

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case no: 71147/17

In the matter between:

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

FILING SHEET

Presented for service and filing: Second to Fourth Applicants Heads of Arguments.

Dated at **Johannesburg** on this the **8th** day of **December 2017**.

And to:

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For: Fifth to Eighth Applicants

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 71174/17

In the matter between:

CHAMBER OF MINES OF SOUTH AFRICA First Applicant

MINING AFFECTED COMMUNITIES
UNITED IN ACTION Second Applicant

WOMEN FROM MINING AFFECTED
COMMUNITIES UNITED IN ACTION Third Applicant

MINING AND ENVIRONMENTAL JUSTICE
COMMUNITY NETWORK OF SOUTH AFRICA Fourth Applicant

BAKGATLA BA SEFIKILE COMMUNITY Fifth Applicant

LESETHLENG COMMUNITY Sixth Applicant

BABINA PHUTHI BA GA-MAKOLA COMMUNITY Seventh Applicant

KGATLU GA MATLALA COMMUNITY Eighth Applicant

and

MINISTER OF MINERAL RESOURCES Respondent

and

NATIONAL UNION OF MINeworkERS First *Amicus Curiae*

SOLIDARITY TRADE UNION Second *Amicus Curiae*

SECOND TO FOURTH APPLICANTS' HEADS OF ARGUMENT
IN THE REVIEW APPLICATION

enhancement of the social and economic welfare of mining communities, as the over-arching policy document on transforming the mining sector. Yet, the 2017 Mining Charter was negotiated and introduced without adequate or reasonable input and participation from the very mining affected communities and host communities it purports to support.

4. The Minister's stated consultation with some communities during the negotiation and drafting stages of the 2017 Mining Charter falls woefully short of the Constitutional imperative of meaningful and adequate public participation, in contravention of the Constitutional rights to procedural fairness (section 33) and under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), or alternatively the principle of legality enshrined in section 1(c) of the Constitution. As a consequence it also impacts, at least, on the rights of mining affected community members to an environment that is not harmful to their health and wellbeing (section 24), to equality (section 9), and to human dignity (section 10).
5. Section 7(2) of the Constitution enjoins government to respect, protect, promote and fulfill the rights in the Bill of Rights, which is the cornerstone of our democracy. Section 9(2) of the Constitution enjoins the State to take legislative and other measures to promote the achievement of equality. The MPRDA and the 2017 Mining Charter are intended to give effect to this constitutional imperative and to redress the scourge of colonial and apartheid legacy on the mining sector. Yet, the very communities who have historically, and continue, disproportionately, to bear the burden of all

8.3.2. Section 33 of the Constitution and PAJA; or alternatively

8.3.3. The principle of legality enshrined in section 1(c) of the Constitution.

8.4. The Minister's failure to comply with the obligation to engage meaningfully with host and mining affected communities in the development of the 2017 Mining Charter requires its review and setting aside; and

8.5. The appropriateness of declaring mining affected communities as key stakeholders for the negotiation of future Mining Charters.

THE CONTEXT OF THE MPRDA AND THE 2017 MINING CHARTER

9. Since its inception, the mining sector in South Africa has flagrantly exploited and negatively impacted mining affected communities both as sending and host communities. Communities have been dispossessed of land, lost burial rights, deprived of visits to ancestral graves and access to water. They have lost access to farming and food security. Mining operations have affected their health and well-being as a result of pollutants from the mines to the air, water and food.² They have been treated as second-class citizens with no formal protection of land rights. The vast majority of mining affected and host communities are poor and black and have doubly borne the brunt of racial discrimination and

² Record Vol 14 Macua Founding Affidavit p1457 para 45.

exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affected by mining on land occupied by such members or part of the community."

13. Chapter 2 of the MPRDA deals with the fundamental principles under the MPRDA. The following fundamental principles relevant to communities:

"The objects of the Act are to -

- (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industry and to benefit from the exploitation of the nation's mineral and petroleum resources.*
- (e) promote economic growth and mineral petroleum resources development in the Republic, particularly development of downstream industries through provision of stock, and development of mining in petroleum inputs industries.;*
- (f) promote employment advance the socio-economic welfare of all South Africans;*
- (g) ...*
- (h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed*

table for effecting the entry of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources.”

