

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

Case no: 20341/19

In the matter between:

MINERALS COUNCIL SOUTH AFRICA

Applicant

and

MINISTER OF MINERAL RESOURCES

First Respondent

**SOUTH AFRICAN DIAMOND AND PRECIOUS METALS
REGULATOR** Second Respondent

REPLYING AFFIDAVIT IN CONDITIONAL COUNTER APPLICATION

I, the undersigned,

TEBELLO LAPHATSOANA CHABANA

hereby say on oath that:

1 Introduction

1.1 I am the Senior Executive: Public Affairs and Transformation of the applicant ("Minerals Council"). I deposed to the founding and replying

affidavits in this matter. As stated therein, I am duly authorised to represent the applicant in this application.

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

1.3 I have read the affidavit deposed to on behalf of the Minister in response to the Minerals Council's conditional application ("**the new affidavit**") and reply thereto as set out below.

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

1.5 Save where the contrary is stated, averments that contradict or are inconsistent with the founding, supplementary and replying affidavits are denied. Allegations not dealt with should be regarded as denied.

1.6 Words or phrases defined in paragraph 4 of the founding affidavit (pp 10-11) bear the same meaning in this affidavit.

2 The Minister's new affidavit

2.1 The Minister on 6 April 2020 filed a new affidavit which, with annexures, comprises 428 pages. He purportedly did so in response to a single page notice of the Minerals Council dated 5 March 2020 in which it gave notice of intention to apply for directions from the court in the event that the

joinder point is upheld, on the grounds set out in the Minerals Council's replying affidavit that was filed on 14 February 2020. (The second page of this notice only contain service details; no substantive content.)The Minister's new affidavit was filed less than a month before the hearing set down for 4 May 2020.

2.2 As set out more fully below, the affidavit is nothing other than an inadmissible and opportunistic attempt to supplement the Minister's answering affidavit in the main application. He filed this affidavit at this late stage of the process without seeking the leave of the court or applying for condonation for, in effect, filing an additional affidavit to supplement its answering affidavit or for doing so out of time and outside of the terms of the case management directives. The Minister's legal representatives also did not mention his intention to file a further affidavit to the Deputy Judge President at the second case management meeting held on 9 March 2020. It first mentioned it to the Minerals Council in a letter dated 31 March 2020 (annexure PA14). Any application by the Minister for leave to file this affidavit at the hearing of the matter will be opposed by the Minerals Council for the reasons set out in this affidavit.

2.3 In the event that the filing of the new affidavit is permitted by the Court, the Minerals Council will apply at the hearing of the matter to strike out large parts of it and its annexures on the basis, set out more fully below, that -

- 2.3.1 they contain irrelevant matter which does not contribute one way or the other to a decision of the matter; and/or
 - 2.3.2 constitute inadmissible new evidence in supplementation of the Minister's answer affidavit after the Minerals Council has already filed its replying affidavit; and/or
 - 2.3.3 constitute inadmissible hearsay evidence, and
 - 2.3.4 the admission of the material will cause prejudice to the Minerals Council.
- 2.4 I briefly deal below with the matter contained in the new affidavit under the headings of:
- 2.4.1 the case management process, directives and agreements between the parties in respect of filing dates; and
 - 2.4.2 the Minister's response to the Minerals Council's conditional application for directions.

3 The case management process, directives and agreements between the parties in respect of filing dates

(Ad paragraphs 8.1 and 13 to 44 of the Minister's new affidavit)

- 3.1 The Minister, in some 8 pages of the new affidavit and with reference to some 20 annexures spanning more than 50 pages, deals with various steps in the case management process, judicial directives and

agreements between the parties in respect of filing dates, under the heading "*The facts subsequent to the filing of the answering affidavit*".

3.2 These paragraphs in the new affidavit, as well as the annexures referred to (annexures PA1 to PA15), are all irrelevant to any of the issues raised in the present application, including the issue of costs. It is not at all clear what the Minister seeks to attain by dealing with this material in the new affidavit. The fact of the matter is that the DJP and Acting DJP issued directives dealing with filing dates from time to time and as circumstances called for it, after duly considering the letters exchanged by the parties' attorneys and meeting with the legal representatives. The Minister cannot now complain about the contents thereof. It is indeed most inappropriate for the Minister to place in issue the correctness of those judicial directives.

