business, organised labour and Government.

2.3 BENEFICIATION

The Government policy on mineral beneficiation seeks to leverage the country's comparative advantage in mineral resource wealth to be a fulcrum for industrialisation by strengthening the linkages between mining and manufacturing. Whilst other elements of this Charter will strengthen side stream linkages between mining and manufacturing (e.g. procurement, Human resource development etc.), this element will strengthen the downstream linkages.

In this regard, the Mining Charter provides for a mechanism for companies to offset up to 11 percentage of the 26% of the ownership reserved for black people.

2.4 EMPLOYMENT EQUITY

The purpose of Employment Equity Act, 55 of 1998, (Act No. 55 of 1998) (EE Act) is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce.

Consistent with the EE Act, workplace diversity and equitable representation at all levels are catalysts for social cohesion, transformation and competitiveness of the mining industry. In order to create a conducive environment to ensure diversity as well as participation of black people at all decision-making positions and core occupational categories in the mining industry, every mining company must achieve a minimum threshold of black people representation as follows:

Executive Management (Board)

(a) A minimum of 50% Black people with exercisable voting rights and proportionally representative, 15% of which must be black females in line employment active population (EAP).

(b) A minimum of 50% Black people proportional represented at the executive directors' level as a percentage of all executive directors of which 25% must be black female in line with the employment active population.

Senior Management (EXCO)

(a) A minimum of 60% Black Employees in Senior Management as a proportional representative percentage of all Senior Management of which 30% is black females in line with the employment active population.

Middle Management level

(a) A minimum of 75% of Black employees in Middle Management as a proportional representative percentage of all middle Management of which 38% is black females employees in that category in line with the employment active population.

Junior Management level

(a) A minimum of 88% Black employees in Junior Management as a proportional representative percentage of all junior management of which 44% is black females in that category in line with the employment active population (EAP).

Employees with disabilities

(a) 2% of Black employees with disabilities as a percentage of all employees.

Core and Critical skills

Mining right holders must ensure that a minimum of 40% Black people are represented in the mining company's core and critical skills by diversifying their existing pools. To achieve this, the right holder must:

(a) Identify and fast track their existing pools for core and critical skills.
(b) The abovementioned fast tracking of pools must be a proportional representation of the workforce.

2.5 HUMAN RESOURCE DEVELOPMENT

The mining industry is a knowledge based and thus hinges on human resource development, constituting an integral part of social transformation at workplace and sustainable growth. To achieve this objective, the mining industry must:

(a) Invest 5% of annual payroll essential skills development activities such as artisanal, bursaries, literacy and numeracy and reflective of the proportional representation, but excluding the mandatory skills levy;

(b) The 5% annual payroll for skills development shall include support for South African based academic institutions, research and development initiatives intended to develop solutions in exploration, mining, processing, technology efficiency (energy and water use in mining), beneficiation as well as environmental conservation and rehabilitation.

(c) Invest 15% of the above mentioned 5% payroll levy to the Ministerial Skills Development Trust Fund. A mining company may make representations to the Minister for exemption from aspects of this requirement in the event of having partnered and supported State owned entity (e.g Mintek) in respect of research and development.

The trustees of the Ministerial Skills Development Trust Fund shall include stakeholders from organised business, organised labour and Government.

2.6 MINE COMMUNITY DEVELOPMENT

Mine communities form an integral part of mining development, there must therefore be a balance between mining development and mine community socio-economic development. Mining companies must meaningful contribute towards community development, both in terms of size and impact, in keeping with the principles of the social license to operate. Stakeholders must adhere to the following:

Meaningful consultation and co-ordination between mining companies, communities and local municipalities is a critical element in ensuring mine community development. Consistent with international best practices mining companies must therefore:

(a) Annually contribute a minimum of 1% of annual turnover towards local community development and labour sending areas.