16. The 2017 Mining Charter was promulgated on 15 June 2017. The context and stated objectives of the 2017 Mining Charter are set out in its preamble:

“The systematic marginalization of the majority of South Africans, facilitated by exclusionary policies of the apartheid regime, prevented Black Persons ... 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 ... the democratic government enacted ... the 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 2014 a second assessment of the levels of compliance by mining companies with the Mining Charter of 2010 was conducted. ... 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. ... 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 harmonisation of these policies is intended to ensure meaningful participation of Black Persons in accordance with the objects of the MPRDA”

18.2. Releasing the Draft Reviewed Mining Charter, in English in the Government Gazette, on the internet, and through media releases.⁹ This is not an accessible platform for many mining affected communities, including the majority of communities and individuals that the second to fourth applicants represent, and who typically do not have at all, or easily or affordably, access to the internet.¹⁰ It is also inadequate to release the Draft Reviewed Mining Charter in English as the only language that is not widely understood by many rural mining affected communities.¹¹ This is not an effective way to ensure that rural mining affected communities receive the information. The Minister does not provide any evidence that the Draft Reviewed Mining Charter “appeared widely in many news publications.”¹² The second to fourth applicants’ members had no sight of such news publications.¹³

18.3. The Minister states that over 60 representations from stakeholders were received in response to invitations for comment,¹⁴ yet only two of these are from or on behalf of a mining affected community.¹⁵

18.4. The Minister relies on consultations conducted with mining affected communities in the Free-State, Limpopo and North-West provinces.¹⁶

⁹ Record Vol 15 Minister's Answering Affidavit pp 1563-5 paras 18-21.

¹⁰ Record Vol 26 Macua Replying Affidavit p 2485 paras 12-13.

¹¹ Record Vol 26 Macua Replying Affidavit p 2486 paras 15.

¹² Record Vol 15 Minister's Answering Affidavit p 1564 para 21.

¹³ Record Vol 26 Macua Replying Affidavit p 2485 paras 13.

¹⁴ Record Vol 15 Minister's Answering Affidavit p 1565 para 22.

¹⁵ Record Vol 16 Annexure “RA3” p 1671: Bulelani Mkhonto; and p1688: Serodumo Sa Rona Community Based Organisation.

and the Minister which were cancelled.¹⁹ Macua was forced to go to great lengths to enforce its Constitutional right to be heard, not as a result of accessible or facilitated public participation processes by the Minister or the Department.

18.6. The Minister refers to around 22 groups that the Department of Mineral Resources consulted from August 2016 to April 2017 over approximately nine months, though only three of those consultations were with mining affected communities, and only from three provinces.²⁰

18.7. The Minister states that the Department consulted 'with about 52 Kgosis and other individuals and entities in the North-West province' on 29 June 2016, and 'Kgosis represent the interests of communities that fall under them.'²¹ That this consultation occurred on one day and through Kgosis is inadequate and problematic given the

¹⁹ Record Vol 15 Minister's Answering Affidavit pp 1566-70 paras 27-35; Record Vol 26 Macua Replying Affidavit pp 2487-8 pp17-21. Macua's version must be preferred. *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para 12; referring with approval to *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C and *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 151A - 153C and at 152 D – F.

²⁰ Record Vol 15 Minister's Answering Affidavit pp 1570-1 para 39; Vol 17 Annex "RA9" pp 1793. The list of engagements from August 2016 to 21 April 2017 entitled 'Continued Stakeholder Engagements on the Gazetted Draft Reviewed Mining Charter, 2016' refers to Traditional Leaders in North-West Province, Bojanala District, community consultation in Free State Province, Matjhabang Local Municipality, and Community consultation in Limpopo province, Mogalakwena Local Municipality only. No further provinces nor communities are put up by the Minister.

²¹ Record Vol 15 Minister's Answering Affidavit p1571 para 40.

THE LEGAL OBLIGATION TO MEANINGFULLY CONSULT AND ADEQUATE PUBLIC PARTICIPATION

22. The Minister was obliged to conduct meaningful and adequate public participation with host and mining affected communities in the negotiation and introduction of the 2017 Mining Charter.

23. The Constitution requires public participation in the process of developing a new Mining Charter. This obligation derives from at least: the participatory nature of our democracy; the requirements of procedural fairness under section 33 and PAJA, or in the alternative the requirement of procedural rationality under the principle of legality through the obligations in s 7(2) of the Constitution.

The Participatory Nature of our Democracy

24. It is settled law that *"our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy."*²⁴ As a result, the Constitution contemplates a *"democratic government that is ... partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes."*²⁵

²⁴ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 116.

²⁵ As above.

include making sufficient effort to ensure that the public has adequate information informing them of their right to be involved in such decision-making procedures and the different avenues through which they can participate; and

27.2. The relevant legislative body must take measures to ensure that persons interested in participating are given a meaningful and effective opportunity to be heard and their views must be actually considered by members of the legislature.

28. This is the minimum standard with which legislative conduct in relation to public participation and consultation must comply. It is submitted that these standards are equally applicable to the Minister and the Department in the measures that they did not, but ought to, have taken to ensure meaningful and adequate participation of host and mining affected communities in the development of the 2017 Mining Charter.

