IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
BEFORE THE FULL BENCH

CASE NO: 43806/19

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

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RESPONDENTS' HEADS OF ARGUMENT

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[I] INTRODUCTION

1. These heads of argument set out the respondents' case in answer to the review application[1] and to the conditional application.[2]

2. For ease of reference, we refer to the first respondent as "*the Minister*", to the second respondent as "*the Regulator* and to the applicant as "*the Council*" or, where historically appropriate, "*the Chamber*".[3] Unless where otherwise stated, references to "*the Minister*" should be taken to include the Regulator. We also use the other abbreviated forms of reference as are defined in the founding and answering affidavits.

3. Our heads are structured in the following manner:

   3.1. First, we in Part 2, explain the procedural history to this application, until the date when these heads of argument are to be filed. We also explain why that date is later than the date stipulated by the Acting Deputy Judge President in her directive, dated 12 March 2020.[4]

   3.2. Second, we deal in Part 3 with the non-joinder point, which is raised at the outset of the answering affidavit. We submit that the application is bad for material non-joinder of certain necessary parties. Contrary to the Council's contentions in this regard, the complaint is not merely about joinder of convenience. In Part 4 we deal with two judgments upon which the Council places significant emphasis in support of its defence to non-joinder: *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the*

[1] The original notice of motion dated 26 March 2019 (pp 1 – 5); and the amended notice of motion dated 22 July 2019 (pp 0.1 – 0.6).
[2] Applicant's notice of conditional application dated 5 March 2020 (pp 1930 – 1931).
[3] The Council was known as the Chamber of Mines until 2018.
[4] Conditional application answering affidavit, annexure "**PA2**" (p 1965). Mr. Alberts' answering affidavit was delivered, electronically, on 6 April 2020.

Republic of South Africa and Others 2000 (2) SA 674 (CC) and *Minister of Health and Another NO v. New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign And Another As Amici Curiae)* 2006 (2) SA 311 (CC). In Part 5, and so as to assist this Court in determining the conditional application, we identify the non-joined parties. The respondents addressed this question in an answering affidavit deposed to by Mr. Alberts on 6 April 2020.[5] The Council served its replying affidavit electronically on 14 April 2020.[6]

3.3. Third, we deal in Part 6 with the theoretical and constitutional foundation in which the 2018 Charter falls to be understood. We address, in particular, the paradigm shift brought about by section 3(1) of the MPRDA.

3.4. Fourth, in Part 7 we deal with the first question in the Rule 16A notice.[7] This question, we submit, is of fundamental importance, not only for the resolution of this application, but more generally for the future exercise of the power conferred by section 100(2) of the MPRDA. The question posed is whether the power conferred by section 100(2) of the MPRDA permits the making of a "*formal policy*", as contemplated by section 85(2)(b) of the Constitution of the Republic of South Africa, 1996, or a "*law*". We submit that the manner in which this question is framed is a logically fallacious false dichotomy. For the various reasons set out in this Part, we submit that there is a wide range of factors which show that, on a proper interpretation, it is more likely than not that section 100(2) contemplates that the Charter should be in the nature of subordinate legislation.

[5] Conditional application answering affidavit, paras 45 to 89 (pp 1944 to 1958).
[6] Conditional application replying affidavit (pp 2360 to 2478).
[7] Replying affidavit, annexure "**RA1**" (pp 1897 to 1902).

We also show why the Council's argument that section 100(2) contemplates mere "*formal policy*" is untenable.

3.5. Fifth, we then in Part 8 make submissions on points of law relative to the grounds of review. We do not repeat the wide range of factual allegations made in the papers. To a large extent, the Minister's case is as he set it out in the answering affidavit.

3.6. Last, in Part 9 we summarise our concluding submissions.

[II] The procedural history of this application

Events before the Covid-19 Directive dated 25 March 2020

4. Mr. Alberts (in his answering affidavit in the conditional application)[8] provides an account of and places in evidence relevant correspondence between the State Attorney (who represents the Minister) and Norton Rose (which acts for the Council), and the Directives issued by the Deputy Judge President on 29 October 2019 (the "*Original Directive*")[9] and the Acting Deputy Judge President on 12 March 2019 (the "*Second Directive*").[10] He also explains what transpired at, before and after the case management meetings before Ms. Justice Malopa (on 22 October 2019) and Ms. Justice Potterill (on 9 March 2020). The Council rejects his account as "*irrelevant to any of the issues raised in the present application, including the issue of costs*".[11] With respect, that is not so. Mr. Alberts' account is necessary, first, to explain to the Court why the Minister's heads are filed on 20 April 2020 and not by the date set out in the Second Directive; second, to show why the time used for the preparation of the Minister's heads of argument is

[8] Conditional application answering affidavit, paras 13 to 44 (pp 1936 to 1943).
[9] Conditional application answering affidavit, annexure "**PA1**" (pp 1962 to 1964).
[10] Conditional application answering affidavit, annexure "**PA2**" (p 1965).
[11] Conditional application replying affidavit, para 3.2 (p 2364).

consonant with his constitutional right to a fair trial; and third, should it become necessary, to inform the question of costs.

5. This application was originally set down for hearing before a Full Bench on 14, 15 and 16 April 2020.[12] In consequence of the restrictions imposed under the Disaster Management Act 2002, the "*lockdown*" (which commenced on 26 March 2020), and paragraph 6 of the Judge President's Directive of 25 March 2020,[13] those dates were lost. The matter was then re-allocated for hearing starting on 4 May 2020.

6. The following milestones are significant:

6.1. The parties, at the case management meeting on 22 October 2019, contemplated just under a month for the Minister's heads of argument. That period was subsequently reduced by a week (by agreement between the parties).

6.2. On 27 February 2020 (one day before the extended deadline for the filing of the Council's heads of argument), Norton Rose addressed a letter to the Deputy Judge President[14] in which new case management directions were requested in terms of which only the non – joinder issue would be determined at the hearing (then) scheduled for 14 – 16 April 2020. The letter concluded with the following request:

> "9 In the circumstances, the applicant hereby respectfully requests that you issue the following new directions:
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> 9.1 all further proceedings in the special motion set down for 14, 15 and 16 April 2020 be stayed and postponed sine die, save for the defence of non-joinder as raised in paragraphs 9 to 33 of the respondents' answering affidavit and paragraphs 22 to 32 of the applicant's replying affidavit
>
> (Separated Issue); ·

[12] Conditional application answering affidavit, annexure "**PA1**", para 2 (pp 1962 to 1963).
[13] Conditional application answering affidavit, annexure "**PA13**", para 6 (pp 2003).
[14] Conditional application answering affidavit, annexure "**PA12**" (p 1986).

9.2 the Separated Issue be heard on 14 April 2020;

9.3 the applicant's conditional application for directions on the identification of the necessary parties to be joined and the proposed procedure (Conditional Application) are to be delivered by no later than 6 March 2020;

9.4 the respondents' answering affidavit to the Conditional Application be delivered by no later than 16 March 2020;

9.5 the applicant to file its replying affidavit by no later than 24 March 2020;

9.6 the applicant to file its heads of argument on the Separated Issue and Conditional Application by no later than 31 March 2020;

9.7 the respondents to file their heads of argument on the Separated Issue and Conditional Application by no later than 7 April 2020."

6.3. In paragraph 10 of the same letter, the Council's attorney indicated that it would not be filing heads of argument in accordance with the Original Directive:

> "The applicant's heads of argument in the main matter would have been due on 28 February 2020 in terms of the Original Directions, but in light of what is set out in paragraph 8 and 9 above we respectfully say that it would not be appropriate for the applicant to do so and await your further directions as set out above."

6.4. The Council indeed failed to deliver its heads of argument by the deadline of 28 February 2020.

6.5. The Council's request for a separation of issues was opposed by the State Attorney.

6.6. The Office of the Acting Deputy Judge President then convened a further case management meeting for Monday 9 March 2020. At that meeting, the notion of a separation of issues was rejected by the Acting Deputy Judge President.

6.7. By not filing its heads of argument on time, the Council confronted Ms. Justice Potterill with what was, in effect, a Hobson's choice: either allow the Minister a period commensurate with what was contemplated in the Original Directive and lose the hearing dates, or keep the hearing dates but curtail the time available to the Minister for the preparation of his heads of argument. It was against this backdrop that the Second Directive required the Council to file its heads of

argument (on all the issues) by 12 March 2020 and the Minister his by 31 March 2020.

The Covid-19 Directive dated 25 March 2020

7. As matters transpired, the Judge President issued a directive on 25 March 2020[15].

Paragraph 6 provided as follows

> "All other matters enrolled from 27 March to 17 April 2020 are hereby ipso facto removed from the Roll without any formalities being required from or by the parties or their representatives, and the files shall be endorsed to reflect the reason for such removal. In respect of Trial matters, the Registrar shall endeavour to accommodate the parties with the earliest dates after 28 April 2020 that can be allocated without crippling the Civil Trial Roll."

8. On 27 March 2020 the State Attorney requested Norton Rose by *WhatsApp* for an agreed extension to file the Minister's heads of argument on 28 April 2020 (recall that a new date for the hearing of the matter had by then not yet been determined). Norton Rose responded by email, stating they would take instructions.

9. As it happened, on 30 March 2020 the parties were advised by the Registrar, Ms. Thobile Ngcobo, that the application had been re-enrolled for hearing starting on 4 May 2020. On the same day, Norton Rose wrote again to say that the State Attorney's request for an extension until 28 April 2020 could not be agreed to, and that the deadline of 31 March 2020 therefore stood.

10. It was against this backdrop that the State Attorney wrote to the Acting Deputy Judge President on 31 March 2020, to explain why it was that an extension for filing the Minister's heads of argument until 20 April 2020 was necessary, and to point out that this would afford the judges hearing this application some two weeks to consider our heads of argument before the hearing.[16] It is for these reasons that the Minister's heads

[15] Conditional application answering affidavit, annexure "**PA13**" (p 2001).
[16] Conditional application answering affidavit, annexure "**PA14**" (pp 2006-2012).

of argument are filed on 20 April 2020 and not on the date specified in the Second Directive.

Right to a fair trial under section 34 of the Constitution

11. The right to a fair trial is protected by section 34 of the Constitution of the Republic of South Africa, 1996.[17] The importance of that right was underscored by Brand A.J. in *Twee Jonge Gezellen (Pty) Ltd and Another v. Land and Agricultural Development Bank of South Africa t/a The Land Bank, and Another* 2011 (3) SA 1 (CC) at [56].[18] It is axiomatic that a right to a fair trial necessarily includes the opportunity properly to prepare for the hearing of that trial. One of the components of the right to a fair trial is the principle of equality of arms. In *Shilubana v Nwamitwa* 2007 (9) BCLR 919 (CC) Van der Westhuizen J. accepted that the "*equality of arms*" principle "*has its constitutional basis, in the civil context, in section 34's guarantee of a fair public hearing*."[19] The significance of this dictum lay in the fact that, until *Shilubana*, equality of arms had been relied upon only in the criminal context.[20]

12. The equality of arms principle is also to be found in other human rights instruments, notably 14(1) of the International Covenant on Civil and Political Rights 1966[21] and

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[17] Section 34 provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[18] There, Brand A.J. held:

> "There can be no doubt about the importance of the fundamental right which is guaranteed by section 34. As stated by this Court in *De Beer N.O. v North-Central Local Council and South-Central Local Council:*
>
> > 'This section 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order.' "

[19] At [21].

[20] It had, however, been alluded to in the civil context: see *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) at fn 154: "*The principle of 'equality of arms', implicit in the right to a fair trial, has not been applied to situations such as the one we are considering in the case before us*."

[21] Art 14(1) reads as follows:

article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.[22] Jurisprudence on the latter is of particular significance, since, as Brickhill and Friedman point out,[23] "*equality of arms*" has evolved further in case law on the European Convention than (yet) it has in our law. We refer, in this regard, to the decisions of the European Court of Human Rights in *Regner v. The Czech Republic* (Application no. 35289/11)[24] and *Avotiņš v. Latvia* (Application no. 17502/07).[25]

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

See, eg, *Robinson v Jamaica*, Communications No 223/1987, UN Doc A/44/40 at 241 (1989).

[22] Art 6(1) reads as follows:

> "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[23] Jason Brickhill and Adrian Friedman, "Access to Courts" in Stu Woolman and Michael Bishop (eds), *Constitutional Law in South Africa* (2nd edn, loose-leaf) at 59-73 – 59-76.

[24] The ECHR held, at [146]:

> "The Court reiterates that the adversarial principle and the principle of equality of arms, which are closely linked, are fundamental components of the concept of a "fair hearing" within the meaning of Article 6 § 1 of the Convention. <u>They require a "fair balance" between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents</u> (see Avotiņš v. Latvia [GC], no. 17502/07, § 119 and other references, ECHR 2016)."[24] (our underlining)

[25] The EHCR held, at [119]:

> "However, the Court emphasises that the adversarial principle and the principle of equality of arms, which are closely linked, are fundamental components of the concept of a "fair hearing" within the meaning of Article 6 § 1 of the Convention. They require a "fair balance" between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents (see, for example, *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 56, ECHR 2004-III). These principles, which cover all aspects of procedural law in the Contracting States, are also applicable in the specific sphere of service of judicial documents on the parties (see

13. The principle has subsequently been expanded in civil judgments. In *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) Madlanga J. (for the majority) held that

> "[e]quality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponents." (our underlining) [26]

14. In the circumstances, we submit that the respondents have now had a sufficient period to prepare their heads of argument. That, we submit with respect, would not have been the case had the respondents been held to the deadline stipulated in the Second Directive: namely, 31 March 2020.

[III] The question of non-joinder

15. The non-joinder point is raised in paragraphs 9 to 33 of the answering affidavit[27] and addressed in paragraph 22 to 32 of the replying affidavit.[28] On 5 March 2020, the Council filed a notice of conditional application.[29]

16. Following the removal of the application from the roll for hearing on 14, 15 and 16 April 2020, the State Attorney wrote to the Acting Judge President to ask that the Second Directive be varied, so as to allow the Minister to file his answering affidavit in the

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Miholapa v. Latvia, no. 61655/00, § 23, 31 May 2007, and *Övüş v. Turkey*, no. 42981/04, § 47, 13 October 2009), although Article 6 § 1 cannot be interpreted as prescribing a specific form of service of documents (see the decision in *Orams*, cited above)."

[26] At [15]. This proposition was recently endorsed by the same court in *Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Waco Africa (Pty) Limited and Others* [2020] ZACC 2 (20 February 2020) at [25].

[27] Answering affidavit, paras 9 to 33 (pp 484 to 492).

[28] Replying affidavit, paras 22 to 32 (pp 1853 to 1860).

[29] Conditional application answering affidavit, annexure "**PA12(iv)**" (pp 1996-1997).

conditional application by Monday 6 April 2020 and the Council its replying affidavit by Monday 13 April 2013.[30]

17. The Minister duly filed his answering affidavit on Monday 6 April 2020[31] and the Council its replying affidavit on 14 April 2020.[32] We deal with the content of these affidavits below.

The test for non-joinder

18. The test for non-joinder was restated by Schoeman A.J.A. in *Absa Bank Ltd v Naude NO* 2016 (6) SA 540 (SCA) in these terms:

> "The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject-matter of the litigation which may prejudice the party that has not been joined. In *Gordon v Department of Health, KwaZulu-Natal* it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interests of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined."[33]

19. The relevant principles governing non-joinder in general were summarised by Celliers A.J. (for a full bench) in *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W):

> "[11] It is important to distinguish between necessary joinder (where the failure to join a party amounts to a non-joinder), on the one hand, and joinder as a matter of convenience (where the joinder of a party is permissible and would not give rise to a misjoinder), on the other hand. In cases of joinder of necessity the Court may, even on appeal, mero motu raise the question of joinder to safeguard the interests of third parties, and decline to hear the matter until such joinder has been effected or the court is satisfied that third parties have consented to be bound by the judgment of the Court or have waived their right to be joined.
>
> [12] The submission of the appellants that informal notice to a party not cited in judicial proceedings, coupled with mere non-intervention or even an intimation of non-intervention does not amount to a representation that such third party will submit to and be bound by any judgment given, is well-founded. (*Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 661 - 3.)

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[30] Conditional application answering affidavit, annexure "**PA14**" (p 2006-2012).
[31] Conditional application answering affidavit (pp 1932 to 2359).
[32] Conditional application replying affidavit (pp 2360 to 2478).
[33] At [10].

[13] In the absence of joinder of the third parties referred to above, and in the absence of judicial notice to and clear evidence of a waiver by such third parties of any right to be joined in the proceedings before the Court a quo, the relevant question is whether any of such third parties fall into the category of parties who should have been joined, as necessary parties, in these proceedings.

[21] The notion that, in some unclear way, Downtown's or Intaprop's rights or obligations would be affected by the judgment of the Court a quo, or the success or failure of this appeal, is so remote and theoretical, that to regard the joinder of either as necessary in the present case would be wrongly to apply the rule of necessary joinder as 'a mechanical or technical rule which must be ritualistically . . . applied, regardless of the circumstances of the case'. (See *Wholesale Provision Supplies CC v Exim International CC and Another* 1995 (1) SA 150 (T) at 158D - E. See also *Ngcwase and Others v Terblanche NO and Others* 1977 (3) SA 796 (A) at 806H - 807B and K*ock & Schmidt v Alma Modehuis (Edms) Bpk* 1959 (3) SA 308 (A) at 318D - 319A.)"

20. In *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) Mlambo J.A. held as follows:

"The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned. In the *Amalgamated Engineering Union* case (supra) it was found that 'the question of joinder should . . . not depend on the nature of the subject-matter . . . but . . . on the manner in which, and the extent to which, the court's order may affect the interests of third parties'. The court formulated the approach as, first, to consider whether the third party would have locus standi to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance. This has been found to mean that if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined."

A court is entitled (and has a duty) to raise the question of non-joinder

21. A court, including a court of appeal, is entitled to raise the question of non-joinder. This entitlement has been articulated as having an obligatory quality. See, for example, *Blake and Others v Commissioner of Mines* 1903 TS 784, where Mason J. held as follows:

"We are of opinion that it is most advisable, and we believe that it is practically obligatory on us, in a case of this kind to make the parties actually holding the licences defendants." (at 785, our underlining)

22. In *Amalgamated Engineering Union v. Minister of Labour* 1949 (3) SA 637 (A), Fagan A.J.A. explained the rationale for this rule in these terms:

> "The fact, however, that, when there are two parties before the Court, both of them desire it to deal with an application asking it to make a certain order, cannot relieve the Court from inquiring into the question whether the order it is asked to make may affect a third party not before the Court, and, if so, whether the Court should make the order without having that third party before it. Indeed, I cannot see that in this respect the position of the two litigants would be any better than that of a single petitioner who applies ex parte for an order which may affect another party not before the Court. The third party's position cannot be prejudiced by the *consensus* of the two litigants that they do not wish that party to be joined."

23. Later, Fagan A.J.A. held:

> "Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect the party's interests. . . . It must be borne in mind, however, that even on the allegation that a party has waived his rights, that party is entitled to be heard; for he may, if given the opportunity, dispute either the facts which are said to prove his waiver, or the conclusion of law to be drawn from them, or both." [34]

24. In *Morudi and Others v NC Housing Services and Development Co Limited and Others* 2019 (2) BCLR 261 (CC) the Constitutional Court said the following with reference to *Amalgamated Engineering*:

> "[32] The agreement between the representatives of the parties – that is, the second and third respondents and the company – did not excuse the High Court from its duty to enquire whether the order these parties were agreed on would prejudice potential shareholders.

Section 34 of the Constitution of the Republic of South Africa, 1996

25. Non-joinder of parties with a direct and substantial (legal) interest deprives them of their fundamental right to a fair hearing. We refer, in this regard, to the following passages from *Morudi*:

> "It must follow that when the High Court granted the order sought to be rescinded without being prepared to give audience to the applicants, it committed a procedural irregularity. The Court effectively gagged and prevented the attorney of the first three applicants – and thus these applicants themselves – from participating in the proceedings. This was no small matter. It was

[34] At 659-660.

a serious irregularity as it denied these applicants their right of access to court. [The court then quoted from the decision of Brand A.J. in *Twee Jonge Gezellen*]"[35]

What constitutes a "direct and substantial interest"?

