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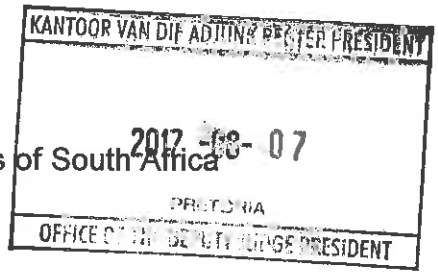
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA



CASE NO: 43621/17

In the matter between:

The Chamber of Mines of South Africa — Applicant

and

Minister of Mineral Resources — Respondent

FILING NOTICE

TAKE NOTICE THAT the Respondent present for filing the following document:

The Answering Affidavit

Dated at Pretoria on this day 7th of August 2017.

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To: **The Registrar of the above**

Honourable Court, Pretoria

Received copy hereof on _____ 2017.

_____

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For: @ 17:50 pm

SGD Rethabile Magoro

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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case 43621/2017

In the matter between:

CHAMBER OF MINES OF SOUTH AFRICA Applicant

and

MINISTER OF MINERAL RESOURCES Respondent

RESPONDENT'S ANSWERING AFFIDAVIT

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I, the undersigned,

MOSEBENZI JOSEPH ZWANE

state under oath that:

1. I am the Minister of Mineral Resources of the Republic of South Africa and was appointed to that post on 23 September 2015. The Minister's office is at building 2C, C/o Meintjes and Francis Baard Street (formerly Schoeman Street), Sunnyside, Pretoria.

2. Unless stated otherwise or the contrary appears from the context, the facts contained in this affidavit fall within my personal knowledge and are to the best of my belief both true and correct.

3. Where I state facts that fall outside my personal knowledge, I attach confirmatory affidavits of those persons who are able to confirm the correctness and the veracity of those facts.

4. Where I make submissions of law, I do so on the advice of my legal advisors whose advice I accept to be correct.

5. I have read the founding affidavit of Tebello Laphatsoana Chabana ("**Chabana**") and the supporting affidavits of Ambrose Vuzumuzi Richard

Mabena ("**Mabena**") and Roger Alan Baxter ("**Baxter**") together with the attached documents.

6. An outline of this affidavit is described in the contents section above. By way of summary, I first set out the following:

6.1. the relevant background and statutory framework;

6.2. the effect of the 2017 charter on existing and new rights;

6.3. the ownership element of the 2017 charter;

6.4. the non-ownership elements of the 2017 charter; and

6.5. the applicant's ("**the chamber**") failure to meet the requirements of an interim interdict.

7. Under each of these themes, I also deal with the key allegations made in the founding papers. Thereafter I seek condonation for the late filing of this answering affidavit. Finally, I respond seriatim to the remaining allegations in the founding papers.

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RELEVANT BACKGROUND AND STATUTORY FRAMEWORK

THE CONSTITUTION

8. The application deals with legislation whose aim is to de-racialise and diversify the mining industry in South Africa in a meaningful and long-term manner.

9. The economic, political and social legacy inherited by the democratic South African government in 1994 was one characterized by the racial exclusion of the majority of South Africans from the mainstream economy. There was, and unfortunately still is, a massive disparity in access to, control over and ownership of resources in the economy, and in the mining industry in particular.

10. At the time, and shortly thereafter, the phraseology of reconstruction, development and transformation of society to redress the substantial imbalances of the past in a meaningful manner, became *de rigueur*, including in the mining industry. Everyone professed to be committed to achieve those objectives.

11. The Department published a white paper in 1998 entitled "*A Minerals and Mining Policy for South Africa*" which recorded, in relevant part (the preamble to chapter 2), as follows:

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"Past legislation and practices have inhibited black ownership of assets, in mining as in other of the country' s principal producing sectors. While various initiatives are under way to introduce black investors into the industry, ownership of the main mining companies remains as yet essentially unchanged. A long-term perspective is needed because of the difficulties of raising the large capital sums involved.

Similarly, workplace discrimination (legislated in some cases) obstructed the advancement of black people into middle and senior management positions in the mining industry. Progress has been made in recent years, both on the mines (notably via apprenticeship and other training programmes) and in head offices. But the impact will take some years to start being really visible because of the long periods needed for employees to acquire the practical experience required for promotion.

Black participation in ownership and management of the mining industry will have special political significance for South Africa's development as a market-based democracy."

12. The relevant extract of the white paper is attached marked "**AA18**"

13. In this context, Parliament enacted the Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA**" or "**the Act**") as a measure *inter alia* to introduce historically disadvantaged South Africans ("**HDSA**") into the mining industry in an incremental, meaningful and sustainable manner.

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14. The Constitution enjoins the government to take legislative and other measures which are designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. In this regard, reference in the Constitution to categories of persons disadvantaged by unfair discrimination is a reference to HDSA.

15. In its terms, the Constitution provides in section 9(2) that:

> *"(1) ...□*
>
> *(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or* categories *of persons disadvantaged by unfair discrimination may be taken."*

16. Given the historical inequities of excluding HDSA from meaningful participation in the mining industry, legislative measures were taken to correct that past and to ensure the participation of HDSA in the mining industry in the future.

MPRDA

17. It is common cause that the then *status quo* within which mining companies operated in the pre-democratic era was not sustainable; did not encourage foreign direct investment; and excluded the majority of South Africans from

ownership and management opportunities within the industry. There was also a constraint on the development of sound labour relations within the industry.

18. All of these matters of racial exclusion informed the decision to review the then *status quo* and to develop a new policy framework for the mining industry. One of the primary documents that records the history of post 1994 developments is the White Paper on a Minerals and Mining Policy for South Africa of 1998. A copy thereof is attached as "**AA19**".

19. This policy document recognised and acknowledged the central role of mining in the South African economy. It essentially sought to create a policy and regulatory framework within which necessary and fundamental changes could be made to the mining industry. One of its primary objectives was that of aligning mining operations with the imperatives of the Constitution and the strategic developmental goals of the newly formed democratic government. This policy framework, developed further, ultimately became enshrined in the MPRDA.

20. The MPRDA is the legislative instrument in the mining industry that was enacted by Parliament to promote the achievement of equality as mandated by the Constitution. The MPRDA was promulgated by the legislature to deal with the prevailing reality that white South Africans wield real economic power while the overwhelming majority of black South Africans are still mired in unemployment and abject poverty. This is because they were (and still are)

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unable to benefit directly from the exploitation of South Africa's mineral resources by reason of their landlessness, exclusion and poverty.

21. In other words, the MPRDA was enacted to address the gross economic inequality in South Africa, and in particular to facilitate equitable access to opportunities in the mining industry. The commencement of the MPRDA had a seismic effect on the mining industry which, to date, is still not fully appreciated by the long-established and well-entrenched participants in the industry.

21.1. It 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.

21.2. The MPRDA also had the deliberate and immediate effect of abolishing the land owner's entitlement to sterilise mineral rights, otherwise known as the entitlement not to sell or exploit minerals. This should have come as no surprise in a country with a progressive Constitution, a high unemployment rate and a gaping chasm (increasingly widening) 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.

21.3. The MPRDA vested rights in the limited mineral resources in the state, as custodian on behalf of all South Africans as part of their common

heritage. The MPRDA gave effect to this principle by granting limited prospecting, mining, exploration or production rights to successful applicants. Provision was made for the grant, content and duration of the rights (generally limited to varying time periods of up to 30 years). In terms of the MPRDA, these rights if not appropriately exercised, they may be suspended or cancelled.

22. It is a matter of public record that attempts by Agri-SA to challenge the MPRDA by alleging that it amounts to a deprivation and/or expropriation of its members' alleged rights was dismissed by the Constitutional Court (see **Agri SA v Minister for Minerals & Energy** 2013 (4) SA 1 (CC)).

23. According to its long title, the MPRDA was enacted to facilitate equitable access to and sustainable development of the nation's mineral and petroleum resources. This objective finds support from the preamble which sets out a list of commitments which lie at the heart of the MPRDA. They are, among others, the eradication of all forms of discriminatory practices in the mineral and petroleum industries. Also included is the undertaking to take measures to address the effects of the skewed distribution of economic benefits which took place during the apartheid era and the creation of a mining regime that is internationally competitive and efficient.

24. The preamble refers to the State's obligation under the Constitution to take legislative and other measures to redress the results of past racial

discrimination. In the relevant part, the preamble points to the fact that the legislature, in passing the MPRDA, is committed to "*eradicating all forms of discriminatory practices in the mineral and petroleum industries as well as having considered the obligations of the State under the Constitution 'to take legislative and other measures to redress the results of past racial discrimination'*".

25. Amongst the objects of the MPRDA is the stated intention to 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, to promote employment and advance the social and economic welfare of all South Africans, as well as to give effect to section 24 of the Constitution.

26. Section 24 relates *inter alia* to the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that include securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

27. The provisions of the MPRDA, as far as is relevant, read:

"***Objects of Act***

2. The objects of this Act are to –

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(a) ...

(b) ...

(c) *promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;*

(d) substantially *and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;*

(e) ...

(f) *promote employment and advance the social and economic welfare of all South Africans;*

(g) ...

(h) *give effect to section 24* of the *Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development..."*

28. It is clear that the MPRDA aims at promoting equitable access to the nation's mineral and petroleum resources to all the people of South Africa. The purpose and objects of the MPRDA as described in the paragraphs above, permeate and have a direct bearing on the meaning of numerous other provisions of the MPRDA. I cite several key examples.

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29. First, the ambit of the definition of HDSA whom the Act seeks to empower in the mining industry must be interpreted with reference to the objects of the MPRDA, in particular, sections 2(d) and (f). The opportunities for HDSA must, according to the objects of the MPRDA, be substantial and meaningful to enable them to benefit from the exploitation of the nation's mineral and petroleum resources. From this, it is evident that any steps that seek to undermine the participation of HDSA in the mining industry in the future would be contrary to the objects of the MPRDA.

30. "*Historically disadvantaged person*" means:

> *"'(a) any person, category of person or community, disadvantaged by unfair discrimination before the Constitution took effect;□*
>
> *(b) any association, a majority of whose members are persons contemplated in paragraph (a);□*
>
> *(c) any juristic person other than an association in which person contemplated in paragraph (a) own and control a majority of the issued capital or members' interest and are able to control a majority of the members' votes".*

31. Secondly, in interpreting the provisions of the MPRDA, the objects under section 2 must necessarily be given effect to and trump any interpretation to the

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contrary. Section 4 of the MPRDA is a specific provision dealing with the interpretation of the MPRDA. It reads as follows:

> *"4. **Interpretation of Act***
>
> *4(1) 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.*
>
> *(2) In so far as the common law is inconsistent with this Act, this Act prevails."*

32. The legislature was unequivocal in providing that precedence must be given to any reasonable interpretation which is consistent with the objects of the MPRDA, that is, any interpretation, reasonable or otherwise, that may stand in competition with the objects of the MPRDA must be rejected. This would include even the common law where it conflicts with the MPRDA.

33. Thirdly, the granting of a prospecting right is determined with reference to section 2(d) of the MPRDA. The relevant provisions of Section 17 of the MPRDA reads:

> *"(1) Subject to subsection (4) the Minister **must** grant a prospecting right if – …*
>
> *(2) …*

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(3) ...

(4) The Minister may, having regard to the type of mineral concerned and the extent of the proposed prospecting project, request the ***applicant to give effect to the object referred to in section 2(d).***" (Own emphasis).

34. As evident from this section, the Minister is obliged to grant prospecting rights if certain conditions are fulfilled. In granting such a prospecting right and having had regard to the type of minerals concerned and the extent of the proposed prospecting project, the Minister may request an applicant to give effect to the objects referred to in section 2(d) of the MPRDA.

35. Invariably, the Minister does require an applicant for a prospecting right to give effect to the transformation objectives sought to be realised by the MPRDA. This is because the realisation of empowering HDSA to participate in and derive meaningful benefits from the exploitation of the country's mineral resources commences at the initial and most basic of levels, the grant of prospecting rights, where the barriers to entry (such as capital costs) for HDSA are relatively minimal.

36. Fourthly, the Minister can only grant a mining right if it would further the objects in sections 2(d) and (f) of the MPRDA. In this regard, section 23(1), provides in relevant part as follows:

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"(1) Subject to subsection (4) the Minister ***must*** *grant a mining right if –*

...

(a) ...

(b) ...

(c) ...

(d) ...□

(e) ...

(f) ...

(g) ...

(h) The granting of such right will further the objects referred to in section 2(d) and (f) in accordance with the Charter contemplated in section 100 and the prescribed social and labour plan" (own emphasis).

37. Under section 23 of the MPRDA and after having had regard to various peremptory requirements including the achievement of HDSA ownership in the mining entities, the Minister is enjoined to grant a mining right. The authority to take into consideration these peremptory requirements is aligned to the transformation objectives that are sought to be achieved by the MPRDA.

38. Fifthly, section 100(2) of the MPRDA obliges the Minister to develop a broad based socio-economic empowerment charter and uses the following language:

□

"Transformation of minerals industry□

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100 (1) The Minister must, within five years from the date on which this Act □ took effect -

(2)(a) To ensure the attainment of 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, targets and time-table for effecting the entry of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources."

