IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 41661/15

In the matter between:-

THE CHAMBER OF MINES OF SOUTH AFRICA Applicant

and

MINISTER OF MINERAL RESOURCES First Respondent

DIRECTOR- GENERAL, DEPARTMENT OF MINERAL RESOURCES Second Respondent

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FILLING NOTICE

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FIRST AND SECOND RESPONDENT'S HEADS OF ARGUMENT

PRELUDE

1. The Constitutional Court[1], per Jafta J (with 8 other justices concurring), had occasion to deal with the proper interpretation of the Minerals and Petroleum

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[1] Minister of Mineral Resources v Sishen Iron Ore Co (Pty) Ltd 2014 (2) BCLR 212 (CC) paras 40-43 and 45-46; Bengwenyama Minerals (Pty) Ltd and Others v General Resources (Pty) Ltd and Others

Resources Development Act, 28 of 2002 ("the **MPRDA**"). In lucid terms, the relevant part reads:

"*Interpretive approach*

[40] It is a fundamental principle of our law that every statute must be interpreted in a manner that is consistent with the Constitution, insofar as the language of the construed provision reasonably permits. In addition, section 39(2) of the Constitution enjoins every court when interpreting legislation to promote the spirit, purport and objects of the Bill of Rights. This Court has described the principle as a "mandatory constitutional canon of statutory interpretation". *In Phumelela Gaming and Leisure Ltd, Langa CJ said:*

> *'A court is required to promote the spirit, purport and objects of the Bill of Rights when* 'interpreting any legislation, and when developing the common law or customary law'. *In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights.'*

[41] It cannot be gainsaid that the MPRDA, apart from creating new rights, regulates rights which constituted property of the affected parties.

(Bengwenyama-ye-Maswati Royal Council Intervening) 2011 (4) SA 113 (CC); and Agri South Africa v Minister for Minerals and Energy (CCT51/12) [2013] ZACC9; 2013 (4) SA 1 (CC) para 1.

Therefore, section 39(2) obliges us to adopt an interpretation of the MPRDA that promotes those rights.

[42] Another important principle relevant to the interpretation of the MPRDA flows from its provisions. Section 4 proclaims two rules, both of which are relevant to the interpretation of the statute. First, it declares that in the case of a conflict between the MPRDA and the common law, the MPRDA must prevail. Second, it directs that a reasonable interpretation that is consistent with the objects of the MPRDA must be preferred over any construction inconsistent with those objects.

[43] Section 2 of the MPRDA lists nine objects. Because of the importance of these objects to the interpretive process, I consider it necessary to quote the entire section. It provides:

The objects of this Act are to-

(a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources;

(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, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;

(e) promote economic growth and mineral and petroleum resources development in the Republic;

(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.

[44] ...

[45] The promotion of equitable access by all South Africans to mineral resources, the expansion of opportunities for historically disadvantaged persons to enter the mining and petroleum industries and the advancement of the social and economic welfare of all South Africans are cornerstones of that transformation. The State is obligated to advance the realisation of these goals. It is, therefore, vitally important to heed the provisions of section 4 when interpreting the MPRDA.

[46] This is not only because section 4 expressly says so, but also for the reason that the MPRDA was enacted to eradicate inequality embedded in all spheres of life under the apartheid order. Equality is at the heart of our

constitutional architecture. It is not only entrenched as a right in the Bill of Rights, but it is also one of the values on which our democratic order has been founded."

2. The controlling instrument to statutory interpretation is then the Constitution itself, which is the supreme law and which enjoins every statutory interpretation to be made in a manner that promotes the spirit, purport and objects of the Bill of Rights. Within the context of the **MPRDA**, the important principle is that s4 proclaims two rules. First, it declares that in the case of a conflict between the **MPRDA** and the common law, the **MPRDA** must prevail. Second, it directs that a reasonable interpretation that is consistent with the objects of the **MPRDA** must be preferred over any construction that is inconsistent therewith.

3. Relevant to the present dispute are s2(d) and (f) of the **MPRDA** which compels that the grant of a mining right or the conversion of an old order mining right must, amongst others, substantially and meaningfully expand opportunities for **HDP**'s including women to enter the mineral and petroleum industries, in the first place. In the second place, the exercise of such rights must have **HDP**'s benefitting from the exploitation of the nation's mineral and petroleum resources. Further, the exercise of such right must promote employment and advance the social and economic welfare of all South Africans.

4. At the heart of the passing of the **MPRDA** is the goal to achieve the transformation of the mining industry. The **MPRDA** radically altered the private ownership of mineral rights and vesting those resources in the nation as a whole. Any

interpretation which seeks to frustrate that outcome would offend against the constitutional provisions as well as s4 of the **MPRDA.**

5. Central also to the promotion of equitable access by all South Africans is the objective of making sure that the exercise of such rights achieves the expansion of opportunities for **HDP**'s to enter the mining and petroleum industries. The State is obligated to advance the realisation of these goals. It is for that reason that the constitutional court holds it as vitally important to heed the provisions of s4 when interpreting the **MPRDA**.

6. The provisions of s4, direct that the interpretation of any of the provisions of the **MPRDA** must seek to prefer that interpretation which is consistent with the objects of the **MPRDA** so as to appreciate that the **MPRDA** "*was enacted to eradicate inequality imbedded in all spheres of life under the Apartheid order.*"

INTRODUCTION

7. This case concerns the proper interpretation of sections 23(1)(h); Item 7(2)(k) of Schedule II; 2(d) and (f); 100(2) of the **MPRDA** read with clause 2 of the Broad Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2010, ("the **amended Charter**").

8. The dispute between the parties is the divergence of their views relating to the equity holding by historically disadvantaged persons ("**HDP**'s") or historically disadvantaged South Africans ("**HDSA**'s").