2.7 HOUSING AND LIVING CONDITIONS

Human dignity and privacy for mineworkers are still the hallmarks to enhance productivity and expedite transformation in the mining industry in terms of housing and living conditions. In this regard mining companies' must improve the standards of housing and living conditions for mine workers in line with the Housing and Living Conditions Standards for the Minerals Industry, as follows:

(a) Maintain the occupancy rate of one person per unit and maintain family units;
(b) Contribute towards home ownership options for interested mine employees in consultation with organised labour.

The contribution for home ownership options include but not limited to the following:

(a) mining companies offering different building packages to interested employees;
(b) subsidising such workers to buy houses;
(c) mining companies partnering with finance institutions to issue guarantees for home ownership on behalf of the mine employees;
(d) Mining companies must ensure that where the company is offering housing for its employees, such housing must be integrated within communities in mining and labour sending areas in line with the Department of Human Settlement policies on Sustainable Integrated Human Settlement.

PART B

2.8 APPLICATION OF THE MINING CHARTER FOR PERMITS/LICENCES GRANTED UNDER THE PRECIOUS METALS ACT, 2005, AND THE DIAMONDS ACT, 1986, AS AMENDED.

The Diamonds Act 1986 and the Precious Metals Act, 2005 make provision for the South African Diamonds and Precious Metals Regulator to have regard to the requirements of the Mining Charter when considering applications lodged in terms of these Acts.

The Mining charter shall therefore, apply to the industries administered under these Acts as follows:

CATEGORY	METAL USAGE IN KG/ANNUM	EXEMPT FROM THE FOLLOWING TARGETS	REQUIRED TO COMPLY WITH THE FOLLOWING TARGETS
Exempted Micro Enterprises (including students)	1.5 kg / annum Estimated max turnover Less than R1 million	Ownership	N/A
		Human Resource Development	
		Procurement	
		Employment equity	
		Community development	
Qualifying Small Enterprises	Between 1.5 kg and 5 kg/annum Estimated max turnover R1 million to 3.8 million	Ownership	Procurement
		Community development	Employment equity
			Human resource development

Medium and large entities	Between 5 kg and up annum Estimated max turnover Greater than R3.8 million	Community development	Ownership
			Procurement
			Employment Equity
			Human resource development

2.9 REPORTING (MONITORING AND COMPLIANCE)

Every mining company must report its level of compliance with the Mining Charter annually, as provided for by Section 28(2) (c) of the MPRDA. The Department shall monitor and evaluate implementation, taking into account the impact of material constraints which may result in not achieving set target.

2.10 APPLICABILITY OF TARGETS

All targets stipulated in the mining charter shall be applicable throughout the life of mine, unless the specific element specifies otherwise.

Ownership, Housing and living conditions and human resources development elements are ring fenced which require 100% compliance at all times.

2.11 TRANSITIONAL ARRANGEMENTS

The existing mining right holders are given a maximum of three years to comply with the revised targets of the Mining Charter from the date of publication of the Mining Charter.

In all the elements, mining right holders must align existing targets cumulatively from the mining charter 2014 targets within three years period to meet the revised targets.

In terms of this mining charter, performance shall be reported and audited against each element in respect of implementation for the applicable year of the report.

2.12 NON-COMPLIANCE

Mining right holders who have not complied with the ownership, housing and living conditions and human resource development elements as well as those who fall between level 6 and 8 of the Mining Charter scored-card will be regarded as non-compliant with the provisions of the Charter and the MPRDA shall render the mining right holder in breach of the MPRDA and subject to sanctions provided for in the Act.

2.13 REVIEW OF THE CHARTER

The Minister of the Department of Mineral Resources may review the Mining Charter as and when the need arises.