3.3 The Minerals Council's heads were duly filed in accordance with the second directive issued by the Acting DJP, Ms. Justice Potterill, on 12 March 2020. The Minister failed to file his heads of argument in terms of the second directive, which was duly issued after hearing the Minister's representatives at the second case management meeting. In any event, after further correspondence had been exchanged between the parties' attorneys and given the changed circumstances, the Minerals Council's attorneys agreed to an extension of time for the Minister to file his heads of argument by 20 April 2020. Quite why, having regard to the Council's agreement to the extension sought by the Minister, the Minister has

nevertheless spent time complaining about how unfair the previous deadline was, is a mystery.

3.4 Incidentally, it is difficult to fathom how the fact that the lockdown commenced on 26 March 2020 could have significantly impeded the ability of counsel to draw heads as alleged in paragraph 37. Under the initial directive, the Minister's heads would have been due by 18 March and under the second directive, by 31 March 2020. They should thus have been far advanced by 26 March. No consultations with the client are required to draft heads of argument, and if client's input was for some reason required, it could have been obtained in an audio conference call or video conference. That is indeed how clients and their legal advisors have been consulting since the lockdown.

3.5 I deny the allegation in paragraph 38 of the new affidavit that the second directive resulted in a manifest "*inequality of arms*" between the parties. The position rather is that the Minister has through-out the process been seeking various extensions and, where they were not granted, simply filed his papers after the expiry of the deadline. This is demonstrated by the following sequence of events:

3.5.1 The present application was issued on 26 March 2019. The Minister's notice of intention to oppose was served late – on 23 April 2019. The record was provided to the Applicant on 31 May 2019, and the Applicant delivered its amended notice of motion

and an insubstantial supplementary founding affidavit on 23 July 2019.

- 3.5.2 The Minister's answering affidavit fell due on 26 September 2019, but the Minister delayed the filing of his answering affidavit and instead sought an extension until the end of November. The Minerals Council agreed to an extension until 18 October 2019. The Minister did not, however, file on 18 October 2019 and sought a further extension. He was afforded a further extension until 29 November 2019 by the first case management directive (issued on 22 October) for the filing of the answering affidavit. He eventually filed it late, on 11 December 2019, which means he effectively had about 8 and a half months to prepare the answering affidavit after receipt of the founding affidavit.
- 3.5.3 The Minerals Council's replying affidavit was filed two weeks after the date initially contemplated in the first directive, by agreement between the parties, on 14 February 2020.
- 3.5.4 The Minerals Council's heads of argument were filed on 12 March 2020 in accordance with the second directive (that amended the dates in the first directive).
- 3.5.5 The Minister's heads of argument are expected to be filed on 20 April 2020, which would be more than nine weeks after the close of pleadings and five weeks after receipt of the Applicant's

heads. Also, it would give the Applicant a mere seven court days to prepare on these arguments before the hearing which is set down for 4 May 2020.

3.6 The allegations in paragraph 38 of the new affidavit that the Minister's right to a fair trial has been violated and that the Minerals Council has had the better part of a year to formulate the arguments which are now set out in its heads of argument are accordingly without any foundation. The true position is that the Minister has consistently failed to comply with the relevant deadlines, has had more than enough time to deliver his answering affidavit and his counsel have ample time to prepare and file their heads of argument.

3.7 Save to admit that the correspondence between the parties is what it purports to be and as set out above, the correctness of the inferences drawn from the correspondence in these paragraphs, is denied.

4 The Minister's response to the Minerals Council's conditional application

(Ad paragraphs 8.2 to 12 and 45 to 93 of the new affidavit)

4.1 The Minister raised a plea of non-joinder in his answering affidavit that was filed on 11 December 2019.

4.2 The Minerals Council dealt fully with the joinder point in its replying affidavit filed on 14 February 2020 and demonstrated that it lacks merit,

amongst others because the Minister had not identified the parties which he alleged should have been joined as a matter of necessity.

