IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no: 71147/17

In the matter between:

The Chamber of Mines of South Africa	First Applicant
Mining Affected Communities United in Action	Second Applicant
Women from Mining Affected Communities United in Action	Third Applicant
Mining and Environmental Justice Community Network of South Africa	Fourth Applicant
Sefikile Community	Fifth Applicant
Lesethleng Community	Sixth Applicant
Babina Phuti Ba Ga-Makola Community	Seventh Applicant
Kgatlu Community	Eighth Applicant
and	
Minister of Mineral Resources	Respondent
And	
National Union of Mineworkers	First *Amicus Curiae*
Solidarity Trade Union	Second *Amicus Curiae*

FILING SHEET

Presented for service and filing: First Applicant's Heads of Argument

Dated at **Pretoria** on this the **7th** day of **December 2017**.

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no: 71147/17

In the matter between:

The Chamber of Mines of South Africa	First Applicant
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Babina Phuti Ba Ga-Makola Community	Seventh Applicant
Kgatlu Community	Eighth Applicant
and	
Minister of Mineral Resources	Respondent
and, as amici curiae,	
National Union of Mineworkers	First Amicus Curiae
Solidarity Trade Union	Second Amicus Curiae

FIRST APPLICANT'S HEADS OF ARGUMENT

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

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

THE NATURE AND PURPOSE OF THE APPLICATION

1 This is an application for two declaratory orders relating to, and for the judicial review and setting aside of, the 2017 Charter[2] under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") *alternatively* the principle of legality.[3]

2 The Chamber's review application is based on -

2.1 general grounds of review of the 2017 Charter;

2.2 grounds of review relating to the ownership elements of the 2017 Charter;

2.3 grounds of review relating to the non-ownership elements of the 2017 Charter; and

2.4 grounds of review in regard to miscellaneous clauses 2.8 to 2.15 of the 2017 Charter.

3 The dispute underlying the application for the declaratory orders is the parties' divergent views about the ambit of the Minister's powers under section 100(2) of the MPRDA and the legal nature and role of the Charter in the context of the MPRDA. These questions are also determinative of the first general ground of review. The matter, therefore, in the first instance concerns the interpretation of section 100(2) of the MPRDA and legal questions about the nature and ambit of the Minister's powers thereunder, and the nature and function of the Charter under the MPRDA.

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[2] In these heads, we use the definitions set out in paragraph 14 of the founding affidavit.

[3] Notice of Motion, p 1-2

4 It is necessary also to state at the outset, in view of the contents of the Minister's answering affidavit, what the application is **not** about, to wit:

4.1 the alleged anti-transformation motives of the Chamber or a difference in "imperatives" or outcomes;

4.2 the alleged obstructive and uncooperative behaviour of the Chamber in the consultation process;

4.3 the Chamber's alleged past conduct in the development or application of the 2004 or 2010 charters; or

4.4 the alleged benevolence and flexibility of the Minister in applying the Charter.

5 Apart from being factually incorrect, as demonstrated in the replying affidavit, these allegations are all irrelevant to the legal issues at stake in this application.

DECLARATORS AND GENERAL GROUNDS OF REVIEW

First general ground of review: excess of power

6 As stated, the declarators and the first general ground of review concern the ambit and scope of the Minister's powers under section 100(2) of the MPRDA.

7 The Chamber alleged in the founding affidavit that the Minister has far exceeded his powers under section 100(2) and, in effect, impermissibly sought to legislate through the backdoor by way of the 2017 Charter in contravention of the doctrine of the separation of powers. The Minister in his answering affidavit drew the battle lines by contending that the Charter is law.

8 The Minister's legislative intent is discernible in the structure and contents of

the Charter, as appears for example from the following:[4]

8.1 The Charter was published in the Government Gazette and, although this is not objectionable in itself, proclaims that it *"shall come into operation from the date of publication of this notice in the Government Gazette"* as if it were a species of legislation.[5]

8.2 It introduces new concepts and definitions foreign to the MPRDA.

8.3 It replaces 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) with a new definition of *"Black Person"*, and thereby changes the class of persons whom the MPRDA intended to advance by these measures.

8.4 It proclaims to be generally applicable at all times to all holders, and not only to function as a formal policy guiding the Minister's discretion in application processes as contemplated in the MPRDA (as set out more fully below) as appears, for example, from statements such as that:

8.4.1 *"a Holder"* (as opposed to an applicant) *"must comply with the following ..."*;[6]

8.4.2 *"The ownership, Mine Community development and human resources development elements are ring fenced and require 100%*

[4] These examples are dealt with in more detail under the grounds of review relating to the specific elements.

[5] See annexure FA5, p 159

[6] Annexure FA5, par 2.1, p 172

compliance at all times.";[7]

8.4.3 "*All targets shall be applicable throughout the duration of a mining right (including prospecting and other exploration rights) ...*";[8]

8.4.4 "*A holder who has not complied with the ownership, mine community development and human resource developments elements and falls between level 5 and 8 of the scorecard will be regarded as non-compliant with the provisions of the Mining Charter and in breach of the MPRDA and will be dealt with in terms of section 93 read in conjunction with section 47, 98, and 99 of the MPRDA.*"[9]

8.5 It purports to be applicable to all existing holders despite the fact that rights have been granted to them on particular terms and conditions including as to their empowerment obligations.

9 The Chamber's first challenge to the 2017 Charter is accordingly the Minister's lack of power to publish the Charter in the form of what purports to be a legislative instrument.

10 Secondly, the Chamber submits that the contents and scope of the Charter go far beyond what is contemplated in section 100(2)(a) of the MPRDA and in some cases beyond the scope of the MPRDA itself. The 2017 Charter seeks not merely to set out a framework for targets and time-table for effecting the

[7] Annexure FA5, par 2.9, p 190

[8] Annexure FA5, par 2.10, p 190

[9] Annexure FA5, par 2.12, p 192

entry of HDSA's into the mining industry and how the objects of the Act *can* be achieved; it seeks to regulate the mining industry in every sphere and even to impose taxes. In doing so it impermissibly overrides, amends and conflicts with the MPRDA and even other legislation such as the Companies Act, 2008.

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

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

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

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

13.2 The Chamber's submissions on the legal nature of the Charter;

13.3 The Minister's case: The Charter is law:

13.3.1 The Minister's view offends against separation of powers;

13.3.2 The Minister's view does not accord with the MPRDA;

13.4 PAJA review; and

13.5 Legality review.

The wording and statutory context of section 100(2)

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

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

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

> "(*a*) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;
>
> (*b*) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;
>
> (*c*) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
>
> (*d*) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
>
> *[Para. (d) substituted by s. 2 of Act No. 49 of 2008.]*
>
> (*e*) promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;

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

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

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

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

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

17 The objects of an Act serve as an aide in the interpretation of the provisions of the Act.[10] In the case of the MPRDA, section 4 expressly provides that:

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

18 The objects of an Act, however, do not operate *in vacuo* and do not impose 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, properly interpreted in view of the objects.

19 In the case of the MPRDA, rather unusually, a number of the substantive

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

provisions make express reference to objects[11] of the Act. See in this regard sections 12(3)(d)[12], 17(1)(f)[13], 17(4)[14], 23(1)(h),[15] 55(1),[16] 100(2) and item 7(2)(k)[17] in Schedule II of the MPRDA.

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

21 As can be seen from section 2, the objects of the MPRDA are framed in broad and general terms, as objects usually are. In the absence of guidelines, the

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

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

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

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

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

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

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

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

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

> "(a) To ensure the attainment of the Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources."[18]
>
> (b) The charter must set out, amongst others how the objects referred to in section 2 (c), (d), (e), (f) and (i) can be achieved."

23 The Charter itself is only expressly referred to in a few sections of the MPRDA, to wit:

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

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

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

24 There are no other provisions in the MPRDA which expressly refer to or require compliance with the Charter as such.

25 The legislature, in the above mentioned substantive provisions of the MPRDA,[19] prescribes when and to what end the Minister must assess whether an applicant has given effect to the specified objects referred to in section 2 of the MPRDA. It thus serves no purpose for the Minister to make general statements regarding the objects of the Act and the Charter as if the Act does not contain these specific substantive provisions.

26 This specificity may be illustrated with reference to the MPRDA provisions pertaining to mining rights and conversions of old order mining rights into mining rights:

26.1 Section 22 provides that an applicant for a mining right must apply therefor in the prescribed manner.[20] Part B of the application form (prescribed in the regulations) *inter alia* requires information on "OWNERSHIP OF PARTICIPATION BY HISTORICALLY DISADVANTAGED SOUTH AFRICANS (HDSA)". It also requires that the application must be

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

[20] See regulations 2 and 10.

accompanied by the prescribed social and labour plan.[21]

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

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

26.4 It is clear therefore that the requirements to be met by an applicant in applying for a mining right or lodging an old order right for conversion are those that prevail at the time the application or lodgement is considered.

26.5 If the Minister is satisfied that the grant of such right would further the objects referred to in sections 2(d) and (f), in accordance with the Charter contemplated in section 100(2) and the prescribed social and labour plan, he must grant the right. There can accordingly be no suggestion that this section imposes a general duty on *holders* of mining rights to comply with

[21] See regulation 46.

the provisions of future Charters. This outcome does not emasculate or defeat the purposes of the Charter. It is up to the Minister firstly to decide whether the grant of the application will be in accordance with the Charter and secondly to impose such conditions in the mining right as are reasonably required to meet that requirement. If he fails to do so he cannot thereafter seek to impose additional obligations on the mining right holder via the Charter.

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

> "(k) documentary proof of the manner in which the holder of the right will give effect to the object referred to in section 2(d) and 2(f)."[22]

26.7 In granting the mining right, the Minister is authorised to impose (*intra vires*) terms and conditions. Section 23(6) of the MPRDA provides that the mining right is subject "to this Act,[23] any relevant law, the terms and conditions stated in the right and the prescribed[24] terms and conditions".

26.8 The Minister has attached to his answering affidavit the standard terms and

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

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

[24] No terms and conditions have been prescribed.

conditions imposed when granting any prospecting or mining right.[25] As appears from these documents, they contain a recordal of the specific empowerment agreement relied upon by the Minister for the grant of the right and imposes an obligation on the holder to honour such agreement by way of a term of the right.[26] In other words, the manner in which the applicant indicates in its application that it intends to give effect to the objects in sections 2(d) and (f) (concretised in its empowerment agreement) and on the basis of which the Minister is satisfied that these objects of the Act would be furthered, is made a term of the mining right.

26.9 Once granted, the holder of the right is obliged to comply with the provisions of the Act and the terms and conditions stated in the mining right.[27] The holder is thus obliged to comply with the specific empowerment agreement it entered into as a term of its right. We note in this regard that the Minister's statement[28] that this term is proof of the general legal enforceability of the Charter is simply wrong. The standard term (usually clause 17) imposes an obligation to comply with the empowerment agreement, not the Charter.

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

[25] Answering affidavit para 147.4, p 352; Annexures AA41 and 42, pp 1163-1186.

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

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

[28] Answering affidavit para 147.6, p 352

documents.

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

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

27.1 a holder cannot be required thereafter to comply with new Charter provisions introduced after the grant of the right - the MPRDA does not require it;[29] and

27.2 a failure to do so, cannot be penalised by a revocation or cancellation of the mining right – the MPRDA does not permit it.

28 Quite apart from the presumption against retrospectivity when interpreting statutory provisions, there is nothing in the MPRDA which provides, either expressly or by necessary implication, that once a mining right has been granted to an applicant, the holder will, in order to retain such right, have to meet new requirements set out in Charters revised from time to time, failing which its right will be jeopardized.

29 Put differently, the decision-maker is *functus officio* and may not amend or revoke his decision in the absence of clear statutory authority to do so, and there is none. As set out more fully below, section 47 of the MPRDA upon

[29] It is also an object of the MPRDA in section 2(g) to provide for security of tenure in respect of prospecting and mining operations.

which the Minister apparently relies, does not constitute such authority.

