

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

Case no: 20341/2019

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

**SUPPLEMENTARY FOUNDING AFFIDAVIT**

I, the undersigned,

**TEBELLO LAPHATSOANA CHABANA**

hereby say on oath that:

**DEPONENT**

1 I am the Senior Executive: Public Affairs and Transformation of the Minerals Council South Africa, previously known as the Chamber of Mines of South Africa. I took office on 1 July 2016.

- 2 I am duly authorised to represent the Minerals Council in this application and to depose to this affidavit on its behalf. I also deposed to the founding affidavit in this matter.
- 3 The facts in this affidavit are true and correct and, unless otherwise stated or the contrary appears from the context, are within my personal knowledge. Legal submissions in this affidavit are made on the advice of the Council's legal advisors.
- 4 Words or phrases defined in the founding affidavit bear the same meaning in this affidavit.

#### THE RECORD

- 5 The State Attorney made the record in this matter available on 31 May 2019. It comprises more than 3000 pages of documents (items A to C), presentations (items D to T) and written submissions and comments by various interested and affected parties in response to the invitation for public comment on the draft mining charter (item U to U120). The record will be filed in separate bundles.
- 6 The Minister's powers in terms of section 100 of the MPRDA are not delegated to anyone so that it is the Minister personally who had to take, and who took, the decision to publish the 2018 Charter.
- 7 The record does not indicate which documents actually served before, and were considered by, the Minister. Unlike is normally the case in decisions taken by the Minister, there is no recommendation document which summarised the documentation submitted to the Minister and made recommendations to him.

Insofar as the 'response' document (item L1, pp 1161-1276) served that purpose, it is hopelessly inadequate and does not comprehensively or correctly reflect the content of the actual submissions which were lodged. This founds a ground of review that the relevant considerations and information contained in all the submissions, some of which are very extensive, were not taken into account by the Minister at all in his decision to publish the 2018 Charter, with the inclusion of the challenged clauses. We deal with specific instances of relevant considerations which the Minister failed to take into account below.

**CLAUSE 2.1 (OWNERSHIP) OF THE 2018 CHARTER: THE LEGAL STATUS OF THE MINING CHARTER, ONCE EMPOWERED, AND THE *CHAMBER OF MINES* JUDGMENT; DISPOSALS, RENEWALS, TRANSFERS AND NEW MINING RIGHTS; AND THE MPRDA AMENDMENT BILL**

8 The above topics are comprehensively and expressly raised in the Founding Affidavit as a matter of law and by reference to grounds of review such as that the challenged clauses of the Mining Charter are unauthorised by the MPRDA, were materially influenced by errors of law, did not take into account relevant considerations and information, and were irrational and unreasonable.

**9 Lack of authority and errors of law**

9.1 The documents included in the record demonstrate that the Minister was pertinently informed of, and thus fully aware of, the legal impediments and constraints, but proceeded nevertheless to publish the 2018 Charter with the inclusion of the challenged clauses.

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9.2 I refer the court in this regard to item T (at pp 1593 ff of the record), which is a legal opinion sought by and given to the Minister himself on the “*constitutionality of the Draft Mining Charter, 2018*” (“State Law Adviser’s Opinion”). The Minister was pertinently advised in this opinion at p 1600 (par 20) that “*Until such time that an appeal to the judgment is successful, the Department is not able to amend or repeal the 2010 Charter, unless the Department ensures that the proposed amendment to section 100 of the MPRDA is passed*”. (See also pages 1610, 1613 and 1614, and the concluding paragraphs 55 to 59 on pages 1614 and 1615); pages 1609 and 1610 (paragraphs 43, 44, 45, and 46)). Although the Minerals Council does not agree with the whole of the contents of the opinion, the Minister was at least correctly advised that he lacked authority to publish the 2018 Charter (or parts thereof) until and unless the MPRDA Amendment Bill B15D-2013 was passed. The Minister, who was in the process of developing a policy document did not, however, heed the legal advice he had sought about the statutory limits of his authority and continued to publish the 2018 Charter with the inclusion of the challenged clauses. In addition to his decision to publish the 2018 Charter not being authorised, as contemplated in section 6(2)(a)(i) and 6(2)(f)(i) of PAJA, the Minister’s decision to ignore the legal advice of the State Law Advisor on the issue of his power to publish the 2018 Charter, in the absence of any contrary legal opinion, rendered the decision procedurally and substantively irrational and unreasonable as contemplated in section 6(2)(f)(ii) and 6(2)(h) of PAJA, and in contravention of the principle of legality.

