IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA



	Case no:	
In the matter between:		
The Chamber of Mines of South Africa	Applicant	
and		
Minister of Mineral Resources	Respondent	
FOUNDING AFFIDAVIT		

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- 8.20 **FA20:** Confirmatory affidavit of Mr RA Baxter

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TEBELLO LAPHATSOANA CHABANA

hereby say on oath that:

PART 1: INTRODUCTION

THE PURPOSE OF THE APPLICATION

- The Chamber of Mines of South Africa (Chamber) and its members are fully committed to the transformational objects of the *Mineral and Petroleum Resources Development Act*, 2002 (MPRDA) and have given concrete and substantial expression to that commitment. As shown below, the Chamber has played an integral role in the reform of South Africa's minerals policies since 1992 and has contributed positively to the reform agenda throughout the process. It goes without saying, however, that the Chamber and its members also have the right to expect lawful, reasonable and procedurally fair conduct by the Minister of Mineral Resources (Minister) and officials of the Department of Mineral Resources (DMR). Regulatory certainty and the fair and evenhanded administration of laws are of the utmost importance in sustaining the mining industry.
- The Chamber and its members are in consequence wholly opposed to attempts to subvert the rule of law, the MPRDA and its objectives by the unlawful publication of instruments which purport to give effect to such objectives but in fact undermine them. The instrument which is the subject of this review application will, if implemented, destroy the very industry whose survival is necessary to give effect to the objects of the MPRDA.

- The purpose of this application is to seek the judicial review and setting aside of the "REVIEWED BROAD BASED BLACK-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING AND MINERALS INDUSTRY, 2016" (2017 Charter) published by the respondent the Minister on 15 June of this year.
- The publication of the 2017 Charter had, and continues to have, a disastrous effect upon the mining industry as a whole, as well as investors, stakeholders and employees in that industry. The shock induced in all role players within the mining industry, including financial commentators, has been so profound that an amount in excess of R50 billion was wiped off the market value of shares in listed mining companies upon the publication thereof. That event reflects the views of thousands of shareholders concerning the consequences for the mining industry of the publication of the 2017 Charter. The effect of the 2017 Charter has indeed been so profound that Moody's, one of the top three sovereign ratings agencies, characterised the 2017 Charter as "credit negative", implying that it may lead to a further cut in South Africa's credit rating.²
- The 2017 Charter has also been met by universal disbelief and condemnation on the part of mining lawyers. In short, the publication of the 2017 Charter has been an unmitigated disaster, both for the mining industry as a whole and for South Africa.³

¹ The calculation of that loss in value is attached marked "FA1".

² This does not mean that there will be a further cut. It does however mean that the 2017 Charter has contributed to a negative outlook.

³ A note prepared by Roger Baxter, the Chief Executive Officer of the applicant, explaining the

- As will appear from what is said below, the publication of the 2017 Charter was so obviously beyond the powers of the Minister that it is incomprehensible that he could honestly have believed that such publication constituted a legitimate exercise of power under section 100(2)(a) of the MPRDA.
- The 2017 Charter is furthermore so confusing and confused, and so contradictory in its core provisions, that not only are the mining companies who are supposedly obliged to comply with the 2017 Charter perplexed as to what they are required to do, but legal experts themselves are confused and find themselves unable to provide clear advice to their mining and investment clients as to the meaning and effect of the 2017 Charter. Furthermore, the Minister's response to the Chamber's urgent application for an interdict preventing him from giving effect to the 2017 Charter did not offer a coherent response to the core interpretational difficulties raised by the Chamber.
- In publishing the 2017 Charter, the Minister has purported to exercise powers which reside exclusively with Parliament. He has, in other words, plainly usurped the role of Parliament.
- 8.1 Thus, for example, he has replaced the definition of "historically disadvantaged person" in section 1 of the MPRDA and the associated term "historically disadvantaged South Africans" in section 100(2)(a) for whose benefit the Charter contemplated in section 100(2)(a) was to be developed with his own definition of "Black Person". The Minister's justification for doing so is that he has adopted the definition of "Black people" in the Broad-Based

impact of the 2017 Charter in the context of a contracting South African mining industry is attached marked "FA2". His affidavit confirming the contents of his note is attached hereto.

Black Economic Empowerment Act, 2003 (B-BBEE Act). But of course that is no answer at all and is troubling insofar as it reveals the Minister's understanding of his powers. In short, the Minister cannot replace the definition adopted by Parliament with one more to his liking. More particularly, the Minister has no power to change the scope of those whom Parliament has decided should benefit from its transformation policy in the mining sphere.

- Another example of gross regulatory overreach which is so obvious that it could not have been overlooked by the Minister concerns foreign-controlled and registered companies supplying the South African mining and minerals industry with mining goods and services. In this regard the 2017 Charter provides that "Foreign Companies" (as defined) must contribute a minimum of 1% of their annual turnover generated from local mining companies towards the Mining Transformation and Development Agency. In imposing a turnover tax, the Minister has not only purported to exercise extra-territorial jurisdiction which is clearly beyond his powers (not least of all because they are not subject to the MPRDA) he has also attempted to usurp the powers of the Minister of Finance.
- In summary, the 2017 Charter represents a most egregious case of regulatory overreach. The act of publication was and is harmful not only because of the content of the 2017 Charter, and the vague and contradictory language employed to convey that content, but also because of the clear threat to the separation of powers which that act presents.

- I am the Senior Executive: Public Affairs and Transformation of the Chamber of Mines of South Africa. I took office on 1 July 2016 but I have been involved with the former Senior Executive: Transformation and Stakeholder Relations of the Chamber, Mr Ambrose Vusumuzi Richard Mabena (Mabena), in the Chamber's efforts in regard to the engagement with the respondent and his Department. A copy of Mr Mabena's confirmatory affidavit of the facts within his knowledge is annexed marked "FA19".
- 11 I am duly authorised to represent the Chamber in launching this application and deposing to this affidavit on its behalf.
- The facts in this affidavit are true and correct and, unless otherwise stated or the contrary appears from the context, are within my personal knowledge.

 Legal submissions in this affidavit are made on the advice of the Chamber's legal advisors.
- I also respectfully refer to the confirmatory affidavit of Mr Roger Baxter (Baxter), the Chief Executive Officer of the applicant, who has personal knowledge of the facts set out below and which is annexed marked "FA20".

DEFINITIONS

- 14 In this affidavit, the following definitions are used:
- 14.1 the *Mineral and Petroleum Resources Development Act*, 2002 is the MPRDA;
- 14.2 the Department of Mineral Resources is the **DMR**;

- 14.3 the Charter contemplated by section 100(2)(a) of the MPRDA is the Charter;
- 14.4 the "Scorecard for the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (including the Charter)" published in Government Notice 1639, Government Gazette 26661 dated 13 August 2004 is the Original Charter;
- the "Amendment of the Broad-based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry" published in Government Notice 838, Government Gazette 33573 dated 20 September 2010 is the 2010 Charter;
- the "Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 (Reviewed Mining Charter, 2017)" published in Government Notice 581, Government Gazette No. 40923 dated 15 June 2017 is the 2017 Charter;
- 14.7 Historically Disadvantaged South Africans as used in the Original Charter and 2010 Charter are HDSAs⁴ (although, as set out below, the reference to HDSAs has been unlawfully substituted in the 2017 Charter with "Black Person" and "Black Owned Company"); and
- 14.8 where appropriate, the Original Charter, the 2010 Charter and the 2017 Charter will be referred to collectively as the **Charters**. These three

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⁴ The MPRDA does not define HDSA. The MPRDA defines the term "historically disadvantaged person". Section 100(2)(a) employs the term "historically disadvantaged South Africans", but there can be little doubt that that term was intended to be a reference to the defined term "historically disadvantaged person". As pointed out below, it was not competent for the Minister to publish a charter in terms of section 100(2)(a) of the MPRDA to address the historical disadvantages of any group other than HDSAs. The MPRDA does not refer to Black Persons or Black Owned Companies at all.

THE PARTIES

- The applicant is the Chamber and it carries on business at 5 Hollard Street, Johannesburg.
- 15.1 The Chamber is a voluntary association with power to sue and be sued in its own name. The Chamber is also registered as an employers' organisation in terms of section 96(3) of the *Labour Relations Act*, 1995.
- The Chamber's members comprise mining finance companies and mines operating in the gold, coal, diamond, platinum, lead, iron ore, rutile, zircon, ilmenite, leucoxene, monazite, magnetite and other associated minerals, antimony and copper mining sectors. A list of the Chamber's members is attached as "FA6". The members of the Chamber affected by this application are those mining companies which are either holders of, or applicants for, prospecting rights, mining permits and mining rights under the MPRDA. In this affidavit, I refer to these affected members of the Chamber as mining companies.
- 15.3 In terms of paragraph 2(a) of its constitution, one of the objects and powers of the Chamber is to "advance, promote and protect the mining and other interests of its members" and to "assist... in the prosecution... of actions involving questions the decisions whereof are likely to affect the common interests of its members". A copy of its constitution is attached as "FA7".
- 15.4 The Chamber is the principal advocate of major policy decisions endorsed by the mining companies and represents these to various organs of South

African national and provincial governments and to other relevant policymaking and opinion-forming entities, both within South Africa and abroad. The Chamber also works closely with the various employee organisations in

15.5 The Chamber is a signatory to the Original Charter and represents the industry in the forums established in order to review performance under the Charters.

formulating these positions where appropriate.

- 15.6 The Chamber brings this application on its own behalf and in the interests of its members.
- As a prelude to what follows, I would emphasise that the Chamber and its members fully support the transformation objectives of the MPRDA and the Original Charter and have made significant progress on all elements of the Original Charter, including meeting and exceeding the ownership target. The Chamber's members continue to support and facilitate HDSA ownership even in the face of the collapse of mining equities and constrained markets. This created significant momentum in HDSA ownership, in the mining sector and beyond. All of this is demonstrated by the fact that, as set out in annexures "FA8" and "FA9" hereto, as at the end of 2014 meaningful economic empowerment participation achieved by HDSAs had been 38% on average⁵ amongst the members of the Chamber, with meaningful economic value transfer of more than R159 billion. The Chamber submits that annexures FA8 and FA9 demonstrate the Chamber's

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⁵ As will be pointed out below, that figure assumes that, in accordance with the Original Charter, empowerment levels once achieved are not eroded by the exit by HDSAs from their investments.

members' commitment to transformation and to the spirit of the Charters.

The respondent is the Minister. The Minister is cited in this application in his official capacity as the Minister responsible for the MPRDA and by virtue of the powers conferred upon him by the MPRDA including, in particular, by section 100(2). His office is situated at Trevenna Campus, 71 Meintjes Street, corner of Meintjes and Francis Baard Streets, Block 2B 2nd Floor, Sunnyside, Pretoria. Service of this application on the Minister will be effected on the State Attorney, Pretoria, in terms of the provisions of Rule 4(9) of the Uniform Rules of Court and on his appointed private attorneys being Goitseona Pilane Attorneys Inc.

PART 2: BACKGROUND FACTS

THE ORIGINAL CHARTER

17 With regard to the content of this paragraph, I respectfully refer to the confirmatory affidavit of Mr Roger Baxter filed herewith who has personal knowledge of the facts set out herein.

Early discussions and negotiations regarding the development of a mining charter

- The Chamber has been intimately involved in the development of the MPRDA and the Charter. It was, for example, involved in the negotiations and discussions -
- 18.1 between the Chamber and the ANC in 1992 following the unbanning of the ANC;
- 18.2 about the Green and White Papers on Minerals Policy in 1998;

- 18.4 about the draft MPRDA in 2002;
- 18.5 about the first Mining Charter in 2002; and
- that led to the finalisation of the MPRDA and the 2004 Charter.
- 19 Neither the current DMR Minister (Mr Zwane), or the DG (Mr Mokoena), DDG (Ms Dlamini), DDG (Mr Raphela) or the previous DDG (Mr Mabuza) was involved in any of the significant discussions mentioned above.
- They accordingly have no first hand knowledge of the significant changes and concessions that were made by the Chamber and its members to help normalise South Africa's minerals policy and mining laws. This lack of knowledge blinds the current Minister and his entire current leadership team to the significant processes and outcomes in the first ten years of discussions.
- In the minerals policy reform process, the ANC focused on opening up access to mining and prospecting activities to all South Africans, on encouraging greater value addition to the country's mineral resources and on encouraging greater sharing of the benefits of the mining sector. This included demands by the ANC that the Roman Dutch principle of private ownership of minerals rights should be changed to state ownership, as envisaged in the Freedom Charter.
- The Chamber and its members actively contributed towards the normalisation of the mineral rights regime. Instead of opposing or resisting it, the Chamber and its members chose to work with the ANC-led government to effect changes that would open up access to the industry, guarantee security of tenure to

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promote investment and assist towards undoing the country's apartheid legacy of exclusion.

- The final consensus was for the new MPRDA to encapsulate the key principle of state custodianship of the minerals of the country, and for a process of conversion of old order rights into new order rights with guaranteed security of tenure, in line with a model followed in many other mining jurisdictions.
- 24 Part of this process were the discussions on a transformation charter for the mining sector in which the Chamber played a positive transformational role as set out below.
- Some of the Chamber's members had already started the transformation process by selling assets to HDSA's even before any charter had been developed and there was early recognition by the industry that transformational change was an important process towards normalising South Africa's economy and democracy.
- 26 Early discussions on a transformation charter for the mining sector started in 2001 between the then Department of Minerals and Energy (**DME**) and the Chamber. This was part of the minerals policy reform process, in which the Chamber was deeply involved.
- The Chamber developed an understanding of the process of transformation that had been adopted by the Malaysian government and the USA affirmative action policies. These countries' policies and programmes provided valuable lessons for South Africa, with special emphasis on education, skills development and high levels of economic growth in the Malaysian model.

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- Purther serious discussions were held in early 2002 with the Chamber and DME both producing their own versions of what a charter could look like. Other stakeholders were also brought into the process including the Department of Trade and Industry, the South African Mineral Development Association (SAMDA) and the National Union of Mineworkers (NUM) as well as the Royal Bafokeng (representing communities). The broad framework of what was discussed included a number of key pillars around ownership, procurement, skills development, beneficiation and housing and living conditions.
- 29 On 26 July 2002, an unmandated rough government charter proposal was leaked to the media, resulting in a blood bath on the capital markets, with some 6,9% of the market capitalisation of the mining companies being wiped out in less than two trading days. The key area of fallout was an unmandated proposal of 50% plus 1 share to BEE shareholders. This issue had never been discussed with other stakeholders and the DME and a media statement on 30 July 2002 stated that "In conclusion, it must be further noted that the leaked document was a draft to stimulate debate and discussions on the matter amongst the aforementioned parties and does not in any way represent official Government policy or position". The principals of the stakeholders assembled very quickly and agreed to a negotiation process to finalise the Charter. The negotiating teams were flown to Mbulwa, an Anglo American property in Mpumalanga, where a week of detailed negations were held and a final draft Charter produced.
- 30 On 11 October 2002, the principals of the stakeholders signed the first Mining Charter, acknowledging that this Charter reflected the collective agreement of

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the stakeholders to progress transformation in a pragmatic, economically feasible and sensible manner.

- 31 Stakeholder roadshows were then conducted to North America, the UK and Australia, where the stakeholders (which then included the Treasury) engaged the global investment community, to explain what the Charter was all about. Stakeholders not only explained the Charter but supported the jointly developed document and defended it.
- 32 The first mining charter was the first path-finding and substantive transformation charter produced in South Africa and it set the course for the development of the DTI Codes of Good Practices and for the development of charters in other sectors. The mining charter contained seven key pillars and was 12 pages in length.

The content of the Original Charter (13 August 2004)

- The Original Charter was published shortly after commencement of the MPRDA on 13 August 2004. A copy of this charter is attached hereto marked "FA3".
- The vision of the Charter was stated to be that all the actions and commitments contained in the Original Charter would be:

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

The preamble of the Original Charter recognised, amongst other things, the formal mining industry's stated intention to adopt a "proactive strategy of change to foster and encourage Black economic empowerment (BEE) and

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transformation at the tiers of ownership, management, skills development, employment equity, procurement and rural development.

- 36 The preamble also noted 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 is not the government's intention to nationalise the mining industry.
 - The key objectives of the Mineral and Petroleum Resources Development
 Act and that of the Charter will be realised only when South Africa's mining
 industry succeeds in the international market place where it must seek a
 large part of its investment and where it overwhelmingly sells its product and
 when the socio-economic challenges facing the industry are addressed in a
 significant and meaningful way.
 - The transfer of ownership in the industry must take place in a transparent manner and for fair market value."
- 37 It was agreed by the signatories to the Original Charter that government's regulatory framework and industry agreements would strive to facilitate the objectives of this charter.

The ownership commitment in the Original Charter

- 38 The signatories undertook in paragraph 4 of the Original Charter to create an enabling environment for the empowerment of HDSAs by subscribing to a number of commitments.
- In making this commitment, both government and industry recognised in paragraph 4.7 that one of the means of effecting the entry of HDSAs into the mining industry and of allowing HDSAs to benefit from the exploitation of mining and mineral resources is by encouraging greater ownership of mining industry assets by HDSAs.

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- The parties agreed that both active and passive involvement of HDSAs would be recognised.
- 40.1 Passive involvement was defined as "Greater than 0 percent and up to 100 percent ownership with no involvement in management, particularly broad-based ownership like ESOPs [employee share option schemes]".
- 40.2 Active involvement was stated to be:
 - HDSA controlled companies (50 percent plus 1 vote), which includes management control.
 - Strategic joint ventures or partnerships (25 percent plus 1 vote).
 These would include a Management Agreement that provides for joint management and control and which would also provide for dispute resolution.
 - Collective investment, through ESOPS and mining dedicated unit trusts. The majority ownership of these would need to be HDSA based. Such empowerment vehicles would allow the HDSA participants to vote collectively."
- The parties agreed in paragraph 4.7 of the Original Charter that the following indicators would apply to measure progress on the broad transformation front:
 - "• The currency of measure of transformation and ownership could, inter alia, be market share as measured by attributable units of South African production controlled by HDSAs.
 - That there would be capacity for offsets which would entail credits/offsets to allow for flexibility.
 - 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.
 - Government will consider special incentives to encourage HDSA companies to hold onto newly acquired equity for a reasonable period."

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- Based on these principles, and in order to increase participation and ownership by HDSAs in the mining industry, the Charter provided that each company would achieve 26% HDSA ownership of the mining industry assets in 10 years.
- 43 It further provided that where a mining company had achieved HDSA participation in excess of any set target in a particular operation, then such excess could be utilised to offset any shortfall in its other operations.
- 44 As stated, the Charter confirmed that transactions would take place "in a transparent manner and for fair market value".
- Stakeholders agreed to meet after five years to review the progress and to determine what further steps, if any, needed to be made to achieve the 26% target (five-year review commitment).
- In relation to financing participation in the industry, the signatories agreed in paragraph 4.12 that HDSA companies would be assisted in securing finance to fund participation in an amount of R100 billion within the first five years. This represented the 15% HDSA ownership necessary to enable lodgement of old order mining rights for conversion in terms of Item 7 in Schedule II to the MPRDA. Beyond that R100 billion industry commitment, it was agreed that HDSA participation would increase based on "a willing seller-willing buyer basis, at fair market value, where the mining companies are not at risk".

The progress review commitment in the Original Charter

47 In addition to the five-year progress review commitment, the signatories to the Original Charter also agreed in paragraph 4.14 thereof to a number of

- consultation, monitoring, evaluation and reporting mechanisms in respect of that charter.
- 48 Relevant for present purposes, is that companies undertook to report on an annual basis on their progress towards achieving their commitments, with these annual reports to be verified by their external auditors.
- 49 In addition, a progress review mechanism would be established which would provide flexibility to the company's Original Charter commitments.
- The parties further agreed to participate in annual forums for the purposes *inter alia* of monitoring progress in the implementation of plans, and reviewing the Charter if required. The contemplated progress review in the Original Charter was a review after the first 5 years to determine "what further steps, if any, need(ed) to be made to achieve the target of 26%". The reference to an increase of HDSA participation was made in the context of the position as at the end of year 5, "in pursuance of the 26 per cent target". The review was thus a review of the implementation rather than the content of the Charter. It was understood that the charter would operate for ten years after which it would cease to apply and that section 100(2)(a) of the MPRDA envisaged the development of only one Charter within six months of the taking effect of the MPRDA.

THE 2010 CHARTER

The Minister published the 2010 Charter in September 2010, a copy of which is attached hereto marked '**FA4**'. Industry stakeholders were not signatories to the 2010 Charter. That charter is the subject of an application by the Chamber

- against the Minister for certain declaratory relief. I deal briefly with the events immediately preceding the application and the relief sought below.
- 52 On 26 March 2015 representatives of the DMR, the Chamber and other stakeholders met at the DMR's Pretoria offices.
- The meeting was chaired by the Minister and attended by, amongst others, the DG, Chamber president Mr Mike Teke, vice president Ms Khanyisile Kweyama, chief executive Mr Bheki Sibiya, economist Ms Mathys, representatives from the unions and SAMDA, and Mr Mabena.
- The DG made a presentation regarding progress regarding the DMR's assessment of the industry's compliance with the 2010 Charter.
- After the DG's presentation, the meeting was invited to respond to the presentation. It was clear from the Chamber's response that there were material differences between its assessment of its members' compliance with the 2010 Charter and the DMR's assessment and in particular the DMR's interpretation of the continuing consequences principle and the exclusion of post-1 May 2004 empowerment transactions.
- In response the Minister noted, inter alia, that he was very concerned about the ownership aspect of Charter compliance. He recommended that a special meeting be convened on 31 March 2015 to agree a mechanism to clarify the law, in particular for the parties to explore approaching the court for a declaratory order with regard to the differing interpretations of the continuing consequences principle. In reply to the Minister, Mr Teke said that the Chamber would support a declaratory order being sought by way of an

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- In the event, the Chamber issued a court application on 4 June 2015, seeking certain declaratory orders (2015 Application). A copy of the notice of motion of the 2015 Application is attached as "FA10".
- The Respondents filed their answering affidavit on 6 August 2015 and the Chamber its replying affidavit on 14 September 2015. The parties filed heads of argument in February 2016 and the matter was set down for hearing on 15 and 16 March 2016.
- Due to circumstances beyond the control of the parties, the 2015 Application was not, however, heard on 15 March 2016 and has, by agreement between the Chamber and the Minister and upon the direction of the deputy Judge President, been set down for hearing on 9 and 10 November 2017.
- In view of the agreement between the parties to seek clarity on the abovementioned disputes by way of declaratory relief, one would have expected the Minister to wait for the conclusion of the 2015 Application before proceeding to publish yet another version of the Charter, which raises the same underlying disputes. However a draft Reviewed Charter was published soon thereafter, in April 2016.

2017 CHARTER

- 57 The DMR published the 2017 Mining Charter on 15 June 2017.
- The Chamber then announced that it would apply for an urgent interdict to have the 2017 Charter suspended and then reviewed. The Chamber also applied to the honourable deputy Judge President of the Gauteng High Court for a date

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for the hearing of the Chamber's declaratory order application and that matter was re-enrolled for November 2017.

THE INTERIM INTERDICT APPLICATION

- The vast and systemic damage which the publication and threatened enforcement of the 2017 Charter has inflicted and continues to inflict upon the financial and reputational interests of not only the Chamber's members, their employees and investors but also the country as a whole, required urgent redress. Such redress was sought by the Chamber by way of an urgent interdict application issued on 26 June 2017, in which it sought an order prohibiting the Minister (including his delegates and other officials) from implementing or applying the provisions of the 2017 Charter in any way, directly or indirectly, pending the final determination of an application for judicial review and setting aside of the Minister's decision to publish the 2017 Charter.
- One of the main reasons for the urgent application was that the 2017 Charter has an immediate effect on applicants for new prospecting and mining rights. There are no transitional provisions allowing existing applications to be treated as if the 2017 Charter had not come into effect. Consequently, applicants who have submitted applications on the basis of the position as it was prior to 15 June 2017 would have to go back to the drawing board. Such applicants would have gone to great expense and trouble to put together applications complying with the DMR's requirements prior to the publication of the 2017 Charter. Agreements would have been entered into with BEE partners and stakeholders on the basis of such requirements and funding structures would have been put in place to support such agreements. If the 2017 Charter were implemented,

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those agreements and funding structures would have to be undone, at great expense, inconvenience and reputational damage.

- It is submitted that the Chamber met all the requirements for an urgent interim interdict. The relief sought was undoubtedly urgently required. A *prima facie* right to such relief was made out. The balance of convenience clearly favoured the Chamber and there was no other appropriate remedy available to the Chamber.
- After the Chamber had instituted the urgent application, and following negotiations between the parties, the Minister gave an undertaking not to implement the 2017 Charter pending judgment in the urgent interdict application, as appears from his attorney's letter which is annexed hereto marked 'FA11'.
- The urgent interdict application was set down, by agreement between the parties and upon the direction of the deputy Judge President, for hearing on 14 and 15 September 2017, and a procedural timetable for the filing of affidavits and heads of argument was agreed, as appears from the letters annexed hereto marked 'FA12'.
- A week before the hearing, on 7 September 2017, the Minister's attorneys addressed a letter to the Chamber's attorneys in which they requested the Chamber to consent to a postponement of the matter in order that it could be set down before a full bench.
- The Chamber did not want to postpone the hearing, for the reasons set out in its attorneys' response addressed to the Applicant's attorney on 8 September

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2017. The Chamber's attorneys on the same day also addressed a letter to the Judge President. Copies of these letters dated 8 September are annexed hereto marked 'FA13' – 'FA14', and their contents are incorporated herein by reference.

- The Judge President then requested the parties to attend a meeting with him on 12 September 2017 in order to assist them in having the matter heard. He indicated that the interdict application could not be heard by a full bench but that the review application could be heard by a full bench on 13 and 14 December 2017.
- After the meeting, the parties reached agreement about an undertaking that the Minister was prepared to give, not to implement the Charter pending judgment in the review application. This agreement was noted by this honourable court on 14 September 2017. I annex a copy of the Minister's undertaking hereto marked 'FA15'.
- As appears from the Chamber's attorneys' letter dated 13 September, 2017 annexed hereto marked 'FA16':
- the judicial review application was accordingly, by agreement between the parties and upon the direction of the Judge President, set down for hearing on 13 and 14 December 2017 before a full bench of the High Court;
- the parties reached agreement about a procedural timetable for filing of affidavits and heads of argument in the review application.
- This timetable made provision for the filing of the record on an expedited basis, prior to the filing of the Applicant's founding affidavit. The Minister duly filed the

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record on 19 September 2017. There is accordingly no need for the Applicant to follow the provisions of Rule 53 and to file a supplementary founding affidavit after receipt of the record.

70 I shall set out the grounds upon which the Chamber seeks an order reviewing and setting aside the 2017 Charter below.

PART 3: GENERAL GROUNDS OF REVIEW

First General Ground of Review: 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.
- As shown below, the Chamber submits that the Minister has far exceeded his powers under section 100(2) and, in effect, seeks to legislate through the backdoor by way of the 2017 Charter.
- The Chamber's first challenge to the 2017 Charter is thus the Minister's lack of power to publish the Charter in the form of what purports to be a legislative instrument.

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- Secondly, the contents or scope of the Charter also go far beyond what is contemplated in section 100(2)(a) of the MPRDA. The 2017 Charter seeks not merely to set out a framework, targets and time-table for effecting the entry of HDSA's into the mining industry; it seeks to regulate the mining industry in every sphere and even to impose taxes. In doing so it impermissibly seeks to supplement the MPRDA and in addition to override provisions of the MPRDA and other legislation such as the *Companies Act, 2008*. The Chamber accordingly seeks to set aside the Charter on the basis that the Minister has exceeded his powers.
- As set out below, the present review is brought in terms of the *Promotion of Administrative Justice Act, 2000* (**PAJA**) *alternatively* in terms of the principle of legality which is founded upon section 1(c) of the Constitution.
- 75 It is necessary, however, before dealing with the specific instances of excess of power and review grounds, briefly to deal with the nature and ambit of the Minister's powers under section 100(2) of the MPRDA. Further argument in this regard will be presented at the hearing of the matter.

The statutory context of section 100(2)

- The MPRDA was assented to on 3 October 2002, and took effect from 1 May 2004.
- 77 The (relevant) objects set out in section 2 of the MPRDA were at the time formulated as follows:

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...

- (c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
- (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;⁶
- (e) promote economic growth and mineral and petroleum resources development in the Republic;⁷
- (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;

...

- (i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating."
- The legislature sought to achieve these objects by the enactment of the MPRDA, which constitutes a radical departure from the previous system of mineral and mining law applicable in South Africa. There are clearly many ways in which effect could be given to the objects of the Act which are formulated, as objects generally are, in broad and general terms. I am advised that the manner in which the legislature chose to give effect to these objects is

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⁶ This provision was amended in terms of the Amendment Act 49 of 2008 wef 7 June 2013 and now provides as follows: "substantially and meaningfully expand opportunities for historically disadvantaged persons, including women <u>and communities</u>, to enter into <u>and actively participate</u> in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;"

⁷ This provision was amended in terms of the Amendment Act 49 of 2008 wef 7 June 2013 and now provides as follows: "promote economic growth and mineral and petroleum resources development in the Republic, <u>particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;"</u>

to be found in the substantive provisions of the MPRDA. The objects of an Act do not operate *in vacuo* and impose no obligations independently of the 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. I make this seemingly obvious point because it is apparent from the Minister's response in the interdict application that he believes that the objects of the MPRDA confer substantive powers upon him independently of section 100(2).

- Express reference is made in the MPRDA to specific objects of the Act in substantive provisions such as sections 12(3)(d), 17(1)(f), 17(4), 23(1)(h), 55(1) and item 7(2)(k) in Schedule II of the MPRDA, as set out below. Outside of these substantive provisions, the objects of the MPRDA only serve as an aide in the interpretation of the substantive provisions as provided in section 4 of the MPRDA.
- The MPRDA, in a number of sections, requires that an assessment be made by the Minister in the decision-making process as to whether, or the extent to which, an applicant has given effect to the objects of the MPRDA in section 2(c), (d), (e), (f) and/or (i). (See, for example, sections 12(3)(d)⁸, 17(1)(f)⁹, 17(4)¹⁰, 23(1)(h), 155(1)¹² and item 7(2)(k)¹³ in Schedule II of the MPRDA).

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⁸ 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)."

 $^{^9}$ 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)." There are as yet no such

- Section 23(1)(h) of the MPRDA, which deals with the granting of a mining right, contains an express reference to the Charter by providing 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".
- Sections 25(2)(h) and 28(2)(c) of the MPRDA 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.
- There are no other provisions in the MPRDA which expressly or impliedly refer to or require compliance with the Charter.
- It should furthermore be borne in mind that, just as the objects in section 2 were incorporated in certain substantive sections (as set out above), they were **not** incorporated in others. I refer in this regard, by way of example, to-

prescribed minerals.

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¹⁰ 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*)."

¹¹ 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."

 $^{^{12}}$ 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."

¹³ 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)".

- reconnaissance permissions, mining permits and retention permits in regard to which there are no empowerment requirements in the MPRDA; and
- sections 18 and 24 dealing with renewals, which similarly have no reference to any of the objects of the Act or the Charter.

The legal nature of the Charter

85 Section 100(2) of the MPRDA in its original form provided¹⁴ the following:

"(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 timetable 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.

- (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."
- This mandate to the Minister in section 100(2) to "develop" a "Charter" does not fall into a well-known juristic niche.
- 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

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This provision was subsequently amended in terms of the *Amendment Act 49 of 2008*. The provision as amended now reads as follows: "(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." (the underlined parts were inserted by the amendment.)

MPRDA¹⁵ 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 (i) of the MPRDA.

At the same time, the Charter is intended to provide a formal indication to the 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 (i) of the MPRDA as contemplated in *inter alia* section 23(1)(h) and item 7(2)(k) of the MPRDA. In this regard, it is also important to note that section 100(2)(b) does not require that the Charter prescribes, on an exclusive basis, what must be done in order to achieve the objects of those provisions.

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It is accordingly submitted that upon a proper construction of the MPRDA, the Charter constitutes a formal guideline or statement of policy, mandated by section 100(2) of the MPRDA, which must be applied in terms of, and in the manner contemplated in, the substantive provisions of the MPRDA. It should be borne in mind in this regard that had Parliament intended to empower the Minister to make laws regarding the attainment of the Government's objectives of addressing historic inequality in the mining industry, it could simply have provided in section 100(2)(a) that the Minister may make regulations in that regard. It did not do so.

90 I emphasize that the Charter, which is intended to assist the Minister in assessing whether an applicant/holder has given effect to these objects does not, and cannot lawfully, operate outside of the structure and provisions of the

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¹⁵ 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.

MPRDA as if it were a stand-alone law of general application which supplements and amends the MPRDA, and even overrides other legislation.

- A policy, formal or otherwise, is not legislation and remains a guideline. The fact that section 23(1)(h) of the MPRDA requires the Minister to consider, when considering an application for a mining right, whether the grant of the right will be "in accordance with the Charter contemplated in section 100" does not transform the Charter into a law. Policy could never be applied so as to have the force of law or to preclude an applicant for a mining right from adopting other means of furthering the objects or giving effect to the objects of the Act. Section 100(2)(b) indeed requires that the Charter should set out how the objects referred to in those sections *can* be achieved. That is language indicative of a policy, not of legislation.
- The Minister contended in his answering affidavit in the interdict proceedings that the Charter is "law". As stated above, this is not correct. The Charter is not legislation or subordinate legislation. I am advised that national or provincial Acts and regulations are legislative instruments, whereas documents setting out governmental policy are not. As a matter of sound government, a clear distinction should be maintained between policy documents and legislative instruments. What the Minister has attempted to do in publishing the 2017 Charter is to transform what Parliament intended to be a policy document into a legislative instrument. That is impermissible.
- 93 Although, in principle, the doctrine of separation of powers does not preclude Parliament, as legislative body, from delegating its power to make laws to other

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bodies, including the executive, the Constitution places certain constraints on the delegation of authority to make law to the executive:

- 93.1 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 Constitution and would allow the executive to confer power upon itself to do as it pleases. It will therefore not survive constitutional scrutiny.
- 93.2 If Parliament does not delegate plenary power but merely the power to make subordinate legislation, such delegation has to conform to constitutional requirements.
- It is submitted that there is no express or implied indication in the MPRDA that it was Parliament's intention to mandate the Minister to legislate to achieve the attainment of the objects identified in section 100(2)(a). In fact, such an interpretation of section 100(2) would render it unconstitutional in view of:
- 94.1 the wide and unqualified nature and ambit of the purported delegation;
- 94.2 the subject-matter to which it relates;
- 94.3 the degree of delegation;
- 94.4 the fact that the discretion of the Minister is in no way structured and guided by the enabling Act;
- 94.5 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;

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- 94.6 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
- 94.7 the fact that the subject-matter does not necessitate the use of forms of rapid intervention which the slow procedures of Parliament would inhibit.
- 95 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.
- In any event, even if section 100(2) is held to constitute a proper delegation of legislative powers to the Minister, which remains denied:
- 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;
- 96.2 the nature, purpose and permissible scope of the Charter all still fall to be determined by the provisions of MPRDA, which is the empowering legislation.

PAJA review or legality review

Notwithstanding the fact that the 2017 Charter constitutes policy and does not constitute law, when the Minister considers an application for a mining right, he must in terms of subsection 23(1)(h) decide whether the granting of the right will be "in accordance with the charter contemplated in section 100". In that

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context the 2017 Charter will certainly adversely affect the rights of applicants and have a direct, external legal effect for the purposes of the definition of "administrative action" in section 1 of PAJA.

98 Whether the development and publication of the 2017 Charter constituted administrative action for the purposes of PAJA outside of that context is a more difficult question.

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 takes place in terms of, and is mandated by, section 100(2) of the MPRDA, the decision to do so may constitute administrative action. I am advised that 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.

100 To the extent that it may be held not to qualify as "administrative action" as defined in PAJA, the Charter is at least constrained by the principle of legality enshrined in section 1(c) of the Constitution. That principle entails that the Minister may exercise no power and perform no function beyond that conferred upon him by law. I am advised that the principle acts as a safety net to give the court some degree of control over action that does not qualify as administrative under PAJA, but nonetheless involves the exercise of public power. I am further advised that it is accepted by our courts that section 1(c) of the Constitution empowers them to review state action on grounds of irrationality.

- 101 In the case of the review ground 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.
- Therefore, once it is found that the Minister in developing and publishing the 2017 Charter exceeded his powers and acted outside of the scope of the empowering statute, the Charter would stand to be reviewed and set aside either on the basis of PAJA (if it is administrative action) or in terms of the principle of legality (if it is policy, legislation or a *sui generis* executive act). The Chamber relies on both these bases in the alternative.

Second General Ground of Review: the 2017 Charter's Application to "Black Persons" is unauthorised and it 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.

103 As mentioned in the introduction above, the 2017 Charter does not employ the terms "historically disadvantaged person" or ""historically disadvantaged

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^{16 &}quot;Historically disadvantaged person" is defined in s 1 of the MPRDA to mean:

[&]quot;(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 paragraph (a);

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

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)."

South African" used in the MPRDA. Instead, it uses the terms "Black Person" and "Black Owned Company" which have materially different definitions.

- 104 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 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.
- 105 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:
- subsection 2(c) refers to the promotion of equitable access to the nation's mineral resources "to all the people of South Africa";

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¹⁷ The 2017 Charter provides that "Black person" "is a generic terms 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."

¹⁸ "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."

- 105.2 subsection 2(d) refers to expansion of opportunities "for historically disadvantaged persons including women and communities";
- 105.3 subsection 2(e) refers to the promotion of economic growth and mineral development in general;
- 105.4 subsection 2(f) refers to the promotion of employment and social and economic welfare "of all South Africans"; and
- 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.
- 106 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.
- 106.1 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.
- 106.2 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. Its furthermore excludes persons who are not South African citizens by birth or descent, did not become citizens before 27 April 1994 or

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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.

- 107 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. 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.
- 108 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 (ultra vires), 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: the 2017 Charter's application to all "Holders" is unauthorised and it therefore stands 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.

- 109 The 2017 Charter defines the term "Holder" as having the same meaning as in the MPRDA.
- 110 In terms of section 1 of the MPRDA the term holder is defined:

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- 111 The term "Holder" therefore includes holders of:
- 111.1 mining permits, retention permits and reconnaissance permissions, but there are no Charter compliance requirements in the granting provisions contained in sections 13 (Reconnaissance), 27 (Mining Permits) or 32 (Retention Permits);
- 111.2 exploration rights, production rights, reconnaissance permits, and technical co-operation permits, all of which relate to petroleum and not to minerals and to which the Mining Charter does not apply, notwithstanding that paragraph 2.10 of the 2017 Charter also refers to exploration rights.
- 112 The applicability of the 2017 Charter to rights, permits or permissions in addition to prospecting rights and mining rights 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.
- 113 In what follows I shall refer to the Holders of mining rights by way of example.

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Fourth General Ground of Review: the Charter conflicts with the Code of Good Practice developed in terms of section 100(1)(b) of the MPRDA and accordingly falls to be reviewed and set aside in terms of the principle of legality and/or section 6(2)(i) of PAJA.

- 114 The Code of Good Practice contemplated in section 100(1)(b) of the MPRDA (which was published on 30 April 2009) is based on the Original Charter.
- 115 The 2017 Charter conflicts with the Code as a whole, which conflict is contrary to the rule of law requirements entrenched in section 1(c) 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.

PART 4: GROUNDS OF REVIEW RELATING TO THE OWNERSHIP ELEMENT

GROUNDS OF REVIEW OF THE OWNERSHIP ELEMENT RELATING TO EXISTING PROSPECTING RIGHTS AND MINING RIGHTS HOLDERS (PARAGRAPH 2.1.2 OF THE 2017 CHARTER)

First Ground of Review of the Ownership Element relating to Existing Prospecting and Mining Right Holders: Imposition of New Charter Obligations after the Grant of a Mining Right is unauthorised and it 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.

116 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:

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"In order to give effect to Meaningful Economic Participation¹⁹ and the integration of Black Persons into the mainstream economy; and ensure Black Persons' effective ownership of the State's mineral resources, <u>a Holder²⁰ must</u> comply with the following:"

- 117 The obligations of the Holder of (for example) a mining right are set out in the MPRDA (see for example sections 23(6) and 25(2)). The MPRDA does not authorise the Minister to impose additional obligations on Holders of mining rights (whether new or existing Holders) by way of the Charter.
- 118 The MPRDA deals with a Holder's duties in respect of the objects in sections 2(d) and (f) of the MPRDA in a specific manner, to wit:
- 118.1 Section 22 provides that application must be made for a mining right in the prescribed manner. Part B of the application form (prescribed in the regulations) requires information on "OWNERSHIP OF PARTICIPATION BY HISTORICALLY DISADVANTAGED SOUTH AFRICANS (HDSA)". It also requires that the application must be accompanied by the prescribed social and labour plan (regulation 46).
- 118.2 Section 23(1) provides that the Minister must grant the 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".
- 118.3 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

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¹⁹ As defined in the 2017 Charter

²⁰ See the First General Ground of Review.

mining right if the Holder complies with item 7(2) including item 7(2)(k) which, from 7 June 2013, provided that the Holder 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)."²¹
- 118.4 If the application or conversion is successful, the ensuing mining right is granted on certain terms and conditions, as appears from section 23(6) of the MPRDA. As a matter of departmental practice, the mining right document contains a recordal of the BEE agreement relied upon for the grant of the right and imposes an obligation on the Holder to honour the terms of such agreement. In addition, the social and labour plan is approved if it complies with regulation 46.
- Once granted, the Holder is obliged to comply with the provisions of the MPRDA and the terms and conditions of its mining right.²² If an applicant entered into an agreement with an empowerment partner to satisfy the criterion in section 23(1)(h), compliance with such agreement is required as part of the right granted. It also has to comply with the provisions of its approved Social and Labour Plan.
- 118.6 After the grant, the Holder has the obligation in terms of section 25(2)(h) to report on its compliance with these provisions and documents.
- 119 Before granting an application for a "new order" mining right, or converting an old order mining right, the Minister must thus satisfy himself that the grant of

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²¹ 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)."

²² In terms of section 23(6) of the MPRDA, the mining right is subject to "this Act". The latter is defined in section 1 of the MPRDA to include any term or condition subject to which the right has been granted.

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. 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 made.

- Once an applicant for a mining right has satisfied the requirements of section 23(1)(h) or item 7(2)(k) in Schedule II²³ and once a decision has been taken to grant a mining right, which is an administrative act, the decision-maker is functus officio and may not revisit his decision.
- A Holder can thus also not be required by the Charter, after the decision to grant the right to him has been taken, to comply with additional criteria, failing which its right will be placed in jeopardy the MPRDA does not permit it; in fact, 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. In terms of section 4(1) of the MPRDA, "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."
- 122 An interpretation of section 100(2)(a) which would permit the Minister to impose new obligations upon the Holder of a mining right which, if not met, would expose such Holder to the loss of such right, would also be inconsistent with the description of a mining right in section 5(1) of the MPRDA as a "limited real right".

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ltem 6: in regard to conversion of old order prospecting rights contains no requirements in regard to compliance.