30 In the premises, it is submitted that the Chamber is entitled to the declaratory orders set out in prayer 1 of the Notice of Motion.

The Chamber's submissions on the legal nature of the Charter

31 In view of the analysis of the Act above, it is submitted that, upon a proper contextual interpretation of section 100(2), the Charter is intended to guide the Minister's discretion, on the basis of a published document, when he takes decisions under those sections of the MPRDA[30] which require that an assessment be made as to whether, or the extent to which, an applicant has given effect to the objects referred to in section 2(c), (d), (e), (f) and/or (i) of the MPRDA.

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

33 It is accordingly submitted -

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

33.2 which must be applied by the Minister;

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

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

34 A policy, formal or otherwise, is not legislation. The fact that section 23(1)(h) of the MPRDA requires the Minister to consider whether *"the granting of such right will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan"* when considering an application for a mining right, does not transform the Charter into a law. The fact that the Minister must apply it, i.e. that it is lawful to apply it in under section 23, should not be confused with it having the "force of law". It is not a law. Section 100(2)(b) indeed requires that the Charter should be "developed" to set a framework for targets and a time-table and set out how the objects referred to in those sections *can* be achieved. That is language indicative of a policy, not of legislation.[31]

35 The statements of Harms JA in *Akani* are apposite in this regard:[32]

> "I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between legislature and executive will disappear. Cf *Executive Council, Western Cape Legislature, and others v President of the Republic of South Africa and*

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

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

others 1995 (4) SA 877 (CC) paragraph 62."

36 Policy could thus never be applied so as to have the force of law; and even less can the Minister proclaim the policy to be a law as he seeks to do in the 2017 Charter.

37 We analyse the nature of this policy in more detail below under the heading "PAJA review" below.

The Minister's contention that the Charter is law

38 As stated, the Minister's case is that the Charter is law. There was no indication in the Minister's answering affidavit in the interdict application as to what kind of law it would be and whether he viewed it as part of the MPRDA (i.e. national legislation) or as subordinate legislation. He has now come to the fore with the following statement:[33]

> "As a point of departure, I am advised that a "law" is defined as meaning "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law".[34] As such, whilst section 100(2) creates a *sui generis* enactment that is particular to the framework, the Mining Charter is still enforceable law. Whilst the Mining Charter is not an Act of Parliament, it is nevertheless a law as contemplated in the definition above."

39 This submission, with respect, begs the very questions which are in dispute: can the Minister make an enactment having the force of law under section 100(2) and does the Charter have the force of law. It is does not take the debate any further. It is in any event incorrect, as set out below.

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[33] Answering affidavit para 142, pp 348 – 349; para 176, p 363

[34] Section 1 of the Interpretation Act 31 of 1957.

40 According to the Minister, the transformational objects of the Act (but, incidentally, not the other objects of the Act) as well as the Charter and the Constitution are all "*legally binding*" and "*produce obligations which the right holders must meet*".[35] "*Non-compliance*" with any aspect thereof at any time is regarded as non-compliance with the MPRDA (although he admits the Charter is not an Act of Parliament), and is allegedly 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.

41 The Minister, in addition to this contention that the Charter is binding law, furthermore contends that the legislature contemplated that the Charter would be *"the most appropriate mechanism to give effect to section 2, enabling the Minister to respond progressively and step by step 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"*.[36]

42 It is respectfully submitted that the Minister's arguments are without merit for the reasons set out below.

43 **The Minister's view does not accord with the provisions of the MPRDA**

43.1 The Minister's view does not accord with the content or structure of the MPRDA.

43.2 Firstly, as stated, the objects of the Act only produce substantive

[35] See for e.g. answering affidavit para 147.8, p 352

[36] Answering affidavit paras 46 – 47, p 302

requirements which applicants for rights must meet to the extent that 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. Outside of these provisions, the objects of the MPRDA only serve as an aide in the interpretation of the substantive provisions of the MPRDA, as provided in section 4 thereof. We refer to what has been set out in this regard above.

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

43.4 Thirdly, there is no indication whatsoever in the wording of section 100(2) that Parliament intended to delegate law-making powers to the Minister or that the Charter was intended to constitute legislation or another kind of "enactment" which could supplement, override, amend or conflict with the MPRDA. If it did, section 100(2) would have been against the doctrine of separation of powers and unconstitutional as set out below. Any such interpretation should accordingly be avoided.

43.5 Fourthly, the contention that the legislature intended that the Charter would provide a flexible means of responding to the changing environment overlooks the Minister's power to make regulations under section 107 of the MPRDA. Given that power, there is no conceivable reason why the legislature would wish to confer upon the Minister an additional, and entirely novel, power to make law.

44 **The Minister's argument disregards the doctrine of separation of powers**

44.1 The Minister's above-mentioned contentions that the Charter is law and that he is entitled to make and change this law completely disregard the doctrine of separation of powers.[37]

44.2 The legislative authority of the national sphere of government is vested in Parliament, as set out in sections 43(a) and 44 of the Constitution, 1996. In terms of sections 44(1)(a)(ii) and (iii), the National Assembly has the power to pass legislation with regard to any matter (subject to certain exclusions which are not relevant for present purposes) and to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body[38] in another sphere of government (i.e. in the provincial or local sphere).

44.3 The executive authority of the Republic is vested in the President by section 85 of the Constitution, 1996. He exercises the executive authority, together with other members of the Cabinet[39] (consisting of the Deputy-President and Ministers[40]), by -

> "(2)(a) implementing national legislation, except where the Constitution or an Act of Parliament provides otherwise;
>
> (b) developing and implementing national policy;
>
> (c) co-ordinating the functions of state departments and

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

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

[39] See section 91(1) of the Constitution

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

administrations;

(d) preparing and initiating legislation; and

(e) performing any other executive function provided for in the Constitution or in national legislation."

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

44.5 There is a separation of powers between the legislative, executive and judicial branches of government. It is trite that the doctrine of separation of powers is a cornerstone of our constitutional dispensation. It entails that each branch of government must perform its constitutionally allocated function, consistently with the Constitution and that the branches of government may not usurp one another's powers. As stated in the *Heath* case:[41]

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

44.6 The doctrine of separation of powers does not preclude Parliament, as a legislative body, from delegating its power to make laws to other bodies, including the executive. However, in view of the above-mentioned

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

constitutional principles, the delegation of legislative authority to the executive is subject to certain constraints.[42]

44.7 In the first instance, a delegation of plenary power to the executive to amend the source of its authority to make law or to amend Acts of Parliament will inevitably subvert the manner and form provisions of the Constitution and would allow the executive to confer power upon itself to do as it pleases. It will therefore not survive constitutional scrutiny. The following statements of Chaskalson CJ are apposite: [43]

> "[51] The legislative authority vested in Parliament under section 37 of the Constitution is expressed in wide terms – "to make laws for the Republic in accordance with this Constitution". In a modern state detailed provisions are often required for the purpose of implementing and regulating laws, and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective lawmaking. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including, as section 16A does, the power to amend the Act under which the assignment is made.
>
> [99] We have said previously that our role as justices of this Court is not to "second guess" the executive or legislative branches of government or interfere with affairs that are properly their concern. We have also made it clear that we will not look at the Constitution narrowly. Our task is to give meaning to the Constitution and, where possible, to do so in

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

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

ways which are consistent with its underlying purposes and are not detrimental to effective government. The issues raised in the present case are, however, of fundamental importance. They concern the powers of Parliament and how it is required to function under the Constitution. They concern also the validity of executive proclamations issued by the President which are intended to have the force of law. Constitutional control over such matters goes to the root of a democratic order. Adherence to the prescribed forms and procedures and insistence upon the executive not exceeding its powers are important safeguards in the Constitution. Section 16A was specifically authorised by Parliament and proclamations under that section were issued in consultation with and had the approval of the relevant committees of both Houses of Parliament. The proclamations were tabled in Parliament and could have been invalidated by resolution, and no such resolution was passed. Yet, what was done, is inconsistent with what is required by the Constitution.

[100] Constitutional cases cannot be decided on the basis that Parliament or the President acted in good faith or on the basis that there was no objection to action taken at the time that it was carried out. It is of crucial importance at this early stage of the development of our new constitutional order, to establish respect for the principle that the Constitution is supreme. The Constitution itself allows this Court to control the consequences of a declaration of invalidity if it should be necessary to do so. Our duty is to declare legislative and executive action which is inconsistent with the Constitution to be invalid, and then to deal with the consequences of the invalidity in accordance with the provisions of the Constitution.

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

44.8 Secondly, where Parliament does not seek to delegate plenary power but merely the power to make subordinate legislation, the following factors were

identified by Mahomed J[44] in the same matter as crucial in considering and determining the constitutional validity of the delegation:

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

44.9 Sachs J formulated the factors as follows:[45]

> "(a) The extent to which the discretion of the delegated authority (delegatee) is structured and guided by the enabling Act;
>
> (b) The public importance and constitutional significance of the measure – the more it touches on questions of broad public importance and controversy, the greater will be the need for scrutiny;
>
> (c) The shortness of the time period involved;
>
> (d) The degree to which Parliament continues to exercise its control as a public forum in which issues can be properly debated and decisions democratically made;
>
> (e) The extent to which the subject-matter necessitates the use of forms of rapid intervention which the slow procedures of Parliament would inhibit;
>
> (f) Any indications in the Constitution itself as to whether such delegation was expressly or impliedly contemplated."

44.10 As stated in the previous paragraph, there is no indication in the wording of section 100(2) that it was Parliament's intention to mandate the Minister to

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

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

"enact" or legislate the Charter to achieve the attainment of the objects identified in section 100(2)(a).

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

44.12 An interpretation of section 100(2) to confer subordinate legislative powers on the Minister would equally render it unconstitutional, and should be avoided, in view of:

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

44.12.2 the subject-matter to which it relates;

44.12.3 the degree of delegation;

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

44.12.5 the total absence of control and supervision retained or exercisable by Parliament with the result that Parliament does not continue to exercise its control as a public forum in which issues can be

properly debated and decisions democratically made;

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

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

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

45 The Minister's above-quoted contentions that the Charter is binding law and, also, 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*"[46] demonstrates the flawed nature of his argument. The Charter is either a law, and has to conform to the requirements (procedurally and substantively) for making and amending laws, or it is policy which the Minister can implement with flexibility, taking into account constantly evolving circumstances but which cannot override, amend

[46] See answering affidavit paras 46-47, pp 302-303.

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 he deems fit or the occasion arises, simply has no foundation in our law.

46 In the event that section 100(2) should be held to constitute a proper delegation of subordinate legislative powers to the Minister, which remains denied:

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

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

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

47.1 Insofar as the Minister suggests[47] that the Constitution produces binding transformational obligations which rights holders must meet or that the Constitution empowers him to impose transformational obligations in the Charter, this is incorrect.

47.2 The Constitutional Court has held that once legislation is passed to fulfil a constitutional right,[48] the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The

[47] Answering affidavit par 147.8, p 352

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

right in the Constitution plays only a subsidiary or a supporting role.[49]

47.3 The Constitutional Court in *My Vote Counts NPC*[50] held that subsidiarity denotes a theoretical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institutional or higher norm, should be invoked only where the more local institution, or concrete norm or detailed principle or remedy, does not avail. The word has been given a range of meanings in our constitutional law.[51] The Court held that the most frequent invocation of subsidiarity has been to describe the principle that limits the way in which litigants may invoke the Constitution to secure enforcement of a right.[52]

47.4 Fundamentally, the principle holds that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation to give effect to that right.[53] Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or a supporting role.[54]

47.5 In relation to the Labour Relations Act 66 of 1995, the Constitutional Court

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

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

[51] At [46]

[52] At [50]

[53] At [53]

[54] At [54]

said the following:

> "[55] Second, the court has applied the principle to legislation Parliament adopts with the clear design of codifying a right afforded by the Bill of Rights. After Parliament enacted the Labour Relations Act (LRA), the High Court in Naptosa refused to allow a litigant to rely directly on the fair labour practices provision in the Bill of Rights. It had to rely instead on the unfair labour practice provisions in the statute, or challenge the statute itself. Conradie J said he could not 'conceive that it is permissible for an applicant, save by attacking the constitutionality of the LRA, to go beyond the regulatory framework which it establishes'. He also stated that it was inappropriate, in a highly regulated statutory environment like labour law, to ask a court to fashion a remedy 'which the legislature has not seen fit to provide'.
>
> [56] This approach was first quoted with approval in this court in a context unrelated to employment rights, then adopted and endorsed unanimously in a case about labour relations, Sandu. Even though national regulations had been enacted providing for collective bargaining, the applicant sought to rely directly on the provisions of s 23(5) of the Bill of Rights to found a more encompassing duty to bargain. The court disallowed this. It held that where legislation has been enacted to give effect to a constitutional right, 'a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard'. If the legislation is wanting in its protection of the right, then that legislation 'should be challenged constitutionally'." [55]

47.6 We accordingly submit that absent a direct challenge of the constitutionality of the MPRDA, the Minister cannot bypass the provisions thereof and contend that rights holders have transformational obligations arising from the Constitution or that the Constitution empowers the Minister to impose transformational obligations by way of the 2017 Charter.