26. In *Pheko and Others v. Ekurhuleni City* 2015 (5) SA 600 (CC) Nkabinde J. held:

> "The test for joinder requires that a litigant have a direct and substantial interest in the subject-matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected by the decision of the court. This view of what constitutes a direct and substantial interest has been explained and endorsed in a number of decisions by our courts"

27. Nkabinde J. referred (at footnote 66) to four judgments as definitive of what constitutes a "*direct and substantial interest*". We consider each in turn.

27.1. The first is *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and Others* 2015 (2) BCLR 182 (CC). It concerned an application by the National Union of Metalworkers of South Africa (NUMSA) to join Intervalve and BHR as parties to unfair dismissal proceedings pending in the Labour Court, against Steinmüller. Intervalve, BHR and Steinmüller were associated companies, with interlinked shareholders and directors. They shared the same human resources services. Nkabinde J. held (at [189]) that they had a "*direct and substantial interest*" in the proceedings on the following basis: they "*had a hand*" in the dismissal of some of the employees, albeit through the medium of a shared HR Services entity, and that the three entities acted jointly and in a single process to effect the dismissals.[36]

27.2. The second is *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC). This case concerned an application for certain interdictory relief in respect of anti-dumping duty imposed in respect of

[35] At [33].
[36] At [188].

certain steel wire rope products imported from Bridon International Limited (UK).[37] The applicant, SCAW, was a South African entity, and the respondent (ITAC), a statutory body with the duty to make recommendations to the Minister of Trade and Industry. Bridon sought leave to intervene in the application for leave to appeal to the Constitutional Court. Moseneke D.C.J. (for the court) was satisfied that Bridon did indeed have a direct and substantial interest:

> "There can be no gainsaying that Bridon UK has a pressing commercial interest in the fate of the existing anti-dumping duties against its product. For, as long as the restraining order is in place, ITAC and the two ministers of state would be precluded from taking steps that would bring the sunset review to fruition and that may lead to the ending of the anti-dumping duties. The duties would remain in force to the obvious commercial detriment of Bridon UK's potential exports into South Africa."[38]

27.3. The third is *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA). It concerned a dispute between G (a white man) and the Department of Health. The Department had turned down G's application for a post, notwithstanding that a selection committee had found him to be the best candidate for that post. Instead, it had appointed M, a black man. G sought relief which, in substance would give him the benefits of the post, albeit that he would not be appointed.[39] The Labour Appeal Court had held that M ought also to have been joined, on the basis that a finding in G's favour would carry the implication that M was unsuitable for appointment. On appeal to the Supreme Court of Appeal, Mlambo J.A. (for a unanimous court) disagreed:

> "The successful appointee can only have a legal interest in the proceedings where the decision to appoint him is sought to be set aside which can lead to his removal from the post. He becomes a necessary party to the proceedings because the order cannot be carried into effect without profoundly and substantially affecting his/her interests."[40]

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[37] The relief sought is described at [4].
[38] At [13].
[39] The relief was "*protective promotion*", as defined in para 9(1)(c), part B.VI/III of the Public Service Commission Staff Code.
[40] At [10].

27.4. The fourth is *Ex parte Body Corporate of Caroline Court* 2001 (4) SA 1230 (SCA) concerned an *ex parte* application by a body corporate for an order in terms of section 48(6) of the Sectional Titles Act 95 of 1986 that it be wound up for inability to pay its debts. The application was refused. In an application for leave to appeal, Navsa J.A. *mero motu* raised the question of non-joinder[41] and held that the local authority (as the major creditor), individual owners (being, by section 36 of the Act, members of the body corporate), and bondholders, were all "*entitled to receive notice of the intended application*".[42] Navsa J.A.'s reasoning, insofar as owners is concerned, is instructive:

> "This situation does not begin to compare with the asserted analogous situation of an *ex parte* application for a provisional winding-up of a company or for the provisional sequestration of an individual. The company being wound up or the individual being sequestrated is usually the debtor whose assets have to be surrendered so that they may be sold to meet debts owed to creditors. A body corporate established in terms of the Act represents its members and such debts as the body corporate incurs are usually incurred on behalf of its members. Members of a body corporate have assets apart from the body corporate. Usually the body corporate's assets will be negligible when seen against the collective assets of its members."[43]

28. Further guidance, we submit, can also be had from the judgments set out immediately below.

29. The first case that we refer to is *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2018] ZACC 41.[44]

29.1. *Maledu* concerned access to a farm in the North West Province (farm). Although non-joinder was not raised, the question when a person who does not have legally

[41] At [5].
[42] At [10].
[43] At [14].
[44] The Lesetlheng Host Community, which has a direct and substantial legal interest in the present proceedings, was the thirty-eighth (successful) applicant in *Maledu*'s case.

enforceable rights ought to be consulted was directly at issue. Itereleng and Pilanesberg had been granted mining rights under section 23 of the MPRDA in respect of the farm, and the thirty-seven applicants each held "*informal land rights*" under the Interim Protection of Informal Land Rights Act 31 of 1996. But the applicants contended that they were, in substance if not in law, the true owners of the farm. They were all members of the Lesetlheng village community. Their forebears had sought to purchase the farm in 1919, but, on account of racially discriminatory laws, were unable to be registered as joint owners[45]. Title to the farm was registered, in due course, in the name of the Minister of Rural Development and Land Reform, who held it in trust for "*the Bakgatla-Ba-Kgafela community*". The Lesetlheng community was apparently not recognised, by the government of the day, as an autonomous entity. The applicants contended that there was a *"clear understanding that only members of the Lesetlheng Community who had contributed to the purchase price had a legal interest in the farm*".[46]

29.2. Itereleng in due course acquired a surface lease, and began preparations for full-scale mining. This brought it into conflict with the applicants' peaceful and undistributed possession of the land. Itereleng and Pilanesberg then sought and obtained an eviction order and other interdictory relief against the applicants. They asserted that they had consulted with interested parties as required by the MPRDA and other statutes at the necessary times. The applicants denied that they had been consulted as required by section 2(1) of the Interim Protection of

[45] In *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (BH) the same form of registration, prevalent in the previous century, was considered.
[46] At [12].

Informal Land Rights Act 31 of 1996. It is this point, we submit, that is of particular relevance in the present application.

29.3. The High Court held that there was no duty to consult the applicants, since they were not the owners of the farm. The Bakgatla-Ba-Kgafela Community (the beneficiary under the statutory trust, by which title to the land resided with the Minister) had been consulted and had agreed at a *kgotha kgothe*[47] to the conclusion of the surface lease. That decision, the High Court held, was binding on the applicants and had therefore terminated their informal rights under the Interim Protection of Informal Land Rights Act 31 of 1996.

29.4. In an appeal to the Constitutional Court, Petse A.J. considered whether the applicants had in fact consented to the termination of their informal rights. Section 2(1) of the 1996 Act precluded the deprival of any person's informal right to land without their consent. In this regard, the respondents relied upon a resolution adopted by the Bakgatla-Ba-Kgafela at the *kgotha kgothe* of 28 June 2008. However, as Petse A.J. pointed out, it "*does no more than merely indicate that it was adopted and signed by Kgosi Pilane and a representative of Barrick*".[48] The unstated but implicit reason is that the applicants were not, in fact, consulted. Consequently, they had not, in fact, been deprived of their informal land rights.

30. Second, we refer to *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd* (624/2016) [2017] ZASCA 131, which concerned the question of non-joinder in an application to interdict the sale of assets in accordance with a business rescue plan.

[47] According to Petse A.J., this is "*an open community meeting that all adult community members are eligible to attend."* (footnote 10).
[48] At [108].

30.1. The applicant was a secured creditor of Corlink, by virtue of a general and special notarial bond registered over certain movable property owned by Corlink. Corlink was placed in business rescue and the business rescue practitioners duly published a plan which, it seems, did not reflect the applicant and its interest as a secured creditor. Instead, it contemplated that most of the proceeds of the sale of Corlink's assets would go to two secured creditors, Absa and GWK.

30.2. The applicant then launched an application for an urgent interdict, to prevent the sale of assets in accordance with the plan. It joined Absa and GWK, but not any of the other creditors. The court at first instance dismissed the application for lack of joinder of the other creditors. Mokgohloa A.J.A., for a unanimous bench, followed *Absa Bank Limited v Naude NO & others* 2016 (6) SA 540 (SCA), which held that if the creditors who voted for the business rescue plan were not joined, their position would be prejudicially affected. This was because if the business rescue plan were to be set aside, money that they had anticipated receiving would not be paid and money that they had received would have to be repaid. Mokgohloa A.J.A. also held that

> "Since the question of joinder had been raised at the previous hearing and since the applicant had taken a deliberate decision not to join other creditors, I do not think that the court a quo was required to afford the applicant a further opportunity to join the other creditors."[49]

30.3. It thus follows that the non- joinder of Corlink's other creditors was fatal to the amended relief sought by the applicant for non-joinder.

[49] At [16].

31. Third, we refer to *Morudi and Others v NC Housing Services and Development Co Limited and Others* 2019 (2) BCLR 261 (CC), which concerned a dispute as to who was entitled to the shareholding in NC Housing Services and Development Co Limited.

31.1. On the one side of that dispute were Mr. Morudi (the first applicant) and seventy others; and on the other side, Mr. Babuseng and Mr. Mongwaketsi (the second and third respondents).

31.2. The second and third applicants launched an application for declaratory relief, including an order that the persons entitled to shareholding in the company were as listed in an annexure to the founding affidavit, annexure "M". The company was cited as a party, but the other (potential) shareholders were not. As Madlanga J, pointed out:

> "Crucially, in the founding affidavit the second respondent averred that it was his and the third respondent's intention to cite these applicants as well, but that it was not practical to do so at the time the proceedings were launched. He made the point that these applicants would be cited in due course. For reasons that have not been explained, that was never done."

31.3. The question whether the list in annexure "M" correctly reflected the shareholders and the size of their respective interests was referred to trial. Subsequently, and following discussion with counsel, Kgomo J.P. made an order in terms of a draft agreed to by counsel for the second and third respondents and the company, in terms of which it was declared that the persons entitled to shareholding in the company were as listed in annexure "M" and that their respective shareholding was as reflected in this annexure. This order was made without giving an audience to the individuals listed in annexure "M".

31.4. On appeal to the Constitutional Court, Madlanga J., for a unanimous bench, accepted that it raised important questions concerning the applicants' rights under section 34 of the Constitution. The learned judge then held as follows:

> "Surely, that makes each potential shareholder listed in annexure "M" to have a direct and substantial interest in the outcome of the dispute. More specifically, a determination of who the shareholders were, and in what proportion, would have a direct impact on the individual rights of each potential shareholder; it could even be prejudicial to those rights. That made them necessary parties and they were thus entitled to joinder of necessity" (at [29])

The non-joinder point is raised in good faith

32. The Council, both in the replying affidavit[50] and in correspondence to the (Acting) Deputy Judge President,[51] repeatedly characterises the non-joinder point as "*dilatory*". In its ordinary meaning, "*dilatory*" has negative connotations.[52] The Council then goes one step further in paragraph 22.10 of the replying affidavit:

> "In [the answering affidavit] the Minister for the first time raised a defence of nonjoinder against the Minerals Council. This despite the fact that the objection had not been taken in the earlier cases brought by the Minerals Council in respect of earlier versions of the Charter. An objection of joinder is, of course, dilatory in nature. Given the Minister's clear unwillingness to progress its appeal in the 'Once Empowered' Application, this objection is perhaps unsurprising."

33. Its point is made in cruder terms in paragraph 9 of the Council's heads of argument, where reference is made to the Minister's alleged "*tactic of engaging with irrelevant and technical matters*",[53] of which the non-joinder point is listed as an example. Words to the same effect were used in an email dated 6 April 2020[54] (in which the Council's

[50] Replying affidavit para 22.10 (p 1856).
[51] Letter to the ADJP dated 5 March 2020, in paras 3 and 4 (Conditional application answering affidavit, annexure "**PA12(iv)**" (p 1994)).
[52] Such as "*tending to delay or procrastinate; slow; tardy / intended to cause delay, gain time, or defer decision*".
[53] Council's heads of argument, para 9.
[54] This email is not yet part of the record and will be made available to the Court if necessary.

attorney responded to the Minister's affidavit filed on that day in answer to the Council's conditional application). We refer to the following statement, in particular:

"…our client will oppose any further attempt at engineering delays or postponements, or steps that amount to filibustering in litigation form."

34. These comments are completely unfounded. In an email dated 7 April 2020,[55] the State Attorney replied as follows to these disgraceful accusations:

"11. We are dismayed by the unfair accusation that our clients (or ourselves) have "attempted (to) engineer delays or postponements" and we do not deserve the censure of 'filibustering in litigation form'.

12. Recall that it is your client which was determined to delay the hearing of the merits of the review by insisting on a separation of issues, which our clients (successfully) opposed before Judge Potterill. If our clients desired a delay of the matter (as alleged in your email), why on earth would it have resisted your client's separation request?" (emphasis added)

35. Dilatory pleas (of which non-joinder is one) are derived from English civil procedure, which first records such pleas as long ago as the seventeenth century.[56] Whilst a dilatory plea, if successful, may delay the hearing of the merits, it is wrong to suggest that a dilatory plea necessarily has delay as its object. Nor does it follow that there is necessarily anything unmeritorious about a dilatory plea, let alone the implications in paragraph 22.10 of the replying affidavit. This much was made clear by Nkabinde A.D.C.J. in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* 2018 (1) SA 1 (CC):

"The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences – including a penalty of committal – for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors' rights to freedom and security of the person are, in the end, not arbitrarily deprived." (at [92], our underlining)

[55] This email is not yet part of the record and will be made available to the Court if necessary.
[56] Eg *Wrights Case* [1650] EngR 224; (1650) Owen 21; 74 ER 870 (B); *Charter v. Friend* [1653] EngR 439; (1653) Cro Eliz 324; 78 ER 573 (C).

"It follows that the objection of non-joinder by the Municipality in Matjhabeng, specifically where the potential contemnor's section 12(1) rights are in the balance, is not a purely idle or technical one − taken simply to cause delays and not from a real concern to safeguard the rights of those concerned." (at [94], our underlining)

36. We submit that precisely the same is true in the present consent.

37. Nkabinde A.D.C.J.'s reasoning in *Matjhabeng Local Municipality* (in relation to non-joinder) – and also that of Jafta J. in *Member of the Executive Council for Health, Gauteng v Lushaba* 2017 (1) SA 106 (CC) at [15] – expressly builds upon the important dictum by Ackermann J. in *De Lange v Smuts NO* 1998 (3) SA 785 (CC) on the wider notion of procedural fairness:

"When contemplating the essential purpose of the protection afforded through the notion of procedural fairness, my sight is arrested by this fact: at heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision. The time honoured principles that no-one shall be the judge in his or her own matter and that the other side should be heard, aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law. They reach deep down into the adjudicating process, attempting to remove bias and ignorance from it. Everyone is entitled to an impartial judge, not because this guarantees a correct decision, but because the human arbiter, not being omniscient, should not be presented with a point of view that his or her position inherently loads. Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest, like personal freedom, tugs at the strings of what I feel is just, and points in the direction of a violation. When the clear basis for committing a person to prison is coercive rather than punitive, warning lights begin to flash." (at [131])

38. All of these considerations, we submit, apply with equal effect to the parties whom the Minister contends have not been joined in this application.

39. The Council, in its replying affidavit,[57] takes the point that the Minister did not raise non-joinder as a defence in the 2015 applications or the review of the 2017 Charter. It also pressed home the same point in correspondence to the Deputy Judge President, most

[57] Replying affidavit, para 22.7 (p 1855).

notably in its letter its letter to the Acting Deputy Judge President on 5 March 2020.[58] The implication is either that the point is not taken in good faith, or that the Minister has somehow waived his right to rely upon non-joinder.

40. Whichever implication is intended, nothing turns on it. The legitimacy of any question of non-joinder of necessary parties does not depend on a party's intention (real or otherwise), nor is it amenable to waiver by someone other than the non-joined party.

Reliance upon papers filed in previous applications

41. The Council's deponent, Mr. Chabana, in replying to the Minister's case regarding non-joinder,[59] states the following:

> "In order to avoid burdening these papers unduly, I have not attached the notice of motion and founding affidavit [*in relation to an interdict application from March 2015*]. They will be made available at the hearing of this matter in case the court wishes to have regard to them. I shall again refer to this application below when dealing with the Minister's allegations in his answering affidavit in this matter about the industry's compliance with the Charter".

42. Next, in paragraph 22.6 of the replying affidavit,[60] Mr. Chabana states:

> "I shall request the Minerals Council's attorneys to file the papers (founding, answering and replying affidavits but excluding the record) in the 2017 Review as a separate bundle with this affidavit"

43. In *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) Cloete J.A. held the following:

> "The allegations relied on by counsel for the respondents appear from the extract from the report prepared by Ernst & Young; the valuations of the applicants' farms performed Griffiths; and the affidavit of Daniels and letters written by his attorney to the Land Claims Commissioner, Mpumalanga, and the Registrar of the SA Council for Property Valuators Profession. Counsel also criticised Roux, the valuer appointed by the applicants, in certain respects. I shall deal with each in turn. Before doing so, it is necessary to emphasise two aspects. … The second is that the case argued before this court was not properly made out in the answering affidavits deposed to by Andreas. The case that was made out, was conclusively refuted in the replying affidavits as I pointed out in paras [18] to [20] above. <u>It is not proper for a party in motion proceedings to base an argument on passages in documents which have been</u>

[58] Conditional application answering affidavit, para 31 (p 1941) and annexure "**PA12(iv)**" (p 1994).
[59] Replying affidavit, para 22 (p 1853).
[60] Replying affidavit, para 22.6 (pp 1854-5).

annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest - the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: *Transnet Ltd v Rubenstein*, and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted."[61]

44. To similar effect, Peter A.J. held the following in *Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another* 2016 (1) SA 78 (GJ):

"The idea that more is better and that it is wiser 'to put everything before the judge' belongs to the lazy and the insecure. It ignores the sentiment expressed in *Phambili*, *Van Zyl*, *Zuma*, *Dunkel* and *McKesson*. Litigants who deluge a court with a welter of irrelevant and unnecessary material, which hides and confuses what is relevant, ought not to be heard to complain about the quality of the judicial determination they receive."[62]

45. Consequently, we submit that it is not open to the Council to do what Mr. Chabana proposes, in paragraphs 22[63] and 22.6[64] of his replying affidavit.

The Rule 16A notice

46. The Council filed a Rule 16A(1) notice[65] on 27 January 2020. The notice sets out three alleged "*constitutional issues*". The second and third are simply repetitious of the grounds of review set out in the amended notice of motion.[66] The first is posed as a question: namely, whether the 2018 Charter "*is law or formal policy as contemplated in section 85(2)(b) of the Constitution, 1996*". We address this question and the logically incoherent manner in which it is framed below.

[61] At [43].
[62] At [19].
[63] Replying affidavit, para 22 (p 1853).
[64] Replying affidavit, para 22.6 (pp 1854-5).
[65] Replying affidavit, annexure "**RA1**" (pp 1897 to 1902).
[66] Cf pp 0.1 to 0.6.

47. Insofar as it might be argued that the Rule 16A notice in any manner cures the problem of non-joinder – and this is certainly implied by the Council's heads of argument[67] and its replying affidavit in the conditional application[68] – we point out that the notice was filed some ten months after the application was launched and almost six weeks after the answering affidavit was filed. Moreover:

47.1. First, Rule 16A(1)(a) requires any person raising a "*constitutional issue*" to give notice "*at the time of filing the relevant affidavit or pleading*". Even assuming that any of the issues mentioned in the notice is indeed a "*constitutional issue*", the relevant pleading in relation to each of the three issues was the founding affidavit, not the replying affidavit. The notice is therefore long out of time.