39. "*Broad based economic empowerment*" as used in section 100(2) is defined in section 1 of the MPRDA to mean:

"a social or economic strategy, plan, principle, approach or act which is aimed at –

(a) redressing the results of past or present discrimination based on race, gender or other disability of historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries; and

(b) transforming such industries so as to assist in, provide for, initiate or facilitate -

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(i) *the ownership, participation in or the benefiting from existing or future mining, prospecting, exploration or production operations;*

...

(iv) □*the ownership of and participation in the beneficiation of the proceeds of the operations or other upstream or downstream value chains in such industries;*

...

(vii) *the socio-economic development of all historically disadvantaged South Africans from the proceeds or activities of such operations;...".*

40. Therefore, section 100(2)(a) of the MPRDA obliges the Minister to develop a broad based socio-economic empowerment charter to ensure the attainment of government's objective of redressing historical, social and economic inequalities as stated in the Constitution and set out in the purpose and objects of the MPRDA. The charter is to set the framework, targets and timetable for effecting the entry of HDSA's into the mining industry. The charter is to enable HDSA's to benefit from the exploitation of mining and mineral resources.

41. At the time of the drafting of the MPRDA, in particular section 100(2), the legislature contemplated that the charter would be a convenient and flexible mechanism enabling the Minister to respond to a fluid and constantly evolving situation regarding methods for the achievement of the relevant objects set out

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in the MPRDA. It would be much easier and purposefully practical to update the charter or write a new charter than to give effect to section 100(2) than to keep amending the Act through the legislative process that is inherently far slower and more cumbersome.

42. In other words, the intention was that, over time, as it was discovered that some aspects of the charter worked and others did not, the Minister could, effectively and relatively expeditiously, give effect to section 100(2) and some of the key objects of the MPRDA. That would avoid:

42.1. casting the modalities and mechanisms of giving effect to the relevant objects of the MPRDA through primary legislation (as opposed to a charter), and

42.2. the resultant danger that, if the legislative mechanisms for giving effect to section 100(2) and the relevant objects of the MPRDA did not go far enough or if they proved to be excessive or if they needed to be amended as time passed and the situation changed (as would inevitably be the case), it would be impossible to amend them with any degree of flexibility and expeditiousness.

43. I point out that the chamber, on behalf of its members, repeats in its founding affidavit the mantra that it is committed to ensuring transformation in the mining industry and is committed to achieving the objects in the MPRDA as set out

above and construed against the values of the Constitution. But the indisputable facts demonstrate the contrary: the chamber, through its conduct, seeks to subvert those very legislative objectives and underpinning values. This is a point that will be demonstrated repeatedly throughout this answering affidavit.

2004 CHARTER

44. In terms of section 100(2) the responsibility, indeed obligation, rests on the Minister (and his Department) to develop the charter. The charter is not an instrument of co-governance to be developed between the Minister and the chamber. Suggestions in the founding papers to that effect are incorrect. It goes without saying, however, that in drawing the charter the Minister is required to consult in a meaningful manner.

45. Pursuant to section 100(2) of the MPRDA, in 2002, the Minister in conjunction with the Department developed a draft of what was ultimately gazetted as the 2004 charter. After the draft was drawn, stakeholders in the mining industry were engaged in extensive consultations. These stakeholders included *inter alia* the Chamber of Mines of South Africa, the National Union of Mineworkers and the South African Mineral Development Association, which is a mining body representing mainly emerging black miners.

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46. I point out that the Department initially sought to include an HDSA ownership requirement of 50 plus 1% in the draft at the time. Some of the stakeholders strongly disagreed with this requirement. The draft was, somehow, leaked to the press in about July/August 2004. The result, reported in newspapers at the time, was that billions in value was apparently lost in a few hours on the Johannesburg Stock Exchange. I attach marked as "**AA20**" a copy of a newspaper article reporting the slump in mining stocks as a result of that leak.

47. The ensuing media blitz and concern from some of the established stakeholders, notably the Chamber of Mines, resulted in the draft charter receiving a lot of attention from the executive, including the President and the Minister of Finance. After intensive consultations, in the interests of certainty and expeditiousness and in order to comply with the time frame set out in section 100(2) of the MPRDA, the draft was shortly thereafter finalised. The HDSA ownership requirement was considerably watered down to 26% in the final version of the 2004 charter which was gazetted on 1 October 2004. This was exactly six months from the date of commencement of the MPRDA on 1 May 2004.

48. The final version of the 2004 charter was a result of a compromise with the mining industry and other relevant stakeholders for a period of ten years within which the mining industry was granted an opportunity to meaningfully and

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substantially achieve the incremental objectives set out in the charter for that period.

49. In relation to ownership, the 2004 charter prescribed *inter alia* that:

49.1. mining companies were to "*achieve 26% HDSA ownership of the mining industry assets in 10 years by each mining company*", and

49.2. the charter would be reviewed in 5 years time with a view to determining what further steps, if any, need to be made to achieve the target of 26%.

50. The mining companies were to assist in funding the 26% HDSA acquisition. The 2004 charter prescribed the financing mechanism in the following terms:

> "*The industry agrees to assist HDSA companies in securing finance to fund participation in an amount of R100 billion within the first 5-years. Participants agree that beyond the R100 billion-industry commitment and in pursuance of the 26 per cent target, on a willing seller – willing buyer basis, at fair market value, where the mining companies are not at risk, HDSA participation will be increased*".

51. For example, the 26% HDSA ownership requirement had to be fulfilled by the mining industry incrementally (the incremental threshold of 15% at 5 years was

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set), but within a framework of ten years, whereafter the charter and its mechanisms to ensure compliance with the relevant objects of the MPRDA would be revisited.

52. The 2004 charter recorded that the achievement of the objectives of the charter (and that of the MPRDA) "*entails an □ongoing process*" (at para 4.14). □Mining companies were obliged to report on an annual basis their progress towards achieving their commitments under the 2004 charter. These annual reports had to be verified by their external auditors.

53. Going forward, the 2004 charter, in its terms envisaged that its provisions had to be reviewed. This was to assess compliance with the 2004 charter and to cater for the inevitable adjustments and new situations and circumstances that would arise in the future, and lessons learned from the past.

54. Furthermore, the 2004 charter envisaged consultation with stakeholders in relation to a wide range of aspects including its implementation and an assessment of the effectiveness thereof, and any amendments in the future. The 2004 charter recorded (at para 4.14) that the stakeholders, including the Chamber of Mines, agreed to participate in annual forums *inter alia* for the purposes of: monitoring progress in the implementation of plans;□developing new strategies as needs are identified;□engaging in ongoing government/ industry interaction in respect of these objectives; developing strategies for intervention where hurdles are encountered; exchanging experiences,

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problems and creative solutions;□ arriving at joint decisions; and,□reviewing the 2004 charter if required. These forums were opportunities for the Minister and the Department to consult with the stakeholders for purposes of, amongst other things, assessing the implementation and effectiveness of the 2004 charter and consulting on any changes to the 2004 charter.

2009 ASSESSMENT

55. The foreshadowed review or assessment of the effectiveness of the implementation of the 2004 charter occurred in 2009. The Department appointed a third party service provider to assist in collating information and drawing the assessment. However the chamber initially refused to provide access to the relevant information sought. The chamber had in fact written officially to the Department and communicated that it was opposed to the assessment. The Department responded that whilst the Minister had no authority over the chamber, the Minister had an obligation over the right holder in assessing the right owner's compliance with the charter which was a condition of the right. I point this out simply in order to demonstrate to the court the chamber's reluctance to constructively meaningfully engage with objectives in the MPRDA. This exemplified the consistent approach adopted by the chamber in relation to these issues of transformation over the years in terms of which the chamber pays lip-service to the objectives in the MPRDA (enshrined

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in ciritical respects in the charter) and the over-arching constitutional values, but it's conduct intentionally subverts those very processes.

56. Eventually after that relevant information was provided, a mining charter impact assessment report was drawn up by the Department in October 2009 ("the 2009 assessment"). A copy of the 2009 assessment is attached marked "**AA21**". The DMR 2009 assessment revealed *inter alia* that the mining companies had fallen well short of their commitments and targets set out in the 2004 charter in almost every aspect. For example, in relation to the HDSA ownership targets (of 15% in 5 years and 26% in 10 years), the DMR 2009 assessment revealed the following concerns and lack of compliance with the 2004 charter –

> "*the current net asset value of the South African mining industry averages R2 trillion, indicating that the 15 percent HDSA ownership threshold requires no less than R300 billion to accomplish (in 2009 terms). The industry's stated commitment of R100 billion to facilitate HDSA ownership represents 5 percent of the current net asset value of the mining industry, which falls far short of the agreed 15 percent empowerment target envisaged within 5 years.*
>
> ...
>
> *Analysis of the available data shows that aggregated BEE ownership of the mining industry has, at best, reached 9 percent*.
>
> ...

Regrettably, the reported level of BEE ownership is concentrated in the hands of anchor partners and SPV's, representing a handful of black beneficiaries, contrary to the spirit and aspiration of both the Freedom Charter and the Mining Charter.

Despite the noble intention of the empowerment vehicles (ESOPS and Community Trust) to effect the broad ownership transformation envisaged in the Mining Charter, a closer examination of these vehicles highlights the pervasive constraints presented in the form of non equitable distribution of benefits inherent in their implementation and such benefits being extended to non HDSA, which remains proverbially problematic.

The underlying empowerment funding model has resulted in the actual ownership of mining assets intended for transformation purposes being tied in loan agreements. Accordingly, the net value of a large proportion of empowerment deals is negative, due to high interest rates on the loan and moderate dividend flows, compounded by the recent implosion of the global financial markets. The rapacious tendencies of the capital markets have consistently thwarted the intended progress towards attaining the goals of transformation, as embedded in the Charter.

The assessment shows that the structure of most empowerment deals is insidiously effected at operational (mining rights) levels, which allows for ring- fencing of transformation at holding company level. Such undesirable practices perpetuate a culture and focus on regulatory compliance at the expense of fundamental transformation of the mining

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industry, including albeit not limited to de-racialising the corporate profiles and ownership of mining companies.

The assessment also points to a structural malaise in BEE deals focussed solely on economic interest, which is not representative of the true ownership transfer of mining assets to HDSA's. As a result of these structural weaknesses, the BEE companies end up in an invidious financial position, as evidenced by the swift mass exodus of these companies, which coincided with the global financial crisis.

The realisation of the benefits of BEE deal-flows to HDSA beneficiaries is delayed by elusive structuring of these deals. The nature of most BEE deals is such that the repayment terms for the HDSA continue beyond the Life of Mine (LOM). There are often onerous conditions attached to agreements to discourage HDSA participation. A majority of empowerment deals are structured with a lifespan ending 2014, contrary to the object of this element, which sought to achieve these targets as a baseline of transformation. Some companies have used what they call the ***"pool and share"*** *method, which is their own creation and features nowhere in the Charter. Through this method, established mining companies enter into joint ventures with black owned companies and each party brings resources into the deal based on the close proximity of their operations "geographically".*

The profits are shared on the basis of who has what percentage of the reserves brought into the deal. Effectively, the BBBEE ownership in such an arrangement is based on how much reserves each party brings into

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the deal. In essence such companies are not empowered and should not claim credit on the basis of attributable units of production since they did not give up any of their reserves for the benefit of black owned company and their racial profile remains unaltered.

Lack of HDSA representation at empowering companies' boards limits their decision making authority and leaves them at the mercy of empowering companies. Consequently, HDSA companies are generally excluded from major decisions relating to investment/divestment and key policies that determine the future direction of the company.

The prevalence of fronting is both an insult and an indictment to the broader objectives of the Mining Charter. This unscrupulous practice sets back the transformation agenda of South Africa and must be condemned in the strongest terms possible. The surreptitious nature of fronting remains a scourge to South Africa's transformation agenda."

(Underlining added).

57. The DMR 2009 assessment recorded that there was material non-compliance with the 2004 charter, and the provisions of the 2004 charter also suffered some shortcoming which required remedy –

"*The first period of the implementation of the current Mining Charter coincided with the longest synchronised commodity boom ever experienced by the mining industry globally. The Charter was developed as a pre-cursor lever to effect sectoral transformation,*

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aligned to the broader national transformation agenda. In developing the Mining Charter, the DME accommodated the diverse interests of various stakeholders, as they lobbied for the protection of their various constituencies.

As an agreement based on concessions by the various stakeholders, the Mining Charter is not without shortcomings. The ambiguity inherent in the current construct of the Charter elements has given rise to various interpretations, which afford the industry an opportunity to exploit intrinsic weaknesses. This has resulted in shocking levels of non compliance.

Consequently, the intended benefits flowing from the mining industry fall significantly below the expectations and aspirations of the majority of South Africans as intended by the Charter. To this extent, there is a degree of criticism levelled against the Mining Charter that in its current form, it is a blunt tool to address the broad based transformation agenda.

Although some of the elements of the Charter allude to the national objectives, there is a need to further align it to the developmental state agenda. However, this raises questions as to whether the state has utilised State Owned Enterprises for the maximum benefit of the nation and what needs to be done to ensure that such utilisation occurs.

It is therefore imperative that the Mining Charter be reviewed to ensure that it remains relevant and true to its original intent, and aligned to the

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Broad Based Black Economic Empowerment (BBBEE) Act No.53 of 2003 and the Codes of Good Practice championed by the DTI.