PAJA review

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

48 The question we consider in this paragraph is whether the development and publication of the 2017 Charter constitute *administrative action* for purposes of PAJA.

49 As set out above, the Chamber contends that the Charters (including the 2017 Charter) constitute a formal expression of policy. However, because the development and publication thereof take place in terms of, and is mandated by, section 100(2) of the MPRDA, the decision to do so may constitute administrative action because PAJA defines administrative action *inter alia* as a decision taken by an organ of state such as the Minister when exercising a public power or performing a public function in terms of any legislation.

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

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

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

51 We firstly deal with the latter question.

52 **Definition of administrative action**

52.1 Administrative action is defined (in relevant part) in section 1 of PAJA as *"any decision taken ... by – (a) a organ of state, when – ... (ii) exercising a public power or performing a public function in terms of legislation ... which*

adversely affects the rights of any person and which has a direct, external legal effect...".

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

52.3 On the Minister's version, there is no debate because the Charter affects the rights of all rights holders immediately upon the publication thereof.

52.4 On the Chamber's version, the Charter will affect the rights of applicants (for e.g., in that they have to enter into empowerment agreements in order to be granted rights) and of holders of rights (through the imposition of terms and conditions relating to empowerment) when it is applied by the Minister, as he must, at the time of deciding whether to grant the mining right. The Charter, however, has the capacity to affect legal rights[56] and that has been held to be sufficient for this part of the definition of administrative action as appears from the following statement by the SCA in *Greys Marine Hout Bay (Pty) Ltd v Min of Public Works:*[57]

> "[23] While PAJA's definition purports to restrict administrative action to decisions that, as a fact, "adversely affect the rights of any person", I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on section 33 of the Constitution. Moreover, that literal construction would be inconsonant with section 3(1), which envisages that administrative action might or might not affect rights adversely.[7] The

[56] See founding affidavit par 97, p 50

[57] [2005] 3 All SA 33; 2005 (6) SA 313 (SCA) paras 21-25

qualification, particularly when seen in conjunction with the requirement that it must have a "direct and external legal effect",[8] was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."

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

53.1 The exclusion relevant for present purposes is contained in subsection (aa) of the definition of administrative action in PAJA. It excludes *"the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c),(d) and (e), 91(2), (3), (4) and (5), 92(3), 97, 98, 99 and 100 of the Constitution".*[58]

53.2 Section 85(2) is relevant for present purposes. As appears from the exclusion in subsection (aa), the powers listed in sections 85(2)(b) to (e) [59] are excluded but not those in section 85(2)(a). Section 85(2)(a) which refers to the executive power of *"(a) implementing national legislation"* is thus, deliberately, not excluded from administrative action.[60]

53.3 In the *SARFU*[61] matter, it was held that the distinction between executive

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

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

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

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

and administrative action comes down to a distinction between the implementation of legislation, which is administrative action, and the development of policy, which is not.[62] The difficulty with section 100(2) is that it has elements of both: it requires the Minister, who is the member of the executive authority responsible for mineral resources,[63] to implement the legislation (section 100(2) of the MPRDA) by developing a formal policy in terms thereof.

53.4 It is submitted that the judgment of the Constitutional Court in *Ed-U-College*[64] is of considerable assistance in this regard. In that matter, the Constitutional Court refined the distinction between decisions related to the formulation of policy and those related to the implementation of legislation. The court stated as follows (with reference to a passage in the *SARFU* judgment):

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

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

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

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

exercise of such powers may often constitute administrative action."[65]

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

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

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

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

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

[65] *Ibid* at para 18

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

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

Legality review

54 In the event that the development of the Charter is held not to constitute "administrative action" as defined in PAJA, it admits of no dispute that the Minister's powers are constrained by the principle of legality enshrined in section 1(c) of the Constitution. This principle entails that the Minister may exercise no power and perform no function beyond that conferred upon him by law.[66] It acts as a safety net to give the court some degree of control over action that does not qualify as administrative under PAJA, but nonetheless

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

involves the exercise of public power.[67] It is accepted by our courts that section 1(c) of the Constitution empowers them to review executive action on grounds of irrationality.[68]

55 In respect of the review grounds that the Minister exceeded his powers or acted irrationally, it would thus make little practical difference whether the development and publication of the 2017 Charter constitutes administrative action or not because his conduct would be reviewable on either basis. In relation to administrative action the principle of legality was enshrined in section 33 of the Constitution (as read with PAJA). In relation to legislation and to executive acts that do not constitute administrative action, the principle of legality is necessarily implicit in the Constitution.

56 Therefore, once it is found that the Minister in developing and publishing the 2017 Charter exceeded his powers by legislating in contravention of the separation of powers or by acting outside of the scope of the empowering statute or that he acted irrationally, the Charter would stand to be reviewed and set aside either on the basis of section 33 of the Constitution and PAJA (if it is found to be policy in the narrow sense and thus administrative action) or in

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

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

terms of the principle of legality (if it is found to be policy in the wide sense, subordinate legislation or a *sui generis* enactment). The Chamber relies on both these bases in the alternative.[69]

57 With regard to the scope of legality review, it is useful to call to mind the following statements of Navsa JA in *Democratic Alliance and others v Acting NDPP and others:*[70]

> "Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution (and that need not be decided in this case), the Constitution is the supreme law and the common law, insofar as it has any application, must be developed consistently with it and subject to constitutional control.
>
> [30] Importantly, the Constitutional Court in *Pharmaceutical Manufacturers* (*supra*) held that the grounds of review articulated in the well-known case of *Shidiack v Union Government* (*Minister of the Interior*) 1912 AD 642 at 651–652 are "consistent with the foundational principle of the rule of law enshrined in our Constitution" (paragraph 83) and that the rule of law also requires rationality as a prerequisite for the validity of the exercise of all public power (paragraphs 85–86).
>
> [31] Section 1(*c*) of the Constitution proclaims the supremacy of the Constitution and the concomitant supremacy of the rule of law. In fulfilling the constitutional duty of testing the exercise of public power against the Constitution, courts are protecting the very essence of a constitutional democracy. Put simply, it means that each of the arms of

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

[70] [2012] 2 All SA 345 (SCA)

government and every citizen, institution or other recognised legal entity, are all bound by and equal before the law. Put differently, it means that none of us is above the law. It is a concept that we, as a nation, must cherish, nurture and protect. We must be intent on ensuring that it is ingrained in the national psyche. It is our best guarantee against tyranny, now and in the future."

Conclusion on first general ground of review

58 It is accordingly submitted that the 2017 Charter is unconstitutional in that it usurps the functions of the legislature thus offending against the separation of powers which is entrenched as part of the rule of law in section 1(c) in the Constitution and accordingly falls to be set aside in terms of the principle of legality implicit in the Constitution and/or under section 6(2)(i) of PAJA, and unauthorised by section 100(2) of the MPRDA generally and accordingly falls to be set aside in terms of the principle of legality implicit in the Constitution and/or under sections 6(2)(a)(i) and (f)(i) of PAJA.

59 The difference between the Chamber and the Minister on the nature of the Charter and whether it constitutes law or policy goes to the heart of the matter. As shown above, the Minister's view that the Charter under section 100(2) is law finds expression in the structure and content of the 2017 Charter. It pervades the 2017 Charter to such an extent that, should the court find in favour of the Chamber in regard to the first general ground of review, the whole of the 2017 Charter stands to be reviewed and set aside.

Second general ground of review: Substitution of definition of HDP / HDSA[71]

60 The Minister's actions which give rise to the second and third general grounds

[71] Founding affidavit par 103-108, pp 52-55; Minister's answering affidavit para 181-183, pp 364-365.

of review are also a result of his view that he is acting as law-maker. They are specific, concrete examples of excess of power.

61 As mentioned above, the 2017 Charter does not employ the terms "historically disadvantaged person"[72] or ""historically disadvantaged South African" used in the MPRDA. Instead, it uses the terms "Black Person"[73] and "Black Owned Company"[74] which have materially different definitions.

62 Section 100(2)(a) of the MPRDA provides that the Minister must develop a broad-based socio-economic empowerment Charter that will set the framework

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[72] "Historically disadvantaged person" is defined in s 1 of the MPRDA to mean:

"(*a*) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect;

(*b*) any association, a majority of whose members are persons contemplated in para (*a*);

(*c*) a juristic person, other than an association, which—

(i) is managed and controlled by a person contemplated in paragraph (*a*) and that the persons collectively or as a group own and control a majority of the issued share capital or members' interest, and are able to control the majority of the members' vote; or

(ii) is a subsidiary, as defined in section 1 (*e*) of the Companies Act, 1973, as a juristic person who is a historically disadvantaged person by virtue of the provisions of paragraph (*c*)(i)."

[73] The 2017 Charter provides that "Black person" "is a generic term which means Africans, Coloureds and Indians –

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

(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;

(c) A juristic person which is managed and controlled by person/s contemplated in paragraph (a) and/or (b) and the person/s collectively or as a group own and control all issued share capital or members' interest, and are able to control the majority of the members' vote."

[74] "Black owned company" is defined in the 2017 Charter to mean "a juristic person having shareholding or similar interest that is controlled by a Black Person/s and in which such Black Person/s enjoy/s a right to economic interest that is at least 50% + 1 of the total shareholding."

for targets and time table for effecting the entry into and active participation of "historically disadvantaged South Africans" into the mining industry. It is thus specific as to the category of persons for whose benefit the charter may be developed. The development of a charter benefitting persons other than those who qualify as historically disadvantaged South Africans would not be authorised by that section.

63 Section 100(2)(b) provides that the Charter must set out how amongst others the objects referred to in section 2(c), (d), (e), (f) and (i) can be applied:

63.1 subsection 2(c) refers to the promotion of equitable access to the nation's mineral resources *"to all the people of South Africa"*;

63.2 subsection 2(d) refers to expansion of opportunities "for historically disadvantaged persons including women and communities";

63.3 subsection 2(e) refers to the promotion of economic growth and mineral development in general;

63.4 subsection 2(f) refers to the promotion of employment and social and economic welfare *"of all South Africans"*; and

63.5 subsection 2(i) refers to the object to ensure that holders contribute towards the socio-economic development of the areas in which they are operating.

64 It is clear from the above that the definition of *"Black Person"* in the 2017 Charter impermissibly changes the scope of those who may benefit from the provisions of the Charter under the MPRDA.

64.1 On the one hand it widens the scope to include 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. There is no requirement that the members of the class constituting "Black Persons" should have been disadvantaged by unfair discrimination before the Constitution took effect.

64.2 On the other hand, it limits the class of beneficiary to "Africans, Coloureds and Indians". This would, for example, exclude white women as well as persons of other ethnic groups who were unfairly discriminated against before 1994. It furthermore excludes persons who are not South African citizens by birth or descent, did not become citizens before 27 April 1994 or would not have been entitled to acquire citizenship by naturalisation prior to that date. The definition of historically disadvantaged persons in the MPRDA contains no similar disqualifications.