9. The respondents, on the one hand, hold a contention that a holder of a mining right or a converted old order mining right must throughout the exercise of such right have 26% of its equity share belonging to **HDP**'s or **HDSA**'s.

10. The applicant, on the other hand, holds a different view, namely, that once the first respondent grants a mining right in terms of s23 of the **MPRDA** or converts an older order mining right in terms of Item 7 of Schedule II to the **MPRDA** and the mineral rights holder achieves a minimum of 26% target of equity for the **HDP**'s or **HDSA**'s (regardless of any diminution in the equity holding by **HDP**'s or **HDSA**'s) remains compliant.

11. For that reason, the parties have agreed to approach the above honourable court for various declarators to achieve clarity on the proper interpretation of the implicated provisions of the **MPRDA**.

THE RELEVANT PROVISIONS OF THE MPRDA AND THE CHARTER

12. In the relevant part, section 23 (1)(h) of the **MPRDA** reads:

> *"23(1) – Subject to subsection (4) the Minister must grant a mining right if –*
>
> *(g) the granting of such right will further the objects referred to in 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan."*

13. Correspondingly and regarding the conversion of old order mining rights, the first

respondent is peremptorily enjoined to grant the conversion of an old order mining right if the applicant complies with the requirements of sub-item (2) of Schedule II to the **MPRDA**. In particular, sub-item (2)(k) reads, in the relevant part,:

> *"a holder of an old order mining right must lodge the right for conversion within the period referred to in sub-item (1) at the office of the regional manager in whose region the land in question is situated together with –*
>
> *(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)."*

14. It is instructive at the outset to take into account the nuanced difference between the two sub-sections. Regarding the granting of a mining right, s23 requires the Minister, amongst others, to be satisfied that the granting of such a right will bring about the deracialisation of the mining industry and achieve the transformative goals that are part of the objects of the **MPRDA.**

15. Concerning the conversion of an old order mining right, the applicant is to make an undertaking that those transformational goals will be realised in the granting of such a mining right or the conversion of that right into a new order mining right.

16. At the outset, the point cannot be overstated that at the time of the granting of the right, all the Minister must be satisfied with is that the granting of such right will in the future achieve the transformational goals. If so satisfied, the Minister is obligated to grant such a right. In the context of the **HDSA** ownership and in line with the Charter requirements, the goal of 26% ownership was to be achieved

within 10 years calculated from 2004 – 2014. With equal force, the granting of a conversion mineral right is an undertaking that those transformational goals will be realised within that 10 year period.

17. In turn, section 2(d) and (f) of the **MPRDA** read:

"Objects of Act

2 – The objects of this Act are to –

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

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

18. Section 100(2) of the **MPRDA** addresses the power of the first respondent to develop a broad based socio-economic empowerment charter and uses the following language:

"***Transformation of minerals industry***

100. (1) The Minister must, within five years from the date on which this Act took effect –

(2) (a) To ensure the attainment of 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, targets and time-table for effecting the entry of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources."

19. In passing s100 (2)(a) of the **MPRDA**, Parliament instructed the Minister to develop a broad based socio-economic empowerment Charter. To that the instruction is that such a Charter must ensure the attainment of the Government objective of redressing historical, social and economic inequalities as stated in the Constitution. The Charter was to set the framework, targets and timetable for effecting the entry of **HDSA**'s into the mining industry. The second object is to allow such **HDSA**'s to benefit from the exploitation of mining and mineral resources.

20. "Broad based economic empowerment" is defined in s1 of the **MPRDA** to mean:

"a social or economic strategy, plan, principle, approach or act which is aimed at –

(a) redressing the results of past or present discrimination based on race, gender or other disability of historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries; and

(b) transforming such industries so as to assist in, provide for, initiate or facilitate –

(i) the ownership, participation in or the benefiting from existing or future mining, prospecting, exploration or production operations;

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

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

21. From the definition of broad based economic empowerment, we can distil the following:

21.1 That empowerment means a social or economic strategy, plan, principle, approach or act which is aimed at redressing the results of past or present discrimination based on race, gender or other disability of the **HDP**'s. We highlight the fact that it is both past and present discriminatory practices that are targeted by the definition.

21.2 In very emphatic terms, the empowerment is for transforming the mining industries so as to assist in, provide for, initiate or facilitate the ownership, participation in or the benefitting from existing or future mining, prospecting, exploration or production operations. This goes for beneficiation as well.

21.3 The empowerment is also said to realise "*the socio-economic development of all historically disadvantaged South Africans **from the proceeds or activities of such operations***". As we highlight later, it is not sound interpretation to conceive of a mining operation in South Africa which does not advance the transformational goals for which the **MPRDA** was intended.

22. It is common cause that the first respondent (with the participation of all relevant stakeholders) developed a broad based social economic empowerment Charter – Scorecard for the broad-based socio-economic empowerment charter for the South African mining industry ("the **Original Charter**") and later the **amended Charter**.

23. Regarding ownership, the language used in the Charter is:

2 ELEMENTS OF THE MINING CHARTER

Ownership

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

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

24. A proper understanding of the Charter regarding ownership is first to understand that the Charter is the instrument the Minister has designed with the object to effect **sustainable growth and meaningful transformation**. The interpretation of the Charter requirements regarding ownership must be one that promotes those objectives.

25. The reading of the preamble to the Charter makes it plain that its goal is to address "*the systematic marginalisation of the majority of South Africans, facilitated by the exclusionary policies of the Apartheid regime, prevented Historically Disadvantaged South Africans (HDSAs) from owning the means of production and from meaningful participation in the mainstream economy.*" The interpretation of the affected provisions must reflect these goals.