- Accordingly, a mining right once granted cannot be revoked or cancelled on the grounds of a failure to comply with Charter requirements imposed after the grant of the right, in the absence of a clear statutory power to do so and there is none. 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 applicant will, in order to retain such right, have to meet the new and more burdensome requirements set out in a Charter as revised from time to time. In particular, as set out below, section 47 of the MPRDA does not grant the Minister such power.
- 124 Section 47 (which is discussed again under the heading "Non-Compliance with the 2017 Charter" below in the context of paragraph 2.12 of the 2017 Charter) of the MPRDA provides the following:

"47. Minister's power to suspend or cancel rights, permits or permissions

- (1) Subject to subsections (2), (3) and (4), the Minister may cancel or suspend any reconnaissance permission, prospecting right, mining right, mining permit, retention permit or holders of old order rights or previous owner of works, if the holder or owner thereof—
 - (a) is conducting any reconnaissance, prospecting or mining operation in contravention of this Act;
 - (b) breaches any material term or condition of such right, permit or permission;
 - (c) is contravening any condition in the environmental authorisation;
 - (d) has submitted inaccurate, false, fraudulent, incorrect or misleading information for the purposes of the application or in connection with any matter required to be submitted under this Act".

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- permits or permissions in the circumscribed instances mentioned in section 47(1). No reference is made therein to non-compliance with the Charter, nor would one expect such a reference. As stated above, if an applicant for a right has entered into an agreement in order to give effect to the objects in section 2(d) and (f), the standard prospecting right or mining right provides as one of its terms that the Holder is bound to the empowerment agreement it has concluded. This means that the Holder must give effect to the objects of section 2(d) of the MPRDA in the form and manner set out in the concrete agreements. Section 47 would become applicable if a Holder breaches a material term of such right. Absent such a breach, the Minister is not entitled, once an applicant has complied with the granting criteria in section 23(1), including 23(1)(h), and a mining right has been granted, to cancel or suspend it in terms of section 47(1) of the MPRDA based on new Charter requirements imposed after the date of grant.
- 126 It is accordingly submitted that the Minister has no power, through the Charter, to impose new obligations on Holders of existing rights outside of, and over and above, the terms and conditions of their granted mining rights and approved Social and Labour Plans.
- 127 As is borne out by the background facts set out above and the terms of the 2017 Charter, the Minister and his functionaries hold a contrary view.
- The Chamber will accordingly seek a judicial review of the Charter as well as a declaratory order that, upon a proper interpretation of the MPRDA, once the Minister or his delegate has been satisfied in terms of section 23(1)(h) or item

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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 of Review of the ownership element relating to existing prospecting right and mining right Holders: references to past transactions: "Recognition" of "Historical BEE Transactions" and "topping-up" 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, and

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.

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- 130 Paragraph 2.1.2 of the Charter, under the heading "Existing Prospecting and Mining Rights Holders", deals with two main topics: the so-called "recognition" of "Historical BEE Transactions" and "Top Up".²⁴
- 130.1 In the first instance, and as appears below, the provisions of paragraph 2.1.2 are not clear. This lack of clarity gives rise to considerable uncertainty. It is submitted that these provisions accordingly offend against the rule of law, which requires clarity and consistency so that citizens can establish their position with certainty and stand to be reviewed and set aside in terms of section 1(c) of the Constitution alternatively section 6(2)(i) of PAJA.
- 130.2 Secondly, and as set out below, it is submitted that the Minister is not empowered by the MPRDA to decree by way of the Charter that a Holder of a mining right has a continuing obligation to maintain the minimum HDSA ownership level (which has now been increased to 30%), and that a failure to be 100% compliant at all times constitutes a contravention of the 2017 Charter, of the terms of their mining rights and of the MPRDA. Paragraph 2.1.2 accordingly also stands to be reviewed and set aside in terms of section 6(2)(a)(i) and/or 6(2)(f)(i) of PAJA alternatively on the basis of the principle of legality.
- 131 Paragraph 2.1.2.1 provides that a Historical BEE Transaction (a defined concept) shall be recognised for the reporting period ending on the date on which the 2017 Charter is published (i.e. 15 June 2017).

²⁴ "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".

[&]quot;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".

- 131.1 This provision is apparently aimed at making it clear that a Holder will not retrospectively be regarded as non-compliant.
- 131.2 Although it is by no means clear, it may also have been intended to mean that such transactions will not be "recognised" after this date. In other words, that a Holder may be required after 15 June 2017 to meet the new increased Black ownership levels whatever empowerment transactions it may in the past have concluded.
- 131.3 Whether this is the meaning of 2.1.2.1 and, if so, whether it is absolute or subject to the remainder of the provisions of the paragraph or whether it should be read in conjunction with paragraphs 2.1.2.2 and/or 2.1.2.3 is simply not clear.
- 131.4 It is also not clear how paragraph 2.1.2.1 (read with 2.1.2.3 and 2.1.2.4) on the one hand and paragraphs 2.1.2.9 to 2.1.2.12 on the other hand, are to be reconciled. A possible interpretation, if they are read together, may be that paragraphs 2.1.2.9 to 2.1.2.11 only pertain to the reporting period ending on 15 June 2017 and simply set out the types of deals which would qualify as Historical BEE Transactions. Again, one is left only to speculate about the meaning of these seemingly conflicting provisions.
- 132 For the period commencing on the publication of this Charter (15 June 2017), it seems that paragraph 2.1.2 distinguishes between the following situations:
- where a Holder previously entered into a transaction which achieved a minimum of 26% Black shareholding, but where the "BEE partner/s has exited the BEE Historical Transaction; or the contract between the Holder

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and the BEE Partner's has lapsed; or the previous BEE Partner/s transferred its shares to a person/s other than a Black Person" (see par 2.1.2.2);

- 132.2 where a Holder has maintained a minimum of 26% Black Person Shareholding after commencement of the 2017 Charter (see par 2.1.2.4); and
- where a Holder had not achieved a minimum of 26% empowerment by the date the 2017 Charter was published (see par 2.1.2.11).
- 132.4 Why this distinction is drawn is not clear, however, because in all cases, it seems, the Holder is required by the 2017 Charter to "top up" from the level of the Holder's actual, existing level of Black ownership (whether it is in fact at 26% or below it when the 2017 Charter was published) to a minimum of 30% Black ownership (see paragraphs 2.1.2.3 and 2.1.2.4) within a period of twelve months. These provisions are, however, not sufficiently clear to make this statement with any certainty.
- 133 What is also not clear, but is one of the possible interpretations of these provisions, is that the 2017 Charter gives no "recognition", for purposes of calculating the current level of ownership, to past empowerment transactions where the "BEE partner/s has exited the BEE Historical Transaction; or the contract between the Holder and the BEE Partner's has lapsed; or the previous BEE Partner/s transferred its shares to a person/s other than a "Black Person". Only the actual shareholding of the Holder of the right, as it existed at the date of publication of the 2017 Charter, seems to be "recognised" for purposes of the top-up required to reach the new minimum of 30% Black shareholding.

- As stated above, there has long existed a dispute between the Minister and his functionaries, on the one hand, and the Chamber and its members, on the other, about whether or not, once a party which applies for a mining right has satisfied the Minister that the granting or conversion of the right will be in accordance with the Charter contemplated by section 100 of the MPRDA, that party is obliged, after the right has been granted or converted (therefore, as mining right Holder), to "top up" the 26% HDSA ownership target (now 30% Black ownership), if for one reason or another it falls below that level. This is often referred to as the "once empowered, always empowered" issue.
- The Minister and his functionaries 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 cases (see paragraph 2.1.2.1 to 2.1.2.3). The top-up is, in addition, required to the new level of 30% and it is required within 12 months. Thereafter, according to paragraph 2.9 (second unnumbered paragraph) and 2.10²⁵ of the 2017 Charter, 100% compliance is required at all times. 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.

²⁵ Par 2.10 provides: "All targets stipulated in this Mining Charter of 2017 shall be applicable throughout the duration of a mining right (including prospecting and other exploration rights), unless a specific element specifies otherwise."

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- As stated above, 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.
- 137 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, for the following reasons:
- 137.1 If HDSA shareholders or other economic participants in mining companies were to be subject to "perpetual lock-ins", it would reduce the value of their investment, materially impair the investment opportunities available to non-HDSAs and discourage investment by HDSAs.
- 137.2 If mining companies were not to subject HDSA owners to perpetual or lengthy lock-in arrangements and were required to continually replace departing HDSA investors, the resultant cost, uncertainty and administrative burden would provide a material disincentive to investment in the mining industry in general and mining companies in particular.
- 137.3 In other words, mining companies can only achieve meaningful empowerment if they allow the HDSA shareholding to be liquid and for the HDSA shareholders to eventually cash out. The consequence of cashing

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out will be that the HDSA shareholding in the Holder of the right diminishes,but there will not be a requirement for another empowerment transaction to be concluded, because there has already been an empowerment transaction that has been given effect to.

- 137.4 It is submitted that where a mining right Holder has complied with its HDSA obligations by meeting the 26% ownership target, it will, where the BEE transaction successfully led to empowerment, have empowered the HDSA participants in question even if such participants realise their investments and withdraw. The argument that the objects of sections 2(d) and (f) of the MPRDA are not fulfilled by a mining company if it does not continuously replace one HDSA investor with another, ignores entirely the empowerment and transformational benefits achieved by the departing HDSA investors. It confuses quotas with empowerment objectives. It also fails to have any regard to the economic consequences thereof. It is submitted that it is simply not sustainable for any business.
- 138 It is accordingly submitted that paragraph 2.1.2 of the Charter stands to be reviewed and set aside on the grounds set out above.

Third Ground of Review of Ownership Element relating to existing prospecting mining right Holders: Reduction in existing shareholding is unconstitutional and unauthorised and falls to be reviewed and set aside in terms of the principle of legality and/or section 6(2)(i) of PAJA

139 Furthermore, in the context of existing rights granted on the basis set out above, paragraph 2.1.2.6 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".

- 140 It is assumed that the reference to "a reduction of the remaining shareholders" in this paragraph is intended to mean a reduction in the remaining shareholders' shareholding (or a dilution of existing shareholding as it is often called).
- 141 The provision thus entails that existing shareholders will be deprived of shareholding which vests in them together with the rights associated with the shares, and the allocation (by whatever means²⁶) of this shareholding to either the existing BEE Partners or to a BEE Entrepreneur who are Black Persons in accordance with paragraph 2.1.2.7 of the 2017 Charter.
- 142 According to settled principles of our law, I am advised, this deprivation, which is a taking from Peter²⁷ to give to Paul²⁸, amounts to an expropriation of property. In order to pass constitutional muster under section 25(1) and (2) of the Constitution, a deprivation (which is an expropriation):
- 142.1 may only take place in terms of law of general application;
- such law may not permit arbitrary deprivation of property; 142.2
- 142.3 may only be done for a public purpose or in the public interest; and

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²⁶ For example, by way of transfer of shares or issue of new shares so as to dilute existing shareholding.

²⁷ I.e. "the remaining shareholders who are not Black Persons" (see paragraph 2.1.2.6).

²⁸ I.e. Black Persons as defined in the 2017 Charter.

- 142.4 is subject to payment of compensation, the amount of which and the timeand manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- 143 It is submitted that:
- 143.1 the Charter is not "a law";
- 143.2 the requirement of 30% Black shareholding in the Charter is arbitrary; and
- 143.3 the Charter does not make provision for the payment of compensation to the expropriated shareholders.
- 144 But even if paragraph 2.1.2.6 resulted in mere deprivation, such deprivation would be unlawful since it would be arbitrary and not occur pursuant to a law of general application. The same outcome applies to all the other instances where the Chamber complains that the 2017 Charter has, or will when implemented, give rise to unlawful expropriation.
- 145 In addition, the mandatory dilution of the rights of non-Black shareholders (which could for example include pension funds or the Public Investment Corporation (PIC)) is inconsistent with the requirement of section 37(1) of the Companies Act, 2008 that shareholders be treated equally.
- 146 Paragraph 2.1.2.6 and, by extension, the whole mechanism of a compulsory "top-up", is accordingly unconstitutional and unauthorised, and liable to be set aside on the basis of the principle of legality and/or section 6(2)(i) of PAJA.

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Fourth Ground of Review of the Ownership Element relating to existing prospecting and mining right Holders: The twelve-month transitional period in respect of the ownership element

- is irrational or so unreasonable that no reasonable person could have imposed it and accordingly falls to be reviewed and set aside in terms of the principle of legality and/or section 6(2)(h) of PAJA;
- does not have regard to relevant considerations and information and accordingly falls to be reviewed and set aside in terms of the principle of legality and/or sections 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA; and
- is not authorised and accordingly falls to be reviewed and set aside in terms of the principle of legality and/or sections 6(2)(a)(i) and6(2)(f)(i) of PAJA.
- 147 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 2.1.2.4.²⁹
- 148 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

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²⁹ See paras 2.1.2.3, 2.1.2.4 and 2.11(a) of the 2017 Charter.

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.

- In terms of paragraph 2.1.2.8, a Holder must already within the first twelvemonth 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.
- 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).

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- 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.
- 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.
- 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.

Concluding remarks on grounds of review of ownership element relating to existing prospecting right and mining right Holders

- The need for clarity is paramount in a case such as the present one where existing rights and contractual relationships are seriously and adversely affected. There can be little doubt that the new ownership requirement of 30%, to be attained within 12 months in the manner set out in the 2017 Charter and the possible non-recognition of past empowerment deals (where Black shareholders have for example sold their shares) will have grave consequences for current non-Black shareholders, which includes all corporate shareholders. The lack of clarity of the provisions of paragraph 2.1.2 mentioned above is a serious breach of the rule of law. This is already a basis to have them reviewed and set aside in terms of section 1(c) of the Constitution and section 6(2)(i) of PAJA.
- 155 It is submitted that the MPRDA does not authorise imposing new requirements by way of the Charter in respect of existing rights and that the manner in which the Minister has sought to do so is not in accordance with the rule of law, ultra vires, irrational and unreasonable. It accordingly stands to be reviewed on the basis of the principle of legality alternatively section 6(2)(a)(i), 6(2)(e)(i), 6(2)(f)(i), 6(2)(f)(ii)(aa) (bb), 6(2)(h) and/or 6(2)(i) of PAJA.
- 156 In addition, inasmuch as the envisaged "reduction" of shareholding will render existing agreements impossible of performance and/or deprive shareholders of vested rights, it falls foul of section 25(1) and 25(2) of the Constitution as not being a law of general application, as permitting arbitrary deprivation of property and as not providing for payment of compensation, and accordingly

stands to be reviewed as being unconstitutional or in terms of section 6(2)(i) of

PAJA.

GROUNDS OF REVIEW OF THE OWNERSHIP ELEMENT RELATING TO NEW PROSPECTING RIGHTS AND MINING RIGHTS HOLDERS (PARAGRAPH 2.1.1 OF THE 2017 CHARTER)

First Ground of Review of ownership element relating to new prospecting right and mining right holders: reference to all prospecting right holders is not authorised and it 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.

- 157 Paragraph 2.1.1.1 of the 2017 Charter introduces a new minimum level of 51% Black Person Shareholding for all holders of new prospecting rights. It is submitted that this paragraph is contrary to and thus not authorised by the MPRDA.
- 158 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 but, in any event, this section does not allow the imposition of a minimum Black shareholding in respect of all minerals.
- 159 Section 17(4) 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.

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160 Sections 17(1)(f) and 17(4) clearly leave no room for the imposition of a 51% prescribed minimum shareholding for all prospecting right applicants and for all minerals, which is therefore unauthorised and falls to be set aside in terms of section 6(2)(a)(i) and (f)(i) of PAJA.

Second Ground of Review of ownership element relating to new prospecting right and mining right holders: 51% black ownership for prospecting rights is irrational and it accordingly 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.

- 161 The Holder of a prospecting right has an exclusive right to apply for and obtain a mining right in terms of section 19(1)(b) of the MPRDA.
 - As stated, paragraph 2.1.1.1 requires a minimum of 51% Black ownership in the company holding the prospecting right but paragraph 2.1.1.2 requires a minimum of 30% Black ownership in the specific distribution in paragraph 2.1.1.3.
- Greenfields prospecting is normally undertaken by small high risk prospecting companies, funded by venture capital. These companies make no cash flow and only make money if they can find a viable deposit and on-sell it or develop the asset. Given the relatively undeveloped venture capital market in South Africa (unlike the developed markets of Canada and Australia), and the fact that banks do not fund high risk venture capital prospecting projects, the ability of domestic or foreign prospecting companies to find venture capital funding, based on the 51% black ownership proposal is small. The result is further uncertainty and less investment in prospecting. This is contrary to the objects of the MPRDA.

The imposition of a higher threshold in the case of prospecting rights is in the circumstances 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 of Review of Ownership Element relating to new prospecting right and mining right holders: specific distribution of shareholding not authorised and it 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.

- There is no section in the MPRDA which authorises the Minister to prescribe the specific distribution of shareholding in the case of all companies holding new mining rights, as he seeks to do in paragraph 2.1.1.3.
- As stated above, the Charter is intended to guide the Minister's discretion but cannot exclude the exercise of his discretion in this manner. It accordingly stands to be reviewed and set aside on the grounds stated above.

Fourth Ground of Review of Ownership Element relating to new prospecting right and mining right holders: restriction on transfer is unauthorised and it 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.

- 166 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.
- 167 It accordingly stands to be reviewed and set aside on the grounds stated above.

Fifth Ground of Review of Ownership Element relating to new prospecting right and mining right holders: inequality in terms of section 9 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.

- Paragraph 2.1.1.5 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.
- This shows a fundamental unequal treatment of shareholders based on race which is not mandated by section 100(2)(a) and inconsistent with section 9(1), (2) and (3) of the Constitution and it accordingly falls to be reviewed and set aside on the grounds stated above.

Sixth Ground of Review of Ownership Element relating to new prospecting right and mining right holders: unconstitutional expropriation of debt which stands to be reviewed and set aside in terms of the principle of legality and/or section 6(2)(i) of PAJA

170 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 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".

171 A provision which requires the "writing-off" of a vested right to receive payment, is a deprivation of property. 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 paragraph thus already stands to be set aside as being unconstitutional on this basis.

Seventh Ground of Review of Ownership Element relating to new prospecting right and mining right holders: contravention of sections 25 and 9 of the Constitution and of section 37(1) of the Companies Act which stands to be reviewed and set aside in terms of the principle of legality and/or section 6(2)(i) of PAJA.

172 In addition to paragraphs 2.1.1.5 and 2.1.1.6, paragraph 2.1.1.7 provides that "a Holder of a new mining right must pay a minimum of 1% on 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.

- 173 The Minister simply has no power under the MPRDA to require that such payments be made by holders to Black Person shareholders.
- 174 It also, again, amounts 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.

Eighth Ground of Review of Ownership Element relating to new prospecting right and mining right holders: contraventions of the Companies Act are unauthorised and fall to be reviewed and set aside in terms of the principle of legality and/or sections 6(2)(a)(i) and (f)(i) of PAJA.

175 Paragraph 2.1.1.12 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

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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.

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 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.

Concluding remarks on grounds of review of ownership element relating to new prospecting right and mining right holders

177 It is submitted that the provisions of paragraph 2.1.1 of the 2017 Charter are accordingly not authorised by the MPRDA and/or conflict with provisions of the MPRDA and the Companies Act, 2008 and accordingly fall to be set aside in terms of the principle of legality alternatively in terms of section 6(2)(a)(i),

- 6(2)(f)(i), 6(2)(h) and/or 6(2)(i) of PAJA. They are in addition in breach of sections 9(1), (2) and (3) of the Constitution.
- In particular, many of the provisions of paragraph 2.1.1 of the 2017 Charter, cumulatively, discriminate between shareholders in a manner which is not sanctioned by the MPRDA and conflicts with the Companies Act, 2008 and with sections 9(1), (2) and (3) of the Constitution. Notably, paragraphs 2.1.1.4, 2.1.1.8, 2.1.1.9, 2.1.1.11 and 2.1.1.12 impermissibly seek to regulate the shareholders and not the holders of rights under the MPRDA.
- 179 With regard to the Companies Act, I respectfully refer the court to an excursus annexed hereto marked 'FA17' in which the Charter provisions which conflict with sections of the Companies Act are set out and which is incorporated herein by reference. Further argument in this regard will be presented to the court at the hearing of the matter.

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

First ground of review: restrictions on off-sets:

- are not authorised and are irrational and fall 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) of PAJA
- retrospectively deprive holders of existing rights and fall to be reviewed and set aside in terms of the principle of legality and/or section 6(2)(i) of PAJA

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Both the Original Charter and the 2010 Charter make reference to the continuing consequences of empowerment deals. The 2017 Charter, without expressly referring to "continuing consequences", seems in paragraph 2.1.1.13 only to make provision for off-setting under the ownership element against the value of Beneficiation. Although paragraph 2.1.1.13 appears in the part which relates to new prospecting right and mining right holders, the wording of paragraph 2.1.1.13 is not limited to new holders and seems to apply even to existing holders who are otherwise dealt with in paragraph 2.1.2. Similarly paragraph 2.1.4 does not limit itself to new holders. Whilst none of these provisions in any of the Charters is clear, I deal with the topic below on the basis of what seems to be a reasonable interpretation of these sections.

Original Charter

- 181 In the Original Charter the term "continuing consequences" was used to describe how in practice previous deals would continue to be taken into account whenever a right holder's achievement of HDSA ownership is measured. In addition, provision was made for offsets.
- 182 In the Original Charter, after it dealt with "Active involvement" and "Passive involvement", the following is stated:

"In order to measure progress on the broad transformation front, the following indicators are important:

- The currency of measure of transformation and ownership could, *interalia*, be market share as measured by attributable units of South African production controlled by HDSA's.
- That there would be capacity for offsets which would entail credits/offsets to allow for flexibility.

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."

- 183 Under the Original Charter a mining company was thus entitled to take into account, for the purposes of meeting the HDSA ownership targets, previous empowerment deals also to the extent to which a "credit" or "offset" arose, which could be utilised to meet the HDSA requirements on a later occasion. That approach is explained further in the final bullet point under paragraph 4.7 of the Original Charter, which provides that in order to increase participation and ownership by HDSAs in the mining industry, mining companies agree:
 - "That where a company has achieved HDSA participation in excess of any set target in a particular operation, then such excess may be utilised to offset any shortfall in its other operations."
- 184 It is submitted that these provisions were rational and reasonable. The Chamber's members relied upon those credits/offsets when entering into empowerment transactions and when entering into further commercial transactions and investing in new and ongoing mining operations.

2010 Charter

- Paragraph 2.1 of the 2010 Charter provides that it is only the continuing consequences of deals concluded <u>prior</u> to the promulgation of the MPRDA which may be included in calculating credits or offsets in terms of market share as measured by attributable units of production.
 - "The continuing consequences of all previous deals concluded <u>prior to</u>
 the promulgation of the Mineral and Petroleum Resources
 Development Act, 28 of 2002 would be included in calculating such
 credits/offsets in terms of market share as measured by attributable
 units of production." [emphasis added]

- 186 In regard to off-sets itself, the second bullet point in paragraph 2.1 of the 2010 Charter provides that:
 - "The only offsetting permissible under the ownership element is against the value of beneficiation, as provided for by section 26 of the MPRDA and elaborated in the mineral beneficiation framework."
- 187 The 2010 Charter thus materially limits the ability of measured entities to offset and limits continuing consequences, not only to offsets or credits arising from the value of beneficiation, but also to deals concluded prior to the promulgation of the MPRDA.

2017 Charter

188 The 2017 Charter has limited this further in providing in paragraph 2.1.1.13 thereof that -

"The only offsetting permissible under the ownership element is against the value of Beneficiation as provided for in paragraph 2.1.4 below. Such offsetting shall account for a maximum of 11% against the ownership target where such offsetting has been approved by the Department of Mineral Resources."

- 189 It is clear that the Minister has in the 2017 Charter sought to extinguish retrospectively the credits/offsets conferred by the Original Charter and even the curtailed ones in the 2010 Charter in respect of the continuing consequences of empowerment transactions.
- 190 The Chamber's members relied upon those credits/offsets when entering into empowerment transactions and when entering into further commercial transactions and investing in new and ongoing mining operations. Massive transactions were designed and implemented on this basis. They would be severely prejudiced if these credits/offsets and benefits of the continuing



consequences of empowerment transactions could simply be retrospectively deprived.

- 191 It is submitted that it is a core principle of the rule of law that persons subject to the law should be able to plan their affairs on the basis of existing laws (assuming for this purpose that the 2017 Charter is a law, which it is not). Retrospective amendments to such laws makes it impossible to do so and renders the law uncertain. It is inconsistent with the principle of legality retrospectively to deprive holders of benefits of the continuing consequences of empowerment transactions conferred by the Original Charter, without making proper provision for transitional measures. In particular, it is arbitrary and irrational to introduce new requirements with which empowerment transactions have to comply, because it renders compliant transactions non-compliant overnight and extinguishes substantial benefits conferred by past transactions without any transition.
- 192 In addition, section 100(2) of the MPRDA does not either expressly or by necessary implication permit the Minister to retrospectively withdraw in later Charters compensating advantages conferred in earlier Charters.
- 193 The Chamber will accordingly seek an order reviewing and setting aside paragraph 2.1.1.13 of the 2017 Charter on the basis that it is not authorised by section 100(2) of the MPRDA, it offends the principle of legality and that it is irrational and arbitrary to retrospectively deprive holders of mining rights of the benefits of the continuing consequences of previous empowerment transactions, which benefits were conferred by the Original Charter.

Second Ground of Review: Beneficiation in the context of off-sets is unequal, arbitrary and irrational and falls to be reviewed and set aside in terms of the principle of legality and/or sections 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.

194 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. For the reasons set forth in regard to offsetting generally above, the new requirements in paragraphs 2.1.4(a) to (e) retrospectively deprive holders which have relied on the beneficiation offsets in the Original Charter of their vested rights to do so.

195 These new requirements are that:

- "(a) A Holder may offset a maximum of 11% of Black Persons ownership by financially investing in and contributing to Beneficiation over and above the provisions of Section 26 of the MPRDA.
- (b) The offsetting referred to in paragraph 2.1.4 (a) shall not exceed 11% irrespective of the formulae, methods and /or mechanisms identified.
- (c) A Holder claiming an offset pursuant to Beneficiation must meet the following criteria:
 - o The Holder must have, since 2004, in addition to section 26 requirements of the MPRDA, invested in Beneficiation;
 - o The activities that are deemed to be Beneficiation are in line with the baseline contemplated in the definition of Beneficiation in the MPRDA: and
 - o The Department of Mineral Resources must approve the proposed activities to ensure that such activities are in line with Beneficiation policies published by it from time to time.
- (d) Offsetting shall not apply to any Beneficiation project which existed post 2004 but which has since ceased to exist and or has been terminated.

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- (e) Offsetting may only be claimed where the Holder's contribution to Beneficiation is still ongoing"
- 196 Beneficiation is defined as the transformation of a mineral (or a combination of minerals) to a higher value product, which can either be consumed locally or exported. The term is often used interchangeably with mineral "value-addition" or "downstream beneficiation". The 2017 Charter provides, under this element, that a mining right Holder may, through its beneficiation projects, offset "up to 11 percentage of the 26% of the ownership reserved for Black people".
- 197 It is submitted that there are three difficulties with the 11% offset provision.
- 197.1 First, a mining right Holder which already meets the 26% ownership target will not have available to it the 11% offset. This would have the effect of discriminating against those mining rights Holders who already meet the 26% ownership target.
- 197.2 Second, there is no reason to limit the beneficiation offset to 11% of the 26% ownership target. The 11% is entirely arbitrary and irrational. A mining right Holder should be able to offset 100% of its 26% ownership target through its beneficiation projects. This would lead to equal treatment between a mining right Holder which satisfies the 26% ownership target but has no beneficiation obligations, on the one hand, and a mining right Holder which does not meet the 26% ownership target but nevertheless has substantial beneficiation projects to offset against the ownership target.
- 197.3 Third, the 2017 Charter does not give any indication of how the 11% is to be calculated. That is to say, a mining right Holder will not know, simply by looking at the 2017 Charter, whether it has reached the 11%, or indeed what

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percentage its beneficiation projects have reached *vis-à-vis* the 26% ownership target. The beneficiation element is accordingly vague in the extreme and does not meet the most basic requirements of the rule of law.

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 of Review: Preferential option on sale of Mining Assets is:

- unauthorised by s11 of the MPRDA and falls to be reviewed and set aside on the basis of the principle of legality and/or ss6(2)(a)(i) and (f)(i) of PAJA
- contravention of sections 1(c) and 25 of the Constitution and falls to be reviewed and set aside on the basis of the principle of legality and/or section 6(2)(i) of PAJA
- 199 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 the Minister *must* grant consent if the jurisdictional facts in sections 11(2)(a) and (b) are satisfied.
- 200 Paragraph 2.1.3 confers a right of first refusal but contains no mechanism and hence contravenes the rule of law requirements entrenched in section 1(c) of the Constitution and falls to be set aside in terms of section 6(2)(i) of PAJA alternatively the principle of legality.

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201 Paragraph 2.1.3 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.

PART 5: GROUNDS OF REVIEW RELATING TO THE NON-OWNERSHIP ELEMENTS

GROUNDS OF REVIEW OF PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT ELEMENT

Introduction

The 2017 Charter imposes certain procurement obligations on a Holder in relation to that Holder's procurement policy. The obligations are meant to apply to "mining goods", "services", "processing of samples", "verification of local content", and "contribution by foreign supplier". I shall deal with these in turn, starting with procurement of mining goods.

Mining goods

203 The 2017 Charter provides that -

"Mining Goods

A Holder must spend a minimum of 70% of total mining goods procurement spend on South African Manufactured Goods. The abovementioned 70% of the total good procurement spend shall be apportioned in the following manner:

(a) A minimum of 21% of total goods procurement spend must be set aside for sourcing South African Manufactured Goods from Black Owned Companies;

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- (b) A minimum of 5% of total mining goods procurement spend must be set aside for sourcing South African Manufactured Goods from Black Owned Companies with a minimum of 50%+1 vote female Black Person owned and controlled and/or 50%+1 vote Youth owned and controlled; and
- (c) A minimum of 44% of total mining goods procurement spend must be set aside for sourcing South African Manufactured Goods from BEE Compliant Manufacturing Companies."

First Ground of Review in respect of Mining Goods: unconstitutionality of "must be set aside": section 1(c) of the Constitution: section 6(2)(i) of PAJA

- The phrase "must be set aside" is unclear. It is not clear, for example, whether it is meant that the Holder must actually spend the required percentages or whether it must simply make provision for spending them. This is an important point, especially because there is no proof that the manufacturers or companies from which the mining goods must be sourced have the capacity to provide the relevant mining goods. If, for example, such manufacturers or companies cannot provide the relevant goods to the Holder, then it would make sense to read this sub-element as requiring a Holder simply to set aside the relevant expenditure percentage. Having done so, it would on this interpretation have fulfilled its obligation under the 2017 Charter.
- 205 If, on the other hand, a Holder is required actually to spend the requisite percentages, then merely setting money aside would not be proper fulfilment of the obligation under this sub-element. Further, on this latter interpretation, a Holder would be in breach of the 2017 Charter if, having attempted actually to spend the requisite percentage, it was unable to do so because there was no relevant manufacturer or company to provide the mining goods. This would operate unduly harshly on a Holder.

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At all events, it is not clear which of these two rival meanings this sub-element bears. This, I am advised, is a problem for the principle of the rule of law, according to which laws must be clear and capable of compliance (assuming for this purpose that the 2017 Charter is a law, which it is not). This sub-element is vague and therefore contrary to section 1(c) of the Constitution.

Second Ground of Review in respect of Mining Goods: unconstitutionality of phrase relating to Black owned Companies: section 1(c) of the Constitution: section 6(2)(i) of PAJA

207 It is simply impossible to understand what is meant by the phrase "Black Owned Companies with a minimum of 50%+1 vote female Black Person owned and controlled and/or 50%+1 vote Youth owned and controlled" in paragraph (b) above. Yet a "minimum of 5% of total mining goods procurement spend must be set aside for sourcing" mining goods from such an ill-defined entity. There is no amount of parsing this element which would make it clearer. Again, a Holder would not know when or when it has not complied with this subelement. This is fundamentally contrary to the rule of law in section 1(c) of the Constitution and the sub-element is void for vagueness. The Court should with respect set it aside.

Third Ground of Review in respect of Mining Goods: unconstitutionality for impossibility: section 6(2)(i) of PAJA

208 There is another problem with the sub-element, which has been foreshadowed above, namely that there is no evidence that companies currently providing mining goods are Black Owned Companies. If the idea is that such companies must gear themselves up so that they are Black Owned Companies, then that obligation should be imposed on those companies. The 2017 Charter must be

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capable of compliance by those to whom it applies, and Holders should be assured (as at present they are not) that there will be an ability to procure goods and services from Black Owned Companies. At the moment, there is, as I say, no evidence of that. (In this regard, I specifically challenge the Minister to produce such evidence in his answering affidavit.) I am advised that the courts have held that if a measure is incapable of implementation, it is on that account alone unconstitutional.

Fourth Ground of Review in respect of Mining Goods: relevant considerations and information not considered: sections 6(2)(e)(iii) and (f)(ii)(cc) of PAJA

As was pointed out in the Chamber's submission and revised submissions on the draft 2017 Charter (copies whereof are items 35, 127, 128, 175 and 176 in the Record.), and in annexure FA2, the 70% capital goods from Black Owned Companies with 60% local requirement is a significant problem for certain commodities (especially those that have to buy very large capital equipment from off-shore sources), and the prescriptive nature of these requirements will be a challenge to meet for mining companies.

Fifth Ground of Review in respect of Mining Goods: unconstitutionality for contravention of international trade agreements: section 39(1)(b) of the Constitution: section 6(2)(i) of PAJA

1 am advised, further, that the requirement that a Holder must spend a minimum of 70% of "total mining procurement spend" on South African Manufactured Goods is in breach of South Africa's obligations under Article XI(1) of the General Agreement on Trade and Tariffs (GATT) and Article 19 of the Trade, Development and Cooperation Agreement (TDCA), in that it imposes quantitative restrictions or limits on exports by other member countries. Both

agreements constitute international treaties to which South Africa has bounditself. Although those agreements may not have become part of South Africa's domestic law, they reflect this country's international law obligations. It is submitted that the treaties in question give rise to an obligation by the South African Government not to undermine its international obligations created thereunder by adopting policies, enacting subordinate legislation or by engaging in administrative action which is irreconcilable with such obligations. To do so would, at the very least, constitute conduct which no reasonable decision-maker would engage in. I attach hereto as Annexure "FA18" an excursus on the 2017 Charter's contravention of international trade agreements.

Concluding remarks in regard to grounds of review in respect of mining goods

211 For all the above reasons, therefore, I am advised and submit that this procurement sub-element is irrational, not capable of implementation and one which no reasonable decision-maker could have reached and is therefore reviewable on the grounds set out in sections 6(2)(e)(i), (h) and (i) of PAJA alternatively on the basis of legality and section 1(c) of the Constitution.

Services

This sub-element requires 80% of "the total services procurement spend" to be sourced from Black Owned Companies. There is then a break-down of these percentages to be spent on: Black Owned Companies (65%); "Black Owned Companies with a minimum of 50%+1 vote female Black Person owned and controlled companies" (10%); and Black Owned Companies with a minimum of 50%+1 vote Youth owned and controlled companies" (5%).

First Ground of Review in respect of Services: unconstitutionality for impossibility: section 6(2)(i) of PAJA

213 The same objection raised above as to the ability to comply with these targets applies in this case. If there are no Black Owned Companies (in their various sub-divisions) or insufficient capacity in such companies from which to source these services in the relevant percentages, then Holders would not be able to comply with this sub-element. There is as matters stand no evidence (and I challenge the Minister to produce it) that the companies currently providing such services are black-owned, or that there are Black Owned Companies capable of providing the services in the relevant percentages to all Holders. I must emphasise that I am not, in saying this, criticising Black Owned Companies, so much as saying that there ought to be the relevant infrastructure to enable compliance with this procurement sub-element.

Second Ground of Review in respect of Services: unconstitutionality of phrase relating to Black owned Companies: section 6(2)(i) of PAJA

214 Again, the phrases "Black Owned Companies with a minimum of 50%+1 vote female Black Person owned and controlled companies" and "Black Owned Companies with a minimum of 50%+1 vote Youth owned and controlled companies" are not capable of any clear meaning. It is therefore impossible for a Holder, seeking to comply with them, to know how to do so.

Concluding Remarks in regard to grounds of review relating to services

215 For all the above reasons, this sub-element is *ultra vires* the MPRDA (and therefore contrary to section 6(2)(e)(i) of PAJA), void for vagueness, irrational and contrary to section 1(c) of the Constitution.

Processing of samples

216 This sub-element requires Holders to "utilise South African Based Companies for the analysis of 100% of all mineral samples across the mining value chain". If a Holder is not to do so, then it must obtain the prior written permission of the Minister.

First Ground of Review in respect of Samples: relevant considerations not considered: section 6(2)(e)(iii) of PAJA

When a similar proposal was previously made by the Minister, the Chamber made submissions to the Minister. In its submissions, the Chamber commented that there is no evidence that local companies have the capacity to conduct an analysis of 100% of a Holder's mineral samples. The Minister does not seem to have taken this factor into account. There is no evidence that South African Based Companies will be able to conduct an analysis of all the mineral samples produced in the mining industry in South Africa. In ignoring this fact, the Minister failed to take into account relevant considerations in imposing this obligation. As a result, the 2017 Charter should be reviewed under section 6(2)(e)(iii) of PAJA. The 2017 Charter is in this regard also irrational.

Second Ground of Review in respect of Samples: unconstitutionality for lack of criteria: section 1(c)of the Constitution: section 6(2)(i) of PAJA

As regards obtaining the Minister's written permission to use foreign companies for mineral sampling, there is no indication of the factors that the Minister will take into account in exercising that discretion. In the absence of any guidelines as to how such a discretion is to be exercised, it is possible that the Minister will

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Third Ground of Review in respect of Samples: micro-management is unauthorised: section 6(2)(e)(i) of PAJA

219 There is then a practical difficulty. If a Holder cannot obtain the sampling services of a South African Based Company when it requires them, there is no time limit within which the Minister must give (or refuse) his written permission. The Minister (who is after all a busy person) may not be able timeously to process such requests. The consequences for the Holder concerned may be enormous. Section 100(2) of the MPRDA does not license the Minister to micro-manage the day-to-day business requirements of Holders. Yet that is what this sub-element permits him to do, with potentially disastrous consequences for the mining industry. Therefore, this sub-element is *ultra vires* the MPRDA and accordingly falls to be reviewed under section 6(2)(e)(i) of PAJA. It is also irrational in that the Minister has not set up any infrastructure timeously to deal with the applications for exemptions.

Fourth Ground of Review in respect of Samples: sampling by South African Companies is not encompassed in sections 100(2)(a) or (b) of the MPRDA and is unauthorised: Sections 6(2)(a)(i) and (f)(i) of PAJA

220 The requirement in regard to processing of samples by South African based Companies does not fall within the ambit of sections 100(2)(a) and (b) of the

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MPRDA, is therefore unauthorised, and falls to be set aside in terms of sections 6(2)(a)(i) and (f)(i) of PAJA

Verification of local content

Ground of Review in respect of verification of local content:

- unauthorised: sections 6(2)(a)(i) and (f)(i) of PAJA
- unconstitutional for impossibility: section 6(2)(i) of PAJA
- The 2017 Charter provides that the responsibility to verify local content lies with the supplier. But the MPRDA does not apply to or bind suppliers. This provision is therefore *ultra vires*, and moreover may render compliance by the Holder impossible if the supplier fails to provide such verification.

Contribution by Foreign Suppliers

This sub-element requires a Foreign Supplier to contribute 1% of its turnover (i.e. whether or not a profit is made) generated from local mining companies towards the Mining Transformation and Development Agency. I am advised that there are a number of difficulties with this.

First Ground of Review in respect of contribution by foreign suppliers: unconstitutional Money Bill: section 6(2)(i) of PAJA

223 First, the Mining Transformation and Development Agency (an entity yet to be established) will receive funds from the Foreign Supplier levied under this subelement. It is, however, quite clear that the funds so received are nothing other than a tax, levy, duty or surcharge imposed on goods and services by Foreign Suppliers. In short, this element of the 2017 Charter should be contained in a money Bill. The 2017 Charter is not a Bill, let alone a money Bill. The Minister

has no power to make or even introduce money Bills or to raise revenue. That power is reposed in the Minister of Finance. 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."

224 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, in lay terms, impose taxes, levies, duties and surcharges. Yet the Minister has purported, by the device of the 2017 Charter, to do that which is reserved for Parliament. The 2017 Charter is in this regard unconstitutional.

Second Ground of Review in respect of contribution by foreign suppliers: receipt of levy by MTDA is unconstitutional: section 6(2)(i) of PAJA

225 Second, section 213(1) of the Constitution provides that:

"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."

The Mining Transformation and Development Agency, which will receive the 1% levy paid to the National Government by Foreign Suppliers, is not established by any Act of Parliament, and is an entity separate and distinct from the National Revenue Fund, which alone under the Constitution can receive revenue. The Mining Transformation and Development Agency, being neither the National Revenue Fund nor provided for by an Act of Parliament, has been given an unconstitutional mandate under the 2017 Charter. It is therefore unconstitutional.

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Third Ground of Review in respect of contribution by foreign suppliers: unconstitutional extra-territoriality: section 6(2)(i) of PAJA

Third, the 2017 Charter purports to have extra-territorial application, which is unconstitutional. Suppose a Foreign Supplier obtained revenue (turnover) in South Africa, and expatriated that turnover, there is no mechanism under the 2017 Charter for enforcing the payment of the turnover to the Mining Transformation and Development Agency, assuming such payment were otherwise lawful. In short, the 2017 Charter is unenforceable *vis-à-vis* a Foreign Supplier with no assets in the Republic. There is nothing in the 2017 Charter which provides that turnover earned in South Africa should be taxed before it is repatriated. Because the 2017 Charter provides no mechanism for enforcement of this element, the element is incapable of compliance and is therefore irrational and contrary to section 1(c) of the Constitution.

Fourth Ground of Review in respect of contribution by foreign suppliers: unauthorised obligations on suppliers: sections 6(2)(a)(i) and (f)(i) of PAJA

Fourth, even if the above submissions are rejected, the Minister's power under section 100(2) of the MPRDA does not permit him to require Foreign Suppliers to pay levies into the Mining Transformation and Development Agency, whose purpose, powers and functions are yet to be set out and may be contrary to the objects of section 100(2) of the MPRDA. Such entities are not Holders and are therefore not subject to the Minister's jurisdiction.

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Concluding remarks in regard to Grounds of Review relating to contribution by foreign suppliers

229 For all the above reasons, therefore, I am advised that this sub-element is unconstitutional and *ultra vires* the MPRDA.