65 The Minister is not the legislator. He is not empowered to devise new definitions and limit or extend the scope of persons whom the legislator intended to be the beneficiaries of the Charter.

66 It is irrelevant that the manner in which the Minister defines "Black person" in the 2017 Charter may be 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 a different definition in the Charter which is not in accordance with the empowering legislation, whether it coincides with a definition in another Act or not.

67 It is also irrelevant that there is an overlap between the persons contemplated in the MPRDA definition and in the 2017 Charter definition inasmuch as black persons represent the majority of HDSAs. The fact remains that some persons whom the legislature intended to empower were impermissibly excluded by the Minister's new definition of "black persons" and others, upon whom the legislature did not intend to confer such benefits, were impermissibly included in the category of beneficiaries by the Minister. This is met with nothing more than a bald denial by the Minister.

68 The definitions adopted in the 2017 Charter accordingly stand to be reviewed and set aside in terms of section 6(2)(a)(i) and/or 6(2)(f)(i) of PAJA alternatively in terms of the principle of legality.

69 Indeed, it is respectfully submitted that once it is found that the Minister, in these pivotal definitions (namely *"Black Person"* and *"Black Owned Company"*), acted outside of the parameters of the MPRDA, the whole 2017 Charter 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.

Third general ground of review: Charter applicable to all "holders"[75]

70 The 2017 Charter defines the term "Holder" as having the same meaning as in the MPRDA.

[75] Founding affidavit paras 109-112, pp 55-56; Minister's answering affidavit par 184-186, pp 365-366.

71 In terms of section 1 of the MPRDA the term holder is defined:

> "in relation to a prospecting right, mining right, mining permit, retention permit, exploration right, production right, reconnaissance permit or technical co-operation permit, means the person to whom such right or permit has been granted or such person's successor in title".

72 The term "Holder" under the MPRDA, and therefore also under Charter, thus includes holders of various rights and permits.

73 In the first instance, the obligations of holders are dealt with in various sections of the MPRDA but none of them imposes a general obligation on any holder to comply with the Charter as revised from time to time at all relevant times. This is dealt with in more detail below. The structure of the Act (in the case of mining rights) is that it requires a commitment / agreement / arrangement / undertaking regarding empowerment at the application stage, which the Minister must consider with the application and, if satisfied that it will further the empowerment objects of the Act, the right is granted subject to a term that requires compliance with *such* arrangement or agreement.

74 Furthermore, the applicants for the various forms of rights are not treated in the same manner by the MRPDA as far as the applicability of sections 2(d) and (f) and the Charter are concerned.

74.1 In the case of mining rights, as set out above, section 23(1)(h) provides that when considering an application for a mining right, the Minister must have regard to whether the granting will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan.

74.2 In the case of prospecting rights, section 17(1)(f) provides that the Minister must grant a prospecting right in respect of *prescribed minerals* (of which there are none so prescribed) if the applicant has given effect to the objects referred to in section 2(d). Section 17(4) empowers the Minister in other cases to request the applicant to give effect to the object referred to in section 2(d), having regard to the type of mineral concerned and the extent of the proposed prospecting project.

74.3 In the case of mining permits, section 27 contains no reference to either the Charter or to any of the objects of the Act.

74.4 In the case of retention permits, sections 31-36 also contain no reference to either the Charter or to any of the objects of the Act. Section 33(c) authorises the Minister to refuse a retention permit if the granting of such right will result in the concentration of the mineral resources in question under the control of the applicant and associated companies, with the possible limitation of equitable access to mineral resources.

74.5 In the case of reconnaissance permissions, sections 13 – 15 contain no reference to either the Charter or to any of the objects of the Act.

74.6 Exploration rights, production rights, reconnaissance permits, and technical co-operation permits all relate to petroleum and not to minerals, and to which the Mining Charter does not apply.

75 The applicability of the 2017 Charter to permits or permissions in addition to prospecting rights and mining rights, by way of a general reference to all "holders", is therefore unauthorised by and in conflict with the MPRDA and the

2017 Charter accordingly falls to be reviewed and set aside in terms of the principle of legality and/or sections 6(2)(a)(i) and 6(2)(f)(i) of PAJA.

76 The Minister's has contented himself with a bald denial in response to this ground.[76]

REVIEW GROUNDS OF THE OWNERSHIP ELEMENT OF THE CHARTER RELATING TO EXISTING RIGHTS (PARA 2.1.2 OF THE 2017 CHARTER)

First ground: Imposition of new charter obligations on holders after the grant of a mining right[77]

77 The introductory sentence of paragraph 2.1 of the 2017 Charter which applies to both new rights holders and existing rights holders, provides as follows:

> "In order to give effect to Meaningful Economic Participation[78] and the integration of Black Persons into the mainstream economy; and ensure Black Persons' effective ownership of the State's mineral resources, a Holder must comply with the following:"

78 The obligations of the holder[79] of (for example) a mining right are set out in the MPRDA (see for example sections 23(6)[80] and 25(2)). The MPRDA does not

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[76] Answering affidavit par 185, p 365

[77] Founding affidavit paras 116-129, pp 57-63; answering affidavit para 191, p 372 ff

[78] As defined in the 2017 Charter.

[79] In what follows, we refer to the holder of a mining right by way of example. It should, however, be noted that the definition of Holder in the MPRDA includes holders of mining permits, retention permits, and reconnaissance permits (/permissions), but there are no Charter compliance requirements in the granting sections 13 (reconnaissance), 27 (mining permits) or 32 (retention permits). The inclusion in the 2017 Charter of references to such permits are *ultra vires* the MPRDA both in regard to the ownership element and in regard to the non-ownership elements.

[80] S 23(6) provides that "A mining right is subject to this Act, any relevant law, the terms and conditions stated in the right and the prescribed terms and conditions and is valid for the period specified in the right, which period may not exceed 30 years."

authorise the Minister to impose additional obligations on holders of mining rights (whether new or existing holders) outside of the provisions of the MPRDA, by way of amendments to the Charter.

79 It is no answer for the Minister to refer to section 2(d) and the Charter in general because the substantive requirements for the grant of a mining right under the MPRDA and the terms of mining rights granted pursuant thereto, deal with the matter in specific terms, as set out in detail above.

80 The Minister's response[81] that no new obligation was imposed by way of the Charter other than an obligation which was originally enshrined and entrenched in the *provisions* pertaining to prospecting rights and mining rights, is incorrect. As stated, there is no such provision in the MPRDA. The Minister's reliance on section 25(2)(h) as a basis for his contention that the Charter constitutes binding law is misconceived. The reporting obligation imposed by that section does not purport to impose any obligation in addition to the duty to submit the prescribed report. The reference in that section to compliance with sections 2(d) and (f) and the Charter is a reference to those elements of 2(d) and (f) and the Charter which were incorporated into the relevant mining right. On the Minister's argument, the effect of section 25(2)(h) is to transform sections 2(d) and (f) into provisions which impose substantive obligations. That argument is simply not supported by the language of section 25(2)(h).

81 The apparently contradictory, further response[82] is that *"the additional requirements prescribed by way of the Charter are for purposes of giving effect*

[81] Answering affidavit para 198, p 373.

[82] Answering affidavit par 199-, p 373.

to the objectives as contained in section 2(d)" and that it is an integral requirement of prospecting and mining rights to give effect to section 2 of the MPRDA. For this statement, the Minister relies on the standard empowerment clause[83] in prospecting and mining rights.[84] The suggestion seems to be that the holder has a general obligation to give effect to the Charter as revised from time to time because of the inclusion of this standard clause in the right.[85] A cursory reading of the standard clause shows that the statement is without any merit. The standard clause referred to requires the holder to honour the agreement entered into with the empowerment partner, i.e. it requires the holder to give effect to section 2(d) *in the manner set out in that agreement.*

82 Indeed, the effect of the Minister's view is that all those agreements must be renegotiated and amended to meet new Charter requirements – even though the holders and empowerment partners are contractually bound to their terms, and despite the fact that compliance with such agreements constitutes a term of the mining right. In fact, a failure to honour the existing the agreement would be a breach of a term of the mining right.

83 The Minister also contends[86] that he is entitled to cancel a mining right in terms of section 47 in the event of non-compliance with the 2017 Charter requirements. This is manifestly incorrect. It is dealt with below.

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[83] The standard rights are annexed as AA41 and AA42, pp 1163-1186.

[84] Answering affidavit par 200, p 373.

[85] This clause typically provides: ""*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*".

[86] Answering affidavit para 202, p 374-375

84 The imposition of new requirements in relation to existing rights is therefore unauthorised by the MPRDA and the Charter accordingly falls to be reviewed and set aside in terms of the principle of legality and/or sections 6(2)(a)(i) and (f)(i) of PAJA.

Second ground: Existing rights: non-recognition of historical BEE transactions and requirement to "top-up"[87]

85 Paragraph 2.1.2 of the Charter deals with the so-called "recognition" of "Historical BEE Transactions"[88] and "Top Up".[89]

86 In the first instance, as set out in the founding affidavit,[90] the Charter provisions in this regard are all but clear. This lack of clarity will give rise to considerable uncertainty and it offends against the rule of law. The Minister has contented himself by baldly asserting that the provisions in paragraph 2.1.2 are clear.[91]

87 With regard to the requirement to "top-up", the Minister and his predecessors have taken the view, already under the previous Charters, that a holder of a mining right has a continuing obligation to maintain a 26% HDSA ownership level (now, 30%) and that a failure to do so constitutes a contravention of the Charters, of the terms of their mining rights and of the MPRDA. The Minister has now apparently sought to formalise this view by requiring a "top-up" in such

[87] Founding affidavit para 130-138; Min's answering affidavit par 205, p 376 ff

[88] "Historical BEE Transactions" is defined in the 2017 Charter to mean "those BEE Transactions concluded prior to the coming into operation of the Mining Charter of 2017 that achieved a minimum of 26% Black shareholding or more".

[89] "Top Up" is defined in the 2017 Charter to mean "the increasing of shareholding of a Black Person in order to reach the minimum thresholds required by the Mining Charter".

[90] Founding affidavit paras 130-133, pp 63-66

[91] Answering affidavit para 205, p 376

cases.[92] The top-up is, in addition, required to the new level of 30% and it is required within 12 months. Thereafter, 100% compliance is required at all times.[93] Top-ups would accordingly continually be required. If, after the initial top-op up has been effected within the said 12-month period and the percentage of black ownership of the holder again falls below 30% thereafter due to, for example, the black shareholders selling their shares, the holder is once more obliged to top-up.

88 It is submitted that there is nothing in the language of section 23 (in particular section 23(1)(h)), or in item 7 (in particular item 7(2)(k)) in Schedule II, which imposes such an obligation upon the successful applicant for, or for conversion to, a mining right. The MPRDA, in particular, does not oblige the holder to restore the percentage ownership by HDSAs or Black Persons to the 26% or 30% target referred to in the Charters where such percentage falls below this level after the grant of the holder's mining right. The "top-up" requirement is accordingly *ultra vires*.

89 It is submitted that the Chamber's interpretation of the MPRDA is not only in line with the language of the MPRDA, but is also in line with the objectives of the MPRDA, including the expansion of opportunities for HDSAs to invest in the mining industry, and the promotion of employment in that industry.[94]

90 The statement in the Minister's answering affidavit[95] that *"Transformation is not*

[92] See paras 2.1.2.1 to 2.1.2.3 of the Charter.

[93] According to paras 2.9 (second unnumbered paragraph) and 2.10 of the 2017 Charter.

[94] See founding affidavit par 137, p 68-69

[95] Para 214, p 378

directed to a moment in time. It requires, to be effective, continuity" effectively ignores all previous empowerment deals and will continually do so. It also ignores entirely the empowerment and transformational benefits which flowed from such transactions to the departing HDSA investors as if these benefits were limited to "a moment in time". It means that, unless all HDSA shareholders are perpetually locked in (which has never been a requirement since 2004, and is still not a requirement under the 2017 Charter), holders of mining rights would continually have to enter into yet further empowerment agreements if the HDSA shareholders sell their shares to non-HDSA shareholders.