While the assessment of the Mining Charter demonstrates a measure of cumulative progress towards the attainment of its objectives as embedded in the elements, it also illuminates some deficiencies in the construct and mechanisms of implementation thereof. The juxtaposition of interpretation of the Mining Charter aligned to the score-card (measures) is blurry."

(Underlining added).

58. The 2009 assessment concluded in the following terms:

"*The assessment of the Mining Charter has demonstrated that the Charter and its constituent elements for effecting meaningful transformation remain relevant. However, the efficacy of the Charter as an instrument of promoting transformation is blunted to a large extent by the identified shortcomings. It is therefore recommended that the Charter be reviewed to strengthen and sharpen its effectiveness in driving transformation in the industry. It is further recommended that the MPRDA be amended to ensure that non-compliance with the provisions of both the Charter and the Act is severely penalised. In addition, there needs to be greater synergy between the procurement element of the Mining Charter and the procurement element of the DTI Codes of Good Practice*" (emphasis added).

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59. Shortly after the Department released the DMR 2009 assessment, the chamber released its own assessment. A copy thereof is attached marked "**AA22**" ("the chamber 2009 assessment"). This was drawn by the chamber on a parallel process. At no point in time prior to the publication by the chamber of its own assessment was the Department alerted to the fact that the chamber was drawing its own competing assessment. Needless to say, the chamber's assessment painted a rosy picture of compliance with the targets, framework and thresholds set out in the 2004 charter. The chamber's rosy assessment was not reflective of reality.

2010 STAKEHOLDERS' DECLARATION

60. As demonstrated above, there was an obvious tension between the imperatives of the chamber and the imperatives of the Department regarding the effectiveness of the implementation of the 2004 charter. In order to best resolve this and consult with the chamber and other stakeholders, the Department arranged an extensive consultative session, with its high watermark comprising a mining summit in Drakensberg in about March 2010 presided over by the then Minister of Mineral Resources, Minister Susan Shabangu.

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61. More particularly, the mining summit was a joint endeavour of the Mining Industry, Growth, Development & Employment Task Team hereafter referred to as "MIGDETT", a tripartite initiative comprising the government, organised business and organised labour (the Department, South African Mineral Development Association, the chamber, National Union of Mineworkers, United Association of South Africa (UASA) and Solidarity).

62. The mining summit and the associated extensive consultation process that preceded and followed it resulted in the MIGDETT representatives (including the chamber) jointly signing a declaration on the "*strategy for sustainable growth and meaningful transformation of South Africa's mining industry*" ("the 2010 stakeholders' declaration"), a copy of which is attached as "**AA23**". The 2010 stakeholders' declaration affirmed the mutual inclusivity of competitiveness and meaningful transformation of the mining industry and further ascertained that one attribute cannot be achieved without the other. It recorded in its terms that it was the product of extensive consultations: "*this declaration symbolises the spirit of common purpose by the stakeholders*".

63. The 2010 stakeholders' declaration affirmed 13 commitments in relatively detailed terms which included *inter alia* the following:

63.1. establish a long-term infrastructure planning mechanism,

63.2. add value through beneficiation,

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63.3. develop skills,

63.4. advance employment equity,

63.5. boost near-mine communities,

63.6. convert hostels into family units by 2014,

63.7. develop enterprises through procurement,

63.8. "*A minimum target of 26% ownership by 2014 to enable meaningful economic participation of HDSA*",

63.9. "*Finalise the review of the Mining Charter by August 2010*".

64. One of the aims of the 2010 stakeholders' declaration was "*[t]o commit to effective implementation of the strategy*" of supporting "*the sustainable growth and meaningful transformation of South Africa's mining industry*". The parties also undertook to *"[a]dhere to effective implementation of strategy*" for achieving the stated transformation objectives of the charter, which entailed monitoring and compliance.

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65. The 2010 stakeholders' declaration served as the basis on which the 2004 charter was amended. The 2010 charter, while retaining all the original elements of the 2004 charter, sought to improve the construct, scorecard, and remove identified ambiguities. It introduced an element on "*sustainable development and growth*". This addressed the stakeholders' commitment to utilise South African based facilities for analysis, and research and development, throughout the mining value chain, together with the improvement of the industry's environmental management as well as progress in implementation of the mine health and safety summit commitments. Furthermore, it introduced the concept of meaningful economic participation.

2010 CHARTER

66. After extensive consultations including with all stakeholders, the 2010 charter was published in the government gazette on 20 September 2010.

67. The 2010 charter incrementally built on and amended the 2004 charter. The 2004 charter records the commitment of stakeholders to a minimum target of 26% ownership by 2014 to enable de-racialisation and diversification of ownership in the mining industry through HDSA participation. That commitment is echoed in the 2010 charter and expanded to meaningful economic

participation. Once again, these provisions indicate a full alignment between the MPRDA and the 2010 charter.

68. The 2010 charter reads: □

> *"The systematic marginalization of the* majority *of South Africans, facilitated by the exclusionary policies of the apartheid regime, prevented Historically Disadvantaged South Africans (HDSA) from owning the means of production and from meaningful participation in the mainstream economy. To redress these historic inequalities, and to thus give effect to section 9 (equality clause) of the Constitution of the Republic of South Africa, Act 108 of 1996 (Constitution), the democratic government has enacted, inter alia, the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). □The objective of the MHPRDA is to facilitate meaningful participation of HDSA in the mining and minerals industry. In particular, section 100(2) of the MPRDA provides for the development of the Mining Charter as an instrument to effect transformation with specific targets. Embedded in the Mining Charter of 2002 is the provision to review the progress and determine what further steps, if any, need to be made to achieve its objectives."*

69. The vision, mission and purpose of the 2010 charter is:

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69.1. to facilitate sustainable transformation, growth and development of the □mining industry;

69.2. to give effect to section 100(2)(a) of the MPRDA;

69.3. to give effect to section 9 of the Constitution;

69.4. to redress the historical exclusion of HDSA in mining;

69.5. to ensure meaningful participation by HDSA in the mainstream economy; and

69.6. to review progress and to determine what further steps, if any, need to be □taken to achieve the objects of the 2010 charter.

70. "*Effective ownership*" in the definition clause of the 2010 charter defines the term to mean the meaningful participation of HDSA in the ownership, voting rights, economic interests and management control of mining entities.

71. The flow-through principle is not defined in the 2010 charter. Reference to the flow through principle is made in the Generic Codes of Good Practice on Broad Based Black Economic Empowerment ('the Generic Code') and states:

"*3.3 Flow-Through Principle*

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3.3. 1 As a general principle, when measuring the rights of Ownership of any category of Black people in a measured Entity only rights held by natural persons are relevant. If the rights of Ownership (of Black people) pass through a juristic person then the rights of ownership of Black people in that juristic person are measurable. This principle applies across every tier of Ownership in a multi-tiered chain of Ownership until that chain ends with a Black person holding rights of Ownership."

72. The Generic Code provides a method of applying the principle across one or more intervening juristic persons. Having applied the method, the result of the calculation will represent the percentage of ownership held by the participant.

73. It admits of no dispute, therefore, that the beneficiaries of the transformation objectives set out in the charters, are natural persons whose participation in the mining industry is sought to be achieved.

74. The 2010 charter defines "*Meaningful economic participation*" as including *inter alia* the following key attributes:

74.1. that BEE transactions shall be concluded with clearly identifiable beneficiaries in the form of:

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74.1.1. BEE entrepreneurs,

74.1.2. workers (including ESOP's), and

74.1.3. communities; and that

74.1.4. barring any unfavourable market conditions, some of the cash-flow should flow to the BEE partner throughout the term of investment, and that for this purpose, stakeholders should engage financing entities in order to structure BEE financing in a manner that permits a percentage of cash-flow to service the funding of the structure, while the remaining amount is paid to BEE beneficiaries.

75. The definition of meaningful economic participation further states that BEE entities should be able to leverage equity from that time in proportion to vested interests over the life of the transaction in order to facilitate sustainable growth of BEE entities.

76. The definition of "*meaningful economic participation*" is mirrored in the 2010 stakeholder's declaration to which the chamber is a signatory.

77. As far as material, the objectives of the charters are to, amongst others, promote equitable access to the nation's mineral resources to all the people of

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South Africa and to substantially and meaningfully expand opportunities for HDSA to enter the mining and minerals industry and to benefit from the exploitation of the nation's mineral resources that belong to the state.

78. With regard to the element of ownership, clause 2 of the 2010 charter states in express terms that "*effective ownership is a requisite instrument to effect meaningful integration of HDSA into the mainstream economy. In order to achieve a substantial change in racial and gender disparities prevalent in ownership of mining assets, and thus pave the way for meaningful participation of HDSA for attainment of sustainable growth of the mining industry*", stakeholders are to commit to achieving a minimum target of 26% ownership to enable meaningful economic participation of HDSA by 2014.

79. Clause 2 of the 2010 charter also deals with pemissible offsets, limiting these to offsets "*against the value of beneficiation, as provided for by section 26 of the MPRDA and elaborated in the mineral beneficiation framework*". Whereas the 2004 charter did not cap the offsets that may be derived from beneficiation, the impact assessment review revealed that some right holders thought it was conceivable to achieve offsets and/or credits of up to 26% from beneficiation. This could never have been the intention that beneficiation can completely supplant the equity requirements in the MPRDA. To remove any doubt, the 2010 charter capped the credits that may be achieved through beneficiation to 11%.

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80. The 2004 charter and the 2010 charter, as elaborated in the scorecard, divide the ownership compliance targets into two parts. The first part was the achievement of a 15% HDSA ownership target by 2009 and the second, the achievement of a minimum 26% HDSA ownership holding with meaningful economic participation and full shareholder rights by 2014. This merely mirrors the provisions of the charters.

81. The 2010 charter expressly provided that the "*Department shall monitor and evaluate, taking into account the impact of material constraints which may result in not achieving targets*" (at para 3). Moreover, it anticipated the inevitable situation that would arise in the future, namely the need for the Minister to amend the provisions of the charter. Therefore, it expressly recorded that *"[t]he Minister of the Department of Mineral Resources may amend the Mining Charter as and when the need arises*" (at para 4).

CHAMBER'S ACCEPTANCE OF THE 2010 CHARTER

82. Bearing in mind that the underpinning framework, the targets, the thresholds were agreed upon in 2004 and the amendments thereto were extensively consulted on and in principle enshrined in the 2010 declaration of stakeholders,

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there was no conceivable scope for dispute about the content of the 2010 charter.

83. The indisputable facts bear this out. After publication of the 2010 charter in September 2010, there was no real dispute from any stakeholder, including the chamber. On the contrary, there was unequivocal support for the 2010 charter from all the stakeholders, including the chamber. The annual report of the chamber for 2009/2010 makes express reference to the extensive consultation that had taken place, and emphasises that its members are fully committed to implement the 2010 charter *inter alia* because there was more than sufficient consultation regarding its content. The chamber's 2010 annual report is attached marked "**AA24**". It states in relevant part as follows:

> "*The significance of this [2010 stakeholders'] declaration is that it is a joint government, labour and business initiative. All the stakeholders agree that growth and transformation are interdependent and the achievement of these two vital objectives will ensure that South Africa is well positioned for the next global commodities boom. This is the reason our theme for this year's annual report is: 'Sustainable growth and development in mining'.*
>
> *The commitments in the [2010 stakeholders'] declaration were also contained and expanded upon in the [2010] Mining Charter, which was published on 20 September 2010. In the revised Charter, some of the targets were specified in more detail and new targets relating to the*

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sustainability of the mining industry were added, and the scorecard was improved. Contrary to what some stakeholders have reportedly asserted, the Department of Mineral Resources (DMR) had in fact consulted with all stakeholders in the process of drafting the revised Charter. The Chamber is satisfied that the outcome is a reasonably balanced Charter. The views of no single stakeholder are fully accommodated, but the Chamber and its members are fully committed to ensure that the revised Charter is implemented not only in the letter but also in the spirit."

(Emphasis added).

84. The chamber's 2009/2010 annual report again makes reference to the fact that the 2010 stakeholder's declaration and the 2010 charter were effectively jointly developed through a process of open and extensive communication between the Department and all stakeholders including the chamber. In short, on the chamber's own version, the 2010 charter was a product of long-running, extensive and detailed collaboration and consultation. In this regard, I refer to the following extract from the chamber's 2009/2010 annual report:

"*In an effort to reposition the South African mining industry, the sector has developed strategies to address identified shortcomings, signed a joint mining declaration with 13 commitments [the 2010 stakeholders' declaration], and amended the Mining Charter [culminating in the 2010 charter]*" (emphasis added).

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85. A mere perusal of the chamber's 2009/2010 annual report also demonstrates that the chamber and its constituent members regarded the 2010 charter as imposing binding obligations on them on every aspect of the 2010 charter.

2015 ASSESSMENT

86. As part of its monitoring function, and in order to gauge whether there has been actual compliance with the 2004 charter and thereafter the 2010 charter in terms of the targets, frameworks and timetables set out therein, the Department commenced an assessment of the effectiveness of the implementation of the 2010 charter in 2014.

87. Once again, the Department struggled to get the co-operation of the mining companies. Therefore, this necessitated a new approach by the Department.