26. The Charter, therefore, identifies 6 objectives, 2 of which are in a language identical to the provisions of s2(d) and (f) of the **MPRDA**. In this regard, the Charter requirements of ownership dovetail squarely with those the first respondent is supposed to consider when deciding on the grant of a mineral right or the conversion of an old order mining right.

27. Against the background of the affected provisions of the **MPRDA** and the interpretative approach spelt out by the Constitutional Court, it is now convenient to test whether the interpretation contended for by the applicant is tenable.

28. The applicant advances a contention that once a mineral rights holder, at a certain point before 31 December 2014, achieves a minimum of 26% **HDP** or **HDSA**

ownership, regardless of whether the ownership percentage of **HDP** or **HDSA** ownership later falls below 26% such mineral rights holder remains compliant. We show later why this construction is plainly wrong.

29. Before doing so, however, we identify 10 *indiciae* which are inimical to the construction which the applicant seeks to advance.

RELEVANT POINTERS

30. A proper interpretation of sections 23(1)(h) and item 7(2)(k) of Schedule II to the **MPRDA** (the "affected provisions") must, ineluctably, embrace the following:

30.1 As enjoined by the Constitution[2] the affected provisions must be interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights. The spirit, purport and objects of the Bill of Rights in relation to the **MPRDA** must be an interpretation which promotes the spirit of equality and access to mineral resources by all in particular including the **HDSA**'s.

30.2 One of the entrenched fundamental human rights in the Constitution is the right to equality[3]. An interpretation of the affected provisions which does not appreciate the fact that one of the pernicious elements of our racist past

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[2] Section 39(2) of the Constitution which reads: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

was inequality must be wrong. To the contrary, the **MPRDA** is intended to correct and to promote the achievement of equality.

30.3 In no less measure, the foundational value in our democratic dispensation is one which holds human dignity, the achievement of equality and the advancement of human rights and freedoms to be inviolable[4]. The affected provisions are to be interpreted in a manner consistent with this foundational value of the Constitution.

30.4 The preamble to the **MPRDA** as the constitutional court has pointed out states in unequivocal terms that the **MPRDA** is passed "*reaffirming the state's commitment to reform to bring about equitable access to South Africa's mineral and petroleum resources.*" The State's commitment to reform the mining and petroleum industries will be foiled if it is possible to continue exercising the mining rights even where there is no equity ownership by **HDSA**'s in a particular mining rights holder. This will be the case if an **HDSA** disinvests in a particular mineral rights holder leaving the latter below 26%.

30.5 Reading from the definition of "broad based economic empowerment" impels a conclusion that the interpretation of the affected provisions must

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[3] See s9(2) of the Constitution which reads: "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken

[4] See s1(a) of the Constitution which reads "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) human dignity, the achievement of equality and the advancement of human rights and freedoms." See also s10 of the Constitution which reads "Everyone has inherent dignity and the right to have their dignity respected and protected."

be with an aim at "*redressing the results of past or present discrimination based on race, gender or other disability of historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries*". A mineral rights holder cannot seek to exercise the mining right despite the fact that such exercise of the right does not redress the results of past or present discrimination[5].

30.6 Broad based economic empowerment also means transforming the mining industry. If in the event of disinvestment by **HDSA** and a mineral rights holder is still able to exercise the mining right, the transformation of the industry which the **MPRDA** seeks to achieve stands to be reversed.

30.7 It is impossible to substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources if a mineral rights holder, having had 26% **HDSA** ownership in its operations, loses it. Section 2(d) of the **MPRDA**, being one of the objects of the **MPRDA**, requires the sustained retention of a 26% **HDSA** ownership to be a consequence of mining in South Africa.

30.8 Tellingly, the **MPRDA** demands that when interpreting any of its provisions, the court must prefer any reasonable interpretation which is consistent with its objects to any other interpretation which is at odds with

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[5] See s1(a) of the **MPRDA**.

such objects. An interpretation that conceives a mineral rights holder to remain compliant despite having lost the minimum of 26% of **HDSA** ownership, however reasonable, must be rejected in favour of one which ensures the transformation of the industry.

30.9 It is instructive that the mineral rights granted or converted in terms of the **MPRDA** are granted with a term or condition that such rights are subject to the Charter[6]. A mineral rights holder with an **HDSA** ownership lower than 26% cannot remain compliant where the exercise of such right is in conflict with the term or condition of such a right.

30.10 One of the obligations resting on the mineral rights holder is to submit annual reports detailing the extent of the holder's compliance with the provisions of sections 2(d) and (f) of the **MPRDA** and the Charter[7]. It will be perverse to expect a mineral rights holder who in year one achieved a minimum 26% **HDSA** ownership and lost it in year two to be required to file nil annual returns "*detailing the extent of its compliance with the Charter*". Such a construction is not reasonable.

31. We now turn to deal with each and every declarator that the applicant seeks in this matter.

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[6] "'this Act' includes the regulations and any term or condition to which any permit, permission, licence right, consent, exemption, approval, notice, closure certificate, environmental management plan, environmental management programme or directive issued, given, granted or approved in terms of this Act, is subject;..."

[7] See section 28 (2)(c) of the **MPRDA** which reads: "an annual report detailing the extent of the holder's compliance with the provisions of section 2(d) and (f), the charter contemplated in section 100 and the social and labour plan."

AD PRAYER 1.1

32. Shorn of the details, the applicant seeks a declarator that **once** the first respondent or his delegate is satisfied that the grant of the mining right applied for will further the objects referred to in s2(d) and (f) of the **MPRDA** and will be in accordance with the Charter and grants such a right, the holder thereof is not thereafter legally obliged to restore the percentage ownership by **HDP**'s to the 26% target should such percentage fall below 26%.