91 The following example illustrates the point: Company X entered into an empowerment agreement with HDSA company Y in terms of which Y took up 26% of the shares in X at a discount. During favourable market conditions, Y sold its shares for a profit to foreign company Z. Y started another 100% HDSA company which applied for and obtained new prospecting / mining rights. The original company X (which has a 26% foreign shareholder in consequence of Y having sold its shares), however, is now "non-compliant" according to the Minister and must "top-up" from 0% HDSA shareholding to 30% HDSA shareholding, failing which its mining right stands to be cancelled (even though it fully complied with all the terms of its mining right, including the empowerment agreement which was the satisfaction of the Minister at the time of grant). This is clearly unsustainable for any business. It furthermore provides no security of tenure in respect of prospecting and mining operations, bearing in mind also that the requirements to maintain the thresholds at all times and the increased percentages were all introduced after the grant of the original right. The Minister's single solution of locking in HDSA shareholders does not avail

holders with pre-existing rights and empowerment agreements as at 2017[96].

92 It is accordingly submitted that the provisions paragraph 2.1.2 are unconstitutional in terms of section 1(c) of the Constitution as being vague and uncertain and fall to be reviewed and set aside in terms of the principle of legality and/or section 6(2)(i) of PAJA, as well as unauthorised and fall to be reviewed and set aside in terms of the principle of legality and/or sections 6(2)(a)(i) and 6(2)(f)(i) of PAJA.

Third ground: Existing rights: Reduction in existing shareholding

93 In the context of existing rights, paragraph 2.1.2.6 of the Charter provides that the top-up required by paragraphs 2.1.2.3 and 2.1.2.4 "*shall be effected by a reduction of the remaining shareholders who are not Black Persons in proportion to their respective shareholding in the company*".

94 The provision thus mandates that existing shareholders be deprived of shareholding which vests in them together with the rights associated with the shares, and the allocation (by whatever means[97]) of this shareholding to Black Persons in accordance with paragraph 2.1.2.7 of the 2017 Charter.

95 In the first instance, there is no provision in the MPRDA which permits the Minister to impose such a requirement.

96 Secondly, this taking from Peter[98] to give to Paul[99], is at least a deprivation of

[96] Answering affidavit par 216-219, p 378-379

[97] For example, by way of transfer of shares or issue of new shares so as to dilute existing shareholding.

[98] I.e. "the remaining shareholders who are not Black Persons" (see paragraph 2.1.2.6 of the

property which, in terms of section 25 of the Constitution, may only take place in terms of law of general application and which law may not be permit arbitrary deprivation of property.

97 As stated above, the Charter is not "a law". In addition, the requirement of 30% Black shareholding in the Charter is arbitrary. The Minister has put up no basis whatsoever for the 30% minimum requirement. His sole response is that the 30% "is directed towards giving effect to the objects of the MPRDA."[100]

98 Paragraph 2.1.2.6 and, by extension, the whole mechanism of a compulsory "top-up", is accordingly *ultra vires* and unconstitutional and liable to be reviewed and set aside.

99 The mandatory dilution of the rights of non-Black shareholders (for example pension funds or the PIC) is also unlawful and inconsistent with the requirement of the Companies Act, 2008 that shareholders be treated equally.[101]

Fourth Ground: Existing rights: twelve-month transitional period

100 The 2017 Charter is immediately applicable, but it affords existing mining right Holders a maximum of twelve months within which to comply with its revised targets and to top-up its Black Person shareholding in accordance with paragraphs 2.1.2.3 and 2.1.2.4.[102]

2017 Charter, p 140).

[99] I.e. Black Persons as defined in the 2017 Charter.

[100] Answering affidavit par 226, p 381

[101] See in this regard section 37(1) of the Companies Act, 2008.

[102] See paras 2.1.2.3, 2.1.2.4 and 2.11(a) of the 2017 Charter.

101 It is submitted that a period of twelve months within which to implement the provisions of paragraph 2.1.2.3 and 2.1.2.4 as read with 2.1.2.6 and 2.1.2.7, and which have already commenced to run on 15 June 2017, is unreasonably short given that these paragraphs require substantial changes to shareholding and finance structures, involving not only existing and new Black Persons, but also persons (including corporate and state entities such as the PIC) whose shareholder rights would have to be diluted. I point out furthermore that the Original Charter provided for 15% effective HDSA ownership in 5 years and the full 26% in 10 years. Since existing Holders may need to "top up" by as much as 30% (depending on circumstances and the "correct" interpretation of these ambiguous provisions) a 12-month top up period is hopelessly insufficient.

102 In terms of paragraph 2.1.2.8, a Holder must already within the first twelve-month period "ensure that its BEE Partners directly and actively control their share of equity interest in the Holder, including the transportation as well as trading and marketing of the proportionate share of the production". This provision pertains to existing right Holders who thus have existing agreements with HDSA's and/or existing shareholder agreements in place. The provision, which is not legislation, has no regard to the basic principles of company law or the law of contract and will require drastic and immediate changes to almost all existing arrangements and/or shareholder agreements.

103 The transitional twelve-month period (set out in paragraph 2.11(a) of the Charter) is not applicable to new rights. Should the Holder of a prospecting right, by way of example, be granted a mining right after 15 June 2017 (the application for which may have been lodged some time ago), the latter will be a

new right which will immediately need to comply with the requirements of a new right, there being no transitional arrangements which apply to new rights. There is also no allowance for pending applications. They will be treated as new rights and not as existing rights and shareholding will immediately have to be restructured. This is contrary to the object in section 2(g) of security of tenure (which includes continuity of tenure from prospecting to mining).

104 The twelve-month period within which to top-up is reckoned from the date of publication of the 2017 Charter (i.e. from 15 June 2017). After the expiry of the initial twelve-month period, there is no period of grace within which a right Holder may rectify depletions of its BEE ownership which occur then. The Holder may thus be held in breach of its obligations immediately after a BEE partner or partners have exited, a BEE contract has lapsed or the previous BEE partner has transferred shares to a non-BEE company.

105 The above-mentioned provisions or absence thereof are so irrational and unreasonable that no reasonable person could have so exercised the power conferred by section 100(2)(a) of the MPRDA, and accordingly stands to be reviewed and set aside under section 6(2)(h) of PAJA, alternatively in terms of the principle of legality. The Minister in this regard also failed to have regard to relevant considerations, and information put forward by the Chamber was not considered, as contemplated in sections 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

106 In paragraph 2.1.2.12, the non-recognition of renewals is contrary to the object of security of tenure in section 2(g) of the MPRDA (which, as stated, includes continuity of tenure by way of renewals) and contradicts sections 18(3) and 24(3), which do not include re-empowerment as a jurisdictional fact for

compulsory grant of renewal applications. This paragraph is accordingly not authorised by the provisions of the MPRDA and stands to be reviewed and set aside in terms of section 6(2)(a)(i) and/or 6(2)(f)(i) of PAJA, alternatively in terms of the principle of legality. The Minister's response[103] is again that the prospecting rights and mining rights make express provision for the objects of section 2(d) to be achieved, which is simply incorrect. I have already dealt with this misconception and refer to what has been stated above in regard thereto.

GROUNDS OF REVIEW OF THE OWNERSHIP ELEMENT RELATING TO NEW RIGHTS (PARA 2.1.1 OF THE 2017 CHARTER)

First ground: New prospecting rights: reference to all holders unauthorised[104]

107 Section 17(1)(f) of the MPRDA provides that the Minister must grant a prospecting right if, *in respect of prescribed minerals*, the applicant has given effect to the objects referred to in section 2(d). No such minerals have been prescribed.

108 Section 17(4) of the MPRDA provides that the Minister *may, having regard to the type of mineral concerned and the extent of the (specific) proposed prospecting project*, request an applicant to give effect to the object referred to in section 2(d). The Minister must clearly consider each prospecting right application in order to exercise this discretion.

109 Sections 17(1)(f) and 17(4) leave no room for the imposition of a 51% prescribed minimum shareholding across the board for all prospecting right

[103] Answering affidavit par 250, p 388

[104] Founding affidavit par 157-160, pp 76-77; answering affidavit para 252-255, p 389-390

applicants and for all minerals.

110 The provisions of paragraph 2.1.1.1 of the Charter which seek to impose a minimum level of 51% Black Person Shareholding for all holders of new prospecting rights are therefore clearly *ultra vires* the above-mentioned provisions of the MPRDA and stand to be reviewed and set aside under sections 6(2)(a)(i) and (f)(i) of PAJA *alternatively* in terms of the principle of legality.

111 The Minister's response[105] to these allegations is that, in the absence of prescribed minerals, it applies to all minerals and that all holders must give effect to the objects in section 2(d). This is clearly incorrect, in particular in the case of prospecting rights:

111.1 In the absence of prescribed minerals, section 17(1)(f) cannot yet be applied and section 17(4) would apply to all minerals. Section 17(4) requires the Minister to have regard to the mineral concerned and the extent of the prospecting project before requesting an applicant to give effect to section 2(d).

111.2 Once minerals have been prescribed under 17(1)(f), section 17(4) would apply to all minerals not so listed.

111.3 The decision to prescribe certain minerals must be a rational and reasonable decision. The provisions of 17(4) cannot be avoided by prescribing "all minerals".

[105] Answering affidavit par 252-253, p 389

112 These provisions of the Charter confirm that the Minister is not aware of the nature and limits of his powers. This lack of awareness is also evident from his statement in the answering affidavit[106] that he *invariably* requires an applicant for a prospecting right to give effect to section 2(d) of the MPRDA. As pointed out in the replying affidavit,[107] this statement by the Minister is a concession that he does so without having had regard, in each individual case, to the mineral concerned and the extent of the project and, accordingly, that he acts unlawfully.

Second ground: new prospecting rights: 51% irrational[108]

113 The imposition of a higher threshold of 51% in the case of prospecting rights is in the circumstances described in the founding affidavit irrational and falls to be reviewed and set aside in terms of the principle of legality and/or sections 6(2)(f)(ii)(aa), (bb) and (cc) of PAJA.

Third ground: New mining rights: prescribed shareholding[109]

114 There is no section in the MPRDA which authorises the Minister to prescribe the specific distribution of shareholding[110] in the case of all new mining rights, as he seeks to do in paragraph 2.1.1.3 of the 2017 Charter. As stated above, the Charter is intended to guide the Minister's discretion in taking decisions under the MPRDA but cannot exclude the exercise of his discretion in this

[106] Answering affidavit, par 40, p 298

[107] Replying affidavit par 20.2.

[108] Founding affidavit par 161-163, pp 77-78; answering affidavit par 256-258, pp 390-391

[109] Founding affidavit paras 164-165, p 78

[110] 8% to be issued to ESOPS, 8% to Mine Communities (in the form of a trust) and 14% to black entrepreneurs (see par 2.1.1.3 of the 2017 Charter).

manner. It accordingly stands to be reviewed and set aside under sections 6(2)(a)(i) and (f)(i) of PAJA *alternatively* in terms of the principle of legality.

115 The Minister in response does not point to any such empowering section in the MPRDA. Instead, he only refers in general to the objects of the Act and the Charter[111] as if the Charter were a parallel piece of legislation, in which the Minister is free to give effect to the objects of the MPRDA in any way he deems fit, and in which he may contradict, amend or supplement the provisions of the MPRDA and the Companies Act. As set out above, this approach is fundamentally flawed. As also stated above, the Charter can only be applied in terms of, and in the manner contemplated in, the substantive provisions of the MPRDA and it cannot contradict, amend or supplement the provisions of the Act (whether it is a policy or subordinate legislation).

Fourth Ground: new rights: restriction on transfer unauthorised[112]

116 Paragraph 2.1.1.4 is similarly not authorised by the MPRDA. Indeed, it is contrary to the MPRDA and section 11, in particular, which does not limit the power to alienate shares in this manner and certainly does not authorise the imposition of such limitations by way of the Charter.