88. The Department then formed a project management steering committee. It held several workshops with stakeholders under the auspices of MIGDETT. The purpose thereof was to establish the requirements of a template to request information from mining companies. In terms of this web-based information gathering exercise, all rights holders would have immediate and ongoing insight into what was transpiring regarding the assessment. They could log in and access their information on the database on the web.

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89. However, the chamber representatives appeared not to understand the need for monitoring and compliance of the charter, and how and why the templates were to be completed. Therefore, the Department officials met with chamber representatives and conducted several workshops to facilitate this process, including specifically in order to explain the rationale and purpose for the templates and how they were to be completed, in order to ensure consistency in their completion and to facilitate compliance.

89.1. On or about 10 November 2014 the Department's mining charter project steering committee met to review progress on the assessment of the implementation of the 2010 charter. I attach hereto a copy of the minute of the meeting marked "**AA25**"

89.1.1. Under the heading "*critical decisions*" the following is noted:

> "*[t]he CFO confirmed that the following key decisions need to be taken by the steering committee based on the outcome of the Chamber of Mines stakeholder meeting.*"

89.1.2. Under the header "*Revision of Mining Charter Questionnaires*", the following is recorded:

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"*HM [Henirich Mundt] stated that the representatives at the Chamber of Mines Info meeting requested the Department to align the Mining Charter questionnaires exclusively to the requirements as stipulated in the Mining Charter. Examples of issues as raised were provided …*

It was agreed that the project task team will review and amend the templates and questionnaire's to address the issues as raised by the Chamber of Mines and also to align questions to what is relevant to the Mining Charter only" (emphasis added).

89.1.3. Under the header "*Project Communication*", the following is recorded:

"*It was agreed that the Project Task Team will continue to engage with other stakeholders, including organised labour following the meeting held with the Chamber of Mines. Also that a follow up meeting will be scheduled with the Chamber of Mines to consult and provide feedback on the issues as raised during the 1st meeting*" (emphasis added).

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89.2. I attach hereto marked "**AA26**"is a copy of a briefing note spanning two workshops held with the chamber in November 2014 (and foreshadowing a further such workshop on 27 November 2014).

89.3. On or about 17 November 2014 the Department's mining charter project steering committee met again to review progress on the assessment of the implementation of the 2010 charter. I attach hereto a copy of the minute of the meeting marked "**AA27**". The following is recorded:

> "*HM [Henirich Mundt] confirmed that the planned follow-up meeting with the Chamber □of Mines scheduled for last week did not transpire due to the unavailability of a number of mining company representatives. □He confirmed that a follow-up meeting is proposed for 24 November '14 by the Chamber of Mines, which need to be confirmed. The DG [Director-General] indicated that he will attempt to intervene to secure an earlier meeting.*"□

89.4. In summary, in relation to the above documents, I point out to this court that they demonstrate the extensive lengths to which the Department took to involve the chamber in consultations (including the DG intervening to secure a meeting with the chamber in circumstances where the chamber was unable to make an earlier meeting because of the unavailability of some of its members.

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89.5. The above documents also illustrate the ongoing communications and meetings between the parties, and the significant extent to which the Department took on board the chamber's input and considerations (including (but not solely) in relation to the relatively minor matter of formulating a template in order to elicit information from mining companies).

89.6. Finally, I note that these are mere samples of minutes and documents. Given the urgent nature of the application, the attendant logistical constraints (including staff members being away), and the relatively limited time period within which I (in conjunction with the Department) have been able to produce this answering affidavit, it has not been possible to exhaustively consider or even produce the full gamut of the documentary trail evidencing the extent to which the chamber has been consulted with, and its inputs considered.

90. A further letter addressed from the chamber to the Department and dated 4 February 2015 reveals yet further extensive consultation and engagement between the parties. A copy of this letter is attached as "**AA28**". It records a meeting between the parties the day before. It also summarises the parties' "*areas of disagreement, proposals and requests as raised in the meeting yesterday, and adds to these based on the web based template we received this morning*".

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91. The Department drew up a template requesting relevant information, with the input of the chamber and other stakeholders (under the auspices of MIGDETT), and the assistance of a third party service provider. All rights holders had access to their own information on the web based system. They accessed and monitored it.

92. The preliminary *ex facie* result of the assessment based on the information submitted from mining companies was that there was substantial compliance with the 2010 charter. For example, based on the information submitted from mining companies there was apparently 70% plus compliance with the 26% HDSA ownership target.. There was a difference between the Department and the chamber on this preliminary result in at least one important respect. The Department was of the view that this face value result had to be viewed with significant caution for at least the following reason. The preliminary result was based on the chamber's notion of 'once empowered always empowered' in terms of which, once a mining company entered an empowerment transaction, it considered itself as thereafter always being in compliance with its charter obligations even though its empowerment partner may already have exited. On closer scrutiny, the Department and the Minister came to the considered view that only 6% of mining rights holders met or fulfilled the requirement of meaningful economic participation as included and defined in the 2010 stakeholders' declaration and in the 2010 charter.

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93. Therefore, the Department called in some of the mining companies who claimed to comply with the 26% ownership requirement in the 2010 charter. The Department engaged them on their notion of 'once empowered always empowered' and the continued consequences of previous transactions, in order to understand exactly what they meant by this in the context of their individual cases. Furthermore, after this process of engagement, the Department tested the information on the templates further for accuracy by taking the top 17 (seventeen) miners and establishing the veracity of the information. The Department thereafter considered the views of the chamber and its members on their so-called 'once empowered always empowered' notion and took the (tested) information from the templates. Together with the assistance of an actuary, the Department then drew up a report.

94. The Department intended publishing the results of its assessment in a report on 31 March 2015. However, because of a threatened interdict from the chamber to prevent the release of the Department's assessment, the Department did not release its assessment report on that date.

95. In an application launched in about March/April 2015 and brought under case number 41661/15 the chamber challenged the 2010 charter and the Minister on the basis that the 2010 charter and the Minister did not have regard to the chamber's asserted notion of 'once empowered always empowered' in dealing with the ownership requirement under the 2010 charter.

96. In short, the Department and the chamber had a dispute on policy. The chamber had repeatedly presented its view. The Department and the Minister were of a different view. The chamber sought to go to court in order to resolve that difference, in the context of the 2010 charter. The Department and the Minister agreed to refer that dispute to court.

97. This approach of going to court appeared to temporarily appease the chamber. As a result the Department published the results of its 2015 assessment in the absence of the threat of an urgent interdict, on or about 15 May 2015. The report is headed "*Assessment of the Broad-Based Socio-Economic Empowerment Charter for the South African mining industry (Mining Charter), May 2015*", and a copy thereof is attached as "**AA29**" ("the Department's 2015 assessment report").

98. The Department's 2015 assessment report notes that it "*presents the findings of the assessment of implementation of the Mining Charter against each element, effectively quantifying progress of implementation of the instrument in an aggregated manner over a ten year window period*".

99. The foreward of the then Minister to the Department's 2015 assessment report conveniently summarises its findings as follows:

> "*The Mining Charter is a trailblazing sector-specific transformation instrument in pursuit of meaningful transformation. It was developed and*

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subsequently refined by government, in collaboration with organised labour and business, in order to emphasise mutual inclusivity of meaningful transformation and global competitiveness of the mining industry.

As of 2014, the Mining Charter had been in force for a decade. This report presents the findings of an assessment in terms of the extent of progress to date.

Notwithstanding a paucity of companies of all sizes that have fully embraced the spirit and the letter of the Mining Charter, there's an extremely varied performance that seems suggest a compliance-driven mode of implementation, designed only to protect the 'social license to operate'.

Whereas the MPRDA has transferred the ownership of the mineral wealth of our country to all the people of South Africa, under the custodianship of the State, a proliferation of communities living in abject poverty continues to be largely characteristic of the surroundings of mining operations.

Limited progress has been made in embracing the broad-based empowerment ownership in terms of meaningful economic participation of HDSAs. The trickle flow of benefits that ought not only to service the loan, but also include cash-flow directly to a combination of beneficiaries, Is vastly limited. To this end, the interests of mineworkers and communities are typically held in nebulously defined Trusts, which constrain the flow of benefits to intended beneficiaries. As a result, the

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mining industry has broadly been faced with increasing tensions with both workers and host communities.

Some strides have been made to date in creating an enabling environment for women to participate in the development of mining and mineral resources.

However, more still needs to be done to ensure meaningful participation of women in the sector.

Transformation remains a central tenet of the government of South Africa. As a result, the Mining Charter targets remain applicable and the government will work tirelessly to turn this picture around and achieve radical socio-economic transformation to deracialise the economy and greater equality in the development of the nation's mineral wealth."

100. The day before publication of the Department's results, on 14 May 2015, the Department called the chamber representatives and other stakeholders in, and shared all its findings with them.

101. A day after the Department released its 2015 assessment report, the chamber released its own assessment report. A copy of a summary thereof is attached marked "**AA30**" ("the chamber 2015 assessment"). This was drawn by the chamber in a parallel process. At no point in time prior to the publication by the chamber of its own assessment was the Department alerted to the fact that the chamber was drawing its own competing assessment. In all the many consultation and workshops and interactions that preceded the Department's

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release of its report, the chamber did not once disclose that it had a parallel process in terms of which it was drawing its own report. Needless to say, the chamber's assessment painted a rosy picture of compliance with the targets, framework and thresholds set out in the 2010 charter.

DRAFT 2017 CHARTER

102. In a meeting dealing with the mining industry, in about September 2015, the President of the Republic of South Africa expressed the public view that the chamber and the Department should not as a measure of first instance resort to courts to resolve their differences, but should speak to one another first in an endeavour to find solutions.

103. To this end, in about December 2015, another MIGDETT meeting was held between the relevant stakeholders. The various stakeholders were aware that the Department was drafting an amendment to the 2010 charter. All of the statekholders wanted certainty in relation to the mining charter. They wanted this finalised as soon as possible. This is because there was too much uncertainty in the mining industry, bearing in mind the events at Marikana had relatively recently occurred and the economy was in recession.

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104. In response to this overwhelming request for certainty, in February 2016 I attended my first mining indaba and very explicitly undertook to bring finality to the charter within a year, taking into account all representations made on the issues. I made this commitment to the entire industry.

105. At that juncture, in about February 2016, the court application involving the chamber's asserted notion of 'once-empowered always-empowered' in the context of the 2010 application was to be heard in court.

106. In about March 2016, another MIGDETT meeting was held between the relevant stakeholders. The Department presented the content of the draft 2017 charter at this meeting. In that context, the various stakeholder representatives made their respective submissions. Admittedly, they did not have sight of the content of the 2017 draft charter before. However, there was nothing revolutionary in the draft 2017 charter or draconianly different. It simply proposed an incremental build-on to the 2010 charter which in turn incrementally built on the 2004 charter. Each of the successive charters was based on agreed principles and objectives enshrined in the Constitution and the MPRDA, and each charter built incrementally upon its predecessor.

107. The draft 2017 charter took into account all the submissions of relevant stakeholders, the Department's 2015 assessment report, as well as the submissions and assertions by the chamber expressed in its separate report and in its earlier correspondence and submissions. Once the drafting of the

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2017 charter was concluded internally, the Minister wrote to the key stakeholders in the mining industry (including the chamber) in early April 2016 and informed them of his intention to publish the draft 2017 charter for comment and input. A copy of the Minister's letter to the chamber is attached as "**AA31**".

108. In accordance with the Department's long-standing practice, the draft 2017 charter was published for comment on 15 April 2016. On that same date the chamber published a media statement, a copy of which is attached as "**AA32**", in which the chamber recorded *inter alia* that:

108.1. the "*Chamber of Mines member companies continue to be committed to the achievement of all the transformation objectives of the Mining Charter and, for the most, have met the targets set by the 2010 Mining Charter*" (emphasis added); and

108.2. "*the version published this morning will be used as the basis for engagement between the DMR and key industry stakeholders. At a meeting this morning between Minister Mosebenzi Zwane and Chamber office bearers and a number of company CEOs, he and the Chamber team agreed on a process over the coming month, or beyond if necessary, on the content of a revised version of the Mining Charter*" (emphasis added).

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2017 CHARTER

109. All interested parties were invited to comment on the draft 2017 charter, including especially stakeholders in the mining industry. In addition to inviting written submissions from any interested party, the Department set aside a period of 4 weeks after the deadline for written submissions closed, in order to receive face-to-face follow up representations.

110. Shortly after publication of the draft 2017 charter, there were various meetings between the chamber and the Department:

110.1. On 24 April 2016 I called Mr Teke on behalf of the chamber and arranged for a meeting at the Inter-Continental Hotel next to the OR Tambo International Airport. In attendance were myself, several members of the Department and Mr Mike Teke (on behalf of the chamber). It was at this meeting that the parties discussed *inter alia* options around the chamber's notion of 'once empowered always empowered' and the HDSA ownership threshold.

110.2. Following on this meeting, a representative from the Department called Mr Roger Baxter, the chamber's representative, and arranged for a meeting of the Department and the chamber on or about 26 April 2017, in order that differences could again be discussed and, where possible, resolved. The meeting of principals, attended by senior representatives

of the chamber and the Department, occurred at the Johannesburg Country Club. This was a without prejudice meeting. However, I am advised and respectfully submit that I can allude to the meeting, at least to the extent set out herein in order to set out the true and full chronological sequence of events in order to refute the chamber's allegations that there has been no meaningful consultation. The parties agreed to establish a joint technical committee (comprising six persons from each side) to look at finding a solution to their differences regarding the charter. They agreed that the joint technical committee would meet at least once every three months and report back to a meeting of principals (senior representatives of the chamber and the Department). As described further below, the chamber/Department technical team met periodically over the next few months, and reported back to a joint meeting of the principals. I point out that no other stakeholder in the mining industry benefited from this much attention and consultation which was afforded to the chamber.