Transitional arrangements in relation to procurement

Ground of Review of Transitional Arrangements in relation to procurement: unconstitutional unclarity: section 1(c) of the Constitution: section 6(2)(i) of PAJA

230 Clause 2.11(c) of the 2017 Charter provides for what it calls "transitional arrangements" in relation to the procurement element, in the following terms:

"The transitional arrangements period for the procurement element targets is three years. The Holder must within three (3) years from the date of publication of this reviewed Mining Charter of 2017, submit a three (3) year plan indicating progressive implementation of the provisions of this reviewed Mining Charter of 2017 insofar as they relate to procurement."

231 Clause 2.11(e) of the 2017 Charter provides that:

"Compliance with procurement targets within the transitional period shall be as follows:

- o The first year target is set at 15% of the 70%, second year target is set at 45% of the 70% and the third year target is set at 70%."
- It would appear from the above clauses, read together, that the procurement targets will become immediately applicable, albeit in a staggered manner. There is, however, a perplexing puzzle as to how the staggered approach is meant to function. For example, clause 2.11(e) refers to "15% of the 70%", "45% of the 70%", and "70%" (in the third year). And these staggered targets are meant to be "compliance with procurement targets within the transitional period". That is to say, on the face of clause 2.11 (e), these targets are meant

to be procurements targets across all the procurement sub-elements (mining goods, services, processing of sample, and contribution by Foreign Suppliers).

At the same time, it is clear that the refrain "of 70%" can only be relevant to the mining goods sub-element which alone speaks of "70%". There is therefore confusion as to the exact meaning of the transitional targets. Do they apply only to mining goods, or do they also apply to all other procurement sub-elements? Put shortly, it is not at all clear whether there is a transition period in relation to the procurement sub-elements other than mining goods. The 2017 Charter does not explain this. Laws (assuming for this purpose that the 2017 Charter is a law, which it is not) must be clear. Those to whom such laws apply must know when, and to what extent (if there is any suggestion of staggered compliance), they are meant to comply. The 2017 Charter is to this extent contrary to section 1(c) of the Constitution.

Procurement: general

General Ground of Review in regard to procurement: relevant considerations and information not considered: sections 6(2)(e)(iii) and (f)(ii)(cc) of PAJA

There is a general point which cuts across all the procurement targets. When the Minister first proposed procurement targets, the Chamber made submissions to him in which it said that the procurement targets were not capable of compliance, in the sense that, with the best will in the world, Holders would not be able to procure goods and services (including sampling services) from Black Owned Companies and local suppliers. There is no evidence (the Minister is challenged to produce it) that the situation has changed since those submissions.

The only conclusion to draw from this is that the Minister failed to apply his mind to those submissions. In promulgating the 2017 Charter in its present terms, the Minister therefore failed to take into account relevant considerations, which failure furthermore exhibits a failure to apply his mind properly. The decision to promulgate the 2017 Charter was therefore unreasonable and irrational (in the legality sense).

Concluding Remarks in regard to grounds of review in regard to procurement

236 For all these reasons, I submit that the procurement element falls to be set aside on review, and declared unconstitutional.

GROUNDS OF REVIEW RELATING TO EMPLOYMENT EQUITY

Introduction

237 The 2017 Charter provides for various employment equity targets, at various levels, with which Holders must comply. They are set out in clause 2.3 of the 2017 Charter as follows:

"Board

A minimum of 50% Black Persons with exercisable voting rights, 25% of which must be black Female Persons.

Executive/Top Management

A minimum of 50% Black Persons at the executive directors' level as a percentage of all executive directors, 25% of which must be Female Black Persons.

Senior Management

A minimum of 60% Black Persons in senior management, 30% of which must be female Black Persons.

Middle Management level

A minimum of 75% of Black employees in middle management, 38% of which must be female Black Persons.

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Junior Management level

A minimum of 88% Black employees in junior management, 30% of which must be female Black Persons.

Employees with disabilities

A minimum of 3% employees with disabilities as a percentage of all employees, reflective of national and/or provincial Demographics."

First Ground of Review in respect of employment equity: relevant consideration of need for transition not considered: section 6(2)(e)(iii) of PAJA

- There is no transitional period for meeting the above employment equity targets. It will be apparent, from the stringent nature of these targets, that, as matters stand, and having regard to the need for sustainable continuation of mining in the Republic, these targets are incapable of immediate compliance. For example, it is not possible, without massive disruption in mining operations, to change 50% of the board of a Holder, or to change 60% of senior management, or to change 75% of middle management or 88% of junior management level. Meeting these targets immediately (i.e. within 12 months), and not over a gradual period allowing for training and up-skilling, will almost certainly lead to a disruption of mining activities in the Republic. This is exacerbated by the facts that:
- as mentioned in the Third General Ground of Review in Part 3 above, the definition of "Black Person" in the 2017 Charter does not accord with the definition of "historically disadvantaged person" in section 1 of the MPRDA, this having the result that white women are excluded whereas previously they were included;

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In saying this, the Chamber recognises the need for change: it submits, however, that such radical change cannot take place immediately without operational impact on mining in the Republic. Therefore, a gradual process by which these targets should be met should have been set out in the 2017 Charter. In failing to set it out, the 2017 Charter has failed to take into account a relevant consideration, namely that, if immediately implemented, the 2017 Charter may in this regard lead to a disruption of mining activities. Therefore the 2017 Charter falls to be reviewed under section 6(2)(e)(iii) of PAJA. It is also irrational in the sense that this sub-element is not capable of immediate implementation.

Second Ground of Review in respect of employment equity: the employment equity requirements are not rational: sections 6(2)(f)(ii)(aa), (bb) and (cc) of PAJA

240 Holders are in any event already bound by the Employment Equity Act, which covers much of the ground sought to be covered by the 2017 Charter in this regard. The immediate imposition by the 2017 Charter of unachievable employment equity targets, with the potential result of disruption, is not rationally connected to the purpose for which the 2017 Charter was adopted, the purpose of the empowering provision, and the information before the Minister. Such targets, bearing in mind the disruption they entail, will not, in the words of section 100(2)(a) of the MPRDA, "allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation

of such mineral resources". In the result, the 2017 Charter falls to be reviewed in this regard under sections 6(2)(f)(ii)(aa), (bb) and (cc) of PAJA.

Third Ground of Review in respect of employment equity: consequences of inability to comply are irrational: sections 6(2)(f)(ii)(aa), (bb) and (cc) of PAJA

241 Finally, having regard to the fact that Holders are required to comply with the employment equity element immediately, and may with the best will in the world not be able to do so (because personnel with the relevant skills may not be available), it is not rational to visit upon Holders the severe consequences for non-compliance set out in clause 2.12 of the Charter, which include losing the mining right. On this further basis, then, the Reviewed 2017 Charter falls to be set aside.

GROUNDS OF REVIEW IN REGARD TO HUMAN RESOURCE DEVELOPMENT

Introduction

242 This element requires a Holder to "invest 5% of the Leviable amount" (as defined in another Act) on "essential skills development". The 5% is then further apportioned towards "essential skill development activities" (2%); South African Historically Black Academic Institutions (1%); and Mining Transformation and Development Agency (2%). The cost of this 2% levy payable to the MTDA is R2.5 billion based on 2017 data annualised. This is a ring-fenced element which in terms of paragraph 2.9 requires 100% compliance at all times.

First Ground of Review in respect of human resource development: relevant consideration of existing National Skills Fund Levy not considered: sections 6(2)(e)(iii) of PAJA

243 The apparent aim of this element is that 5% of a Holder's Leviable amount should be invested in skills development. I must, however, point out that the mining industry currently pays a 1% levy towards the National Skills Fund, which relevant consideration was not considered rendering section 6(2)(e)(iii) of PAJA applicable.

Second Ground of Review in respect of human resource development: unconstitutional inequality: section 9 of the Constitution: Section 6(2)(i) of PAJA

- 244 The mining industry is the only industry that is required to invest in community development projects, some of which include expenditure in basic education for the unemployed and *ad hoc* scholarship programmes.
- Therefore, to require of the mining industry, in addition to the contribution that it is already making, to comply with this element is to treat it differently (that is to say unequally) from other sectors. There is no apparent justification for the imposition of that additional burden or for treating the mining industry materially differently from all other industries.

Third Ground of Review in respect of human resource development: unconstitutional offending against separation of powers: section 1(c) of the Constitution: section 6(2)(i) of PAJA

246 In any event, such a law, providing as the element does for Ministerial exemption, should be debated in Parliament and passed by Parliament, having regard to its impact and reach. It is not to be left to the executive. Accordingly, this element offends against the principle of separation of powers enshrined in the Constitution and is on that account reviewable and to be set aside.

Fourth Ground of Review in respect of human resource development: unconstitutional receipt of levy by MTDA: section 6(2)(i) of PAJA

247 The Mining Transformation and Development Agency is, for reasons already advanced, not entitled to receive any funds which in terms of section 213(1) of the Constitution ought properly to be paid to the National Revenue Fund. No Act of Parliament has reasonably excluded from such requirement the payment of moneys into the Mining Transformation and Development Agency. The Minister simply has no power to override the Constitution, as he has here sought to do.

Fifth Ground of Review in respect of human resource development: unconstitutional Money Bill: section 6(2)(i) of PAJA

248 Perhaps more importantly, the 5% on Leviable amount is in essence a tax, duty or surcharge. Accordingly, it could only properly be passed by Parliament in the form of a money Bill. On that further basis the element is unconstitutional.

Sixth Ground of Review in respect of human resource development: unconstitutional requirement to pay levy to non-existent MTDA: section 6(2)(i) of PAJA

Moreover, the Mining Transformation and Development Agency is yet to be formed, yet since in par 2.11(a) in respect of existing mining right holders, there are no transitional provisions which apply to paragraph 2.4(d), paragraph 2.4(d) is effective immediately. The requirement to pay levies to an entity yet to be formed offends the rule of law principle, which requires that laws (assuming for this purpose that the 2017 Charter is a law, which it is not) be capable of compliance. The paragraph therefore also offends section 1(c) of the Constitution.

GROUNDS OF REVIEW IN REGARD TO MINE COMMUNITY DEVELOPMENT

First Ground of Review in respect of Mine Community Development: unconstitutional unclarity: section 1(c) of the Constitution: section 6(2)(i) of PAJA

- 250 This element requires a Holder to contribute towards Mine Community Development. It does so, however, in terms that are so vague that it is impossible to comply with them.
- 250.1 For example the scorecards where it refers to Mine Community

 Development refers to alignment "to the district, metropolitan and <u>local</u>

 <u>municipality's IDPs of revenue projection</u> for two and half years, applicable to

 a SLP's for five (5) years cycle." [my underlining] which, apart from being



- incomprehensible does not accord with the paragraph 2.6 of the 2017 Charter itself in its reference to Integrated Development Plans.
- 250.2 Another example is that the element provides that a "Holder's contribution towards Mine Community Development must be proportionate to size of the investment". There is no definition of "investment" in the 2017 Charter. A Holder wishing to comply with this element would not be able to do so.
- The above are just two examples. The whole element is unclear and 250.3 therefore incapable of implementation by those to whom it applies.
- 250.4 To make matters worse, this is a ring-fenced element which in terms of paragraph 2.9 requires 100% compliance at all times.

Second Ground of Review in respect of Mine Community Development: unconstitutional conflict with MPRDA regulations in regard to social and labour plans: section 6(2)(i) of PAJA

- 251 Another difficulty with the element is that it seeks to impose obligations that Holders already have under their Social and Labour Plans (SLPs). The major difference is that the element introduces a timetable for meeting SLP targets which may conflict with the provisions of the various SLPs. A Holder's right would therefore be put in jeopardy if it complies with its SLP but nevertheless fails to comply, within 12 months, with the vaguely expressed provisions of this element. On this further ground, therefore, the element cannot be sustained.
- 252 SLP's are already regulated by the Mineral and Petroleum Resource Development Regulations (MPRD Regulations) made under section 107 of the MPRDA. The three pillars of SLP's, as per the MPRD Regulations, are a

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- human resource development program, local economic development program and downscaling and retrenchment processes (regulation 46).
- 253 As aspects of the seven components of 2017 Charter are already covered by the MPRD Regulations, the purported regulation of these overlapping aspects in the 2017 Charter conflicts with the MPRD Regulations.

GROUNDS OF REVIEW IN REGARD TO SUSTAINABLE DEVELOPMENT AND GROWTH OF THE MINING AND MINERALS INDUSTRY

First Ground of Review in respect of sustainable development and growth: this element is unauthorised by section 100(2) of the MPRDA: sections 6(2)(a)(i) and (f)(i) of PAJA

- In terms of section 100(2)(a) of the MPRDA the purpose of the Charter is to "set the framework for targets and timetable 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 mining and mineral resources and beneficiation of such mining and mineral resources". In terms of section 100(2)(b) the Charter must set out how the objects referred to in sections 2(c), (d), (e), (f) and (i) can be achieved.
- 255 Sustainable development is dealt with in section 2(h), and is therefore not one of the relevant objects. Health and Safety are not dealt with in such objects at all because they are dealt with in the Mine Health and Safety Act, 1996. Paragraphs 2.6.1 and 2.6.2 in the 2017 Charter are therefore ultra vires section 100(2) and fall to be set aside on that ground.

Second Ground of Review in respect of sustainable development and growth: not rationally connected to purpose: sections 6(2)(f)(ii)(aa) and (bb) of PAJA

256 Because this element constitutes a reiteration, in vague and aspirational terms, of obligations that Holders already bear under other pieces of legislation, it introduces confusion when it imposes implementation targets (12 months) which are not contained in the other legislation. The result is potentially that a Holder will be compliant with primary legislation whilst being in breach of the 2017 Charter. That is a chaotic outcome which is not connected to the purpose for which the Minister's power (assuming that the Minister had such power, which he did not) to publish the 2017 Charter was conferred.

Third Ground of Review in respect of sustainable development and growth: unconstitutional uncertainty, impossibility, and Money Bill issue, relating to research and development: section 6(2)(i) of PAJA

- 257 The element in paragraph 2.6.3 of the 2017 Charter goes further to provide that a Holder must spend 70% of its research and development budget in South Africa. It is then provided that 50% of this 70% should be "spent on South African Historically Black Academic Institutions". There are a number of difficulties with this.
- 258 First, these percentages seem to have been plucked out of nowhere. No "costing" was ever done to test their practicability. The Minister is specifically invited to provide the facts he considered in arriving at these percentages.
- 259 Second, it is not at all clear what the element means when it says that 50% of the 70% "must be spent on South African Historically Black Academic

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Institutions." Does it mean that research and development money must be given to those institutions, or that research and development must be conducted at those institutions?

Third, there is no evidence that these institutions have the capacity to assist in mining research and development within a period of 12 months. They may in due course develop that capacity, but it is absurd to require a Holder, within 12 months, to spend part of its research and development budget on institutions from which that Holder will gain nothing in return. That is not research and development, but a tax to fund these institutions. But if the aim is that the mining industry should contribute to South African Historically Black Academic Institutions, then that should not be in the guise of research and development, and it should be done by introducing a money Bill into Parliament, as the Constitution requires.

Concluding remarks in regard to grounds of review in respect of sustainable development and growth

261 For all the above reasons, I submit that this element should be set aside.

GROUND OF REVIEW IN REGARD TO HOUSING AND LIVING CONDITIONS

Ground of Review in respect of housing and living conditions: not authorised by section 100(2) of the MPRDA: sections 6(2)(a)(i) and (f)(i) of PAJA

The Chamber supports the values expressed in this sub-element, but this topic is already regulated by the Housing and Living Condition Standard developed by the Minister under section 100(1)(a) and he has no power to regulate the same topic under section 100(2)(a). The inclusion of these requirements in the

2017 Charter is accordingly *ultra vires* the empowering provision. It is in any event an unlawful and chaotic repetition of what is already been provided for. Moreover this element is not included in the scorecard.

PART 6: GROUNDS OF REVIEW IN REGARD TO MISCELLANEOUS CLAUSES 2.8 TO 2.15 OF THE 2017 CHARTER

GROUNDS OF REVIEW IN REGARD TO APPLICATION OF CHARTER TO LICENCES GRANTED UNDER THE PRECIOUS METALS ACT, 2005 AND THE DIAMONDS ACT, 1986

Introduction

263 Section 6(1)(b) of the Precious Metals Act, 2005 provides that -

- "(i) In considering an application for any licence, permit or certificate the Regulator
 - (b) must have regard to the requirements of the Broad-Based Socio-Economic Empowerment Charter developed in terms of section 100 of the Mineral and Petroleum Resources Development Act, 2002 (Act No.28 of 2002);".
- 264 Section 5(2) of the Diamonds Act provides that -

"the Regulator may³⁰—

. . .

(a) when considering an application for any of the licences or permits provided for in this Act, have regard to the broad-based socio-economic empowerment Charter contemplated in section 100 of the Mineral and Petroleum Resources Development Act".

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³⁰ This is to be contrasted with the "shall" in section 5(1) thereof.

First Ground of Review: applicability not authorised: sections 6(2)(a)(i) and (f)(i) of PAJA

- As in the case of the MPRDA, these provisions clearly operate at the time of the grant of a licence and mean that the Regulator may have regard to the Charter in deciding whether or not to grant a licence under the Precious Metals Act or under the Diamonds Act. These provisions do not authorise the Minister, as he has in paragraphs 2.8 and 2.8.1 of the 2017 Charter purported to do, to make the targets and elements of the Charter applicable to licence holders under those Acts in line with the table at pp 23-24 thereof. They also do not authorise the Minister to prescribe ownership targets for licensees in the downstream diamonds and precious metals industry.
- 266 Paragraphs 2.8 and 2.8.1 of the 2017 Charter are therefore *ultra vires* and accordingly stand to be reviewed and set aside in terms of sections 6(2)(a)(i) and/or 6(2)(f)(i) of PAJA alternatively on the basis of the principle of legality.

Second Ground of Review: repeal of Part 3 of Codes not authorised: sections 6(2)(a)(i) and (f)(i) of PAJA

267 Paragraph 2.8.2 is also *ultra vires*: the Minister has no power in terms of section 100(2)(a) of the MPRDA to repeal the code of good practice which was developed in terms of section 100(1)(b) of the MPRDA. In any event, since the Code (which was published on 30 April 2009) is based on the Original Charter, the 2017 Charter conflicts with the code as a whole and not only insofar as Chapter 3 is concerned, which conflict is contrary to the rule of law requirement in section 1(c) of the Constitution, an aspect which relates not only to the Diamonds Act and the Precious Metals Act, but generally in regard to the 2017

GROUND OF REVIEW IN REGARD TO SECOND PARAGRAPH OF PARAGRAPH
2.9 OF THE 2017 CHARTER: RING-FENCING AND 100% COMPLIANCE IN
REGARD TO OWNERSHIP, MINE COMMUNITY DEVELOPMENT AND HUMAN
RESOURCE DEVELOPMENT

Ground of Review: unconstitutional impossibility, section 1(c) of the Constitution: section 6(2)(i) of PAJA

268 It is impossible and irrational to expect that Holders can comply as to 100% at all times with the ownership, mine community development and human resources development elements, and the second paragraph of paragraph 2.9 of the 2017 Charter falls to be set aside on that ground in terms of section 6(2)(i) of PAJA.

GROUNDS OF REVIEW OF PARAGRAPH 2.10 OF THE 2017 CHARTER IN REGARD TO APPLICABILITY OF TARGETS:

First Ground of Review: unconstitutional and unauthorised

269 In regard to the above I refer to the First and Second General Grounds Of Review above.

Second Ground of Review: reference to exploration rights is unauthorised: sections 6(2)(a)(i) and (f)(i) of PAJA

270 As mentioned in the third general ground of review above, exploration rights as defined in section 1 of the MPRDA relate to petroleum so that the Mining Charter is not applicable to them, with the result that reference thereto is

unauthorised by section 100(2) of the MPRDA rendering sections 6(2)(a)(i) and (f)(i) of PAJA applicable.

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

Ground of Review: not unauthorised in terms of section 100(2) of the MPRDA: section 6(2)(a)(i) of PAJA

- 271 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".
- As set out above, 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. 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.
- 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

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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.

- 274 I repeat, as set out above, that the Charters do not constitute regulations and do not constitute legislation. In particular, they do not fall within the definition of "this Act" in the MPRDA. Instead they constitute formal guidelines or statements of policy, which are mandated by section 100 of the MPRDA. As stated, they are intended to provide a formal indication, made known to the 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 (i) of the MPRDA as contemplated in inter alia section 23(1)(h) and item 7(2)(k) of the MPRDA. A policy, formal or otherwise, is not legislation and remains a guideline. It could never be applied so as to have the force of law or to preclude an applicant for a mining right from adopting other means of furthering the objects or giving effect to the objects of the Act. Section 100(2)(b) indeed requires that the Original Charter should set out how the objects referred to in those sections can be achieved. In this regard it is important to note that section 100(2)(b) does not require that the contemplated charter prescribe, on an exclusive basis, what must be done in order to achieve the objects of those provisions.
- 275 The Minister cannot by decree elevate the Charter's status to that of legislation and cannot by decree provide in the Charter that non-compliance therewith shall render the mining company in breach of the MPRDA and subject to the provisions of sections 47, 98 and 99 of the MPRDA.

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- 276 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.
- The Chamber will also seek an order declaring that a failure by a Holder of a mining right or converted mining right to meet the requirements of the Charter(s), and in particular a failure to maintain a 26% HDSA or 30% Black ownership level after the grant of a mining right or converted mining right, does not constitute a contravention of the MPRDA including, in particular, a contravention for the purposes of sections 47(1)(a) or 93(1)(a), and does not constitute an offence for the purposes of section 98(a)(viii).

PART 7: CONCLUSION

- 278 It is accordingly submitted that the 2017 Charter stands to be judicially reviewed on the basis of PAJA and/or the principle of legality. As set out above,
- 278.1 the publication of the 2017 Charter:
 - 278.1.1 was not authorised by section 100(2)(a) of the MPRDA, from which the Minister purports to derive his power;
 - 278.1.2 does not constitute a *bona fide* exercise of power in that it is clear that the Minister could not reasonably have believed that he enjoyed the power to create law in the manner in which he has sought to do;

- 278.2.1 does not constitute, as it purports to, a form of binding legislation;
- 278.2.2 is inconsistent with the MPRDA;
- 278.2.3 it is not authorised by section 100(2)(a) or (b) of the MPRDA.
- 278.2.4 violates a number of provisions of the Constitution, including:
 - (i) the principle of the rule of law in section 1(c) [in that it is so confusing and contradictory that those to whom it purports to apply cannot reasonably regulate their affairs in compliance with the 2017 Charter and in that the 2017 Charter contravenes the separation of powers principle];
 - (ii) the right to equal protection of the law in section 9 [in that shareholders of mining companies are discriminated against unfairly on the grounds of race];
 - (iii) the right to property in section 25 [in that it requires, without compensation, the expropriation of shareholder rights and arbitrarily deprives them of rights otherwise than in terms of a law of general application];
 - (iv) the right to just administrative action guaranteed in section 33 and protected by PAJA.
- 278.2.5 violates the principle of equality of shareholders enshrined in the Companies Act, 2008.

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- 279 It is submitted that the following factors fall to be considered by the court in exercising its discretion to set aside the 2017 Charter:
- 279.1 As I pointed out in my introductory section, the publication of the 2017 Charter resulted in in excess of R50 billion being wiped off the value of shares in listed mining companies operating in South Africa. In annexure FA2 the impact of the 2017 Charter and in particular the consequences of its implementation in the context of a mining industry which is not only contracting and shedding jobs, but also already suffering from the burden of uncertain and overly intrusive regulation are explained in detail. That result is wholly inconsistent with the objects of the MPRDA and demonstrates the irrationality of the measures sought to be adopted in the 2017 Charter.
- 279.2 The 2017 Charter will apply immediately to applicants for new prospecting and mining rights. In order to comply with the new requirements of the 2017 Charter they will have to attempt to undo the agreements which they reached with their BEE shareholders and partners, and with their investors and enter into new agreements. That will put all such applications on hold for an indefinite period, leading to substantial losses, a loss of reputation amongst investors and chronic uncertainty. As stated above, pending applications of mining companies for rights and renewals, some of which are required urgently for viability or continuity of mines, will now be adjudicated upon based on the new 2017 Charter requirements. This will make those mining houses which were compliant at the date of the application, immediately non-compliant for purposes of the adjudication of such pending application for rights and/or renewals.

- 279.3 The 12-month period provided to existing Holders to comply with the revised targets is impossibly short. If they are to have any hope of meeting such targets within that period they will have to start immediately re-arranging their affairs at a massive cost in time and resources and with accompanying organisational disruption.
- 279.4 As I pointed out above, every commentator be it economists, ratings agencies, share analysts or mining lawyers has concluded that the implementation of the 2017 Charter will be massively detrimental to the mining industry.
- The employment equity provisions of the 2017 Charter are not subject to the transitional provisions and, as pointed out above, although the absence in the transitional provisions of a reference to employment equity may be an error, the risk remains that the targets apply immediately. They will require massive reorganisation and are not immediately achievable. A failure to meet them places Holders' prospecting and mining rights at risk.
- 279.6 The 2017 Charter imposes unlawful taxes on Holders and non-Holders.

 Again, a failure to pay those unlawful taxes will place Holders rights at risk.
- 279.7 The prejudice to the industry is further exacerbated by the crisis situation it faces amidst weakening profitability. The industry has faced significant increases in operating costs (electricity, labour, steel, water etc.) over the past seven years which, when combined with production disruptions cause by inappropriate section 54 stoppages, community protests and strike action, have negatively affected the viability of many mining companies. The industry has also faced volatile commodity prices, and recent declines in



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some mineral prices which has also affected the viability of companies. In

the period 2012 to 2016 some 70 000 jobs have been lost and large portions

of the sector such as platinum mining are making losses or are marginally

profitable at current prices.

280 In the event that the honourable court should review and set aside the

Reviewed Charter 2017, it is submitted that it is necessary, for the avoidance of

doubt, also to set aside the purported repeal thereby (in paragraph 2.14 of the

Reviewed Charter 2017) of the 2004 and the 2010 Mining Charters.

Confirmatory affidavits

281 I respectfully refer to the confirmatory affidavits by Mr Ambrose Vusumuzi

Richard Mabena and Mr Roger Baxter, annexed marked "FA19" and "FA20".

WHEREFORE, the applicant seeks the relief set out in the notice of motion to which

this affidavit is annexed.

TEBELLO LAPHATSOANA CHABANA

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

COMMISSIONER OF OATHS

LIST OF ANNEXURES

Copies of:

FA1: The calculation of loss of value of R50 million;

FA2: Note by Roger Baxter, the Chief Executive Officer of the applicant, explaining the impact of the 2017 Charter in the context of a contracting South African mining industry

Codin Amedia mining in

FA3: Original Charter

FA4: 2010 Charter

FA5: 2017 Charter

FA6: A list of the Chamber's members

FA7: Chamber's Constitution

FA8: Chamber's statement relating to last-minute MIGDETT meeting on 14

May 2015

FA9: Media statement and ancillary documents from the media conference held

by the Chamber on 15 May 2015

FA10: Notice of Motion in 2015 application

FA11: Minister's undertaking not to implement the 2017 Charter pending

judgment in the interdict application

FA12: Letters indicating that by agreement the urgent application was set down

for 14 and 15 September and attaching a copy of the procedural timetable

FA13: Letter dated 8 September 2017 in respect of postponement

FA14: Letter to the Judge President dated 8 September 2017 in respect of

postponement

FA15: Minister's undertaking not to implement 2017 Charter pending judgment in

this review application

FA16: Letter from Chamber's attorney of record on 13 September 2017

FA17: Excursus on Charter's provisions which conflict which sections of the

Companies Act are set out

FA18: Excursus on the 2017 Charter's contravention of international trade

agreements

FA19: Confirmatory affidavit by Mr AVR Mabena

FA20: Confirmatory affidavit by Mr RA Baxter

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CALCULATION OF THE LOSS OF MARKET EAPITALISATION FOR SOUTH AFRICAN LISTED MINING. COMPANIES DUE TO THE OMR RENIEWED MINING. CHARTER BEING RELEASED

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20 June 2017

DMR REVIEWED MINING CHARTER: ECONOMIC IMPACT ON THE STRUGGLING MINING SECTOR

Without Private Sector Investment South Africa's economy cannot grow (and faces further downgrades)

The private sector accounts for 80% of employment and economic activity in South Africa. One of the key pillars of promoting a higher growth rate (which is desperately needed), is to significantly increase private sector investment. Investment in turn is driven by *confidence*. Investment confidence is driven by stable and competitive policies, smart tape and credible institutions that administer the laws, and on the sound rule of law.

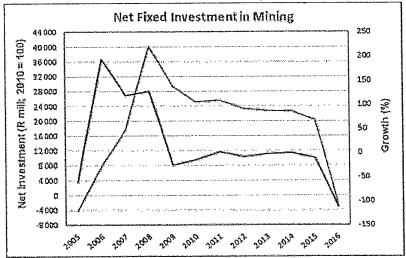
Investment hates uncertainty, draconian policies and institutions that are not trusted to fairly and impartially drive the laws of the land.

South Africa is in a recession. Business and investor confidence are at a very low ebb. The damage caused by the release of a draconian DMR Charter will lead to an exacerbation in the crisis in the mining sector. This will have negative ripple effects throughout the entire economy. It will in all likelihood lead to a further downgrade to the country's sovereign debt rating — with huge negative implications for all South Africans.

The Mining Sector is in an investment and economic crisis

South Africa's mining sector is in crisis. The following points are relevant:

- The sector is smaller in real GDP terms in 2016 than it was in 1994.
- In the past 5- years mining GDP shrank by 0.2% per annum, while the rest of the economy grew by 1,6% per annum.
- Investment at the gross and net levels has declined materially in the past two years. The industry is now not even covering depreciation, which means production declines will follow.

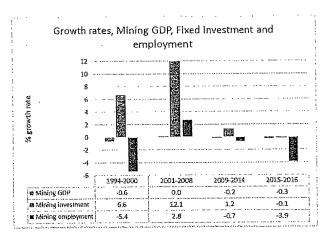


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Source: SARB

- In 2015, the sector made a R31 billion loss and at current prices 60% of the platinum mining sector is loss-making.
- In the period 2012-2016 over 70,000 jobs have been lost in the sector. The sector is currently losing 1,500 jobs per month.



Source: StatsSA and SARB

- The sector has faced a hostile regulator, inappropriate s54 safety stoppages, rapidly escalating costs (Eskom), challenging employment relations, and policy and regulatory uncertainty.
- It has also been in the eye of the storm regarding state capture.
- South Africa is ranked a dismal 74th out of 104 mining jurisdictions in the 2016 Fraser Institute Survey for investment attractiveness in mining.
- South Africa is ranked a very weak 13th out of 18 countries in Africa in the Fraser Institute Survey, behind countries such as the DRC, Ethiopia, Ivory Coast, Burkina Faso and so on.
- The largest contributor to South Africa's poor performance in the Fraser Institute rankings is the uncertainty regarding the interpretation of existing regulations (ranked 90th), uncertainty regarding environmental regulations (ranked 80th), regulatory duplication and inconsistency (ranked 94th), uncertainty on land claims (ranked 94th), workplace disruptions (ranked 101st), and poor security (ranked 93rd).
- Continued uncertainty regarding the finalisation of the MPRDA Amendment Bill and the Mining Charter adds
 to the policy uncertainty facing the industry. I addition, frustration with the inefficiency of the DMR
 bureaucracy has resulted in delays to the issuance of new prospecting and mining rights, to the approval of
 s11 transfers, Social and Labour Plans, etc., with the result that much of the industry's new project
 investment has been placed on hold.

The unilaterally developed DMR Reviewed Charter is damaging for investment

The DMR's unilaterally developed draconian Charter has spooked the markets and will be negative for investment. It was developed in a flawed process and contains provisions (like the 1% of turnover preference payment to BEE shareholders) that will significantly impact on the viability of many mines and discourage investment in the sector.

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For example, in 2016 the total dividends paid by mining to shareholders was R5,9 billion and the 1% turnover requirement is valued at R5,8 billion, meaning existing shareholders would get virtually nothing.

It is clear that no proper economic impact assessment has been done by the DMR on the impact of the different provisions in the DMR's Charter. The economic and investment impact of this draconian charter is as follows:

- Listed mining companies lost R51 billion in terms of their market capitalisation value on 15 June 2017. This
 will affect the pension funds and investments of millions of South Africans including the government
 employees whose investment via the PIC lost R2,7 billion on the 15th.
- It is important to stress that the R51 billion lost market capitalisation is off the back of a sector's valuation that was already being negatively impacted by policy and regulatory uncertainty, i.e. this uncertainty was already priced into the share prices.
- Another 50,000 to 100,000 jobs are at risk in the sector, if investment is not made to stem the decline. As
 mentioned in the section above the mining sectors net fixed investment is already negative (the sector is not
 even covering depreciation), which given the deleterious impact of the Charter will result in declining
 production going forward. This will negatively affect investment, production, GDP, employment, export
 earnings, taxes to the state and undermine all the multiplier effects of mining into the rest of the economy.
- The mining sector's poor economic performance of the past 5 years will worsen and be a drag on the overall
 growth rate. Through the mining sectors multiplier and induced effects, the rest of the economy will also be
 weakened. Given the fact that mining generates two jobs in the rest of the economy for every one job
 created in mining, the DMR's Charters impact in other sectors will be a reduction of employment of between
 100,000 to 200,000 jobs.
- This Charter has negatively affected investor sentiment towards the sector. Policy uncertainty means that SA is ranked 13th in Africa in the Fraser Institute Survey in terms of our investment attractiveness. Even the DRC and Ethiopia are ahead of South Africa. This ranking will deteriorate further. Less investment, means falling production, jobs losses, etc.
- This will contribute to the ratings agencies potentially further downgrading the country to total junk status (only Moody's still has the country rated at one notch above junk status), and all citizens will be negatively affected.

Annexure A: Specific challenges with the Charter

The following are some of the specific issues the Chamber believes are damaging in the DMR Charter:

- The DMR negotiation with the Chamber to try and resolve the ownership element was conducted in bad faith, with new issues added at the 11th hour by the DMR.
- The process that led to the development of the Charter was flawed. The DMR abandoned the traditional tripartite negotiation model and rather just "consulted" stakeholders' developing a wish list of targets. The DMR never brought together all the key stakeholders into a single negotiation to allow all parties to have an overview of all the issues that the DMR was considering.
- The Chamber has had limited access to the DMR's Charter documents. The Chamber only saw the first published
 draft Reviewed Charter when it was released in April 2016 and only then again on the final publication of the
 Reviewed Charter on 15 June 2017. At no stage in the intervening period has the Chamber had access to the detail,

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and essentially the Chamber could only work off the brief presentation the DMR gave to the Chamber (this presentation was never shared with the Chamber either electronically or in physical format). This illustrates the lack of substantive engagement by the DMR with the Chamber.

- There are a number of substantive issues that appear in the final Charter released on 15 June 2017, that have never been discussed with the Chamber. These will be highlighted in the sections below.
- There is a key difference between being an "interested party" and an "affected party". While some people may have an interest in trying to access the mining sector as an interested party, the Chamber's members accounting for 90% of RSA mineral production will be the main party implementing the Charter (and therefore is a materially affected party). The DMR cannot use a view that it consulted 60 parties, because some are really affected and others are just interested.

On ownership:

- The Charter does not provide continuing consequences for existing rights or for new rights.
- o The 1% of turnover to the BEE shareholders, which was never discussed with the Chamber, is contrary to the principle of shareholder equality in the Companies Act and is simply unaffordable to the industry. In 2016 the total dividends paid by the mining sector was R6 billion. A 1% of turnover requirement is valued at R5,7 billion, effectively meaning there would be very little left over for the remaining shareholders who own 70% of the company. This is simply not practical and will damage investment in the sector.
- o The 30% ownership target is new.
- o The one year transitional period to top up to 30% is not practical.
- o The 50% +1 ownership requirement on new prospecting rights is a new issue and is contrary to the MPRDA and will simply undermine exploration (and significantly impact new mine/resource development), which is venture capital funded (with venture capital funding scarce in SA). How many exploration or mining companies will invest in a prospecting right if they own a minority of the shares but are expected to provide the majority of the capital and take the majority of the risk. RSA's Greenfields exploration has already collapsed. We should be encouraging exploration, not inhibiting it.
- o The ring-fencing of allocations of ownership to mineworkers and communities is new and is a one size fits all approach and is too prescriptive.
- o The requirement that all community trusts must be controlled by the MTDA is a new issue that has never been discussed with the industry. What are the governance implications?
- o The requirement not to dilutBEE below 30% limits the ability of South African companies to raise future capital.
- o The requirement that BEE shareholders must achieve a no debt position (i.e. the shares must vest) within 10years is a new issue, or the amount will need to be written off by the right holder, is effectively an expropriation event which has constitutional implications. Existing shareholders will not tolerate ongoing dilutions in perpetuity.
- o The requirement that the Black shareholder can take 30% of the production for their own transport and sales, is a new issue and has never been discussed with the industry and has significant implications for the mining companies.
- o The requirement that the Black shareholder can only sell to another Black company, will create a two tier share market. This will affect the liquidity of shares traded on the JSE and may have other unintended consequences.
- On employment equity:
 - o Even in an optimistic scenario of a 5% annual growth rate in the mining sector (with increasing employment levels) these employment equity targets will be very hard to reach. The Chamber believes the EE targets are not achievable in the next 5-years.

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o The specific prescription of targets for black women does not take into account the industry's existing employment equity profile or the university skills pipeline.

• On procurement:

- o The 70% capital goods from Black owned or controlled companies with 60% locally manufactured is a significant problem for certain commodities (especially those that have to buy very large capital equipment in
- o The extremely prescriptive nature of the Charter on local procurement will be a challenge to meet for the mining companies.
- o The 1% of foreign supplier turnover to the MTDA is a tax on the industry and will raise the costs of production. The Chamber does not support this tax. A money bill will need to be developed on this matter. This will cost the industry another R433 million per annum based on 2016 intermediate import data.
- o The 3 year transitional period is too short.

On beneficiation:

- o The 11 percentage point offset against the ownership target has never worked, as there is no clear system of
- o The requirement that the right holder should have invested in beneficiation since 2004 is heavily skewed towards companies with existing operations
- On preferential sale of South African assets:
 - o This was not discussed with the Chamber.

· On HRD:

- o The Chamber does not support the establishment of the MTDA, another brand new bureaucracy. Instead focus should be placed on fixing the existing MQA.
- o The MTDA has no required governance arrangements (the April 2016 draft indicated all stakeholders would be involved) nor does it have a stated remit or purpose. Now the MTDA just reports to the Minister.
- o The Chamber does not support 2 percentage points of the 5% skills development commitment being taken to the MTDA. This will undermine skills development in the mining sector. This is effectively another tax. The cost of this is R2,5 billion based on 2017 data annualised.
- Sustainable Development elements, which were never included in the first draft now account for 35% vs 29% in 2010
 - o Shockingly, 3% of the 35% was not agreed and 32% was not consulted on.
 - o Worst of all, 19% relate to the inclusion of aspirational health and safety milestones where we were given the explicit assurance that they would not find their way into the Mining Charter.
- · Transitional arrangements.
 - o There are no transitional arrangements for new right applications (so companies cannot structure community trusts under the MTDA for a year).
 - o There is only a one year transitional period for companies to achieve the employment equity targets and the other main elements of the Charter.

Annexure B: Economic Background

The Mining Sector has to cope with three fundamental areas of uncertainty over which it has very little control;

- International commodity prices,
- The Rand exchange rate (mostly relative to the dollar), and

Page | 5



Domestic cost pressures (other than labour)

International commodity prices (measured in Rand terms) have been extremely volatile since the financial crisis of 2008, varying between +40% and -40%. Prices have been declining since the beginning of 2012 and have only recently regained upward momentum (since the second half of 2016). The rand dollar exchange rate has been equally unstable; the rand has been strengthening against the dollar since the middle of 2010 to the middle of 2016 and therefor neutralized better dollar prices for commodities over most of this period. The domestic cost base of the mining sector (excluding labour) are largely determined by administered prices related to energy and transport and logistics (more than 50%). The costs of intermediate inputs have been rising at double digits (on average) for the last 10 years.

The result has been a sector in decline measured by virtually every indicator (over the last 5 years, annual weighted average rates of change, inflation adjusted numbers);

- Turnover fell by 1% (Statistics SA)
- Value added to the economy by 0,3% (Statistics SA)
- People employed fell by 1,4%, or 70 000 people (Statistics SA)
- Gross Fixed Investment stagnated and Net Fixed Investment turned negative in 2016 (Statistics SA)
- Reported Profits declined by 8% (Statistics SA)

The proposed extra levies/taxes will further erode profitability in a sector loosing 1500 jobs per month at the moment. The Sector is in dire need of investment to keep operations running and investment for expansion and new technologies to exploit ever lower grade ores.

The actual salient data for the Mining and Quarrying Sector is a follows;

	Annual Turnover	Annual Profit/Loss	Dividends Paid	Salaries	Total Mining
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2 007	277 627	81 223	18 324	58 221	11 450
2 008	336 412	155 673	23 950	69 675	20 454
2 009	349 094	43 958	25 519	75 601	2 529
2 010	388 734	73 555	16 407	86 399	16 090
2 011	442 836	92 067	12 406	97 479	18 541
2 012	469 122	63 261	11 582	109 796	12 358
2 013	519 292	21 163	8 646	120 748	15 781
2 014	538 184	44 401	9 569	127 137	11 759
2 015	537 171	-30 782	7 026	138 311	8 513
2 016	571 301	47 895	5 953	120 065	
Sources	1; Statistics South A	frica		*****	
	2; Statistics South A	frica (Quarterly Financ	cial Surveys)		And designed between "" anamond to be "to produce Noor or security
	3; Statistics South	Africa (Quarterly Finan	cial Surveys)		
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	5; Davis Tax Comm	ission & Budget Reviev	vs		

The Mining Charter document proposes several new taxes and levies on the sector

A 1% levy on turnover

Page | 6



• 2 percentage points (40%) of the 5% of salaries and wages committed to skills development by the Sector, also to fund the MTDA.

The 1% Levy on Turnover will amount to the following and erode a hefty percentage of profits before taxes.

	Annual	1% of Turnover	Percentage of
	Turnover		Profits/Loss
,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,	R mill	R mill	%
2006	238 681	2 387	3.94
2007	277 627	2 776	3.42
2008	336 412	3 3 6 4	2.16
2009	349 094	3 491	7.94
2010	388 734	3 887	5.28
2011	442 836	4 428	4.81
2012	469 122	4 691	7.42
2013	519 292	5 193	24.54
2014	538 184	5 382	12.12
2015	537 171	5 372	-17.45
2016	571 301	5713	11.93

The 40% tax on the committed 5% of salaries and wages for skills development and training will have the following impact on funds available for that purpose;

	Salaries	Theoretical	Estimated Actual	Estimated	40% Levy on
and the Colonial continuous desirements	& Wages	1% Levy	1% MQA Levy *	5% Commitment	5% Commitment
44. 3 14. 5 14 2 3 3 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1	R mill	R mill	R mill	R mill	R mill
	1	2	3	4	5
2006	49 535	495		2 477	
2007	58 221	582		2 911	
2008	69 675	697		3 484	
2009	75 601	756		3 780	
2010	86 399	864		4 320	
2011	97 479	975		4 874	
2012	109 796	1 098	. 854	5 490	2 196
2013	120 748	1 207	1 030	6 037	2 415
2014	127 137	1 271	1 075	6 357	2 543
2015	138 311	1 383	1 200	6 916	2 766
2016	120 065	1 201	1 243	6 003	2 401
2017	124 868	1 249	1 228	6 243	2 497
Sources	1; Statistics Sou	ıth Africa			
AND DESCRIPTION OF STREET STREET	2; Chamber of	Mines estimate	1		
	3; Chamber of	Mines estimate	calculated from a	tual 80% Skills Lev	ry to MQA
and the same designation of the same state of th	4; Chamber of	Mines estimate	of 5% commitmer	t to Skills and SLP	S
Adian sala in alas di anno de la Parametra anterior de compand del			of 40% (2 percent		
Note *	The mining sec	tor can only get	access to +/- 50%	of column 3 for sl	dills deveplment

The Mining Charter document proposes a new 1% levy on imported inputs (not procured in SA). The estimates of such a levy has been done on two sets of data; mines import intermediary inputs as well as inputs for fixed capital investment. The tables give some estimates of the levy proposed which will in all likelihood be recouped on mining companies and thus increase their cost base. (It is unclear whether the levy will be imposed on imported gross fixed capital goods or net investment goods.)