117 It accordingly stands to be reviewed and set aside in terms of the principle of legality and/or sections 6(2)(a)(i) and 6(2)(f)(i) of PAJA.

Fifth Ground: new rights: inequality in terms of section 9 of the Constitution[113]

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[111] Answering affidavit paras 259-261, p 391.

[112] Founding affidavit para 166-167, p 78

[113] Founding affidavit para 168-169, p 79

118 Paragraph 2.1.1.5 of the 2017 Charter which provides that "any reduction of shareholding of existing shareholders through the issue of new shares, shall not reduce the Black Person shareholding distribution", means, for example, that where a company seeks to raise capital for a new venture by issuing shares, only the non-Black Persons' shareholding will be reduced, which in effect means that the Black Persons do not contribute equally towards raising such capital.

119 This shows a fundamentally unequal treatment of shareholders based on race which is not mandated by section 100(2)(a) and inconsistent with section 37(1) of the Companies Act, 2008 as well as section 9(1), (2) and (3) of the Constitution and it accordingly falls to be reviewed and set aside in terms of the principle of legality and/or section 6(2)(i) of PAJA.

Sixth ground: New mining rights: vesting of 30% equity in 10 years and writing-off of debt[114]

120 Paragraph 2.1.1.6 goes further. It provides that Black Person shareholding shall vest within 10 years (by no less than 3% annually) and shall be paid for from the proceeds of dividends received by the Black Person shareholders provided, however, that if the total dividends are insufficient, "*the balance owing in respect thereof shall be written off by the Holder or vendor of the shares to the Black Person*". It should be kept in mind that prospecting projects are by nature capital intensive and do not render any real returns and start-up mining ventures take a long time to become profitable. Dividends are thus unlikely to

[114] Founding affidavit para 170-171, p 79-80

be paid for a number of years so that, under this paragraph, the shareholding in the Holder of the right will vest irrespective of payment, and which will as a result have to be "written off".

121 In the first instance, there is no provision in the MPRDA which empowers the Minister to deprive property in this manner.

122 Secondly, a provision which requires the "writing-off" of a vested right to receive payment, is a deprivation of property. This conflicts with section 37(1) of the Companies Act, 2008. Also, as stated above, section 25(1) and 25(2) of the Constitution provides that no one may be deprived of property, except in terms of law of general application, and no law may permit arbitrary deprivation and if the deprivation amounts to an expropriation, that compensation should be payable. As stated, the Charter is not a law of general application and the stated provision of the Charter thus stands to be set aside as being unauthorised and unconstitutional.

Seventh ground: New mining rights: new rights of Black Person shareholders[115]

123 Paragraph 2.1.1.7 of the 2017 Charter provides that "a holder of a new mining right must pay a minimum of 1% of its annual turnover in any given financial year to the Black Person shareholders, prior to and over and above any distributions to the shareholders of the Holder", subject only to solvency and liquidity requirements.

124 These provisions are, in the first instance, *ultra vires* the MPRDA:

[115] Founding affidavit par 172-174, pp 80-81

124.1 There is no provision in the MPRDA which authorises the imposition of the very substantial obligation to pay 1% of *turnover* to black shareholders, over and above all other payments.

124.2 There is also no provision in the MPRDA which authorises the Minister to prescribe provisions to be inserted in shareholders' agreements. What a shareholder may do in relation to his/her/its shares will be dictated by the company's Memorandum of Incorporation, the relevant shareholder agreement (to which the Holder may not even be a party) and the Companies Act, 2008.

125 Secondly, they again amount to a deprivation of the holder's and of other shareholders' property, as well as unequal treatment of shareholders contrary to section 37 of the Companies Act, and to unfair discrimination in breach of the provisions of sections 9(1), (2) and (3) of the Constitution. It would have dramatic and far-reaching effects on the mining industry, which the Minister has failed to consider. Statistics South Africa disclosed in its Quarterly Financial Statistics for March and June 2017 that the total turnover for the mining industry in 2016 was R583,5 billion, excluding dividends and non-mining revenue. 1% of that figure, which would be payable to Black Shareholders in terms of the paragraphs of the 2017 Charter referred to above, would amount to R5,8 billion. In 2016 total dividends paid by mining companies to all shareholders amounted to R6,2 billion. If the 1% turnover payment had to be made to Black Shareholders, only R0,4 billion would be left to pay as dividends to the remaining 70% non-Black shareholders. It should be obvious from that calculation that no sensible investor would find such an investment attractive.

The requirement is accordingly not only irrational but also inconsistent with section 2(e) of the MPRDA, which stipulates that an object of that Act is to "promote economic growth and mineral and petroleum resources development in the Republic".

Eighth Ground: new rights: contraventions of Companies Act[116]

126 Paragraph 2.1.1.12 of the Charter is virtually incomprehensible and in any event *ultra vires*. A Holder cannot possibly ensure that a Black Person shareholder "directly and actively control" his, her or its shareholding. The shareholder in question may wish instead to be a passive investor. In any event, it is unclear what might constitute "direct and active control". What a shareholder may do in relation to his/her/its shares will be dictated by the company's Memorandum of Incorporation, the relevant shareholder agreement (to which the Holder may not even be a party) and the Companies Act, 2008.

127 In any event, the notion that a Black Person shareholder must trade, market and transport his/her/its proportionate share of the production of the company in which the shares are held is stupefying. It is a power which is wholly inconsistent with the fundamental distinction between shareholders on the one hand and the company and its management on the other. The idea of a shareholder being entitled to actively pursue a proportionate share of the business of the company merely by virtue of being a shareholder is entirely inconsistent with the Companies Act, 2008. The further notion that a particular class of shareholder should by means of an instrument issued by the Minister

[116] Founding affidavit para 175-176, pp 81-82

be given that power to the exclusion of other shareholders in addition runs counter to the central principle of shareholder equality enforced by the Companies Act, 2008.

128 This provision accordingly falls to be set aside as being unauthorised in terms of the principle of legality and/or sections 6(2)(a)(i) and (f)(i) of PAJA.

GROUNDS OF REVIEW RELATING TO THE OWNERSHIP ELEMENT: SALE OF MINING ASSETS, BENEFICIATION, AND OFF-SETS

First ground: restriction on off-sets[117]

129 It is submitted that paragraph 2.1.1.13 of the 2017 Charter, which purports retrospectively to deprive holders of mining rights of the benefits of the continuing consequences of empowerment transactions, and which benefits were conferred by the Original Charter, is contrary to the rule of law, arbitrary and/or irrational and not authorised.

130 This provision is accordingly falls to be reviewed and set aside in terms of the principle of legality and/or sections 6(2)(a)(i), 6(2)(f)(i) and 6(2)(f)(ii)(aa), (bb) and (cc) or 6(2)(i) of PAJA as set out more fully in the founding affidavit.

Second ground: beneficiation[118]

131 Beneficiation is referred to in paragraphs 2.1.1.13 and 2.1.4 of the 2017 Charter. It is no longer a separate element but is now dealt with as part of the ownership element. The new requirements in paragraphs 2.1.4(a) to (e)

[117] Founding affidavit para 180-193, p 83-87

[118] Founding affidavit par 194-198, pp 88-90

retrospectively deprive holders which have relied on the beneficiation offsets in the Original Charter of their vested rights to do so.

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

Third ground: preferential option on sale of mining assets

133 Paragraph 2.1.3 of the 2017 Charter provides that a Holder who sells its mining assets must give Black Owned Company a preferential option to purchase.

134 The term "mining assets" is not defined. It may include the mining right itself. If it does, then paragraph 2.1.3 contradicts, and is *ultra vires*, section 11 of the MPRDA in that section 11 provides that the Minister *must* grant consent for a sale if the jurisdictional facts in sections 11(2)(a) and (b) are satisfied.

135 In addition, paragraph 2.1.3 contains no mechanism for affording such a "preferential option" and hence contravenes the rule of law requirements entrenched in section 1(c) of the Constitution.

136 Paragraph 2.1.3 accordingly arbitrarily and without compensation deprives existing holders of rights of a component of ownership (the right of disposition) and deprives existing holders of options and of rights of first refusal of their rights, contrary to section 25 of the Constitution and falls to be set aside in terms of section 6(2)(i) of PAJA, alternatively the principle of legality.

REVIEW GROUNDS IN RESPECT OF THE NON-OWNERSHIP ELEMENTS OF THE CHARTER

GROUNDS OF REVIEW OF PROCUREMENT, SUPPLY AND ENTERPRISE DEVELOPMENT

137 **Mining Goods: "Must be set aside" is void for vagueness**

137.1 The 2017 Charter provides that a holder must "set aside" a minimum of 5% of its total mining goods manufacturing spend on South African Manufactured Goods. The same goes for 44% of total mining goods manufacturing spend, which, the Charter provides, must be "set aside" for sourcing South African Manufactured Goods from BEE Compliant Manufacturing Companies.

137.2 The problem about this, as the Chamber pointed out in its founding affidavit, is that it is simply not clear what "set aside" means in this context.[119] "Set aside" might mean simply making money (in the relevant percentages) available for spending on mining goods to be sourced from the relevant entities. In that event, actually sourcing the mining goods from the relevant entities might not be what the element requires since - it is possible - those entities might not have the mining goods.

137.3 On the other hand, the element might mean that a Holder must actually source the mining goods, in the relevant percentages, from the relevant sources. In that case, the mining goods must be available for sourcing. Otherwise sourcing such mining goods, say from foreign suppliers, might be

119 FA paras 204-206 pp 92-93.

a breach of the 2017 Charter. But mining must continue, and mining goods must be sourced from somewhere. It would put a Holder in an impossible position if it cannot source mining goods from South Africa or from BEE Compliant Manufacturing Companies whilst, at the same time, it is required actually to spend money on sourcing mining goods from those entities. The Minister in this regard has no discretion to permit deviations from the element. Or if he has, as he sometimes implausibly claims he does, then it is not clear what guides his exercise of that discretion.

137.4 The important point, however, is that it is not clear just which of the above rival interpretations of the element is right - spend or set aside. This is not a matter of semantics. The 2017 Charter purports to be binding. Its breach attracts criminal sanctions, penalties and the suspension or cancellation of mining rights.[120] If a Holder is to be exposed to such consequences, then the rule of law requires that what the Holder is required to do should not be ambiguous, or subject to yet unknown interpretations which the Minister might in due course give to the element.

137.5 Nor does the Minister's own understanding of this element give any comfort, let alone clarity, to those whom he purports to regulate by the 2017 Charter. He says in his answering affidavit that, of the two interpretations of the element set out above, the one that "best fits" the spirit, purport and objects of the 2017 Charter "is the appropriate one to adopt".[121] But he does not say which one he adopts. One can only conclude from this that the Minister

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120 2017 Charter clause 2.12.

121 AA para 318 p 413.

does not know which of these two interpretations best fits the objects of the 2017 Charter. If he does not know, how does he expect a Holder to know? The Minister plainly has not thought through what his own charter means.

137.6 It is a fundamental part of the rule of law (section 1(c) of the Constitution) that a person bound by a law (which the 2017 Charter purports to be) must know what the law means. It is true that laws are subject to interpretation, and that lawyers may differ on the right interpretation, but where, as here, even the Minister does not purport to know what the element means, then, we submit, the matter is different. Where the challenge is that the element is vague, and the Minister agrees that it might be (depending on the object, etc, which he does not spell out), then the only conclusion is that the element is void for vagueness. That is, it does not meet the rule of law requirement in section 1(c) of the Constitution.

137.7 The Constitutional Court has dealt with this in *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* 2009 (1) SA 565 (CC) where at paras 27-28 it said:

> "[27] As this Court has held, impermissibly vague laws and legal provisions violate the rule of law, a founding value of our Constitution. In *Affordable Medicines Trust & others v Minister of Health of the Republic of South Africa & another*, Ngcobo J on behalf of a unanimous court reasoned as follows:
>
> > 'The doctrine of vagueness is founded on the rule of law, which . . . is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly' (footnotes omitted).