SCORECARD FOR THE BROAD-BASED SOCIO-ECONOMIC EMPOWEREMENT CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY

ELEMENT[1]	DESCRIPTION	COMPLIANCE TARGET	YEARLY TARGET	WEIGHTING
Ownership	Minimum target for HDSA ownership	Workers	26%	Y/N
		Entrepreneurs		
		Communities		
		Beneficiation[2] offset of up to 11 percentage of ownership		
Housing and Living Conditions	Maintaining a one person occupancy rate	Occupancy rate of one person	100%	Y/N
	Conversion and upgrading of hostels into family units	Family units established		
	Facilitate for home ownership through buying of homes	Home ownership facilitation in line with integrated community development policies		
Human Resources Development[3]	HRD expenditure as percentage of total annual payroll (excl. mandatory skills development levy)	Skills development	5%	Y/N
	Percentage of the annual 5% payroll	Ministerial development trust fund	15%	
	Right holders to contribute the remainder of the 5%	Contribution to Research and academic institutions		
		Bursaries		

[1] It must be noted that Ownership, Housing and Living Conditions and Human Resource Development are ring fenced elements

[2] This sub-element provides for up to 11 percentage to be off-set against 26% ownership in line with the terms and conditions contained in Section 26 of the MPRDA.

[3] This element is measured in terms of the national demographics as per the statistics of the economically active population.

	annual payroll to these	Artisan development					
		Literacy & Numeracy					
Employment Equity[4]	Diversification of the workplace to reflect the country's demographics to attain competitiveness	Executive (Board)				50%	30%
		Black Africans	Coloureds	Indians	Whites		
		Senior (EXCO)				60%	
		Black Africans	Coloureds	Indians	Whites		
		Middle				75%	
		Black Africans	Coloureds	Indians	Whites		
		Junior				88%	
		Black Africans	Coloureds	Indians	Whites		
		Disabilities				2%	
		Black Africans	Coloureds	Indians	Whites		
		Core & Critical				40%	
		Black Africans	Coloureds	Indians	Whites		
Procurement & Supplier development	Procurement spent from locally based companies	Locally manufactured capital goods[5]				60%	
		Locally manufactured consumables				70%	
		Percentage of services target procured from local companies				80%	

[4] This element is measured in terms of the national demographics as per the statistics of the economically active population.

[5] A minimum of 30% on capital goods, 30% on consumables and 40% on services must be set aside for small business development.

		Percentage of samples analysed using local facilities	100%	40%
	Multinational suppliers contribution to the social fund	Annual procurement spend from multinational suppliers	1%	
Mine Community Development	Conduct ethnographic community consultative and collaborative processes to delineate community needs analysis	Local community development	1% of annual turnover	30%

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Annexure A

This annexure provides an alignment between the DTI levels and DMR BBSEE scorecard.

LEVELS	DTI SCORECARD	DMR SCORECARD	3 Ring Fenced Elements[6] + percentage weighting
Level 1	≥100 points	3 Ring fenced Elements + 100%	Compliant[7]
Level 2	≥85 but <100 points	3 Ring fenced Elements + 80 -100%	
Level 3	≥75 but <85 points	3 Ring fenced Elements + 70-80%	
Level 4	≥65 but <75 points	3 Ring fenced Elements + 60-70%	
Level 5	≥55 but <65 points	3 Ring fenced Elements + 50-60%	
[redacted]			

[6] Ring Fenced Elements are those elements where 100% compliance is required.

[7] A right holder will be deemed non-compliant if they fail to comply with one or more of the ring fenced elements regardless of their percentage score

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WARNING!!!

To all *suppliers and potential suppliers* of goods to the Government Printing Works

The Government Printing Works would like to warn members of the public against an organised syndicate(s) scamming unsuspecting members of the public and claiming to act on behalf of the Government Printing Works.

One of the ways in which the syndicate operates is by requesting quotations for various goods and services on a quotation form with the logo of the Government Printing Works. Once the official order is placed the syndicate requesting upfront payment before delivery will take place. Once the upfront payment is done the syndicate do not deliver the goods and service provider then expect payment from Government Printing Works.

Government Printing Works condemns such illegal activities and encourages service providers to confirm the legitimacy of purchase orders with GPW SCM, prior to processing and delivery of goods.

