IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE No: 41661/15

In the matter between:

THE MINISTER OF MINERAL RESOURCES	First Applicant
THE DIRECTOR-GENERAL, DEPARTMENT OF MINERAL RESOURCES	Second Applicant
and	
CHAMBER OF MINES SOUTH AFFICA	First Respondent

APPLICATION FOR LEAVE TO APPEAL

BE PLEASED TO TAKE NOTICE that the applicants intend to bring an application for leave to appeal the majority judgment and orders (*per Berrie AJ with Mabuse J concurring and Siwendu J dissenting*) delivered on 04 April 2018 and hereinafter referred to as the judgment or the court.

BE PLEASED TO TAKE NOTICE FURTHER that the application for leave to appeal will be made on a date and time to be determined by the Registrar and communicated to the parties beforehand.

BE PLEASED TO TAKE NOTICE FURTHER that, should leave to appeal be granted, the applicants intend to have the appeal serve before the Supreme Court of Appeal as contemplated in Section 16(1) (a) (ii) of the Superior Court Act, 10 of 2013.

Grounds for Leave to Appeal

1. Whereas the issues for determination by the court concerned the proper interpretation, amongst others, of section 100(2) of the Minerals and Petroleum Resources Development Act, 28 of 2002 (*the MPRDA*), therefore related to interpretation of legislation, the judgment is anchored erroneously on the provisions of the Interpretation Act, 33 of 1957, **despite:**

   1.1 the Constitution of the Republic of South Africa, 1996, being the supreme law of the Republic and making any law or conduct inconsistent with it invalid;[1]

   1.2 the Constitution requiring every court when interpreting any legislation to do so in a manner that promotes the spirit, purport and objects of the Bill of Rights[2];

   1.3 the Constitutional Court having held that it is a "*mandatory constitutional canon of statutory interpretation*" to interpret every statute in a manner that promotes the spirit, purport and objects of the Bill of Right[3];

   1.4 the Constitutional Court having held that "*a court is required to promote the spirit, purport and objects of the Bill of Right when 'interpreting any legislation, and when developing the common law or customary law'. **In this no court has a discretion.***"[4](own emphasis).

2. The court erred in not following the statutory injunction provided for in section 4 of the MPRDA that when interpreting the MPRDA, a court must prefer an interpretation that is consistent with the objects of the MPRDA (which includes that it – substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources)[5].

3. The court erred in holding that "*the concept of a charter is a rather nebulous one. In given*

[1] See section 1 and 2 of the Constitution
[2] See section 39(2) of the Constitution
[3] See Minister of Mineral Resources v Sishen Iron Ore CO(Pty) Ltd 2014 (2) BLCR212 (CC) para 40
[4] Phumelele Gaming and Leisure Ltd v Grundlingh 2006 ZACC 6; 2006 (8) BCLR 883 (CC)
[5] See section 2(d) of the MPRDA

circumstances, a charter can be a document setting out objectives or standards of conduct that those subscribing to it aspire to achieve or maintain. Otherwise, it can be a constitutional document of an organisation or corporate entity that binds the members thereof." This is **despite:**

3.1 section 100 (2)(a) of the MPRDA requiring the Minister to develop a charter whose purpose is to ensure the attainment of the Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution;

3.2 section 100(2)(b) of the MPRDA peremptorily stipulating that the charter must amongst others show how the objects in section 2 (c), (d), (e), (f) and (i) can be achieved;

3.3 section 23(1) (h) of the MPRDA requiring that the granting of a mining right is only legally competent when the minister is satisfied that 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;

3.4 item 7 of schedule 2(k) of the MPRDA providing that the conversion of a mining right must be on the undertaking that the holder will give effect to the objects referred to in section 2(d) and 2(f) of the MPRDA;

3.5 the definition of "*this Act*" to include a condition on which a mining right is granted; and

3.6 the admitted evidence being that a typical mining right licence will require compliance with the provisions of section 2(d) and (f) of the MPRDA

4. The court erred in holding that the charter only has legal significance in the context of the granting of the mining right and whether such an obligation exists or not "*depends entirely on whether it arises in terms of the terms and conditions subject to which the minister granted the mining right that may be in question.*" A proper reading of the MPRDA makes it plain that compliance with the objects of the MPRDA is not an optional "*term*" or "*condition*" but rather mandatory.

5. The court erred in holding that interpreting various conditions of the MPRDA is "*the process occurs with due regard, throughout, to the primacy of relevant provisions of the constitution, and also with the provisions of the interpretation Act in mind.*" The law relating to the interpretation of any statute is now settled law and does not involve the provisions of the interpretation Act.

6. The court erred in law in holding that section 100 of the MPRDA does not expressly state what the legal consequences will be of a mining charter. Even though not expressly stated what the legal consequences of the charter are, a proper interpretation consistent with the objects of the MPRDA ineluctably leads to the conclusion that the charter provisions are legally binding.

7. For reasons already advanced above, the court erred in holding "*that the charter contemplated in section 100 is referred to in four sections of the MPRDA. None of these provides that the charter contemplated in section 100 would as such without further ado have any binding effects, i.e. have force or effect as 'an enactment having the force of all' as referred to in the definition of the term 'law' in section 2 of the Interpretation Act.*"(own emphasis).

8. The court erred in stating and holding, without reasons, that "*Accordingly, even the terms of the original charter could have been interpreted to specify an ongoing commitment that a 26% HDP/HDSA participation / ownership level would be achieved and maintained indefinitely, which is not the case, it would not, of itself, have created an obligation in that regard for holders of mining rights enforceable by means of application of section 47 or section 98 and 99 of the MPRDA.*"

9. *In pari passu,* the court erred in holding that " ... *The terms of the 2010 Charter can have legal consequences or significance only insofar as they are, in some way or another, reflected in terms or conditions subject to which the Minister grants the mining right.*"

BE PLEASED TO ATKE NOTICE FURTHER that it will be argued on behalf of the applicants, that there are reasonable prospects of success on appeal, with one judge having dissented, that leave to appeal be granted and the costs of this application to be costs in the appeal.

Dated at PRETORIA on this day 19TH of APRIL 2018

SIPHO MATHEBULA

APPLICANTS' ATTORNEY

THE STATE ATTORNEY

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And to:

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