47.2. Second, we submit that the Rule 16A notice is little more than a naked attempt by the Council to avoid the consequences of its failure to join necessary parties. It has all the hallmarks of an afterthought. It is notable that nowhere in Norton Rose's letter of 15 January 2020 to the State Attorney (regarding extended time frames) was there any mention of a Rule 16A notice.[69] Nor was there any mention of its view (first articulated in the replying affidavit, filed on 14 February 2020) that the non-joinder point was not taken in good faith, let alone that persisting in the non-joinder point might necessitate a separation of issues.[70]

47.3. Third, an argument to the effect that a Rule 16A notice "*is meant to deal with the problem of identifying parties who ought to have been joined in the proceedings*"[71] was considered and rejected by Mokoena A.J. in *Scholes and*

[67] Council's heads of argument, para 6.
[68] Conditional application replying affidavit, paras 4.10 and 6.2 (pp 2370 and 2374).
[69] Conditional application answering affidavit, annexure "**PA9**" (p 1982).
[70] Conditional application answering affidavit, annexure "**PA10**" (p 1983).
[71] At [37].

Another v Minister of Mineral Resources (50642/2015) [2017] ZAGPPHC 303 (30 June 2017). As the learned acting judge held:

> "the process in Rule 16A is an invitation by the Court, on application by a party wishing to make a contribution to the assistance of the Court. It does not serve the purpose of a non-joinder."[72]

47.4. This finding, we submit, accords with the explicit purpose of Rule 16A(2), namely to facilitate the participation by "*any interested party in a constitutional issue*" to be admitted "*as amicus curiae*" (our underlining). The role of an *amicus* is explained in these terms by Ngcobo J. in *Hoffmann v. South African Airways* 2001 (1) SA 1 (CC):

> "An amicus curiae assists the Court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the Court's decision may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position."[73] (our underlining)

47.5. *ABSA Bank Ltd v. Naude NO and Others* 2016 (6) SA 540 (SCA) is to similar effect. Here, a creditor had applied for the setting aside of a vote approving a business rescue plan. However, he failed to join the other creditors, and instead, gave the notice under section 130 of the Companies Act 71 of 2008. On appeal, it was argued that the non-joinder point was bad, on the basis that the creditors (by reason of the section 130(3) notices) had knowledge of the proceedings and

[72] At [37].
[73] At [63], followed on this point in *Minister for Justice and Constitutional Development v. Nyathi and Others* 2010 (4) SA 567 (CC) and *City of Cape Town v. Khaya Projects (Pty) Ltd and Others* 2016 (5) SA 579 (SCA).

did not intervene. Schoeman A.J.A., for a unanimous bench, considered this argument to be "*without substance*"[74] and held:

> "It was stated in *Amalgamated Engineering Union v Minister of Labour* that an interested party's non-intervention without more —
>
> > 'after receipt of a notice of legal proceedings short of a citation, cannot therefore . . . be treated as if it were a representation, express or tacit, that the party concerned will submit to and be bound by, any judgment that may be given'.
>
> Further, it is the duty of the sheriff, when serving process, to explain the nature and exigency thereof to the person on whom service is effected. The creditors could thus have made an informed decision as to whether to oppose the application."[75]

48. We therefore submit that the Rule 16A notice takes matters no further, insofar as the non-joinder point is concerned.

The *Scholes* judgment

49. The Minister, in paragraphs 18 to 20 (pages 487 to 488) of the answering affidavit dealt with the review application that foreshadowed the *Scholes* judgment. He referred, in paragraph 19[76], to the non-joinder point raised by the Minister in defence of that application, and attached copies of the answering affidavit[77] and judgment.[78] Unfortunately, the copy of the *Scholes* judgment (annexure "**AA3**" at pages 598 – 605) is incomplete. The complete judgment will accordingly be delivered with these heads of argument.[79]

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[74] At [9].
[75] At [9].
[76] Answering affidavit, para 19 (p 488).
[77] Answering affidavit, annexure "**AA2**" (pp 582 to 597).
[78] Answering affidavit, annexure "**AA3**" (pp 598 to 613).
[79] See annexure "**A**" to these heads of argument. A copy of the *Scholes* judgment is also available at: http://www.saflii.org/za/cases/ZAGPPHC/2017/303.html.

50. The Council argues that *Scholes* is distinguishable for the following reasons:

50.1. First, the applicant in *Scholes* was "*a single person who applied for far-reaching relief*", [80] whereas the Council represents a "*substantial number of holders of rights*".[81] The Council, however, fails to appreciate the significance of the fundamental point which the Minister emphasises in his answering affidavit: namely, that the Council does not speak for the whole of the mining industry. This, the Council simply dismisses as "*irrelevant and technical matters*".[82]

50.2. Second, the Council does not seek to strike down the whole of the 2018 Charter, but instead seeks to review "*only*" the clauses set out in the amended notice of motion.[83] It is correct that the relief sought by the Council is less extensive than the relief sought in *Scholes*.[84] But this, we submit, is a distinction without any meaningful difference, since the relief sought by the Council would (as with the relief in *Scholes*) largely denude the 2018 Charter of its most significant transformative provisions. It would leave the 2018 Charter unable to achieve what section 100(2) of the MPRDA requires.

50.3. Third, the Council suggests that Mokoena A.J. (at [16]) stated that "*the Chamber of Mines is one of the most important role players*".[85] With respect, this is misleading. What appears in paragraph 16 of *Scholes* is in fact words attributed to counsel who appeared for the two applicants in that matter:

> "Mr Bekker agreed during oral argument that the Chamber of Mines is one of the most important role players in this application."[86]

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[80] He was in fact one of two applicants, the other being his law firm.
[81] Council's heads of argument, para 14.1.
[82] Council's heads of argument, para 9.
[83] Council's heads of argument, para 14.1.
[84] The operative parts of the notice of motion are quoted in paragraph 4 of the judgment by Mr. Acting Justice Mokoena: Answering affidavit, annexure "**AA3**", at [4] (pp 599 to 603).
[85] Council's heads of argument, para 14.2.
[86] See *Scholes* Judgment paragraph [16].

51. We therefore submit that none of these reasons provides any basis to distinguish *Scholes*.

52. The Council also takes issue with Mokoena A.J.'s reasoning:

52.1. First, the Council refers[87] to what Mokoena A.J. held (at [30]) namely that parties with a direct and substantial interest are "*entitled to be notified of this* [sic] *and ... upon receipt of such notice elect either to participate or abstain*". We respectfully submit that this part of the judgment accords with the reasoning of Erasmus A.J.A. in *In re BOE Trust Ltd and Others NNO* 2013 (3) SA 236 (SCA) at [20], and is therefore unobjectionable. The Council offers no explanation for why it has not attempted even this form of "*informal notice*" in respect of the non-joined parties.

52.2. Second, the Council takes issue[88] with what is set out in paragraph 36 of *Scholes.* There, Mokoena A.J. held:

> "… the rules of this Court permit the parties to bring forward an application seeking directive as to how to go about identifying parties that may be adversely affected by the findings of the Court in their absence. This Court may further direct on how to bring to their attention the intended proceedings."

52.3. The first sentence of this dictum, we submit, reflects in substance what the Council itself has now done, by launching its conditional application on 5 March 2020.[89] And the second sentence, we submit, is consistent with the pragmatic approach adopted by our courts in applications under Rules 4 and 5 in relation to substituted service and edictal citation.

[87] Council's heads of argument, para 14.4.
[88] Council's heads of argument, para 14.4.
[89] The notice of application is at pp 1930 – 1931.

52.4. Next, the Council boldly asserts that the judgment in *Scholes* is "*clearly incorrect*", in that it confuses joinder of necessity with a joinder of convenience.[90] But the Council, however, seemingly fails to have regard to what Mokoena A.J. held at [33]:

> "The Minister's contention is not that 'the parties who have an 'interest' in the outcome of this application' must be joined. The Minister's complaint is that parties whose rights and interest may adversely be affected by the outcome of this application and who would have the right to be parties to the determination of the issues raised by Scholes are not joined in these proceedings."

52.5. Last, the Council (at [16]) again refers to its Rule 16A notice.[91] We have already explained (and referred to authority) why such a notice does not cure the problem of non-joinder.

53. We point out that the Minister, in the answering affidavit, has raised the question of non-joinder in substantially more detail than the manner in which the Director-General in the DMR raised non-joinder in *Scholes*. There, he said only the following:

> "27. As I pointed out above, there are persons and entities who have direct and substantial interest in the legality or otherwise of the Charters and the constitutional challenge which is sought to be mounted in this application. l have also pointed out to (*sic*) the fact that the Chamber of Mines have instituted a similar application albeit that this application seeks to go wider than the one brought by the Chamber of Mines.
>
> 28. The applicants do admit in their papers that mining forms a critical and substantially large part of the countries' economy. This application affects a large portion of would-be litigants whose rights and interests may adversely be affected by the outcome of this application and who would have the right to be parties to the determination of these issues. These third parties have not been cited in these proceedings.
>
> 29. For reasons stated under this heading I am advised, and so will it be argued at the hearing of this application, that on this ground alone the application stands to he dismissed with costs."

[90] Council's heads of argument, para 14.3.
[91] Council's heads of argument, para 16.

54. We therefore submit that the Council has neither shown any error in Mokoena A.J.'s reasoning, nor has it demonstrated why *Scholes* is distinguishable. In our submission, *Scholes* is directly in point.

The non-joined parties sufficiently identified

55. The Council complains that the Minister has failed to identify the necessary parties out of the "*vast pool of what he refers to as 'stakeholders'*"[92] and has also not identified their "*direct and substantial interest*".[93] Yet the Council also complains that the Minister, in his answering affidavit, "*dealt in detail*"[94] (allegedly as part of a "*tactic of engaging with irrelevant and technical matters*"[95]) with the process by which the 2018 Charter was developed albeit that there "*is no complaint about procedural fairness*".[96] With respect, however, the Council fails to appreciate that this explanation is integral to understanding the range of stakeholders who have a direct and substantial interest in this application, and whose joinder is therefore necessary – not merely convenient.

56. There are, we submit, two answers to the Council's complaint.

56.1. The first is that a similar complaint of impracticability was raised, and rejected, in the *Scholes* judgment. There, Mokoena A.J. implicitly accepted the point that the practical difficulty of joining a large number of parties does not justify their non-joinder.[97]

56.2. The second is that the Council has, in any event, itself provided a mechanism to resolve the problem of which it complains. It did so in its letter to the Acting

[92] Council's heads of argument, para 11.
[93] Council's heads of argument, para 12.
[94] Council's heads of argument, para 9.
[95] Council's heads of argument, para 9.
[96] Council's heads of argument, para 9.
[97] At [35].

Deputy Judge President of 5 March 2020. In paragraph 6 of that letter, the Council's attorneys stated the following:

> "In the event that the non-joinder point is argued in April and it were to be upheld, the Minerals Council would seek further directions from that court in respect of joinder. In this regard, on reflection, we respectfully submit that it is not necessary to adopt the more protracted procedure outlined in paragraph 9 of our letter to you of 27 February 2020. It would suffice for the applicant to proceed with the attached notice of conditional application, in accordance with Rule 6(11)."

57. The relief sought in the attached Notice of Conditional Application is articulated in the following terms:

> "… in the event that the first respondent's plea of non-joinder is upheld, the applicant intends to apply at the hearing of the matter for directions from the above Honourable Court on who has to be joined, how they are to be joined and the further conduct of the matter, on the grounds set out in the applicant's replying affidavit."

58. It is against that backdrop that Mr. Pieter Alberts (Chief Director, Legal Services, Department of Mineral Resources) on 6 April 2020 served electronically an answering affidavit to the conditional application.[98] As Mr. Alberts explains in paragraphs 10 and 11 of his affidavit,[99] he seeks to assist the Court by identifying those parties who, from the answering papers, can be discerned as necessary parties. He also cross-references the link between the development of the 2017 Charter and the 2018 Charter, and makes reference to the papers in relation to the review of the 2017 Charter, in which the question of non-joinder was also raised.[100]

59. The Council, in its replying affidavit, stigmatises Mr. Alberts' affidavit as a "*new*" affidavit which is impermissibly filed without permission.[101] With respect, neither proposition is correct. The Council does not, however, provide any response to the

[98] Conditional application answering affidavit, (pp 1932-2359).
[99] Conditional application answering affidavit, paras 10 and 11 (pp 1935-1936).
[100] Conditional application answering affidavit, para 11 (pp 1932-2359); Answering affidavit, paras 17 to 33 (pp 487-492).
[101] Conditional application replying affidavit, paras 2.1 to 2.4.2 (pp 2361 to 2363).

assertion that the Minister is entitled to file an answering affidavit to the conditional application.[102] This is hardly surprising, since it is necessarily a corollary of the right to a fair trial, in section 34 of the Constitution of the Republic of South Africa, 1996, that the Minister has a right to answer to the relief sought in the conditional application – regardless of whether the Council elected to file founding papers.

60. As is apparent from Mr. Alberts' affidavit (as well as the Minister's answering affidavit), there are three discernible groups of non-joined parties:

60.1. First, those parties who were represented by the Centre for Applied Legal Studies in relation to the 2017 Charter, being Mining Affected Communities United in Action (MACUA), Women Affected by Mining United in Action (WAMUA), and the Mining and Environmental Justice Community Network of South Africa (MEJCON). Mr. Alberts refers to members of this group as "*the CALS parties*".[103] These three entities are described as "*the country's three main mining-affected community networks*".[104]

60.2. Second, various host communities represented in the Council's 2017 Mining Charter review by Lawyers for Human Rights, being Bakgatla Ba Sefikile, Lesetlheng, Babina Phuti Ba Ga-Makola and Kgatlu. He refers to these parties as "*the LHR parties*".[105] Insofar as the "*CALS parties*" and the "*LHR parties*" are concerned, Mr. Alberts places in evidence the notice of motion and founding affidavit which they respectively filed in an application for leave to intervene in the Councils' application to review the 2017 Charter as annexures "**PA16**" and

[102] Conditional application answering affidavit, para 9 (p 1935).
[103] Conditional application answering affidavit, para 47.1 (p 1944), paras 48 to 51.2.3 (pp 1945-1947) and paras 58 to 70 (pp 1951 to 1953).
[104] See Answering affidavit, annexure "**AA7** "(page 657), in the affidavit filed by Lawyers for Human Rights in support of joinder in the Council's review of the 2017 Mining Charter.
[105] Conditional application answering affidavit, para 47.2 (p 1944) and 52 to 70 (p 1947 to 1953).

"**PA17**".[106] As he was required by *Swissborough Diamond Mines (Pty) Ltd and others v. Government of the Republic of South Africa and others* 1999 (2) SA 279 (T)[107] to do, he identifies precisely which parts of those affidavits he relies upon.

60.3. Third, there are the so-called "*social partners*", being members of the Mining Charter Transformation Team (which was formed to facilitate development of the 2018 Mining Charter). They are the DMR, AMCU, UASA, NUM, Solidarity, SAMDA and Chamber of Mines (now the Minerals Council).[108] Mr. Alberts explains that the particular role of the "*social partners*" in the process of developing the 2018 Charter.[109] He also explains that the Council is one of the "*social partners*". It is striking that nowhere in its replying affidavit does the Council address these allegations. Its failure to do so is, we submit, hardly surprising, since the logical corollary of the Council's insistence that it occupies a special position in relation to the 2018 Charter is that the same is true of the other "*social partners*".

61. We submit that all members of these three groups are sufficiently identified in the answering papers; that each is a necessary party; and each ought therefore to be joined in this application.

62. As Mr. Alberts explains in his answering affidavit in the conditional application, he seeks to identify categories of parties who <u>from the answering papers</u> have a direct and substantial interest in the relief sought by the Council.[110]

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[106] Conditional application answering affidavit, annexures "**PA16**" (pp 2014 to 2131) and "**PA17**" (pp 2132 to 2339).
[107] At 324F-G.
[108] Conditional application answering affidavit, paras 71 to 89 (p 1953 to 1958).
[109] Conditional application answering affidavit, paras 71 and 72 (pp 1953 to 1954).
[110] Conditional application answering affidavit, para 11 (p 1935).

63. He points to paragraphs in the papers already filed,[111] and explains that his affidavit serves essentially as a referencing aid.[112]

64. Attached to his affidavit, marked "**PA19**",[113] is a table which identifies eleven groups of non-joined parties. It was decided, however, to disclose it already in Mr Alberts' answering affidavit thus affording the Council a fair opportunity to respond to its content. For the court's convenience, we attach a copy of the Table as annexure "**B**".

65. It is noteworthy that the Council, in its replying affidavit in the conditional application, devotes a mere two pages (pp 2372 to 2373) to the Table, and says nothing at all about its content.

66. It simply dismisses the selection in the Table as "*... irrational, ... based on hearsay and conjecture on the side of the Minister*".[114]

67. With respect, this is a strikingly unhelpful response to an answering affidavit which is intended to <u>assist</u> the Court in answering the very question which the Council's conditional application asks: namely, who should be joined?

68. In the absence any meaningful response by the Council to the most relevant parts of Mr. Alberts' affidavit and to the Table, we set out the following explanation so as to assist the Court:

    68.1. The first column identifies the relevant non-joined party and provides pinpoint references to the answering affidavit and annexures where references to that party are to be found.

[111] Conditional application answering affidavit, para 11 (p 1935).
[112] Conditional application answering affidavit, para 12 (p 1936).
[113] Conditional application answering affidavit, annexure "**PA19**" (pp 2341 to 2359).
[114] Conditional application replying affidavit, para 5.3 (p 2373).

68.2. The second column identifies the body (if any) that represented each non-joined party in previous rounds of this litigation. This information is for reference only, but it may assist the Court in addressing the pragmatic question of how should each non-joined party be joined.

68.3. The third column identifies each non-joined parties' interest. The explanation relative to each party emerges from the papers already filed in this application.

68.4. The fourth column provides examples of how setting aside the impugned provisions of the 2018 Charter will necessarily prejudice the direct and substantial interest of each non-joined party.

69. So as to illustrate how the Table is intended to operate, I shall explain the first section, which is headed "HOST COMMUNITIES (INCLUDING WOMEN)" (pages 2341 to 2351).

69.1. This section identifies seven non-joined parties – Mining Affected Communities United in Action (MACAU), Women for Mining Affected Communities United in Action (WAMAU), Mining Environmental Justice Community Network of South Africa (MEJCO), Sefikile Community, Lesethleng Community, Sabina Phuti Ba Ga-Mokola Community, and Kgatlu Community. The first three correspond to those whom Mr. Alberts describes as "*the CALS parties*"[115] and the next four fall into the group which he describes as "*the LHR parties*".[116]

69.2. As is apparent from the first column in the Table, references to each of the seven can be found at various junctures in the answering affidavit and annexures.

[115] Conditional application answering affidavit, para 47.1 (p 1944).
[116] Conditional application answering affidavit, para 47.1 (p 1944).

69.3. The second column explains who represented each of the seven in previous rounds of this litigation, and the third column identifies where in the papers already filed reference is made to these parties, and the nature of their interest is described.

69.4. The yellow bar on page one of the Table summarises the nature of the direct and substantial interest of each of the seven in the relief claimed in the Council's amended Notice of Motion: namely, they hold a "*5% non transferable carried interest or minimum 5% equity equivalent benefits*". These summarised facts are all evident from the Council's amended Notice of Motion read with the impugned provisions of the 2018 Charter (annexure "**FA4(1)**"[117]), in which the terms "*carried interest*" and "*equity equivalent benefit*" are defined in clause 1.[118] "*Host community*" is also defined in clause 1.