To confirm the legitimacy of purchase orders, please contact:

Renny Chetty (012) 748-6375 (Renny.Chetty@gpw.gov.za),

Anna-Marie du Toit (012) 748-6292 (Anna-Marie.DuToit@gpw.gov.za) and

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The Road to Zero Harm
New Milestones

Mr. David Msiza
Chairperson of the MHSC
19th November 2014

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"RA2"

RC N.T

AGENDA

- Tripartism towards target of ZERO HARM
- The 2014 Milestones
  - Occupational Safety
  - Occupational Health
  - TB & HIV/AIDS
  - Culture Transformation
  - Centre of Excellence
- Conclusions

MHSC

mineral resources
REPUBLIC OF SOUTH AFRICA

THE 2014 OHS MILESTONES

- The intent of the milestones that follow is to further accelerate our journey to zero harm.

- The MHSC's Culture Transformation Framework (CTF) and the Centre of Excellence (CoE) will also be pivotal drivers in accelerating our journey to zero harm.

THE 2014 OHS MILESTONES

- The milestones were developed collaboratively between the stakeholders
- Agreed upon by our Principals.
- This collaborative efforts will strive to ensure a learning and participative culture where everybody is treated with care, dignity and respect.
- This spirit of tripartism should prevail in all initiatives of the summit milestones.

THE 2014 OHS MILESTONES

- For each milestone clear action plans and initiatives were developed.

- Implementation of risk-specific activities such as:
  - Adoption of leading practices
  - Implementation of research outcomes

- Clear timeframes for delivery

- Roles and responsibilities defined

2014 Occupational Safety Milestones

ELIMINATION OF FATALITIES AND INJURIES

- Every mining company must have a target of ZERO FATALITIES
- Every Fatality is one too many, we will eliminate fatalities by December 2020.
- Up to December 2016, 20% reduction in Serious Injuries* per year.
- From January 2017, 20% reduction in Lost Time Injuries (LTI**) per year.

*Serious injury is an injury which either incapacitates the injured employee from performing that employee's normal or similar occupation for a period totaling 14 days of more or which causes the injured employee to suffer the loss of a joint, or part of a joint, or sustain a permanent disability.

**LTI is any injury which incapacitates the injured employee's normal or similar occupation the next calendar day.

[redacted]

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2014 Occupational Health Milestones

ELIMINATION OF OCCUPATIONAL LUNG DISEASES

- **By December 2024, 95% of all exposure measurement results will be below the milestone level for respirable crystalline silica of 0.05 mg/m^3 (these results are individual readings and not average results).**
- **By December 2024, 95% of all exposure measurement results will be below the milestone level for platinum dust respirable particulate of 1.5 mg/m^3 (<5% crystalline silica) (these results are individual readings and not average results).**
- **By December 2024, 95% of all exposure measurement results will be below the milestone level for coal dust respirable particulate of 1.5 mg/m^3 (<5% crystalline silica) (these results are individual readings and not average results).**
- **Using present diagnostic techniques, no new cases of silicosis, pneumoconiosis, coal worker's pneumoconiosis will occur amongst previously unexposed individuals.**

("previously unexposed individual" are those unexposed to mining dust prior to December 2008 i.e. equivalent to a new persons who entered the industry in 2009

EC 14.7

2014 Occupational Health Milestones

ELIMINATION OF NOISE INDUCED HEARING LOSS

- **Quietening of Equipment**
  - **By December 2024, the total operational or process noise emitted by any equipment must not exceed a milestone sound pressure level of 107 dB(A).**

(This milestone of the sound pressure levels will be verified by initiatives under the CoE and MOSH and reviewed in 2016

- **For the Individual**
  - **By December 2016, no employee's Standard Threshold Shift (STS) will exceed 25 dB from the baseline when averaged at 2000, 3000 and 4000 Hz in one or both ears**

- **Establish a multi- stakeholder team to consider different compensation systems**