4.3 In the new affidavit, the Minister now seeks to identify the parties who allegedly have a direct and substantial interest. He alleges (in paragraph 11) that he does this -

4.3.1 for the most part, by identifying the paragraphs in the papers already filed, where those parties and the nature of their interests are set out; and

4.3.2 to a limited extent, by referring to parts of papers filed “in previous rounds of this litigation”.

4.4 He alleges in paragraph 11 that, in substance, the new affidavit is essentially a “*referencing aid*”. In paragraph 46, the Minister adds that he sets out the facts in this regard “*so as to assist the Court*”.

4.5 I deny that the affidavit is a “*referencing aid*” as alleged. I also deny that the Minister has set out these facts (in some 13 pages), “*to assist the Court*”. It is plain that the Minister has instead filed the new affidavit in an attempt to supplement the answering affidavit when the shoe started to pinch after the replying affidavit demonstrated the shortcomings in the answering affidavit in relation to the non-joinder defence. I am advised that it is impermissible to supplement the case made out (or not made out) in the answering affidavit in this manner. The Minerals Council will

at the hearing object to the filing thereof or apply that the offending portions be struck out because they prejudice the Minerals Council.

- 4.6 In paragraphs 48 to 70, the Minister sets out the facts in respect of intervention applications brought in previous proceedings in respect of different charters, under different case numbers. He attaches copies of those intervention applications, with their annexures, to the present application as annexures PA16 and PA17 spanning from p 2014 to p 2339, i.e. 325 pages.
- 4.7 First, the intervention applications in the previous case are wholly irrelevant to the present matter. The Minister's approach seems to be that, because other parties applied to intervene in a previous case, they must be joined as a matter of necessity in the present case. That approach is illogical. It also fails to take account of the difference between a joinder of necessity and a joinder of convenience.
- 4.8 Second, save for stating as a fact that the intervening parties brought certain applications previously and made certain statements therein, Mr. Alberts on behalf of the Minister cannot attest to the correctness of any of the facts set out in their affidavits. He simply does not have personal knowledge thereof. The allegations are all hearsay and stand to be struck out on this basis as well. Even the statements in the new affidavit about who represents whom, are hearsay.
- 4.9 Third, it is telling that the same intervening parties have not brought similar applications in the present matter. The reason is clear. The

intervening parties' complaint in the previous matter was a lack of proper consultation before the publication of the 2017 Charter. In the case of the 2018 Charter, there was full and proper consultation. The consultation process preceding the 2018 Charter is therefore not in issue between the parties in the present application and no one else has come forward to say that there was no proper consultation. This despite the fact that the inference must thus be that the previous intervening parties are satisfied with the consultation process in respect of the 2018 Charter and also, that they do not wish to participate in the present dispute which in essence pertain to the legality of certain provisions of the 2018 Charter. The intervening parties became aware of the 2017 litigation and brought the intervention applications as a result of the publication of the details of the dispute in the media. The present matter has similarly enjoyed wide coverage in the media as appears from various media reports, a summary table of which is annexed marked '**SA1**' and a bundle of copies of the actual media reports is annexed marked '**SA2**'.

- 4.10 In the present matter, the Minerals Council has also given notice in terms of Rule 16A. Notwithstanding the wide media coverage and the Rule 16A notice, no one came forward with a request to be joined, or brought an application to intervene as a party or as an *amicus curiae*.
- 4.11 I accordingly deny the correctness of the allegations in amongst others paragraphs 60 and 68 of the new affidavit that the recognition that the CALS and LHR parties received in the 2017 Charter review, applies with

equal force to the current review proceedings. It appears from the intervention court order itself (quoted in par 64 of the Minister's new affidavit) that the intervening parties were recognised as interested and affected parties "*for the purpose of consultation on the Charter formulation process*".