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Intermediary Imports

Capital Goods Imports

	Intermediate Imports	1% Levy
	R mill	R mill
2006	20 851.54	208.52
2007	25 005.95	250.06
2008	28 570.00	285.70
2009	27 317.80	273.18
2010	31 707.22	317.07
2011	37 798.96	377.99
2012	38 586.91	385.87
2013	43 955.23	439.55
2014	43 204.45	432.04
2015	43 322.99	433.23

	Estimated	Estimated 1%
	1% Levy on	Levy on Net
	Gross Fixed	Fixed
	Investment	Investment
	R mill	R mill
	1	2
2006	73.83	21.66
2007	105.17	57.74
2008	163.15	198.47
2009	181.45	136.13
2010	175.11	107.17
2011	196.59	99.74
2012	227.80	107.41
2013	266.61	146.74
2014	304.37	170.20
2015	321.68	183.70

The added uncertainties cast over the profitability of the sector due to these proposed cost increasing measures and the damage to investors' confidence has had and immediate effect on share prices.

The combined market capitalization of the listed mining companies on the Johannesburg Stock Exchange declined by nearly 3% within the space of one day, from R 1,875 trillion to R 1,825 trillion.

The Public Investment Corporation, through its investment in several mining companies lost R2,685 billion, or 5% in one day. This represents the losses to the pensions of government officials.

The PIC's share of mining companies' equity has dropped from 2,85% before the losses to 2,78% after the first day of trading.

Scorecard for the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (including the Charter)

GNR 1639 OF 13 AUGUST 2004

	ARRANGEMENT OF REGULATIONS	Page
Annexure A	Scorecard for the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry	4
1.	Preamble	
2.	Interpretation	
3.	Objectives	
4.	Undertakings	

Introduction

- The proposed scorecard gives effect to the provisions contained in the Broad Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry.
- The scorecard is designed to facilitate the application of the Charter in terms of the Mineral and Petroleum Resources Development Act requirements for the conversion of all the "old order rights" into new rights within a five-year conversion window period, but recognising the full 10-year period.
- In adjudicating the scorecard the Minister of Minerals and Energy will need to take into
 account the entire scorecard in decision making.
- The scorecard is intended to reflect the "spirit" of the Broad Based Socio-Economic Empowerment Charter for the Mining Industry.
- Progress by stakeholders in achieving the aims of the Charter as enunciated in the Scorecard can be measured in two ways:
 - · The specific targets set in the Charter.
 - · The targets set by companies.

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[Issue 2]

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ANNEXURE A SCORECARD FOR THE BROAD BASED SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY

Notes	Mescription = 1	ie 5	jear	tárget	10 уеат	farget
1	Human Resource Development					
	 Has the company offered every employee the opportunity to be functionally literate and numerate by the year 2005 and are employees being trained? 	Yes		No		
	 Has the company implemented career paths for HDSA employees including skills development plans? 	Yes		No.		
	Has the company developed systems through which empowerment groups can be mentored?	-Yes		No		
2	Employment Equity					
-	Has the company published its employment equity plan and reported on its annual progress in meeting the plan?	Ϋ́S		No		
	 Has the company established a plan to achieve a target for HDSA participation in management of 40% within five years and is implementing the plan? 					
	Has the company identified a talent pool and is it fast tracking it?	Yes	THE CANADA	No		
	• Has the company established a plan to achieve the target for woman participation in mining of 10% within the five years and is implementing the plan?	1				
3	Migrant Labour					
	Has the company subscribed to government and industry agreements to ensure non-discrimination against foreign migrant labour?	Yes	1202	No:		
4	Mine Community and Rural Development					
	Has the company co-operated in the formulation of integrated development plans and is the company co-operating with the government in the implementation of these plans for communities where mining takes place and for major labour sending areas? Has there been effort on the side of the company to engage the local mine communities and major labour sending area communities (Companies will be required to cite a pattern of consultation, indicate money expenditures and show a plant.)	Yes Y				

[Issue 2] BBSEE-2

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Notes	Description (C)	5 y	ear l	argel		10 year targel
5	Housing and Living Conditions					
	• For company provided housing has the mine, in consultation with stakeholders established measures for improving the standard of housing, including the upgrading of the hostels, conversion of hostels to family units and promoted home ownership options for mine employees? Companies will be required to indicate what they have done to improve housing and show a plan to progress the issue over time and is implementing the plan?	es Yes	OHERO SOOLOGISTO DE ESTAS BEREIRAS ESTAS E	No		
	 For company provided nutrition has the mine established measures for improving the nutrition of mine employees? Companies will be required to indicate what they have done to improve nutrition and show a plan to progress the issue over time and is implementing the plan? 	Ϋ́ea		No.		
6	Procurement					
	Has the mining company given HDSA's preferred supplier status?	Yes		No		
	Has the mining company identified current level of procurement from HDSA companies in terms of capital goods, consumables and services?	Ye5		Nö		
	Has the mining company indicated a commitment to a progression of procurement from HDSA companies over a 3 – 5 year time frame in terms of capital goods, consumables and services and to what extent has the commitment been implemented?	X		No. 1		
7	Ownership & Joint Ventures					
	 Has the mining company achieved HDSA partici- pation in terms of ownership for equity or attributable units of production of 15 percent in HDSA hands within 5-years and 26 percent on 10- years? 		15%		,	26%
8	Benefication					
	Has the mining company identified its current level of benefication?	Yes		No.	N SOUND	
	 Has the mining company established its base line level of benefication and indicated the extent that this will have to be grown in order to qualify for an offset? 	Vac		No		
9	Reporting					
	Has the company reported on an annual basis its progress towards achieving its commitments in its annual report?	Yes.		No.		

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[Issue 2]

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Notes

- The commitment of the mining companies is to have offered each employee the
 opportunity to become functionally literate and numerate. The critical test is if a human resource development system has been established and resourced so that people
 are being trained.
- The mentoring of empowerment groups refers to that mining company's HDSA employees and HDSA linked partners at the levels of ownership and procurement. It does not preclude mining companies being involved in mentoring programmes outside of its own operations.
- 3. The aspirational target for HDSA participation in management is a 5-year target. If companies want to convert to licenses within a much shorter time frame, then a phase in approach will be adopted with the companies committing to a 40 percent by the fifth year. The key decision point here is whether the company has established a plan to achieve the target and is implementing the plan.
- 4. The aspirational target for women participation in mining is a five-year target and the phase in approach will be used. The key decision point here is whether the company has established a plan to achieve the target and is implementing the plan.
- 5. The commitment of stakeholders to ensure non-discrimination against foreign migrant labour can be approached from the perspective that each company subscribes to industry and government agreements on the matter.
- 6. In terms of companies establishing measures for improving the standard of housing the company will be required to indicate what it has done to improve housing and show a plan to progress the issue over time and are implementing the plan.
- 7. In terms of companies establishing measures for improving the standard of nutrition the company will be required to indicate what it has done to improve nutrition and show a plan to progress the issue over time and are implementing the plan.
- 8. In terms of procurement the mining company should commit to an increase of procurement from HDSA companies over the 3-5 year time frame and agree to a monitoring system.
- The Scorecard represents the 5-year targets and it has been agreed that within 10years the level of HDSA participation will rise to 26 percent.
- 10. In terms of beneficiation commitments and the offset option the key issue is to capture the actual beneficiation activities of a company and to convert it to the same unit of measurement of ownership e.g. attributable units of production/or % measure of value as the case may be and offset accordingly. The attributable ounces that are beneficiated above the base state may be offset against HDSA ownership targets. Considering that some 59 different minerals are mined in South Africa the detailed discussions on the base state for each mineral are ongoing.

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

VISION

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

PREAMBLE

Recognising:

 The history of South Africa, which resulted in blacks, mining communities and women largely being excluded from participating in the mainstream of the economy, and the

BBSEE-4



formal mining industry's stated intention to adopt a proactive strategy of change to foster and encourage black economic empowerment (BEE) and transformation at the tiers of ownership, management, skills development, employment equity, procurement and rural development;

- The imperative of redressing historical and social inequalities as stated by the Constitution of the Republic of South Africa, in inter alia section 9 on equality (and unfair discrimination) in the Bill of Rights;
- The policy objective stated in the Mineral and Petroleum Resources Development Act to expand opportunities for historically disadvantaged persons to enter the mining and minerals industry or benefit from the exploitation of the nation's mineral resources;
- The scarcity of relevant skills has been identified as one of the barriers to entry into the mining sector by historically disadvantaged South Africans (HDSA's);
- The slow progress made with employment equity in the mining industry compared to other industries.

Noting that

- 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 is not the government's intention to nationalise the mining industry.
- The key objectives of the Mineral and Petroleum Resources Development Act and that of
 the Charter will be realised only when South Africa's mining industry succeeds in the
 international market place where it must seek a large part of its investment and where it
 overwhelmingly sells its product and when the socio-economic challenges facing the industry are addressed in a significant and meaningful way.
- The transfer of ownership in the industry must take place in a transparent manner and for fair market value.
- That the following laws would also assist socio-economic empowerment:
 - The Preferential Procurement Framework Act (No. 5 of 2000);
 - The Employment Equity Act (No. 55 of 1998);
 - The Competition Act (No. 89 of 1998) (Also ref. To the Amendment Act No. 35 of 1999 and subsequent amendments);
 - The Skills Development Act (No. 97 of 1998).

Therefore

The signatories have developed this Charter to provide a framework for progressing the empowerment of historically disadvantaged South Africans in the Mining and Minerals Industry. The signatories of this Charter acknowledge:

Section 100 (2) (a) of the Mineral and Petroleum Resources Development Act, which states that, to insure the attainment of Government's objectives of redressing historical social and economic inequalities as stated in the Constitution, the Minister of Minerals and Energy must within six months from the date on which this Act takes effect develop a Broad Based Socio-Economic Empowerment (BBSEE) Charter.

- 1. Scope of application.—This Charter applies to the South African mining industry,
- 2. Interpretation.—For the purposes of interpretation, the following terms apply:

 Broad Based Socio-Economic Empowerment (BBSEE) refers to 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 historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries; and

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- Transforming such industries so as to assist in, provide for, initiate, facilitate or benefit from the:
 - Ownership participation in existing or future mining, prospecting, exploration and beneficiation operations;
 - Participation in or control of management of such operations;
 - Development of management, scientific, engineering or other skills of HDSA's;
 - · Involvement of or participation in the procurement chains of operations;
 - Integrated Socio-economic development for host communities, major labour sending areas and areas that due to unintended consequences of mining are becoming ghost towns by mobilising all stakeholder resources.

The term Historically Disadvantaged South Africans (HDSA) refers to any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) came into operation.

HDSA Companies are those companies that are owned or controlled by historically disadvantaged South Africans.

Major labour sending areas refer to areas from where a significant number of mineworkers are or have been recruited.

Ghost towns refer to areas whose economies were dependent on mining and therefore could not survive beyond the closure or significant downsizing of mining activities.

Ownership of a business entity can be achieved in a number of ways:

- a majority shareholding position, i.e. 50% + 1 share;
- Joint ventures or partnerships (25% equity plus one share);
- Broad based ownership (such as HDSA dedicated mining unit trusts, or employee share ownership schemes).
- 3. Objectives.—The objectives of this charter are to:
- Promote equitable access to the nation's mineral resources to all the people of South Africa;
- Substantially and meaningfully expand opportunities for HDSA's including women, to enter the mining and minerals industry and to benefit from the exploitation of the nation's mineral resources;
- Utilise the existing skills base for the empowerment of HDSA's;
- · Expand the skills base of HDSA's in order to serve the community;
- Promote employment and advance the social and economic welfare of mining communities and the major labour sending areas; and
- Promote beneficiation of South Africa's mineral commodities.
- 4. Undertakings.—All stakeholders undertake to create an enabling environment for the empowerment of HDSA's by subscribing to the following:
 - 4.1 Human Resource Development

The South African labour market does not produce enough of the skills required by the mining industry. Stakeholders shall work together in addressing this skills gap in the following manner:

- Through the standing consultative arrangements they will interface with statutory bodies such as the Mines Qualifications Authority (MQA), in the formulation of comprehensive skills development strategies that include a skills audit;
- By interfacing with the education authorities and providing scholarships to promote mining related educational advancement, especially in the fields of mathematics and science at the school level;

BBSEE-6



- By undertaking to ensure provision of scholarships and that the number of registered learnerships in the mining industry will rise from the current level of some 1200 learners to not less than 5000 learners by March 2005; and
- Through the MQA shall undertake to provide skills training opportunities to miners during their employment in order to improve their income earning capacity after mine closure.

Government undertakes that:

- In its bi-lateral relations with relevant countries, undertakes to secure training opportunities for HDSA companies' staff, as well as exchange opportunities with mining companies operating outside of South Africa;
- Through the MQA and in collaboration with academic institutions, DME associated institutions, NGO's, and the Gender Commission, shall provide training courses in mining entrepreneur's skills.

Companies undertake:

- To offer every employee the opportunity to become functionally literate and numerate by the year 2005 in consultation with labour;
- To implement career paths to provide opportunities to their HDSA employees to progress in their chosen careers; and
- To develop systems through which empowerment groups can be mentored
 as a means of capacity building.

4.2 Employment Equity

Companies shall publish their employment equity plans and achievements and subscribe to the following:

- Establish targets for employment equity, particularly in the junior and senior management categories. Companies agree to spell out their plans for employment equity at the management level. The stakeholders aspire to a baseline of 40 percent HDSA participation in management within 5-years;
- South African subsidiaries of multinational companies and South African companies, where possible, will focus their overseas placement and/or training programmes on historically disadvantaged South Africans;
- Identification of a talent pool and fast tracking it. This fast tracking should include high quality operational exposure;
- Ensuring higher levels of inclusiveness and advancement of women. The stakeholders aspire to a baseline of 10 percent of women participation in the mining industry within 5-years; and
- Setting and publishing targets and achievements.

4.3 Migrant Labour

Stakeholders undertake to:

Ensure non-discrimination against foreign migrant labour.

4.4 Mine Community and Rural Development

Stakeholders, in partnership with all spheres of government, undertake to:

Co-operate in the formulation of integrated development plans for communities where mining takes place and for major labour-sending areas, with special emphasis on development of infrastructure.

4.5 Housing and Living Conditions

Stakeholders, in consultation with the Mine Health and Safety Council, the Department of Housing and organised labour, undertake to:

BBSEE-7



- Establish measures for improving the standard of housing including the upgrading of hostels, conversion of hostels to family units and the promotion of home ownership options for mine employees; and
- · Establish measures for improving of nutrition of mine employees.

4.6 Procurement

Procurement can be broken down into three levels, namely: capital goods; services; and consumables.

Stakeholders undertake to give HDSAs a preferred supplier status, where possible, in all three levels of procurement. To this end stakeholders undertake to:

- · Identify current levels of procurement from HDSA companies;
- Commit to a progression of procurement from HDSA companies over a 3 to 5-year time frame reflecting the genuine value added by the HDSA provider;
- Encourage existing suppliers to form partnerships with HDSA companies, where no HDSA Company tenders to supply goods or services; and
- Stakeholders commit to help develop HDSA procurement capacity and access Department of Trade and Industry (DTI) assistance programmes to achieve this.

List of suppliers: It is envisaged that information on all HDSA companies wishing to participate in the industry will be collected and published. All participants in the industry will assist the DTI in compiling such a list that will inter alia be published by government on the Internet and updated regularly.

4.7 Ownership and Joint Ventures

Government and industry recognise that one of the means of effecting the entry of HDSA's into the mining industry and of 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:

- HDSA controlled companies (50 per cent plus 1 vote), which includes management control.
- Strategic joint ventures or partnerships (25 per cent plus 1 vote). These
 would include a Management Agreement that provides for joint management and control and which would also provide for dispute resolution.
- Collective investment, through ESOPS and mining dedicated unit trusts.
 The majority ownership of these would need to be HDSA based. Such empowerment vehicles would allow the HDSA participants to vote collectively.

Passive involvement:

- Greater than 0 percent and up to 100 percent ownership with no involvement in management, particularly broad based ownership like ESOPs.
 In order to measure progress on the broad transformation front the follow-
- ing indicators are important:

 The currency of measure of transformation and ownership could, inter alia, be market share as measured by attributable units of South African production controlled by HDSA's.
- That there would be capacity for offsets which would entail credits/offsets to allow for flexibility.

BBSEE-8



- 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.
- Government will consider special incentives to encourage HDSA companies to hold on to newly acquired equity for a reasonable period.
 - In order to increase participation and ownership by HDSA's in the mining industry, mining companies agree:
- To achieve 26% HDSA ownership of the mining industry assets in 10 years by each mining company; and
- That where a company has achieved HDSA participation in excess of any set target in a particular operation then such excess may be utilised to offset any shortfall in its other operations.

All stakeholders accept that transactions will take place in a transparent manner and for fair market value. Stakeholders agree to meet after 5-years to review the progress and to determine what further steps, if any, need to be made to achieve the 26% target.

4.8 Beneficiation

This Charter will apply to mining companies in respect of their involvement in beneficiation activities, specifically activities beyond mining and processing. These include production of final consumer products.

Mining companies will be able to offset the value of the level of beneficiation achieved by the company against its HDSA ownership commitments.

Mining companies agree to:

- Identify their current levels of beneficiation.
- Indicate to what extent they can grow the baseline level of beneficiation.

4.9 Exploration and Prospecting

Government will support HDSA companies in exploration and prospecting endeavours by, inter alia, providing institutional support.

4.10 State Assets

Government will ensure compliance with the provisions of this Charter and be exemplary in the way in which it deals with state assets.

4.11 Licensing

To facilitate the processing of licence conversions there will be a scorecard approach to the different facets of promoting broad based socio-economic empowerment in the mining industry. This scorecard approach would recognise commitments of the stakeholders at the levels of ownership, management, employment equity, human resource development, procurement and beneficiation. These commitments have been spelt out in sections 4.1 to 4.9 above.

The HDSA participation required to achieve conversion within the five year period on a company specific basis will be specified in the score-card, hereto attached as Annexure A.

4.12 Financing Mechanism

The industry agrees to assist HDSA companies in securing finance to fund participation in an amount of R100 billion within the first 5-years. Participants agree that beyond the R100 billion-industry commitment and in pursuance of the 26 per cent target, on a willing seller — willing buyer basis, at fair market value, where the mining companies are not at risk, HDSA participation will be increased.

BBSEE-9



4.13 Regulatory Framework and Industry Agreement

Government's regulatory framework and industry agreements shall strive to facilitate the objectives of this Charter.

4.14 Consultation, Monitoring, Evaluation and Reporting

It is recognised that the achievement of the objectives set out herein entails an ongoing process.

Companies undertake to report on an annual basis their progress towards achieving their commitments, with these annual reports verified by their external auditors. A review mechanism will be established which again provides flexibility to the company commitments.

Parties hereto agree to participate in annual forums for the following purposes:

- 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 creative solutions;
- Arriving at joint decisions;
- · Reviewing this Charter if required.

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Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry

[GN 838 of 20 September 2010]

[Date of Commencement 13 September 2010]

Preamble

Publication of the amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (Government Gazette No. 33573)

The Minister of Minerals and Energy has in terms of section 100 (1) (b) of the Mineral and Petroleum Resources Development Act, 2002, (Act 28 of 2002), developed the Codes of Good practice for the minerals industry as set out below.

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Preamble

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. To redress these historic inequalities, and thus give effect to section 9 (equality clause) of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution), the democratic government has enacted, *inter alia*, the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

BBEE-1

[Issue 9]



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

In line with this provision, the DMR has concluded a comprehensive assessment to ascertain the progress of transformation of industry against the objectives of the Charter in the mining industry. The findings of the assessment identified a number of shortcomings in the manner in which the mining industry has implemented the various elements of the Charter, viz. ownership, procurement, employment equity, beneficiation, human resource development, mine community development, housing and living conditions, all of which have not embraced the spirit of the Charter to the latter. To overcome these inadequacies, amendments are made to the Mining Charter of 2002 in order to streamline and expedite attainment of its objectives. Additionally, the review of the Charter introduces an element of sustainable growth of the mining industry, which seeks to ensure sustainable transformation and growth of the mining industry.

. VISION

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

MISSION

To give effect to section 100 (2) (a) of the MPRDA and section 9 of the Constitution.

Definitions

"BEE entity" means an entity of which a minimum of 25% + 1 vote of share capital is directly owned by HDSA as measured in accordance with flow through principle;

"Beneficiation" means the transformation of a mineral (or a combination of minerals) to a higher value product, which can either be consumed locally or exported. The term "beneficiation" is often used interchangeably with mineral "value-addition" or "downstream beneficiation";

"Broad-Based Socio-Economic Empowerment (BBSEE)" means a socio-economic strategy, plan, principle, approach or act, which is aimed at—

- (a) Redressing the results of past or present discrimination based on race, sex and 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, facilitate or benefit from the—
 - Ownership participation in existing or future mining, prospecting, exploration and beneficiation operations;
 - · Participation in or control of management of such operations;
 - Development of management, scientific, engineering or other skills of HDSA's;
 - Involvement of or participation in the procurement chains of operations;
 - Integrated socio-economic development for mine workers, host communities, major labour sending areas and areas that due to unintended consequences of mining are becoming ghost towns by mobilising all stakeholder resources:

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

BBEE-2

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- "Community" means a coherent, social group of persons with interest of rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law;
- "Demographics" means the numerical characteristics of a population (e.g. population size, age, structure, sex/gender, race, etc.)
- "Effective ownership" means the meaningful participation of HDSAs in the ownership, voting rights, economic interest and management control of mining entities;
- "EMP" means an approved environmental programme contemplated in section 39 of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002);
- "Enterprise development" means monetary and non-monetary support for existing or fostering of new HDSA companies in the mining sector of the economy, with the objective of contributing to their development, sustainability as well as financial and operational independence;
- "ESOPs" mean Employees Share Ownership Schemes;
- "Historically Disadvantaged South Africans" ("HDSA") refers to South African citizens, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) came into operation which should be representative of the demographics of the country;
- "Labour sending area" areas from which a majority of mineworkers, both historical and current are or have been sourced;
- "Level of management" refers to line of demarcation between various managerial positions;
- "Life of Mine" means the number of years that a particular mine will be operational;
- "Meaningful economic participation" includes, inter alia, the following key attributes—
- BEE transactions shall be concluded with clearly identifiable beneficiaries in the form of BEE entrepreneurs, workers (including ESOPs) and communities;
- Barring any unfavourable market conditions, some of the cash flow should flow to
 the BEE partner throughout the term of the investment, and for this purpose, stakeholders will engage the financing entities in order to structure the BEE financing in
 a manner where a percentage of the cash-flow is used to service the funding of the
 structure, while the remaining amount is paid to the BEE beneficiaries. Accordingly, BEE entities are enabled to leverage equity henceforth in proportion to vested
 interest over the life of the transaction in order to facilitate sustainable growth of
 BEE entities;
- BEE shall have full shareholder rights such as being entitled to full participation at annual general meetings and exercising of voting rights, regardless of the legal form of the instruments used;
- Ownership shall vest within the timeframes agreed with the BEE entity, taking into account market conditions;
- "Mining Charter" means the broad-based socio-economic empowerment Charter for the South African Mining and Minerals Industry;
- "Mine Community" refers to communities where mining takes place and labour sending areas;
- "Non-discretionary procurement expenditure" means expenditure that cannot be influenced by a mining company, <u>such as</u> procurement from the public sector and public enterprises;
- "Shareholder" shall mean a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached;

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"Social Fund" refers to a trust fund that provides financing for investments targeted at meeting the needs of poor and vulnerable communities as informed by commitments made by companies in terms of their social and labour plans;

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

"Sustainable development" means the integration of social, economic and environmental factors into planning, implementation and decision-making to ensure that the mineral and petroleum resources development serves present and future generations.

1. Objectives

The Broad Based Socio-Economic Empowerment Charter for the South African Industry, hereafter referred to as "the Mining Charter", is a Government instrument designed to effect sustainable growth and meaningful transformation of the mining industry. The Mining Charter seeks to achieve the following objectives:

- (a) To promote equitable access to the nation's mineral resources to all the people of South Africa;
- (b) To substantially and meaningfully expand opportunities for HDSA to enter the mining and minerals industry and to benefit from the exploitation of the nation's mineral resources;
- To utilise and expand the existing skills base for the empowerment of HDSA and to serve the community;
- To promote employment and advance the social and economic welfare of mine communities and major labour sending areas;
- (e) To promote beneficiation of South Africa's mineral commodities; and
- (f) Promote sustainable development and growth of the mining industry.

2. Elements of the Mining Charter

2.1 Ownership

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

- Achieve a minimum target of 26 percent ownership to enable meaningful economic participation of HDSA by 2014;
- The only offsetting permissible under the ownership element is against the value of beneficiation, as provided for by section 26 of the MPRDA and elaborated in the mineral beneficiation framework.

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

2.2 Procurement and Enterprise Development

Local procurement is attributable to competitiveness and transformation, captures economic value, presents opportunities to expand economic growth that allows for creation of decent jobs and widens scope for market access of South African capital goods and services. In order to achieve this, the mining industry must procure from BEE entities in accordance with the following criteria, subject to the provisions of clause 2.9—

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- Procure a minimum of 40% of capital goods from BEE entities by 2014;
- Ensure that multinational suppliers of capital goods annually contribute a minimum of 0.5% of annual income generated from local mining companies towards socio-economic development of local communities into a social development fund from 2010;
- Procure 70% of services and 50% of consumer goods from BEE entities by 2014.
 The targets above are exclusive of non-discretionary procurement expenditure.

2.3 Beneficiation

Beneficiation seeks to translate comparative advantage in mineral resources endowment into competitive advantage as fulcrum to enhance industrialisation in line with State developmental priorities. In this regard, mining companies must facilitate local beneficiation of mineral commodities by adhering to the provision of Section 26 of the MPRDA and the mineral beneficiation strategy—

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

2.4 Employment Equity

Workplace diversity and equitable representation at all levels are catalysts for social cohesion, transformation and competitiveness of the mining industry. In order to create a conducive environment to ensure diversity as well as participation of HDSA at all decision-making positions and core occupational categories in the mining industry, every mining company must achieve a minimum of 40% HDSA demographic representation at—

- · Executive Management (Board) level by 2014;
- Senior management (EXCO) level by 2014;
- · Core and Critical skills by 2014;
- · Middle management level by 2014;
- · Junior management level by 2014.

In addition, mining companies must identify and fast-track their existing talent pools to ensure high level operational exposure in terms of career path programmes.

2.5 Human Resource Development

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

- Invest a percentage of annual payroll (as per relevant legislation) in essential
 skills development activities reflective of the demographics, but excluding the
 mandatory skills levy, including support for South African based research and
 development initiatives intended to develop solutions in exploration, mining,
 processing, technology efficiency (energy and water use in mining), beneficiation as well as environmental conservation and rehabilitation; as follows—
 - Target for 2010 = 3%;
 - Target for 2011 = 3.5%;
 - Target for 2012 = 4%;
 - Target for 2013 = 4.5%;
 - Target for 2014 = 5%.



2.6 Mine Community Development

Mine communities form an integral part of mining development, there has to be meaningful contribution towards community development, both in terms of size and impact, in keeping with the principles of the social license to operate. Stakeholders must adhere to the following—

- Consistent with international best practices in terms of rules of engagement and guidelines, mining companies must invest in ethnographic community consultative and collaborative processes prior to the implementation/develop-ment of mining projects;
- Mining companies must conduct an assessment to determine the developmental needs in collaboration with mining communities and identify projects within the needs analysis for their contribution to community development in line with Integrated Development Plans (IDPs), the cost of which should be proportionate to the size of investment.

2.7 Housing and Living Conditions

Human dignity and privacy for mineworkers are the hallmarks to enhance productivity and expedite transformation in the mining industry in terms of housing and living conditions. In this regard mining companies must implement measures to improve the standards of housing and living conditions for mineworkers as follows—

- Convert or upgrade hostels into family units by 2014;
- Attain the occupancy rate of one person per room by 2014;
- Facilitate home ownership options for all mine employees in consultation with organised labour by 2014.

2.8 Sustainable Development and Growth of the Mining Industry

Mineral resources are non-renewable in nature, forthwith exploitation of such resources must emphasise the importance of balancing concomitant economic benefits with social and environmental needs without compromising future generations, in line with Constitutional provisions for ecological, sustainable development and use of natural resources. To this end, with consideration to clause 2.9, every mining company must implement elements of sustainable development commitments included in the "Stakeholders' Declaration on Strategy for the sustainable growth and meaningful transformation of South Africa's Mining Industry of 30 June 2010 and in compliance with all relevant legislation", as follows—

- Improvement of the industry's environmental management by—
 - Implementing environmental management systems that focus on continuous improvement to review, prevent, mitigate adverse environmental impact,
 - Undertake continuous rehabilitation on land disturbed or occupied by mining operations in accordance with appropriate regulatory commitments;
 - Provide for the save storage and disposal of residual waste and process residues;

(Editorial Note: Wording as per original Government Gazette. It is suggested that the phrase "Provide for the save storage" is intended to be "Provide for the safe storage".)

- Design and plan all operations so that adequate resources are available to meet the closure requirements of all operations.
- Improvement of the industry's health and safety performance by—
 - Implementing a management systems focused on continuous improvement
 of all aspects of operations that have a significant impact on the health and
 safety of employees, contractors and communities where mining takes place;

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- Providing all employees with health and safety training and require employees of contractors to have undergone such training;
- Implement regular health surveillance and risk-based monitoring of employees.
- Stakeholders undertake to enhance the capacity and skills in relevant South
 African research and development facilities in order to ensure quality, quick
 turn around, cost effectiveness and integrity of such facilities. To this extent,
 mining companies are required to utilise South African based facilities for the
 analysis of samples across the mining value chain.

2.9 Reporting (Monitoring and Evaluation)

Every mining company must report its level of compliance with the Mining Charter annually, as provided for by section 28 (2) (c) of the MPRDA.

The Department shall monitor and evaluate, taking into account the impact of material constraints which may result in not achieving set targets.

3. Non-compliance

Non-compliance with the provisions of the Charter and the MPRDA shall render the mining company in breach of the MPRDA and subject to the provisions of Section 47 read in conjunction with sections 98 and 99 of the Act.

4. Amendments

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

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

147.01.01.00.00	gurugrati	Y/N	X/X		x/x	•	5%	5%	2%	3%	3%	4%	3%	1%	5%	bounitura
	2014	March 2015	26%	26%	100%	100%	40%	70%	20%	0.50%	40%	40%	40%	40%	40%	
PROGRESS ACHIEVED BY	2013	Ma		A	75%	75%	30%	809	40%	0.50%	35%	35%	40%	40%	35%	
SS ACH	2012	March 2013	S. J. W. Brent, J. W. College, S. College,	22.00	50%	20%	20%	20%	25%	0.50%	30%	30%	40%	40%	30%	
PROGRE	2011	March 2012		1	25%	25%	10%	40%	15%	0.50%	25%	25%	35%	40%	20%	
	2010	" March 2011	15%	15%	Base-line	Base-line	5%	30%	10%	0.50%	20%	20%	30%	40%	15%	
#UN ALTUMOO	TARGET BY 2014	Annually	26%	26%	Occupancy rate of one person per room	Family units established	40%	70%	20%	. 0.5% of procurement value	40%	40%	40%	40%	40%	
	MEASURE Documentary proof of receipt from the depart- ment		Meaningful economic participation	Full shareholder rights	Percentage reduction of occupancy rate towards 2014 target	Percentage conversion of hostels into family units	Capital goods	Services	Consumable goods	Annual spend on procurement from multinational suppliers	Top Management (Board)	Senior Management (EXCO)	Middle Management	Tunior Management	Core Skills	
	DESCRIPTION	Has the company reported I the level of compliance with the Charter for the notlendar year			Conversion and upgrading of hostels to attain the occupancy rate of one person per room	Conversion and upgrading of hostels into family units	Progrement spent from	BEE entity		Multhational suppliers contribution to the social fund	Diversification of the	workplace to reflect the country's demographics to	attain competitiveness		٠	
	ELEMENT			Ownership	Housing and Living	conditions			Procurement	Development			Employment	Calmira		

[Issue 9]

BBEE-8

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	weignung	. 25%	15%	12%	12%	5%		100%
	2014	5.0%	hance ng to cts	I EMPs	ents in fety	100%	les of on South	
EVED BY	2013	4.5%	Implementation of projects will serve to enhance relationships amongst stakeholders leading to communities owing patronage to projects	Annual progress achieved against approved EMPs	Annual progress achieved against commitments in the tripartite action plan on health and safety	75%	The beneficiation strategy and its modallites of implementation outline the beneficiation requirements per commodity extracted in South Africa	
PROGRESS ACHIEVED BY	2012	4.0%	of projects v congst stake	chieved ag	chieved aga tion plan or	50%	n strategy a on outline t commodit	
PROGR	2011	3.5%	3.5% antation of sahips amo	лодтеѕѕ а	rogress a partite acl	25%	neficiatior lementati ments per	
	2010	3%	Implem relation com	Annual p	Annual p	establish baseline	The ber imp requires	
COMPLIANCE	TARGET BY 2014	. 2%	Up-to-date project implementation	1,00%	1.00%	100%	Section 26 of the MPRDA (percentage above baseline)	RE
	MEASURE	HRD expenditure as percentage of total annual payroll (excl. mandatory skills development levy)	Implement approved community projects	Implementation of approved EMPs	Implementation of the tripartite action plan on health and safety	Percentage of samples in South African facilities	Additional production volume contributory to local value addition beyond the base-line	TOTAL SCORE
	DESCRIPTION	Development of requisite skills, incl. support for South African based research and development initiatives intended to develop solutions in exploration, mining, processing, technology efficiency (energy and water use in mining,) beneficiation as well as environmental conservation and rehabilitation	Conduct ethnographic community consultative and collaborative processes to delineate community needs analysis	Improvement of the industry's environmental management	Improvement of the industry's mine health and safety performance	Utilisation of South African based research facilities for analysis of samples across the mining value chain	Contribution of a mining company towards beneficiation (this measure is effective from 2012)	Landard Market and Control of the Co
	ELEMENT	Human Resource Development	Mine community development		Sustainable development	& growin	Beneficiation	

Y/N applies to pillars that are ring-fenced.

Legend

0-25% (Gross non-compliance)
25-50% (Non-compliance)
50-75% (Marginal to acceptable performance)

75-100% (Excellent performance)

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SCORECARD FOR THE BROAD-BASED SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY: REPORTING TEMPLATE

	-			A	ROGRES	PROGRESS ACHIEVED BY	ZED BY		
DESCRIPTION		MEASURE	COMPLIANCE TARGET BY 2014	2010	2011	2012	2013	2014	Weighting
Has the company reported Doct the level of compliance recei with the Charter for the depa	Docu	Documentary proof of receipt from the department	. Annually						X/N
Minlmum target for Mean effective HDSA ownership parti	Mea	Meaningful economic participation	26%						N/X
Full s	Full :	Full shareholder rights	26%						
Conversion and upgrading Percer of hostels to attain the occupancy rate of one towar person per room	Percer of occi towar	Percentage reduction of occupancy rate towards 2014 target	Occupancy rate of one person per room						X/X
Conversion and upgrading Percen of hostels into family units of host units		Percentage conversion of hostels into family units	Family units established						-
ent spent from	Capita	Capital goods	40%						2%
BEE entity Services	Servic	Sa	70%						5%
Const	Const	Consumable goods	50%						2%
Multinational suppliers Annual sp contribution to the social multination fund suppliers	Annu procu multir suppli	Annual spend on procurement from multinational suppliers	0.5% of procurement value						. 3%
									continued

[Issue 9]

BBEE-10

COSM

Weighting		3%	4%	3%	1%	5%	25%	15%	
2014								erve to zst nities s	
PROGRESS ACHIEVED BY	2013							Implementation of projects will serve to enhance relationships amongst stakeholders leading to communities owing patronage to projects	
SS ACHI	2012							n of projectationship leading t atronage	
ROGRE	2011							mentatio nhance ri eholders owing p	
	2010							Imple e. stak	
COMPLIANCE TARGET BY 2014		40%	40%	40%	40%	40%	gs.	Up-to-date project implementation	
MEASURE		Top Management (Board) level	Senior Management (Exco)	Middle Management	Junior Management	Core Skills	HIOD expenditure as percentage of total annual payroll (exci. mandatory skills development levy)	Implement approved community projects	
DESCRIPTION		Diversification of the workplace to reflect the	country's demographics to attain competitiveness				Development of requisite skills, Inci. support for South African based research and development initiatives intended to develop solutions in exploration, mining, processing, technology efficiency (energy and water use in mining), beneficiation as well as environmental conservation and	Conduct ethnographic community consultative and collaborative processes to delineate community needs analysis	
ELEMENT		Employment Equity					Human Resource Development	Mine community development	

[Issue 9]

BBEE-11

L			1	COMPLIANCE	PR	OGRES	PROGRESS ACHIEVED BY	VED BY		Weighting	
	ELEMENT	DESCRIPTION	MEASURE	TARGET BY 2014	2010	2011	2012	2013	2014	9,77,97,11	
ш		Improvement of the industry's Implementation of environmental management approved EMPs	Implementation of approved EMPs	100%	Annual progress achieved against approved EMPs	ogress ac	hieved ag EMPs	gainst ap	proved	12%	
	Sustainable development	Improvement of the industry's mine health and safety performance	Implementation of the tripartite action plan on health and safety	100%	Annual progress achieved against commitments in the tripartite action plan on health and safety	ual progr ents in th health	Annual progress achieved against nitments in the tripartite action pla health and safety	ved again te action j ety	st olan on	12%	
	יים ביים אינו פיים א	Utilisation of South African based research facilities for analysis of samples across the mining value chain	Percentage of samples in South African facilities	100%	-					5%	
	Beneficiation	Contribution of a mining company towards beneficiation (this measure is effective from 2012)	Additional production volume contributory to local value addition beyond the base-line	Section 26 of the MPRDA (percentage above baseline)	The beneficiation strategy and its modalities of implementation outline the beneficiation requirements per commodity extracted in South Africa	iciation s nentation nents per Sou	The beneficiation strategy and its modalities of implementation outline the beneficiation requirements per commodity extracted in South Africa	nd its mo he benefi ity extrac	dallHes ciation ted in	decembra	
لــ			TOTAL SCORE							100%	\neg
ل			***************************************								

Y/N applies to pillars that are ring-fenced.

0-25% (Gross non-compliance) 25-50% (Non-compliance)

50-75% (Marginal to acceptable performance)

75-100% (Excellent performance)

BBEE-12

[Issue 9]

SCORECARD FOR THE BROAD-BASED SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY CATEGORY: HUMAN RESOURCE DEVELOPMENT

		ł	1.00%						
		While	Female			·			
TE		Indlan	Female						
TEMPLA	\R:	υŢ	Male						
REPORTING TEMPLATE	YEAR:	Coloured	Female						
R		Col	Male						
		African	Female						
		Afi	Male				-		
SPREAD OF MEASURE	SPREAD OF MEASURE CATEGORY			Learnership and Bursaries (of core and critical skills)	Artisans	HRD expenditure ABET training (level J, II, as percentage of III, IV and NQF 1)	Other training initiatives (school support & post matric programmes)	Support for South African based research and development initatives	
MEASURES	MEASURES					HRD expenditure as percentage of	total amual payroll (excl. mandatory skills	development levy)	-
DESCRIPTION	DESCRIPTION			Development of requisite skills, incl.	support for South African based	research and development initiatives intended to	develop solutions in mining, processing, and exploration	(energy and water use in mining), beneficiation as well as environmental	conservation and rehabilitation.

BBEE-13

[Issue 9]

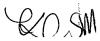
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SCORECARD FOR THE BROAD-BASED SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY CATEGORY: EMPLOYMENT EQUITY

		Total							
		White	Female						
E		Indian	Female						
TEMPLA	YEAR:	uI .	Male						
REPORTING TEMPLATE	YEÀR	Coloured	Male . Female						
		8	Male						
		African	Female						
		Af	Male						
MEASURE	MEASURE			Top management (Board level)	Senior Management (EXCO)	Middle Management	Junior Management	Core Skills	
DESCRIPTION	(ACTION)			Diversification of	ω	attain	competitiveness		

[Issue 9]

BBEE-14



GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF MINERAL RESOURCES

NO. 581

15 JUNE 2017

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

I, Mosebenzi Joseph Zwane, MP, Minister of Mineral Resources, hereby in terms of section 100 (2) of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002), as amended, publish the Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 (Reviewed Mining Charter, 2017) for implementation.

The Reviewed Mining Charter shall come into operation from the date of publication of this notice in the Government Gazette.

A copy of the Reviewed Mining Charter, 2017 is attached hereto.

Mr. Wosebenzi Joseph Zwane, MP.

Minister of Mineral Resources.

Date: 15/06/2017.



BROAD-BASED BLACK SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING AND MINERALS INDUSTRY, 2017

June 2017



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No. 40923 7

PREAMBLE

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

The objective of the MPRDA is to ensure the attainment of Government's objectives of redressing historical, socio-economic inequalities and ensuring broad based and meaningful participation of Black Persons in the mining and minerals industry. In particular, section 100 (2) (a) of the MPRDA provides for development of the broad-based black economic empowerment charter for the South African mining and minerals industry as an instrument to effect transformation with specific targets.

In 2009 the Department of Mineral Resources conducted a comprehensive assessment to ascertain the progress of transformation of the mining and minerals industry against the objectives of the Mining Charter of 2002 in the mining and minerals industry. The findings of the assessment identified a number of shortcomings in the manner in which the mining and minerals industry has implemented the various elements of the Mining Charter of 2002, viz. ownership, procurement, employment equity, beneficiation, human resource development, mine community development, and housing and living conditions. To overcome these inadequacies, the Mining Charter of 2002 was

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amended in order to streamline and expedite attainment of its objectives. Further, the sustainable development element, which sought to ensure sustainable transformation and growth of the mining and minerals industry was introduced.