111. The chamber/Department joint technical team had over the course of the next few months come up with a jointly agreed proposal *inter alia* in terms of which the Department would allow, as an exception, eight mining companies identified by the chamber to benefit from the chamber's notion of 'once empowered always empowered'. The agreement was further that the Department whould write appropriate letters to those companies that claim that they have achieved the HDSA ownership targets. The chamber was going to furnish the

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Department with the names of those 8 companies proposed to be exempted. The basis of that in-principle agreement was limited to the 8 companies that the chamber alluded to. The Department's assessment was that, given the extent of mining activities in the country, the exemption of 8 companies as part of a negotiated compromise with the chamber would not have a material adverse impact on the objectives of the charter. But when the chamber recanted and suddenly produced over a hundred companies, this defied the very basis for that negotiated compromise. More importantly, it subverted the very basic principles on which the parties had agreed, and the mechanisms to give effect to those principles in the mining industry on the parties appeared to have also reached agreement.

112. On 19 July 2016 the joint technical team reported back to a meeting of principals of the chamber and the Department. At that meeting the chamber suddenly reneged on the joint technical proposal. Furthermore, the proposed list of 8 companies illustrated that these companies actually owned more than 130 mining and prospecting rights. This changed the position for an exemption materially. The parties simply could not find common ground on this issue.

113. The Department received just over 60 written representations from various stakeholders in response to its invitation for comments from interested parties on the draft 2017 charter. The chamber presented a written submission to the Department on or about 27 May 2016, a copy of which is attached as "**AA33**".

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114. In its written submission, the chamber complained about insufficient time within which to draft its response to and comments on the 2017 draft charter. The chamber foreshadowed many of the arguments that now feature in this application. Constitutent members of the chamber also submitted their own written representations, as did other stakeholders. A broad summary of those submissions is contained in the attached table marked "**AA34**".

115. Thereafter, for part of June, the entire month of July 2016 and for the early part of August 2016, on a daily basis, the Department engaged in face-to-face consultations with individual entities and groups of entities. For illustrative purposes I attach as "**AA35**" a copy of the then itinerary for the limited period of 21 June 2016 until 28 July 2016.

116. The chamber was also given such an audience and opportunity to make further representations. When the chamber met with the Department in the course of about 8 July 2016, it sought permission to submit a further written submission. The Department granted the chamber this permission and accepted and considered this further written submission which was dated 16 September 2016, a copy of which is attached as "**AA36**".

117. The chamber's constituent members who had made written submissions were also granted an opportunity to make oral representations. Again, I point out that there was not always uniformity between the chamber's representations on the one hand, and those of its constituent members on the other hand. Nor

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was there a uniformity between the different chamber members' representations. On the contrary, they sometimes differed in material respects. I cite but one example. In relation to the 1% contribution from foreign suppliers, Afrisam (a chamber member) proposed 1% of net profit after tax (as opposed to 'annual turnover generated from local mining companies' stipulated in the draft 2017 charter). However, the chamber disagreed with this contribution entirely.

118. I point out that all the elements in the draft charter were discussed with the chamber, except for that of ownership and the chamber's notion of 'once empowered always empowered'. This is because the chamber and the Department agreed that issue would be best dealt with by a one-on-one bilateral consultation process specially accorded to the chamber which, as described above, comprised joint meetings at the level of principals and a slew of periodic meetings of the six-a-side joint technical committee. However, other stakeholders who had made written submissions and made oral representations broached the question of ownership targets for HDSA. Some were calling for 40%, some were calling for 51%, and some were calling for 60% HDSA ownership.

119. The Department had originally intended to finalise the 2017 charter and publish it by the end of October 2016. However, there was intense interest in the charter. Many persons and entities who had not made written submissions sought to make oral representations. Furthermore, the charter deals with a highly contested and emotive subject-matter. And the content of the charter

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was (and remains) of critical importance for the country, and the mining industry specifically, going forward. For those reasons, *inter alia*, I took a decision in August 2016 (after conferring with the relevant representatives of the Department) to extend the period for consultations for several months. During that period, the Department consulted *inter alia* with black person shareholders, various communities, traditional leaders, emerging black miners, major commercial and private banks and other major financial institutions (including the IDC and PIC). I attach hereto a copy of a document marked "**AA37**" and headed "*Continued Stakeholder Engagements on the Gazetted Draft Reviewed Mining Charter, 2016 - List of Engagements (August 2016 to 21 April 2017)*" which was drawn up at the relevant time. It illustrates the comprehensive, intensive and detailed nature of the consultative process that was embarked upon.

120. In October 2016 the Department had yet another meeting with the chamber to engage it and receive oral representations from the chamber on its revised written submission. As a result of the chamber's submissions, there were changes wrought to the sustainable development target in the draft 2017 charter, to accord closer with the chamber's position.

120.1. For example, on 18 October 2016, the Department met with the chamber to engage further on the draft 2017 charter. During the engagement the Department indicated that due to public interest it sought to reinsert the sustainable development element in the draft

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2017 charter (I point out that the sustainable development element was included in the 2010 charter, but had been omitted from the draft 2017 charter). That element requires that every mining right holder must contribute 0,15% annual turnover towards Research and Development.

120.2. The chamber indicated that its concern with regard to the 0,15% of annual turnover was that not all mining companies were investing in research and development, and further, that a compulsory requirement is an additional obligation on all mining companies.

120.3. The Department then reconsidered the requirement as follows: where a right holder is investing in research and development, 70% of the investment must be utilised using local facilities.

120.4. Therefore, in response to the chamber's contribution, the element only applies to those companies investing in research and development, and not to all mining companies. Furthermore, in response to the chamber's contribution, the benchmark of 0,15% of turnover was rendered more flexible.

120.5. The chamber's submissions in relation to other elements of the draft 2017 charter might not have manifested in the 2017 charter in a similar manner described above. This, however, does not in any way mean that the chamber's submissions were not considered by the

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Department and myself, or that the chamber was not meaningfully consulted. The contrary is true.

121. On about 15 November 2016 the Department presented its latest thinking on the then evolved draft 2017 charter to the parliamentary portfolio committee. It had evolved as a result of the Department's consultations over the preceding few months. The parliamentary portfolio committee meeting is an open public hearing. The chamber sent a representative to attend the hearing.

122. The chamber and the Department were scheduled to have another principals meeting on 19 November 2016. The agenda for that principals meeting was to once again attempt to break the deadlock in relation to the chamber's asserted notion of 'once empowered always empowered' in relation to the question of HDSA ownership, which issue was pending before the high court. The meeting did not happen. The chamber sent the Department a letter in advance, raising all sorts of reasons for not attending and withdrew from the meeting. A copy of that letter is attached as "**AA38**".

123. On 17 January 2017 the senior principals of the Department and the chamber once again met. The Department arranged for that meeting, despite the chamber having pulled out of the 19 November 2016 meeting. The parties mainly discussed the issues in the pending court application. They also broached other issues raised by the chamber regarding the draft 2017 charter.

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124. All these issues were taken up further as part of the joint technical meetings between the chamber and the Department, the next one which occurred on 18 January 2017. In the joint technical committee meeting the Department presented its thinking on the content of a near final version of the draft 2017 charter. The chamber replied in a sharp letter in January 2017, attacking some aspects of the revised draft 2017 charter which had been shared with it at that stage. A copy of that letter is attached as "**AA39**".

125. On 23 January 2017 the chamber/Department technical committee had a further meeting to discuss the draft 2017 charter. At this juncture the parties' respective contentions regarding the ownership element in the draft 2017 charter was contained in a document, in its eighth iteration (and headed "Version 8"). It is attached as "**AA40**". It once again demonstrates that the Department bent over backwards to meaningfully consult with the chamber.

126. On or about 17 February 2017, the joint technical committee of the chamber the Department met again and produced a document setting out the results of the detailed discussions and meetings between the parties over the preceding months and recording the instances where they agreed, where they disagreed, and where an accomodation was possible. This document was developed further over the next few meetings and through consutlations between the parties. A copy of this document is attached hereto marked "**AA41**".

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127. The final joint technical committee meeting (comprising chamber and Department representatives) was held on or about 23 March 2017. It was the final technical joint committee meeting held between the parties. .

128. On 24 March 2017 the chamber, per Mr Roger Baxter, wrote to the acting DG of the Department, Mr David Msiza, and responded in detail to "*the request by the DMR for further input on three important elements of the DMR's reviewed Mining Charter [namely, employment equity, procurement targets and community investment target]*". A copy of this letter is attached as "**AA42**". This letter once again is illustrative of the ongoing engagement, consultation and interaction between the Department on the one hand and the chamber on the other.

129. The consultation process with the chamber came to a natural end. The Department aimed to publish the 2017 charter by the end of March. However, after it finalised its consultations with cabinet (the last cabinet meeting dealing with the 2017 charter was on 24 May 2017), it was only able to do so on 15 June 2017.

130. I point out that throughout the course of its deliberations and consultations with the chamber from at least July 2016 onward, the Department kept the chamber apprised of its thinking and consulted with the chamber as the draft 2017 charter evolved as part of the consultative process with all the other parties. The Department had devoted considerably more time, energy and resources to

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dealing with the chamber and its concerns than any other stakeholder in the industry. I attach hereto marked "**AA43**" a schedule headed "*Meetings with Chamber of Mines on the Draft Reviewed Charter*". The schedule evidences that over the period March 2016 until March 2017 there were at least 17 substantive meetings and extensive engagements which the Department had with the chamber in relation to the draft 2017 charter.

131. I believe that the above described extensive, detailed and long-running consultative process has more than reasonably and adequately met the requirement for consultation. The chamber, in particular, cannot legitimately complain about a lack of meaningful consultation. The chamber's stance appears to be that any and every change from the draft 2017 charter (published on 15 April 2016) caused by the extensive and long-running consultative process with stakeholders, causing an evolution in the Department and Minister's thinking, needed to be run past the chamber before the final charter was published. With respect, and as a matter of common sense, the chamber's approach is fundamentally ill-conceived.

132. Confirmatory affidavits of the following persons from the Department who were, amongst others, involved at various stages throughout the above-described procedure, are attached hereto:

132.1. Sibongile Jane Malie (Director: Mineral Policy Development),

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132.2. Bongiwe Mabusela (Director: Empowerment Transactions Assessment),

132.3. David Msiza (Chief Inspector of Mines and formerly Acting Director-General of the Department),

132.4. Mosa Mabuza (CEO of the Council of Geoscience),

132.5. Rendani Muthige (Deputy Director: Mineral Policy Development),

132.6. Rofhiwa Irene Singo (Chief Financial Officer),

132.7. Setepane Mohale (Chief Director: Mineral Promotion and International Co-ordination),

132.8. Sibusiso Kobese (Deputy Director: Mineral Policy Development),

132.9. Ayanda Shezi (Director: Communications),

132.10. Mthokozisi Zondi (Deputy Chief Inspector of Mines),

132.11. Joel Maleatlala Raphela (Acting Deputy Director General: Mineral Policy and Promotion),

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132.12. Pieter Alberts (Chief Director: Legal Services),

132.13. Seipati Dhlamini (Acting Deputy Director General: Mineral Regulation),

132.14. Jeaniffer Ntome (Assistant Director: Mineral Policy Development),

132.15. Malcolm Mabaso (Special advisor to the Minister),

132.16. Zarina Kellerman (Special advisor to the Minister), and

132.17. Kagiso Menoe (Director: Mineral Beneficiation Economics and Acting Chief Executive Officer, State Diamond Trader).

133. These persons are also relevant to and confirm the remaining allegations made in this affidavit regarding the Department and its interactions with various parties, including the chamber.

CHAMBER'S CLAIM THAT THERE WAS NO CONSULTATION IS INCORRECT

134. In light of the above, I respectfully submit that the chamber's allegations that the conduct of the Department and the Minister was unilateral and devoid of consultation are clearly incorrect. In the face of overwhelming evidence to the

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contrary, the chambers allegations regarding a lack of consultation are also unfortunate and questionable. They allow for the chamber to create, and take advantage of, a negative media spin against the Department which detracts from the Department's important work in pursing the development of the charter and in giving effect to the values underpinning it.

135. I note that the only evidence the chamber relies upon for its submission of a lack of consultation appears at annexure FA2 to the founding affidavit, which is a letter from the chamber to myself complaining *inter alia* of a lack of consultation. I point out that this is not the only such letter. In such instances, the Department or the Ministry unfortunately did not respond by way of letter. Instead, the complaint was addressed directly and proactively by way of an actual meeting or workshop.

136. Therefore, it is inappropriate for the chamber to assert a lack of consultation by relying its own letter asserting that complaint. The actual facts, as described above (in as full a version as permits under the urgent circumstances in which this affidavit was drawn), demonstrate the exact opposite.