- 4.12 I also deny that the review of the 2018 Charter is in all material respects the continuation of its review of the 2017 Charter. The present application is a new application, under a new case number. Besides, the processes preceding the respective charters, as well as their contents, differ markedly.
- 4.13 As stated, the Minister has burdened the present application with about 325 pages of annexures, being the notices of motion and founding affidavits filed in the unrelated intervention applications (related to the matter under case number 71147/2017). Not only did he annex the applications themselves, he quoted substantial portions from those papers in the new affidavit (e.g., paras 51, 55) and described the issues and other, irrelevant matters at length (e.g., par 57). The Minerals Council will at the hearing apply that these annexures and portions of the new affidavit be struck out. Their inclusion was entirely unnecessary.
- 4.14 The Minerals Council will be prejudiced if the striking out is not granted because of the sheer volume of the material and the prejudice the Minerals Council would suffer if it had to reply to the contents thereof at

this late stage and, particularly, to the irrelevant, new and hearsay matter that it contains.

5 Ad the table annexed as PA19

5.1 If this Honourable Court finds that the Minister is correct (which is not admitted) that all host communities, women, BEE entrepreneurs, employees and other persons or groups of persons who stand to benefit under the 2018 Charter, must be joined, then they must all be joined. (I emphasize in this regard that the Minerals Council does not contend that these persons or groups of persons should not benefit. They have all received recognition and benefits to varying degrees under all the iterations of the Charter. The Minerals Council's complaints are a matter of record.)

5.2 Instead, the Minister has made a selection himself, based on hearsay evidence, comprising,

5.2.1 in the case of host communities,

- (i) some 4 host communities, all previously represented by LHR, together consisting (on the version in the new affidavit) of about 4000 people and 274 families, but which are but a small proportion of the communities hosting mining operations nationwide;

(ii) 3 “main” mining-affected community networks, all previously represented by CALS, but without mentioning any other networks which are not “main” networks;

5.2.2 in the case of employees, four major labour unions; and

5.2.3 in case of BEE entrepreneurs, one single association (being SAMDA) without giving any indication of their membership, other than to say that it seeks to be the vehicle for the development of a vibrant and sustainable junior mining sector, and based on a profile that the Minister obtained from the internet (annexure PA18).

5.3 This selection is accordingly irrational, is based on hearsay and conjecture on the side of the Minister and will not result in the joinder of all parties who, on the Minister’s own version, should be joined. In the event that the joinder plea is upheld, the Minerals Council will accordingly seek directions from the court as to who should be joined, how they should be joined and the procedure as to the further conduct of the matter, as set out in its notice of conditional application dated 5 March 2020.

6 Conclusion

6.1 The Court should, with respect, disallow the filing of the Minister’s new affidavit for the reasons set out above, *alternatively* strike out the portions thereof as well as the annexures identified above, with costs, on an

attorney and client scale. The Minister has abused the court process and has inundated the court with more than 400 pages of mostly irrelevant and inadmissible material at this late stage of the proceedings, and outside of the terms of the case management directives.

6.2 On the merits of the non-joinder, the fact of the matter, as stated, remains that none of the parties identified in the Minister's new affidavit have themselves come forward to be joined or to intervene despite the wide media coverage the matter enjoyed and the Rule 16A notice, and none of them have supported on oath or otherwise, the Minister's attempts to force their participation in the present proceedings.

6.3 The question is why the Minister is bent on insisting on the joinder of parties who do not, themselves, insist on joinder. The only reasonable inference is that the Minister is intent on delaying the determination of the merits, or to obfuscate the issues. The adoption of the Minister's approach to cases where judicial challenges are brought to legislation or purported legislation would make these types of applications either impossible or impracticable. On the Minister's reasoning every person in South Africa affected in one way or another by legislation which is challenged, must be joined. I am advised that a consideration of the relevant case law demonstrates that is manifestly not the approach our courts have adopted.

6.4 It is submitted that the court should, with respect, not allow the Minister to do so and that it should dismiss the non-joinder plea.

WHEREFORE, the applicant persists in opposing the plea of non-joinder and, in the event that it is granted, in seeking the relief set out in the conditional application.

TEBELLO LEPHATSOANA 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 day of **2020**, 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

SA1: Table of media reports on review of 2018 Charter

SA2: Bundle of media reports on review of 2018 Charter