In 2014 a second assessment of the levels of compliance by mining companies with the Mining Charter of 2010 was conducted. This second assessment has revealed the following:

- Although there was a noticeable improvement in levels of compliance, there remains a long way for the mining and minerals industry to be fully transformed.
- Notwithstanding a paucity of companies of all sizes that have fully embraced the spirit of the Mining Charter, companies have adopted extremely varied degrees of performance most of which seem to suggest a compliance-driven mode of implementation, designed only to protect the "social license to operate".
- Whereas the MPRDA has transferred the ownership of the mineral wealth
 of the country to all the people of South Africa, under the custodianship
 of the State, a proliferation of communities living in abject poverty
 continues to be largely characteristic of the surroundings of mining
 operations.
- Limited progress has been made in embracing the broad-based empowerment ownership in terms of Meaningful Economic Participation of Black Persons. The trickle flow of benefits that ought not only to service any debt funding, but also include cash-flow directly to BEE Partners, is vastly limited. To this end, the interests of mineworkers and communities are typically held in trusts, which constrain the flow of benefits to intended beneficiaries. As a result, the mining and minerals industry has broadly



been faced with increasing tensions with both workers and host communities.

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

The review process took into account the need to integrate Government policies to remove ambiguities in respect of interpretation and create regulatory certainty. In this regard, the principles of this Mining Charter of 2017 are harmonised with the provisions of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003) and the Codes of Good Practice (Dti Codes), the Employment Equity Act, 1998 (Act No. 55 of 1998) and other relevant regulatory framework.

The Mining Charter of 2017 introduces new definitions, terms and targets to effect the abovementioned harmonisation. The harmonisation of these policies is intended to ensure meaningful participation of Black Persons in accordance with the objects of the MPRDA and the Mining Charter and provide for policy and regulatory certainty sought to invest in the development of the industry.



VISION

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

MISSION

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

1 :

DEFINITIONS

Government has identified a need to align and integrate the transformation regulatory framework contained in the Mining Charter of 2017 in order to remove ambiguities in respect of interpretation and bring about regulatory certainty. In this regard, this section defines terms and concepts used in this Mining Charter of 2017 so as to provide clarity as to their meaning.

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

"Beneficiation" has the meaning ascribed to that term in the MPRDA;

"BEE Compliant Manufacturing Company", in relation to the procurement element contemplated herein, means a company that manufacturers goods and has minimum BEE level 4 of the Dti Codes and minimum 26% black ownership;

"BEE Entrepreneur" means a Black Owned Company or a Black Person who acquires an equity interest in a Holder through a BEE Transaction;

"BEE Partner" means a Black Person that holds equity in a mining company as a result of a BEE Transaction;

"BEE Transaction" means the issue of equity instruments to Black Persons or a group of Black Persons based on the principles of broad-based black economic empowerment the aim of which includes-

- (a) to redress the results of past or present discrimination based on the race of historically disadvantaged persons in the mining and minerals industry; and
- (b) to transform such industries so as to assist in, provide for, initiate or facilitate—
 - (i) the ownership, participation in or the benefiting from existing or future mining, prospecting, exploration or production operations;



- (ii) the participation in or control of management of such operations;
- (iii) the development of management, scientific, engineering or other skills of historically disadvantaged persons;
- (iv) the involvement or participation in the procurement chains of operations;
- (v) the ownership of and participation in the beneficiation of the proceeds of the operations or other upstream or downstream value chains in such industries;
- (vi) the socio-economic development of mine communities; and
- (vii) the socio-economic development of all historically disadvantaged Black South Africans from the proceeds or activities of such operations;

"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; or
- (b) Who became citizens of the Republic of South Africa by naturalisation:
 - (i) before 27 April 1994; or
 - (ii) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date;
- (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;

"Black Owned Company" means 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;

"Companies Act" means the Companies Act, 2008 (Act No. 71 of 2008) as amended from time to time;

"Core and Critical Skills" means high level technical skills across all organisational levels within both the production and operational parts of the Holders' value-chain;

"Demographics" means the numerical characteristics of a national and/or provincial population and includes but is not limited to population size, age, structure, sex/gender, race;

"Dti" means the Department of Trade and Industry;

"Economic Interest" means the entitlement of a BEE Partner to distributions (including but not limited to dividends), capital gains and other economic rights of shareholders;

"Effective Ownership" means the meaningful participation of Black Persons in the net value ownership, voting rights, economic interest and/or management control of mining entities;

"ESOPs" refers to black employee share ownership plans, a vehicle used to empower employees of a mining company who are Black Persons, excluding employees who already hold shares in the same company as a condition of their employment agreement except where such condition is a Mining Charter requirement;

"Foreign Supplier" means a foreign controlled and registered company, supplying the South African mining and minerals industry with mining goods and services, which does not have at least a level 4 Dti Codes BEE status and 25%+ 1 vote black ownership;

"Historical BEE Transactions" means those BEE Transactions concluded prior to the coming into operation of the Mining Charter of 2017 that achieved a minimum 26% Black shareholding or more;



1.11

"Holder" has the same meaning as is ascribed to that term in the MPRDA;

"Housing and Living Conditions Standards" means the Housing and Living Conditions Standards for the Mining and Minerals Industry developed in terms of Section 100 (1) (a) of the MPRDA;

"Labour Sending Areas" means areas from which a majority of South African mineworkers both historical and current, are or have been sourced;

"Leviable amount" has the same meaning as is ascribed to that term in the Skills Development Levies Act, 1999 (Act No. 9 of 1999);

"Meaningful Economic Participation" includes, inter alia, the following key attributes:

- (a) BEE Transactions shall be concluded with clearly identifiable partners in the form of BEE Entrepreneurs, Mine Communities and workers;
- (b) A percentage of Effective Ownership must accrue to partners who are Black Persons;
- (c) Taking into account the provisions of the Companies Act, some of the distributions by mining companies should flow to the Black Person partners throughout the term of the investment the structure of the BEE Transaction financing should be in a manner where a percentage of the cash-flow is used to service the funding of the structure;
- (d) Accordingly, BEE Partners are enabled to leverage equity henceforth in proportion to vested interest over the life of the BEE Transaction in order to facilitate sustainable growth of Black Person partners;
- (e) BEE Partners shall have full shareholder rights such as being entitled to full participation at annual general meetings, shareholders meetings and exercising of voting rights in all aspects at shareholders meetings;



"Mine Community" refers to communities where mining takes place, major Labour Sending Areas, as well as adjacent communities within a local municipality, metropolitan municipality and/or district municipality;

"Mining Transformation and Development Agency" refers to an agency to be established by the Minister during the period set out in paragraph 2.11(a);

"Minister" means the minister of the Department of Mineral Resources;

"Mining Charter" means this broad-based black socio-economic empowerment charter for the South African mining and minerals industry, 2017, developed in terms of section 100 (2) (a) of the MPRDA;

"Mining Goods" refers to tangible goods used by the Holder, or by a contractor on behalf of the Holder, for mineral extraction, materials handling, environmental control, mineral processing, drilling, digging, and earthmoving. This also includes aftermarket components and products that are used and/or consumed in daily operations;

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

"the Republic" means the Republic of South Africa;

"Services" refers to work contracted out by the Holder, or by a contractor on behalf of a Holder, which includes but is not limited to, mining production services, drilling, mineral trading, mineral marketing, shipping, transportation, information technology services, security, payroll, finance, medical, cleaning, insurance and any other services which are supplementary or optional to the mine;

"Scorecard" means the scorecard set out in paragraph 2.16 below;

"SLP" means the social and labour plan contemplated in section 23 of the MPRDA;



- "South African Based Company" refers to a company incorporated in the Republic in terms of the Companies Act and which has offices in the Republic;
- "South African Historically Black Academic Institutions" means institutions of higher learning which were historically solely for Black Persons;
- "South African Manufactured Goods" means goods where at least 60% of the value added during the assembly and/or manufacturing of the product is realised within the borders of the Republic. The calculation of value added for the purposes of this definition excludes profit mark-up, intangible value (such as brand value) and overheads;
- "Top Up" means the increasing of shareholding of a Black Person in order to reach the minimum thresholds required by the Mining Charter;
- "Youth" for the purposes of this Mining Charter refers to Black Persons between the ages of 18 to 35 years old.

1. OBJECTIVES OF THE MINING CHARTER

This Mining Charter, is a government instrument designed to achieve mutually symbiotic sustainable growth and broad based and meaningful transformation of the mining and minerals industry. The Mining Charter seeks to achieve the following objectives:

- (a) Recognition of the internationally accepted right of the State to exercise sovereignty over all the mineral resources within the Republic;
- (b) Deracialising of ownership of the mining and minerals industry by redressing the imbalances of the past injustices;
- (c) Substantially and meaningfully expanding opportunities for Black Persons to enter the mining and minerals industry and to benefit from the exploitation of the State's mineral resources;



- (d) Utilising and expanding the existing skills base for the empowerment of Black Persons;
- (e) Advancing employment and diversifying the workforce in order to achieve competitiveness and productivity of the mining and minerals industry;
- (f) Enhancement of the social and economic welfare of Mine Communities and major Labour Sending Areas in order to achieve social cohesion;
- (g) Promotion of sustainable development and growth of the mining and minerals industry;
- (h) Catalysing growth and development of the local mining inputs sector by leveraging the procurement spend of the mining and minerals industry; and
- (i) Promoting Beneficiation of South Africa's mineral commodities by South African Based Companies.

2. ELEMENTS OF THE MINING CHARTER

2.1 OWNERSHIP

In order to give effect to Meaningful Economic Participation 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:

2.1.1 NEW PROSPECTING AND MINING RIGHTS HOLDERS

- 2.1.1.1 A Holder of a new prospecting right must have a minimum of 50% + 1 Black Person shareholding which shareholding shall include voting rights, per prospecting right or in the company which holds the right.
- 2.1.1.2 A Holder of a new mining right must have a minimum of 30% Black Person shareholding which shall include economic interest plus a corresponding percentage of voting rights, per right or in the mining company which holds the right.



- 2.1.1.3 The 30% Black Person shareholding must be distributed in the following manner:
 - (a) a minimum of 8% of the total issued shares of the Holder shall be issued to ESOPs (or any similar employee scheme structure);
 - (b) a minimum of 8% of the total issued shares of the Holder shall be issued to Mine Communities (in the form of a community trust); and
 - (c) a minimum of 14% of the total issued shares of the Holder shall be issued to BEE Entrepreneurs.
- 2.1.1.4 To the extent that any Black Person holds shares within one of the categories set out in paragraph 2.1.1.3 above, such Black Person shall ensure that in the event of transferring the shares, the party to whom the shares are transferred must fall within the same category as the transferring Black Person as set out paragraph 2.1.1.3 above. Such that the Black Person shareholding distribution set out in paragraph 2.1.1.3 above shall always be maintained by the Holder.
- 2.1.1.5 The Holder shall ensure that any reduction of shareholding of existing shareholders through the issue of new shares, shall not reduce the Black Person shareholding distribution as set out in the paragraph 2.1.1.3 above.
- 2.1.1.6 The portion of the 30% Black Person equity shareholding referred to in paragraph 2.1.1.3 which has not yet vested shall vest in no more than 10 years and by no less than 3% annually of the total issued share capital of the Holder, proportionate to the respective non-vested shareholding of the employees, Mine Communities and BEE Entrepreneurs. Such vesting shall be paid for from the proceeds of dividends received by the Black Person shareholders, provided that if the total dividends received by any of the Black Person shareholders is not sufficient to discharge the amount required for full vesting, the

- balance owing in respect thereof, shall be written off by the Holder or vendor of the shares to the Black Person as the case may be.
- 2.1.1.7 Subject only to the solvency and liquidity requirements as set out in the Companies Act, a Holder of a new mining right must pay a minimum 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.
- 2.1.1.8 Subject to the provisions of paragraph 2.1.1.4, the BEE Entrepreneurs shall be allowed to dilute a maximum of 49% shareholding in the Holder, provided that 100% of the proceeds from the dilution are used by the BEE Entrepreneurs to develop another asset.
- 2.1.1.9 The shareholding of the Mine Community must be held in a trust created and managed by the Mining Transformation and Development Agency, from a date to be published by the Minister.
- 2.1.1.10 The Mining Transformation and Development Agency shall report to the Minister. on an annual basis.
- 2.1.1.11 The 30% Black Person shareholding must be held in an entity/ies or by person/s which is/are separate from the right Holder.
- 2.1.1.12 The Black Person shareholders shall directly and actively control their share of equity interest in the empowering company, including the transportation as well as trading and marketing of the proportionate share of the production.
- 2.1.1.13 The only offsetting permissible under the ownership element is against the value of Beneficiation as provided for in paragraph 2.1.4 below. Such offsetting shall account for a maximum of 11% against the ownership target where such offsetting has been approved by the Department of Mineral Resources.

2.1.2 EXISTING PROSPECTING AND MINING RIGHTS HOLDERS

- 2.1.2.1 A Historical BEE Transaction shall be recognised for the reporting period ending on the date on which this Mining Charter is published in the Government Gazette.
- 2.1.2.2 The provisions of paragraph 2.1.2.1 shall apply to an existing Holder whose BEE Partner/s has exited the BEE Historical Transaction; or the contract between the Holder and the BEE Partner/s has lapsed; or the previous BEE Partner/s transferred its shares to a person/s other than a Black Person.
- 2.1.2.3 A Holder who claims the recognition of Historical BEE Transactions is required to Top Up its Black Person shareholding from the existing level to a minimum of 30% Black Person shareholding, at the Holder level within the twelve (12) months transitional period. Such Top Up need not be in proportion to the shareholding distribution set out in paragraph 2.1.1.3 above.
- 2.1.2.4 An existing Holder, who after the coming into operation of the Mining Charter of 2017, has maintained a minimum of 26% Black Person shareholding shall be required to Top Up its Black Person shareholding to a minimum of 30% within the twelve (12) months transitional period. Such Top Up need not be in proportion to the shareholding distribution set out in paragraph 2.1.1.3 above.
- 2.1.2.5 An existing Holder who has acquired and maintained more than 30% Black Person shareholding shall be allowed to maintain its existing structure until such time as the BEE Partner/s exits or upon renewal of such right.
- 2.1.2.6 The required Top Up stipulated in 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.



- 2.1.2.7 The Black Person shareholding Top Up referred to in 2.1.2.3 and 2.1.2.4 shall be given proportionally to the Holder's existing BEE Partner/s. To the extent that BEE Partner/s has exited the BEE Historical Transaction; or the contract between the Holder and the BEE Partners has lapsed; or the BEE Partners have transferred the shares to a person other than a Black Person, then the Top Up shall be to a BEE Entrepreneur.
- 2.1.2.8 A Holder referred to in 2.1.2.3 to 2.1.2.5 must, within the transitional period of twelve (12) months, 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.
- 2.1.2.9 The recognition of Historical BEE Transactions shall include the recognition of historical deals concluded on units of production, share asset deals (including deals where the BEE Partner/s have sold their shareholding) and all Historical BEE Transactions deals which formed the basis upon which new order mining rights were granted.
- 2.1.2.10 The Historical BEE Transactions referred to above may be at company level, asset level or cover all operations.
- 2.1.2.11 The recognition of Historical BEE Transactions shall not apply to transactions which did not achieve a minimum of 26% empowerment by the date on which this Mining Charter is published in the *Government Gazette*.
- 2.1.2.12 After the date of publication of this Mining Charter in the Government Gazette the recognition of Historical BEE Transactions shall not apply to applications for a new mining right or prospecting right or applications for the renewal of such rights, or to applications in terms of section 11 of the MPRDA affected by such recognition.

2.1.3 Sale of South African Mining Assets

In order to ensure effective and meaningful participation of Black Persons in the mining and minerals industry, a Holder who sells its mining assets must give Black Owned Company/s a preferential an option to purchase.

2.1.4 MINERAL BENEFICIATION

In order to give effect to government policies and contribute to the Republic's national developmental imperatives relating to Beneficiation of the Republic's mineral resources:

- (a) A Holder may offset a maximum of 11% of Black Persons ownership by financially investing in and contributing to Beneficiation over and above the provisions of Section 26 of the MPRDA.
- (b) The offsetting referred to in paragraph 2.1.4 (a) shall not exceed 11% irrespective of the formulae, methods and/or mechanisms identified.
- (c) A Holder claiming an offset pursuant to Beneficiation must meet the following criteria:
 - The Holder must have, since 2004, in addition to section 26 requirements of the MPRDA, invested in Beneficiation;
 - The activities that are deemed to be Beneficiation are in line with the baseline contemplated in the definition of Beneficiation in the MPRDA; and
 - o The Department of Mineral Resources must approve the proposed activities to ensure that such activities are in line with Beneficiation policies published by it from time to time.



- (d) Offsetting shall not apply to any Beneficiation project which existed post 2004 but which has since ceased to exist and or has been terminated.
- (e) Offsetting may only be claimed where the Holder's contribution to Beneficiation is still ongoing.

The processes and mechanisms that shall determine the offset of each mineral value chain, shall be provided for by the Minister, by way of *Government Gazette*, as envisioned in section 26 (2) of the MPRDA.

2.2 PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT

Leveraging maximum benefit from the Republic's mineral resources will require strengthening linkages between the mining and minerals industry and the broader economy. This element seeks to strengthen these linkages through procurement of South African Manufactured Goods and sourcing of Services from South African Based Companies. Procurement of South African Manufactured Goods and Services presents opportunities to expand economic growth that allows for the creation of decent jobs and widens the scope for market access of South African Manufactured Goods and Services. A Holder must identify what goods and services are available within the community where its mining operation takes place and, where feasible, give preference to suppliers within that community.

To achieve this, a Holder must identify all goods and services that will be required in its operations and must ensure that its procurement policies adhere to the following criteria:

Mining Goods

A Holder must spend a minimum of 70% of total mining goods procurement spend on South African Manufactured Goods. The abovementioned 70% of the total goods procurement spend shall be apportioned in the following manner:

- (a) A minimum of 21% of total mining goods procurement spend must be set aside for sourcing South African Manufactured Goods from Black Owned Companies;
- (b) A minimum of 5% of total mining goods procurement spend must be set aside for sourcing South African Manufactured Goods from Black Owned Companies with a minimum of 50%+1 vote female Black Person owned and controlled and/or 50% +1 vote Youth owned and controlled; and
- (c) A minimum of 44% of total mining goods procurement spend must be set aside for sourcing South African Manufactured Goods from BEE Compliant Manufacturing Companies.

Services

A minimum of 80% of the total spend on services must be sourced from South African Based Companies. The abovementioned 80% of the total services procurement spend shall be apportioned in the following manner:

- (a) A minimum of 65% of the total spend on services must be sourced from BlackOwned Companies;
- (b) A minimum of 10% of the total spend on services must be sourced from Black Owned Companies with a minimum of 50%+1 vote female Black Person owned and controlled companies; and
- (c) A minimum of 5% of the total spend on services must be sourced from Black Owned Companies with a minimum of 50%+1 vote Youth owned and controlled companies.



Processing of samples

- (a) A Holder must utilise South African Based Companies for the analysis of 100% of all mineral samples across the mining value chain, except in cases where samples are analysed for the purpose of verification of the accuracy of local laboratories.
- (b) A Holder may not conduct sample analysis using foreign based facilities and/or companies without the prior written consent of the Minister.

Verification of local content

- (a) A Holder shall, when submitting the annual Mining Charter report contemplated in paragraph 2.9 to the Department of Mineral Resources, provide proof of local content for goods and services in the form of certification from the South African Bureau of Standards (SABS).
- (b) The responsibility to verify local content lies with the supplier of goods and/or services.

Contribution by Foreign Suppliers

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

2.3 EMPLOYMENT EQUITY

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



Consistent with the EE Act, workplace diversity and equitable representation at all levels are catalysts for social cohesion, transformation and competitiveness within the mining and minerals industry. In order to create a conducive environment to ensure diversity as well as participation of Black Persons at all decision-making positions and core occupational categories in the mining and minerals industry, a Holder must employ a minimum threshold of Black Persons which is reflective of the Demographics of the country as follows:

Board

A minimum of 50% Black Persons with exercisable voting rights, 25% of which must be female Black Persons.

Executive/Top Management

A minimum of 50% Black Persons at the executive directors' level as a percentage of all executive directors, 25% of which must be female Black Persons.

Senior Management

A minimum of 60% Black Persons in senior management, 30% of which must be female Black Persons.

Middle Management level

A minimum of 75% of Black Persons in middle management, 38% of which must be female Black Persons.

Junior Management level

A minimum of 88% Black employees in junior management, 44% of which must be female Black Persons.

Employees with disabilities

A minimum of 3% employees with disabilities as a percentage of all employees, reflective of national and/or provincial Demographics.



Core and Critical skills

A Holder must ensure that a minimum of 60% Black Persons are represented in the Holder's Core and Critical Skills by diversifying its existing pools. Core and Critical Skills must include technical representation across all organisational levels. To achieve this, the Holder must identify and implement its existing pools in line with the approved SLP and such implementation must be reflective of the Demographics of the Republic.

Career progression (aligned with SLP)

A Holder must develop and implement a career progression plan consistent with the Demographics of the Republic by:

- (a) Developing career development matrices of each discipline (inclusive of minimum entry requirements and timeframes);
- (b) Developing individual development plans for employees;
- (c) Identifying a talent pool to be fast tracked in line with the needs; and
- (d) Providing a comprehensive plan with targets, timeframes and how the plan will be implemented.

The targets indicated under this element may change in order to address employment equity measures.

2.4 HUMAN RESOURCE DEVELOPMENT

The mining and minerals industry is knowledge based and thus hinges on human resource development which constitutes an integral part of social transformation in the workplace as well as sustainable growth. The objective is to improve the employment prospects of Black Persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education.



A Holder must invest 5% of the Leviable amount on essential skills development. To achieve this objective, a Holder must invest the 5% in the following manner:

- (a) 2% on essential skills development activities such as artisanal training, bursaries, literacy and numeracy skills for employees and non-employees (community members);
- (b) The skilling referred to in paragraph (a) must be a representative of national and/or provincial demographics and must be biased towards low level employees;
- (c) 1% towards South African Historically Black Academic Institutions for research and development initiatives intended to develop solutions in exploration, mining, processing, technology efficiency (energy and water use in mining), Beneficiation as well as environmental conservation and rehabilitation. A Holder may make representations to the Minister for exemption from the 1% referred to in this paragraph (c) if the Holder has partnered and supported a State owned entity in respect of mining related research and development; and
- (d) 2% towards the Mining Transformation and Development Agency.

2.5 MINE COMMUNITY DEVELOPMENT

Mine Communities form an integral part of mining development, which requires a balance between mining and the Mine Community's socio-economic development. A Holder must meaningfully contribute towards the development of the Mine Community (with a bias towards communities where mining takes place) both in terms of impact, and also in keeping with the principles of the social license to operate.

Mine Community development projects referred to above must include infrastructure projects, income generating projects and enterprise development.



District, metropolitan, and local municipalities as constitutionally, mandated institutions for community development, have a responsibility to develop integrated development plans (IDP's) in consultation with all relevant stakeholders in a transparent and inclusive manner in terms of applicable legislation. A Holder must contribute towards Mine Community development by identifying priority project/s as per the approved IDP.

- (a) In this regard a Holder's contribution towards Mine Community development must be proportionate to the size of the investment.
- (b) A Holder must meaningfully contribute towards Mine Community development in terms of its approved SLP which is to be published in English and other languages commonly used within the Mine Community.
- (c) All project management and consultation fees incurred during the execution of Mine Community development projects shall be capped at 8% of the total budget.
- (d) Holders may collaborate on projects where more than one right Holder operates in the same area informed by their SLPs, which are aligned to the district, metropolitan and local municipality's IDP's for maximum socio- economic developmental impact.

2.6 SUSTAINABLE DEVELOPMENT AND GROWTH OF THE MINING AND MINERALS INDUSTRY

Mineral resources are non-renewable in nature. Accordingly, exploitation of such resources must emphasise the importance of balancing concomitant economic benefits with social and environmental needs without compromising future generations, in line with the provisions of the Constitution for ecologically sustainable development and use of natural resources. To this end, in consideration of clause 2.122.9 (reporting), a Holder must implement elements of sustainable development commitments included in the "Stakeholders' Declaration on Strategy for the sustainable growth and meaningful transformation of South



Africa's Mining Industry" of 30th June 2010, and in compliance with all relevant legislation, as follows:

2.6.1 Improvement of the industry's environmental management

In order to preserve and improve the environment, a Holder must comply with and implement environmental management systems that focus on continuous improvement to review, prevent and mitigate adverse environmental impacts in line with the environmental management plan approved in terms of the National Environmental Management Act 1998 (Act 107 of 1998) and its Regulations.

2.6.2 Improvement of the industry's health and safety performance

The stakeholders within the mining and minerals industry have committed themselves to the goal of zero harm. The key driver to achieve zero harm will be the implementation of the 2016 Occupational Health and Safety Summit Milestones and taking into consideration the following:

- (a) Implementing a management system focused on continuous improvement of all aspects of operations that have a significant impact on the health and safety of employees and communities where mining takes place;
- (b) Providing all employees with health and safety training; and
- (c) Implementing regular health surveillance and risk-based monitoring of employees.

The Holder must comply with the following milestones:

- (a) Elimination of occupational lung diseases in accordance with agreed timelines and taking into account occupational exposure limits;
- (b) Elimination of noise-induced hearing loss in accordance with agreed timelines and taking into account occupational exposure limits;
- (c) Prevention and management of tuberculosis and HIV/AIDS in accordance with agreed timelines;
- (d) Elimination of fatalities and injuries in accordance with agreed timelines; and



(e) Implementing the approved Culture Transformation Framework pillars aimed at significantly improving the culture towards health and safety across the mining sector, in accordance with agreed timelines.

A Holder must further put in place a management system focused on continuous improvement of all aspects of operations that have a significant impact on the health and safety of employees, contractors and communities where mining takes place. A Holder must continue providing all employees with health and safety training and require employees of contractors to have undergone such training.

2.6.3 Research and Development Spend

- (a) Where a Holder intends to undertake research and development, the Holder must spend at least 70% of their research and development budget in the Republic.
- (b) 50% of the 70% indicated above must be spent on South African Historically Black Academic Institutions.

2.7 HOUSING AND LIVING CONDITIONS

Human dignity and privacy for mineworkers are still the hallmarks to enhance productivity and expedite transformation in the mining and minerals industry in terms of housing and living conditions. In this regard Holders must improve the standards of housing and living conditions for mine workers as stipulated in the Housing and Living Conditions Standards. The Housing and Living Conditions Standards provide for, amongst others, the following principles:

2.7.1 Principles of Housing Conditions

- · Decent standards of housing;
- Centrality of home ownership;



- · Provision for social, physical and economic integrated human settlements;
- · Measures to address housing demand;
- · Involvement of employees in the housing administrative system; and
- Secure tenure for the employees in housing institutions.

2.7.2 Principles of Working Conditions

- Proper health care services;
- Affordable, equitable and sustainable health system; and
- Proper nutrition requirements and standards.

A Holder shall further be required to submit a housing and living conditions plan which must be approved by the Department of Mineral Resources after consultation with the Department of Housing and organised labour and the Department of Human Settlement.

2.8 APPLICATION OF THE MINING CHARTER TO LICENCES GRANTED UNDER THE PRECIOUS METALS ACT, 2005 AND THE DIAMONDS ACT, 1986.

The Diamonds Act 1986 (Act 56 of 1986) and the Precious Metals Act 2005 (Act 37 of 2005) make provision for the South African Diamond and Precious Metals Regulator (as defined therein) to have regard to the requirements of this Mining Charter of 2017 when considering applications lodged in terms of those acts.



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The targets and elements of the Mining Charter shall therefore apply to licenses under those Acts in line with the table below:

CATEGORY/SIZE	QUALIFYING	EXEMPT FROM	REQUIRED TO
OR CLASS	CRITERIA	THE	COMPLY WITH THE
		FOLLOWING	FOLLOWING
		TARGETS	TARGETS
Exempted Micro	Estimated max	Ownership	Sustainable
Enterprises	turnover less than	Human Resource	Development and
(including	R1 Million.	Development	growth of the
students)		Procurement	minerals industry.
,		Employment	
		Equity	
	,	Mine Community	.:
		Development	
Qualifying Small	Estimated max	Ownership	Employment Equity
and Micro	turnover R1	Mine Community	Human Resource
Enterprises	Million to R3.8	Development	Development
(QSME's)	Million.		Procurement and
		:	supplier and
		:	enterprise
			development.
			Sustainable
			Development and
			growth of the
			minerals industry.
			Ownership

Medium	and	Estimated	max	Mine	Community	Employme	ent Equ	uity ²
Large Entities		turnover	greater	Devel	opment	Human	Resc	ource
		than R3.8	million.			Developm	ent ³	
						Procurem	ent	and
						supplier		and
					:	enterprise)	
						developm	ent	
						Sustainab	le	
						Developm	nent	and
						growth	of	the
						minerals i	ndustr	y.

ELEMENTS OF THE MINING CHARTER APPLICABLE TO LICENSEES UNDER THE PRECIOUS METALS ACT, 2005 AND THE DIAMONDS ACT, 1986 AS AMENDED

2.8.1 OWNERSHIP

- (a) In line with Government policies to encourage Beneficiation of the Republic's mineral resources, offsetting shall be permissible under the ownership element against the value of Beneficiation up to a maximum of 11% against the ownership target. As such the ownership target for the downstream diamonds and precious metals industry is a minimum of 19% in the hands of Black Persons per licensee to enable meaningful economic participation of Black Persons.
- (b) The Black Person shareholding indicated above shall comprise of BEE Entrepreneurs and workers and must be 40% ownership of net value based upon the time based graduation factor.



(c) Taking into account the extent of the exemption in terms of the above table, a permit or license holder in terms of the Precious Metals Act and the Diamonds Act is required to comply with all the relevant elements and targets as set out in this Mining Charter of 2017.

2.8.2 REPEAL OF PARAGRAPH 3 OF THE CODES OF GOOD PRACTICE FOR THE MINERALS INDUSTRY

Paragraph 3 of the Codes of Good Practice for the Minerals Industry published in Government Gazette No. 32167 of 29 April 2009 is hereby repealed.

2.9 REPORTING (MONITORING AND COMPLIANCE)

A Holder must report its level of compliance with this Mining Charter of 2017 annually, as provided for by Section 28 (2) (c) of the MPRDA. The Department shall monitor and evaluate the Holder's implementation of this Mining Charter of 2017, taking into account the impact of material constraints which may result in not achieving the set target.

The ownership, Mine Community development and human resources development elements are ring fenced and require 100% compliance at all times.

2.10 APPLICABILITY OF TARGETS

All targets stipulated in this Mining Charter of 2017 shall be applicable throughout the duration of a mining right (including prospecting and other exploration rights), unless a specific element specifies otherwise.



2.11 TRANSITIONAL ARRANGEMENTS

The following provisions shall only apply to existing Holders:

- (a) An existing mining right holder has a maximum of twelve (12) months to comply with the revised targets of this Mining Charter of 2017 from the date of publication of this Mining Charter of 2017. Save that the twelve (12) month period in relation to paragraph 2.1.1.3 (b) as read with paragraph 2.1.1.9, shall commence upon a date to be published by the Minister.
- (b) The Holder must align existing targets cumulatively from the Mining Charter of 2014 targets within the transitional period referred to above to meet the revised targets in line with the attached Scorecard.
- (c) The transitional arrangements period for the procurement element targets is three years. The Holder must within three (3) years from the date of publication of this reviewed Mining Charter of 2017, submit a three (3) year plan indicating progressive implementation of the provisions of this reviewed Mining Charter of 2017 insofar as they relate to procurement.
- (d) The transition period for the procurement target may upon request by the Holder be extended by a further two (2) years to allow the Holder sufficient time to develop the 50%+1 vote Black Owned Company suppliers in accordance with the procurement targets.
- (e) Compliance with procurement targets within the transitional period shall be as follows:
 - The first year target is set at 15% of the 70%, second year target is set at 45% of the 70% and the third year target is set at 70%.
- (f) A Holder must comply with the Housing and Living Conditions Standards and ensure that it maintains single sex units and family units and any other agreement which has been reached with workers pending the finalisation of the Reviewed Housing and Living Conditions Standards.



(g) The Holder's performance shall be reported and audited against each element in respect of implementation for the applicable transitional period.

2.12 NON-COMPLIANCE

A Holder who has not complied with the ownership, Mine Community development and human resource development 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.

2.13 REVIEW OF THE CHARTER

The Minister may, by notice in the Government Gazette review this Mining Charter.

2.14 REPEAL OF PREVIOUS MINING CHARTERS

This Charter repeals the 2004 and the 2010 Mining Charters.

2.15 INTERPRETATION OF THE MINING CHARTER

The Mining Charter shall be read and interpreted in conjunction with MPRDA and the BBBEE Act where words are not defined and a meaning thereof has been ascribed in the aforementioned legislation.



2.16 SCORECARD; MINING CHARTER REVIEW

Reviewed Mining Charter Scorecard	Weighting %.
Ownership	Y/N
Human Resource Development	YIN
Mine Community Development	ΧΊΝ
Procurement supplier & Enterprise Development	30%
Employment Equity	35%
Sustainable Development and growth	35%
Total	100%



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OWNERSHIP

Escale Sept		 		_
Weighting %	Y/N (Ring-fenced element)			
Compliance Target%	30% BBBEE Ownership			
Measure		BEE Entrepreneurs	Mine Community	
Element Description	Minimum target for representation of Black ESOP's people ownership.			

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HUMAN RESOURCE DEVELOPMENT

Compliance Weighting %	Y/N (Ring-fenced element)		
Complian Target %	2%	2%	1%
Measure	Percentage of the total annual Leviable amount contributed to essential skills development activities	of human resources intended to exploration, mining, lology efficiency, and las environmental Agency.	Percentage of the total annual Leviable amount contributed to South African Historically Black Academic Institutions
ElementiDescription	Percenta annual amount of requisite core and critical essential skills, literacy and numeracy and South developm African Historically Black Academic	Institutions in respect of human resources development initiatives intended to annual develop solutions in exploration, mining, Mining, processing, technology efficiency, and beneficiation as well as environmental Agency, conservation.	liture as ble amou ment lev



MINE COMMUNITY DEVELOPMENT

Compliance Weighting %	Y/N (Ring-fenced element)
Compliance Target %	
Measure to the second s	Contribution towards mine community development must be proportionate to the size of the investment
	roved community ned to the district, nunicipality's IDPs for two and half SLP's for five (5)
Element Bescription	Implement locally app projects, which are align metropolitan and local ration of revenue projection years, applicable to a years cycle.



PROCUREMENT SCORECARD

Compliance Weighting %	2%	1%	%6	2%
Çompilancı Çarget%	21%	2%	44%	65%
Measure	Percentage of the total mining goods procurement spend on South African manufactured goods from 50% + 1 vote Black owned and controlled companies.	Percentage of the total goods procurement spend on South African manufactured goods from companies with a minimum of 50%+1 vote Black women owned and controlled and/or 50% +1 vote youth ownership;	Percentage of the total goods procurement spend on South African manufactured goods from companies that are at least at level 4 BEE +26% ownership	Percentage of total spend on services from South African based services companies.
Sement Description		Goods Procurement: A minimum of 70% of the total mining goods procurement spend must be spent on South African manufactured goods must be sourced from a BEE compliant manufacturing companies. Calculation of goods and services spend does not include spend on buildings.	roads, utilities (electricity and water) and land rates.	Services Procurement: A minimum of 80% of the total spend on services must be sourced from South



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2%	2%	3%		3%
10%	5%	100%		1%
Percentage of total spend on services from companies with a minimum of 50%+1 vote Black women owned and controlled companies.	Percentage of total spend on services from companies with a minimum of 50%+1 vote youth owned and controlled companies.	Percentage of samples analysed using South African based facilities		Percentage of annual turnover generated from local mining companies contributed towards the Mining Transformation and Development Agency
African based companies. The abovementioned 80% of the total services procurement spend shall be apportioned in the following manner.1		Percentage of samples analyses using South African based facilities:	Utilise South African based facilities for the analysis of mineral samples across the mining value chain except in cases where samples are analysed for the purpose of verification of the accuracy of local laboratories.	Contribution by Foreign Suppliers Mining companies to submit supplier development plans.

EMPLOYMENT EQUITY

Element Description			Compliance Target%	Weighting:%
Board:				THE REPORT OF THE PROPERTY OF
Africans	Coloureds	Indians	20%	3%
Black Females as a	percentage of all Board representatives	oresentatives	25%	3%
Executive/ Top Man	nagement			
Africans	Coloureds	Indians	20%	3%
Black Females as a	percentage of all executive directors.	directors.	25%	3%
Senior Managemen	1.			
Africans	Coloureds	Indians	%09	4%
Black Females as a	percentage of all senior managers.	anagers.	30%	4%
Middle Managemen	71			
Africans	Coloureds	Indians	75%	3%
Black Females as a	percentage of all middle managers	anagers.	38%	3%
Junior Managemen				
Africans	Coloureds	Indians	%88	1%
		7		



Slack Females as a p	Slack Females as a percentage of all junior managers.		44 %	3%
Employees with disal	abilities:			
Africans	Coloureds	Indians	3%	2%
Core and Critical Skills:	<u>dilis:</u>			
Africans	Coloureds	Indians	%09	3%
Total				35%

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SUSTAINABLE DEVELOPMENT

Element Description	Weasure	Compliance Target%	Weighting.%
Improve the industry's environmental compliance	Complaince with the approved Environmental Management	100%	10%
A minimum of 70% of the right holder's	Percentage of research and development budget spent in South Africa	70%	%8
get must	Percentage of the research budget spent locally and spent on South African Historically Black Academic Institutions.	%05	2%
Total			15%

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-	Compliance rarget. Weig	1%	1%	1%	%
-	λ 1		<u> </u>	-	Below National TB 2% incident rate
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	uo	5%	5%	% 96	Below Natior incident rate
- Transmitter	υ <u> </u>	(a) Percentage of all exposure measurement results for 95% respirable crystalline silica below the milestone	(b) Percentage of all exposure measurement results for platinum 95% dust respirable particulate below the milestone		ш.=
***************************************		for	£	(c) Percentage of all exposure measurement results for coal dust respirable particulate below the milestone level	
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		Percentage of all exposure measurement respirable crystalline silica below the milestone	Percentage of all exposure measurement resul dust respirable particulate below the milestone	Percentage of all exposure measurement results dust respirable particulate below the milestone level	(d) Tuberculosis incidence rate by 2024
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2%	2%	7%	3%	1%	20%
100%	100%	20%	20%	6 Fillars implemented	
(e) Percentage of employees offered HIV Counselling and Testing (HCT) annually	(f) Percentage of all eligible employees linked to an Anti-Retroviral Treatment (ART) programme	(a) Percentage annual reduction of fatalities	(b) Percentage annual reduction of injuries	(a) Culture Transformation Framework pillars aiming to significantly improve the culture towards Health and Safety across the mining sector, in accordance with agreed timelines	
Elimination of Occupational Diseases		Elimination of Occupational fatalities and	injures	Culture Transformation Framework	Total



Annexure A

This annexure provides an alignment between the Dti BBEEE and DMR scorecard

ON LEVELS	DMRLEVELS	DMR SCORECARD	3 King renced Elements repercentage weighting
evel 1	Level 1	3 Ring fenced Elements + 100%	
Level 2	Level 2	3 Ring fenced Elements + 80 -100%	1 2 2
Level 3	Level 3	3 Ring fenced Elements + 70-80%	Compliant
_evel 4	Level 4	3 Ring fenced Elements + 60-70%	
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CHAMBER MENAERS

COMSA MEMBERS

These are mining companies in South Africa that identify themselves and members of the Chamber of Mines of South Africa.

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Palabora Mining Company Limited

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CONSTITUTION OF CHAMBER OF MINES OF SOUTH AFRICA

Name

1. The name of the Organisation shall be CHAMBER OF MINES OF SOUTH AFRICA (hereinafter referred to as the "Chamber").

Status

2. The Chamber shall be a body corporate with perpetual succession capable of entering into contractual and other relations and of suing and being sued in its own name and shall be an association not for gain.

Objects and powers

3. The objects and powers of the Chamber shall be:

- a. to advance, promote and protect the mining and other interests of its members; to consider, discuss and make recommendations on matters connected therewith or incidental thereto; to collect, circulate and publish information, and to investigate and conduct research into matters concerning its members, their interests or activities; to represent its members and to act on their behalf or as their agent in matters affecting their common interests; and to assist technically, financially or otherwise in the prosecution or defence of actions involving questions the decision whereof is likely to affect the common interests of its members;
- b. to regulate relations between its members and their employees; to represent its members and act on their behalf in matters connected with the regulation of such relations; to negotiate and conclude, on behalf of its members, agreements with any or all of their employees, or with any association, associations, trade union or trade unions representing any or all of such employees, relating to wages or other conditions of employment; to represent its members and act on their behalf in industrial disputes in which they or any of them are concerned and in all matters arising under or in connection with industrial legislation affecting them;
- c. to petition or make representations or submit evidence to the President, Parliament, any Premier of a Province, any Provincial Legislature, any Municipality, any other legislative or administrative body or any commission on matters concerning its members, their interests or activities and to promote or oppose legislative measures affecting them;
- d. to form, or participate in the formation of, and to support, or grant subsidies to associations, institutions, companies, committees and other organizations or bodies associated or connected with the mining industry or calculated to benefit the industry, gratuity funds, provident and pension funds, and medical aid and sick benefit funds for the benefit, wholly or partly, of persons employed in the mining industry; to provide scholarships and endowments; to provide facilities for the training in first aid, rescue operations and safety, of persons employed in the mining industry; to establish and maintain a mining exhibit or exhibits at any exhibition or public show; to subscribe money for charitable or benevolent objects, for exhibitions or for public, general or useful objects; and to guarantee the

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payment of the liabilities or the fulfilment of the contracts or undertakings of any person, company, association or institution;

e. to examine and report upon applications for patents or other monopolies which affect or may affect the interests of its members; to promote or oppose such applications and to acquire, hold and dispose of any patents or other monopolies for the purposes of the Chamber;

f. to establish, or participate in the establishment of pension, gratuity, medical aid or sick funds for the benefit, wholly or partly of the Chamber's employees and to contribute to any such fund;

g. to acquire and hold, to improve, sell, lend, let, hire, mortgage, donate, dispose of or deal in any other way with any property, movable or immovable, for the purposes of the Chamber;

h. to invest or lend any moneys of the Chamber with or without security and on such terms and conditions as may be decided from time to time and to realize or vary any such investment or loan;

i. to borrow or raise moneys for the purposes of the Chamber, whether by means of debenture bonds, mortgages or otherwise howsoever and to pledge as security for the repayment of such moneys all or any of the property or assets of the Chamber;

j. to open and operate a banking account and to make, draw, accept, endorse, discount, execute, issue or otherwise dispose of bills of exchange, promissory notes, bills of lading and other negotiable or transferable instruments or securities;

k. to employ or appoint and remunerate attorneys, advisers, agents and other persons for the purposes of the Chamber;

1. to establish and maintain a library and museum embracing collections of books and articles of interest to its members;

m. to act as secretaries or managers of associations, institutions, funds, companies, committees and other organizations or bodies associated or connected with the mining industry and to charge fees for so acting; and

n. generally to do all such other things as are necessary, conducive or incidental to the attainment of the above objects.