LEGAL ENFORCEABILITY OF THE CHARTER

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137. The chamber's suggestion that any charter published under section 100(2)(a) is somehow an aspirational document that operates as a mere non-binding guideline is:

137.1. Legally unsound, because it is not consonant with the provisions of the MPRDA);

137.2. Factually incorrect, because, as demonstrated above, that is not how it has been implemented and abided by in practice; and

137.3. Not consonant from a policy perspective, because the chamber's thesis assumes that the broad MPRDA objectives and policies captured in the charter's framework and targets were permanently cast in stone in 2004 and remain so save for an amendment to the MPRDA. This interpretation of the chamber runs contrary to the spirit, purport and objects of the MPRDA.

138. The terms of the 2004 charter (and, indeed, any charter published in terms of section 100(2)(a) of the MPRDA, including the 2010 charter and thereafter the 2017 charter) were obligatory. This is clear from at least the following.

139. First, the wording of the MPRDA, when construed against its objects, makes that plain.

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139.1. The Constitution demands everyone to enjoy equality which includes the full and equal enjoyment of all rights and freedoms. Participation of HDSA in the mining industry is a search for the substantive equality that is promised under the Constitution. The objective to achieve equality is not merely aspirational or a guideline.

139.2. The MPRDA in its own various provisions makes it patently clear that the transformational objectives spelt out, *inter alia,* in section 2(d), are legally binding.

139.3. The granting of a mining right or a prospecting right is only legally competent if the Minister is satisfied that the transformation objectives are achieved as well.

139.4. Furthermore, section 25(2)(d) of the MPRDA provides that the holder of a mining right must "*comply with the relevant provisions of this Act, any other relevant law and the terms and conditions of the mining right*". Similarly, section 19(2)(d) of the MPRDA provides that the holder of a prospecting right must "*comply with the terms and conditions of the prospecting right, relevant provisions of this Act and any other relevant law*".

139.5. "*[T]his Act*" is defined in section 1 of the MPRDA as including "*the regulations and any term or condition to which any permit, permission,*

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licence right, consent, exemption, approval, notice, closure certificate, environmental management plan, environmental management programme or directive issued, given, granted or approved in terms of this Act, is subject".

139.6. In other words, the granting of a mineral right is generally subject to the condition that the transformation objectives are to be achieved. By way of illustration, a standard mining right reads *"in the furthering of the objects of this Act, the holder is bound by the provisions of an agreement or arrangement dated ... entered into between the holder/empowering partner and ... (the empowerment partner) which agreement or arrangement was taken into consideration for the purposes of compliance with the requirements of the Act and/or a Broad Based Economic Empowerment Charter developed in terms of the Act and such agreement shall form part of this right*". The legal enforceability of the charter could not have been stated any higher. The standard conditions imposed by the Department against the grant of any mining or prospecting right are attached marked as "**AA44**" to "**AA47**".

139.7. Finally, the MPRDA empowers the Minister to develop a charter. This legislative instruction bears legal consequences which follow the development of the charter by the Minister. Parliament therefore, in empowering the Minister to develop the charter was intent on ensuring

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that government's objectives of redressing historical, social and economic inequalities must be achieved in the broadest manner possible.

139.8. Taken together, these are some of the factors that demonstrate that the transformation objectives spelt out in the Constitution and the MPRDA, and enshrined in the charter, produces obligations which the right holders must meet.

140. Second, the enforcement of the MPRDA and attempted compliance therewith by mining companies (including members of the chamber) also makes that clear.

140.1. The terms of the 2004 charter were enforced by the DMR in a flexible, sensitive and accomodating manner. However, they were certainly not aspirational or viewed as such. When non-compliance notices in terms of section 47 of the MPRDA were issued, the holders of relevant rights (including many members of the Chamber of Mines) indicated that they had complied with the terms of the charter.

140.2. The mining companies, including members of the chamber, filed their annual audited reports setting out their degree of compliance with the charter. Two examples hereof are attached marked as "**AA48**" and "**AA49**".

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140.3. There were also a number of cases where the holder of a right under the MPRDA challenged allegations of non-compliance with the framework targets and milestones set out in the 2004 charter. Despite a search the DMR officials have not unearthed any case where the validity of the 2004 charter as a binding instrument was challenged or where it was contended that a charter in terms of section 100(2)(a) is a mere non-binding guideline. Furthermore, I believe that there is no finding by any court or regulator that any charter is a mere non-binding guideline. Instead, the 2004 charter was enforced by the Department, and viewed by mining companies (including the chamber and its constituent members), as binding law.

141. Third, the chamber accepts the binding nature of the 2004 charter. However, it refuses to accept the binding nature of the 2010 and 2017 charters. Instead, it contends that, by their nature, they are non-binding guidelines. This obvious contradiction in the chamber's stance is not explained clearly, or at all. It is not rooted in principle. It demonstrates that the objection to the charter as a non-binding guideline is an excuse to latch onto the lowest common denominator insofar as the achievement of the objects of the MPRDA is concerned. The chamber's actual challenge to the 2010 charter is to a limited aspect of that charter.

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142. Fourth, although not required for purposes of enforcement, it appears from a reference in the 2004 charter that the relevant stakeholders signed the 2004 charter as a mark of their acquiesence therein. Furthermore, in relation to the 2010 charter the chamber signed the 2010 stakeholder's declaration that preceded, informed and gave effect to it. The chamber's express conduct belies its relatively recent submission that the charter is a non-binding guideline. As set out above, in its 2009/2010 annual report the chamber expressly acknowledged that the 2010 charter was a binding document to be implemented by its members and that it was the result of a full and proper consultative process.

143. Fifth, It is self-evident that the framework, targets and timetable in the respective charters are a baseline set for the transformation of the mining industry at a particular point in time and for a particular period of time, until such time that the Minister deems it prudent to revisit them given, for example, changed circumstances or the non-effectiveness of any measures. In short, the charter was intended by the legislature:

143.1. to constitute a flexible measure implemented by the Minister in 2004 that was to be incrementally built as and when the occasion arose;

143.2. in order to effectively ensure the entry of HDSA into the mining industry and, more importantly, to ensure that such HDSA benefit from the

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exploitation of mining and mineral resources in a meaningful and substantive manner over the long term.

144. Accepting as the chamber does that it embraces the transformation objectives of the MPRDA which in substance are particularised in the charters, and then to argue that those targets are merely aspirational or guidelines, is plainly wrong.

145. Parliament's objective, as set out in section 2(d) and (f) of the MPRDA, of redressing historical inequalities through the charter, would not be realised if the charter had no legal force but was a mere "*aspirational*" document or were its provisions considered to be mere non-binding "*guidelines*".

EFFECT OF 2017 CHARTER ON NEW AND EXISTING RIGHTS

EFFECT ON EXISTING RIGHTS

146. For the Court to fully consider this aspect in its proper context, I will outline the position in terms of the three charters before elaborating and answering to the allegations in the founding affidavit in this specific regard.

147. In terms of the 2004 charter:

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147.1. Under the scorecard – enquired whether has the mining company achieved HDSA participation in terms of ownership for equity or attributable units of production of 15% in HDSA hand within five years and 26% on ten (10) years. This contained a five-year target at 15% and a ten (10) year target at 26%.

147.2. In the definitions ownership of a business entity entails to be achievable in a number of ways.

147.2.1. a majority shareholding position, i.e. 50% plus one share;

147.2.2. joint ventures of partnerships (25% equity plus one share);

147.2.3. broad-based ownership (such as HDSA dedicated mining unit trust, or employee share ownership schemes).

147.3. Ownership in joint ventures – government and industry recognise that one of the means of effecting the entry of HDSA's into the mining industry and of allowing HDSA's to benefit from the expectation of mining and mineral resources is by encouraging greater ownership of mining industry assets by HDSA's. Ownership and participation by HDSA's can be divided into active or passive involvement as follows.

147.4. Active involvement entails:

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147.4.1. HDSA controlled companies (50% plus one vote), which includes management control;

147.4.2. strategic joint ventures or partnerships (25% plus one vote). These would include a management agreement that provides the joint management and control which would also provide for dispute resolution.; and

147.4.3. collective investment, through ESOPS and mining dedicated unit trust. The majority ownership of these would need to be HDSA-based. Such empowerment vehicles would allow the HDSA participants to vote collectively;

147.5. Passive involvement entailed:

147.6. greater than 0% and up to 100% ownership with no involvement in management, particularly broad-based ownership like ESOPS. In order to measure progress on the broad transformation front the following indicators are important:

147.7. the currency of measure of transformation and ownership could, *inter alia*, be market share as measured by attributable units of South African production controlled by HDSA's;

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147.8. that there would be capacity for offsets which would entail credits that offsets would allow for flexibility;

147.9. the continuing consequences of all previous deals will be included in calculating such credit/offsets in terms of market share as measured by attributable units of production;

147.10. Government will consider special incentives to encourage HDSA companies to hold on to newly acquired equity for a reasonable period. In order to increase participation in ownership by HDSA's in the mining industry, mining companies agree:

147.11. to achieve 26% HDSA ownership of the mining industry assets in 10 years each mining company; and that where a company has achieved HDSA participation in excess of any set target in a particular operation then such access may be utilised to offset any shortfall in its other operations. All stakeholders except the transaction will take place in a transparent manner and for a fair market value. Stakeholders agreed to meet after five (5) years to review the progress and to determine what further steps, if any, need to be made to achieve the 26% target.

148. In terms of 2010 charter:

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148.1. Effective ownership is defined to mean the meaningful participation of HDSA's in the ownership, voting rights, economic interest and management control of mining entities;

148.2. Meaningful economic participation includes the following key attributes:

148.2.1. These transactions shall be concluded with clearly identifiable beneficiaries in the form the BE entrepreneurs, workers (including ESOP) and community;

148.2.2. barring any unfavourable market conditions, some of the cash flow should flow to the BE partner throughout the term of investment, and for this purpose, stakeholders will engage the financing entities in order to structure the BE financing in a manner where a percentage of the cash flow is used to service the funding of the structure, while the remaining amount is paid to the beneficiaries. Accordingly, BEE entities were enabled to leverage equity henceforth in proportion to vested interests over the life of the transaction in order to facilitate sustainable growth of BEE entities;

148.2.3. these rights such as being entitled to full participation at Annual General Meetings and exercising of voting rights, regardless of the legal form of the instruments used; and

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ownership shall vest within the timeframes agreed taking into account market conditions.

148.3. Effective ownership is a requisite instrument to effect meaningful integration of HDSA into the mainstream economy. In order to achieve a substantial change in racial and gender disparities prevalent in ownership of mining assets, and thus paved the way for meaningful participation of HDSA for attainment of stainable growth of the mining industry, stakeholders commit to:

148.3.1. achieve a minimum target of 26% ownership to enable meaningful economic participation of HDSA by 2014;

148.3.2. the only offsetting permissible under the ownership element is against the value of beneficiation, as provided for by section 26 of the MPRDA and elaborated in the mineral beneficiation framework.

148.4. The continuing consequence of all previous deals concluded prior to the Promulgation of the Mineral and Petroleum Resources Development Act 2008 at 2000 will be included in calculating such credit/offsets in terms of market share as measured by attributable units of production.

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149. The outlined provisions of the 2004 charter and 2010 charter should be taken into consideration when considering the Department's response into the specific challenge on the terms of the 2017 charter.

AD PARAGRAPH 41

150. I admit that the 2017 charter deals with ownership in paragraph 2.1, paragraph 2.1.1 and paragraph 2.2.1.2 deal with new prospecting and mining right holders and existing prospecting and mining right holders respectively.

AD PARAGRAPHS 42.1 & 42.2

151. In terms of the provisions of section 17 of the MPRDA the Minister may, having regard to the type of mineral concerned and the extent of a proposed prospecting project, request the chamber to give effect to the object referred to in section 2(d).

152. In terms of the provisions of section 19(d) the holder of a prospecting right has to comply with the terms and conditions of the prospecting right, relevant provisions of this Act and any other relevant law.

153. In terms of section 23(h), 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.

154. In terms of the provisions of section 25(1)(d) and (f) the holder of a mining right must comply with the relevant provisions of the MPRDA and any other relevant law and the terms and conditions of the mining right.

155. Further the holder of the mining right must comply with the requirements of the prescribed social and labour plan.

156. Section 25(1)(h) goes further to create an obligation on the holder of a mining right to submit a 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 labour plan.

157. Be it in-line with prospecting or mining, the Minister did not impose any new obligation other than an obligation which was originally enshrined and entrenched in the provisions pertaining to prospecting rights and mining rights.

158. I did not impose any additional obligations on holders of mining rights. The additional requirements prescribed by the charter are for purposes of giving effect to the objectives as contained in *inter alia* section 2(d). I refer this Court

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to **"DMR3"** and **"DMR4"**, which are copies of template prospecting rights and mining rights.

159. Evident *ex facie* the prospecting rights and the mining rights, are an integral requirement to give effect to the objectives as contained in section 2 of the MPRDA.

160. I submit that the notion of an additional obligation being imposed is misconstrued. The empowering provision in the portion of the charter being worded as it is, is to ensure effective integration and participation of black persons into the mainstream economy. The definition of black persons accords with the BBBEE Act as amended and the applicable codes.

AD PARAGRAPH 42.3 & 42.3.1

161. It is correct that in terms of section 22(1)(b) of the MPRDA, an application must be made in the prescribed manner. It is also correct that the application must be accompanied as provided for by the provisions of regulation 46 and the social and labour plan.