33. In the applicant's written heads of argument[8], the argument appears to be that the assessment on whether the granting of the right will meet the requirements of s23 (d) and (f) is made "*upfront*" and is also said to be an assessment made "*once-off*".

34. The argument made is further that the legislature would have provided that a holder of a mining right will be required to continually meet the requirements of s23 if it had intended it.

35. This construction by the applicant must be wrong. The reasons are:

35.1 The **Original Charter** in its preamble stated the following: "*it is government's stated policy that whilst playing a facilitating role in the transformation of the ownership profile of the mining industry it will allow the market to play a key role in achieving this end and it's not the government's intention to nationalise the mining industry.*" This is an

important and cardinal factor. The government did not seek to dictate to any of the mineral rights holders on how to commercially structure their relationships in the attainment of the equity stake of the **HDSA**'s. Both the **MPRDA** and the Charter do not address themselves to the shareholders. The rights and obligations that flow from the granting of a mineral right are rights and obligations to be exercised and performed by the mineral rights holder.

35.2 Having stated that as a background, the interpretation that the applicant seeks to advance under this prayer offends against all the 10 *indiciae* we have identified in the paragraph above, including, the constitutional imperative of the **MPRDA** being such a legislative measure with which the constitutional purpose to promote the achievement of equality is to be realised.

35.3 An interpretation contended for by the applicant flies in the face of the provisions of s4 whose coercive language is plain that the courts must interpret the provisions of the **MPRDA** in a manner that is consistent with the objects of the **MPRDA**. This must be so even where the interpretation contended for by the applicants is found to be reasonable.

35.4 At the time of granting of the mining right or the conversion of the old order mining right, the first respondent or his delegate grants such a right or converts it, having considered the application, that such grant **WILL**

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[5] Paras 49; 50 and 51.

achieve the transformational goals spelt out in the s2(d) and (f), amongst others. This is true even for the conversion of the old order mining right. In the latter case, all the applicant needs to do is to make an **undertaking**.

35.5 It goes without saying that the 26% of **HDSA** ownership is not realised at the point of the granting of such a right but rather on the strength of an undertaking that such equity will be transferred to **HDSA**'s in the 10 year window spelt out in the Charter.

35.6 A mining right enures for the "*life of mine*" meaning the number of years that a particular mine will be operational[9]. It is for that reason that Parliament would not have seen it fitting to spell out that the objects of the **MPRDA** are to be pursued for the "*life of mine*". The exploitation of the mineral resources of South Africa is no longer possible without including in such operation the equity involvement of such **HDP**'s.

35.7 There is no doubt that the assessment by the first respondent to grant a mining right or to convert an old order mining right is made at the time of the application only. This being a given, does not mean that the obligations of the mineral rights holder do not continue for the "*life of mine*". On the contrary, they do.

35.8 The applicant then makes its submission that:

"Accordingly, in the absence of a clear statutory power, a mining right

once granted or converted cannot be revoked or cancelled where the empowerment requirements have changed after the fact.[10]" This contention is without substance. Where the Charter requires 26% **HDSA** ownership, an **HDSA** who disinvests does not change the empowerment requirements of the Charter. The license holder will still be required by the **MPRDA** and the Charter to comply with its targets. We deal later with whether there are any punitive consequences which follow a breach of the **MPRDA** or the Charter.

AD RELIEF 1.2

36. The declarator under this prayer is no different than the relief sought in paragraph 1.1 of the notice of motion. This prayer relates to the conversion of an old order mining right in terms of Item 7(3) of Schedule II to the **MPRDA**.

37. We have already advanced reasons why the argument made by the applicant is wrong. We repeat those submissions under this heading.

AD RELIEF 1.3

38. Paraphrased, and should the court find that there is an obligation on a mineral rights holder to top up any diminution of **HDP** ownership level to 26%, the applicant seeks a declarator that such a diminution does not constitute a

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[9] See definition section of the Charter.
[10] See paragraph 58 of the applicant's heads of argument.

contravention for purposes of s47 (1)(a) or 93(1)(a) and further does not constitute an offence for the purposes of s98(a)(viii).

39. It is common cause that s47 of the **MPRDA** deals with the first respondent's power to suspend or cancel rights, permits or permissions if, among others, the conducting of the mining operation is in contravention of the **MPRDA** or breaches a material right or condition of such right, permit or permission.

40. The section also specifies procedural steps before any suspension or cancellation of a mining right can occur.

41. The applicant having dealt with the meaning of "*mining* operation"; "*to mine*"; "*the mining* area" advances an argument that a contravention is only a "*specific mining related contravention of an operational kind*" and "*not a potential contravention relating to the ownership of the industry asset, BEE transactions or the transformation provision of the Act.*"

42. Again, with respect, the argument is wrong. It is the conduct of a mining operation in contravention of any provision of the **MPRDA**[11]. "this Act" includes the regulations and **any term or condition** to which a license right is granted in terms of the **MPRDA**. There is no reason to limit the provisions of s47 to specific mining related "*contraventions of an operational kind*".

43. We are fortified in our submission by the fact that one of the conditions for the

grant of a mining right or conversion of an old order mining right is compliance with the Charter requirements. It is inconceivable that there could be no consequences for the transformational objectives of the **MPRDA** in the event of a breach of such a condition for the granting of the right.

44. If the argument of the applicant is to hold, there would have been no purpose in the Constitution and Parliament taking such drastic steps in rearranging mining in this country. The private ownership of mining rights was abolished; the State was made the custodian of the mineral rights on behalf of all South Africans; the **MPRDA** is intended to advance equal access for all South Africans to all mineral resources of the country. Against that background, the applicant appears to say there would be no consequence if at one point a mineral rights holder had a minimum of 26% **HDSA** ownership and subsequently lost that ownership profile.