69.5. The fourth column deals in more specific detail with <u>how</u> each party's interest is affected by those provisions of the 2018 Charter which the Council applies to be set aside in this review. This makes it self-evident what each party stands to lose, should the relief sought by the Council be granted. We mention, by way of examples, clause 2.1.3.2, which provides that the 30% BEE shareholding must be distributed to various parties, including a minimum 5% non-transferable carried interest to host communities (clause 2.1.3.2(ii)); and clause 2.1.3.2(iv), which requires that a minimum 20% effective ownership should be distributed to a BEE entrepreneur, of which 5% is preferably for women. All of these facts are ascertainable from the 2018 Charter, which is part of the founding papers.

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[117] Founding affidavit, annexure "**FA4(1)**" (pp 169 to 212), read with the amendment in annexure "**FA4(2)**" (pp 213 to 216), cl 1 (*sv* "*carried interest*" and "*equity equivalent benefit*").
[118] Founding affidavit, annexure "**FA4(1)**", cl 1 (*sv* "*carried interest*" and "*equity equivalent benefit*").

70. The same methodology explains the categories of Qualifying Employees (pages 2351 to 2356) and BEE Entrepreneur (pages 2357 to 2359). Again, the identity of these parties, the nature of their direct and substantial interest (including pinpoint references to relevant clauses of the 2018 Charter under review) are provided. From this, too, it is readily ascertainable how granting the relief sought by the Council will affect their direct and substantial interest. I point out, too, that all members of the categories of Qualifying Employees and BEE Entrepreneur are also members of the Mining Charter Transformation Team (as was the Council), on the basis that each was a "*social partner*".[119] The only non-joined "*social partner*" that is not included in this list is the Council for Geoscience. This, we submit, is because the Council for Geoscience is, for all practical purposes, aligned with the Department of Mineral Resources. It therefore has no separate interest, in this application, from that of the Minister.

71. We have provided this explanation so as to demonstrate that the Table – as with most of Mr. Alberts' affidavit – is simply a referencing aid, provided for the assistance of this Court in addressing the questions posed by the conditional application.

[IV] *New Clicks* and *Pharmaceutical Manufacturers*

72. The Council contends that the various individuals and bodies identified in the answering affidavit[120] are not necessary parties. It puts forward various reasons for that contention, including the following:

> "if it were otherwise, an applicant would in every application in which an interpretation of a law was sought or in which the validity of a law or regulation were challenged, have to join

[119] Conditional application answering affidavit, paras 47.3 and 71 to 89 (pp 1944 and 1953 to 1958); Answering affidavit, para 32 (pp 491-492) and annexure "**AA9**" (pp 682 to 692).
[120] And now more fully identified in the Conditional application answering affidavit, paras 45 to 89 (pp 1944 to 1958).

every person or group consulted in the legislative process preceding its adoption or who are effected by that law"[121]

73. The same point is made in even more strident terms in the replying affidavit in the conditional application:

"On the Minister's reasoning every person in South Africa affected in one way or another by legislation which is challenged, must be joined."[122]

74. That proposition, with respect, amounts to no more than slippery slope reasoning. It is illogical hyperbole, and is supported by neither of the two cases which the Council cites as evidence of the alleged "*practice of our courts*". So as to demonstrate the fallacies in the Council's reasoning, we deal with each case in turn.

Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)

75. *Pharmaceutical Manufacturers* concerned a proclamation issued by the State President which purported, in accordance with section 55 of the South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998, to bring that Act into force.

76. Various parties, including the State President, sought the review and setting aside of the proclamation and a declarator that two other Acts,[123] which would otherwise have been repealed by the commencement of the 1998 Act, remained in force as they applied on 29 April 1999. The Department of Health had asked the State President to exercise his power to bring the 1998 Act into force, but had done so in error. In fact, no regulations had been made, and new Schedules had not yet been prescribed by regulation.

[121] Council's heads of argument, para 13.
[122] Conditional application replying affidavit, para 6.3 (p 2374).
[123] Medicines and Related Substances Control Act 101 of 1965 ("*the 1965 Act*") and the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947 ("*the 1947 Act*").

Consequently, the "*the entire regulatory structure relating to medicines and the control of medicines*" was rendered unworkable.[124]

77. We submit that one need know little more than these facts to appreciate that *Pharmaceutical Manufacturers* concerned a set of facts that are materially different from those at issue in this application. We draw attention to the following important differences:

77.1. First, the undisputed (and unintended) consequence of the proclamation was to render unworkable "*the entire regulatory structure relating to medicines and the control of medicines*".[125] It is inconceivable that setting aside the proclamation could have an adverse effect on the rights of any non-joined party. It is therefore hardly surprising that non-joinder appears not to have been raised in this case. Against this backdrop, nothing turns on the Council's point that

> "it was not suggested that all "'stakeholders' involved in the manufacture, sale and possession of medicines for human and animal use, had to be joined."[126]

77.2. Second, there was no suggestion in *Pharmaceutical Manufacturers* that the 1998 Act was the product of a consultation process which, in any manner or degree, resembled the process by which the Minister performed his obligation to "*develop*" the 2018 Charter. The Minister provides a detailed account of that process in his answering affidavit,[127] and Mr. Alberts gives further insight into the significance of the "*social partners*" who participated in the work of the Mining Charter Transformation Team.[128] The Council simply dismisses this as

[124] At [7].
[125] At [7].
[126] Council's heads of argument, para 13.1.
[127] Answering affidavit, paras 34 to 55 (pp 492 to 499).
[128] Conditional application answering affidavit, paras 71 to 89 (pp 1953 to 1958).

an example of "*irrelevant and technical matters*".[129] That process, we submit, provides solid justification for distinguishing *Pharmaceutical Manufacturers*.

77.3. Third, the 1998 Act did not regulate access to anything that is or was subject to a "*common heritage*" regime, nor did it do so pursuant to the unique notion of "*state custodianship*". This, too, is dealt with in the answering affidavit.[130] We submit that it is precisely because of the unique statutory regime applicable to mineral resources that participation in the process of "*developing*" the Charter, including by the "*social partners*", renders them necessary parties in this application.

77.4. Fifth, as Chaskalson P. pointed out, the applicants (at first instance) in *Pharmaceutical Manufacturers* were the President of the Republic of South Africa, the Minister of Health, the Minister of Agriculture, certain functionaries in the Departments of Health and Agriculture, the Pharmaceutical Manufacturers Association of South Africa and the Crop Protection and Animal Health Association.[131] From the outset, then, we submit that a range of stakeholders participated in that application. In this application, by comparison, the Council has not seen fit to join anyone else.

Minister of Health and Another NO v. New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign And Another As Amici Curiae) 2006 (2) SA 311 (CC)

78. *New Clicks* concerned an application by the Pharmaceutical Society of South Africa and various others for the review and setting aside of regulations made by the Minister of Health under the Medicines and Related Substances Act 101 of 1965. The Minister had

[129] Council's heads of argument, para 9.
[130] Answering affidavit, para 93.2 (pp 511 to 512).
[131] At [1].

made these regulations to give effect to the pricing system for the sale of medicines, on the recommendation of the Pricing Committee. There were initially two applications – one by New Clicks and the other by the Pharmaceutical Society of South Africa (PSSA) and others – and they were duly consolidated and heard by a Full Bench.

79. The Council makes several points in relation to *New Clicks*.

79.1. First, the Council suggests that it was not necessary, in that application, to join any other parties.[132] With respect, this is conjecture. Nothing in *New Clicks* proves or disproves that proposition. It is not open to the Council to speculate as to what might or might not have happened had non-joinder been raised in that matter.

79.2. Second, the Council points out that the applicants in *New Clicks* were (i) a society representing a number of companies that owned and operated pharmacies (ii) an association which represented about 80% of all retail pharmacies and (iii) five others, being companies conducting business as operators of pharmacies. That may be so, but it takes matters no further, insofar as the Council's contention (in this application) is that it need not have joined any other parties. We note that the Council lists, as a further example of "*irrelevant and technical matters*",[133] the Minister's evidence as to why the Council does not represent all relevant stakeholders in relation to the 2018 Charter.[134] With respect, we disagree: that point is directly relevant to the question of non-joinder.

79.3. Third, the Council suggested that, on the Minister's argument, in *New Clicks*

[132] Council's heads of argument, para 13.2.
[133] Council's heads of argument, para 9.
[134] Answering affidavit, paras 61 to 65 (pp 501-503); and see Replying affidavit, paras 49 to 52 (pp 1869 to 1870).

"all pharmacy owners, all manufacturers of pharmaceutical products and all purchaser of such products should have been joined".[135]

79.4. This, with respect, is a distortion and exaggeration of the Minister's case. Again, the Council fails to appreciate the material differences between the regulations at issue in *New Clicks* and the unique nature of the 2018 Charter and the process by which it was developed. The regulations at issue in *New Clicks* were made on the recommendation of the Pricing Committee, which had elected to abide the decision of the High Court.[136] This is quite different from the process by which the 2018 Charter was developed.

79.5. Last, as with *Pharmaceutical Manufacturers*, the subject-matter of the regulations in *New Clicks* did not concern a resource declared to be the "*common heritage*" nor was the regime of state custodianship at issue.

80. We therefore submit that neither *New Clicks* nor *Pharmaceutical Manufacturers* is subversive to the Minister's non-joinder point.

[V] The non-joined parties

81. In summary, then, we submit that all of the following have a direct and substantial interest, and each is therefore a necessary party:

81.1. <u>CALS parties</u>

81.1.1. Mining Affected Communities United in Action (MACUA);

81.1.2. Women Affected by Mining United in Action (WAMUA);

[135] Council's heads of argument, para 13.2.
[136] At [5].

81.1.3. Mining and Environmental Justice Community Network of South Africa (MEJCON);

81.2. LHR parties

81.2.1. Bakgatla Ba Sefikile;

81.2.2. Lesethleng;

81.2.3. Babina Phuti Ba Ga-Makola Community;

81.2.4. Kgatlu Community;

81.3. Qualifying employees / social partners

81.3.1. AMCU;

81.3.2. UASA;

81.3.3. NUM;

81.3.4. Solidarity;

81.4. BEE entrepreneurs / social partner

81.4.1. SAMDA.

[VI] The theoretical and constitutional foundation

82. It is immediately apparent that much of the Council's argument, both in its affidavits and in its heads of argument, is articulated in the traditional vocabulary of property law. Whilst the Council fleetingly acknowledges that the MPRDA effected a "*radical departure*" from the previous regime of mining law,[137] it scarcely addresses the

[137] Council's heads of argument, para 28.

implications of that departure and, in particular, of section 3 of the MPRDA, which provides as follows:

"3. Custodianship of nation's mineral and petroleum resources.—

(1) Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.

(2) As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may—

(a) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and

(b) in consultation with the Minister of Finance, prescribe and levy, any fee payable in terms of this Act.

(3) The Minister must ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development.

(4) The State royalty must be determined and levied by the Minister of Finance in terms of an Act of Parliament."

83. For the most part, the Council appears to proceed on the assumption that section 3 has no impact at all on any of its arguments.

84. It is for that reason that we start this part of the analysis by setting out what is, in our submission, the proper context in which any debate about mining rights, the 2018 Charter and the interpretation of section 100(2) of the MPRDA must be located.

The traditional approach towards mining law

85. At common law, mineral rights were perceived through the prism of property law. Our law accepted, for the most part, the doctrine of English common law, which proclaim "*Cuius est solum, eius est usque ad coelum et ad inferos*".[138] Lord Coke articulated this principle in these terms in the sixteenth century in *Bury v. Pope*[139]

[138] Accredited to the glossator Accursius, in the 13th century, meaning that property holders have rights not only to the plot of land itself, but also the air above and (in the broader formulation) the ground below. The principle is often referred to in its abbreviated form as the *ad coelum* doctrine.
[139] (1587) Cro. Eliz. 118.

"And lastly, the earth hath in law a great extent upwards, not only of water as hath been said, but of aire, and all other things even up to heaven, for *cujus est solum ejus est usque ad coelum*, as it is holden."

86. Insofar as the subterranean content of the earth was concerned, the principle was expressed by Blackstone in this manner:

"Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum*, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land: and, downwards, whatever is in a direct line between the surface of any land, and the center of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word 'and' includes not only the face of the earth, but every thing under it, or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows."[140]

87. Although the *ad coelum* principle was not to be found in classical Roman Law in its fullest form,[141] it found a home in 19th century South African law.[142] Plewman A.J.A. explained its application to minerals in *Trojan Exploration Co (Pty) Ltd and Another v. Rustenburg Platinum Mines Ltd and Others* 1996 (4) SA 499 (A) in these terms:

"I start with the observation that South African law does not recognise the separate ownership of different strata in the land or of different parts of the land on the principle *cuius est solum eius est usque ad coelum et ad inferos*. The result is that so long as the minerals remain unseparated from the land, ownership thereof remains vested in the owner of the land." (at 537B-C)[143]

88. The same was the result with groundwater.[144]

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[140] Sir William Blackstone, *Blackstone's Commentaries on the Laws of England* (1765-1770), bk 2, chap 2, p 18.
[141] Andrew Borkowski and Paul du Plessis, *Textbook on Roman Law* (2005, 3rd edn) at 6.2.4.1, on exceptions to the principle that the land owner necessarily owned everything beneath that land.
[142] See the discussion by Hanri Mostert, "The 'Thing' Called 'Mineral Right' Re-examining the nature, content and scope of a rather confounding concept in South African law" (2014) *Recht in Africa / Law in Africa / Droit en Afrique - Zeitschrift der Gesellschaft für afrikanisches Recht*.
[143] To similar effect, see *Neebe v Registrar of Mineral Rights* 1902 TS 65.
[144] *Smith v Smith* 1914 AD 257; *Union Government (Minister of Railways and Harbours) v Marais and Others* 1920 AD 240 at 246. For discussion, see D.D. Tewari, "A detailed analysis of evolution of water rights in South Africa: An account of three and a half centuries from 1652 AD to present" (October 2009) 35 *Water SA* no 5.

89. The role of this principle in relation to mining law in South Africa was acknowledged in the 1998 White Paper, "*A Minerals and Mining Policy for South Africa*".[145] Since land had remained largely in white hands, so, too, had mineral resources. As the White Paper observed:

> "A distinguishing feature of the South African mining industry at present [*i.e. 1998*] is that almost all privately-owned mineral rights are in white hands."[146]

The policy which underpins in the MPRDA

90. The Minister, in paragraph 64 of the answering affidavit, pointed out that the MPRDA stems from the White Paper.[147] Paragraph 1.3.6.1 provides as follows:

> "i) Government recognises the inherent constitutional constraints of changing the current mineral rights system. However, in terms of the Constitution the State is bound to take legislative and other measures to enable citizens to gain access to rights in land on an equitable basis. In addition, it empowers the State to bring about land rights (including mineral rights) and other related reforms to redress the results of past racial discrimination. Furthermore, article 2(1) of the UN Charter of Economic Rights and Duties of the State grants to States full permanent sovereignty, including possession and disposal, over all its natural resources. Government therefore does not accept South Africa's current system of dual state and private ownership of mineral rights.
>
> ii) Government's long-term objective is for all mineral rights to vest in the State for the benefit of and on behalf of all the people of South Africa.
>
> iii) State-owned mineral rights will not be alienated.
>
> iv) Government will promote minerals development by applying the "use-it or lose-it"/"use-it and keep-it" principle.
>
> v) Government will take transfer of mineral rights in cases where a holder(s) of mineral rights cannot be traced or where mineral rights have not been taken cession of and are still registered in the name of a deceased person(s)."

91. The overriding importance of the transformative object of the MPRDA was recognised in the following passages in the decision of Mogoeng CJ in *Agri SA v Minister for Minerals & Energy* 2013 (4) SA 1 (CC):

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[145] Answering affidavit, para 64 (p 503) and annexures "**AA32**" (pp 1112 to 1166).
[146] At [1.3.1.2].
[147] Answering affidavit, para 64 (p 503) and annexures "**AA32**" (pp 1112 to 1166).

"[1] South Africa is not only a beauty to behold but also a geographically sizeable country and very rich in minerals. Regrettably, the architecture of the apartheid system placed about 87% of the land and the mineral resources that lie in its belly in the hands of 13% of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty. To address this gross economic inequality, legislative measures were taken to facilitate equitable access to opportunities in the mining industry.

[2] That legislative intervention was in the form of the Mineral and Petroleum Resources Development Act (MPRDA). Its commencement had the effect of freezing the ability to sell, lease or cede unused old order rights until they were converted into prospecting or mining rights with the written consent of the Minister for Minerals and Energy (Minister). It also had the deliberate and immediate effect of abolishing the entitlement to sterilise mineral rights, otherwise known as the entitlement not to sell or exploit minerals. This ought to come as no surprise in a country with a progressive Constitution, a high unemployment rate and a yawning gap between the rich and the poor which could be addressed partly through the optimal exploitation of its rich mineral and petroleum resources, to boost economic growth."

92. In *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2018] ZACC 41, Petse A.J. reconfirmed the transformative objective of the MPRDA in the following statement:

"The MPRDA, recognising that the custodianship of the country's mineral and petroleum resources vests in the state, has as one of its primary objects the transformation of the sector and the empowerment of those of the country's population who were previously excluded from participating in the exploitation of the country's mineral and petroleum resources."[148]

Section 3(1): the common heritage principle

93. Section 3(1) of the MPRDA provides as follows:

"Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans."

94. The "*common heritage*" principle first appeared[149] in South African statutes in section 2(4)(o) of the National Environmental Management Act 107 of 1998, which provides:

[148] At [50].

[149] An antecedent is to be found in s 3 of the National Water Act 36 of 1998, in these terms:

"(1) As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved,

"The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage."

95. This principle, we submit, is in all likelihood derived from the language of public international law. Its best known manifestations are in the Moon Treaty 1979[150] and the Law of the Sea Convention 1982. It also appears in some international human rights treaties.[151] Whilst the Moon Treaty has, to date, only a small number of states parties, the Law of the Sea Convention 1982 has been almost globally adopted.[152]

96. The Law of the Sea Treaty subjects the "*seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction*" (which it calls "*the Area*") to the regime of "*common heritage of mankind*". It regulates access to those resources in a similar manner to the way in which the MPRDA deals with mineral resources. A comparison between the two is therefore relevant and instructive.

97. Article 136 declares that:

"The Area [being the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction] and its resources are the common heritage of mankind."

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managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.

(2) Without limiting subsection (1), the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values.

(3) The National Government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic."

[150] Art 11(1) provides: "1. The moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement and in particular in paragraph 5 or this article." The first consequence, which has a parallel in the regime created by the MPRDA, finds expression in art 11(2), in these terms: "The moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means." Exploitation of its natural resources is controlled by art 11(5).

[151] African Charter for Human and Peoples' Rights, art 22(1), which provides:
"All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind."

[152] Most recently acceded to by Azerbaijan (its 168th state party) in June 2016.

98. The corollaries of that proposition are set out in article 137:

> "1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.
>
> 2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority.
>
> 3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized."

99. This, we submit, represents a fundamental departure from the traditional principles which govern sovereignty over territory which principles, in turn, are heavily influenced by Roman law concepts of property.[153] This backdrop, we submits, lends context to the adoption of the "*common heritage*" principle in the MPRDA.

100. In *Xstrata South Africa (Pty) Ltd and Others v SFF Association* 2012 (5) SA 60 (SCA) Wallis J.A. (for the court) held:

> "[The MPRDA] fundamentally altered the legal basis upon which rights to minerals in South Africa are acquired and exercised. Previously such rights vested in the owner of the land on or under which minerals were found. The owner of the land, or a party authorised to do so by the owner, could exploit the minerals, subject to the person exploiting the minerals possessing a mining authorisation in terms of the Minerals Act 50 of 1991. Once the [MPRDA] came into operation all mineral resources vested in the state as the custodian of such resources on behalf of all South Africans. The right to exploit such minerals was thereafter to be conferred by the state by way of mining rights granted in terms of s 23 of the [MPRDA]."[154]

101. The same point was made still more emphatically by Froneman J. (in a concurring judgment) in *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC):

> "The MPRDA abolished private ownership of minerals, based either on land ownership or the holding of severed real rights to the minerals, which existed under the mining law dispensation enacted prior to the Constitution. In its stead the MPRDA introduced a mineral law

[153] Malcolm N. Shaw, *International Law* (2008, 6th edn) at 490; D.P. O'Connell, *International Law* (1965) at 403 to 404.
[154] At [1].

dispensation in terms of which the state became the custodian of mineral resource with the power to allow exploitative access to those resources to all the people of South Africa."