AD PARAGRAPH 42.3.2

162. The provisions of section 23(1)(h) of the MPRDA must be considered together with the provisions of sections 23(1)(a) to (g).

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AD PARAGRAPH 42.3.3

163. I admit the allegations herein contained.

AD PARAGRAPH 42.3.4

164. I admit the allegations herein contained. The mining rights specifically provide as follows:

> *"Provision relating to section 2(d) and (f) of the Act in the furthering of the object of this Act, the holder is bound by the provisions of an agreement entered into between the holder and empowering partner which agreement or arrangement was taken into consideration for purposes of compliance with the requirements of the Act and/or broad-based economic empowerment charter developed in terms of this Act and such agreement shall form part of this writing".*

AD PARAGRAPH 42.3.5

165. I admit the allegations herein contained and further submit that the terms and conditions of the rights have to be complied with together with the obligations of the holder of a mining right as contained in the provisions of section 25(1)(d), (f) and (h).

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AD PARAGRAPH 42.3.6

166. I admit the allegations herein. The Reporting on compliance is required annually.

AD PARAGRAPH 42.4

167. The Minister when granting the mining right must satisfy himself that, in line with the provisions of 23(h), the granting of such right will further the objects referred to in section 2(d), (f) and in accordance with the charter as contemplated in section 100. The requirements which prevailed from time to time were as follows:

167.1. Pre-2004 lacked any form of regulatory framework ("unchartered");

167.2. The period 2004 – 2009 period where the 2004 charter was applicable;

167.3. The period 2010 – 2017 where the 2010 charter was applicable; and

167.4. Presently, the 2017 charter onwards.

AD PARAGRAPH 42.5

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168. I admit that the decision of granting a mining right is administrative action.

169. The contention that a mining right cannot after its grant be amended is misplaced and incorrect.

AD PARAGRAPH 42.5.2

170. I deny that I am *functus officio* after the grant of a mineral right and in this regard, refer to my powers as contained in the provisions of section 47.

171. The notion that the decision-maker would in the circumstances be *functus officio* is misguided based on the express provisions of the Act.

AD PARAGRAPH 42.6

172. I deny that a mining right once granted cannot be revoked or cancelled. The transitional provisions as contained in the 2017 charter cater for the alleged concern contained herein.

173. The notion that the holder of a mining right will in order to retain such right have to meet the new and more burdensome requirements set out in the charter as revised from time to time is taken care of by the transitional provisions of the charter which apply to existing holders in the following respects:

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173.1. An existing mining right holder has a maximum of twelve (12) months to comply with the revised target of the 2017 charter from the date of publication of the 2017 charter;

173.2. The holder must align existing targets cumulatively from the targets in the 2010 charter within the transitional period referred to above to meet the revised mining target in line with the attached scorecard;

173.3. The holder's performance shall be reported and audited against each element in respect of the implementation for the applicable transitional period.

AD PARAGRAPH 42.7

174. I deny the allegations herein contained. The Minister's power stems from the provisions of section 100 read with the provisions of section 2(d). In this regard, the provisions of the 2004 charter (to which the chamber was a signatory) explicitly provided that *"all stakeholders accept that transactions will take place in a transparent manner and for fair market value. Stakeholders agreed to meet after five (5) years to review the progress and to determine what further steps, if any, need to be made to achieve a 26% target"*. The target referred to was that of the 2004 charter. It was reviewed in the 2010 charter and the 2017 charter. The empowering provision of the Minister herein is informed by the lack of adequate compliance, if any, to meet the targets and has to be redressed by

taking further steps to ensure the deracialisiation and active participation in the main stream mining industry.

175. The Ministers powers also are contained explicitly in the mining rights which makes specific reference to the objectives as contained in section 2(d). This aspect has to be taken into consideration and considered in light of the fact that mining or mineral resources are non-renewable resources. The effect thereof means that once depleted there will not be a mining industry to regulate and ensure entry by black persons and benefiting therefrom.

AD PARAGRAPH 42.8

176. The Department, its functionaries and I hold a contrary view to that of the chamber. The chamber presents itself as pro transformation. Its actions in relation to transformation imperatives don't bear out its pronouncement in this regard.

AD PARAGRAPH 42.9

177. I note that the chamber will seek a declaratory order. The chamber is not entitled to such an order.

AD PARAGRAPH 42.10

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178. I deny that the chamber has reasonable prospects of success in obtaining such an order. The chamber's argument in this regard is to advance the notion of "once empowered always empowered" which undermines the object of section 2(d) of the MPRDA. The 2004 charter made reference to the recognition of consequences of previous deals. That was informed by a compromise at the time in relation to transactions that were concluded prior to 2004.[1] The agreement as highlighted in the 2004 charter was that transactions concluded prior to the 2004 charter coming into effect, would be recognised. This, though, was specific to the context of the 2004 charter.

179. This should be considered against the background that the pre-2004 dispensation operated in a regulatory vacuum. Post 2004 the MPRDA created clearly stipulated requirements for transformation, *inter alia* through section 2(d) of the MPRDA. The rationale behind these transformation objectives is to implement diversification and de-racialisation of ownership of the mining industry. However, the 2004 charter did not specifically mention continuing consequences in the mining industry in relation to diversification and de-racialisation.

AD PARAGRAPHS 43.1, 43.2 AND 43.3

[1] Prior to the MPRDA – 1 May 2004

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180. The provisions in paragraph 2.1.2 are clear. The chamber's allegations to the contrary are denied.

181. It is a question of statutory interpretation that will be dealt with by way of argument at the hearing of this matter.

AD PARAGRAPHS 43.4 AND 43.5

182. The "top-up" provisions in paragraph 2.1.2 are clear.

183. The paragraph contemplates different factual situations which may exist (having regard to historical targets and levels of BEE shareholding actually achieved and retained) as at the date of publication of the 2017 charter.

184. The manner in which, and the transitional period permitted for the attainment of the required 30% shareholding is then set out.

185. Thereafter, reference is made to historical BEE transactions where the previous requirement of 26% was not met.

186. Finally, provision is made to dispense with recognition of historical transactions for future applications for mining and prospecting rights and the renewal of such rights.

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187. These provisions are directed towards ensuring that the targets for percentage black shareholdings are actually met.

AD PARAGRAPH 43.6

188. Historical transactions are recognised for the reporting period up to the date of publication of the 2017 charter. But after publication of the 2017 charter, the BEE shareholding of 30% must be met, and to facilitate this the 12 month transitional period is provided for.

AD PARAGRAPH 43.7

189. I repeat what I stated regarding the "once empowered always empowered" issue above. The chamber's approach to this issue frustrates the transformation imperatives of the MPRDA, and such is not consistent with the provisions of the MPRDA. The chamber's view on this issue has been fully considered. However, I came to the view that the suggestion of "once empowered always empowered" has led to abuses in regulatory attempts to transform the mining industry and has also undermined the objectives of the MPRDA.

AD PARAGRAPH 43.8

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190. The obligation to continually maintain the 26% HDSA ownership level was an obligation provided for in the 2004 charter and the 2010 charter. A failure to maintain the 26% HDSA ownership is a contravention of the targets contained in the 2004 charter as developed by the 2010 charter. The 2017 charter makes provision for a twelve (12) month transitional period within which the mining right holders can top-up to 30%.

191. The principled issue the chamber attacks is a requirement in the 2017 charter, as exisited in the 2010 charter, that true transformation of the industry can only occur if the required level of Black Shareholding is always maintained in the entity holding mining or prospecting rights. Transformation is not directed to a moment in time. It requires, to be effective, continuity.

AD PARAGRAPH 43.10

192. I deny that the chamber's interpretation of the MPRDA is in line with the language, spirit, purport and objectives of the MPRDA.

AD PARAGRAPH 43.10.1

193. I deny the notion of perpetual lock-ins and submit that the charter properly interpreted makes provision for a consistent and constant participation of HDSA shareholders. The contention that the lock-ins will reduce the value of their HDSA investment and materially impair investment opportunities available to

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HDSA and discourage investments in HDSA is misplaced. The 2004 charter describes as one of the goals, the intention to create an industry that would *"proudly reflect the promise of a non-racial South African"*.

194. A requirement limited to the notion of "once empowered always empowered" has the likelihood of perpetuating an ownership structure of mining and prospecting rights which will not give effect to the objects in the MPRDA. The chamber, in taking this approach, does not use the objects of the MPRDA as its point of departure.

AD PARAGRAPH 43.10.2, 43.10.3 AND 43.10.4

195. I deny that the consequence of cashing out will be that HDSA shareholding and the holder of the right diminishes. This is catered for by the fact that an exiting HDSA must be replaced by an entering HDSA participant at market related prices for fair value. The issue is policy driven in order to ensure that the objects of the MPRDA are not diluted. The consequence of the chamber's approach is that theoretically (and perhaps even practically) a time could come when the mining industry is devoid of any Black Shareholding even if it once did have Black Shareholding – this approach undermines the objects of the MPRDA and its legislative imperatives, as well as the Constitution.

AD PARAGRAPH 43.11.1

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196. I admit the provisions of paragraph 2.1.23, 2.1.24 and 2.1.26 insofar as they accord with the express provisions of the 2017 charter. A previously empowered mining right holder who's HDSA shareholder wishes to sell its shares will be able to do so and will be entitled to sell its shares to another HDSA. The right holder and the HDSA can commercially reach such a measure through disclosing agreements. There is no obligation for an HDSA to disinvest when market conditions are not conducive. If the HDSA equity is sold to another HDSA which is a transaction that is commercially permissible, then the transformation credentials of such right holder will not be open to any threat. If all HDSA participants who seek to disinvest are enjoined to sell their shares to other HDSAs then there is no risk of dilution by the mining company. There are many sound companies of varying economic standing which have lock-up clauses in their shareholder's agreements without diluting the value for the shareholders.

197. The MPRDA is designed in a way to retain sustainable participation of HDSA in the mining industry. There is yet a further issue to consider. The acquisition of equity in a mining company by HDSA is facilitated by the MPRDA and the charter. This arises from ownership by the State of South Africa's mineral resources on behalf of the people of South Africa. And the corollary of such a facilitation of ownerhsip is the requirement that the principle of Black Ownership in mining companies remain constant and not limited to a "moment in time".

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AD PARAGRAPH 43.11.2

198. The remaining shareholders refers to the shareholders who are not black persons.

AD PARAGRAPH 43.11.3

199. I deny that the provision mandates that the existing shoulders be deprived of shareholding which vested in them. The relevant paragraph clearly regulates that to the extent that the BEE partner or partners have exited the BEE historical transaction or the contract between the holder and the BEE partners have lapsed or the BEE partners have transferred the shares to a person other than a black person, then the top-up shall be to a BEE person entrepreneur.

AD PARAGRAPH 43.11.4

200. I deny the allegations herein contained. Not only are they inconsistent with the effect of the charter, but they also undermine the transformation objectives of the MPRDA.

AD PARAGRAPH 43.11.5, 43.11.6 AND 43.11.7

201. I deny that the charter is not a "law". The charter and its publication is enabled by the MPRDA.

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202. The charter is "of general application" to all rights granted and existing under the MPRDA.

203. The requirement of 30% Black Shareholding, far from being ambitious, is directed towards giving effect to the objects of the MPRDA. Significantly, the chamber is silent on how else this ought to be achieved.

204. The dilution principle is consistent with the principles of both the MPRDA and the Constitution. The reference to the Companies Act is a fallacy. That Act does not prohibit different classes of shareholders.

205. Save as aforesaid these allegations are denied.

AD PARAGRAPH 44

206. The twelve (12) month transitional period in terms of the 2017 charter cannot be considered in isolation.

207. In terms of the 2004 charter, the scorecard under the heading of ownership and joint ventures contained a five year target of 15% and a ten year target of 26%. The ownership aspect entailed an enquiry as to whether a holder of a mining right has achieved HDSA participation in terms of ownership for equity or attributable units of production in relation to the said five year and ten year targets.

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208. The 15% target would have had to have been obtained in 2009 and the 26% target in 2014.

209. In terms of the 2010 charter effective ownership is a requisite instrument to effect meaningful integration of HDSA into the mainstream economy. In order to achieve a substantial change in racial and gender disparities prevalent in ownership of mining assets, and thus pave the way for meaningful participation of HDSA for attainment of sustainable growth of the mining industry, Stakeholders committed to achieve a minimum target of 26% ownership participation by HDSA by 2014.

210. The 26% ownership as outlined in the 2004 charter and in the 2010 charter was a minimum target to be achieved by 2014. This in turn means that if holders of mining companies exceeded the 26% threshold by 2014 that additional percentage would be recognised as at the inception of the 2017 charter. The transitional period of twelve months is applicable to the following:

210.1. A holder who claims the recognition of historical transactions is required to top-up its black person shareholding from the existing level to a minimum of 30% black person shareholding;

210.2. An existing holder, who after the coming into operation of the 2017 charter, has maintained a minimum of 26% black person shareholding

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who will be required to top-up its black person shareholding to a minimum of 30%. An existing holder who has acquired and maintained more than 30% black person shareholding shall be allowed to maintain its existing structure until such time as the BEE partner/partners exit or upon renewal of such right.

211. In terms of paragraph 2.1.2.8 a holder referred to in paragraph 2.1.2.3 or to 2.1.2.5 must, within the transitional period of twelve months, ensure that the BEE partners directly and actively control their share of equity interest in the holder, including transportation as well as trading and marketing of the proportionate share of the production.