45. The applicant also argues that s47 of the **MPRDA** cannot be used for what it calls "*a notional* 'non-compliance'" *with the transformational provisions of the Act*". This contention is somewhat perplexing. The entire edifice of the **MPRDA** is to realise those transformational provisions of the **MPRDA**. We ask rhetorically how can this be "*notional*".

46. The other argument the applicant makes is that in the event of a breach the first respondent can direct the holder of a mining right to take corrective measures. The argument then goes to say that the first respondent has no power to direct a mining right holder or a converted mining right holder to comply with the provisions of

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[11] See s1 of the **MPRDA**.

s2(d) and (f) of the Charter. This argument is difficult to understand. In the first place, the first respondent cannot grant a mining right or convert a mining right if he or she is not satisfied that the mining right holder will comply with the provisions of s2(d) and (f) of the Charter. It therefore stands to reason that a mineral rights holder who is in breach of the condition of license or the basis for the grant of such license is at peril of the license being suspended or cancelled.

47. The distinction which the applicant seeks to make between the provisions of s17(4) and 23 or under Item 7 of Schedule II of the **MPRDA** is one without a difference. Section 17(4) gives the first respondent the power, having regard to the type of mineral concerned and the extent of the proposed prospecting project to request that the applicant gives effect to the objects referred to in s2(d). The section obviously relates to prospecting which may or may not lead to mining.

48. Section 23 and Item 7 of Schedule II of the **MPRDA** uses the word "*satisfied*" and undertakes to realise the objectives of s2(d) and (f) of the **MPRDA**. The distinction is easy to understand. With an application for a mining right, an applicant will have a plan about how it will fulfil the objectives of the **MPRDA** including those set out in s2(d). With a conversion, the applicant, as an already existing mining entity, undertakes to meet those objectives.

49. It is incorrect to say the first respondent does not unilaterally impose terms and conditions in the granting of a mining right or a conversion of a mining right. On the contrary, this is what the first respondent does. The mining licenses are issued with one of the conditions being compliance with the provisions of the Charter. As

in the Mawetse judgment[12], the Supreme Court of Appeal did point out that these are terms and conditions unilaterally imposed.

50. The other argument advanced by the applicant is that the first respondent does not have any general powers of enforcement of the Charter provisions. This cannot be correct. The first respondent cannot grant a mineral right or convert a mineral right if the granting of such right does not advance the goals set out in the Charter.

51. Section 23(h) of the **MPRDA** regarding the granting of a mineral right only implores the first respondent to grant such a right if the granting of such right will further the objects referred to in s2(d) and (f) **and in accordance with the charter contemplated in s100** and the prescribed social and labour plan. To suggest that these are provisions that can be breached with impunity runs counter to the very transformation objectives of Parliament passing the **MPRDA**.

52. As we make the point, s25(h) and 28(2) of the **MPRDA** requires mineral rights holders to report *inter alia* detailing the extent of their compliance with the provisions of s2(d) and (f), **the Charter contemplated in s100** and the social and labour plan.

53. It is significant that failure to meet this reporting obligation is one ground that may lead to the suspension or cancellation of a mining right. If the details of compliance with the Charter were as innocuous as the applicant would want to make them, no

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

such penalties would have been legislated under s47 of the **MPRDA**.

54. Regarding the ring-fencing or lock-in provisions, it was never the government's intention to involve itself in the commercial transactions that the license holders make with their empowerment partners. It is also incorrect to argue that the **original Charter** was by consensus. The first respondent did consult the industry stakeholders who agreed and signed the **original Charter**. This does not, by any means, suggests that the power of the first respondent to develop the Charter in terms of s100 (2) of the **MPRDA** will be by way of consensus. The amount of R100 billion referred to in the **original Charter** was not a funding that was to be made by the industry for the acquisition of equity by **HDSA**'s but rather the industry had agreed to assist **HDSA** companies in securing finance to fund their participation in an amount of R100 billion.

55. It is not understood what argument is being made around the "*retrospective changes being made to the ownership requirement*[13]". The 26% target was to be realised within the period of 10 years. This target has not been revised upwards or downwards.

56. The argument that the Charter obligations are "*clearly the aspirational nature of the targets to which the parties had agreed*" is simply incorrect. As we point out earlier, the **MPRDA** and the Charter impose obligations which the exercise of a mining right throughought the "*life of a mine*" are to be met and maintained.

57. It is not particularly surprising that the applicant does not offer an explanation of what the consequences of non-compliance with the targets set out in the Charter should be. The reason for this is simple. There could not be any basis to alter the legal regime for mining in South Africa with particular emphasis in ensuring equal access to the nation's resources to all, yet failing to do so would have no consequences following. The true answer to the question is that the obligations imposed in the Charter, following the development of the Charter as provided for in s100(2)(a) of the **MPRDA**, are to be met.

58. Nowhere in the **original Charter** or the **amended Charter** is there a reflection of a consensus between the government and the stakeholders that there would be no ring-fencing or lock-in provisions, or for that matter, any reference to a process by which the commercial arrangements by license holders and their **HDSA** partners are to structure their relationships.

59. It is significant that the applicant does acknowledge that the **original Charter** contemplated a review of the obligations imposed by the Charter in the 5 year period of its coming into operation. During this review period the government and the stakeholders would also reveal any deficits and design whatever correction was necessary to address those shortcomings. We submit implicit in this that all role players acknowledged that the Charter may, on good reason, be amended to achieve any correction that was necessary.