[28] The definition of 'shebeen' in the Act is therefore impermissibly vague. It is accordingly inconsistent with the Constitution and must be declared invalid." [Emphasis added]

137.8 We submit, therefore, that this element is void for vagueness, constitutionally invalid, and should be set aside.

Verification of local content and the impossibility of determining "South African Manufactured Goods"

137.9 The Chamber says that a Holder will not know 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*". A Holder has no access to these aspects of value 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.

137.10 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.[122] The Minister arrives at this conclusion *via* the verification provisions of the 2017 Charter.[123] 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

122 AA para 355 p 432.

123 AA para 354 p 431.

"verify" local content is on the supplier.

137.11 Quite how verification and proof are supposed to work under the 2017 Charter remains unclear. The Minister gives a legally incomprehensible account of how this might work, essentially saying (if we follow what he says) that if a supplier refuses to "verify" local content, then that supplier "cannot benefit from the transaction [whatever that is] in order for the Holder to be compliant with the MPRDA". To the extent comprehensible, this seems to say that the supplier can refuse to verify local content, however unreasonably, but that if it does so, then it may be punished—quite how it is not explained—and that it will not "benefit from the transaction". Quite how this "punishment" helps a Holder who is entitled to a verification (and therefore a certificate) from a supplier remains unclear. This points to the deep confusion—and therefore unlawfulness—of the scheme the Minister has purported to set up regarding verification.

137.12 That is just one of the problems about this scheme. The other is this. It is said that the SABS will determine whether mining goods are "South African Manufactured Goods". 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 determining or ascertaining whether mining goods are "South African Manufactured Goods" for purposes of the 2017 Charter. On the contrary, the object of the Standards Act is set out in its preamble as:

> "To provide for the development, promotion and maintenance of standardisation and quality in connection with commodities and the rendering of related conformity assessment services; and for that

purpose to provide for the continued existence of the SABS, as the peak national institution; to provide for the establishment of the Board of the SABS; to provide for the repeal of the Standards Act, 1993; to provide for transitional provisions; and to provide for matters connected therewith."

137.13 The rendering of "conformity assessments", upon which the Minister relies as empowering the SABS to issue certificates for the purposes of the 2017 Charter, 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]

137.14 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 would 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. The powers of the SABS are limited by the Standards Act. As the Court said in *Orangezicht Estates Ltd* v *Cape Town Town Council* 23 SC 297, at page 308:

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

137.15 This proposition was quoted with approval by the Appellate Division in *Van*

Eck NO and Van Rensburg NO v Etna Stores 1947 (2) SA 984 (A) at pp 997-998.

137.16 The SABS therefore cannot obtain under the 2017 Charter powers it does not enjoy under the Standards Act. Only Parliament could give it such powers. The Minister cannot give it such powers because in the eyes of the law, he is, just like the SABS, a functionary (in the purely legal and non-derogatory sense).

137.17 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 sense of how this element works remains unanswered by the Minister.

137.18 Also, quite apart from anything else, the Minister has no power, *via* a subordinate instrument (whatever else it is in law, the 2017 Charter is plainly subordinate to primary legislation) to determine the meaning of primary legislation. That is, he cannot assign to the SABS what the Standards Act does not—namely the power to issue certificates as to local content. This trite proposition is ancient and has been repeated in various cases. It suffices to refer only to *Moodley and Others v Minister of education and Culture, House of Delegates, and Another* 1989 (3) SA 221 (A). That case dealt with regulations which were sought to be used to interpret primary legislation. There the Court said at 233-E-G:

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

137.19 Not even the Minister suggests that the 2017 Charter is primary legislation. And if it is not primary legislation, then, on the authority of *Moodley* (and other cases to which it refers), the 2017 Charter cannot be used to alter or "enlarge" upon the meaning of the Standards Act. In short, the Minister is acting *ultra vires* his powers, and trespassing on Parliamentary sovereignty, in seeking to assign to the SABS powers it does not enjoy.

137.20 It gets worse. In terms of the 2017 Charter, the "responsibility to verify local content lies with the supplier of goods and/or services". If the SABS is out of the equation (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 an ill-thought idea without any means of proper implementation.

137.21 There remains therefore an insuperable difficulty in determining, practically, what "South African Manufactured Goods" means. 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?

137.22 For all these reasons, we submit that there is no meaningful answer to the Chamber's complaint in relation to this element. This element therefore falls to be set aside.

138 **Mining Goods: The vagueness of "*Black Owned Companies with a minimum of 50%+1 vote female Black Person owned and controlled and/or50%+1vote Youth owned and controlled*" (This also applies to the "Services" element to the extent that it uses this vague phrase)**

138.1 The 2017 Charter provides that "5% of total mining goods procurement spend" must be "set aside" for procuring mining goods from "Black Owned Companies with a minimum of 50%+1 vote female Black Person owned and controlled and/or50%+1vote Youth owned and controlled".

138.2 We submit that there is no available way of making sense of this requirement. It is so opaque that no one reading it could understand it. Nor does the Minister even attempt to say what the phrase means. He contents himself with making the irrelevant point that the Chamber has not previously said that it does not understand the phrase.[124] What he studiously avoids is to say what, in his view (this being his charter), the phrase means. He simply says that "this is a matter for legal interpretation" and that the phrase must be construed in its context, without saying what that context says the meaning must be.[125] This, we respectfully submit, is an indication that the Minister does not know what the phrase means.

138.3 The Minister must therefore go back and make his intention clear in a properly drafted and comprehensible charter. The 2017 Charter simply does not meet that standard. It is therefore vague and, on the authorities cited above, constitutionally invalid for want of compliance with section 1(c) of the

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124 AA para 320 pp 413-414.

125 AA para 321 p 414.

Constitution.

139 **The Minister did not assess ability to meet the targets set in the non-ownership elements**

139.1 The Minister never satisfied himself, before publishing the 2017 Charter, that the non-ownership elements were capable of being met. This appears in various parts of the founding and replying affidavits,[126] with no meaningful contestation on the Minister's part.[127] However, the publication of the 2017 Charter could only be rational if, before publication, the Minister had first determined the viability of implementing the non-ownership targets and was satisfied that the targets could be met.

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

> "[87] In the present case, the Act was not brought into force with the appropriate regulatory infrastructure in existence or ready to be put in place. On the contrary, the founding affidavit asserts that the necessary schedules had not been determined and that the Act was brought into force in error.
>
> [89] The President's decision to bring the Act into operation in such

126 FA paras 208-209 pp 93-94; FA para 213 p 96; FA para 217 p 97; FA para 219 p 98; FA para 234 p 103; FA para 258 p 113. RA paras 103.2-103.2 pp 2326-2327; RA paras 105.1-105.25 pp 2329-2337.

127 See AA paras 322-331 pp 419-422; AA paras 349-349.3 pp 428-429.

circumstances cannot be found to be objectively rational on any basis whatsoever. The fact that the President mistakenly believed that it was appropriate to bring the Act into force, and acted in good faith in doing so, does not put the matter beyond the reach of the court's powers of review. What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner. This the President manifestly, though through no fault of his own, failed to do."

139.3 The same applies, we submit, to the present case. The Minister never meaningfully challenged, by reference to relevant evidence, the allegation made by the Chamber that there is no capacity to meet the targets. His response appears to be that it is for the Chamber to prove that there is an absence of capacity. That approach is wholly misconceived. A policy can only be rational if the author of the policy has established that the policy's objectives can be met. If that is not done, the policy is by definition irrational. The failure of the Minister to determine, before publishing the 2017 Charter, whether the targets he set were capable of implementation was accordingly irrational and the 2017 Charter falls to be reviewed and set aside on that basis.

140 **Processing of samples**

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

140.1.1 The Chamber said that there was no evidence of capacity to conduct 100% sample analysis in South Africa.[128]

[128] FA para 217 p 97.

140.1.2 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.[129]

140.1.3 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.[130]

140.2 Against this the Minister has advanced factually baseless contentions. Below we set out the contentions, as well as the Chamber's answers to them:

140.2.1 First, the Minister refers to what he considers history, and says that until 1994 local sampling capacity was "resilient and strong".[131] Then, after 1994, sampling began suddenly to take place overseas.[132] This allegedly resulted in the closure of many sampling facilities in South Africa.[133] Finally, the aim of the 100% local sampling element is to redress this.[134]

140.2.2 If anything, these answers by the Minister support the Chamber's

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129 FA para 218 p 97.

130 FA para 219 p 98.

131 AA para 341 p 425.

132 AA para 342 p 426.

133 AA para 342 p 426.

134 AA para 343 p 426.

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 contrary to the law, as already set out above: any measure must be capable of implementation if it is to be lawful.

140.2.3 Second, the Minister says that he is not obliged to demonstrate that there is sampling capacity in the country to meet the 100% target.[135] On this he is wrong: the law is, as already demonstrated, the other way.

140.2.4 Third, the Minister seems to say ("seems", because he does not actually say it) that there *is* such sampling capacity.[136] His evidence for this, undercuts his own argument. He refers to and quotes from annexure AA47 to the answering affidavit. The quotation on which the Minister relies does not support his contention. It talks about research and development and not to sampling. These are two different things. In any event, even if the quotation was about sampling, it simply says that the relevant capacity "remains grossly under-utilised". What it does not say,

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135 AA para 349.2 p 429.

136 AA para 349.3 p 429.

and what the Minister has no evidence for, is the proposition that the 100% sampling target can be met by South African institutions.

140.2.5 Fourth, and 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."

140.2.6 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

140.3 For all the above reasons, we maintain that the Chamber's case against the sampling element remains unchallenged and ought to be upheld.

141 **Breaches of GATT and TDCA**

141.1 The 2017 Charter requires that 70% of mining goods procured by a Holder

be South African Manufactured Goods. This requirement is in breach of the General Agreement on Trade and Tariffs (GATT) and Trade, Development and Co-operation Agreement (TDCA), both treaties to which South Africa is a signatory. 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."

141.2 The internal exceptions contained in Article XI(2) of GATT do not apply so as to save the procurement provisions in the 2017 Charter. Therefore the prohibition on restrictions in Article XI(1) of GATT apply.

141.3 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."

141.4 The treaties were signed by South Africa and are binding as a matter of international law. The treaties prohibit the restriction imposed by the 70% local goods requirement. The Minister therefore could not publish a charter which was contrary to these treaties—not, at any rate, without proving to this Court that he considered these treaties and has a good reason for deviating

from them.

141.5 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 serves as a basis for determining the legality of subordinate instruments. In *Progress Office Machines CC v South African Revenue Services and Others* 2008 (2) SA 13 (SCA) the Court said the following in relation to anti-dumping duties imposed by the relevant Minister:

> "Not only is a court bound to "prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law" but subordinate legislation such as the notice by the Minister of Finance imposing the anti-dumping duty must be reasonable. Dugard submits that a court may "insist on compliance with a state's international obligations as a requisite for the validity of subordinate legislation". The duration of the anti-dumping duty imposed beyond the period allowed by the Anti-Dumping Agreement would not only be a breach of the Republic's international obligations and an unreasonable interpretation of the notice but also unreasonable and to that extent invalid. [Internal footnotes omitted and emphasis added]

141.6 The reasoning of the majority in *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) is consistent with - indeed gives effect to - what was said in *Progress Office Machines* quoted above. It is therefore plain that the Minister may not, in a charter, provide for targets which are inconsistent with South Africa's international treaty obligations, in this case GATT and TDCA.

141.7 There are therefore different ways in which this Court could deal with this element. One is to declare it invalid to the extent that it conflicts with South Africa's international obligations. The second, and perhaps most satisfactory

approach, is to find that section 100(2) of the MPRDA does not empower the Minister to develop a charter which infringes South Africa's international treaty obligations.

141.8 For the above reasons, we submit that the 70% local mining goods requirement is contrary to international law (treaties concluded by South Africa) and (as held in In *Progress Office Machines*) is to that extent invalid. We submit further that the Minister acted beyond his powers in imposing the 70% local mining goods requirement.