Section 3(1): State custodianship

102. The second proposition in section 3(1) of the MPRDA is that "*the State is the custodian thereof for the benefit of all South Africans*". It is striking that the Council's submissions regarding the proper interpretation of section 100(2) and the legal nature of the 2018 Charter appear to have no regard to this fundamental principle.

103. In *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) Mogoeng C.J. (in the majority decision) accepted that the notion of custodianship was a "*new concept in our law*" (footnote 137), and held:

> "The critical question is, however, whether this deprivation, the assumption of custodianship and the power to grant others what could previously have been granted only by holders, means that the state acquired ownership of rights to these mineral and petroleum resources. The answer is no. Unlike in the case of the state (i) acquiring land for governmental projects such as road infrastructure, industrial development or other purposes, and (ii) acquiring mineral rights so that it could exploit them, in this case the state did not acquire any mineral rights, including those of Sebenza, at the commencement of the MPRDA. The state, as the custodian of these resources, is not seeking or supposed to be a co-contender with people or business entities for the right to prospect for or mine these minerals. It is a facilitator or a conduit through which broader and equitable access to mineral and petroleum resources can be realised." (at [68], our underlining).[155]

104. Jafta J. in *Minister of Mineral Resources and Others v. Sishen Iron Ore Co (Pty) Ltd and another* 2014 (2) SA 603 (CC) expressed the view that: "*Ownership of all mineral and petroleum resources is now vested in the nation*".[156] Whilst the correctness of this view has been doubted for its incompatibility with first principles of property law,[157] we

[155] Endorsed in *Maledu and Others v. Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019 (2) SA 1 (CC) at [50].
[156] At [16].
[157] eg J.D. van der Vyver, "Nationalisation of mineral rights in South Africa" 2012 *De Jure* 125 at 133; P.J. Badenhorst, "The Nature of New Order Prospecting Rights and Mining Rights: A Can of Worms" (2017) 134 *SALJ* 361 at 369. The doctrinal objection lies principally in the difficulty that "*the nation*" is not capable of owning anything.

submit that it nonetheless underscores the dramatic shift in paradigm brought about by section 3(1) of the MPRDA. Even if there is some doubt as to all of the implications of section 3(1) of the MPRDA,[158] at least three propositions appear to us to be clear: first, there has been an intentional breaking of the link between ownership of land and ownership of the minerals contained within in it;[159] second, the *ad coelum* doctrine, insofar as it applies to minerals, has been abolished;[160] and third, the paradigm shift is set to impact upon all questions regarding mining rights including (we submit) the questions raised in this application. This court is at liberty to explore the contours of that paradigm shift, and to consider and pronounce upon the implications of section 3 of the MPRDA. One view is that section 3 of the MPRDA falls to be understood through the prism of a "*public trust*" doctrine.[161] And one fundamental consequence which we submit flows from section 3 is the notion that the Minister (acting in the discharge of state custodianship) is required to maintain at least some degree of control over the exercise of mining rights even after they have been granted. It is against this backdrop that the Minister's submission that section 100(2) of the MPRDA contemplates that the Charter should be in the nature of subordinate legislation falls to be understood.

[158] On which, see P. J. Badenhorst, "Ownership of Minerals in Situ in South Africa: Australian Darning to the Rescue" (2010) 127 *SALJ* 646 at 655-661.
[159] Elmarie van der Schyff, "The Right to be Granted Access Over the Property of Others in Order to Enter Prospecting or Mining Areas: Revisiting Joubert v Maranda Mining Company (Pty) Ltd 2009 4 All SA 127 (SCA)" (2019) 22 *Potchefstroom Elec. L.J.* 1 at 22
[160] Elmarie Van Der Schyff, "Who Owns the Country's Mineral Resources: The Possible Incorporation of the Public Trust Doctrine through the Mineral and Petroleum Resources Development Act' [2008] *TSAR* 757 at 759.
[161] On which, see Elmarie Van Der Schyff, "Who Owns the Country's Mineral Resources: The Possible Incorporation of the Public Trust Doctrine through the Mineral and Petroleum Resources Development Act' [2008] *TSAR* 757; Elmarie van der Schyff, "Stewardship doctrines of public trust: Has the eagle of public trust landed on South African soil?" (2013) 130 *SALJ* 369.

[VII] The "law or policy question": the proper interpretation of the power in section 100(2) of the MPRDA

The formulation of the issues in the Rule 16A notice

105. The Council's Rule 16A notice (filed on 27 January 2020) identifies the following issue:

> "Whether, having regard to the fact that it was developed under section 100(2) of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA), the Broad-based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 (2018 Charter) is law or formal policy as contemplated in section 85(2)(b) of the Constitution, 1996."

106. We submit that the Council, by narrowing the options to just two – "*law*" or "*formal policy*" as contemplated in section 85(2)(b) of the Constitution, 1996 – has presented this Court with a fallacy of definition. As we shall demonstrate below, there are various contenders which fall under the broad heading of "*law*"; and similarly, the field of choice under the heading "*formal policy*" (regardless of what meaning the adjective "*formal*" is intended to add) is wider than the question suggests.

107. We point to *R. (on the application of Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148 (HL), which demonstrates that there is not always a clear dividing line between "*law*" and "*policy*". Here, the Lords differed on whether a policy of seclusion at a hospital was "*in accordance with the law*", within the meaning of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.[162] Lord Brown of Eaton-under-Heywood reasoned that the

[162] Article 8 provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." (our emphasis).

"practices relating to seclusion adopted by any individual hospital, rational and reasonable though those practices might be, would not have 'the necessary legal quality to render them compatible with the rule of law'."[163]

108. But Lord Scott of Foscote disagreed:

"*'The law'*, for article 8 purposes, does not consist only of statutes, directives, statutory codes and the like. It must include, also, the variety of duties and rights arising out of the circumstances in which individuals and institutions find themselves and their relationship with one another that are imposed by the common law."[164]

109. We shall also demonstrate that, both in England and in South Africa, the vocabulary used to denote subordinate (or delegated) legislation is both varied and inconsistent; and second, that even in contemporary South African law, the range of possibilities which might be reckoned as subordinate legislation is not limited just to "*regulations*".

110. These points further underscores the artificiality of the two-fold distinction drawn by the Council in its Rule 16A notice.

Section 100(2)

111. It is common ground between the parties that the power, conferred by section 100(2) of the MPRDA to "*develop*" a Charter, "*does not fall into a well-known juristic niche*".[165] It is *sui generis*. It is also correct, as Barrie A.J. pointed out in *Chamber of Mines v. Minister of Mineral Resources and Another* 2018 (4) SA 581 (GP) at [79], that the MPRDA does not stipulate what the status of the Charter contemplated by section 100 of the MPRDA is.

[163] At [127].
[164] At [103].
[165] Founding affidavit, para 29 (p 28); Answering affidavit, para 80 (p 508).

112. The starting point in the inquiry must be with the express words of section 100(2).[166] It provides as follows:

> "(2) (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.
>
> (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." (our underling).

113. We invite attention to several textual attributes of this section:

113.1. First, the command to the Minister is not to "*make*", but rather to "*develop*". The Council, for its part, points out that the word "*develop*" also appears in section 85(2)(b) of the Constitution, in relation to national policy.[167] It then asserts that this "*is language indicative of a policy, not of legislation*".[168] We return to that argument below. The Minister puts forward his understanding of the word "*develop*": namely, that it has an organic quality.[169] It is that quality, we submit, that accounts both for the consultative process by which the Charter is developed, and also the need for revisions to the Charter from time to time.

113.2. Second, the object of the command is not "*regulations*", but rather "*a broad-based socio-economic empowerment Charter*". It is common ground that the Charter "*does not fall into any recognised juristic niche*".[170]

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[166] Council's heads of argument, para 27.
[167] Section 85(2)(b) of the Constitution provides as follows:
> "The President exercises the executive authority, together with the other members of the Cabinet, by- …
> (b) developing and implementing national policy."
[168] Council's heads of argument, para 36.
[169] Answering affidavit, paras 93.1 (p 511), 97 (p 513), 147 (p 523) and 173 (p 537).
[170] Founding affidavit, para 29 (p 28).

113.3. Third, section 100(2)(b) stipulates what is, in essence, an obligation both of conduct and of outcome: the Charter must set out how the objects in sections 2 (c), (d), (e), (f) and (i) can be achieved. That stipulation, in our submission, cannot meaningfully be achieved if (as on the Council's version) the Charter is a mere policy document.

113.4. Fourth, that stipulation is expressly qualified by the words "*amongst others*". We refer, in this regard, to the important dictum by Makgoka A.J.A. in his separate concurring judgment in *GN v JN* 2017 (1) SA 342 (SCA) at [54]:

> "Those words should be given meaning. One cannot treat those words as if they do not exist. It is impermissible to do so, as it militates against a long-standing precept of interpretation that every word must be given a meaning, and that no word should be ignored, or treated as tautologous or superfluous. See *African Products (Pty) Ltd v AIG South Africa* Ltd 2009 (3) SA 473 (SCA) para 13; *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) (2013 (2) BCLR 170; [2012] ZACC 29) para 99; *Kilburn v Tuning Fork (Pty) Ltd* 2015 (6) SA 244 (SCA) ([2015] ZASCA 53) para 15."

113.5. In other words, setting out how those the objects in sections 2 (c), (d), (e), (f) and (i) can be achieved is not the only function of the Charter. The Council, however, disregards those words. On its version, the Charter's only function is to

> "guide the Minister's discretion, on the basis of a published document, when he takes decisions under those sections of the MPRDA 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."[171]

113.6. The Council's version, we submit, is inconsistent with the principle restated by Makgoka A.J.A. in *GN*, since it ignores the words "*amongst others*".

113.7. Fifth, the stipulation in section 100(2)(b) refers to some (but not all) of the objects set out in section 2 of the MPRDA. The referred objects are set out in

[171] Founding affidavit para 42 (p 32) and elsewhere.

section 2(c),[172] 2(d),[173] 2(e),[174] 2(f)[175] and 2(i).[176] We point out that four of the five referred objects are transformative in nature. Moreover, the scope of section 2(d) was widened in 2008 by the addition of the words "*and communities*". Consequently, we submit, it follows that the attainment of transformation in relation to the mining industry and access to mineral resources should be the primary focus of the power conferred by section 100(2).

114. In *Aquila Steel (South Africa) (Pty) Ltd v. Minister of Mineral Resources and Others* 2019 (3) SA 621 (CC), Cameron J. emphasised the need to interpret the MPRDA in a manner that promotes the transformative objectives:

> "Both the High Court and the Supreme Court of Appeal were alert to the need to interpret the MPRDA and item 8's exclusivity, priority and duration provisions purposively, in light of the statute's transformational objectives."[177] (our underlining)

[172] Section 2(c) provides:
"promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa".

[173] Section 2(d) provides:
"substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources".

[174] Section 2(e) provides:
"promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries".

[175] Section 2(f) provides:
"promote employment and advance the social and economic welfare of all South Africans".

[176] Section s 2(i) provides:
"ensure that holders of mining and production rights contribute towards the socioeconomic development of the areas in which they are operating".

[177] At [80].

115. The need to interpret the MPRDA in that manner was stressed at first instance by Tuchten J.[178] and by Ponnan J.A. on appeal.[179] The same approach, we submit, ought also to apply in relation to the process of interpreting section 100(2) of the MPRDA.

116. We also draw attention to section 4 of the MPRDA, which requires that:

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

The constitutional imperatives when interpreting the MPRDA

117. The Council, in paragraph 53 of its heads of argument, contends that the

> "Insofar as the Minister suggests that the Constitution produces binding transformational obligations which rights holders must meet or that the Constitution empowers him to impose the transformational obligations contained in the 2018 Charter, this is incorrect."

118. Paragraphs 53.1 to 53.6 of the Council's heads of argument then deal with the principle of subsidiarity.[180] The Council, with respect, loses sight of the significance of the Constitution insofar as the process of interpreting the MPRDA is concerned.

119. Froneman J. underscored the importance of that proposition in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC):

> "Equality, together with dignity and freedom lie at the heart of the Constitution. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of substantive equality the Constitution provides for legislative and other measures to be made

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[178] *Aquila Steel (SA) Ltd v. Minister of Mineral Resources and Others* 2017 (3) SA 301 (GP) at [77] – [78]. The judge held, at [78]:

> "[78] In my view, the objects of the MPRDA would be far better achieved if item 8 were interpreted to mean that the exclusivity ran only until 30 April 2005. Thereafter other aspirant right-holders might join the queue. Counsel submitted that the contrary interpretation would not I give effect to the notion in item 8(3) that the unused old order right would remain valid until the application was granted and dealt with in terms of the MPRDA or refused."

[179] *Pan African Mineral Development Co (Pty) Ltd and Others v Aquila Steel (SA) (Pty) Ltd* 2018 (5) SA 124 (SCA) at [15]:

> "[15] In order to give effect to that constitutional objective, it is necessary to read ss 16 and 17 (and 22 and 23) of the MPRDA as being subject to item 8(3)."

[180] Council's heads of argument, pp 37 to 39.

to protect and advance persons disadvantaged by unfair discrimination. The Constitution also furnishes the foundation for measures to redress inequalities in respect of access to the natural resources of the country. The Mineral and Petroleum Resources Development Act (Act) was enacted amongst other things to give effect to those constitutional norms. It contains provisions that have a material impact on each of the levels referred to, namely that of individual ownership of land, community ownership of land, and the empowerment of previously disadvantaged people to gain access to this country's bounteous mineral resources."[181] (our underlining)

120. To similar effect (albeit in a different context), Petse A.J. (for a unanimous bench) held the following in *Maledu and Others v. Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019 (2) SA 1 (CC):

"Mining is one of the major contributors to the national economy. But there is a constitutional imperative that should not be lost from sight, which imposes an obligation on Parliament to ensure that persons or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices are entitled either to tenure which is legally secure or to comparable redress. Accordingly, this case implicates the right to engage in economic activity on the one hand and the right to security of tenure on the other."[182] (our underlining)

The language of the primary legislation is not decisive

121. As we have pointed out, both the command ("*develop*") and the object of that command ("*a broad-based socio-economic empowerment Charter*") are unique. Often, an empowering statute will frame a command to make subordinate legislation in more conventional terms: for example, direct that the Minister "*may ... make regulations regarding*" (as does section 107 of the MPRDA). But nomenclature is not decisive. As Professor Cora Hoexter, *Administrative Law in South Africa* (2nd edn, 2012) puts it:

"An array of terms is used for different types of delegated legislation: regulations, proclamations, rules, orders, declarations, directives, decrees and schemes are some of the most common" (at 52).

[181] At [3].
[182] At [5].

122. The same is true in England and Wales. As Sir William Wade and Christopher Forsyth, *Administrative Law* (11th edn, 2014) explain:

> "Parliament follows no particular policy in choosing the form of delegated legislation, and there is a wide range of varieties and nomenclature. An Act may empower an authority to make regulations, rules or byelaws, to make orders, or to give directions. … Untidy though the language may be, it makes no legal difference" (at 731).

123. The problem of inconsistency in terminology is not new. It was addressed as long ago as 1932 by the (British) Committee on Ministers' Powers.[183] Its report[184] stated:

> "Delegated legislation takes many forms. With the haphazard habit characteristic of English political life the constitutional practice has grown up gradually, as and when the need arose in Parliament, without any logical system. The power has been delegated by Parliament for various reasons, because, for instance, the topic involved much detail, or because it was technical, or because the pressure of other demands upon Parliamentary time did not allow the necessary time to be devoted by the House of Commons to the particular Bill. The limits of delegated power, the methods of Ministerial procedure, and the safeguards for the protection of the public or the preservation of Parliamentary control thus appear often to have been dictated by opportunist considerations, peculiar to the occasion.
>
> As a natural consequence the choice of terminology has also been accidental; and the nomenclature of delegated legislation is confused. The Act of Parliament which delegates the power may in so many words lay down that " regulations," " rules," " orders," " warrants," " minutes," " schemes," " bye-laws," or other instruments—for delegated legislation appears under all these different names—may be " made " or " approved " under defined condition"[185] (our underlining).

124. The Committee's recommendation that, to avoid confusion, Parliament should thenceforth use the word "*regulations*" to "*describe the subordinate legislation which results from delegation*",[186] was not followed, and the problem of inconsistency in nomenclature remains in England, as it does in South Africa. As we shall demonstrate below, not all subordinate legislation takes the form of regulations: and the label given to an instrument is not determinative of the question whether or not it is subordinate

[183] The Committee was established following the publication of a book by the then-Lord Chief Justice, Lord Hewart, entitled *The New Despotism*, in which he criticised the proliferation of subordinate legislation in England and Wales.
[184] Cmd Paper No 4060.
[185] At 16.
[186] At 18.

legislation. This proposition, we submit, is also implicit from section 101(3) of the Constitution of the Republic of South Africa, 1996, which provides:

> "Proclamations, regulations and other instruments of subordinate legislation must be accessible to the public." (our underlining).

125. It is against this backdrop that we submit:

125.1. neither a statutory command in primary legislation in the form used in section 107 of the MPRDA, nor the use of the word "*regulations*", are the sole indicators of a power to make subordinate legislation; and

125.2. the command to "*develop*" a "*Charter*" must, on a proper interpretation of section 100(2) and having regard to its context, purpose and legislative history, be taken to be a command to make subordinate legislation.

Can the status of the Charter be inferred from other sections of the MPRDA?

126. In *Chamber of Mines v. Minister of Mineral Resources and Another* 2018 (4) SA 581 (GP) at [79], Barrie A.J. relied, in part, on cross-references to the Charter in other sections of the MPRDA in order to pronounce upon its status. So, too, does the Council, for its argument that section 100(2) contemplates only the making of a policy instrument. Barrie A.J. noted, in particular, the none of those sections specifies that the Charter is to "*have force or effect as referred to in the definition of the term 'law' in s 2 of the Interpretation Act*." This reasoning led directly to his conclusion[187] that

> "'(T)he charter contemplated in section 100' of the MPRDA accordingly finds application and legal significance in an indirect manner only, through application of the other sections of the MPRDA that refer to it."

[187] At [81].

127. It is correct that the only cross-references in the MPRDA to the Charter are to be found in sections 23(1)(h),[188] 25(2)(h),[189] 28(2)(h)[190] and 84(1)(i).[191] It is also correct that it is necessary to have regard to the internal context of the MPRDA to assist in the interpretation of section 100(2). But to go no further, we submit, is to fall far short of the interpretative exercise required by Wallis J.A. explained in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at [18]:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

128. In our submission, it is clear from this dictum that the process by which section 100(2) is to be interpreted cannot be confined to considering express cross-references in other

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[188] Section 23(1)(h) provides:
"Subject to subsection (4), the Minister must grant a mining right if-… 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."

[189] Section 25(2)(h) provides:
"The holder of a mining right must … submit the prescribed annual report, detailing the extent of the holder's compliance with the provisions of section 2 (d) and (f), the charter contemplated in section 100 and the social and labour plan."

[190] Section 28(2)(h) provides:
"The holder of a mining right or mining permit, or the manager of any mineral processing plant operating separately from a mine, must submit to the Director-General- … an annual report detailing the extent of the holder's compliance with the provisions of section 2 (d) and (f), the charter contemplated in section 100 and the social and labour plan."

[191] Section 84 (1)(i) provides:
"The Minister must grant a production right if- … the granting of such right will further the object 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."

provisions of the MPRDA. To do so would be to constrain the scope of the inquiry in a manner that is not compatible with the interpretative process contemplated by Wallis J.A.