60. At this point it is useful to meet the other argument which the applicant seeks to

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[13] See para 103 of the applicants heads of argument.

mount that the first respondent does not have the power to amend the Charter. On the contrary, I am advised that it is settled law that where a functionary is given a power to do something, that functionary would have the power to undo that where good reason exists to do so. This is quite different to the principle of the *functus officio*. Further legal argument will be made upon the hearing of this application[14].

61. To fortify the argument, the government and the stakeholders could not have agreed to review the Charter if the implications of such review were irremediable simply because the first respondent would then have been *functus officio*. On the contrary, on good and compelling grounds, the first respondent would be entitled to revise, for instance, the percentage equity holding by **HDSA** upwards or downwards if there is a rational reason to do so.

62. Regarding the "*continuing consequences*", the **original Charter** read:

> "*4.7*
>
> - *The continuing consequences of all previous deals would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production.*"

The corresponding provision in the amended Charter reads:

> "*2.1* *The continuing consequences of all previous deals* concluded prior to the participation of the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002 *would be included in calculating such credits/offsets in terms of the market share as measured by attributable units of production.*" (Own emphasis)

63. It is plain, therefore, that where the **original Charter** refers to "*previous deals*", the **amended Charter** qualifies those deals to be those concluded prior to the coming

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[14] See Masetlha v The President of the Republic of South Africa and Another 2008(1) BCLR 1 (CC) Paras 66 – 70.

into operation of the **MPRDA**. It is for this reason that we submit nothing new is introduced in the **amended Charter** save to clarify the phrase "previous deals" appearing in the **original Charter**.

64. We must emphasise that nowhere in the **original Charter** as well as in the **amended Charter** does one find the phrase "*continuing consequences limitation*". Any argument that presupposes that the **amended Charter** in this regard affects "*the ability of the mining companies to meet the target by 2014*"[15] is therefore misplaced.

65. The applicant argues that the provision in the Charter which make non-compliance with the obligations under the Charter liable to a suspension or cancellation in terms of s47 of the **MPRDA** has no legal standing because the first respondent is not empowered by s100 of the **MPRDA** to do so[16].

66. We meet the argument in these terms:

66.1 It is correct that the source of power to suspend or cancel a mineral right does not derive from the Charter itself. This stated, however, does not mean that the power of the first respondent to cancel or suspend a mineral right does not exist. In express terms, s47 of the **MPRDA** confers that power on the first respondent to suspend or cancel a mineral right where the conduct of the mining operation is in breach of the provisions of the

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[15] See para 117 of the applicant's heads of argument.
[16] See clause 3 of the **amended Charter**.

MPRDA. Section s23(1)(h) makes specific reference to compliance with the Charter and Schedule II part 7(2)(k))

67. What renders the breach of the Charter obligations liable to the s47 of the **MPRDA** consequences is the **MPRDA** itself. This is when s47 of the **MPRDA** empowers the first respondent to cancel any mining right if the holder thereof is conducting a mining operation in terms of the **MPRDA** and in particular breaches any material term or condition of such right. It follows, therefore, that where a material term or condition of such a right entails, *inter alia*, compliance with the Charter, a breach of such a term or condition will trigger the provisions of s47 of the **MPRDA**.

68. If the argument relating to the "*imposition after the fact of new and more onerous charter provisions and the attempt at the retrospective enforcement of those provisions*", rests on the assumption that the **original Charter** required achievement of a minimum of 26% **HDSA** ownership once in the 10 year period and the **amended Charter** requires that ownership to be held in perpetuity, the argument would have substance. But, this is not the case. Nowhere in the **original Charter** does it state that the 26% **HDSA** ownership target is a once-off. What both Charters contemplate is that an exercise of a mineral right under the **MPRDA** is compliant for as long as there is a minimum of 26% **HDSA** ownership in the holder of the mineral right throughout the "*life of the mine*".

Administrative Justice

69. The applicant contends that if the first respondent was entitled to develop a new

Charter he had to comply with the provisions of s6 of the **MPRDA** which provides for any administrative decision making to be lawful, reasonable and procedurally fair.

70. On the evidence, the development of the **amended Charter** was inclusive. All the stakeholders were present throughout the process and expressed their reservations in respect of some elements of the amendment to the Charter. This does not render the process administratively unfair[17]. It must be understood that the power of the first respondent to develop the Charter does not require consensus with stakeholders[18]. Nor does fair administrative action require consensus.

71. The applicant argues that there was a "*common understanding between the state and industry stakeholders*" that the obligation of a 26% requirement was "*not a continuous and on-going one*". This was not common cause[19]. The applicant is invited to show where in the text of the **original Charter** this understanding is found. In any event, such a provision would have been inconsistent with the objects of the **MPRDA**.

72. We reiterate the submission that nowhere was the obligation to achieve a minimum of 26% **HDSA** ownership target within 10 years a once-off requirement. The plain reading of the **MPRDA** clearly shows that the objects referred to in s2(d) and (f) read with the obligations in the Charter provided in s100 are to be met for a mining right or a conversion of a mining right to remain valid.

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[17] See answering affidavit, para 42, paginated page 201.
[18] See s100(2)(a) of the **MPRDA**.
[19] See paragraph 127 of the applicant's heads of argument.

AD RELIEF 1.4

73. Under this remedy the applicant seeks a declarator that neither the **original Charter** nor the **amended Charter** requires the holder of a mineral right to continue to enter into further empowerment transactions to address losses in **HDP** or **HDSA** ownership.

74. The phrasing of this declarator is mere semantics if it avoids the conclusion that it is a declarator that conveys what the respondents contends is a concept of "*once empowered always empowered*".

75. In this regard we repeat the submissions we made that neither the **original Charter** nor the **amended Charter** spells out that the achievement of a minimum of 26% **HDSA** ownership is a once-off event. To the contrary, a mining right and a converted mining right is compliant for the "life *of the mine*" for as long as it, *inter alia*, meets the objectives set out in s2(d) and (f) of the **MPRDA** and the Charter contemplated in s100(2)(a).