142 **Contribution by foreign suppliers**

142.1 The 2017 Charter requires foreign suppliers to contribute a minimum of 1% of their turnover generated from local mining companies towards the Mining Transformation Development Agency (MTDA).[137] The MTDA is yet to be established. Even if and when it is finally established, the MTDA has no lawful entitlement to receive the monies since under section 213(1) of the Constitution such monies can only be paid into the National Revenue Fund. Section 213(1) of the Constitution provides for an exclusive and indivisible collecting agency in the following terms:

> **"213. National Revenue Fund** - (1) There is a National Revenue Fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of Parliament. [Emphasis added]

142.2 The 1% contribution by foreign suppliers would be "*money received by the national government*". On the 2017 Charter, it will not be paid into the

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137 2017 Charter p 145.

national revenue fund but to the MTDA. But there is no Act of Parliament which "reasonably excludes" such monies from the application of section 213(1) of the Constitution. Therefore, in providing for the MTDA in the 2017 Charter, the Minister has acted in breach of section 213(1) of the Constitution and of the principle of separation of powers.

142.3 There is a second problem with the foreign supplier element. The imposition of the 1% on foreign suppliers constitutes what under the Constitution is called a "money Bill". Section 77(1)(b) of the Constitution defines a "money Bill" in *inter alia* the following terms:

> "A Bill is a money Bill if it - ...
>
> (b) imposes national taxes, levies, duties or surcharges."

142.4 Under section 77(3) of the Constitution, all money Bills must be considered under the procedure set out in section 75 of the Constitution. That procedure is Parliamentary procedure. Put shortly, only Parliament can pass a money Bill, or impose taxes, levies, duties and surcharges.[138] In deciding what constitutes a "money Bill", the Constitutional Court held in *South African Reserve Bank and Another v Shuttleworth and Another* 2015 (5) SA 146 (CC) at para 48 that it is important to have regard to the dominant purpose of the instrument in question:

> "[48] So, aside from mere labels, the seminal test is whether the primary or dominant purpose of a statute is to raise revenue or to regulate conduct. If regulation is the primary purpose of the revenue raised under the statute, it would be considered a fee or a charge rather than a tax. The opposite is also true. If the dominant purpose is

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138 See, in this regard, the useful discussion in *South African Reserve Bank and Another v Shuttleworth and Another* 2015 (5) SA 146 (CC) at paras [47], [48], [52]–[53], [55]–[57], [61] and [64].

to raise revenue then the charge would ordinarily be a tax. There are no bright lines between the two. Of course, all regulatory charges raise revenue. Similarly, "every tax is in some measure regulatory". That explains the need to consider carefully the dominant purpose of a statute imposing a fee or a charge or a tax. In support of this basic distinguishing device, judicial authorities have listed non-exhaustive factors that will tend to illustrate what the primary purpose is." [Internal footnotes omitted]

142.5 The 1% element serves no regulatory purpose. It does not seek to regulate conduct either of local or foreign entities. It is a pure tax on foreign entities. Its primary purpose is to raise revenue from foreign entities whose revenue is derived from South Africa. In short, it is a tax, or levy, or a duty or a surcharge. Yet the Minister has purported, by the device of the 2017 Charter, to do that which is reserved for Parliament. He has therefore breached the Constitution. The 2017 Charter accordingly unconstitutional.

142.6 The Minister did not answer these pertinent points raised in the founding affidavit with respect to tax, namely that:-

142.6.1 he has imposed a tax in the Charter; and

142.6.2 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.

142.7 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. For all these reasons, the 2017 Charter falls to be set aside.

REVIEW GROUNDS IN RELATION TO EMPLOYMENT EQUITY

143 The Chamber supports the aims of this element. The Chamber is, however,

concerned about the achievability of the targets within 12 months. For example, it is not possible to change 50% of the board of a Holder, or its top executive management, or 60% of its senior management, or 75% of its middle management, or 88% of junior management, within 12 months without a massive disruption in mining operations.[139]

144 In response to this, the Minister says that he will be flexible in applying this element.[140] But the Minister has no discretion to "dis-apply" this element. Second, the Minister says (by reference to annexure AA48) that there is a sufficient number "of suitably qualified HDSA persons who are not being employed by the mining industry".[141] But annexure AA48 proves no such fact. The document is no more than a list of names.

145 The Chamber accordingly submits that, to the extent that it is not possible to achieve the targets of this element, the element is irrational and should be set aside.

REVIEW GROUNDS IN RELATION TO HUMAN RESOURCES DEVELOPMENT

146 This element requires a holder to invest 5% of the Leviable Amount in essential skills development. 2% of the 5% is to be paid to the MTDA which, as already pointed out, does not exist. We submit that the 5% of the Leviable Amount is a tax, duty or surcharge and accordingly falls outside the Minister's power under section 100(2) of the MPRDA.[142] The MTDA, as already observed, does not

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139 FA para 238 p 105.

140 AA para 387 p 442.

141 AA para 388 p 443.

142 FA para 248 pp 109-110.

exist and, in any event, would not have the right to receive funds since that right is in terms of section 213(1) conferred on the National Revenue Fund.[143]

147 For these reasons, we submit that this element is unconstitutional.

OTHER GROUNDS OF REVIEW

148 The Chamber has other concerns about the 2017 Charter, which it has set out in its founding affidavit. These have not been addressed in these heads but will, if necessary, be addressed in oral argument at the hearing of this case. These include, without limitation, the following elements of the 2017 Charter: human resource development, mine community development, sustainable development, housing and living conditions, and transitional arrangements.

REVIEW GROUNDS IN RESPECT OF MISCELLANEOUS CLAUSES 2.8 TO 2.15 OF THE 2017 CHARTER

149 The Chamber also raised concerns in Part 6 of its founding affidavit about clauses 2.8 to 2.15 of the 2017 Charter. The Chamber briefly submits the following in relation to those clauses:

149.1 In relation to clause 2.8, the relevant provisions of the Precious Metals Act, 2005 and of the Diamonds Act, 1986, operate only at the time of grant of licences and not on an ongoing basis, and even then do not authorise the Minister to prescribe ownership targets for licensees. Furthermore, the Minister has no power in terms of section 100(2)(a) of the MPRDA to repeal

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143 FA para 247 p 109.

part 3 of the Code of Good Practice. For all these reasons, clause 2.8 is *ultra vires*.

149.2 The second paragraph of clause 2.9, which requires 100% compliance at all times with the ownership, mine community development and human resource development elements, is incapable of compliance and what we have said in paragraph 140 above applies equally to this clause.

149.3 Clause 2.10 requires all targets to be applicable throughout the duration of prospecting rights and mining rights, unless a particular element specifies otherwise. That is not authorised by section 100(2) of the MPRDA and in regard to which the first and second general grounds of review (discussed in paragraphs 6 and following of these heads of argument) apply. Moreover, the reference to exploration rights (which is defined in section 1 of the MPRDA in relation to petroleum and which definition is applicable to the 2017 Charter by virtue of clause 2.15 thereof) is *ultra vires* section 100(2) as applied to the minerals and mining industry, there being a separate Charter which applies to petroleum and which appears in schedule 1 to the Petroleum Products Amendment Act, 2003.

149.4 Aspects of clause 2.11, which contains the transitional arrangements, have been traversed in the discussion of each relevant element above.

149.5 Clause 2.12, which deals with non-compliance, will due to its importance be discussed separately in paragraphs 147 and following below.

GROUNDS OF REVIEW IN REGARD TO NON-COMPLIANCE WITH THE 2017 CHARTER

150 Paragraph 2.12 of the 2017 Charter is *ultra vires*. It provides that mining right Holders who have not complied with *inter alia* the ownership element will be "regarded" as non-compliant with the provisions of the Charter "*and in breach of the MPRDA and will be dealt with in terms of sections 47, 98 and 99 of the MPRDA*".

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

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

153 We have dealt with the nature of the Charter above. It is not law and the

Minister cannot by decree elevate the Charter's status to that of legislation. The Minister can also not decree that non-compliance with the Charter shall render the mining company in breach of the MPRDA and subject to the provisions of section 47 read in conjunction with sections 98 and 99 of the Act. Only Parliament, by means of appropriate amendments to the MPRDA, can render a breach of the 2017 Charter a breach of the MPRDA.

154 The Chamber will accordingly seek an order reviewing and setting aside paragraph 2.12 of the 2017 Charter as not being authorised by the MPRDA as contemplated in section 6(2)(a)(i) of PAJA *alternatively* on the basis that this excess of power offends the principle of legality.

CONCLUSION

155 The Chamber has pointed out in its founding affidavit the shock, horror and confusion which the publication of the 2017 Charter induced in those involved in the mining industry, including investors in that industry, holders of rights and expert commentators. So great was the shock that an amount in excess of R50b was wiped off the market value of shares in listed mining companies.[144] In an ailing industry, the publication of the 2017 Charter created a perfect storm. Investors in any regulated industry require consistency and rationality on the part of a regulator as well as an understanding of how the industry functions and what is required to make the industry prosper. In an industry already in trouble, that requirement is all the more important.

[144] As to the calculation of the loss in value, see founding affidavit at para 4, p. 20 and Annexure FA1, p. 126

156 It is clear from the terms of the 2017 Charter that the Minister has no idea of how the industry functions and what the consequences would be of the various obligations he sought to impose on right holders by means of the 2017 Charter. It also appears to have escaped the Minister entirely that there can be no transformation of the mining industry, and in particular there can be no meaningful expansion of opportunities for historically disadvantaged persons to actively participate in that industry and to benefit from the exploitation of the nation's mineral and petroleum resources, unless the industry is sustainable and an attractive investment opportunity. If the industry is rendered unsustainable by the imposition of irrational requirements, none of the objects set out in section 2 of the MPRDA can be met.

157 In summary, a careful analysis of the 2017 Charter, and the response of the Minister to criticisms of that Charter, justify the following conclusions:

157.1 The Minister has assumed a power to make laws *via* the 2017 Charter which is virtually unbridled. Not only has he characterised what is in truth a policy document as a law and seen fit to amend the core definition of Historically Disadvantaged South Africans in the MPRDA, but he has also seen fit to attempt to regulate topics which are the subject-matter of other legislation, for example the Precious Metals Act, 2005, the Diamonds Act, 1986 and the Mine Health and Safety Act, 1996. The Minister's alarming response to the criticism that he is not empowered to regulate matters which fall under other Acts, is that he is simply reinforcing those obligations. The Minister also sees no reason why he should not amend the definition of those persons who are entitled to benefit from the Charter or impose obligations upon

mining companies and confer rights upon black shareholders which are wholly inconsistent with the Companies Act.

157.2 The alarming prospect of a regulator who believes that he has the unique power to legislate by creating laws which constitute neither national, nor provincial nor subordinate legislation is compounded in this case by the Minister's complete lack of understanding of how the mining industry operates and what the effect will be of enforcing what he believes are legally enforceable requirements of the Charter. Unbridled power is bad enough. But where it is coupled with a lack of comprehension as to the effects of its exercise, the result is bound to be catastrophic.

157.3 The Chamber has in its founding affidavit demonstrated the Minister's lack of comprehension as to the effects of the 2017 Charter. One example of that will suffice. The Minister believes that he is entitled to impose obligations on rights holders to acquire goods and services from particular sources without enquiring as to whether or not it is possible to do so. The Minister says it is for the Chamber to show that it is not possible to achieve the Charter's objects. However, it is a necessary element of rational planning and policy making, as well as legislation, that the person responsible for such planning, policy and legislation establishes first that the objects are achievable.

158 A finding that the Charter amounts to legislation would create a constitutional problem of significant dimensions, since the provisions of the Charter conflict not only with the MPRDA, but with other legislation, for example the provisions of the Companies Act, 2008.

159 We submit that there is no saving the 2017 Charter. Its genesis and its content

are so inherently at odds with the Constitution and PAJA that the only sensible way to deal with it is to set it aside as a whole and not attempt to rescue bits and pieces.

160 In the circumstances the Chamber and the mining companies it represents accordingly have no choice but to seek the judicial review and setting aside of the 2017 Charter.

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

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7 December 2017