Membership

- 4. The following may be admitted as ordinary members of the Chamber:
 - a. any company registered in South Africa in accordance with the prevailing South African legislation and engaged in the Republic of South Africa in the business of mining;
 - b. any company registered in South Africa in accordance with the prevailing South African legislation and engaged in the Republic of South Africa in the business of promoting or financing mining ventures or in the business of providing administrative, secretarial, technical or other services to companies engaged in the business of mining:
 - c. any company registered in South Africa in accordance with the prevailing South African legislation and engaged in the Republic of South Africa in the business of extracting any mineral (as defined in the prevailing South African legislation regulating the extraction of minerals) from any tailings, slimes, waste rock or other residues produced in the course of mining if such company is provided with

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- administrative, secretarial, technical or other services by a member of the Chamber; and
- d. any association whose members include a significant number of companies contemplated in paragraph (a), (b) or (c) of this Article 4.

For the purposes of this Article "mining" means the operation of any mine as defined in the prevailing South African legislation regulating the extraction of minerals.

5. Any company desirous of becoming an ordinary member of the Chamber shall lodge with the Chief Executive a written application to the Council for admission as such; and, for the purposes of the application, the company concerned shall provide the Council with the company's full name or names and registered address and such further information as the Council may require. The application shall be considered at the next ordinary meeting of the Council or, if the President so directs, at a special meeting of the Council convened for the purpose and the Council shall then decide whether or not the applicant shall be admitted and the terms and conditions upon which it shall be admitted which shall not be subject to review in terms of this Article; provided that such an application, if received less than fourteen days before the next ordinary meeting of the Council, shall be considered at that meeting, or at the meeting following, as the President may direct.

After the meeting of the Council at which such an application is considered, the applicant shall be notified, in writing, by the Chief Executive whether or not the applicant has been admitted and of the terms and conditions imposed by the Council. If within thirty days of the date of a notification from the Chief Executive that an application for admission as an ordinary member has been refused, the applicant lodges with the Chief Executive a request, in writing, that the Council's decision be reviewed by the Chamber, in general meeting, the application shall be considered at the next annual general meeting of the Chamber, or if the Council so decides, at a special general meeting of the Chamber convened for the purpose; and if the meeting then decides to admit the applicant by a two-thirds majority of the representatives present and entitled to vote, the applicant shall be admitted to ordinary membership, but not otherwise.

- 6. Any person may be elected by the Council, on such terms and conditions as the Council may decide, as an honorary member of the Chamber.
- 7. The liability of ordinary members shall be limited to the amount, if any, payable by way of subscription or otherwise to the Chamber by such members. Any such liability may be waived in whole or in part by resolution of the Council on behalf of the Chamber.
- 8. The Council may establish two or more classes of ordinary members according to the nature or extent of the business carried on by members of the Chamber or according to any other criterion as may be determined by the Council and in such event the Council shall allocate every ordinary member to one or more of such classes. In making such allocation the Council shall be guided, but not bound, by the member's principal business or businesses. The Council may at any time re-allocate an ordinary member to any class or classes.

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Appointment of representatives

- 9. Within fourteen days of admission to membership of the Chamber, each ordinary member shall appoint a representative, by notice, in writing, lodged with the Chief Executive. Such notice shall contain the full names, occupation and address of the representative concerned.
- 10. An ordinary member may, at any time, appoint an alternate representative, by notice, in writing, lodged with the Chief Executive. Such notice shall contain the full names, occupation and address of the alternate representative concerned.
- 11. An ordinary member may withdraw the appointment of a representative or alternate representative, by notice in writing, lodged with the Chief Executive and, in the case of the withdrawal of the appointment of an alternate representative, may then or at any time thereafter appoint, in the manner prescribed by Article 10, another in such alternate representative's place. If the appointment of a representative is so withdrawn or if a representative ceases for any other reason, to be such, the ordinary member concerned shall appoint, within fourteen days thereafter and in the manner prescribed by Article 8, another in such representative's place.
- 12. The representative or alternate representative of an ordinary member shall cease to be such:
 - a. if such representative or alternate representative resigns;
 - b. if the member who appointed such representative or alternate representative withdraws the relevant appointment; or
 - c. if the member who appointed such representative or alternate representative ceases to be a member.

General provisions applicable to members

- 13. Six months' notice in writing (or such lesser period of notice as may be allowed by resolution of the Council) shall be given to the Chief Executive of any ordinary member's intention to withdraw from the Chamber. Upon expiry of the financial year of the Chamber in which the period of such notice expires, the member concerned shall cease to be a member.
- 14. Any ordinary member who ceases to be eligible, in terms of Article 4, for ordinary membership, shall withdraw from the Chamber within three months of ceasing to be eligible for membership. One month's notice, in writing, shall be given to the Chief Executive of such member's intention so to withdraw from the Chamber, and, upon the expiry of the notice, the member concerned shall cease to be a member. Any member who, having ceased to be eligible for ordinary membership, does not so withdraw from the Chamber may be excluded from the Chamber by resolution of the Council and shall thereupon cease to be a member.
- 15. Any member who, having been given notice, in writing, by the Chief Executive of the amount of any subscription due by such member and of the date on which such subscription is payable, fails to pay the amount concerned within six months of that date, may be excluded from the Chamber by resolution of the Council and shall thereupon cease to be a member; provided that the provisions of this Article shall not apply to any ordinary member who has failed to pay the amount of any such

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subscription by reason of the fact that a request, lodged in terms of Article 72, that the basis on which such subscription has been calculated or the amount of such subscription, be reviewed, has not yet been considered and disposed of by the Chamber in general meeting.

- 16. Any member who has been placed in liquidation or is under judicial management, may be excluded from the Chamber by resolution of the Council and shall thereupon cease to be a member.
- 17. Any member who has infringed the provisions of these Articles or of any by-laws passed in terms of Article 32, or being, in the opinion of the Council, guilty of any practice or proceeding likely to bring discredit upon the Chamber, may be excluded from the Chamber by resolution of the Council.
- 18. Any member who has been excluded from the Chamber by resolution of the Council, in terms of Articles 14, 15, 16 or 17, shall be notified immediately by the Chief Executive, in writing, of the Council's decision and the ground, with such particularity as the Chairperson shall decide, on which such member has been excluded.
- 19. If a member who has been excluded from the Chamber by resolution of the Council, in terms of Article 17 lodges, with the Chief Executive, within fourteen days of the date of the notification referred to in Article 18, a request, in writing, that the decision of the Council be reviewed by the Chamber, in general meeting, the matter shall be considered at the next annual general meeting of the Chamber or, if the Council so decides, at a special general meeting of the Chamber convened for the purpose; and the member concerned shall not be excluded from the Chamber if the meeting then decides accordingly by a majority of not less than two-thirds of the representatives present and entitled to vote. Unless it is so decided that the member concerned shall not be excluded from the Chamber, such member shall cease to be a member at the conclusion of the meeting. If such a written request that the Council's decision to exclude a member, in terms of Article 17, be so reviewed, is not received by the Chief Executive within fourteen days of the date of the notification referred to in Article 18, the member concerned shall thereupon cease to be a member.
- 20. Cessation of membership in terms of these Articles shall not release the member concerned from liability for any subscription or other amount due by the member to the Chamber or from any other obligation to the Chamber.

Register of members

- 21. There shall be kept a register of members in which there shall be recorded:
 - a. the full name or names and the address of each member and a statement whether the member is an ordinary member or an honorary member;
 - b. the full names of the representative and alternate representative, if any, of each ordinary member; and
 - c. the date on which each member is admitted to membership of the Chamber, the class or classes to which each ordinary member has been allocated or re-allocated in terms of Article 8 together with the date of such allocation or re-allocation, and the date on which any member ceases to be a member and the reason therefor.

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Constitution and powers of the Council

- 22. There shall be a Council of the Chamber which shall consist of such number of persons as may be determined from time to time at a general meeting of the Chamber.
- 23. The members of the Council shall be elected at each annual general meeting of the Chamber by the representatives of ordinary members present and entitled to vote. Each member of the Council shall hold office until the next annual general meeting after such member's election when such member shall retire but be eligible for reelection. Each candidate for election to the Council other than a retiring member shall be nominated by the representative of an ordinary member and such nomination shall be lodged with the Chief Executive at least fourteen days prior to the date on which the election is to take place. The representatives of ordinary members shall be the only persons eligible for election to the Council. Notwithstanding anything to the contrary contained in this Article, the Chief Executive appointed in terms of Article 70 shall ex officio be a member of the Council. Article 29 shall not apply to such ex officio membership.
- 24. The President shall be the Chairperson of the Council and shall take the chair at all meetings of the Council. If the President is not present at any such meeting the members present shall elect one of their number to be Chairperson of that meeting.
- 25. Any member of the Council shall have the power at any time to appoint, by notice in writing to the Chief Executive, any person to act as alternate member in such member's place at any meeting of the Council at which such member shall not be present and to act on such member's behalf for the purpose of signing any resolution contemplated in Article 31. Any alternate member so appointed shall, whilst so acting in the place of a member of the Council, hold office as a member of the Council. The appointment of any alternate member by the President shall not entitle the person so appointed to act as Chairperson at any meeting of the Council and the Chairperson of such meeting shall be elected in accordance with Article 24. If a member who appointed an alternate member ceases to be a member of the Council or gives notice in writing to the Chief Executive of the withdrawal of the appointment of such alternate member, the appointment of such alternate member shall cease.
- 26. Half of the number of members of the Council from time to time (and if half the number equals a fraction, it must be rounded up to the next round number) plus one, or such other number of members of the Council as may be determined from time to time at a general meeting of the Chamber shall form a quorum at any meeting of the Council.
- 27. The Council shall meet as soon as practicable after each annual general meeting of the Chamber and thereafter shall meet at least once every three months on such dates and at such times as may be determined by the Council. At least three days' notice in writing of each meeting of the Council or such shorter period of notice as the President or the Council itself may decide shall be given to members thereof by the Chief Executive provided that such shorter period of notice, if given, shall not be

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less than is reasonably necessary to permit the members to attend the meeting concerned.

The President may convene a meeting of the Council at any time and the Chief Executive shall convene a meeting of the Council if requested in writing to do so by at least five members thereof. The Council may act notwithstanding any vacancy or vacancies in its number, but if and so long as the number of continuing members of the Council is reduced below the number fixed as the quorum, such continuing members of the Council may act for the purpose of increasing the number of members to that number, but for no other purpose.

Notwithstanding Articles 22 and 23, the Council may at any time and from time to time in its discretion, appoint any representative of an ordinary member as an additional member of the Council. Each member so appointed to the Council shall hold office until the next annual general meeting after such member's appointment when such member shall retire but be eligible for re-election or re-appointment.

The Council may at any time co-opt the services of the representative or the alternate representative of any ordinary member to such extent and for such purposes as the Council may decide. Such a representative or alternate representative may attend, by invitation, any meeting of the Council and may take part in discussion, but may not vote.

- 28. The Council shall have power to appoint at any time a representative of an ordinary member to fill a casual vacancy in the Council. Any representative so appointed shall hold office as a member of the Council until the next annual general meeting of the Chamber when such representative shall retire but shall then be eligible for reelection.
- 29. If a member of the Council resigns by giving notice in writing to the Chief Executive of such resignation or if a member of the Council ceases to be a representative of an ordinary member, such member shall cease to hold office as a member of the Council. A member of the Council may be removed from office by the President upon being absent without leave of absence from three consecutive meetings of the Council.
- 30. At any meeting of the Council a decision shall be taken by a majority of the members present voting by a show of hands. The Chairperson shall have a deliberative vote but no casting vote. The conduct of a meeting of the Council shall be the responsibility of the Chairperson who, subject to the provisions of these Articles, shall determine the procedure to be followed at the meeting.
- 31. A resolution in writing signed by members of the Council and being not fewer in number than are sufficient to form a quorum shall be as valid as if it had been passed at a meeting of the Council duly called and constituted. Such resolution may consist of several documents in like form each signed by one or more members of the Council or may consist of an electronic communication containing the resolution sent to a member's e-mail address and with that member's electronic response of approval having been received by the Chamber.

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32. The general administration and management of the Chamber shall be vested in the Council which in addition to the powers expressly conferred upon it by these Articles may exercise all such powers and do all such acts and things in the name of and on behalf of the Chamber as may be exercised or done by the Chamber.

Without prejudice to its general powers or to the powers, acts and things which by these Articles it may exercise or is required to do, the Council shall have power:

- a. to enter into such contracts in the name and on behalf of the Chamber as it thinks expedient for the purpose of the Chamber;
- b. to pass by-laws for the regulation of the business of the Chamber not inconsistent with the provisions of these Articles or of any law;
- c. to appoint at such remuneration and on such terms as the Council may decide and to remove employees or agents of the Chamber;
- d. to acquire and hold, to improve, sell, rent, let, hire, mortgage, donate, dispose of or deal with in any other way, any property, movable or immovable for the purposes of the Chamber;
- e. to determine and change at its discretion, the place at which the head office of the Chamber shall be situated;
- f. to appoint representatives on any bargaining or statutory council in which the Chamber or any member is concerned;
- g. to institute, conduct, defend, compound or abandon any proceedings by or against the Chamber in any court of law or before any arbitrator, wage board or other body constituted according to law and, without prejudice to any other provision contained herein, to recover by legal proceedings or otherwise any amount due to the Chamber;
- h. to appoint sub-committees to act in an advisory and/or specialist capacity and any other standing committees, ad-hoc committees or ad-hoc working parties which the Council in its discretion deems necessary, and to regulate the number of such committees or working parties, the nature of the business to be conducted by each of them and their composition, to establish procedural rules and guidelines to be followed by them, and for the purposes of any such appointment, to authorize the co-option of the services of any person; and
- i. to delegate any of its functions or powers to any member of the Council or to any principal committee established by the Council, or to any employee of the Chamber upon such terms and conditions as the Council may decide.

President and vice-presidents

33. At each annual general meeting one of the members of the Council then elected in terms of Article 23 shall be elected President and one representative of an ordinary member (whether or not a member of the Council) shall be elected Vice-President of the Chamber by the representatives of ordinary members present at the meeting and entitled to vote. Such representatives of ordinary members may, in addition, elect one or more than one Vice-President from the representatives of ordinary members (whether or not members of the Council). The President and any Vice-President so elected shall hold office until the next annual general meeting when they shall retire, but shall be eligible for re-election.

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- 34. If the President or any Vice-President resigns from that office or ceases to be a representative of an ordinary member, such President or Vice-President shall cease to hold office as such.
- 35. Any President, Vice-President or member of the Council who, in the opinion of the Council, is guilty of any practice or proceeding likely to bring discredit upon the Chamber, may be removed from office by resolution of the Council. The provisions of Articles 18 and 19 shall apply, mutatis mutandis, for the purpose of an appeal to the Chamber in general meeting against the decision of the Council.
- 36. If the office of the President or a Vice-President becomes vacant for any reason such vacancy shall be filled for the unexpired term of the current period of office by the Council, or, if the Council so decides, at a special general meeting of the Chamber convened for the purpose.

Constitution and powers of the Council

- 37. The Council may establish one or more principal committees of the Chamber specifically to promote the interests of and to deal with matters concerning any class of members established by the Council in terms of Article 8. Every principal committee shall consist of such number of members as the Council shall determine, who shall be appointed by the Council from the representatives of members of the class for which the principal committee has been established. Each member of a principal committee shall hold office until the first meeting of the Council held after the annual general meeting next following the appointment of such member. The Council shall appoint a member of each principal committee as Chairperson and shall fix a quorum for each such committee. If the Chairperson of a principal committee is not present at a meeting of the committee, the members present shall elect one of their number to be Chairperson of that meeting.
- 38. Subject to the direction and control of the Council every principal committee appointed by the Council shall be empowered to deal with all matters concerning members of the Chamber of the class in respect of which the committee was appointed and with all matters arising within the mining industry which affect their interests and to that end may exercise all such powers and do all such acts and things in the name and on behalf of the Chamber as may be done by the Chamber by virtue of paragraphs (a), (b), (c), (d), (e) and (n) of Article 3; and, without prejudice to such general powers and such further powers that may be delegated to it by the Council, a principal committee shall have power:
 - a. to appoint representatives on any bargaining or statutory council in which any
 member of the class for which the committee has been established or the
 Chamber acting on behalf of any or all of such members, is concerned; and
 - b. to appoint sub-committees to act in an advisory and/or specialist capacity, and any other standing committees, ad-hoc committees, or ad-hoc working parties which such principal committee may in its discretion deem necessary, and to regulate the number of such committees or working parties, the nature of the business to be conducted by each of them and their composition, to establish procedural rules and guidelines to be followed by them, and for the purposes of any such appointment, to authorize the co-option of the services of any person.

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Transitional provisions

39. (Deleted)

General provisions applicable to committees

- 40. Every principal committee shall each meet at least once every three months on such dates and at such times as shall be decided by the committee concerned. All matters on which a decision has to be taken at any meeting of any such committee (including the election of Chairperson where necessary) shall be decided by the majority of members present voting by a show of hands.
- 41. The Chairperson of a meeting of a principal committee shall have a deliberative vote but not a casting vote.
- 42. Subject to the provisions of Article 44 any principal committee of the Chamber may make such regulations as it thinks appropriate as to the summoning and holding of its meetings and the transaction of business thereat; provided that the Chairperson of such committee may convene a special meeting of such committee at any time. No business may be transacted at any meeting of any such committee unless a quorum is present. Each such committee may also at any time co-opt the services of the representative or the alternate representative of any ordinary member to such extent and for such purposes as the committee concerned may decide. Such a representative or alternate representative may attend by invitation any meeting of the committee by which such representative or alternate representative was co-opted and may take part in discussion but may not vote.
- 43. Any member of any principal committee shall have the power at any time to appoint, by notice in writing to the Chief Executive, any person to act as alternate member in such member's place at any meeting of the committee concerned at which such member shall not be present and to act on such member's behalf for the purpose of signing any resolution contemplated in Article 47. Any alternate member so appointed shall, whilst so acting in the place of a member of any principal committee, hold office as a member of the committee concerned. The appointment of any alternate member by the Chairperson of any principal committee shall not entitle the person so appointed to act as Chairperson at any meeting of the committee concerned and the Chairperson of such meeting shall be elected in accordance with Article 37. If a member who appointed an alternate member ceases to be a member of the committee concerned or gives notice in writing to the Chief Executive of the withdrawal of the appointment of such alternate member, the appointment of such alternate member shall cease.
- 44. At least three days' notice in writing of each meeting of a principal committee or such shorter period of notice as the Chairperson of the committee concerned, or the committee itself shall decide, shall be given to the members thereof by the Chief Executive, provided that such shorter period of notice, if given, shall not be less than is reasonably necessary to permit the members to attend the meeting concerned.
- 45. The Council shall have power to appoint at any time a member of the Council or a representative of an ordinary member in the appropriate class, as the case may be, to

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fill a casual vacancy in a principal committee or as an additional member of a principal committee. Any person so appointed shall hold office as a member of the committee concerned until the first meeting of the Council held after the annual general meeting next following such person's appointment.

- 46. The Chairperson of any meeting of a principal committee shall be responsible for the conduct of the meeting and shall, subject to the provisions of these Articles, determine the procedure to be followed at the meeting.
- 47. A resolution in writing signed by members of a principal committee and being not fewer in number than are sufficient to form a quorum shall be as valid as if it had been passed at a meeting of the committee concerned duly called and constituted. Such resolution may consist of several documents in like form each signed by one or more members of the committee concerned or may consist of an electronic communication containing the resolution sent to a member's e-mail address and with that member's electronic response of approval having been received by the Chamber.
- 48. A member of a principal committee shall be entitled to resign at any time from membership of the committee concerned upon written notice to the Chief Executive.
- 49. A member of a principal committee shall cease to hold office as a member of the committee concerned:
 - a. upon resignation;
 - b. upon ceasing to hold the qualification necessary in terms of these Articles for appointment to the committee concerned; or
 - c. upon being absent without leave of absence duly granted by the relevant committee concerned from three consecutive meetings of the committee concerned.

Annual general meetings

- 50. The annual general meeting of the Chamber shall be held in each calendar year before the first day of December, on such day and at such time and place as the Council shall decide. The Chief Executive shall give at least thirty days' notice, in writing, of such meeting to each member.
- 51. At each annual general meeting the Chairperson shall review the activities of the Chamber and refer to any other matters which the Chairperson considers to be relevant to the occasion and the Council shall submit an audited statement of income and expenditure for the past financial year, an audited balance sheet as at the date to which such statement is made up, and the report of the Chamber's auditors thereon.
- 52. At least fourteen days before the date for which each annual general meeting is originally called, the Chief Executive shall send to each member true copies of the audited statement of income and expenditure, the audited balance sheet and the report of the Chamber's auditor or auditors thereon, which are to be submitted to the meeting in terms of Article 51.

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Special general meetings

53. The Council may convene a special general meeting of the Chamber, at any time, for the consideration of special business and shall do so within thirty days of the date on which a request, in writing, by the representatives of at least seven ordinary members, that a special general meeting be convened, is lodged with the Chief Executive. Subject to the provisions of Articles 89 and 90, the Chief Executive shall give to each member at least seven days' notice, in writing, of each special general meeting or such shorter period of notice as the Council may decide; provided such shorter period of notice, if given, shall not be less than is reasonably necessary to permit the representatives of members to attend the meeting concerned.

General provisions applicable to general meetings

- 54. Each ordinary member shall be represented at general meetings of the Chamber by the representative of such member or, in the absence of such representative, by the alternate representative of such member, duly appointed in terms of these Articles.
- 55. An honorary member may be present, in person, at general meetings of the Chamber.
- 56. The representative or, in the absence of such representative, the alternate representative of any ordinary member, and any honorary member shall be entitled to take part in the discussions at all general meetings of the Chamber. If the representative of an ordinary member is present at any general meeting, the alternate representative of that member may also be present and may take part in the discussions, but shall not vote at the meeting on behalf of the member concerned. An alternate representative of an ordinary member, while acting in the place of the representative of that member, shall exercise all the duties, powers and functions of such representative.
- 57. Any person who has been invited by the Council to be present and take part in the discussion at any general meeting, may do so, but shall have no right of voting.
- 58. The President shall take the Chair at all general meetings of the Chamber. If the President is not present at any general meeting, the representatives of ordinary members present and entitled to vote shall elect one or other of the Vice-Presidents to be Chairperson of that meeting. If neither the President nor a Vice-President is present at a general meeting, the representatives of ordinary members present and entitled to vote shall elect one of their number to be Chairperson of the meeting. The Chairperson of a general meeting shall be responsible for the conduct of the meeting.
- 59. The representatives of such number of ordinary members as is equal to the quorum requirement for meetings of the Council as contemplated in article 26 shall form a quorum at any general meeting of the Chamber. If a quorum is not present ten minutes after the time for which any such meeting is called, the meeting shall stand adjourned until the same day in the next week at the same time and place, or if such day is a public holiday, until the day following, and the representatives then present shall constitute a quorum and may transact the business for which the meeting was originally called.

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- 60. If any ordinary member, having been given notice, in writing, by the Chief Executive of the amount of any subscription due by such member and the date on which such subscription is payable, has failed to pay the amount concerned within six months of that date and the subscription is still outstanding on the date for which any general meeting of the Chamber is originally called, the representative of that member shall not be entitled to be present at or take part in the proceedings of the meeting or any adjournment thereof nor to vote thereat; provided that the provisions of this Article shall not apply to any representative of any ordinary member who has failed to pay the amount of any such subscription by reason of the fact that a request, lodged in terms of Article 72, that the basis on which such subscription has been calculated or the amount of such subscription be reviewed, has not yet been considered and disposed of by the Chamber in general meeting.
- 61. If any member has been excluded from the Chamber by resolution of the Council in terms of Articles 14, 15, 16 or 17, neither the member concerned nor any representative of that member shall be entitled to be present at or to take part in the proceedings of any general meeting of the Chamber or any adjournment thereof or, in the case of an ordinary member, to vote thereat, except for the purposes of the review of such member's exclusion in terms of Article 19. 62. The representative or, in the absence of such representative, the alternate representative of each ordinary member present at a general meeting shall be entitled on a show of hands, to one vote on behalf of the member concerned. On a ballot other than a ballot on a lockout referred to in Article 67, the representative or, in the absence of such representative, the alternate representative of each ordinary member present at a general meeting shall be entitled, on behalf of the member concerned, to one vote in respect of each one hundred rand (R100) or part thereof paid by such member by way of subscription in respect of the immediately preceding financial year, provided that such representative or, in the absence of such representative, such alternate representative shall be entitled to at least one vote.
- 62. An honorary member shall not be entitled to vote any general meeting of the Chamber.
- 63. All matters on which a decision has to be taken at any general meeting (including the election of Chairperson, where necessary, the election of the President and the Vice-Presidents, and the election of members of the Council) shall be decided on a show of hands, unless a ballot is required to be taken by virtue of this or any other Article, and, unless a ballot is so required to be taken, a declaration by the Chairperson that a resolution has or has not been carried, on a show of hands, shall be final.

At any general meeting, the Chairperson or the representatives of seven ordinary members present and entitled to vote may demand a ballot on any matter, on which a decision has to be taken either before or on a declaration of the result of a show of hands, except on the matter of the election of a Chairperson or of the appointment of scrutineers or of the adjournment of the meeting. If a ballot is so demanded, it shall be taken at once or at such other time during the meeting as the Chairperson shall decide.

SM Exe A ballot which is required to be taken by virtue of this or any other Article, shall be conducted in accordance with and shall be governed by the following provisions:

- a. two scrutineers shall be appointed by the Chairperson to supervise the taking of the ballot at the meeting;
- b. the representative of each ordinary member present at the meeting shall be given, in the presence of the scrutineers, one ballot paper which such representative shall thereupon complete, fold and deposit in a container provided for the purpose;
- c. a ballot paper shall not be endorsed or marked in any away apart from any endorsement required to show the number of votes to which a representative is entitled and the mark or marks required to be made by a representative in recording such representative's vote or votes. Papers bearing any other endorsements or marks shall be regarded as spoiled and shall not be counted;
- d. on completion of the taking of the ballot the result of the voting thereat shall be ascertained by the scrutineers and communicated to the Chairperson, by whom the outcome of the ballot shall be declared to the meeting;
- e. in computing the majority on a ballot, regard shall be had to the number of votes to which the representative of each ordinary member present at the meeting is entitled;
- f. for the purposes of ascertaining the representatives who are entitled to vote, on a ballot, at any general meeting and the votes to which they are or any of them is entitled, the scrutineers shall have a right of access to the register of members and to the books of account and other records of the Chamber;
- g. for the purposes of enabling the scrutineers to ascertain the result of the voting at any ballot and to communicate such result to the Chairperson, the Chairperson may adjourn the meeting and shall fix a place, date and time for such adjourned meeting, in which case the outcome of the ballot shall be declared at such adjourned meeting;
- h. the result of a ballot shall be deemed to be the decision of the meeting at which the ballot was required to be taken on the matter concerned;
- i. a demand for a ballot shall not prevent the continuance of the meeting for the transaction of any business, other than the matter on which the ballot was demanded;
- j. the decision of the Chairperson on any matter arising in connection with the taking of a ballot shall be final.
- 64. At the instance and on the direction of the Chairperson of any general meeting of the Chamber, any question which, in the opinion of the Chairperson, directly affects one class of ordinary members shall be dealt with, at the meeting, by the representatives present of the ordinary members within the class affected and entitled to vote and, for such purpose, the Chairperson shall confine the proceedings on the question concerned at the meeting to the representatives of that class; and all the provisions of these Articles shall apply, mutatis mutandis, for the purpose of ascertaining the decision of such class on that question.
- 65. Members wishing to bring business before the Chamber at any annual general meeting shall lodge notice in writing, with the Chief Executive of intention to move the discussion of such business, at least fourteen days before the date of the meeting at which such business is proposed to be brought forward. The only business which

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- shall be dealt with at a special general meeting shall be the business for the consideration of which the meeting was convened.
- 66. The Chairperson of a general meeting, may, with the consent of the meeting, adjourn the same from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

Ballots on lock-outs

- 67. A ballot shall be taken on a proposal by any ordinary member that the Chamber should call a lock-out as defined in the Labour Relations Act, No. 66 of 1995, or any law in substitution thereof. Such ballot shall be a ballot of those ordinary members of the Chamber in respect of whom it is intended to call the lock-out. Should the President, or in the absence of the President, one of the Vice-Presidents, decide that the proposal shall be considered at a general meeting of the Chamber, the ballot thereon shall be conducted in accordance with the provisions of Article 63; provided that the representative or, in the absence of such representative, the alternate representative of each such ordinary member present and entitled to vote shall have only one vote and the proposal shall be deemed to have been carried if a majority of all the members concerned have voted in favour of it.
- 68. In the event that it is decided that a proposal referred to in Article 67 should not be considered at a general meeting, the following procedure shall apply:
 - a. the Chief Executive shall forthwith submit the proposal to the Council, which shall determine which members or class or classes of members are directly affected by the proposal. Voting in the ballot shall be confined to such members or class or classes of members;
 - b. after the Council has determined who shall participate in the ballot the Chief Executive shall give written notice of the ballot to the members concerned in good standing;
 - c. such notice shall be given at least three days before the ballot is to be conducted or within such shorter period as the Council may decide; provided that such shorter period of notice shall not be less than is reasonably necessary to permit the members concerned to vote in the ballot. The notice shall specify the date, place and time for voting in the ballot;
 - d. a ballot paper shall be sent with each notice and each ordinary member concerned shall have one vote;
 - e. before voting in the ballot commences, the Chief Executive shall appoint two scrutineers to supervise the taking of the ballot and to ascertain the result thereof;
 - f. a ballot paper shall not be marked in any way apart from the mark or marks required to be made by a member in recording its vote. Papers bearing any other marks shall be regarded as spoiled and shall not be counted;
 - g. voting shall take place by a representative of a member, such representative's alternate or another person authorized by the member depositing the marked and folded ballot paper in a container provided for this purpose;

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- h. upon the expiry of the time fixed for voting in the ballot the scrutineers shall ascertain the result thereof and inform the Chief Executive who shall make it known to all ordinary members;
- i. the proposal shall be deemed to have been carried if the majority of all the members concerned have voted in favour of it.
- 69. Notwithstanding anything to the contrary contained in these Articles, a member shall not be disciplined or have its membership terminated for failure or refusal to participate in a lock-out if:
 - a. no ballot was held about the lock-out; or
 - b. a ballot was held but a majority of the members who voted did not vote in favour of the lock-out.

Chief executive

70. There shall be a Chief Executive of the Chamber who shall be appointed by the Council on such terms and conditions as the Council shall decide; provided that such appointment shall at all times be subject to the condition that it may be terminated at any time by the Council or the Chief Executive on giving not less than one month's notice, in writing, of the Council's or the Chief Executive's intention to do so or may be terminated summarily by the Council on any ground which at common law justifies summary dismissal.

Upon termination by the Council of the appointment of the Chief Executive, the Chief Executive may lodge with the Council, within fourteen days of the date of notification of such termination, a request, in writing, that the decision of the Council be reviewed by the Chamber in general meeting at a special general meeting convened for that purpose and the appointment of the Chief Executive shall not be terminated if the meeting then decides accordingly. Unless it is so decided that the appointment of the Chief Executive shall not be terminated, the appointment of the Chief Executive shall be terminated at the conclusion of the meeting. If a written request to review the termination of the Chief Executive's appointment is not received by the Council within fourteen days of the date of the notification of such termination, the appointment of the Chief Executive shall thereupon be terminated.

Subject to the direction and control of the Council, it shall be the duty of the Chief Executive:

- a. to keep or cause to be kept the register of members for which provision is made in Article 21;
- b. to keep or cause to be kept the records and accounts for which provision is made in Article 75;
- c. to keep or cause to be kept the minutes and records for which provision is made in Article 82;
- d. to compile annually or at such other interval as the Council may decide, a report on the activities of the Chamber, for the information of its members; and
- e. to perform such other duties and functions as may be entrusted to the Chief Executive by these Articles or by the Council in accordance with the terms and conditions of the Chief Executive's appointment.

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Subscriptions

- 71. The aggregate subscriptions payable for each financial year by each class of members established in terms of Article 8 shall be determined by the Council from time to time. Such aggregate subscriptions shall be allocated amongst the members of each particular class by the principal committee established in terms of Article 37 to deal with matters concerning each class or in the absence of such a committee, by the Council. The subscriptions payable by ordinary members in respect of each financial year shall be paid in advance or in arrear at such time or times or in such amount or amounts as the Council in its discretion may decide. An ordinary member admitted after the commencement of a financial year shall pay as a subscription for such year such amount, not exceeding the subscription that would have been payable by such member for the whole year, as the Council may decide.
- 72. Within thirty days of the date of any notice, in writing, from the Chief Executive giving the amount of any subscription due by any ordinary member and the date on which such subscription is payable, the ordinary member concerned may lodge with the Chief Executive a request, in writing, that the basis on which such subscription has been calculated and/or the amount of such subscription be reviewed by the Chamber, in general meeting. Such a request, if lodged within the period prescribed by this Article but not otherwise, shall be considered at the next annual general meeting of the Chamber or, if the Council so decides, at a special general meeting of the Chamber convened for the purpose; and the meeting shall then either confirm or determine anew the basis on which the subscription concerned shall be fixed and/or the amount of the subscription which the ordinary member concerned shall be required to pay, as the case may be. Any decision taken by the Chamber, in general meeting, in terms of this Article, shall be final in respect of the subscription which is the subject of such decision.
- 73. No subscription shall be payable by honorary members.

Financial year, funds and accounts

- 74. The financial year of the Chamber shall be the period from 1 January to 31 December.
- 75. A record shall be kept of the subscriptions, if any, due by each member of the Chamber and the periods to which such subscriptions relate as also the subscriptions paid by each such member and the periods to which such payments relate. Proper accounts shall be kept of all moneys received and expended by the Chamber, of all the matters in respect of which such receipts and expenditure take place and of the assets, credits and balances of the Chamber.
- 76. All moneys received by the Chamber, from time to time, shall be banked in the name of the Chamber, within seven ordinary business days of receipt, with such bank as the Council shall, from time to time, appoint.
- 77. All cheques and other negotiable instruments drawn in the name of the Chamber shall be signed by one or more employees of the Chamber duly appointed for the

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- purpose either by the Council or by such employee or employees of the Chamber as the Council shall decide.
- 78. All expenditure incurred by or on behalf of the Chamber shall be duly authorized by the Council or a principal committee as the case may be, acting in terms of the powers conferred upon such committee by these Articles, or by the Chief Executive or such other employee of the Chamber, acting in terms of such authority as shall have been conferred upon the Chief Executive or such other employee by any of such committees.
- 79. Any profits or gains which may accrue to the Chamber shall not be distributed to any person, but shall be employed solely for the purpose of investment or for the carrying out of the Chamber's objects.
- 80. The Chamber's accounts shall be audited annually and reported upon by the auditor or auditors appointed in terms of Article 81.

Auditors

81. An auditor or auditors shall be appointed to the Chamber at each annual general meeting, when the remuneration for the past year's audit shall also be fixed; provided that, if so authorized by resolution of the meeting, such remuneration may be fixed by the Council. The auditor or auditors appointed at each annual general meeting shall hold office until the next annual general meeting, when such auditor or auditors shall retire, but shall be eligible for re-appointment. Casual vacancies in the office of auditor shall be filled by the Council and any person so appointed shall hold office until the next annual general meeting, when such person shall retire, but shall be eligible for re-appointment.

Minutes and records

82. Minutes shall be kept of proceedings of general meetings of the Chamber and of the meetings of the Council and the principal committees of the Chamber, as also records of the correspondence and transactions of the Chamber.

Proceedings

83. All legal or other proceedings by or against the Chamber shall be instituted, conducted or defended in its name.

Property

84. All movable property belonging to or acquired by the Chamber shall vest in the Chamber and all immovable property belonging to or acquired by the Chamber shall be registered in its name.

Signature of documents

85. All powers of attorney, bonds, deeds and other similar instruments shall be signed and executed on behalf of the Chamber by such member or members of the Council

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Notices

- 86. Any notice, written notification or document required by these Articles to be given or sent to any member shall be deemed to have been given or sent if it has been delivered, by hand, at such member's registered address, has been sent through the post addressed to such member at the member's registered address or has been electronically sent to such member's e-mail address and written (including electronic) proof of receipt has been provided to the Chamber. The date on which any such notice, written notification or document is so delivered, is so posted or is so electronically sent shall be deemed to be the date on which it was given or sent.
- 87. The notice convening any general meeting of the Chamber shall state the date, time and place of the meeting and the general nature of the business to be transacted; provided that, in the case of a notice convening a special general meeting at which any amendment or alteration of or any addition to these Articles is to be considered, the notice shall be accompanied by a copy of the proposed amendment, alteration or addition.

Indemnity

88. The office-bearers and employees of the Chamber shall be indemnified by the Chamber against all costs, losses and expenses they may incur or become liable to by reason of any contract entered into or act or deed done by them in their capacity as such or in any way in the discharge of their duties.

Alteration of articles

89. These Articles shall not be amended, altered or added to except by resolution of a majority of not less than two-thirds of the representatives of ordinary members present and entitled to vote at a special general meeting of the Chamber called for that purpose, of which at least fourteen days' notice, in writing, has been given by the Chief Executive to each member.

Upon any such alteration, amendment or addition being made in terms of this Article, the same shall be deemed to be incorporated in and form part of these Articles, in the same manner in all respects as though originally inserted herein, and shall be binding upon all members of the Chamber without any further act of assent thereto, subject, however, to the provisions of the Labour Relations Act, No. 66 of 1995, or any law in substitution thereof.

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Winding up

- 90. Subject to the provisions of the Labour Relations Act, No. 66 of 1995, or any law in substitution thereof and any order of the Labour Court, the Chamber shall be wound up if, at a special general meeting of the Chamber of which at least thirty days' notice, in writing, has been given by the Chief Executive to each member and at which voting has taken place by ballot, a resolution to wind up the Chamber has been passed by a majority of two-thirds of the representatives of ordinary members present and entitled to vote. Upon the passing of such a resolution, the liquidator or liquidators shall, subject to any order of the Labour Court, realize the assets of the Chamber, in such manner as deemed fit, liquidate the debts and liabilities of the Chamber and distribute any surplus assets to
 - a. another entity approved by the Commissioner for the South African Revenue Service in terms of section 30B of the Income Tax Act;
 - b. a public benefit organisation approved in terms of section 30 of the Income Tax Act;
 - c. an institution, board or body which is exempt from tax under section 10(1)(cA)(i) of the Income Tax Act; or
 - d. the government of the Republic of South Africa in the national, provincial or local sphere.

Compliance with Income Tax Act

- 91. In compliance with section 30B(2)(b) of the Income Tax Act, Act No. 58 of 1962,
 - a. substantially the whole of the Chamber's funding must be derived from its annual or other long term members;
 - b. the Council must submit any amendment of this constitution to the Commissioner for the South African Revenue Service within 30 days of such amendment having been approved by the Registrar of Labour Relations, as contemplated in the Labour Relations Act, Act No. 66 of 1995;
 - c. the Chamber must comply with any reporting requirements determined by the Commissioner for the South African Revenue Service from time to time; and
 - d. the Chamber may not knowingly become a party to, or knowingly permit itself to be used as part of, an impermissible avoidance arrangement as contemplated in Part IIA of Chapter III, or a transaction, operation or scheme contemplated in section 103(5), of the Income Tax Act.

AvA/com/Chamber Constitution as approved on 17 July 2015

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CHAMBER OF MINES OF SOUT

Putting South Africa First



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5 Hollard Street Johannesburg 2001 PO Box 61809 Marshalltown 2107

Telephone: (011) 498-7100 Telefax: (011) 834 1884 Web: http://www.chamberofmines.org.za E-mail: info@chamberofmines.org.za

FOR IMMEDIATE RELEASE TO ALL MEDIA

14 MAY 2015

MEDIA STATEMENT

The Chamber of Mines and its members are fully committed to the growth and transformation of the South African mining industry. Despite turbulent global conditions, the South African mining industry (specifically Chamber members), has made significant progress on all elements of the Mining Charter – including meeting and exceeding the ownership target. The Chamber and its members are committed to building the mining industry and helping to achieve the strategic objectives of the National Development Plan.

The MIGDETT Principals were called at late notice to a meeting at the DMR in Pretoria on 14 May 2015, to consider, inter alia, the DMR's Mining Charter audit process, the viability challenges facing large parts of the mining sector and the relevant potential job losses and the Project Phakisa process.

At the last MIGDETT meeting held on 31 March 2015, the Minister announced that the parties had agreed to jointly approach the courts for a declaratory order to clear up differences of interpretation on the ownership element of the Mining Charter. In the interim the parties also agreed not to release the DMR's ownership data pending the outcome of the declaratory order process. The Chamber itself committed not to release its ownership data, compiled by independent credible external companies, to remain faithful to the agreed declaratory order process. The legal teams of both the DMR and Chamber have been meeting to progress the declaratory order process.

At the urgent MIGDETT Principals meeting on 14 May 2015 the DMR and stakeholders has insisted on releasing the findings of their DMR Mining Charter report, including the ownership section. This is contrary to the agreement reached in the last MIGDETT meeting on the non-release of ownership data. The results presented by the DMR show both simple and employment weighted averages. The DMR has emphasized Mining Charter definitional interpretations, such as the meaningful economic participation of historically disadvantaged South Africans,



which undermine the measurement of the progress made. The Chamber and its members do not agree with this DMR interpretation, which suggests that only 20% (on a weighted basis) of mining right holders have met the definition in terms of meaningful economic participation.

Nevertheless, on the basis of the DMR releasing its report – we have no option but to make sure that the correct facts, based on our interpretation are on the table. Based on independently completed research covering 85% of the value of the mining sector, (work completed by Rand Merchant Bank, and audit firm SizweGobodoNtsaluba with the Chamber), the mining sector has achieved a weighted ownership target of 38.5%, which significantly exceeds the 26% targeted level and demonstrated meaningful economic participation by HDSAs.

We note the differences in the DMR report which seeks to cast the industry as not having met its obligations. The DMR states that 90% of the companies achieved the 26% target on an employment weighted basis with an average of 32.5% HDSA ownership. However, the DMR in its own interpretation of meaningful economic participation is now of the view that mining companies have to not only do narrow based empowerment transactions, but have to also include community and employee ownership schemes, which they say on a weighted basis that only 20% of the transactions comply. The Chamber does not share this interpretation and is firmly of the view that 100% of Chamber members have achieved the 26% ownership target. These interpretational differences is the reason why a declaratory order process is necessary (and was agreed between the stakeholders) in order to provide certainty on the matter. This in addition to the continuing consequences limitation.

On the challenges facing the mining sector the stakeholders briefly discussed the viability risks facing the gold, platinum and coal sectors, and the potential job losses in these sectors. The stakeholders discussed the matter and agreed that all legal processes should be followed by companies. The Chamber did not agree to any MIGDETT task team regarding job losses. The Chamber urges all stakeholders to play their role in managing the viability crisis, to reduce cost pressures and to manage the viability challenges the sector is facing.