129. The same, with respect, applies to Barrie A.J.'s finding that

> "The charter 'contemplated in section 100' was the charter that the Minister was in terms of s 100(2) of the MPRDA obliged to develop within the six-month period referred to in the section. The Minister complied with the duty imposed upon her/him, resulting in the Original Charter coming into existence in accordance with what s 100 specified. Accordingly, the Original Charter is 'the charter contemplated in section 100'. The 2010 Charter is not."[192]

130. Even the Council now disagrees with that proposition.

The Council mischaracterises the Minister's stance on section 100(2)

131. The Council repeatedly mischaracterises, exaggerates or otherwise mis-states the Minister's view of how section 100(2) is to be interpreted. Examples include:

131.1. "*The Minister's position is that he has the power to make laws via the 2018 Charter which [sic] is virtually unbridled*".[193]

131.2. The Minister is a "*regulator who believes that he has an untrammelled power to legislate by creating laws which constitute neither national, nor provincial, nor subordinate legislation ...*".[194]

131.3. The Charter

> "still proceeds from the basic incorrect premise that it constitutes an instrument of law. It seeks to impose legal obligations, by decree, on mining right holders, to be complied with at all relevant times, in conflict with or in addition to those set out in the MPRDA and the regulations or in other legislation, as if the Charter constituted law".[195]

[192] At [96].
[193] Council's heads of argument, para 4.
[194] Council's heads of argument, para 8.
[195] Founding affidavit, para 16 (pp 22-23).

132. The Council does not put up any evidence to sustain any of these allegations. This is perhaps not surprising. The Minister's stance is that he has the power to "*develop*" a Charter within the confines of section 100(2).

133. We point out, too, that nowhere in the founding or replying affidavits does the Council allege any conflict with "*the regulations*".

The imperative language of the Charter

134. The Council complains that aspects of the 2018 Charter are written in imperative terms.[196] That may be, but this is not determinative of its normative character. To that extent, the Council's complaint confuses result with cause.

135. The contention that this language somehow manifests "*the Minister's legislative intent*"[197] is, with respect, simply not relevant. The Minister explains, in some detail, in the answering affidavit that certain provisions which read in the language of the imperative are, in substance, simply declaratory of obligations which already arise, either in express terms or by necessary implication, from the MPRDA itself. He also accepts that some of the clauses in the 2018 Charter "*might have been differently or perhaps better drafted*".[198]

136. We submit that the Minister's contention is consistent with *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* (CCT140/16; 2017 (9) BCLR 1108 (CC), in which the majority (led by Mogoeng C.J.) found that a policy instrument was

[196] Council's heads of argument, para 20.
[197] Council's heads of argument, para 20.
[198] Answering affidavit, para 295 (p 575).

not, on a proper interpretation, peremptory in effect, despite the use of imperative language.[199]

137. We therefore submit that the language of the Charter is not determinative of the normative character of the power conferred by section 100(2).

Subordinate legislation of a *sui generis* type

138. The Council denies that the Charter is subordinate legislation of a *sui generis* type, for three reasons:

138.1. First, it alleges, there is no indication in the wording of section 100(2) that the legislature intended a delegation of legislative power to the Minister.[200]

138.2. Second, the Council alleges, to interpret section 10(2) as implicitly affording the Minister such powers would infringe the separation of powers between the legislature and the executive.[201] The deponent describes such powers in the following manner:

> "unbridled powers to prescribe any such binding measures as he, in his sole discretion, deems appropriate in order to achieve the objects in sections 2(c), (d), (e), (f) and (i), such as he has sought to exercise in publishing the challenged clauses …"

138.3. Yet again, this is an exaggeration of the powers which the Minister asserts are in fact contemplated by section 100(2). Nowhere in the evidence does the Minister assert any entitlement to "*unbridled powers*"[202] or an "*untrammelled power to legislate*".[203]

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[199] It was on this basis that Mogoeng C.J. distinguished the judgment of Sachs J. in *Minister of Education v Harris* 2001 (4) SA 1297 (CC), which also considered the interpretation of a policy instrument.
[200] Replying affidavit, para 16.1 (p 1850).
[201] Replying affidavit, para 16.2 (pp 1850 to 1851).
[202] Replying affidavit, para 16.2 (pp 1850 to 1851)
[203] Replying affidavit, para 18 (p 1851).

138.4. Third, even if the Charter is intended to be *sui generis* subordinate legislation, it cannot conflict with, amend or supplement the MPRDA and other legislation.[204] The short answer to this proposition is that the Charter does not, on a proper construction, conflict with, amend or supplement any provisions of the MPRDA or any other legislation. We deal with this aspect of the Minister's case in more detail below.

Subordinate legislation may take various forms

139. We explained, at the outset of this section , why the two-fold distinction in the Rule 16A notice between "*law*" and "*formal policy*" is unhelpful. The Council seemingly fails to appreciate that there are many different forms of "*law*", authorised in each case by empowering provisions in primary or even secondary legislation. We set out several examples immediately below. It is not necessary for this Court to label the 2018 Charter by reference to any of these examples. In our submission, it is sufficient to conclude that the 2018 Charter constitutes subordinate legislation in a *sui generis* form.

[a] Directions

140. The Disaster Management Act 57 of 2002 is a fertile source of recent examples. Once the condition precedent (the declaration of a national disaster) was satisfied, section 27(2) permitted that the Minister

> "may, subject to subsection (3), and after consulting the responsible Cabinet member, make regulations or issue directions or authorise the issue of directions concerning- [*the range of matters listed in (a) to (o)]*" (our underlining)

[204] Replying affidavit, para 16.3 (p 1851).

141. The Minister duly published Regulations on 18 March 2020.[205] These were subsequently amended. Regulation 10, in turn, empowers the Ministers of Health, Justice and Correctional Services, Basic and Higher Education, Police, Social Development, Trade and Industry, Transport, and (for various purposes) "*any other minister*" each to make "*directions*". In due course, various Ministers issued a raft of Directions in the exercise of the powers sub-delegated by regulation 10.

142. Are the Regulations "*law*" and the "*Directions*" something other than law? Or are they all "*law*"? Or are some "*law*" and others, depending upon the substantive nature, not "*law*"? We pose these rhetorical questions to illustrate the point that subordinate legislation may take various forms. The Act does not define or otherwise identify any substantive differences between "*regulations*" and "*directions*". In the absence of any other indicators, it appears to us that both its "*regulations*" and "*directions*" may legitimately be regarded as "*law*".

[b] Directives

143. In *Ahmed and Others v Minister Of Home Affairs and Another* 2019 (1) SA 1 (CC) the Constitutional Court considered the legal status of the Immigration Directive 21 of 2015, which provided that asylum seekers may not apply for visas or permanent residence permits.[206] Theron J. (for the court) accepted that the "*nature and status of a directive is unclear*",[207] whilst proceeding immediately to characterise a directive as "*an official*

[205] GN 318 in GG 43107, on 18 March 2020.

[206] It provided, in relevant part:

> "'In view of the above provisions I wish to advise all immigration officials that Departmental Circular No. 10 of 2008 has fallen away since the 26th of May 2014 and is hereby officially withdrawn. All applications for change of status from asylum seeker permit to temporary residence visa which are still pending in the system should be processed as per this directive regardless of the date of application.'"

[207] At [41].

*policy document, which guides government departments on how to apply legislatio*n."[208]

The nub of the dispute was this:

"The applicants argue that the Directive is binding on all employees of the Department and thus they are obliged to adhere to and act in accordance with it. The respondents contend that the Directive is merely a statement of policy which has no force in law and which cannot confer any rights nor deprive a person of rights."[209]

144. Theron J. then adopted Professor Baxter's exposition and expanded upon it, in these terms:

"[41] According to Baxter, directives belong to a 'body of rules which are of great practical importance' and which constitute 'instructions issued without clear statutory authority to guide the conduct of officials in the exercise of their powers'. Baxter refers to departmental circulars and directives as 'administrative quasi-legislation', which are neither legislation nor subordinate legislation. This does not necessarily mean that a directive is unenforceable or that it has no legal status. Where it appears that an Act has anticipated the creation of a directive, a court will be more willing to find that it has legal authority and is enforceable. The fact that directives are not promulgated and there is uncertainty as to their legal status, may lead to a situation where an official or body relies on a directive that is not aligned to applicable law.

[42] The nature of policy directives differs. They may be statutorily required, in which case their lawfulness is assessed against the empowering legislation seen through a constitutional lens. In other cases, the application of the statutory policy in individual instances may be challenged on the grounds of the infringement of certain fundamental rights, like the right to equality. In *Barnard*, this court held that there was no discrimination against the applicant because the policy was flexible and the functionary's exercise of discretion in accordance with that flexibility could not be faulted. Lastly, the policy may not be expressly required by legislation, but be an internal document that regulates the implementation and application of statutory powers granted to functionaries.

[43] The Directive here appears to fall into the third category. The difficulty then is whether its contents may be challenged directly in the same way as legislation by way of legality review, or whether only its application in individualised instances may be challenged under administrative review. However the two are, at times, closely interlinked.

[44] The Directive was issued by department officials and in practice, employees of the Department, and its agent VFS Global, believed that they were bound by the terms of the Directive. Standing alone, the Directive could be said to constitute an exercise of public power which is reviewable, be it under the Promotion of Administrative Justice Act (PAJA) or the principle of legality. The application of its terms by officials would merely be an extension of this conduct. If that conduct — the issuing of the Directive and its subsequent application by officials — was based on a material error of law the result under legality or administrative review would be the same: it would be invalid and unlawful.

[208] Ibid.
[209] At [40].

> [45] In my view, it is not necessary to make a pronouncement on the status of the Directive or directives falling into the third category. Similarly, it is not necessary for me to make a pronouncement on whether the review should take place under PAJA or the principle of legality as the distinction was never raised by the parties. That the Directive is treated as binding by the people tasked to implement it is sufficient for this court to make a determination on whether the Directive is ultra vires and thus invalid." (our underlining)

145. This analysis gives rise to a number of important propositions:

145.1. First, any question regarding the normative status of a species of subordinate legislation (or, indeed, policy) is not the same in every case.

145.2. Second, directives are "*quasi-legislation*".

[c] Guidance

146. On the boundary between law and policy are "*guidance*" documents, in respect of which Sir William Wade and Christopher Forsyth have suggested "*the observance of which may or may not be mandatory, according as the Act intends*".[210] The judgment of Sedley J. in *R v Islington London Borough Council, ex p Rixon* [1997] ELR 66, 32 BMLR 136, [1998] 1 CCL Rep 119, illustrates this proposition. This case concerned the legal status of "*directions*" issued by the Secretary of State under section 29(1) of the National Assistance Act 1948. That section provided that:

> "A local authority may, with the approval of the Secretary of State, and to such extent as he may direct in relation to persons ordinarily resident in the area of the local authority shall, make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons aged 18 or over who are blind … or who suffer from mental disorder of any description and other persons aged 18 or over who are substantially and permanently handicapped by … congenital deformity."

147. Also relevant was section 7(1) of the Local Authority Social Services Act 1970, which provided as follows:

[210] Sir William Wade and Christopher Forsyth, *Administrative Law* (11th edn, 2014) at 731.

"Local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State."

148. At issue in this matter, a judicial review, was the "*Secretary of State's Approvals and Directions under s 29(1) of the National Assistance Act 1948*", published as an appendix to departmental circular LAC(93) 10 and coming into force on 1 April 1993" .

149. Sedley J. reasoned as follows:

"What is the meaning and effect of the obligation to 'act under the general guidance of the Secretary of State'? Clearly guidance is less than direction, and the word 'general' emphasises the non-prescriptive nature of what is envisaged. Mr McCarthy, for the local authority, submits that such guidance is no more than one of the many factors to which the local authority is to have regard. Miss Richards submits that, in order to give effect to the words 'shall … act', a local authority must follow such guidance unless it has and can articulate a good reason for departing from it. In my judgment Parliament, in enacting s 7(1), did not intend local authorities to whom ministerial guidance was given to be free, having considered it, to take it or leave it. Such a construction would put this kind of statutory guidance on a par with the many forms of non-statutory guidance issued by departments of state. While guidance and direction are semantically and legally different things, and while 'guidance does not compel any particular decision' (*Laker Airways Ltd v Dept of Trade* [1977] 2 All ER 182 at 199, [1977] QB 643 at 714, per Roskill LJ), especially when prefaced by the word 'general', in my view Parliament, by s 7(1), has required local authorities to follow the path charted by the Secretary of State's guidance, with liberty to deviate from it where the local authority judges, on admissible grounds, that there is good reason to do so, but without freedom to take a substantially different course."[211]

150. It is clear, we submit, that Sedley J.'s findings as to the mandatory nature of the "*guidance*" was derived from a proper examination of the enabling provisions in the relevant legislation. Thus:

"Returning, then, to s 29 of the National Assistance Act 1948, this section operates in tandem with s 2(1) of the 1970 Act. Not only does the latter trigger a duty to exercise the functions spelt out in the former; the former contains its own trigger provision in the form of any direction given by the Secretary of State, the effect of which is to make mandatory what is otherwise discretionary under the section." (at 141).

[211] At 140.

[d] Rules

151. Our law also recognises the making of statutory "*rules*", sometimes in the absence of any clear statutory authorisation. On the status of those "rules" for which there is no clear statutory authorisation, Professor Baxter[212] states:

> "Where an Act appears to anticipate (though not necessarily require) their creation, the courts incline towards affording them legal recognition and enforceability"

152. Professor Baxter cites, as authority for this proposition, *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and Others* 1983 (3) SA 344 (W) (non-statutory rules of the Johannesburg Stock Exchange held to be binding on the JSE, because they were "recognised" in the Stock Exchange Control Act 7 of 1947 s 10(1)(c)).

[e] Proclamations

153. A "*proclamation*" also appears in the lexicon of subordinate legislation. Professor Baxter says:

> "Delegated legislation is not easily classified because the relevant terminology is used inconsistently and ambiguously. For example, municipalities enact 'by-laws' and 'regulations', yet other kinds of administrative bodies also enact 'by-laws'. 'Statute' is a word which usually refers to an Act of Parliament but it is also used to refer to legislative enactments generally, and in any event 'statutes' are also used by the Rand Water Board and by universities. 'Proclamations' are an important type of delegated legislation, but not all 'proclamations' are of a legislative nature."[213]

154. Professor Baxter, as authority for the last proposition, relied upon *S v Naicker And Another* 1965 (2) SA 919 (N). Here, Caney J. considered whether a particular Proclamation was an administrative act or legislative in nature. He followed the reasoning of Schreiner J.A. in *Pretoria North Town Council v A.1. Electric Ice-Cream Factory* 1965 (2) SA 926, who drew attention to the tendency towards classification of

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[212] At 201.
[213] Lawrence Baxter, *Administrative Law* (1984) at 199.

discretions and functions and warned that one should be careful not to elevate what may be no more than a convenient classification into a source of legal rules, adding

'What primarily has to be considered in all these cases is the statutory provision in question, read in its proper context.'"

155. Caney J. then applied that approach and then reasoned (at 926):

"In the instant case I think the discretion is administrative. By the words of the legislation, it is limited only by the expression 'whenever it is deemed expedient', and it must be taken, I think, that the legislation was enacted under the authority and with the object of fulfilling the purpose of sec. 59 of the South Africa Act, 1909, which contained the Constitution at the time the Statute was passed, namely:

'Parliament shall have full power to make laws for the peace, order and good government of the Union.'"

What did Parliament intend by section 100(2)

156. We submit that some guidance as to the proper interpretation of section 100(2) can legitimately be derived by considering parliamentary material.

157. In South Africa,[214] as in England and most other Commonwealth jurisdictions, courts traditionally declined to look to any parliamentary records in order to interpret an Act of Parliament.[215] This came to be known as the "*exclusionary rule*".[216]

158. The seminal judgment of the House of Lords in *Pepper v Hart*[217] marked the beginning of an important departure from the "*exclusionary rule*". Lord Browne-Wilkinson, in his speech, held the following:

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[214] *Bok v Allen* (1881-1884) 1 SAR TS 119 (Kotzé C.J.) (citing English authority (at 132)); followed by the Appellate Division in *More v. Minister of Co-operation and Development and Another* 1986 (1) SA 102 (A) at 106. For discussion, see Gary A. Oliver, "Reference to Hansard in the Interpretation of States: Are there prospects for a new approach?" (April 1994) *Consultus* 50.

[215] In England, the "*exclusionary rule*" has its antecedents in *Millar v Taylor* (1769) 2 Burr. 2302 (Willes J.) (KB). The retention of this rule was recommended as recently as 1969 by the English and Scottish Law Commissions, *The Interpretation of Statutes*, Law Commission Report No. 21 and Scottish Law Commission Report No. 11 (1969).

[216] On the "*exclusionary rule*" in Commonwealth countries, see Francis Bennion, *Bennion on Statutory Interpretation* (2008, 5th edn) at 673-680.

[217] [1993] AC 593 (HL).

"My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases reference in court to parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot see that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria."

159. He continued:

"In sum, I do not think that the practical difficulties arising from a limited relaxation of the rule are sufficient to outweigh the basic need for the courts to give effect to the words enacted by Parliament in the sense that they were intended by Parliament to bear. Courts are frequently criticised for their failure to do that. This failure is not due to cussedness but to ignorance of what Parliament intended by the obscure words of the legislation. The court should not deny themselves the light which parliamentary materials may shed on the meaning of the words Parliament has used and thereby risk subjecting the individual to a law which Parliament never intended to enact."

160. *Pepper v. Hart* was followed in Canada in *Bristol-Myers Squibb Canada Inc v Canada (Attorney-General)*.[218] The exclusionary rule was never as firmly entrenched in New Zealand[219] and was finally abolished in *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694 (Court of Appeal). Cooke P. stated:

"in my view it would be unduly technical to ignore such an aid as supporting a provisional interpretation of the words of the Act, or as helping to identify the mischief arrived at or to clarify some ambiguity in the Act."[220]

161. Similarly, in Australia (but as a result of statutory amendment[221]), the exclusionary rule no longer applies. As Heydon and Crennan J.J. put it in *Bryers v Kendle* [2011] HCA

[218] [2005] 1 SCR 533 at [20].
[219] *In re AB* (1905) 25 NZLR 299; *Monk v Mowlem* [1933] NZLR 1255.
[220] At 701.
[221] The Acts Interpretation Act 1901 (Cth), s 15AB, which provides as follows:
" (1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

26, 243 CLR 253, "*extrinsic materials have been routinely examined to ascertain what the legislature meant*." (at [97]).[222] And even before the Act, Australian courts had already begun to loosen the exclusionary rule.[223]

162. The exclusionary rule has also been loosened in South Africa.

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:

(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;

(b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;

(c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;

(d) any treaty or other international agreement that is referred to in the Act;

(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;

(f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;

(g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and

(h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.

(3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage."

[222] At [99].

[223] *Wacando v Commonwealth* (1981) 148 CLR 1 (HCA); *TCN Channel Nine Pty Ltd v Australian Mutual Provident Society* (1982) 42 ALR 496.

163. In *Thoroughbred Breeders' Association v. Price Waterhouse* 2001 (4) SA 551 (SCA) Marais J.A., Farlam J.A. and Brand A.J.A. (in a combined judgment) left open the question whether the courts could have recourse to *Hansard* when interpreting legislation. As they put it

> "During the course of the argument counsel for the respondents referred us to the texts of draft bills which were published in the Government Gazette before the Act was passed by Parliament. These texts showed, so it was submitted, that although it was originally proposed to limit the operation of the Act to delictual claims this intention was departed from in the text which was eventually passed by the Legislature. Counsel for the appellant responded to this material by placing before us the text of the Hansard report of the proceedings in the House of Assembly which clearly showed, particularly from the speech of the Minister of Justice, who introduced the Second Reading of the Bill, that the discussions related solely to delictual claims. In view of the fact that we have without reference to this material come to the conclusion that the Act only applies to delictual claims it is unnecessary for us to decide whether material of this kind can be looked at by a court when legislation falls to be interpreted and, in particular, whether the decision of the House of Lords in *Pepper v Hart* [1993] AC 593 (HL) is in accordance with our law" (at [25], our underlining)

164. However, the question was revisited by Binns-Ward and Rogers J.J in *S v Pedro* [2014] 4 All SA 114 (WCC). Rogers J. held as follows:

> "It may be said that, under our law at any rate, an explanatory memorandum can only be used to identify the "mischief" aimed at by the legislation and that commentary on the meaning of the provisions of the bill cannot be allowed to influence the interpretation. It may be argued, further, that in the present case the "mischief" was the expense and inconvenience of appointing private psychiatrists and that identifying this "mischief" does not assist one in determining which of the three potential solutions (the first, second or third interpretation) was the one intended by the lawmaker. I doubt, however, that there is a "bright line" between a statement of the mischief and a statement of the intended effect of remedial legislation or that there is even good reason to accept the one but exclude the other as an aid to interpretation. The question must ultimately be the reliability of the assistance afforded by the explanatory memorandum. It may be that generally stated purposes are more reliable than micro-commentary on the provisions of the bill." (at [65]).