76. The difference between the applicant and the respondents regarding the period and extent to which a mineral rights holder should have a minimum 26% **HDSA** ownership is the interpretation of the 10 year period in the Charters. Respondents maintain that **HDSA** ownership participation in a license is for the entire duration of the "*life of the mine*". The 10 year period is merely a period within which a mineral rights holder is to achieve a minimum of 26%. By contrast, the applicant uses the period of 10 years as the period within which the 26% **HDSA** ownership is

to be achieved and once achieved the mineral rights holder is entitled to continue mining despite having no **HDSA** ownership in its operations.

77. A *fortiori* each mining entity, for as long as the law remains the same, must by year 20 and until the "*life of mine*" still have a minimum of 26% **HDSA** ownership. It is for that reason that the duty to report compliance with the requirements of the Charter is annual (for the "*life of the mine*") as spelt out in s25(h) and 28(2)(c). The reporting provisions are not limited to the 10 year period between 2004 and 2014.

78. We cannot overstate the submission that an interpretation that a mining rights holder, whether original or converted, can continue mining without meeting the transformational requirements of the **MPRDA** would be an interpretation hostile to the injunction in s4 of the **MPRDA**. The section requires the court to prefer an interpretation which is consistent with the objects of the **MPRDA** and to reject one, however reasonable, that is incompatible with those objects.

79. It is evident that the loss of **HDP** or **HDSA** ownership in a license holder is a function of the nature of the commercial transactions which the mineral rights holder would have concluded with its **HDP** or **HDSA** partners. The **MPRDA** recognises the freedom of contract which the right holder would have and correspondingly the **HDSA**. This freedom of contract does not exculpate the mineral rights holder from meeting the obligatory requirements of the **MPRDA** and the Charter.

80. It would, in law, be improper for the State to prescribe what contractual agreements

the industry must conclude to remain compliant.

81. On the contrary, the **original Charter** recognises that the role of the State is merely facilitative[20] in that it will allow the market to play a key role. So the stakeholders have the absolute discretion on how to structure their contractual arrangements.

AD RELIEF 1.5

82. In this regard, the applicant seeks a declarator that neither the **Original Charter** nor the **amended Charter** require **HDSA** ownership to include **HDP**'s or **HDSA**'s, entrepreneurs, workers (including employee share option schemes, and/or communities).

83. We quote the relevant provisions of the **original Charter** in response. The clause reads:

"*4.7*

Government and industry recognise that one of the means of affecting the entry of HDSA's into the mining industry and allowing HDSA's to benefit from the exploitation of mining and mineral resources is by encouraging greater ownership of mining industry assets by HDSA's. Ownership and participation by HDSA's can be divided into active or passive involvement as follows:

- *Active involvement, collective investment, through ESOPS and mining dedicated unit trusts. The majority ownership of these would need to be HDSA based...*"

84. To this submission we must add that the definition of "*Historically Disadvantaged South Africans (HDSA) refers to any person, category of persons or community, disadvantaged by unfair discrimination*" before the interim Constitution came into

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[20] See the **original Charter**, preamble bullet point 6, page 113.

operation.

85. From the definition[21], we can read "*any person or category of persons*" to include entrepreneurs. The reference to communities is explicitly stated.

86. There is also an express reference to "*collective investments through ESOPS*"[22].

87. The argument that there are new categories included in the **amended Charter** but not in the **original Charter** is therefore incorrect. No new categories are introduced by the **amended Charter**.

88. Further submission in this regard insofar as the first respondent and the stakeholders had agreed to review the **original Charter** in the first 5 years and to see what are necessary measures for the realisation of its goals, it follows that where such an assessment would reveal a need for a broader **HDSA** category, that such an alignment would be possible.

AD PRAYER 1.6

89. The case the applicant makes under this heading is that the 2010 Charter is *ultra vires* the powers of the first respondent where it purports to retrospectively deprive holders of mining rights or converted mining rights of various benefits. This is incorrect.

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[21] See page 114.
[22] See clause 4.7 of the **original Charter** bullet point 3, page 116.

90. The **original Charter** contemplated monitoring progress in the implementation of plans; developing new strategies as needs are identified; ongoing government/industry interaction in respect of these objectives; developing strategies for intervention where hurdles are encountered, exchanging experiences, problems and creating solutions; arriving at joint decisions and **reviewing this Charter if required**.

91. The **original Charter** was alive to make the review period midway into the compliance period. It clearly contemplated that if the review dictated that there were hurdles encountered, strategies of intervention were going to be developed. This was not going to be "*retrospective*". To the contrary, the stakeholders would be afforded the next 5 years to find alignment with the revised strategies.

92. The submission then is that the first respondent was not acting *ultra vires* in making such adjustments as the review dictated were necessary. Further, that such adjustments were not "retrospective" but rather were to be achieved in the remaining half of the compliance period.

AD RELIEF 1.7

93. Here the complaint is that the **amended Charter** is *ultra vires* where the first respondent purports to render holders of mining rights (new order or converted) who failed to comply with the **original Charter** or the **amended Charter** or the **MPRDA** in breach of the **MPRDA** and subject to the provisions of s47 thereof read with s98 and 99.

94. We have addressed this argument in relation to relief 1.3 and repeat those submissions as appear in paragraphs 38-72 of these written submissions.

CONCLUSION

95. Where the applicant contends that there is no recurring obligation on the part of the mining rights holder (new order or converted), a recurring obligation to maintain a minimum of 26% **HDSA** ownership, the respondents contend that every mining right holder must reflect a minimum of 26% **HDSA** ownership for the "*life of the mine*". The 10 year period reflected in both charters was merely offering the mining rights holder a window within which that level of empowerment was to be achieved.