The Chamber states unequivocally that it is unhappy with the rushed MIGDETT process on the DMR's Mining Charter Progress report. The Chamber has not been given the opportunity to properly interrogate the DMR's Progress Report and has not even been given a copy of the report. The MIGDETT process has been rushed and does not adequately cover the key principles of fairness, transparency and effective stakeholder engagement, which are the traditional hallmarks of the MIGDETT

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process. What the Chamber has seen is a truncated presentation – and this was also not shared with the Chamber in electronic or hard copy format

It is important to highlight that the Chamber will continue to engage government on all issues that are inhibiting the growth and transformation of the mining sector. However, for the government to be shifting the goal posts mid-stream and for stakeholders to continue to incorrectly accuse the industry of non-compliance is both damaging to trust and investment in the mining sector.

The Chamber will be holding a media conference at 11h00, Johannesburg Country Club, Auckland Park on 15 May 2015.

ENDS

Issued by: The Chamber of Mines of South Africa

For enquiries contact Zingaphi Matanzima on 082 766 3940





CHAMBER OF MINES OF SOUTH AFRICA

Putting South Africa First

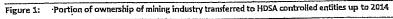


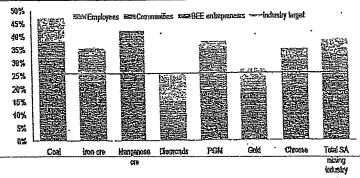
CHAMBER OF MINES CALCULATES BROAD BASED HDSA OWNERSHIP OF 38% and MEANINGFUL ECONOMIC VALUE TRANSFER OF >R159 BN

The Chamber of Mines (Chamber) and its members, release findings of a comprehensive report which demonstrates the meaningful economic participation of HDSAs in the South African mining industry as per the ownership element of the Mining Charter. It is an aggregation of company information based on DMR submissions as at 31 December 2014. Given the significance of this milestone which sets the 26% HDSA ownership target, the Chamber has engaged the services of industry experts SizweNtsalubaGobodo (SNG) auditing firm and Rand Merchant Bank (RMB) corporate finance. The analysis represents the majority of the Chamber membership and also captures a significant portion of the South African mining industry (80% – 90% based on BEE transactions, value and volumes).

Although it is a calculation at end 2014, the analysis has captured the ownership compliance in relation to asset level mining rights' compliance over the last 12 years. The results below demonstrate that the industry has met and exceeded the ownership target of 26% HDSA by 2014 and has transferred significant value to HDSAs despite the significant challenges posed by the 2008 World Financial Crisis and the subsequent bear market for commodities. In addition, meaningful economic participation of HDSAs has occurred with a broad based identifiable beneficiaries and cash flowing to HDSA beneficiaries. This demonstrates the industry's commitment to transformation and the spirit of the Mining Charter. The highlights are:

- Since the commencement of the process of transformation in the mining industry, meaningful economic empowerment participation by HDSA has been 38% on average, based on the Chamber of Mines collation. This is above the Mining Charter 26% HDSA ownership target by 2014.
- The various sectors of the South African mining industry have similarly all met or exceeded the HDSA ownership targets -- PGM at 38.0%, Gold at 27.3%, Coal at 47.2%, Diamonds at 26.0%, Iron Ore at 35.7%, Manganese Ore at 42.2% and Chrome at 35.1%.
- The composition of identifiable HDSA beneficiaries in the industry that has benefited through ownership, both directly and indirectly, is 63% BEE entrepreneurs (46 BEE companies), 22% communities (6.9 million HDSAs) and 15% employees (210 thousand HDSAs).
- The DMR's interpretation of the Charter is that the definition of meaningful economic participation has to include all three beneficiary categories to be compliant (this interpretation is not shared by the Chamber). Based on the company information we have received, we found that the proportion of companies that have all three categories present, i.e. BEE entrepreneurs, communities and ESOPs in their HDSA empowerment structures represent a minimum of 41% of the SA Mining Industry.

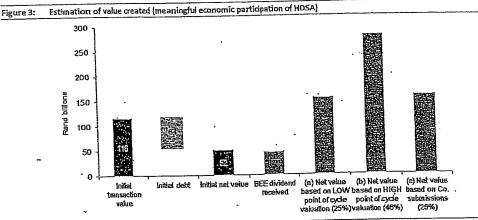




Source: SNG and Chamber of Mines analysis

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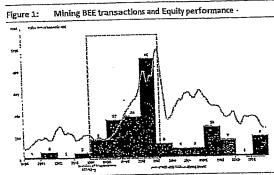
- Over the 12 year period, dividends of a minimum of R47 billion were paid to HDSA beneficiaries, representing 19.6% of the total 'company' dividends paid over the period. This is in line with the staged HDSA ownership target from 15% by 2009 to 26% by 2014 and fairly represents the average over the period. It also does not take into account profit from asset sales over the period and should be considered against a background where many shareholders during the period did not receive dividends.
- BEE transactions with an initial value of R116 billion were implemented over the period. These transactions created net value of around R159 billion (+207%) over the same period. The net value (after deducting debt from the asset values) created for HDSA controlled entities represented 26% of the value (EBITDA multiple basis) of the entire industry at December 2014.
- However, based on a through-the-cycle low and high valuation of assets, the net value created represents between R155bn (+200%) and R282bn (+444%) or 25% to 46% of the entire industry value (EBITDA multiple basis), respectively.

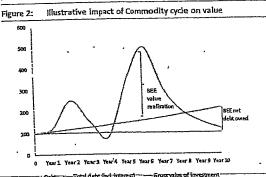


Source: SNG, RMB and Chamber of Mines analysis (Netvalue = Total asset value -- debt autstanding + dividends; (a) and (b) valuation based on EBITDA multiple calculations)

These results have been achieved by the industry, despite the fact that measurement is occurring at a low point in the commodities cycle. Key lessons learnt include:

- Market volatility has impacted value creation. Underlying funding structures depended on rising commodity prices to result in value creation for beneficiaries.
- Lock-in provisions have prevented beneficiaries from unlocking value created during the peak of the cycle. Lack of diversification is an inherent risk in BEE transactions.
- Facilitation important in ensuring sustainable transaction e.g. vendor funding, free shares, minimum guaranteed cash flows. Implementing BEE transactions at the height of the commodities cycle resulted in unsustainable high debt levels.





Source: RMB and Dealmakers online

Source: RMB

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Summarised HD	SA ownership results
The South African Mining Industry	The industry has achieved BEE ownership of 37.7% (22.8% BEE entrepreneurs, 10.8% communities and 4.2% ESOPs) weighted based on value of the assets. The ownership structure has benefited 60% BEE entrepreneurs, 29% communities and 11% ESOPs, and an estimated 7 million individuals. In terms of volumes weighting (Production and revenue), the industry has achieved BEE ownership level of 38.8% (24.3% BEE entrepreneurs, 9.1% communities and 5.4% ESOPs). The ownership has benefited 63% BEE entrepreneurs, 22% communities and 15% ESOPs. The industry has created net value of between R 155 320 million and R 282 018 million representing a return of between 200% and 444%. In addition, most of the sectors have not only met but also exceeded the 26% minimum compliance requirement.
PGM .	The PGM sector has achieved BEE ownership of 39.5% (19.5% BEE entrepreneurs, 18.0% communities and 2.0% ESOPs) weighted based on value. The ownership structure has benefited 49% BEE entrepreneurs, 46% communities and 5% ESOPs, and an estimated 2.774 493 individuals. In terms of volumes weighted, the industry has achieved a BEE ownership of 38.0% (19.8% BEE entrepreneurs, 15.5% communities and 2.6% ESOPs). The ownership structure has benefited 52% BEE entrepreneurs, 41% communities and 7% ESOPs. The PGM sector has a total net value of between R 43 442 million and R 65 987 million representing a change of between 109% and 212%.
Gold .	The Gold sector has achieved BEE ownership of 28.8% (18.6% BEE entrepreneurs, 0.9% communities and 9.2% ESOPs) weighted based on value. The ownership structure has benefited 65% BEE entrepreneurs, 3% communities and 32% ESOPs, and an estimated 135 109 individuals. In terms of volumes weighted, the industry has achieved a BEE ownership of 27.3% (18.3% BEE entrepreneurs, 1.6% communities and 7.5% ESOPs). The ownership structure has benefited 67% BEE entrepreneurs, 6% communities and 27% ESOPs. The Gold sector has a net value of between R 7 182 million and R 32 267 million representing a change of between -31% and 209%.
Coal	The Coal sector has achieved BEE ownership of 43.9% (32.0% BEE entrepreneurs, 5.3% communities and 6.3% ESOPs) weighted based on value. The ownership structure has benefited 74% BEE entrepreneurs, 12% communities and 14% ESOPs, and an estimated 1753 087 individuals. In terms of volumes weighted, the industry has achieved a BEE ownership of 47.2% (32.0% BEE entrepreneurs, 6.2% communities and 9.0% ESOPs). The ownership structure has benefited 68% BEE entrepreneurs, 13% communities and 19% ESOPs. The Coal sector has a net value of between R24 000 million and R 49 512 million representing a change of between 189% and 497%.
Diamonds	The Diamond sector has achieved BEE ownership of 26.0% (4.4% BEE entrepreneurs, 11.6% communities and 10.0% ESOPs) weighted based on value. The ownership structure has benefited 17% BEE entrepreneurs, 45% communities and 38% ESOPs, and an estimated 114 653 individuals. In terms of volume weighted, the industry has achieved a BEE ownership of 26.0% (5.1% BEE entrepreneurs, 10.2% communities and 10.7% ESOPs). The ownership structure has benefited 20% BEE entrepreneurs, 39% communities and 41% ESOPs. The Diamond sector has a net value of between R 616 million and R 5 290 million representing a change of between -56% and 282%.
Iron ore	The Iron Ore sector has achieved BEE ownership of 38.2% (24.0% BEE entrepreneurs, 12.0% communities and 2.2% ESOPs) weighted based on value. The ownership structure has benefited 63% BEE entrepreneurs, 31% communities and 6% ESOPs, and an estimated 1 482 163 individuals. In terms of volume weighted, the industry has achieved a BEE ownership of 35.7% (22.9% BEE entrepreneurs, 10.3% communities and 2.5% ESOPs). The ownership structure has benefited 64% BEE entrepreneurs, 29% communities and 7% ESOPs. The Iron Ore sector has a net value of between R 53 220 million and R 115 330 million representing a change of between 433% and 1054%.
Manganese ore	The Manganese Ore sector has achieved BEE ownership of 50.1% (33.3% BEE Entrepreneurs, 16.3% Communities and 0.0% ESOPs) weighted based on value. The ownership structure has benefited 67% BEE entrepreneurs, 33% communities and 0% ESOPs, and an estimated 411 512 individuals. In terms of volume weighted, the industry has achieved a BEE ownership of 42.2% (31.2% BEE entrepreneurs, 11.0% communities and 0.0% ESOPs). The ownership structure has benefited 74% BEE entrepreneurs, 26% communities and 0% ESOPs. The Manganese Ore sector has a net value of between R -436 million and R 8 389 million representing a change of between 100% and 100%.
Chrome	The Chrome sector has achieved BEE ownership of 28.1% (15.9% BEE entrepreneurs, 7.0% communities and 5.2% ESOPs) weighted based on value. The ownership structure has benefited 57% BEE entrepreneurs, 25% communities and 18% ESOPs and an estimated 454 594 individuals. In terms of volume weighted, the industry has achieved a BEE ownership of 35.1% (20.3% BEE entrepreneurs, 10.6% communities and 4.2% ESOPs). The ownership structure has benefited 58% BEE entrepreneurs, 30% communities and 12% ESOPs. The Chrome sector has a net value of between R 1 824 million and R 5 242 million representing a change of between 204% and 774%.

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	Per fite Mining Charter Scorecard		DMR published as (!) Comparison to (!) % of submissin	DMM published assessment Chamber assessment () Comparison to target () Comparison to target (1) % of submissions that has mot target (1) % of submissions	Chamber ossessment (i) Comparison to target (ii) % of submissions that	Chamber ossessment 3) Compartson to target 3(1) % of submissions that has met target	Broad allgament 19111'DMR. (Yes/No)
Tiement (Storecard welrbitta)	tlerDescription	Target	Unwelghfed	Weighted	Welghted	Assassment	
Ownership (Y/N)	Min HDSA ownership % Percenings of companies neticving 26% Percenings of companies neticving 26% recembly of months of companies with BBH, community received.	26% 100% (not agreed)	(l) 30.6% (u) 79% (li) 6.3%	(I) 32.5% (II) 90% (III) 20%	(f) 38% ³ (u) 100% (il) 41%	Achieved well	No - signioficant differeaces in definitional intepretation
·Housing and living conditions	se BSOP. 18 Percentuge reduction of occupancy rate towards 2014 target	100%		0	(1) - (11) 73%	Good progress mude	No ,
	Percentuge conversion of hustels into family units	100%	1	45 tz (II)	(I) (II) 63,4%	Wark to be dans	No
Procurement and enterprise development (15%)	Capital goods (5%)	40%	(I) 39.6%	(I) 82.1%	(t) 72% (tl)	Achieved wall	Yes (on weighted data)
	Services (5%) % of companies metaling the inrest	70%	(J) 33.2%	(1) 64.9%	(1) 63% —— (11)	Good progress made	Yes (on welghied data)
•	Consumable goods (2%) % of companies meeting the target	20%	%09 (II)	(i) 85.2%	(J) 72% (U) —	Achieved well	Yes (on welghied data)
	Anaual spend on procurement from MNCs (3%) % of companies meeting the target	0.5% of procument	(I) 3,3%	(1) 14.9%	(I) 20%	Work to be done	Yes (on weighted data)
Employment equity (16%)	Top Managument (Board) (3%)	40%			(1) 50,4%	Achloved well	
	Senior Management (Axco) (4%)	40%	ı		(1) 41,9%	Achleved	1
	Middle Manegemeni (3%)	40%	"Mining Indust	"Mining Indusiry exceeded 40% larget"	%6'05 (I)	Achleved well	Yes - but DMR still critical of white males dominating at certain selection of Industry
	Junior Management (1%)	40%	ſ		(1) 54%	Achieved well	
	Core skills (5%)	40%	1		(1) 75,5%	Achleyed wall	ı
Human rospurca development (25%)	nt HRD expenditure as % of tolal annual payroll % of companies schieving the target	5%	(1) 38.1%	(I) %6.32 (II)	(1) 5.5% (11) 100%	Achieved well	No
Mine community development (15%)	ent Implement approved community projects % of companies meeting inrgei	Up to date · (I) —— Implementation (II) 36%	· (l) —	- (1)	(1) 70,6% (1)	Work to be done	Yes - ilming issues to be addrassed
Sustainable development and growth (29%)	d Implementation of approved BMPs (12%) % of companies meeting larget	100%	(J) 44.5%	(I) 48,6%	(1) (1) (11)	Good progress made	Να
	Implementation of the tripartite action plan on health and sucesty (27%) we of commonies meeting the target	%001	(I) 2.0%	(I) 1.6%	(I) 86,2% . (II) — ,	Achleyad well	No - DMR wants occupational health elements to be improved
	Percentage of samples in SA facilities (5%) % of companies meeling the target	%00T	(I) 65.5%	(1) 84,2%	(I) 84,6% (U) —	Achieyed	Ye

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Source; Chamber of intext, Department of Milatel il Geoures Nete 1; Weighling based on DNM peoployment ligues Note 2; Weighling based on Chamber umployment figures, strept for ownschip witiel it based on relumes and miseral anius Note 3; Dated on Independent Chamber Ownership Collation report

BANKARA CHAMBER OF MINES OF SOUTH AFRICA

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IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case no: 44661/15

In the matter between:

The Chamber of Mines of South Africa

and

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Minister of Mineral Resources

SOUTP ASSICA CAUTENG DIVISION, PRETORIA

PREVATE SAG/PRIVATISAK X67 APPRETORIA OD 1

2015 - 06 - 04

E. TIGER

GRIFFIER VAN DIE HOË HOF VAN

SUID AFRIKA GAUTENG AFDELING, PRETORIA

First Respondent

Director-General, Department of Mineral Resources

Second Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the Chamber of Mines of South Africa intends to make application to the above Honourable Court for an order in the following terms:

- 1 Declaring that:
- once the first respondent or his delegate is satisfied in terms of section 23(1)(h) of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) that the grant of the mining right applied for will further the objects referred to in sections 2(d) and (f) of the MPRDA and will be in accordance with The Broad-based Socio-economic Empowerment Charter for the South African Mining Industry (Original Charter)

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published in *Proclamation GNR 1639 Government Gazette 26661* of 13 August 2004 and developed by the first respondent in terms of section 100(2)(a) of the MPRDA or will be in accordance with the *Amendment of the Broad-based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry* published in Government Notice 838, *Government Gazette* 33573 dated 20 September 2010 (2010 Charter) and grants such right, the holder thereof is not thereafter legally obliged to restore the percentage ownership (howsoever measured, *inter alia* wholly or partially by attributable units of South African production controlled) by historically disadvantaged persons (as defined in section 1 of the MPRDA) (HDPs) or historically disadvantaged South Africans as defined in the Original Charter and in the 2010 Charter) (HDSAs) to the 26% target referred to in the Original Charter and in the 2010 Charter where such percentage falls below 26%;

once the first respondent or his delegate converts an old order mining right in terms of item 7(3) of Schedule II to the MPRDA and the holder of such converted right complies with the undertaking provided in terms of item 7(2)(k) the holder of such converted mining right is not legally obliged to restore the percentage ownership (howsoever measured, *interalia* wholly or partially by attributable units of South African production controlled) by HDPs or HDSAs to the 26% target referred to in the Original Charter and in the 2010 Charter where thereafter such percentage falls below 26%;

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- 1.3 a failure by a holder of a mining right or converted mining right to meet the requirements of the Original Charter or of the 2010 Charter, and in particular a failure to maintain (should the court find that there is an obligation to do so) a 26% HDP or HDSA ownership level, does not constitute a contravention of "this Act" as defined in section 1 of the MPRDA, and in particular does not constitute a contravention for the purposes of sections 47(1)(a) or 93(1)(a), and further does not constitute an offence for the purposes of section 98(a)(viii);
- 1.4 neither the Original Charter nor the 2010 Charter requires the holder of a mining right or converted mining right to continue to enter into further empowerment transactions to address losses in HDP or HDSA ownership once the 26% ownership level has been achieved;
- neither the Original Charter nor the 2010 Charter requires that HDP or HDSA ownership must include HDP or HDSA entrepreneurs, workers (including employee share option schemes), and/or communities;
- 1.6 paragraph 2.1 of the 2010 Charter is *ultra vires* the powers of the first respondent and void in that it purports retrospectively to deprive holders of mining rights or converted mining rights of the benefit of:
 - 1.6.1 the capacity for offsets which would entail credits/offsets to allow for flexibility;

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- 1.6.2 the continuing consequences of empowerment transactions concluded by them after the coming into force of the MPRDA, which benefits were conferred by the Original Charter;
- 1.6.3 the right, where a company has achieved HDSA participation in excess of any set target in a particular operation, to utilise such excess to offset any shortfall in its other operations;
- 1.6.4 the entitlement to offset the full value of the level of beneficiation achieved by the Company against its HDSA ownership commitments; and
- 1.6.5 all forms of ownership and participation by HDPs and HDSAs, and not only those which fall within the definition of "meaningful economic participation" as defined in the 2010 Charter, being taken into account;
- 1.7 paragraph 3 of the 2010 Charter is *ultra vires* the powers of the first respondent and void in that it purports to render holders of mining rights or converted mining rights who fail to comply with the Original Charter or with the 2010 Charter and the MPRDA in breach of the MPRDA and subject to the provisions of section 47 thereof read in conjunction with sections 98 and 99.
- Directing that any respondent that opposes the relief sought in this application shall pay the costs thereof.
- 3 Granting further or alternative relief.

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AND THAT the accompanying affidavit of AMBROSE VUSUMUZI RICHARD MABENA, together with the annexures thereto, will be used in support of this application.

TAKE NOTICE FURTHER that the Applicant has appointed Norton Rose Fulbright South Africa Inc care of Mothle Jooma Sabdia Inc at the address set out here below at which it will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that if the Respondent intends opposing the relief sought in this application, it is required to —

- (a) Notify the Applicant's attorneys in writing of its intention to oppose this application within 5 days of the date of this notice of motion; and
- (b) Deliver its answering affidavit, if any, no later than 15 days after delivering its notice of intention to oppose.

AND FURTHER that the Respondent is to appoint in such notification an address referred to in Rule 6(5)(b) at which it will accept notice and service of all documents on these proceedings.

If no such notice of intention to oppose is given, the application will be made on 21 July 2015 at 10:00 or soon thereafter as counsel may be heard.

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Dated at Sandton on this the 4th day of June 2015

Narton Rose Fulbright South Africa inc Attorneys for Applicant

15 Alice Lane, Sandton 2196

PO Box 784903, Sandton 2146.

Docex 215, Johannesburg

Tel: 011 685 8500

Fax: 011 301 3200

Ref: CMI251/Mr AP Vos/Ms D Naidoo

Email: andre.vos@nortonrosefulbright.com denushka.naidoo@nortonrosefulbright.com

c/o Mothle Jooma Sabdia Inc

Ground Floor, Duncan Manor Cnr Jan Shoba & Brooks Streets

Brooklyn, Pretoria

P O Box 11147, Hatfield, 0028

DX 235, Pretoria

Tel: 012 362 3137

Fax: 012 362 4139

Ref: Mr Ebrahim Jooma

Email: ebrahimJ@mis-inc.co.za

To:

The Registrar of the above Honourable Court, Pretoria

And to:

The Minister of Mineral Resources

Department of Mineral Resources

First Respondent

2nd Floor, Block 2B

Travenna Campus

71 Meintjies Street

Cnr Meintjies and Frances Baard (formerly Schoeman) Streets

Sunnyside, Pretoria

c/o The State Attorney

8th Floor, Manaka Heights

167 Andries Street

Pretoria

Tel: 012 309 1500

Fax: 012 328 2663

[SERVICE PER SHERIFF]

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And to:

Director-General: Department of Mineral Resources
Second Respondent
2nd Floor, Block 2B
Travenna Campus
71 Meintjies Street
Cnr Meintjies and Frances Baard (formerly Schoeman) Streets
Sunnyside, Pretoria
clo The State Attorney
8th Floor, Manaka Heights
167 Andries Street
Pretoria
Tel: 012 309 1500
Fax: 012 328 2663

[SERVICE PER SHERIFF]

GOITSEONA PILANE ATTORNEYS INC. + 27 83 445 3437

Our ref: Mr G Pilane / MMR0001

Your ref: CM1251/Mr A Vos/Ms K Kalan/ Ms.

J Pinto

Date: 12 July 2017

NORTON ROSE FULBRIGHT SOUTH AFRICA Inc.

By email: andre.vos@nortonrosefulbright.com

Dear Andre

Re: URGENT INTERDICT APPLICATION: CHAMBER OF MINES OF SOUTH AFRICA // THE MINISTER OF MINERAL RESOURCES - CASE NO. 43621/17

- 1. We refer to the discussion on 12 July 2017 between ourselves, the legal team for the Chamber of Mines of South Africa and Rabie J.
- 2. We have received instructions from our client to provide the revised undertaking to the Chamber of Mines of South Africa as follows, that:
 - 2.1. the Minister, including his delegates and other officials and functionaries of the Department of Mineral Resources, undertake not to implement or apply the provisions of the 2017 Charter in any way, directly or indirectly, pending judgment in the urgent interdict application;
 - 2.2. in the event of any breach by the Minister of the above undertaking, the applicant can set the urgent interdict application down for hearing on 48 (forty-eight) hours notice to the Minister; and
 - 2.3. the dates for the filing of papers and the hearing of the urgent interdict application are to be determined by the Deputy Judge President. In this regard, the Minister consents to the dates for the filing of papers and heads of argument as already proposed by the parties, and to the hearing date(s) as already proposed by the parties, which dates are subject to allocation by the Deputy Judge President.
- 3. Our client's rights remain strictly reserved.

Kind regards

G D Pilane

72, 6th Avenue, Florida, Johannesburg, South Africa

Director: Goitse Pilane

From: Engela Groenewald [mailto:EGroenewald@judiciary.org.za]

Sent: 10 August 2017 10:03 AM
To: Vos, André; goitse@pilaneinc.co.za

Subject: The chamber of mines/ minster of miniral resources- case no 43621/17

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TO: NORTON ROSE FULBRIGHT Attention: CMI260/ Mr AP Vos

Dear Sirs

I refer to your letter dated 2 August 2017.

I grant the extension of the time periods for filing of affidavits and heads of argument as set out in Annexure C and paragraph 5 of your letter dated 2 August 2017.

Regards

A P LEDWABA
DEPUTY JUDGE PRESIDENT
HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

10/08/2017 11:32 /



2 August 2017

By Email: KRamokoka@judiciary.org.za

By Fax: 086 663 6107

The Honourable Justice AP Ledwaba Office of the Deputy Judge President High Court of South Africa Gauteng Division, Pretoria Cnr Madiba & Paul Kruger Streets Pretoria

A NORTON ROSE FULBRIGHT

Norton Rose Fulbright South Africa Inc 15 Alice Lane Sandton 2196 South Africa

Tel +27 11 685 8500 Fax +27 11 301 3200

Direct fax +27 11 301 3363 PO Box 784903 Sandton 2146 Docex 215 Johannesburg nortonrosefulbright.com

Direct line +27 11 685 8865

Email

andre.vos@nortonrosefulbright.com

Your reference

Our reference CMI260/Mr AP Vos

Dear Judge

The Chamber of Mines of South Africa / Minister of Mineral Resources, case no 43621/17

- As you know, we act for the Chamber of Mines of South Africa, the applicant in the above matter. We copy Mr Goitse Pilane of Goitseona Pilane Attorneys Inc, the respondent's attorney in the matter, in this letter.
- The purpose of this letter is to request you to amend certain time periods in your directives of 27 July 2017 in order to cater for developments which occurred after the directives had been issued.
- 3 The relevant background and developments are as follows:
- On 26 July 2017 you telephoned the writer to convey your intention to issue directives substantially in accordance with the agreement between the parties as to the time limits in the matter for the filing of further papers and the hearing of the matter on 14 and 15 September 2017. After our telephone discussion we immediately wrote to Mr Pilane by email. A copy of my email is annexed marked "A".
- 4.1 On 27 July 2017 you issued your letter containing the directives in accordance with what you conveyed to the writer telephonically on the previous day. A copy of your directives letter is annexed marked "B" for ease of reference.
- 4.2 Unfortunately your 27 July letter did not reach us at the time. It appears from the first page of your letter that the reason for this was that although the letter was addressed to our firm, using our general fax number, the email address used was only that of Mr Pilane, not also that of the writer. (Whether or not your letter reached our firm through our fax number, is not clear, but the writer can confirm that he never received your letter at the time or at all by fax.)
- 4.3 On 31 July 2017 the respondent's attorney wrote to the writer in which letter Mr Pilane explained why the respondent failed to file his answering affidavit by the due date, 31 July 2017. A copy of Mr Pilane's letter is annexed marked "C".
- 4.4 On the same day the writer replied by letter, sent via email, in which we conveyed our instructions, amongst others, to contest the respondent's failure to file his answering affidavit. The respondent had offered since 6 July 2017 to file his answering affidavit by 31 July 2017 and had known since 26 July 2017 that he had to do so. Further, we recorded our instructions that the applicant required

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Coroutant MS Ash JNR Caldow PM Chronis MR Gloson RJ Howel AP Williams



2 August 2017

NORTON ROSE FULBRIGHT

the respondent to apply to court, on affidavit, for condonation for the late filing of his answering affidavit, which was due by 31 July 2017, but which the respondent now proposes to file by 7 August 2017. A copy of this letter is annexed marked "D".

- 4.5 Mr Pilane emailed the writer last night, to which he kindly attached a copy of your 27 July letter, which was the first time that your letter came to our attention. A copy of Mr Pilane's email (without the attachment) is annexed marked "E".
- 4.6 This morning the writer responded by email to Mr Pilane's email of yesterday evening. A copy of the writer's reply email is annexed (without its annex) marked "F".
- To sum up, the parties agreed that the answering affidavit was due on 31 July 2017. The parties have since agreed that the dates for the filing of the answering affidavit, replying affidavit and heads of argument of both parties be amended to 7 August, 18 August and 1 September 2017 respectively.
- For the avoidance of any doubt, by the applicant agreeing to the 7 August date for purposes of your directives the applicant does not condone the late filing of the answering affidavit, but requires the respondent to apply for condonation, simultaneously with delivery of the answering affidavit.
- In the circumstances, we should be very grateful if you could amend your directives to the extent necessary, to accord with the revised dates, as set out in the schedule annexed to Mr Pilane's letter of 31 July 2017 (annex "C").
- We thank you in anticipation. Should you have any queries, please let us know. If you require the legal representatives of the parties to meet with you, we, on behalf of the applicant, will make ourselves available.

Yours faithfully

André Vos Director

Norton Rose Fulbright South Africa Inc.

Copy to: Mr Goitse Pilane, Director, Goitseona Pilane Attorneys

Attorney for respondent goitse@pilaneinc.co.za



Roos, Carien

From:

Vos, André

Sent:

26 July 2017 03:59 PM

To:

goitse@pilaneinc.co.za

Cc:

Dale, Michael; Kalyan, Kirthi; Yuda, Amina

Subject:

Our ref: CMI260 - Chamber of Mines / Minister of Mineral Resources: interdict application

case no: 43621/17 [NRFSA-JHB.FID3701686]

Dear Mr Pilane

The Deputy Judge President, Mr Justice AP Ledwaba, telephoned me a few minutes ago, in response to our 21 July 2017 letter.

The judge said that he will by Friday, 28 July 2017 issue a letter with directives on the hearing of the interdict application, stipulating dates as far as possible in accordance with what the parties agreed in the 21 July letter, but adjusted as necessary to accommodate a hearing on 14 and 15 September 2017. He said his directives will allocate the dates agreed between the parties, save that the following dates will have to be adjusted:

Replying affidavit to be filed by 14 August 2017;

- Applicant's heads of argument to be filed by 25 August 2017;
- Respondent's heads of argument to be filed by 1 September 2017;

Accordingly, the respondent's answering affidavit remains due, as agreed, by 31 July 2017.

Kind regards

André Vos | Director
Norton Rose Fulbright South Africa Inc
15 Alice Lane, Sandton 2196, South Africa
Tel +27 11 685 8865 | Mob +27 83 604 0598 | Fax +27 11 301 3363
andre.vos@nortonrosefulbright.com

NORTON ROSE FULBRIGHT

Law around the world

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Norton Rose Fulbright extends its African footprint

SM Yae



OFFICE OF THE DEPUTY JUDGE PRESIDENT HIGH COURT OF SOUTH AFRICA, GAUTENG PROVINCIAL DIVISION, PRETORIA

Gauteng High Court Building, Cnr. Madiba (Vermeulen) & Paul Kruger Str, Room 7.15, Seventh Floor Tel. (012) 315 7572 – Direct Fax. 086 663 6107 – E-mail: <u>KRamokoka@iudiciary.cr...za</u>

27 July 2017

TO:

NORTON ROSE FULBRIGHT ATTORNEYS

Fax No:

011 301 3200

EMAIL:

goitse@pilaneinc.co.za

Your Ref:

CMI260/Mr AP Vos

Our Ref:

43621/17/DJP LEDWABA/KF

Dear Sirs

RE: SPECIAL MOTION: THE CHAMBER OF MINES OF SOUTH AFRICA / MINISTER OF MINERAL RESOURCES, CASE NUMBER: 43621/17

- 1. I refer to the above matter and contents of your letter dated 21 July 2017.
- 2. The matter is hereby set down for hearing as a special motion on 14 & 15 SEPTEMBER 2017. The notice of set down should be served and filed together with a copy of this letter attached to it within 5 (five) days after receipt hereof, failing which the allocated date(s) of hearing may lapse and may be allocated to other litigants who applied for a special motion date. The notice of set down must be filed at the office of the Deputy Judge President, 7th Floor, Room 7.15, High Court Building.

SM

3. I direct that:

- 3.1 The Applicant should file its replying affidavit not later than 14 August 2017.
- 3.2 The Applicant should also file its Heads of Argument not later than 25 August 2017.
- 3.3 The Respondents should file its Heads of Argument not later than 1 September 2017.
- For proper administration and allocation of special motions, the applicant should deliver the court file duly indexed and paginated to my office on 25 August 2017.
- 5. The parties should also send via email (KRamokoka@judiciary.org.za) to my office a joint Practice Note 11 September 2017 containing the following:
 - Names of the parties and the case number
 - Names and telephone numbers of all counsel in the Motion
 - Nature of the motion
 - Issues to be determined in the application
 - Relief sought at the hearing by the party on whose behalf counsel is appearing
 - An estimate of the probable duration of the application
 - Number of pages in the application and whether or not all
 papers need to be read and if not, which portion need not be read
- 6. The aforesaid directives must be strictly adhered to, failing which the matter may be allocated to a Judge for hearing, however depending on why there was non-compliance.



- 7. All queries and/or communications concerning the hearing of this matter must be directed to my office in writing. All documents and the court file must be filed at the office of the Deputy Judge President on the 7th floor, High Court.
- 8. It remains the duty of the **all legal representatives** to ensure that the court file has been properly indexed and paginated in time and that all documents have been filed accordingly as directed at the office of the Deputy Judge President, High Court Pretoria, 7th Floor, Room 7.15.
- Should it, for any reasons, transpire that this matter will not proceed on the given date, you are directed to inform the Office of the Deputy Judge President, immediately.
- 10. None availability of counsel representing any of the parties shall simply not be allowed as a reason for the matter not to proceed on the date of hearing arranged with my office.
- 11. Should the above directive not be complied with, the matter may not be allocated to a Judge and the allocated dates may be utilized for other deserving cases.

Regards

A P LEDWABAN DEPUTY JUDGE PRESIDENT HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA



Roos, Carien

From:

Goitse Pilane <goitse@pilaneinc.co.za>

Sent:

31 July 2017 09:17 AM

To:

Vos, André

Subject:

URGENT INTERDICT APPLICATION: CHAMBER OF MINES OF SA v THE MINISTER OF MINERAL

RESOURCES - CASE NO. 43621/17

Attachments:

Letter to NRF 31072017.pdf; Revised Timelines 31072017.pdf

Dear Andre

Hope the email finds you well.

Lattach letter dated 31 July 2017nfor your urgent consideration and reply.

Kind regards . .

Lese Pilane | Director
Goitseona Pilane Attorneys Inc.
No. 72, 6th Avenue, Florida, Johannesburg, South Africa
Mob +27 83 445 3437
goitse@pilaneinc.co.za

GOITSEONA PILANE ATTORNEYS INC. + 27 83 445 3437

Our ref: Mr G Pilane / MMR0001

Your ref: CM1260/Mr A Vos/Ms K Kalan/ Ms.

J Pinto

Date: 31 July 2017

NORTON ROSE FULBRIGHT SOUTH AFRICA Inc.

By email: andre.vos@nortonrosefulbright.com

Dear Andre

Re: URGENT INTERDICT APPLICATION: CHAMBER OF MINES OF SOUTH AFRICA // THE MINISTER OF MINERAL RESOURCES - CASE NO. 43621/17

- 1. Matter above has reference.
- 2. In terms of Rule 12(a) of the Rules Regulating the Conduct of the Proceedings of the several Proceedings of the Provincial and Local Divisions of the High Court of South Africa ("the Rules") the parties requested the Deputy Judge President to dispense with the forms and service provided for in these Rules and agreed that the papers may be served between the parties as set out in the attached schedule marked Annexure "A". In this regard, the Respondent's Answering Affidavit is due not later than close of business today 31 July 2017.
- 3. Our client is unfortunately outside the country in the Central African Republic on official engagement and we have been advised that our client will only return to South Africa on Friday 4 August 2017. Given the nature of the application, the legal issues challenged and its impact on the mining industry in settling we are of the view that we will require a meeting with our client to consider each aspect of our client's answering affidavit in detail. This we can only do when our client is back and we will practically require at least 48 hours for this purpose.
- 4. In regard, our client will realistically only file its answering affidavit on 7 August 2017 and we will request the DJP to condone the filing of the papers as set out on the revised dates in terms of Annexure "A".
- Our client's rights remain strictly reserved.

Kind regards

G D Pilane

72, 6th Avenue, Florida, Johannesburg, South Africa

Director: Goitse Pilane

SM!

The Chamber of Mines of South Africa v The Minister of Mineral Resources Urgent Interdict Application to be heard 14 and 15 September 2017 Case No. 43621/17 The High Court of South Africa, Gauteng Division, Pretoria

		Revised Dates
Respondent's Answering Affidavit	31 July 2017	/ Vigasi Kot.
Applicant's Replying Affidavit	14 August 2017	18 August 2017 /
	25 August 2017	1 September 2017 (simultaneously with the
Applicant's Heads of Argument	לין אמלמיני בין איני	Respondent) 🗸
	1,000	1 Sentember 2017 (simultaneously with the
Respondent's Heads of Argument	1. September 2017	Applicant) V
		11 8, 15 Centember 2017
Hearing of the Application	14 & 15 September 2017	בין א דין



Vos, André

From:

Vos, André

Sent:

31 July 2017 12:53 PM

To:

goitse@pilaneinc.co.za

Subject:

Our ref: CMI260 - Chamber of Mines / Minister [NRFSA-JHB.FID3701686]

Attachments:

CMI260 - Letter to Goitseone Pilane Att - 31.7.17.PDF

Dear Mr Pilane

Attached is a letter for your attention.

Kind regards

André Vos | Director
Norton Rose Fulbright South Africa Inc
15 Alice Lane, Sandton 2196, South Africa
Tel +27 11 685 8865 | Mob +27 83 604 0598 | Fax +27 11 301 3363
andre vos@nortonrosefulbright.com

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31 July 2017

By Email: goitse@pilaneinc.co.za

Goitseone Pilane Attorneys Inc

NORTON ROSE FULBRIGHT

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Direct fax +27 11 301 3363 PO Box 784903 Sandton 2146 Docex 215 Johannesburg nortonrosefulbright.com

Direct line +27 11 685 8865

Email andre.vos@nortonrosefulbright.com

Your reference Mr G Pilane / MMR0001 Our reference CMI260/Mr AP Vos

Dear Mr Pilane

Chamber of Mines of South Africa / Minister of Mineral Resources – interdict application, case number 43621/17

- 1 We refer to your letter of this morning.
- We disagree with the content of paragraph 2 of your letter. It will be the court, not the DJP, who will need to grant an order in terms of prayer 1 of the notice of motion regarding the dispensing of the forms and service of our client's urgent application. The respondent has, however, agreed that the matter is urgent.
- Your client has offered since 6 July 2017 to file his affidavit today and known since 26 July 2017 that he had to do so. There is no indication in your letter when, exactly, your client left the Republic or why he could not depose to an answering affidavit before his departure. You did not advise us, when your client was leaving the Republic, that he would not be able to depose to an affidavit for filing today.
- In the circumstances, we are instructed that the applicant requires the respondent to apply to court, on affidavit, for condonation. On receipt of a condonation application, to be filed simultaneously with any answering affidavit, our client will consider whether it will oppose the condonation application.
- We note that you have not addressed your letter to the honourable Deputy Judge President. If you intend writing to the DJP, please also provide a copy of this letter to him.
- 6 All the applicant's rights are reserved in full.

Yours faithfully

André Vos

Director

Norton Rose Fulbright South Africa Inc

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Consultant: MS Ash JHR Deloow PM Chiopie MR Gibern RJ Howill AP Williams

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Roos, Carien

From:

Goitse Pilane <goitse@pilaneinc.co.za>

Sent:

1 August 2017 05:55 PM

To: Subject: Vos, André FW: SPECIAL MOTION: THE CHAMBER OF MINES OF SOUTH AFRICA / MINISTER OF MINERAL

RESOURCES, CASE NUMBER: 43621/17

Attachments:

CCE20170801_0001.pdf

Dear Mr Vos

I hope you are well.

I received the attached directive from the office of DJP, I'm not sure if you did. I await your indication on how you would like us to deal with logistical arrangements in preparation for the hearing of the application.

Frier today, the DJP's registrar confirmed telephonically that they have noted our request for the matter to be heard by a full bench will be allocated to hear the application.

I think we must seek clarity and a proper directive from the DJP's office as this is critical for preparation of our bundles for the judges.

Please let me know what your views are.

Kind regards

Goitse Pilane | Director Goitseona Pilane Attorneys Inc. No. 72, 6th Avenue, Florida, Johannesburg, South Africa Mob +27 83 445 3437 goitse@pilaneinc.co.za

Fi : Kgomotso Ramokoka [mailto:KRamokoka@judiciary.org.za]

Sent: 01 August 2017 10:25 AM

To: Goitse Pilane < goitse@pilaneinc.co.za>

Subject: RE: SPECIAL MOTION: THE CHAMBER OF MINES OF SOUTH AFRICA / MINISTER OF MINERAL RESOURCES, CASE

NUMBER: 43621/17

Dear Sir / Madam

Kindly find the attached directive for your attention.

Regards

Kgomotso Ramokoka Secretary to the Deputy Judge President A.P LEDWABA Gauteng High Court, Pretoria 7th Floor, Room 7.16

Tel: (012) 315 7572

Fax to email: 086 663 6107

Email: KRamokoka@judiciary.org.za

SM W

Roos, Carien

From:

Vos, André < Andre. Vos@nortonrosefulbright.com>

Sent:

2 August 2017 12:02 PM

To:

Goitse Pilane

Cc:

Kalyan, Kirthi; Yuda, Amina

Subject:

Our ref: CMI260 - Chamber of Mines / Minister of Mineral Resources : urgent interdict

application case number: 43621/17 [NRFSA-JHB.FID3701686]

Attachments:

CMI260 - Letter to DJP - 2.8.17.DOCX

Dear Mr Pilane

Thank you for your email below. We did not receive the letter from the office the Deputy Judge President of 27 July 2017. Thank you for forwarding the letter. It appears that the reason we did not receive it was that although the letter is addressed to the writer and our firm, the email address used is yours only, not the writer's.

We will write to the DJP to ask him to amend his directives to accord with the revised dates that you proposed on 31 $J_{l'} \sim$ Accordingly, we attach a copy of our letter to him in which we will copy you.

Our client's rights remain reserved in full in regard to your client's failure to deliver his answering affidavit, as dealt with in our letter to you of 31 July 2017.

Kind regards

André Vos | Director Norton Rose Fulbright South Africa Inc 15 Alice Lane, Sandton 2196, South Africa Tel +27 11 685 8865 | Mob +27 83 604 0598 | Fax +27 11 301 3363 andre.vos@nortonrosefulbright.com

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No n Rose Fulbright extends its African footprint

From: Goitse Pilane [mailto:goitse@pilaneinc.co.za]

Sent: 1 August 2017 05:55 PM

To: Vos, André

Subject: FW: SPECIAL MOTION: THE CHAMBER OF MINES OF SOUTH AFRICA / MINISTER OF MINERAL RESOURCES, CASE

NUMBER: 43621/17

Dear Mr Vos

I hope you are well.

I received the attached directive from the office of DJP, I'm not sure if you did. I await your indication on how you would like us to deal with logistical arrangements in preparation for the hearing of the application.

Earlier today, the DJP's registrar confirmed telephonically that they have noted our request for the matter to be heard by a full bench and further that a full bench will be allocated to hear the application.