165. In our submission, *Pedro* is authority for the proposition that extrinsic evidence may be used if it is reliable. It is against that backdrop that we turn to the legislative history of section 100(2).

166. Section 100, in its present form, was not to be found in the version of the Mineral and Petroleum Resources Development Bill B15-2002, as introduced in the National Assembly. It contained no provision for the development of a Mining Charter.[224]

167. That provision appears first to have been introduced, by the Portfolio Committee on Minerals and Energy, into Bill B15A-2002.[225] On 26 June 2002, the Bill (now including provision for the development of a Charter) was adopted by Parliament. Then then-Minister of Minister of Minerals and Energy, addressed Parliament and explained the legislative purpose of the Charter in the following terms:

> "… in addition we are bringing a charter which we will be working on together with the industry, so that when we table it, it will be a launch not by Government alone, but something that we will be launching and bringing to the public together.
>
> As I have said, we have included those definitions in the main body of the Bill, but in addition to that we also have the charter.
>
> The other issue that came up during the hearings in relation to these two issues that I have referred to was quantification. Again, in the charter we are going to quantify what quantum of empowerment will be expected, because, as hon members can imagine, we want meaningful empowerment.
>
> Of course, we are going to quantify the charter. People have been throwing around a figure of 25% empowerment that is going to be in the charter. What we can say as a department is that we want historically disadvantaged people to be minority owners in the existing mines. However, we want to see meaningful minorities in accordance with the Companies Act, which is 26%-plus."

168. And, to similar effect Mr M. V. Moosa (then Minister of Environmental Affairs and Tourism) said:

> "We also asked the Minister to introduce a charter in terms of clause 100 of the Bill - to bring further clarity to the issue of economic empowerment and actually to indicate exactly what the industry is expected to do. So there was no uncertainty issue in the first place, but if there was it is even clearer now. There is a definition and there is a charter."

169. We submit, based on these two speeches, that the following propositions emerge:

169.1. The Charter, like the MPRDA, was intended to be binding.

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[224] This Bill is not yet part of the record and will be made available to the Court if necessary.
[225] This Bill is not yet part of the record and will be made available to the Court if necessary.

169.2. The Charter was intended to bring about meaningful transformative empowerment.

169.3. The Charter, unlike the MPRDA, was to be developed by a process of consultation and collaboration.

169.4. The Minister was uniquely able to develop the Charter.

170. It follows, from these propositions, that section 100(2) was intended to create a power to make subordinate legislation, and not merely policy.

Principles governing delegated legislation and their compatibility with the doctrines of separation of powers and the rule of law

171. The Council alleges that to interpret section 100(2) of the MPRDA as conferring upon the Minister a power to make subordinate legislation is contrary to the doctrine of separation of powers[226] and the rule of law.[227]

172. We start by addressing the question whether parliament may delegate its authority to legislate. Neither the interim (1993) Constitution nor the final (1996) Constitution contain any express authorisation in this regard.[228] But parliament's power to do so is beyond doubt. Chaskalson P. considered this issue in *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC), and held:

> "In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies"[229]

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[226] Council's heads of argument, paras 19, 23.1, 26.3, 27, 50.1, 50.2, 50.5, 50.6, 50.10.2, 64 and 65.1.
[227] Council's heads of argument, paras 26.3.3, 34, 50.1, 51, 65.1 and 104.
[228] Michael Bishop and Ngwako Raboshakga, "*National Legislative Authority*" in Stu Woolman and Michael Bishop (eds), *Constitutional Law in South Africa* (2nd edn, loose-leaf) at 17-45.
[229] At [51].

173. Although (as is apparent from footnote 61 of the Council's heads of argument), the power at issue in *Executive Council* contemplated the assignment of plenary legislative power and not the making of subordinate legislation, Mahomed D.P. nonetheless provided important guidance on the latter:

> "The competence of a democratic Parliament to delegate its law-making function cannot be determined in the abstract. It depends inter alia on the constitutional instrument in question, the powers of the Legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegatee, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegatee, and practical necessities generally."[230]

174. *Executive Council*, we submit, dispels the Council's argument that to interpret section 100(2) as conferring a power to make subordinate legislation would be contrary to the rule of law and the separation of powers. We point out that the proposition advanced by Chaskalson P. in *Executive Council* reflects similar conclusions reached by courts and parliamentary bodies in other common law jurisdictions, including England[231] and New Zealand,[232] which subscribe to Montesquieu's separation of powers into legislative, executive and judicial branches.[233]

175. Mogoeng C.J., in *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* (CCT140/16; 2017 (9) BCLR 1108 (CC)), articulated the general proposition that the executive, judicial and legislative branches each "*enjoys functional independence in the exercise of its powers*". It was against this backdrop that the Chief Justice cautioned that:

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[230] At [136].
[231] Committee on Ministers' Powers, Report (1932), Cmd Paper No 4060.
[232] Delegated Legislation Committee, Report (1962) [1962] AJHR I.18.
[233] Charles de Secondat, Baron de Montesquieu, *De l'esprit des lois* (1748).

> "Alive to this arrangement, all three must always caution themselves against intruding into the constitutionally-assigned operational space of the others, save where the encroachment is unavoidable and constitutionally permissible." (our underlining)[234]

176. We submit that the Council, in its submissions, loses sight of the underlined words, which make it clear that some degree of encroachment between the arms of government is constitutionally permissible. Regard must also be had to what the Constitutional Court held in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), namely:

> "[n]o constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation."[235]

177. We also refer to *S v Dodo* 2001 (3) SA 382 (CC), in which Ackermann J. reviewed the authorities on separation of powers, and held:

> "This Court has therefore clearly enunciated that the separation of powers under our Constitution
>
> 16.1 although intended as a means of controlling government by separating or diffusing power, is not strict;
>
> 16.2 embodies a system of checks and balances designed to prevent an over-concentration of power in any one arm of government; it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another; this engenders interaction, but does so in a way which avoids diffusing power so completely that government is unable to take timely measures in the public interest." (our underlining).[236]

178. The Council submits that the "*Minister's contentions that the 2018 Charter is law … completely disregards the doctrine of separation of powers*".[237] It relies upon the extra-judicial writing of the Late Justice Pius Langa (in an article published in the *South African Journal of Human Rights* in 2006[238]) as authority for that proposition. However, there is no indication anywhere in that article that Justice Langa was of the view that a

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[234] At [1].
[235] At [109].
[236] At [16].
[237] Council's heads of argument, para 50.2
[238] Pius N. Langa, "The separation of powers in the South African constitution : symposium : 'a delicate balance' : the place of the judiciary in a constitutional democracy" (2006) 22 *SAJHR 2*.

statutory delegation of law-making power in any way violated the doctrine of separation of powers. Far from it: in his article, Justice Langa specifically referred to the *Certification* judgment,[239] *Executive Council*,[240] and *S v Dodo*[241] (all of which are mentioned above). He also referred[242] to *In re Constitutionality of the Mpumalanga Petitions Bill, 2000* 2002 (1) SA 447 (CC), in which he (as Langa D.P.) gave the leading judgment. We refer to what Langa D.P held, at [19]:

> "Regulations are a category of subordinate legislation framed and implemented by a functionary or body other than the legislature for the purpose of implementing valid legislation. Such functionaries are usually members of the Executive branch of government, but not invariably so. A legislature has the power to delegate the power to make regulations to functionaries when such regulations are necessary to supplement the primary legislation. Ordinarily the functionary will be the President or the Premier or the Member of the Executive responsible for the implementation of the law."

179. We therefore submit, contrary to the Council's submissions, that the Minister's interpretation of section 100(2) of the MPRDA is consonant with the doctrine of separation of powers.

180. The Council appears to provide no explanation for why that interpretation of section 100(2) violates the rule of law. The case law which we have set out in this section plainly indicates that precisely the opposite is true. We also note that, nowhere in his widely acclaimed book, *The Law of Rule,*[243] did Lord Bingham[244] suggest that such a power might offend against the rule of law. There is no evidence that Lord Bingham saw a parliamentary delegation of subordinate law-making power as objectionable. We submit that the same is true in South Africa.

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[239] At p 5 of the article.
[240] At p 5 of the article.
[241] At p 6 of the article.
[242] At p 7 of the article.
[243] Tom Bingham, *The Rule of Law* (2010).
[244] He was, successively, Master of the Rolls, Lord Chief Justice and Senior Law Lord.

The Minister's view of section 100(2) is not unconstitutional, does not infringe the separation of powers and is not contrary to the rule of law

181. The Council complains that the Minister published the Charter in the *Gazette* despite having no authority to do so, and that it was unconstitutional for him to do so.[245] We have already set out our submissions as to why section 100(2) of the MPRDA confers a power to make subordinate legislation. The Council complains that to interpret section 100(2) in this manner would result in a breach of the doctrine of separation of powers, be contrary to the rule of law and would be unconstitutional. One of the reasons it gives for these submissions is

> "the total absence of control and supervision retained or exercisable by Parliament over the Minister, 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"[246]

182. But, we submit, the Council over-inflates the degree of control which Parliament, in truth and in fact, exercises over any subordinate legislation. As we shall show, South African law contemplates significantly less in this regard than do other common law jurisdictions. As Professor Baxter (writing in 1984) pointed out, the 1950s

> "was the last occasion on which parliamentary scrutiny of delegated legislation was seriously considered in South Africa".[247]

183. Professor Baxter also pointed out that there was no general requirement in our law that delegated or subordinate legislation should lie before Parliament before taking effect. Instead, there is section 17 of the Interpretation Act 1957, which requires only that:

> "When the President, a Minister or the Premier or a member of the Executive Council of a province is by any law authorized to make rules or regulations for any purpose in such law stated, notwithstanding the provisions of any law to the contrary, a list of the proclamations, government notices and provincial notices under which such rules or regulations were published in the Gazette during the period covered in the list, stating in each case the number, date and title of the proclamation, government notice or provincial notice and the number and date of the

[245] Council's heads of argument, para 23.1
[246] Council's heads of argument, para 50.10.3(v).
[247] Lawrence Baxter, *Administrative Law* (1984) at 213.

Gazette in which it was published, shall be submitted to Parliament or the provincial legislature concerned, as the case may be, within fourteen days after the publication of the rules or regulations in the *Gazette*."

184. These requirements, in any event, are directory only and not peremptory, and non-compliance does not render subordinate legislation invalid.[248] By comparison, there are express requirements in Australia,[249] New Zealand[250] and England[251] that subordinate legislation must be laid before parliament. Those requirements, we submit, are examples of parliamentary scrutiny over subordinate legislation. The Council's complaint about the alleged lack of scrutiny by parliament could, with equal effect, be made against most other delegated legislation, including the regulations made under section 107 of the MPRDA. That complaint, in fact, has nothing to do with the interpretation of section 100(2) as conferring a power to make subordinate legislation.

185. We submit that the main requirements governing the making of subordinate legislation are the following:

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[248] *Bloem and another v. State President of the Republic of South Africa and Others* 1986 (4) SA 1064 (O) at 1091C-D; *Rex v Daniels and Another* 1936 CPD 331. As Watermeyer J. put it in the latter:

> "The laying of the regulations upon the table of the Provincial Council is not a public act like promulgation in the *Gazette* and probably very few people know if it is done or if it is not done or when it is done. To allow legislation to cease to be in force in that haphazard way is against the fundamental principles of legislation which are that laws must be certain and they must be properly promulgated. However, I do not think we are driven to give a decision which would lead to such an unsatisfactory result because in my opinion the direction that the regulations be laid on the table of the Provincial Council is directory and not imperative." (at 335).

L.M. du Plessis, "Statute Law and Interpretation" in *The Law of South Africa* (vol 25, 2nd edn) (at 296) includes the same proposition in his analysis of the contemporary legal principles that govern the making of subordinate legislation in South Africa.

[249] Legislation Act 2003 (Cth) ss 57 and 57A requires "legislative instruments" to be paid before Parliament.

[250] In New Zealand, the Legislation Act 2012 (NZ) does not use the term "regulations". Instead it introduced a requirement that a "disallowable instrument" (i.e. a delegated legislative instrument) must be presented to the House and can be disallowed by the House: Mary Harris and David Wilson (edd), *McGee' Parliamentary Practice in New Zealand*, (2017, 4th edn) at 460 to 461.

[251] In England, most subordinate legislation must be laid before Parliament before it comes into force: Sir William Wade and Christopher Forsyth, *Administrative Law* (11th edn, 2014) at 754.

185.1. Subordinate legislation must be made in the manner required by the enabling Act.

185.2. The scope of subordinate legislation must not stray beyond the permissible limits of the powers conferred by the enabling Act.

185.3. Subordinate legislation must be promulgated.

185.4. Subordinate legislation is subject to judicial review

186. We deal briefly with each of these requirements.

Internal formalities

187. Some enabling statutes prescribe internal requirements for the validity of subordinate legislation. Section 100(2) of the MPRDA, however, prescribes no such requirements in relation to the Charter. We therefore need not consider this element any further.

Permissible limits of subject-matter

188. We set out our submissions regarding the subject-matter and the scope of the powers conferred by section 100(2) of the MPRDA elsewhere in these heads of argument. We explain elsewhere why it is that the 2018 Charter does not stray beyond these limits.

189. One of the questions left open by *Executive Council* was whether Parliament must provide clear criteria for the exercise of delegated power.[252] The Constitutional Court addressed that question in *Affordable Medicines Trust and Others v. Minister of Health and Others* 2006 (3) SA 247 (CC). Ngcobo J.[253] accepted that in principle Parliament

[252] Michael Bishop and Ngwako Raboshakga, "*National Legislative Authority*" in Stu Woolman and Michael Bishop (eds), *Constitutional Law in South Africa* (2nd edn, loose-leaf) at 17-47.
[253] Following *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at [53].

could permit a delegee discretion to decide how to use the delegated power.[254] But that is subject to the following considerations:

> "However, the delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may well lead to the arbitrary exercise of the delegated power. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. These constraints will generally appear from the provisions of the empowering statute as well as the policies and objectives of the empowering statute."[255]

190. This has been described, by commentators, as "*a fairly narrow constraint*" on Parliament's ability to delegate.[256]

Promulgation

191. Subordinate legislation must be promulgated.[257] In *Byers v Chinn and Another* 1928 AD 322, the following explanation appears:

> "The purpose of promulgation is to notify those who will be, or may be, affected by the legislative enactment in question of its import and effect. … Published notices in matters affecting the public at large, a considerable portion of it, or a large class of persons, is the only practical way of informing the individuals concerned of their rights and duties."[258]

192. Smalberger J.A. explained the rationale for this requirement in *National Police Service Union and Others v. Minister of Safety and Security* 2000 (3) SA 371 (SCA), in these terms:

> "It is a requirement of both the common law and statute that subordinate legislation, even if it has been validly enacted, is not of binding force and effect in law until it has been promulgated. The requirement is subject to qualification, as will appear later. The purpose of promulgation

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[254] At [33].
[255] At [34].
[256] Michael Bishop and Ngwako Raboshakga, "*National Legislative Authority*" in Stu Woolman and Michael Bishop (eds), *Constitutional Law in South Africa* (2nd edn, loose-leaf) at 17-48.
[257] This rule now has a constitutional foundation. Section 101(3) of the Constitution of the Republic of South Africa, 1996, provides:

> "(3) Proclamations, regulations and other instruments of subordinate legislation must be accessible to the public."

[258] At 330.

is to notify those who will be, or may be, affected by the legislative enactment in question of its import and effect."[259]

193. The contemporary statutory rule is to be found in section 16 of the Interpretation Act 1957, which provides as follows:

> "When any by-law, regulation, rule or order is authorized by any law to be made by the President or a Minister or by the Premier of a province or a member of the Executive Council of a province or by any local authority, public body or person, with the approval of the President or a Minister, or of the Premier of a province or a member of the Executive Council of a province, such by-law, regulation, rule or order shall, subject to the provisions relative to the force and effect thereof in any law, be published in the *Gazette*."

194. The Act does not define "*by-law*", "*regulation*", "*rule*" or "*order*", and there is only limited relevant case law. In *National Police Service Union* the Court considered the validity of a statutory "*scheme*",[260] and one the issues was whether it ought, by reason of section 16 of the 1957 Act, to have been published in the *Gazette*. Smalberger J.A. answered that question in the negative, and found:

> "The character of the scheme was not of the kind that would normally call for promulgation. It did not amount to a 'by-law, regulation, rule or order' within the purview of s 16 of the Interpretation Act."[261]

195. In view of our submissions that section 100(2) of the MPRDA empowers the Minister to make subordinate legislation, we submit that the character of the 2018 Charter is "*of the kind that would normally call for promulgation*". The same requirement, we submit, emerges from section 101(3) of the Constitution of the Republic of South Africa, 1996.[262]

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[259] At [17].
[260] The Minister of Safety and Security was empowered by s 14(1) of the South African Police Service Rationalisation Proclamation R5 of 1995 to "*determine a scheme for the rationalisation, reorganisation and consolidation' of the service*".
[261] At [20].
[262] Section 101(3) of the Constitution provides as follows:
> "Proclamations, regulations and other instruments of subordinate legislation must accessible to the public."

196. The Minister satisfied the requirement of promulgation by publishing the 2018 Charter,[263] the amendment to the 2018 Charter,[264] and the Implementation Guidelines[265] in the *Government Gazette.*

Judicial review

197. The Council, in this application, seeks the judicial review of the 2018 Charter. Its right to seek that remedy is not in dispute. Nor was it in dispute when the Council sought the judicial review of the 2017 Charter. These facts demonstrate the fallacy of the Council's contention that the Charter (as it is perceived by the Minister) is somehow free from external control. It plainly is not.

Section 100(2) does not contemplate the making of policy

198. The Council submits that the proper role of section 100(2) is to empower the Minister to make "*formal policy*". That, of course, is <u>not</u> what section 100(2) says in express terms.

199. There are a number of obvious difficulties with the Council's argument.

200. First, whilst there is ample authority (which we have set out above) for the proposition that subordinate legislation may take a variety of forms and that the nomenclature is <u>not</u> decisive, we are unaware of any authority for a parallel proposition in relation to a statutory power to make policy. The Council has not cited any. Its reliance upon

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[263] *Government Gazette* No. 41934, 27 September 2018 (Founding affidavit, annexure "**FA4(1)**" (pp 169 to 212)).
[264] *Government Gazette* No. 42130, 20 December 2018 (Founding affidavit, annexure "**FA4(2)**" (pp 213 to 216)).
[265] *Government Gazette* No. 42122, 19 December 2018 (Founding affidavit, annexure "**FA9**" (pp 404 to 458)).

authorities that distinguish between the implementation of legislation and policy-making takes matters no further. [266]

201. Second, the Council's argument rests primarily, if not solely, on a convoluted textual interpretation of other provisions of the MPRDA. But its interpretation disregards the wider enquiry required by Wallis J.A. in *Natal Joint Municipal Pension Fund*. In particular, it is not a purposive interpretation, and it has little or no regard to the context or the objectively perceived purpose of the Charter contemplated by section 100(2).