Procedural Fairness Under PAJA

29. In *Grey's Marine* Nugent J identified seven elements of the PAJA definition necessary for a diagnosis of administrative action: a decision of an administrative nature made under an empowering provision; by an organ of state; exercising a public power or performing a public function; in terms of legislation or an empowering provision; that adversely affect rights; that has a direct external legal effect; and that is not explicitly excluded from the

administrative action is ... the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals. Administrative powers are in this sense generally lower-level powers, occurring after the formulation of policy. ... A power that is more closely related to the formulation of policy is likely to be executive in nature and, conversely, one closely related to its application is likely to be administrative.”³⁰

31. In *JDJ Properties v Umngeni Local Municipality*, Plasket, AJA reiterated that administrative action is -

“In general terms, ... the conduct of the bureaucracy in carrying out the daily functions of the State, which necessary involves the application of policy, with direct and immediate consequences for individuals or groups of individuals.”³¹

32. The Minister's power to draft the Charter is derived from section 100(2)(a) of MPRDA. Statutory power conferred on a public authority amounts to public power. It is not delegated legislation in the true sense of the word as it is not regulations. However, the 2017 Mining Charter constitutes rules, thus in establishing the Charter, the Minister is

³⁰ *Motau* paras 36-38.

³¹ 2013 (2) SA 395 (SCA) at para [16]; See also *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005(6) SA 313(CC) at para [24]; *South Africa Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA).

36. In *Minister of Home Affairs v Eisenberg & Associates In re: Eisenberg & Associates v Minister of Home Affairs and Others* 2003 (5) SA 281 (CC) the Constitutional Court avoided classifying the delegated legislation, but simply dealt with the immigration regulations at issue as administrative action.
37. In *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang NO* ("New Clicks")³⁴ the Constitutional Court left the issue open as to whether regulation making constituted administrative action. Chaskalson J made a statement about the importance of delegated legislation in the administrative process in that - "*It gives effect to the policies set by the Legislature and provides the detailed infrastructure according to which this is to be done.*"³⁵
38. The Court concluded that given the constitutional imperatives of accountability, transparency and public participation in the law-making process under the constitutional order "*To hold that the making of delegated legislation is not part of the right to just administrative action would be contrary to the Constitution's commitment to open and transparent government.*"³⁶
39. This process of rule-making is consonant with the shift away from the apartheid era of secrecy, where there was no consideration for the

³⁴ 2005 (2) SA 530 (CC) at para [113].

³⁵ As above.

³⁶ As above.

43. The standard to be applied in determining whether a public authority has complied with obligations of facilitating public participation is one of reasonableness: the reasonableness of the functionary's conduct depends on the peculiar circumstances and facts at issue.³⁹ The court will not prescribe to the functionary how public participation will be facilitated.
44. In *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) the Constitutional Court developed the test of reasonableness in administrative decisions. The court held that in considering whether the decision was reasonable or not depends on the circumstances of each case.⁴⁰
45. The Constitutional Court further held that:

*"factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected."*⁴¹

³⁹ *Land Access Movement of SA v Chairperson of the NCOP* 2016 (5) SA 635 at para [60] (*Land Access Movement*).

⁴⁰ *Bato Star* para [45].

⁴¹ As above.

49. Taking a decision as an organ of state, the first respondent should have facilitated meaningful engagement with mining affected communities. The failure to facilitate meaningful engagement with mining communities renders the decision of the first respondent unreasonable and irrational.
50. With the administrative decision of this nature, which does not go through common legislative processes through parliament, raises the bar for fair procedure. Furthermore, when dealing with vulnerable groups such as mining affected communities, the threshold of engagement with such communities is more than passing government gazettes for comment. It is meaningful engagement that is required for a decision of the first respondent to be reasonable and rational.
51. In *Government of the Republic of South Africa v Grootboom*⁴³ the Constitutional Court developed jurisprudence on meaningful engagement between municipalities and communities affected by socio-economic decisions taken by the state. The Court held that the state was required to act in a manner that is reasonable in its efforts to progressively realise the right to housing. It found that for a programme of the state dealing with the progressive realisation of socio-economic rights to be considered reasonable, it was important for the state to engage with people who were going through an eviction as soon as it became aware of their illegal occupation of the land. In this way, the

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(2000) 11 BCLR 1169 (CC).

approach is not sufficient more is required. In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (“Olivia”)⁴⁵ the court held that:

“Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.”

54. The court continued that:

“The City has constitutional obligations towards the occupants of Johannesburg. It must provide services to communities in a sustainable manner, promote social and economic development, and encourage the involvement of communities and community organisations in matters of local government. It also has the obligation to fulfil the objectives mentioned in the preamble to the Constitution to “[i]mprove the quality of life of all citizens and free the potential of each person”. Most importantly it must respect, protect, promote and fulfil the rights

⁴⁵ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (19 February 2008) para [15].

57. In the circumstances, the public participation process was unreasonable and constitutionally invalid, and accordingly fall to be reviewed and set aside.