96. The applicant contends (as a second question) that the first respondent does not have the power to enforce compliance with the provisions of the Charters. This is on the basis that the Charters are policy documents and not subsidiary legislation[23]. The respondents maintain that the Charters are indeed subsidiary legislation. This is so for the following reasons:

96.1 It is Parliament in s100 that confers the power on the Minister to develop the Charter.

96.2 It is not in the remit of parliament to confer policy making powers to the

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[23] See Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd, 2001 (4) SA 501 (SCA), para 7.

executive[24].

96.3 To develop the Charter constitutes an administrative action because in so doing the first respondent is implementing legislation.

97. Non-compliance with the requirements of the **MPRDA** does trigger the provisions of s47or 93, or an offence in terms of s98. This is so for the following reasons:

97.1 The definition of "*this Act*" includes terms and conditions for the grant of the right which in these instances includes compliance with the provisions of the Charter and axiomatically mean that a breach of that condition would be a breach of "*the Act*".

97.2 There is an annual obligation on the mineral rights holder to submit reports indicating the extent of compliance with the Charter obligations. This reporting requirement is one obviously intended to enable sound monitoring which implies ongoing obligations to be reported upon.

97.3 The provisions of s23(1)(h) of the **MPRDA** are clear in their language that the first respondent's granting of a mineral right is when satisfied, amongst others, that the granting of such a right will be in accordance with the provisions of the Charter.

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[24] See s85(2)(b) of the Constitution, it reads: "*the President exercises the executive authority, together with the other members of the Cabinet, by (b) developing and implementing national policy.*"

98. The third question involves the determination of whether there has been compliance with the 26% target in the light of both Charters. The applicant contends that the first respondent has "*retrospectively*" introduced new requirements and deprived the rights holders of rights they had acquired through the **original Charter**.

99. The answer to this question is that the 10 year period within which the **HDSA** ownership target was to be met did not entail that once that target was met at a certain point in the 10 year period there would never be a requirement for such mineral rights holder to replenish that equity were it to fall below the minimum of 26%. Stated differently, the "*once empowered, always empowered*" concept has no application in both the Charters.

100. The fourth question is whether the first respondent, in amending the **original Charter** was acting *ultra vires* her powers.

101. In response, the respondents contend that the **original Charter** did contemplate a possibility that a mid-term review may reveal aspects which require some intervention. Implicit in this is that the first respondent and the industry appreciated the fact that where hurdles are encountered, the Charter would be reviewed and such review would entail an intervention.

102. The intervention, if justified, would include the power to amend the Charter.

103. In the circumstances, the court must exercise its discretion and not grant the

declarator sought in these proceedings in the terms set out in the notice of motion. Instead, the respondents have made out a case that:

103.1 the granting of a mineral right (new order or converted), by the first respondent, having satisfied himself or herself that the granting of such a right will substantially and meaningfully expand opportunities for Historically Disadvantaged Persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources (s2(d)) and will promote employment and advance the social and economic welfare of all South Africans, must mean that such goals are to be achieved for as long as that right is extant;

103.2 the period of 10 years spelt out in both Charters is merely a window period given to the mineral rights holder to realise the empowerment target of a minimum of 26% **HDSA** ownership. It does not mean that once the minimum target is achieved at any period within the 10 years no consequences follow if there is a dilution below the target percentage;

103.3 the annual reporting requirements under s25(2)(h) and 28(2)(c) are obligations of each mining right holder for submitting prescribed reports **detailing the extent of the holder's compliance** with the provisions of the Charter is indicative of a duty that the obligations of the Charter enures for as long as the mineral right remains valid;

103.4 the power of the first respondent to suspend or amend a mineral right (new order or converted) in terms of s47 of the **MPRDA** includes where the conduct of the mineral rights holder is in contravention of "*this Act*". "*This Act*" includes, *inter alia*, any term or condition for the grant of the right. One such term or condition is compliance with the provisions of the Charter. Axiomatically a contravention of a provision of the Charter will be a breach of the **MPRDA**. A breach of the **MPRDA** in turn triggers the provisions of s47 of the **MPRDA**;

103.5 section 98 of the **MPRDA** makes it an offence where any person contravenes any provision of "*the Act*". Where a person is shown to have contravened one of the provisions of the Charter will, by definition, be a contravention of "*the Act*". Such transgressor would therefore be guilty of an offence;

103.6 section 99 of "*the Act*" provides for penalties for anyone convicted in terms of the provisions of s98. Therefore, any person found to have contravened or failed to comply with any provision of the **MPRDA** (such as compliance with the provisions of s23(1)(h))is liable to a penalty;

103.7 the concept of "*once empowered, always empowered*" is inconsistent with the objects of the **MPRDA** and therefore of no application in the interpretation of the provisions of the **MPRDA**;

103.8 where a mineral right holder's (new order or converted) **HDSA** ownership

falls below the minimum of 26% which was previously held, it still holds the obligation to replenish the **HDSA** ownership to the minimum of 26%;

103.9 implicit in the power of the first respondent to develop the Charter is the power to amend such Charter where there are rational reasons to do so; and

103.10 the revision of some of the elements of the Charter mid-term does not entail "*retrospectivity*". The first respondent and the industry stakeholders did contemplate that if the review process reveals hurdles for the achievement of the objects of the **MPRDA** it would be revised. The revised elements were to be achieved in the second half of the 10 year period.

DATED AT JOHANNESBURG ON THIS THE 10th DAY OF FEBRUARY 2016

IAM SEMENYA SC

L. GCABASHE SC

N. MAYET

CHAMBERS, JOHANNESBURG