8 September 2017

By Email: goitse@pilaneinc.co.za

Goitseone Pilane Attorneys Inc

NORTON ROSE FULBRIGHT

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Direct fax +27 11 301 3363 PO Box 784903 Sandton 2146 Docex 215 Johannesburg nortonrosefulbright.com

Direct line +27 11 685 8865

Email

andre.vos@nortonrosefulbright.com

Your reference Mr G Pilane / MMR0001 Our reference CMI260/Mr AP Vos

Dear Mr Pilane

Chamber of Mines of South Africa / Minister of Mineral Resources – interdict application, High Court of South Africa, Gauteng Division, Pretoria, case number 43621/17

We are instructed that our client does not consent to your request as contained in paragraph 4 of your letter of 7 September 2017. All our client's rights remain similarly reserved.

Yours faithfully

André Vo Director

Norton Rose Fulbright South Africa Inc

8 September 2017

By Email: Nndungane@judiciary.org.za

The Honourable Justice D Mlambo Office of the Judge President High Court of South Africa Gauteng Division, Pretoria Cnr Madiba & Paul Kruger Streets Pretoria

A NORTON ROSE FULBRIGHT

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Direct line +27 11 685 8865

Email andre.vos@nortonrosefulbright.com

Your reference Our reference CMI260/Mr AP Vos

Dear Judge

The Chamber of Mines of South Africa / Minister of Mineral Resources, case no 43621/17

- We refer to the letter from the respondent's attorney to you of earlier today and your reply email to the parties inviting them to a meeting with you on Monday, 11 September 2017 at 18:00 or Tuesday, 12 September 2017 at 10:00. We first respond to the letter from Mr Pilane, before we deal with your email.
- The applicant's position remains that it is not prepared to agree to the request for postponement, amongst others, for the following reasons:
- 2.1 The application for an interim interdict is an urgent one. The respondent agrees that the matter is urgent.
- 2.2 The procedural dates, including the hearing dates for the 14 and 15 September 2017, were agreed between the parties. That agreement was not premised on the constitution of a full bench. Further, the request for a full bench by the respondent was always only a request. The applicant's position was and remains that it will not object to the constitution of a full bench to hear the matter, should the Deputy Judge President deem fit to do so, provided that the matter can proceed on the agreed dates.
- 2.3 The DJP considered the respondent's request for a full bench allocation and advised that it would not be possible to appoint a full bench, because a sufficient number of judges was not available on the agreed dates. That was an outcome which was entirely foreseeable.
- The issue of the intervention application of the National Union of Mine Workers, opposed by the applicant, has been resolved in that the NUM has agreed to the applicant's proposal. The proposal appears from the copies of our letter dated 7 September 2017 and the reply email from the NUM's attorney of today, annexed marked "A" and "B" respectively.
- The interdict application does not raise complex or novel questions of law which require the attention of a full bench. The court hearing the interdict application will not make any binding findings on the merits of the parties' opposing contentions as to the legality of the Charter. All that that court will have to determine is whether or not the Chamber has satisfied the requirements for an interim interdict. It is only the court hearing the review application which will have to pronounce definitively

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on the legality of the Charter, which is indeed a matter of great importance affecting the country as a whole. It will be the review application which will raise what the respondent's attorney termed "the relatively complex and novel legal issues". The applicant is therefore prepared to agree to the following:

- 3.1 The respondent agrees to an interim interdict in terms of the notice of motion, that order to be made by agreement on 14 September 2017. The reason why the applicant requires an interim interdict, instead of a mere extension of the existing written undertaking which the respondent had furnished pending the hearing of the interim interdict application is because of the ongoing harm caused by the respondent's conduct. In this regard:
 - (1) The respondent at the Africa Down Under Mining Conference in Perth, Australia in a speech earlier this week, according to the publication *Mining Review Africa*, said, amongst others, the following:
 - "'The new Mining Charter III may be a work in progress and my door remains open to discuss concerns, but we have also had a lot of positive feedback regarding its transformation objectives. However, it remains law and companies will have to comply and the deadline (to increase BEE ownership to 30%) remains as is 12 months from 15 June 2017 states Zwane.'
 - (2) The Applicant's CEO, Mr Baxter, was in the audience at this conference and confirms the foregoing. Mr Baxter said that the respondent in his speech created a false impression that, quoting from an email Mr Baxter sent yesterday, "everything is fine, that the RMC2017 is law and is being implemented", failed to mention this pending interdict application, failed to mention the respondent's written undertaking not to implement Reviewed Mining Charter, 2017 pending judgment in the interdict application, and failed to mention the applicant's separate application to be heard by this court on 9 and 10 November 2017 on the interpretation of the ownership element of the Charter (versions 1 and 2).
 - (3) The respondent, therefore, continues to purport to exercise powers which reside exclusively with Parliament. This threat to the separation of powers posed thereby causes significant and increasing prejudice to the applicant's members and to investor confidence.
- 3.2 The applicant will issue the judicial review application by 30 November 2017.
- 3.3 A full bench is allocated to hear the matter as soon as possible, which will in turn depend on the procedural timetable to be agreed between the parties in regard to answering and replying affidavits, as well as heads of argument, alternatively to be determined by you or the DJP.
- If the respondent is not prepared to agree to the proposal in 3 above, the respondent is invited to bring a substantive application for postponement to be served by midday on 11 September 2017, the applicant to file its answering affidavit by close of business on 12 September 2017 and the respondent to file its replying affidavit by midday on 13 September 2017.
- The applicant's legal representatives are unfortunately not available to attend a meeting with you and the other side on 11 September 2017. This is because applicant's lead counsel has a major commitment that afternoon and evening, applicant's second counsel is in the High Court in Bloemfontein and the writer has overseas clients on an urgent matter.

The applicant's legal representatives are available to have the meeting you propose on 12 September 2017 at 10:00 at your chambers.

ours faithfully

André Vos Director

Norton Rose Fulbright South Africa Inc.

M

NORTON ROSE FULBRIGHT

Copy to:

Mr Goitse Pilane, Director, Goitseona Pilane Attorneys Attorney for respondent goitse@pilaneinc.co.za



By Email: chris@fpinc.co.za

Mr Phukubje Finger Phukubje Inc Attorneys

A NORTON ROSE FULBRIGHT

Norton Rose Fulbright South Africa Inc 15 Alice Lane Sandton 2196 South Africa

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Direct fax +27 11 301 3363 PO Box 784903 Sandton 2146 Docex 215 Johannesburg nortonrosefulbright.com

Direct line +27 11 685 8865

Email andre.vos@nortonrosefulbright.com

Your reference Our reference Mr Phukubje/ CMI260/Mr AP Vos Modisane/NUM/614/16

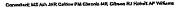
Dear Sirs

Chamber of Mines of South Africa / Minister of Mineral Resources - Interdict Application, High Court of South Africa, Gauteng Division, Pretoria, case number 43621/17

- We refer to your client's belated intervention application, served on 4 September 2017. We repeat the contentions contained in our 16 August 2017 letter (a copy of which Annexure "NUM2" to your client's founding affidavit in its intervention application), none of which your client has addressed in its founding affidavit.
- Your client applies to intervene on one of two bases as second respondent in the main application, alternatively as amicus curiae. However, your client has failed to comply with Rule 16A(2) of the High Court Rules. In terms of this Rule, your client ought to have sought written consent from the Chamber of Mines of South Africa (Chamber), which consent had to be given not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue in which your client suggests it is an interested party was first raised. In this regard:
- 2.1 Your client's application does not identify any constitutional issue.
- 2.2 Any interest) your client may have in the matter (which our client does not admit exists), is on its own version limited to the prospective review application, yet to be instituted. Your client on its own version applied for intervention in the wrong matter.
- 2.3 As pointed out in our 16 August 2017 letter, our client's application was issued on 26 June 2017 and on that day became publically available. Yet, your client brought its intervention application only on 4 September 2017, so that the 20 day period as stipulated by Rule 16A(2) has long since expired. Accordingly, it is not possible for the Chamber to furnish such consent, which you in any event do not seek on behalf of your client.
- The Chamber, however, will not oppose your client's intervention application as amicus curiae, provided that your client:
- 3.1 files its written submissions by 17:00 on Monday, 11 September 2017; and
- 3.2 if admitted by the court, restrict its oral argument at the hearing on 14 and 15 September 2017 to no longer than 45 minutes.

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Nation Rose Fullshipt South Affice Inc. (Reg No 1984/00335721) Directors, SWA Guite (disalines) D Direct (chief executive offices) K Alexia Mi Alexander S Anthony LA Adulet SM Barred II Blose BE Bada of Go Bower FA Bendre DR Reviel JJ Chapped M Charved SE, Chemaly C Contact NG Con MD Dail V David SM Desay AGS Siron L Firm BB Harber AV Hat NC Harber SR Issaes IV Johnse von Renrhard J Jones E Justian CC & Market S, Oppelan ZS, Kithada AP Krister J Kithady-Good SS (Notes), Left (J. Market), And Contact Review Rev





NORTON ROSE FULBRIGHT

- The restriction on oral argument is necessary, because we anticipate that oral argument by counsel for the applicant and respondent respectively may take up most of the allocated two days.
- For the avoidance of any doubt, the Chamber continues to oppose your client's application for intervention in the main application as second respondent. But because of the proposal contained in this letter, our client will not file its answering affidavit in that regard until you have responded to this letter. If your client accepts the proposal, there will be no need for our client to file an answering affidavit.
- 6 We await your urgent response under a full reservation of our client's rights.

Yours faithfully

Andre Voa

Norton Rose Fulbright South Africa Inc

Copy to:

Mr Goitse Pilane, Director, Goitseona Pilane Attorneys

goitse@pilaneinc.co.za Attorneys for respondent

> KW SM

Vos, André

From:

Thuso Modisane <thuso@fpinc.co.za>

Sent

8 September 2017 02:48 PM

To:

Vos, André; Yuda, Amina; Kalyan, Kirthi chris@fpinc.co.za; goitse@pilaneinc.co.za

Cc: Subject:

RE: Intervention Application In re: Chamber of Mines SA v Minister of Mineral

Resources - Interdict Application Pretoria HC - Case Num 43621/17

Good afternoon Mr Vos

I attempted to call you on both your office and mobile numbers without success. Be that as it is;

- Your letter sent to our <u>chris@fpinc.co.za</u> and <u>eugenia@dpinc.co.za</u> on 7th September 2017 refers.
- 2. Our client is agreeable to your client's proposal per paragraph 3 of your letter.
- 3. Kindly note that we couldn't write this communique on a letterhead because of the power outage currently gripping the Johannesburg CBD where our offices are also situated.

Trusting that you find the above in order.

Regards

Mothusi TT Modisane

Associate Attorney

Mobile: 082 521 3546 Tel: 057 352 8227



Finger

Phakubje inc.

10 Ryk Street, Nedbank Building

Suite 106, Welkom

ALSO AT JOHANNESBURG

8? Albertina Sisulu
Comer Von Brandis Streets
The Works@Market Building
4th Floor, Suite 405
Johannesburg, 2000

From: Thuso Modisane [mailto:thuso@fpinc.co.za]

Sent: Friday, 08 September 2017 12:21 PM

To: 'Roos, Carien' < Carien. Roos@nortonrosefulbright.com >

Cc: 'andre.vos@nortonrosefulbright.com' <andre.vos@nortonrosefulbright.com>

Subject: RE: Our ref: CMI260 - CoM / MMR [NRFSA-JHB.FID3701686]

Morning Ms/rs Roos

Received many thanks.

Kindly please note that we will provide you with reply after considering the contents therein.

Regards

821 SW

GOITSEONA PILANE ATTORNEYS INC.

Mobile: +27 83 445 3437

Our Ref: Mr G Pilane/MMR0001

Your ref: CMI260/Mr A Vos/Ms K Kalan/Ms J Pinto

Date: 13 September 2017

NORTON ROSE FULBRIGHT SOUTH AFRICA Inc.

By email to: andre.vos@nortonrosefulbright.com

Dear Mr. Vos

RE: CASE NUMBER 43621/17: HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA – THE MINISTER'S UNDERTAKING

- 1. The Minister gives the following undertaking:
 - 1.1. The Minister, including his delegates and other officials and functionaries of the Department of Mineral Resources, undertakes not to implement or apply the provisions of the 2017 Mining Charter in any way, directly or indirectly, pending the judgement in the review application set down for hearing on 13 and 14 December 2017 under case number 43621/17;
 - 1.2. If the Minister makes any reference in public to the 2017 Mining Charter, the Minister will simultaneously make reference to the undertaking given in paragraph 1.1 above and that the Chamber of Mines of South Africa has brought review proceedings in the High Court of South Africa, Gauteng Division, Pretoria to set aside the 2017 Mining Charter;
- 2. By agreement between the parties the undertaking will be noted by the High Court of South Africa, Gauteng Division, Pretoria on Thursday 14 September 2017.
- 3. The parties will also, by agreement, request that the High Court of South Africa, Gauteng Division, Pretoria reserve costs relating to the urgent interdict application set down for 14 and 15 September 2017 under case number 43621/17.
- 4. The undertaking contained in paragraph 1 above, is given without any concessions made by the Minister or any admission of the merits by the Minister in respect of the Chamber's urgent interdict application and / or the review application.
- 5. The Chamber has agreed to the Minister's request that the review be heard on an expedited basis by a full bench and to that end 13 and 14 December 2017 has been allocated for the hearing of the review.

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GOITSEONA PILANE ATTORNEYS INC.

Mobile: +27 83 445 3437

For ease of reference, we attach a schedule setting out the agreed procedural timetable for the exchange of the papers by the parties (including the National Union of Mine Workers) and the date of the hearing of the review application before a full bench.

Kind Regards

Goitse Pilane

Copied to: Mr Finger Phukubje, Director, Finger Phukubje Attomeys

also copied to: Mr Modisane, Finger Phukubje Attorneys

Attorneys for the Intervening Party



The Chamber of Mines of South Africa v The Minister of Mineral Resources Case No. 43621/17 The High Court of South Africa, Gauteng Division, Pretoria Review Application to be heard 13 and 14 December 2017

1.	Sekvice / Filling / Activity Submission of the record	//mtx.el.Parca 19 September 2017
2.	Filing of the Review Application	17 October 2017
ů,	3. Filing of the Minister's and the National Union of Mine Workers' ("NUM") Answering Affidavit	10 November 2017
4,	Filing of the Chamber's Replying Affidavit	22 November 2017
5,	5. Filing of the Chamber's Heads of Argument	30 November 2017
6.	Filing of the Minister's and NUM's Heads of Argument	5 December 2017
7.	7. Review Application to be heard by a full bench	13 & 14 December 2017



By Email: Nndungane@judiciary.org.za

The Honourable Justice D Mlambo Office of the Judge President High Court of South Africa Gauteng Division, Pretoria Cnr Madiba & Paul Kruger Streets Pretoria

NORTON ROSE FULBRIGHT

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Direct line +27 11 685 8865

andre.vos@nortonrosefulbright.com

Our reference Your reference CMI260/Mr AP Vos

Dear Judge President

The Chamber of Mines of South Africa / Minister of Mineral Resources, case no 43621/17: urgent interdict application

- We refer to the meeting held at your Chambers yesterday. 1
- We confirm that, by agreement between the parties and your direction, the hearing of the judicial 2 review application to be instituted by the Chamber of Mines of South Africa as envisaged in prayer 2 of the notice of motion in the interdict application under case number 43621/17 (Review Application) will be set down for hearing on 13 and 14 December 2017 before a full bench of the High Court.
- The parties have agreed on the following procedural timetable for the institution and further conduct 3 of the Review Application:
- submission of the record 19 September 2017; 3.1
- serving and filing of the Review Application -- 17 October 2017; 3.2
- serving and filing of the Minister's and the National Union of Mine Workers' (NUM) answering 3.3 affidavit - 10 November 2017;
- serving and filing of the applicant's replying affidavit 22 November 2017; 3.4
- serving and filing of the applicant's heads of argument 30 November 2017; 3.5
- serving and filing of the Minister's and NUM's heads of argument 5 December 2017. 3.6
- We wish to express our gratitude for your assistance in this matter.

Yours faithfully

André Vos Director Norton Rose Fulbright South Africa Inc.

CMI250 - Letter to JP - 13.9.17.DOCX

NORTON ROSE FULBRIGHT

Copy to:

Mr Goitse Pilane, Director, Goitseona Pilane Attorneys

Attorney for respondent goitse@pilaneinc.co.za

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2017 Charter provisions which conflict with sections of the Companies Act

1 Definitions

- 1.1 **2017 Charter** means the Reviewed Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 (Reviewed Charter, 2017) published in Government Notice 581, Government Gazette No. 40923 dated 15 June 2017; and
- 1.2 Companies Act means the Companies Act, 2008.
- 2 Analysis of paragraphs of 2017 Charter which contravene sections of the Companies Act
- 2.1 This note identifies those paragraphs of the 2017 Charter which contravene or which, if implemented, will result in contraventions of sections of Companies Act.
- 2.2 Restriction on transferability of shares
 - (1) In terms of paragraph 2.1.1.4 of the 2017 Charter, to "the extent that any Black Person holds shares within one of the categories set out in paragraph 2.1.1.3 above, such Black Person shall ensure that in the event of transferring the shares, the party to whom the shares are transferred must fall within the same category as the transferring Black Person as set out paragraph 2.1.1.3 above. Such that the Black Person shareholding distribution set out in paragraph 2.1.1.3 above shall always be maintained by the Holder."
 - (2) Equality of treatment for shareholders
 - (a) In terms of section 37(1) of the Companies Act, "all of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class." Section 37(1) confirms the common law principle of the doctrine of equality between shareholders.
 - (b) Paragraph 2.1.1.4 of the 2017 Charter contravenes the Companies Act as:
 - it legislatively creates different set of rights for the holders of the same class of shares; and
 - (ii) this restriction on the ability of Black shareholders to dispose of shares is not a contractual arrangement but is legislative regime which removes the rights for a Black shareholder compared to the rights of others shareholders of the same class of shares. This results in the unequal treatment of shareholders of the same class of shares.
 - (3) Oppressive, prejudicial, or unfair treatment of shareholders
 - (a) In terms of section 163 of the Companies Act, a "shareholder or a director of a company may apply to a court for relief if: (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant."
 - (b) Whilst section 163 of the Companies Act relates to oppressive, prejudicial, and unfair acts of the company or other shareholder, paragraph 2.1.1.4 of the 2017 Charter contravenes the Companies Act as it has the impact of creating oppressive, prejudicial, and unfair circumstances for Black shareholders of a Holder:
 - (i) by legislatively restricting Black shareholders only regarding the identity of purchasers. This restriction results in oppressive, prejudicial, and unfair circumstances for Black shareholders of a Holder who have more onerous

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legislative rights relating to disposals of shares to other shareholders of the same class; and

(ii) limiting the capital value in the shares of a Black shareholder compared to other shareholders. The capital value in a share or other asset is impacted by the class of persons able and willing to buy that share. The restriction of Black shareholders to sell, not only to other Black people but then to the same class of Black people is a limitation on the ability for Black shareholders to equally enjoy the capital value of their shares compared to other shareholders.

2.3 Issuing of shares and no dilution of Black shareholders

- (1) In terms of paragraph 2.1.1.5 of the 2017 Charter, the "Holder shall ensure that any reduction of shareholding of existing shareholders through the issue of new shares, shall not reduce the Black Person shareholding distribution as set out in the paragraph 2.1.1.3 above."
- (2) In terms of paragraph 2.1.2.6 of the 2017 Charter, the "required Top Up stipulated in 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."
- (3) In terms of paragraph 2.1.2.7 of the 2017 Charter, the "Black Person shareholding Top Up referred to in 2.1.2.3 and 2.1.2.4 shall be given proportionally to the Holder's existing BEE Partner/s. To the extent that BEE Partner/s has exited the BEE Historical Transaction; or the contract between the Holder and the BEE Partners has lapsed; or the BEE Partners have transferred the shares to a person other than a Black Person, then the Top Up shall be to a BEE Entrepreneur."
- (4) One must also bear in mind that:
 - (a) in terms of paragraph 2.1.1.1 of the 2017 Charter, the "Holder of a new prospecting right must have a minimum of 50% + 1 Black Person shareholding which shareholding shall include voting rights, per prospecting right or in the company which holds the right";
 - (b) in terms of paragraph 2.1.1.2 of the 2017 Charter, the "Holder of a new mining right must have a minimum of 30% Black Person shareholding which shall include economic interest plus a corresponding percentage of voting rights, per right or in the mining company which holds the right"; and
 - (c) the 2017 Charter contemplates the shareholders of the Holder of a prospecting right potentially being diluted when the Holder of the mining right raises capital as part of the conversion from prospecting to mining.
- (5) Issuing shares for adequate consideration
 - (a) In terms of section 40(1) of the Companies Act, "the board of a company may issue authorised shares only: (a) for adequate consideration to the company, as determined by the board; (b) in terms of conversion rights associated with previously issued securities of the company; or (c) as a capitalisation share as contemplated in section 47."
 - (b) In terms of section 40(2) of the Companies Act, before "a company issues any particular shares, the board must determine the consideration for which, and the terms on which, those shares will be issued."
 - (c) In terms of section 44 of the Companies Act, except "to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise the company to provide financial assistance by way of a loan, guarantee, the provision of security or otherwise to any person for the purpose of, or in

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connection with, the subscription of any option, or any securities, issued or to be issued by the company or a related or inter-related company, or for the purchase of any securities of the company or a related or inter-related company, subject to subsections (3) and (4)."

- (d) Paragraph 2.1.1.5, paragraph 2.1.2.6, and paragraph 2.1.2.7 of the 2017 Charter contravene the Companies Act as they each create a legislative regime which effectively obliges the Holder to:
 - (i) issue shares to Black shareholders for nominal value if that Black shareholder is unable to raise the necessary funding, notwithstanding that the board of the Holder is not satisfied that the nominal subscription price constitutes adequate consideration for the purposes of section 40(1) or section 40(2) of the Companies Act; or
 - (ii) provide financial assistance (as defined in the Companies Act) to Black shareholders to subscribe for shares for the consideration lawfully declared adequate by the board of the Holder to the extent that they cannot raise third party financing but without the obligation in the 2017 Charter being subject to compliance with the requirements of section 44 (financial assistance for subscription of securities) or section 45 (loans or other financial assistance to directors) of the Companies Act, including but not limited to satisfying the solvency and liquidity test in the Companies Act.

(6) Equality of treatment for shareholders

- (a) In terms of section 37(1) of the Companies Act, "all of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class." Section 37(1) confirms the common law principle of the doctrine of equality between shareholders.
- (b) Paragraph 2.1.1.5, paragraph 2.1.2.6, and paragraph 2.1.2.7 of the 2017 Charter contravene the Companies Act as they each create a legislative regime which effectively:
 - (i) obliges a shareholder to issue shares to Black shareholders to maintain their effective shareholding; and
 - (ii) so creates a right for Black shareholders in addition to that of other shareholders of the same class.

(7) Pro rata issuing of shares

- (a) In terms of section 39(2) of the Companies Act, if "a private company proposes to issue any shares, other than as contemplated in subsection (1)(b), each shareholder of that private company has a right, before any other person who is not a shareholder of that company, to be offered and, within a reasonable time to subscribe for, a percentage of the shares to be issued equal to the voting power of that shareholder's general voting rights immediately before the offer was made." In terms of section 39(1), section 39 applies to a public company to the extent that the company's Memorandum of Incorporation states as such.
- (b) Paragraph 2.1.1.5, paragraph 2.1.2.6, and paragraph 2.1.2.7 of the 2017 Charter contravenes the Companies Act as it obliges a Holder that is a private company to contravene section 39(2) of the Companies Act and a public company to contravene section 39(1) of the Companies Act by issuing shares pro rata only to Black shareholders only (even if they do not elect or want to subscribe for such shares) and not to all shareholders, as required by section 39(2) and, if applicable, section 39(1).

(8) Repurchase of shares

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- (a) Section 48 (company or subsidiary acquiring company's shares) of the Companies Act sets out various rules regarding a company repurchasing its own shares.
- (b) These rules relating to a share repurchase in section 48 include implementing the repurchase as a scheme of arrangement and complying with section 114 (proposals for scheme of arrangement), section 115 (required approval for transactions contemplated in part), and section 164 (dissenting shareholders appraisal rights) of the Companies Act. In addition, in certain circumstances, a company may not implement such repurchase without an approval from the takeover regulations panel.
- (c) Paragraph 2.1.2.6 of the 2017 Charter contravenes the Companies Act as it:
 - (i) obliges a Holder to effect a repurchase of shares; but
 - do so without complying with section 48 (company or subsidiary acquiring company's shares), section 114 (proposals for scheme of arrangement), section 115 (required approval for transactions contemplated in part), or section 164 (dissenting shareholders appraisal rights) of the Companies Act, including but not limited to applying the solvency and liquidity test and, where applicable, implementing such repurchase as a scheme of arrangement, obtaining the approval of court when required, or complying with any of the other rules relating to share repurchases, affected transactions, or the takeover regulations.

2.4 Payment of a minimum 1% of its annual turnover

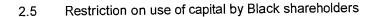
(1) In terms of paragraph 2.1.1.7 of the 2017 Charter, subject "only to the solvency and liquidity requirements as set out in the Companies Act, a Holder of a new mining right must pay a minimum 1% of its annual turnover in any given financial year to the Black Person shareholders, prior to and over and above any distributions to the shareholders of the Holder."

(2) Unauthorised distribution

- (a) In terms of section 1 of the Companies Act, distribution means, amongst other matters, a direct or indirect: "transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one or more holders of any of the shares, or to the holder of a beneficial interest in any such shares, of that company or of another company within the same group of companies, whether..."
- (b) Paragraph 2.1.1.12 and paragraph 2.1.2.8 of the 2017 Charter contravene the Companies Act as they each:
 - (i) requires the Holder to declare a distribution; but
 - (ii) do so without complying with section 46 (distributions must be authorised by the board), save for applying the solvency and liquidity test.

(3) Equality of treatment for shareholders

- (a) In terms of section 37(1) of the Companies Act, "all of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class." Section 37(1) confirms the common law principle of the doctrine of equality between shareholders.
- (b) Paragraph 2.1.7 of the 2017 Charter contravenes the Companies Act as it results in distributions being declared for a select group of shareholders but not to the other shareholders of the same class of shares and so the unequal treatment of shareholders.





(1) In terms of paragraph 2.1.1.8 of the 2017 Charter "subject to the provisions of paragraph 2.1.1.4, the BEE Entrepreneurs shall be allowed to dilute a maximum of 49% shareholding in the Holder, provided that 100% of the proceeds from the dilution are used by the BEE Entrepreneurs to develop another asset."

(2) Equality of treatment for shareholders

- (a) In terms of section 37(1) of the Companies Act, "all of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class." Section 37(1) confirms the common law principle of the doctrine of equality between shareholders.
- (b) Paragraph 2.1.1.8 of the 2017 Charter contravenes the Companies Act as it creates different rights for the holders of the same class of shares. The restriction on the ability of Black shareholders to use the capital proceeds of a sale of shares is not a contractual arrangement but is legislative regime which creates obligations for a shareholder in addition to the obligations of others shareholders of the same class of shares. This results in the unequal treatment of shareholders of the same class of shares.
- (3) Oppressive, prejudicial, or unfair treatment of shareholders
 - (a) In terms of section 163 of the Companies Act, a shareholder or a director of a company may apply to a court for relief if: (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant."
 - (b) Whilst section 163 of the Companies Act relates to oppressive, prejudicial, and unfair acts of the company or other shareholder, paragraph 2.1.1.4 of the 2017 Charter contravenes the Companies Act as it has the impact of creating oppressive, prejudicial, and unfair circumstances for Black shareholders of a Holder by legislatively restricting Black shareholders only regarding the use of such capital. This restriction results in oppressive, prejudicial, and unfair circumstances for Black shareholders of a Holder.

2.6 Structural requirements

- (1) In terms of paragraph 2.1.1.9 of the 2017 Charter, the "shareholding of the Mine Community must be held in a trust created and managed by the Mining Transformation and Development Agency, from a date to be published by the Minister."
- (2) In terms of paragraph 2.1.1.11 of the 2017 Charter, the "30% Black Person shareholding must be held in an entity lies or by person/s which is/are separate from the right Holder."
- (3) In terms of section 37(1) of the Companies Act, "all of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class." Section 37(1) confirms the common law principle of the doctrine of equality between shareholders.
- (4) In terms of section 163 of the Companies Act, a shareholder or a director of a company may apply to a court for relief if: (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant."
- (5) Paragraph 2.1.1.9 and paragraph 2.1.1.11 of the 2017 Charter contravenes the Companies Act as the legislative restriction on the ability for Black shareholders (in particular the Mine Community) only to structure their shareholding and affairs in a manner equal to that of other shareholders:
 - (a) impacts on Black shareholders ability to hold those shares in a manner equal to that of other shareholders of the same class; and

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(b) whilst section 163 of the Companies Act relates to oppressive, prejudicial, and unfair acts of the company or other shareholder, has the impact of creating oppressive, prejudicial, and unfair circumstances for Black shareholders of a Holder.

2.7 Management

- (1) In terms of paragraph 2.1.1.12 of the 2017 Charter, the "Black Person shareholders shall directly and actively control their share of equity interest in the empowering company, including the transportation as well as trading and marketing of the proportionate share of the production."
- (2) In terms of paragraph 2.1.2.8 of the 2017 Charter, a "Holder referred to in 2.1.2.3 to 2.1.2.5 must, within the transitional period of twelve (12) months, 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."
- (3) Juristic nature of a company
 - (a) It is a basic but fundamental principle of the common law that a company is a juristic person with separate juristic personality from its shareholders.
 - (b) Furthermore, in terms of section 19(1) of the Companies Act from "the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company: (a) is a juristic person, which exists continuously until its name is removed from the companies register in accordance with this Act; (b) has all of the legal powers and capacity of an individual, except to the extent that: (i) a juristic person is incapable of exercising any such power, or having any such capacity; or (ii) the company's Memorandum of Incorporation provides otherwise."
 - (c) Paragraph 2.1.1.12 and paragraph 2.1.2.8 of the 2017 Charter contravene the Companies Act in that they each:
 - (i) cut through the separate juristic personality of the Holder from its shareholders; and
 - (ii) seek to provide Black shareholders with the legislative right to control the assets and business of the Holder notwithstanding that the Holder is a separate juristic person to all of its shareholders.

(4) Role of the board

- (a) In terms of section 66(1) of the Companies Act, the "business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.
- (b) Paragraph 2.1.1.12 and paragraph 2.1.2.8 of the 2017 Charter contravene the Companies Act as they each provide a legislative right:
 - (i) for Black shareholders to manage a portion of the business and affairs of a company; and
 - so contravenes the rights and obligations on the board to manage the entire business and affairs of the company.

(5) Equality of treatment for shareholders

(a) In terms of section 37(1) of the Companies Act, "all of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class." Section 37(1) confirms the common law principle of the doctrine of equality between shareholders.

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- (b) Paragraph 2.1.1.12 and paragraph 2.1.2.8 of the 2017 Charter contravene the Companies Act as they each provides a legislative right:
 - (i) for Black shareholders only to manage the business and affairs of a company; and
 - (ii) so create a right for Black shareholders in addition to that of other shareholders of the same class.
- (c) In addition, paragraph 2.1.1.12 and paragraph 2.1.2.8 result in the Black shareholders constituting prescribed officers of the Holder due to the nature of such shareholders controlling a portion of the business of the Holder. This results in a legislative regime which creates obligations and potential liabilities for a shareholder in addition to the obligations and potential liabilities of others shareholders of the same class of shares. This results in the unequal treatment of shareholders of the same class of shares.

2.8 Writing off loan

(1) In terms of paragraph 2.1.1.6 of the 2017 Charter, the "portion of the 30% Black Person equity shareholding referred to in paragraph 2.1.1.3 which has not yet vested shall vest in no more than 10 years and by no less than 3% annually of the total issued share capital of the Holder, proportionate to the respective non-vested shareholding of the employees, Mine Communities and BEE Entrepreneurs. Such vesting shall be paid for from the proceeds of dividends received by the Black Person shareholders, provided that if the total dividends received by any of the Black Person shareholders is not sufficient to discharge the amount required for full vesting, the balance owing in respect thereof, shall be written off by the Holder or vendor of the shares to the Black Person as the case may be."

(2) Unauthorised distribution

- (a) In terms of section 1 of the Companies Act, distribution means, amongst other matters, a direct or indirect: "(c) forgiveness or waiver by a company of a debt or other obligation owed to the company by one or more holders of any of the shares of that company or of another company within the same group of companies."
- (b) In terms of section 37(1) of the Companies Act, "all of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class." Section 37(1) confirms the common law principle of the doctrine of equality between shareholders.
- (c) Paragraph 2.1.1.6 of the 2017 Charter contravenes the Companies Act as it:
 - (i) places a portion of property of the company at the disposal of the Black shareholders constitutes a distribution for the purposes of the Companies Act; but
 - (ii) does so without complying with section 46 (distributions must be authorised by the board), including but not limited to applying the solvency and liquidity test.

(3) Equality of treatment for shareholders

- (a) In terms of section 37(1) of the Companies Act, "all of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class." Section 37(1) confirms the common law principle of the doctrine of equality between shareholders.
- (b) Paragraph 2.1.1.6 of the 2017 Charter contravene the Companies Act as it provides a legislative right:

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- (i) for Black shareholders only to manage the business and affairs of a 274 company; and
- (ii) so creates a right for Black shareholders in addition to that of other shareholders of the same class.
- (c) In addition, paragraph 2.1.1.6 of the 2017 Charter contravenes the Companies Act it results in distributions being declared for a select group of shareholders of the same class of shares and so the unequal treatment of shareholders.

(4) Financial assistance

- (a) In terms of section 45 of the Companies Act, financial assistance includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation.
- (b) In terms of paragraph 2.1.1.6 of the 2017 Charter and to the extent that this write-off does not constitute a distribution, a Holder is effectively obliged to guarantee the outstanding balance of the loan by being obliged to right off the debt.
- (c) Paragraph 2.1.1.6 of the 2017 Charter contravenes the Companies Act (to the extent that this write-off does not constitute a distribution) as it obliges a Holder to provide financial assistance to a shareholder notwithstanding that the Holder has not complied with section 45 of the Companies Act.

2.9 Restriction on transferability of shares and offers to the public

- (1) In terms of paragraph 2.1.1.3 of the 2017 Charter, the "30% Black Person shareholding must be distributed in the following manner: (a) a minimum of 8% of the total issued shares of the Holder shall be issued to ESOPs (or any similar employee scheme structure); (b) a minimum of 8% of the total issued shares of the Holder shall be issued to Mine Communities (in the form of a community trust); and (c) a minimum of 14% of the total issued shares of the Holder shall be issued to BEE Entrepreneurs."
- (2) In terms of paragraph 2.1.1.5 of the 2017 Charter, the "Holder shall ensure that any reduction of shareholding of existing shareholders through the issue of new shares, shall not reduce the Black Person shareholding distribution as set out in the paragraph 2.1.1.3 above."
- (3) In terms of paragraph 2.1.2.6 of the 2017 Charter, the "required Top Up stipulated in 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."
- (4) In terms of paragraph 2.1.2.7 of the 2017 Charter, the "Black Person shareholding Top Up referred to in 2.1.2.3 and 2.1.2.4 shall be given proportionally to the Holder's existing BEE Partner/s. To the extent that BEE Partner/s has exited the BEE Historical Transaction; or the contract between the Holder and the BEE Partners has lapsed; or the BEE Partners have transferred the shares to a person other than a Black Person, then the Top Up shall be to a BEE Entrepreneur."
- (5) In terms of section 8(2)(b) of the Companies Act, "a profit company is: (b) a private company if: (i) it is not a state-owned company; and (ii) its Memorandum of Incorporation: (aa)prohibits it from offering any of its securities to the public; and (bb) restricts the transferability of its securities."
- (6) The majority of mining companies in South Africa are public and listed companies. Paragraph 2.1.1.3 read with paragraph 2.1.1.5, paragraph 2.1.2.6, and paragraph 2.1.2.7 of the 2017 Charter contravenes the Companies Act in relation to public companies as it creates a legislative restriction on the:
 - (a) ability of a public company to make offers to the public; and

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- (b) restricts the transferability of shares in a public company.
- (7) In addition, the creation of a restriction on the transferability of the shares of a public listed company is impractical as the Holder has no ability to control its shareholders and prevent trading of shares on the market.



2017 Charter's contravention of international trade agreements.

The 2017 Charter is unconstitutional as being inconsistent with South Africa's international trade obligations for the following further reasons.

- (1) Section 233 of the Constitution requires that:
 - (a) when interpreting any legislation the courts must prefer any reasonable interpretation which is consistent with international law over any alternative interpretation which is inconsistent with international law,
 - (b) international law is a basis for determining the legality of subordinate legislation.
- (2) The state's obligation in section 7(2) of the Constitution to protect and fulfil the Bill of Rights requires the executive in initiating legislation, and Parliament when enacting legislation, to give effect to the obligations of the state in terms of section 7(2) to promote and fulfil the rights in the Bill of Rights. This includes a duty to consider international law and the obligations undertaken by South Africa under international law; and that the state, having bound itself under international law, must take reasonable measures to implement international law where such is required to protect and fulfil the Bill of Rights.
- (3) The consequences of the above are that international law obligations restrain the exercise of executive power that is inconsistent with them; and that such obligations may give rise to a duty on the state to take reasonable measures to give effect to such obligations. The 2017 Charter violates South Africa's trade obligations as detailed below, since the only manner in which the Minister would be able to exercise his powers would be to violate international law since the exercise of such powers would result in a quantitative restriction on exports of minerals.
- (4) South Africa is a member of the World Trade Organisation (WTO) which provides international measures in regard to export restrictions for member countries by way of *inter alia*:
 - (a) the General Agreement on Tariffs and Trade, 1994, Article XI: 1 of which limits the ability to impose export restrictions. 1
 - (b) the WTO Agreement on Subsidies and Countervailings Measures, Article 3 in Part II of which outlaws the requirement to use domestic over imported goods, if the downstream beneficiation would mean that imported goods were likely to be less favoured.²
 - (c) The WTO Agreement on Trade-Related Investment Measures, Article 2(2) read with the Annex to which provide an illustrative list of Trade-

² Article 3 provides: "Part II: Prohibited Subsidies Article 3: Prohibition 3.1 except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited: (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I; (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods. 3.2 a Member shall neither grant nor maintain subsidies referred to in paragraph 1.".



¹ Article XI: 1 provides: "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."

Related Investment Measures (TRIMs) inconsistent with Article XI of the above GATT, 1994.3

- South Africa and the European Union entered into an Agreement on Trade, (5) Development and Co-Operation, 1999 which came into force in 2004, Article 19 of which prohibits quantitative restrictions on exports.⁴ In terms of Article I of GATT, 1994,5 the provisions of the European Union reservation are also applicable to other non-EU WTO Members.
- South Africa is also a party to the Southern African Development Community (6)Trade Protocol, 1996 which in Article 6 prohibits trade barriers. Article 8 also prohibits quantitative restrictions on exports.
- South Africa and the European Union entered into an Economic Partnership (7)Agreement, 2016, Article 39 of which read with GATT, 1994, prohibits quantitative export restrictions.
- (8)Also of relevance are the abovementioned BITs since they normally contain a "fair and equitable treatment" clause which prohibits subjecting investors or investments to unjustified, unreasonable or discriminatory measures. This has been held in international arbitration cases to encompass transparency and non-discrimination in regulatory processes;⁸ full protection and security for foreign investments; acting in good faith and in a non-arbitrary manner towards foreign investors; to not undermining the legitimate expectations taken into account by foreign investors in making their investments. 11 The fact that South Africa has not renewed or has terminated its BITs does not stop the BITs remaining in force in regard to existing investments made during the currency of the BIT.
- (9) Also relevant to this is that the 2017 Charter would cause some producers to have to breach their long-term export contracts.
- From the above it follows that the 2017 Charter violates South Africa's (10)abovementioned international trade agreements.

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³ The annex in Para 2(c) refers to: "2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict: . . . (c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume

or value of its local production.".

A Article 9 provides: "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 or 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."

Article I: 1 provides: "1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.".

6 Article 6 provides: "NON-TARIFF BARRIERS Except as provided for in this Protocol Member State shall, in

relation to intra-SADC trade: (a) adopt policies and implement measures to eliminate all existing forms of NTBs. (b) Refrain from imposing any new NTBs.".

⁷ See Article 2.3 of the Italy/RSA BIT and Article 3(1) of the Belgo-Luxembourg/RSA BIT and the Foresti arbitration

Metalclad Corp v United Mexican States, ICSID (NAFTA) Case ARB (AF) 97/1.

⁹ Ronald S. Lauder v the Czech Republic, UNCITRAL Final Award of 3 September 2001.

¹⁰ Occidental Exploration and Production Company v Republic of Ecuador (London Court of International Arbitration, Administered Case UN 3467), 1 July 2004.

11 Tecmed SA v United Mexican States, ICSID Case ARB (AF) /00/2, 29 May 2003.

(11) In conclusion therefore:

- (a) the 2017 Charter entails quantitative restrictions on exports;
- (b) such export restrictions breach South Africa's international law obligations;
- (c) South Africa's international law obligations are of constitutional relevance in that:
 - (i) they must be considered for the purpose of interpreting legislation; and
 - (ii) international law obligations discipline the exercise of powers granted under primary legislation to make subordinate legislation, as well as executive conduct generally.



IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

FA19

Case no: In the matter between: The Chamber of Mines of South Africa Applicant and **Minister of Mineral Resources** Respondent **CONFIRMATORY AFFIDAVIT** I, the undersigned, AMBROSE VUSUMUZI RICHARD MABENA hereby say on oath that: 1 Prior to my retirement on 30 June 2016, I was Senior Executive: Transformation and Stakeholder Relations of the applicant.

AMBROSE VUSUMUZI RICHARD MABENA

I hereby certify that the deponent has acknowledged that he knows and understands the

I have read the Founding Affidavit of Tebello Laphatsoana Chabana and confirm its

correctness insofar as it relates to me.

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contents of this affidavit, which was signed and sworn to before me at **Sandton** on the day of **OCTOBER 2017**, the regulations contained in Government Notice No R1268 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Full Names

Sarah Ashleigh Macqueen Commissioner of Oaths Practising Attorney Republic of South Africa 4th Floor, The Forum 2 Maude Street, Sandown

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IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

FA20

Case no: In the matter between: The Chamber of Mines of South Africa Applicant and **Minister of Mineral Resources** Respondent **CONFIRMATORY AFFIDAVIT** I, the undersigned, **ROGER ALAN BAXTER** hereby say on oath that: I am the Chief Executive Officer of the Chamber of Mines of South Africa. 1 I have read the Founding Affidavit of Tebello Laphatsoana Chabana and 2 confirm its correctness insofar as it relates to me **ROGER ALAN BAXTER**

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at **Sandton** on the \(\frac{16}{20}\) day of **OCTOBER 2017**, the regulations contained in Government Notice

\$282\$ No R1268 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Full Names

Sarah Ashleigh Macqueen Commissioner of Oaths Practising Attorney Republic of South Africa 4th Floor, The Forum 2 Maude Street, Sandown

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