202. Third, the Council's argument in this regard rests not upon any apparent attributes of the Charter as a policy instrument, but rather simply as the result of a process of elimination: if the 2018 Charter is not law (so the argument appears to run), then it must be policy.

203. Fourth, the Council says very little about why section 100(2) should be construed as conferring a power to make policy, let alone why "*formal policy*" within the alleged meaning of section 85(2)(b) of the Constitution.

204. In *Minister of Defence and Military Veterans v. Motau And Others* 2014 (5) SA 69 (CC) Khampepe J. held:

> "the purpose of s 85(2) is to allocate functions to the executive arm of government — the national executive in particular — just as the Constitution allocates functions to the legislature and the judiciary. The adjective 'executive' thus indicates that the enumerated powers inhere in the President and the cabinet rather than in parliament or the courts. The section selects the functionary to whom the powers are allocated, rather than determine the nature of the power."[267]

205. Here, the court considered the question whether a decision by the Minister of Defence and Military Veterans to terminate the membership of two members of Armscor's board

[266] Notably, *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) and *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and another v. Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC): see Councils heads of argument, paras 58 to 59.6.5.
[267] At [28].

of directors[268] was executive or administrative action.[269] Khampepe J. reasoned as follows:

> " … the minister's s 8(c) power is an adjunct to her power to formulate defence policy. In terms of this power, the minister formulates policy on, among other things, the acquisition and maintenance of 'air navigation systems' and 'arms, ammunition, vehicles, aircraft, vessels, uniforms, stores and other equipment'. Of course this is policy in the broad sense: overarching and direction giving, with the minutiae of individual procurement decisions left to Armscor …
>
> Second, and relatedly, the exercise by the minister of her s 8(c) power is not a low-level bureaucratic power which merely involves the application of policy in the discharge of the daily functions of the state, which is the ordinary remit of administrative law. Rather, it operates at a different level, for the section is a constitutive part of the minister's power to supervise highlevel public office bearers in the performance of their official duties. She does so by means of the corporate relationship that she has with the board members. They are the directors she has selected, in accordance with her policy dictates, to manage the corporation — and thereby determine defence procurement policy."[270]

206. We submit that the Council's interpretation of section 100(2) is fundamentally incompatible with the power conferred by section 85(2)(b) of the Constitution:

206.1. First, on the Council's own version, the Charter contemplated by section 100(2) serves only:

> "…to guide the Minister's discretion, on the basis of a published document, when he takes decisions under these sections of the MPRDA which require that an assessment be made as to whether, or the extent to which, an applicant has given effective to the objects referred to in section 2(c), (d), (e), (f) and/or (i) of the MPRDA
>
> At the same time, the Charter is intended to provide a formal indication to applicants for rights, and the general public, of what the Minister will regard as 'furthering' or 'giving effect to' the objects referred to in section 2(c), (d), (e), (f) and/or (i) of the MPRDA as contemplated in *inter alia* section 23(1)(h) and item 7(2)(k) of the MPRDA"[271]

[268] In terms of section 8(c) of the Armaments Corporation of South Africa Ltd Act 51 of 2003.
[269] The practical significance of this point lay in the question of whether the decision was amenable to review as "administrative action" under PAJA. The exercise of executive powers and functions (including developing and implementing national policy and performing executive functions provided in national legislation, as contemplated by sections 85(2)(b) and (e) of the Constitution) are excluded from the ambit of a PAJA review.
[270] At [47] to [49].
[271] Council's heads of argument, paras 42 and 43.

206.2. In other words, section 100(2) (on the Council's version) is what Khampepe J. described in *Minister of Defence* as a "*low-level bureaucratic power*". This is not policy-making within the scope of section 85(2)(b) of the Constitution.

206.3. Second, the Council nowhere suggests that (on its version of section 100(2) of the MPRDA) the policy-making power resides with "*The President ... together with the other members of the Cabinet*" (as is required by section 85(2)(b) of the Constitution). On the Council's version, and by implication, that power resides with the Minister alone.

206.4. Third, nowhere in its version does the Council address the 1998 White Paper, which the Minister put in evidence and alleged to be the genesis of the MPRDA. That, we submit, is a true example of policy contemplated by section 85(2)(b) of the Constitution. The Charter is not.

207. We therefore submit that section 100(2) does not contemplate the making of policy (let alone "*formal policy*") contemplated by section 85(2)(b) of the Constitution.

[VIII] SUBMISSIONS ON THE GROUNDS OF REVIEW

208. The Council, in the amended notice of motion and in its founding papers, relies upon a slew of grounds of review under PAJA, and also on the doctrine of legality. In its heads of argument, it prunes those grounds down to somewhat more manageable proportions. Those heads of argument – from paragraph 66 (on page 47) to paragraph 141 (on page 76) – for the most part summarise the competing factual allegations in the papers. We do not see any point in doing the same. We do, however, wish to make legal submissions in relation to some of the key allegations.

Ownership elements

209. Part 3 of the founding affidavit deals with those elements of the 2018 Charter which affect mining rights holders.

210. A number of arguments merit particular attention.

211. First, the Council argues that the Minister has no power, after the grant of a mining right, to impose "*new obligations*" upon mining right holders by means of the 2018 Charter, whether generally, or upon renewal, or upon transfer. Consequently, the Council argues that various clauses of the 2018 Charter are beyond the powers conferred by section 100(2), and are contrary to various sections of PAJA, notably 6(2)(a)(i) and/or 6(2)(f)(i).[272] This argument recurs, in various incarnations, throughout the founding affidavit.

212. The Minister's response has three main components:

212.1. The power to "*develop*" a Charter necessarily implies the power to revise the Charter from time to time.[273] This, we submit, is consistent with the reasoning of Moseneke D.C.J. (for the majority) in *Masetlha v. President of The Republic of South Africa and Another* 2008 (1) SA 566 (CC).[274] Contrary to the Council's contention,[275] the Minister is therefore not *functus officio* once he has granted a mining right. As the Minister points out, mining rights can be granted for as long as 30 years at a time. So, too, renewals. The MPRDA's transformative purposes would be of very little effect if a mining right holder was only required to apply and conform to the Charter as it stood at the date of grant.

[272] Council's heads of argument, para 73.
[273] Answering affidavit, para 93.1 (p 511).
[274] At [66].
[275] Founding affidavit, para 81 (p 49).

212.2. The Minister contends that the Council gives little weight to the regimes of common heritage and state custodianship, in section 3(1) of the MPRDA. We refer, in this regard, to our submissions above regarding the paradigm shift brought about by section 3(1) of the MPRDA. The Minister contends that one consequence of these regimes is that it is necessary for the Minister to retain some control after a mining right has been granted.[276] This, we submit, is an inevitable consequence of the doctrine of state custodianship.

212.3. The Minister also contends that the Charter falls within the scope of "*any other law*", as contemplated by section 24(3)(a) of the MPRDA, by reason that it an "*enactment having the force of law*", as the word "*law*" is defined in the Interpretation Act 1957.[277] From this, it follows that the Minister is entitled (by means of the 2018 Charter) to impose requirements which are to apply when a mining right is renewed. It therefore follows that such a requirement does not contradict section 24(3)(a) of the MPRDA, but is consistent with it.

213. Second, the Minister raises various complaints regarding those provisions of the 2018 Charter which apply to transfers of mining rights.

213.1. The Minister provides the following explanation. His power to consent to a transfer is set out in section 11(2)(b) of the MPRDA. That sub-section requires him to be satisfied that there has been compliance with the requirements in sections 17 and 23 of the MPRDA. The criterion in section 23(1)(h) is as follows:

> "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." (our underlining)

[276] Answering affidavit, paras 93.2 to 98 (pp 511 to 513).
[277] Answering affidavit, paras 104 to 109 (pp 514 to 515).

213.2. Consequently, the Minister is entitled to require compliance with the 2018 Charter when application is made for the transfer of a mining right. Were that not so, the express cross-reference to section 23 by section 11(2)(b) of the MPRDA would serve no useful purpose. To read section 23 and section 11(2)(b) are applying only upon the grant (but not transfer) of a mineral right would be to disregard the dictum by Makgoka A.J.A. in his separate concurring judgment in *GN v JN* 2017 (1) SA 342 (SCA) at [54].

214. Third, the Council complains that clause 2.1.3.2 and 2.1.4 of the 2018 Charter are objectionable "*because there is no section in the MPRDA which authorises the Minister to prescribe the specific distribution of shareholding*".[278] This argument is raised on more than one occasion. The Minister's response is that he is entitled to use his discretion to establish the limits of the power conferred by him.[279] We submit that his response accords with the finding in *Affordable Medicines Trust and Others v. Minister of Health and Others* 2006 (3) SA 247 (CC) by Ngcobo J.[280] that Parliament may in principle permit a delegee the discretion to decide how to use the delegated power.[281] The Minister also provides an explanation of the reasons why he exercised his discretion in this manner.[282]

215. Fourth, the Council takes issue with the obligation, in clauses 2.1.5.2 and 7.2 of the 2018 Charter, that the minimum 30% target shall apply for the duration of the mining right.

[278] Founding affidavit, para 114 (p 61).
[279] Answering affidavit, para 127 (p 518).
[280] Following *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at [53].
[281] At [33].
[282] Answering affidavit, paras 130 to 134 (pp 519 to 520).

It raises two main complaints: first, that these clauses are not authorised by section 100(2) of the MPRDA, and second that they are impermissibly vague.

215.1. As to the vagueness point, the Minister (in paragraph 140 of the answering affidavit) takes pains to provide an interpretation that cures the alleged vagueness.[283]

215.2. The Minister then addresses the lack of power point in detail.[284] The central point of that explanation appears in paragraph 146: namely, that the requirement of 30% is clearly a "*target*", as contemplated by section 100(2) of the MPRDA.[285] That, we submit, clearly demonstrates that the lack of power point is bad.

216. Fifth, the Council deals at length with those provisions of the 2018 Charter that deal with the beneficiation equity equivalent against the ownership target.[286] The Minister responds in detail,[287] albeit that that the Council's complaint raises little in the way of cognisable grounds of review. In relation to the lack of power point (which the Council again raises), the Minister makes the same point as above: namely, that section 100(2) is worded in broad terms which need not authorise every provision of the Charter in express terms.[288] Again, we submit that this response accords with the principle in *Affordable Medicines Trust*.

[283] Answering affidavit, para 140 (pp 520 to 521).
[284] Answering affidavit, paras 141 to 148 (pp 521 to 524).
[285] Answering affidavit, para 146 (p 523).
[286] Founding affidavit, paras 126 to 145 (p 66 to 74).
[287] Answering affidavit, paras 149 to 156 (pp 524 to 532).
[288] Answering affidavit, para 152.4.3 (p 527).

Non-ownership elements

217. In Part 4 of the founding affidavit, the Council complains that the Minister did not assess the ability to meet targets for the mining goods sub-element,[289] the ability of meet the services sub-element,[290] and the ability to meet the research and development sub-element.[291] Whilst a variety of grounds of review are identified in this part of the founding affidavit, the Council in its heads of argument apparently prunes those grounds down to a single complaint, namely, irrationality.[292]

218. The Council relies upon *Pharmaceutical Manufacturers* as authority for the proposition that it was necessary for the Minister, before adopting the 2018 Charter, to establish whether it was capable of being adopted.[293] But *Pharmaceutical Manufacturers* is entirely distinguishable on its facts, and it in any event does not set out the test for rationality. We make two main points in response:

218.1. First, *Pharmaceutical Manufacturers* arose from an entirely different set of facts from those that are at issue in this application. The Council states, in paragraph 123 of its heads of argument, that there the President had brought a law into force "*without the necessary infrastructure for its implementation*".[294] In fact, what was missing were the regulations and Schedules. This had the result that "*the entire regulatory structure relating to medicines and the control of medicines*" was rendered unworkable.[295] That is a far cry from the Council's complaint. Even assuming that the Council is correct (which we deny) in respect of the

[289] Founding affidavit, paras 148 to 164 (pp 75 to 80); Council's heads of argument, paras 121 to 124.
[290] Founding affidavit, paras 165 to 170 (pp 80 to 82); Council's heads of argument, paras 125 to 127.
[291] Founding affidavit, paras 178 to 180 (p 85); Council's heads of argument, paras 128 to 132.
[292] Council's heads of argument, paras 124, 127 and 131.
[293] Council's heads of argument, paras 123 to 124.
[294] Council's heads of argument, paras 123.
[295] At [7].

mining goods sub-element, the services sub-element, and the research and development sub-element, this would not render the "*entire regulatory structure*" relative to the 2018 Mining Charter unworkable. *Pharmaceutical Manufacturers* is therefore irrelevant.

218.2. Second, we submit (as did the Minister, in his answering affidavit), that the Council misapprehends the test for rationality. In *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) Yacoob A.D.C.J. held:

> "rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional."[296]

219. As Professor Hoexter put, rationality "*demands merely a rational connection – not perfect or ideal rationality*".[297]

220. As is apparent from the answering affidavit, the Minister did, in fact, rely upon evidence, albeit evidence which the Council rejects in its replying affidavit. In substance, then, the Council's complaint is not that there was no evidence, but rather that there was not sufficient or satisfactory evidence. That, we submit, falls short of the test for irrationality.

[296] At [32].
[297] Professor Cora Hoexter, *Administrative Law in South Africa* (2nd edn, 2012) at 342.

Application of the 2018 Charter to licences granted under the Diamonds Act and the Precious Metals Act

221. In Part 5 of the founding affidavit, the Council complains that various clauses in the 2018 Charter[298] seek to impose targets in respect of holders of licences issued under the Diamonds Act 1986 or the Precious Metals Act 2005.[299] Again, although various grounds of review are set out in the founding affidavit, only one – namely, that the clauses in question are *ultra vires* the MPRDA – is pursued in the Council's heads of argument.[300] The substance of this complaint is that the MPRDA "*does not authorise the Minister to amend other legislation through the Charter*".[301]

222. With respect, that is not what the 2018 Charter does or purports to do. The Minister explains at length that the clauses at issue give content to the Regulator's obligations[302] to "*have regard to*" the Charter.[303] We submit that this Court has an obligation, where possible, to prefer an interpretation of the Charter that is consistent with the Act, rather than one which is inconsistent. That obligation also applies, by section 4 of the MPRDA, to interpreting the Act.

223. We therefore submit none of the clauses mentioned by the Council are, in fact, *ultra vires* the MPRDA.

[298] Namely, clauses 4, 6.2, 7.1, 7.3, 8.7, 8.8, 8.9 and 9.2.
[299] Founding affidavit, paras 185 to 201 (pp 87 to 92).
[300] Council's heads of argument, paras 133.
[301] Council's heads of argument, paras 133.
[302] Under s 6(1)(b) of the Precious Metals Act 2005 and s 5(2) of the Diamonds Act 1986.
[303] Answering affidavit, paras 246 to 266 (pp 562 to 567).

Clause 9.1 of the 2018 Charter

224. In Part 6 of the founding affidavit, the Council takes issue with clause 9.1 of the 2018 Charter[304] on the basis that it "*is* ultra vires".[305] In its heads of argument, the Council identifies two grounds: that clause 9.1 is contrary to section 6(2)(a)(i) of PAJA,[306] or that it is an excess of power which offends the principle of legality.[307]

225. Clause 9.1 purports to deem certain mining right holders to "*be in breach of the MPRDA*".[308]

226. The Council, in its heads of argument, seemingly ignores the explanation provided by the Minister in his answering affidavit, namely, that the 2018 Charter is of a binding character, and clause 9.1, on a proper interpretation, is merely declaratory of those categories of mining right holders that will be deemed by the MPRDA to be non-compliant.[309]

227. We submit that the Minister's answer is consistent with the reasoning of Mogoeng C.J. (for the majority) in *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* (CCT140/16; 2017 (9) BCLR 1108 (CC). At issue was an instrument in which the word "*shall*" appeared in paragraph 5.1.2(B). It was argued that it was therefore of a peremptory nature. Mogoeng C.J. (at [32] and [33]) analysed the language

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[304] Founding affidavit, paras 202 to 210 (pp 92 to 96).
[305] Founding affidavit, para 202 (p 92).
[306] That section provides:
"A court or tribunal has the power to judicially review an administrative action if-
(a) the administrator who took it-
(i) was not authorised to do so by the empowering provision"
[307] Council's heads of argument, paras 141.
[308] 2018 Charter, as amended (p 215).
[309] Answering affidavit, para 277.2 (p 571).

used in the instrument, then concluded that, despite the peremptory language, was not in fact peremptory in effect.[310]

228. We therefore submit clause 9.1. does not, in fact, *ultra vires* the MPRDA.

[IX] CONCLUSIONS

229. On the issue of non-joinder, our submissions are the following:

229.1. The parties identified in Part V have a direct and substantial legal interest in the relief claimed by the Council. They should therefore have been joined.

229.2. The Council made a deliberate decision not to join the interested parties. Consequently, the Court is invited to apply the Supreme Court of Appeal's approach in *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd* (624/2016) [2017] ZASCA 131 at paragraph [16], and decline the applicant's request to be afforded a further opportunity to join the interested parties. In that event, the Court is also requested to dismiss the application with costs, including the costs of two counsel.

229.3. *Alternatively* and should the Court be willing to afford the applicant an indulgence by allowing it an opportunity to join the interested parties, the application will have to be postponed on such terms as the Court deems appropriate for the joinder of the interested parties. In that event, the Court is requested to postpone the application (with directions) and to order the Council to pay the first and second respondents' wasted costs, including the costs of two counsel.

[310] It was on this basis that Mogoeng C.J. distinguished the judgment of Sachs J. in *Minister of Education v Harris* 2001 (4) SA 1297 (CC), which also considered the interpretation of a policy instrument.

230. On the "*law or policy question*", our submissions are the following:

230.1. The question of what power is conferred by section 100(2) of the MPRDA falls to be established by the usual rules of statutory interpretation, which include having regard to context in which section 100(2) appears, its apparent purpose, the background to its preparation, and the material known to those responsible for its production.

230.2. The paradigm shift effected by section 3(1) of the MPRDA is of fundamental importance in this inquiry. The Court is invited to consider the extent to which the "*common heritage*" and "*state custodianship*" doctrines affect the interpretation of section 100(2). The Minister contends that one consequence of state custodianship is that he is to retain a greater degree of control over the exercise of mining rights, including upon transfer or renewal, than the Council contends he may.

230.3. Regard must be had to the Minister's contention that the Charter would be incapable of achieving the purposes expressly identified by section 100(2) were it to be anything less than a binding instrument, or a mere policy document.

230.4. Regard must be had to the policy considerations set out in the 1998 White Paper, which make plain the transformative imperatives, and to the objects of the MPRDA and the constitutional imperatives.

230.5. Regard may (and we submit, must) be had to parliamentary material, which demonstrate that Parliament's intention was that the Charter was to be binding, that it would be "*developed*" by the Minister, and that its central focus was on transformation.

230.6. To interpret section 100(2) as conferring a power to make an instrument in the nature of subordinate legislation does not violate the doctrine of separation of powers, is not contrary to the rule of law, and is not unconstitutional.

230.7. Subordinate or delegated legislation takes a wide range of forms: and nomenclature is not decisive. It is not necessary for the Court to decide which form of subordinate legislation the 2018 Charter is.

230.8. The Council's argument as to why the Charter is a policy instrument fails to have regard to the ordinary rules of statutory interpretation and disregards, in particular, the need for a purposive interpretation. It also gives no weight to the paradigm shift brought about by the regimes of common heritage and state custodianship, introduced by section 3(1) of the MPRDA.

230.9. Taken together, the factors set out above indicate that it is more likely than not that the Charter contemplated by section 100(2) is intended to be subordinate legislation and not a mere policy.

231. On the grounds of review, the Minister's case is as set out in the answering affidavit, and our key submissions as to the relevant legal principles are set out above.

232. Finally, even if this Court were to find that some provisions within the Charter fall to be reviewed and set aside (which we dispute), such a finding ought not to affect the characterisation of the 2018 Charter as being in the nature of subordinate legislation.

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20 April 2020