9.3 I also refer the court to pp 1214 – 1228 of the record (item L1) where the Minerals Council’s submissions are summarised and the DMR’s responses

thereto are recorded. The responses of the DMR are often based on material errors of law and further render the inclusion of the challenged clauses reviewable on the basis of section 6(2)(d) of PAJA. Further argument will be presented to the court in this regard.

#### 10 Relevant considerations and information not taken into account

Relevant considerations and information were provided to the Minister regarding the 2018 Charter's Legal Status; the Once Empowered principle; the *Chamber of Mines* judgment; the MPRDA Bill; Disposals; Renewals; Transfers; and New Mining Rights as appears from *inter alia* the following pages of the record: Pages 1616-1623; 1687-1688; 1765-1771; 1839-1840; 1845; 1928-1929; 1940-1947; 1952; 1954-1957; 1960-1986; 1989-2010; 2026-2030; 2058-2062; 2066-2067; 2070; 2074-2075; 2094; 2188-2193; 2214-2223; 2257-2282; 2314-2318; 2479-2483; 2494-2521; 2582-2583; 2672-2676; 2677-2679; 2752-2771; 2798-2806; 2814-2824; 2830-2832. These relevant considerations were not, however, taken into account by the Minister, further rendering the decision reviewable in terms of section 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of PAJA.

#### 11 Clause 2.1.6 (Disposal of BEE Shareholding in Respect of Existing and New Mining Rights) of the 2018 Charter

11.1 I dealt with the applicability of Clause 2.1.6 to existing rights in paragraphs 106ff of the founding affidavit (p 59 ff). As stated, the heading of this clause refers to both existing and new mining rights. Existing mining rights are, however, already dealt with in clauses 2.1.1.1 and 2.1.1.2 of the 2018 Charter, where the principle of "once empowered always empowered" is acknowledged

in respect of existing rights. Clauses 2.1.6.1.1 to 2.1.6.1.4 directly contradict clauses 2.1.1.1 and 2.1.1.2, which deal with existing mining rights, and the application of clauses 2.1.6.1.1 to 2.1.6.1.4 to existing rights leads to an absurd result whilst clause 2.1.6 is workable if intended to apply to new rights only, except that even then they conflict with the "*once empowered, always empowered*" principle even insofar as new rights are concerned.

11.2 It appears from the record that the parties at all times during the consultation process understood the intention to be that clause 2.1.6 of the Mining Charter would apply only to new mining rights. See for example pages 46; 57; 241 and 264 to 265; 1230; and 1234 of the record.

11.3 It is submitted that the heading to clause 2.1.6 is clearly wrong in as much as it refers to existing mining rights, and that clause 2.1.6 clearly does not apply to existing mining rights granted before the 2018 Charter, as prayed in paragraph 1.7 of the Notice of Motion.

## **CLAUSE 2.2 (INCLUSIVE PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT) OF THE 2018 CHARTER**

12 In the founding affidavit, the Minerals Council indicated that there was no evidence that the procurement element in the Charter could be implemented. The Minerals Council is fortified in this by the record filed by the Minister, in consequence of which the Council now files this supplementary founding affidavit. Not only was there no evidence before the Minister indicating that the procurement element could be implemented, there was in fact a considerable body of evidence to the contrary. In what follows, therefore, the Council sets out some of that material which emerges from the record.

- 13 The Council remains committed to the aims of the 2018 Charter. It is duty-bound, however, to point out what is workable and what is not; and, in particular, to indicate the impact of the 2018 Charter on the mining and related industries. The Minister does not seem to have addressed the concerns set out below. He seems simply to assert that the procurement targets and time frames are based on (undisclosed) research. I assume that the research exists somewhere and that the Minister will produce it in his answering affidavit.
- 14 In what follows, then, I reproduce without commentary what some (not all) of the submissions to the Minister said about the procurement element. I do not say that the submissions are univocal: they could hardly be, given the various interests they represent. I do however submit that, when faced with stakeholders, with intimate knowledge of the mining industry, who say that the procurement element is not practicable, the Minister is required to give serious consideration to such submissions and to base any contrary view on proper evidence. No such evidence is apparent from the record.
- 15 The various representations before the Minister were the following.
- 15.1 The South African Mining and Mineral Processing Supply-Chain Clusters (which consists of Mining Equipment Manufacturers of Southern Africa, SA Mineral Processing Equipment Cluster, Casting, Forging and Machining Cluster of South Africa, and Electro-Technical Industry Cluster of South Africa) submitted in relation to the procurement element the following:

"Regarding the Draft Charter's target of 70% local procurement of Mining Goods within 5 years, there could be specific circumstances where this is not

achievable (in particular types of mining or processing), which could result in these mines being non-compliant with the Charter. These potential situations could be catered for through an alternative local supply-chain development option (offset)." (Record p 1672 para 6])

- 15.2 AfriSam (South Africa) (Pty) Ltd, a manufacturer and supplier of cement and construction materials, made the following submission in relation to the procurement of the Mining Goods target of 70%:

"Not always possible in the Cement Industry due to speciality equipment."  
(Record p 1688 para 2.2.1)

- 15.3 The Japan External Trade Organisation (JETRO) (a body representing Japanese companies in South Africa) submitted the following from one of its members:

"In the mining equipment perspective, it wouldn't be achievable regardless of the transition period since our product is high-quality and technical based on our hundreds of parts and component suppliers in Japan, US and Germany. Even if we bring the factories herein SA, it's impossible to achieve 60% value added without bringing all the suppliers to SA, which is definitely also impossible." [Record p 1699]

- 15.4 The Aggregate and Sand Producers Association of South Africa submitted, in relation to the procurement element, the following:

"The issue of procurement, supplier etc. is also a big problem for smaller operations and would not be feasible, practical or even possible. A small operation purchases very small items, low costs and often from other areas. We believe this should also not apply to the smaller mines." (Record p1717 para 4.11)

- 15.5 AngloGold Ashanti Limited submitted the following to the Minister in relation to the procurement element:



"The feedback we have received in consultation with our suppliers is that a five-year target to build capacity in the local manufacturing sector is unrealistic in the circumstances where the capacity to supply cannot realistically be up-scaled in five years to achieve these requirements. A more collaborative approach is needed between Government, mining companies and suppliers to identify the sources of goods being procured internationally and providing incentives for these foreign companies to locally manufacture these products further benefitting the economy and at the same time meeting the Mining Charter requirements." (Record p1841 para 5.1)

AngloGold Ashanti went on to say in its submission that:

"The need to stimulate procurement from the South African manufacturing industry must be balanced with the need to ensure that mining companies have access to Goods when they need it for continuity and sustainability of operations. It would be a devastating and unintended consequence of the procurement targets of the Draft Mining Charter, 2018 if mining companies were unable to procure Goods that are high demand and are simply not produced locally, resulting in the mine having suspend or scale down operations to wait for domestic supply." (Record p1841 para 5.3)

AngloGold Ashanti went on to propose that:

"[t]here should be an exemption for compliance with the mining good target where there is a domestic supply shortage ..." (Record p1845 para 8.2.4)

15.6 In its submission to the Minister, Tronox Limited, a producer and marketer of inorganic minerals and chemicals, made the following submission:

"By way of example, Tronox makes use of highly specialised electrodes in its beneficiation processes. These electrodes are only available from foreign suppliers. South Africa has neither the technological nor financial ability to produce these electrodes. The Draft Charter should make provision for exemptions from these requirements where such constraints exist." (Record p1948 para 29.2)

15.7 Anglo American submitted the following in relation to the procurement element:

"We believe that a target to procure 70% of mining goods, excluding non-discretionary expenditure, from Black Entrepreneurs, Black Women Entrepreneurs, Youth Owned and BEE Compliant companies may potentially be achievable over 5 years. However, the requirement that these goods have a >60% verifiable local content value may, depending on the definition of value add, be difficult to achieve. It should also be confirmed that these proposals are consistent with international trade law and comply with South Africa's international obligations." [(Record p1967)

15.8 The Southern African-German Chamber of Commerce and Industry made the following submission on behalf of its members:

"Members argue that, since they use international supply chains, the inflexibility of the local content element will be difficult to implement due to the relatively small size of the South African market. They propose a flexible approach for certain machinery and equipment. One example that was put forward and proposed is that 10% local content requirement could be applied to some machines and that the locally manufactured components will be exported from South Africa as part of their global supply chain as a trade-off." (Record p2077 para 322)

15.9 The Clay Brick Association made the following submission:

"While the Clay Brick Association understands the rationale for the procurement requirement of the 2018 Draft Charter – to ensure economic integration of Black People in the mining value chain, the following provisions of these proposals are practicably and economically not achievable by brick clay miners." (Record p2080 para 93.1)

The Clay Brick Association went on to say:

"As set out above, brick clay miners do not have the capacity and ability to develop suppliers of goods and services to the mining industry which satisfies the requirements in paragraph 2.1.1 [sic: 2.2.1]." (Record p2080 para 9.5.1)

The Clay Brick Association went on to say:

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"The majority of goods utilised and procured by brick clay mining industry consists of yellow goods (earth moving machinery). These goods are sophisticated and technologically advanced equipment supplied mainly by long established international manufacturers who supply this equipment on a world-wide basis at competitive prices and who provides product support, maintenance services and spare parts availability. It is not practicably achievable to develop South African BEE suppliers of this equipment within any timeframe on the basis that such suppliers must compete with international manufacturers. Even if that were possible (and we suggest it is simply not) such venture would be beyond the means and ability of small scale brick clay miners to achieve this impossible task." (Record p2081 para 9.5.2)

15.10 Metal Concentrators SA (Pty) Ltd, a precious metals refinery and jewellery business, made the following submission:

"The precious metals refining industry has limited resources of specialty chemicals that are necessary for the process chemistry in our business. These are supplied by the major chemical suppliers in South Africa who are BEE compliant. In our experience, small suppliers are generally not available or are agents of the major suppliers. Our concern is therefore that the procurement levels are unattainable in the circumstances of the South African precious metals refining industry. (Record p2143 para 2.5.2)

In light of the above, we would respectfully request that the requirements set out in section 2.2 of the Draft Mining Charter be made more realistic or flexible to cater for the circumstances that necessarily exist in the precious metals refining industry." (Record p2143 para 2.5.3)

15.11 The Tyre Importers Association of South Africa submitted the following in relation to the procurement element:

"Foreign Suppliers play an important role in the South African mining industry and few South African companies (and even fewer who meet the requirements set out in the Procurement Element) have the capacity to manufacture the specialised machinery generally utilised by the industry.

The Mining Charter does not cater for a scenario where there are not enough local suppliers available to service the industry....

In addition to there being no manufacturers of these specialised tyres in South Africa, there is an even greater unlikelihood of there being any suppliers based in South Africa which would (i) have the technology, the skills and the finances to manufacture these tyres; and (ii) meet the requirements of the allocation required between black entrepreneurs, BEE women entrepreneurs and BEE compliant companies.

Given the current composition of the mining industry, it may simply not be possible at this stage for mining companies to comply. Mining companies factually not being able to comply with the procurement targets is significant given the weighting of the procurement targets set out in the scorecard included in the Mining Charter.” (Record p2153)

15.12 Barloworld Equipment (CAT) made the following submission:

“The minimum total mining goods procurement thresholds should be based on clearly defined financial, economic, and other analysis and research.

It is unclear if it is economically possible for the mining industry to achieve these targets and continue to operate in a profitable manner or if it will be required to reduce other costs which may result in retrenchments or shutting down uneconomic shafts of specific mines.

These thresholds should be based on detailed research relating to the ability for mining companies to actually meet the thresholds without incurring substantial further cost which results in the business no longer being viable.” (Record p2161 para 2.1)

- 16 In a document compiled by the DMR titled “Report: Mine Communities’ Consultation on the Reviewed Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry,” dated 6 June 2018, the following is noted by the DMR itself:

“With regards to local procurement, most of the technology is imported from China. There is only one supplier in KZN. It is going to be very difficult for one supplier to supply goods to all mining companies in South Africa.” (Record p311)