The Principle of Legality and Procedural Rationality

58. Should this court determine that the introduction of the 2017 Mining Charter does not constitute administrative action for the purposes of PAJA, the exercise of the Minister's power is nevertheless still constrained by the section 1(c) of the Constitutional and the principle of legality. It is now settled law that all public conduct must be rational and comply with the principle of legality.⁴⁶
59. It is also well established that rationality includes procedural rationality. As Yacoob J put it in *Simelane*: "*both the process by which the decision is made and the decision itself must be rational.*"⁴⁷ The Court went on to explain that the process must be considered holistically:

"We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so

⁴⁶ *Pharmaceutical Manufactures: In re Ex parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para [85].

⁴⁷ *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) at para [34] (our emphasis). See also *ICC Withdrawal* at para [64].

Charter into force that he believes serves this purpose. But the Minister cannot confidently determine that this purpose has been served without meaningful engagement and facilitation of participation with the very people it purports to serve. The Minister will have particular policy goals which it is entitled to pursue. But the Minister must understand what interests will be affected by his conduct. The Minister can only do that through consultation with mining affected communities.

63. Whether or not developing a Charter is deemed part of a "*law-making process*", or part of "other measures" the ratio in *Doctors for Life*, concerning public participation is still directly applicable.⁵⁰
64. In *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* ("*New Clicks*")⁵¹ Sachs J explained that:

"It would be strange indeed if the principles of participatory democracy and consultation operated when the chain of public power began with the enactment of the original legislation, then vanished at the crucial stage when the general principles of the original statute were being converted into operational standards and procedures, only to re-surface at the stage of the implementation of provisions impacting on specific individuals. The principle at stake at the intermediate regulation-making process would relate not so much to securing fair procedures, as to ensuring openness, responsiveness and accountability. The need to secure fairness would, however, increase in

⁵⁰ *Doctors for Life* at para 135.

⁵¹ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at fn 17.

67. As this quote makes plain, where the power must be exercised in the public interest, it is irrational not to take *“any steps to ascertain the views of the public or any interested or affected party”*. Given the transformation imperatives of the Mining Charter in the context of South Africa’s mining history, it will always be irrational not to ascertain the public’s views, but most particularly, mining affected communities.
68. For all these reasons, public consultation, in particular with mining affected communities, is vital in order for the Minister to rationally exercise the power to introduce a new Mining Charter.

REMEDY

69. Whether the Minister’s introduction of the 2017 Mining Charter is deemed to be administrative action under PAJA, or the exercise of public power subject to the principle of legality, it is required to be procedurally fair.
70. The Minister’s failure to comply with the obligation to engage meaningfully with host and mining affected communities in the development of the 2017 Mining Charter requires its review and setting aside.
71. Section 6(2)(c) of PAJA affords a court the power to judicially review administrative action that was procedurally unfair. Section 8(1)(c)

75. The Minister makes numerous references to key stakeholders, and relevant stakeholders, who make up the Mining Industry Growth, Development and Employment Task Team ("MIGDETT").⁵⁶ This is comprised of the Department, Mines, and Labour. Notwithstanding the apparent task team mandate to include development, mine affected communities are not included in MIGDETT, nor are they referred to by the Minister anywhere as "key" or "relevant" stakeholders, merely stakeholders.
76. Mining affected communities are placed no higher than the general public. This cannot be, and it is mutually destructive of the very transformational intentions of the Department and the Minister, and the recognition of the historical context of the mining industry.
77. In any event, even as members of the general public, the Minister and Department's conduct towards host and mining affected communities does not satisfy the prescripts of adequate, meaningful and reasonable public participation. The second to fourth applicants accordingly persist in seeking this relief.
78. This remedy is necessary because the Minister has failed to engage meaningfully with mining affected communities in developing the 2017 Mining Charter. This necessitates this court's intervention to compel the Minister and Department to recognise that mining affected

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Vol 15, pp1562-3, paras [15]- to [17].

has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry.”⁵⁷

82. We submit that this is such a case. Should the Court be minded to review and set aside the 2017 Mining Charter on the basis of the Minister’s failure to comply with the obligation to facilitate meaningful and reasonable public participation under the principle of legality, that granting the declaratory relief will provide clarity to the Minister for the exercise of his power and Constitutional obligations in the development of any future Mining Charter.

CONCLUSION

83. The fundamental objectives of the MPRDA and the 2017 Mining Charter are unarguably directed at intervention to redress past inequalities in the mining industry.
84. Our Courts have recognised that meaningful participation is deeply engrained in our constitutional fabric and is vital to protect a number of rights including the rights to expression, information, association, and political participation. It is specifically protected in a number of structural provisions of the Constitution. It is a requirement of PAJA and it is often a requirement for rational executive conduct. Moreover,

⁵⁷ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2006] 1 All SA 103 (SCA) at para [18].