M.T

2014 TB & HIV/AIDS Milestones

PREVENTION of TB and HIV/AIDS

Reduction and prevention of TB, HIV & AIDS infections

- **By December 2024, the TB incidence rate should be at or below the National TB incident rate and**
- **100% of employees should be offered HCT annually with all eligible employees linked to an ART programme as per the NSP.**

2014 CTF Milestones

CULTURE TRANSFORMATION FRAMEWORK

Implementation of the approved framework

- **By December 2020 there will be 100% implementation of:**
  - **The Leadership Pillar of the CTF**
  - **The Risk Management Pillar of the CTF**
  - **The Bonus and Performance Incentive Pillar of the CTF**
  - **The Data Management Pillar of the CTF**
  - **The Diversity Management of the CTF**
  - **The Leading Practice pillar of the CTF**

Implementation of the approved framework

- **After December 2020 the remaining pillars will be implemented:**
  - **The Integrated Mining Activity Pillar of the CTF**
  - **The Technology Pillar of the CTF**
  - **The Inspectorate Pillar of the CTF**
  - **Tripartism Pillar of the CTF**
  - **Regulatory Framework Pillar of the CTF**

1819

N.T

2014 CoE Milestones

CENTRE OF EXCELLENCE

Implement the Centre of Excellence

- Launch the Centre of Excellence
- Undertake quick win projects
- Technology & knowledge transfer of quick win projects
- Centre of Excellence operational by 1st April 2016

1820

CONCLUSION

- It is important that all the stakeholders should live the theme of STRIVING FOR ZERO HARM

ENSURING EVERY MINE WORKER RETURNS FROM WORK UNHARMED EVERY DAY.

- Every stakeholder to ensure that these milestones are achieved timely.

THANK YOU!

1822

"RA3"

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

1823

Case no: 43621/17

In the matter between:

The Chamber of Mines of South Africa Applicant

and

Minister of Mineral Resources Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned,

AMBROSE VUSUMUZI RICHARD MABENA

hereby say on oath that:

1 Prior to my retirement on 30 June 2016, I was Senior Executive: Transformation and Stakeholder Relations of the applicant.

2 The facts in this affidavit are true and correct and, unless otherwise stated or the contrary appears from the context, are within my personal knowledge.

3 I have read the replying affidavit of Tebello Laphatsoana Chabana and confirm its correctness insofar as it relates to me.

N.T

AMBROSE VUSUMUZI RICHARD MABENA

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at **Sandton** on the ___ day of **August 2017**, the regulations contained in Government Notice No R1268 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Full Names

"RAL"

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

1825

Case no: 43621/17

In the matter between:

The Chamber of Mines of South Africa Applicant

and

Minister of Mineral Resources Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned,

ROGER ALAN BAXTER

hereby say on oath that:

1 I am the Chief Executive Officer of the Chamber of Mines of South Africa.

2 I have read the replying affidavit of Tebello Laphatsoana Chabana and confirm its correctness insofar as it relates to me.

ROGER ALAN BAXTER

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at **Sandton** on the **18th** day of **August 2017**, the regulations contained in Government Notice No R1268 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Full Names

Nothisa Tandiwe Matshebela
155 - 5th Street
Sandown, Sandton, 2196

Commissioner of Oaths
Ex-Officio / Practising Attorney R.S.A

"RA 5"

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

1827

Case no: 43621/17

In the matter between:

The Chamber of Mines of South Africa Applicant

and

Minister of Mineral Resources Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned,

SIETSE VAN DER WOUDE

hereby say on oath that:

1 I am the Senior Executive: Modernisation & Safety of the Chamber of Mines of South Africa.

2 I have read the replying affidavit of Tebello Laphatsoana Chabana and confirm its correctness insofar as it relates to me.

SIETSE VAN DER WOUDE

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at **Sandton** on the ___ day of **August 2017**, the regulations contained in Government Notice No R1268 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Full Names