- 17 I have not in the above exposition purported to summarise all the submissions to the Minister, although there are many more submissions, which are representative of the vast majority of the submissions which were made, in which it is submitted that the procurement targets are not practically or economically achievable or implementable due to lack and non-existence of local capacity, that they are not justifiable and are unrealistic, and that the Minister needed to undertake objective and comprehensive studies which would assess local capabilities so as to put the Minister in a position to set realistic and achievable targets. Further references to applicable pages of the record will insofar as necessary be made during the hearing of this application. My providing a summary in this supplementary founding affidavit of all the submissions to the Minister would unduly burden this supplementary affidavit. I have sought only to highlight some of the deep problems to which the 2018 Charter leads in relation to procurement. Other difficulties, also in relation to other elements, will be addressed at the hearing of this application.
- 18 I have been advised and respectfully submit that, in publishing the Charter, the Minister failed to take into account relevant considerations and information and that his decision to publish the Charter was procedurally and substantively irrational as contemplated in section 6(2)(e)(iii) and 6(2)(f)(ii) of PAJA and/or in terms of the principle of legality.

**CLAUSES 4 (APPLICATION OF THE MINING CHARTER TO LICENCES GRANTED UNDER THE PRECIOUS METALS ACT, 2005 AND THE DIAMONDS ACT, 1986) AND 7 (APPLICABILITY OF THE MINING CHARTER) OF THE 2018 CHARTER**

19 The applicability of the 2018 Charter to areas beyond the mining industry such as to applicants for licences and permits in the downstream diamond industry and the downstream precious metals industry was also pertinently raised with the Minister by various interested and affected parties on the basis set out at for example pages 1963; 1968-1969; 1985; 1998; 2018-2025; 2140-2145 (and 2206-2210 and 2247-2252 which are a triplication); 2192-2193; 2243-2246; 2521; 2724; 2779-2780; 2792-2794; and 2971-2975 of the record.

20 Notwithstanding the above, the relevant considerations and information adduced in the above references were not taken into account by the Minister and he simply proceeded to include clauses 4 and 7 in the 2018 Charter. The decision is accordingly reviewable on the grounds set out in section 6(2)(e)(iii) and 6(2)(f)(ii) of PAJA.

**CLAUSE 9 (NON-COMPLIANCE) OF THE 2018 CHARTER**

21 It was pointed out to the Minister that the provisions of clause 9 (which was numbered as clause 8 in the draft published on 15 June 2018) are unauthorised and also directly contradictory to the *Chamber of Mines* judgment. See for example pages 1952, 2083-2084, 2202, 2333, 2753, 2817 - 2818 (para 3.12), 2833 of the record. The Minister nevertheless again included clause 9 in the 2018 Charter.

22 He thereby exceeded his powers, ignored relevant considerations, materially erred in law, and acted substantively and procedurally irrationally and unreasonably and in contravention of the principle of legality.

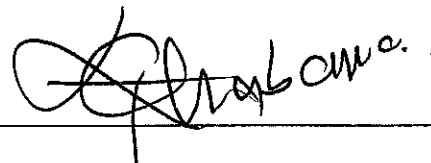
### CORRECTIONS

23 I wish finally to correct two small errors in the founding affidavit that I noticed when re-reading the founding affidavit:

23.1 In paragraph 185 (p 87) of the founding affidavit, I made reference only to platinum group metals whereas additionally reference should have been made to gold.

23.2 In paragraphs 71.1 and 71.2 (p 45), the first references in each of these paragraphs to section 6(2)(i) should be to section 6(2)(a)(i) of PAJA which deals with unauthorised conduct. It should be noted that the fourth references in each of these paragraphs to section 6(2)(i) of PAJA (unconstitutional or unlawful conduct) are however correctly to section 6(2)(i) of PAJA.

WHEREFORE, the applicant persists in seeking the relief set out in the notice of motion as amended in accordance with the slightly amended notice of motion which will be filed simultaneously with this supplementary founding affidavit.



TEBELLO LAPHATSOANA CHABANA

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at

Johannesburg on the 22<sup>nd</sup> day of **JULY 2019**, the regulations contained in Government Notice No R1268 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

Twala

**COMMISSIONER OF OATHS**

Brian Tshupo Twala  
EX OFFICIO  
COMMISSIONER OF OATHS  
PRACTISING ATTORNEY  
REPUBLIC OF SOUTH AFRICA  
11 ALICE LANE  
SANDTON

22/07/2019