AD PARAGRAPH 44.1

212. These allegations are admitted.

AD PARAGRAPH 44.2

213. I reiterate the provisions of subsection 2(d) of the MPRDA, namely that it is an object of the MPRDA to 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 exportation of the nation's mineral and petroleum resources.

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214. The emphasis is on historically disadvantaged persons including women and communities to enter into and activitely participate and benefit from the exploitation of the nation's mineral resources.

215. Minerals are non-renewable resources and as such the transformation of the mining industry cannot be prolonged any further. The longer transformation is prolonged, the less historically disadvantaged persons enter into and actively participate in mineral and petroleum resources and benefit therefrom. Non-renewable mineral resources will be exploited without the benefit of the HDSA. The alleged complaints by the chamber of an *"unreasonably short"* period indicates the lack of compliance with the 2014 target. The targets as contained in the 2004 charter and re-affirmed in the 2010 charter indicate that as at 2009, 15% effective HDSA ownership had to have been achieved, and full minimum 26% HDSA ownership in a ten year period (by 2014). Once the 30% target is considered in this context, then the chamber's contention reveals itself as without merit.

216. The transitional aspects, and recognition of the consequence of previous deals are contained in the charter to cater for such situations wherein a holder of a right was compliant prior to the effective date of the 2017 charter. The 2004 charter to which the chamber is a signatory, reaffirmed by the stakeholder declaration, was a commitment to achieve the target as contained in the 2004 charter. The chamber cannot at this stage, after three years from which the

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26% minimum HDSA ownership target had to be obtained, complain of a top-up of 4% being unreasonable within a twelve month period.

AD PARAGRAPH 44.3

217. I admit the express provisions of paragraph 2.1.2.8 of the 2017 charter. The provisions of the 2017 charter are in line with the objects as contained in section 2(d) which is a recurring theme in the MPRDA, and stems from an empowering provision.

218. The chamber's reference to "*basic principles of company law*", "*the law of contract*" and changes to existing arrangements/shareholders' agreements is not only misplaced in law but is quite simply a veiled attempt to persist with a failure to give real effect to the objects of the MPRDA. Indeed, the constant and continued failure in the mining industry to give effect in real terms to the objects of the MPRDA has been a major factor motivating the 2017 charter. The chamber, rather than constructively engage on how the MPRDA objects can be met has sought to put up one technical objection after another, it would now seem, to undermine those objects.

AD PARAGRAPH 44.4

219. The 2017 charter contains a scorecard with no real scope for the chamber's contention of "once empowered forever empowered" in the mining industry. The contention of the pending rights being treated as new rights and not as

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existing rights and shareholding having to be immediately restructured is not contrary to the object as contained in section 2(g) of the MPRDA.

AD PARAGRAPH 44.5

220. The twelve month period expires on 15 June 2018. The notion of a grace period infers a further hindrance and unnecessarily prolongs transformation. Should the holder of a right show cause to the Department on transformational orientated grounds why it requires more time to implement, this would be considered by the Department. I reiterate that the longer it takes for transformation to be implemented, the more minerals are exploited from the Republic of South Africa without having fully benefited HDSA. The charter envisages the continued involvement of the HDSA.

AD PARAGRAPH 44.6

221. I deny that the provisions are so unreasonable that no reasonable person could have so exercised the power conferred by section 102(a) of the MPRDA. I deny that publiction of the 2017 charter stands to be set aside in terms of PAJA. I deny that I failed to have regard to relevant considerations and information put forward by the chamber. I further deny that this charter stands to be set aside on the basis that irrelevant considerations were taken into account or relevant considerations were not considered. The extensive consultations with members of the chamber indicate a vigorous consultation process which then led to the 2017 charter. I took into consideration all the relevant considerations put

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forward by the chamber and refer this Court to all the minutes of the extensive consultation with the chamber.

AD PARAGRAPH 44.7

222. I deny that the non-recognition of renewals is contrary to the object of security of tenure and contradicts the provisions of section 18(3) and 24(3).

223. The provisions of section 18(3) provides as follows:

"The Minister must grant the renewal of a prospecting right if application complies with subsections (1) and (2) and the holder of a prospecting right has complied with the:

(a) terms and conditions of a prospecting right and is not in contravention of any relevant provision of this Act;

(b) prospecting work programme; and

(c) compliance with the conditions of the environmental authorisation."

224. Section 24(3) provides as follows:

"The Minister must grant the renewal of a mining right if the application complies with subsections (1) and (2) and the holder of a mining right has complied with:

(a) terms and conditions of the mining right and is not contravention of any relevant provision of this Act or any other laws.

(b) the mining works programme;

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(c) provisions of the environmental authorisation; and

(d) requirements of the approved environmental management program."

225. In terms of both the above quoted provisions compliance is required with either the terms and conditions of the prospecting rights or the mining right and no contravention of any relevant provision of the MPRDA or any other law is permitted.

226. As highlighted above both the prospecting rights and mining rights make express provision for the objects of section 2(d) to be achieved.

AD PARAGRAPH 45.1

227. As highlighted above I deny that the paragraph 2.1.2 of the charter lacks clarity or that it is a breach of the rule of law. I deny that there is any basis for the charter to be reviewed and set aside on the basis of it being unconstitutional or unlawful.

AD PARAGRAPH 45.2

228. I deny that the charter lacks clarity. The charter's aim is to give effect to the relevant provisions of section 2 of the MPRDA. The MPRDA expressly provides for this. The real issue in this case is not about a lack of clarity. It is about the general failure of the mining industry to facilitate the objects of the MPRDA. The 2017 charter seeks to redress that very problem..

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AD PARAGRAPH 45.3

229. These allegations are denied.

AD PARAGRAPH 45.4

230. These allegations are denied.

EFFECTS ON NEW RIGHTS

AD PARAGRAPH 46

231. I deny that the new charter introduces a new minimum level of black ownership shareholding which is *ultra vires* the MPRDA. I submit that this contention is without merit. The 2017 charter seeks to give effect to the objects set out in section 2 of the MPRDA, insofar as permitted by the MPRDA.

232. The interpretation of section 17(1)(f) which is in line with the objects of the Act, would entail that in the absence of prescribed minerals, it is applicable to all minerals. Any chamber would have to give effect to the objects referred to in section 2(d). The notion that the section does not allow the imposition of a 51% black shareholding in respect of minerals is in the circumstances and in light of the three charters unfounded and misplaced.

233. Save as aforesaid, these allegations are denied.

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AD PARAGRAPH 47

234. The 2017 charter makes provision for:

234.1. New prospecting rights require a minimum of 50% plus one black shareholding which shall include voting rights, prospecting rights or in the company which holds the right:

234.2. New mining rights must have a minimum of 30% black shareholding which shall include economic interest plus a corresponding percentage of voting rights, per mining right or in the mining company which holds the right.

235. The rationale behind this threshold in relation to prospecting rights is to ensure and facilitate the entry of HDSA or black persons as referred to in the 2017 charter and the BBBEE Act of 2003 as amended together with the BBBEE.

236. The prospecting of any given area for any mineral is for purposes of assessing the area and conducting geological surveys which will confirm the size, extent and life of the asset. The cost of entry for black persons into mining is as such lower in the case of prospecting when compared to the cost of entry after the confirmation of the mineral resource.

237. I deny that the difference in threshold will complicate the transition from prospecting to mining by such a holder. In this regard I refer this Court to the

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provisions of 2.1.1.6 which regulates the vesting of the black person equity shareholding, namely that it shall vest in no more than ten years and by no less than 3% annually of the total issued capital of the holder. This will be proportionate to the respective non-vested shareholding of employees, mine communities and BEE entrepreneurs. The recurring tone of the charter is implementation of the transformation imperatives.

AD PARAGRAPH 48

238. I deny the allegations herein contained. The objectives of the MPRDA for purposes of redressing historical, social and economic inequalities, empower me as the Minister to develop a broad-based socio-economic empowerment charter that will set the timeframe for targets and timetable for the effecting of the entry into an active participation of historically disadvantaged South Africans alternative black persons into the mining industry. This is in order to allow South Africans to benefit from the exploitation of the mineral resources.

239. The charter is not solely intended to guide the Minister's discretion. Instead the charter is intended to create a framework and set timeframes to allow for greater participation of black business defined in the charter.

AD PARAGRAPH 49

240. I deny the allegations herein contained. Paragraph 2.1.1.5 pertains to any reduction of shareholding of existing shareholders through the issue of new shares. The effect thereof is that it shall not reduce percentage black

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shareholdings. The provision is directed towards ensuring that the threshold levels of black ownership is not progressively diluted.

241. The contention that the black persons do not contribute towards receiving funding is baseless and unsubstantiated. The reciprocal benefits received by the holder of the mining right or prospecting right is compliance with the charter and MPRDA, on empowerment credentials.

AD PARAGRAPH 50

242. The 2014 assessment found that there was substantial non-compliance with transformation targets. This led to a policy reconsideration which required the Department to ensure greater compliance with the implementation of the targets. The 2017 charter evidences a value unlocking document to facilitate entry to and benefit from exploitation of minerals by black persons.

243. The effect of paragraph 2.1.1.6 is that the 50% black shareholding has to be concluded within twelve (12) months notwithstanding that distrubution has to vest within ten (10) years. The Department's intention is to ensure that this black shareholding is unencumbered. The effect of the 50% plus one for prospecting and 30% for mining in effect means that with the transition from prospecting to mining the black shareholding can be diluted to 30% from the 50% plus 1%. The dilution from 50% plus 1% from the prospecting right stage to 30% at the mining right stage then negates the effect of any amount which will have to be written off. The emphasis and intention of the Department is to

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ensure an unencumbered black shareholding. There are various examples of BEE transactions which evidence the perpetual encumbrance of the black shareholder. The 2017 charter seeks to correct and redress this problem.

AD PARAGRAPH 51

244. I deny that there is any form of expropriation and deprivation of property. The transition from prospecting to mining right permits a dilution to the maximum of 30% of the black shareholding. I submit that the transition caters for and considers the rights of the holder.

AD PARAGRAPH 52

245. I deny the alleged intended effective meaning attributed to black shareholders. Paragraph 2.1.1.7 clearly provides that subject only to the solvency and liquidity requirements as set out in the Companies Act, a holder of a new mining right must pay a minimum of 1% of its annual turnover in any given financial year to black person shareholders, prior to and over and above any distributions to the shareholders of the holder.

246. The 1% payment of the annual turnover is subject to the solvency and liquidity requirements as set out in the Companies Act. In turn this means that should the solvency and liquidity requirements not be satisfactory, then the payments of the minimum 1% annual turnover will in any given financial year not ensue to the black person shareholders.

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AD PARAGRAPH 53

247. I deny that paragraph 2.1.1.12 is *ultra vires* or that the interpretation is contrary to the objectives as contained in section 2(d). Paragraph 2.1.11.12 gives effect to active participation of Black Shareholders and ensures that they benefit from the exploitation of mineral resources. The contention contained herein by the chamber is contrary to its self-proclamation as being in favour of transformation.

248. This contention should also be considered against the backdrop of the chamber contending that the mining industry has achieved 38% of black ownership and shareholding. The intention behind the provisions of paragraph 2.1.1.12 is to ensure that black persons are not deprived of ownership in the true sense and their share of equity. The intention is to ensure that black persons are active participants and are involved in the running of operations as to ensure a skills transfer at operational management and board level and to ensure that value is created throughout the entire value chain. This policy position will begin to truly unlock the value of the black equity part of the shareholding which will give effect to the object as contained in section 2(d) and the objectives of the 2017 charter.

AD PARAGRAPHS 53, 54 & 55

249. The MPRDA's objects facilitate Black Shareholders' participation in the mining industry, and this is echoed in practical terms by the 2017 charter. The charter creates a reciprocal duty and obligation on the black shareholder to direct and

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actively control the issue of shareholding and equity in order to give effect to the MPRDA. I submit that the idea of a shareholder being entitled to actively pursue a proportionate share of the business of the company merely by virtue of being a shareholder is entirely inconsistent with the Companies Act of 2008 as being inconsistent with the objectives of the Act and intentions of the 2017 charter. Paragraph 2.1.12 creates a clear obligation on black persons to participate.

OFF-SETS

AD PARAGRAPHS 56 TO 64

250. The question of off-sets relates to a recurring theme in the founding papers, namely the assertion of continuing consequences of empowerment deals. The debate must therefore be construed in light of the above paragraphs.

251. Off-setting in the 2004 charter entailed the recognition of activity outside the scope of ownership. Based on the results of the 2009 assessment pointing to minimal meaningful black ownership, a policy consideration arose requiring an incremental curtailment of off-sets.

252. Accordingly, in the 2017 charter, the off-set is designed for an inclusion of an activity other than ownership.

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253. The chamber's complaint that the Minister does not have the power to revisit any element of the 2004 charter has been dealt with above. It also applies in relation to off sets. Allegations of retrospective application of the 2017 charter are ill-conceived.

254. The provisions of the 2004 charter, the 2010 charter and the 2017 charter are admitted to the extent that they accord with those charters.

255. Save as aforesaid these allegations are denied.

BENEFICIATION

AD PARAGRAPH 65

256. The chamber's complaint that the Minister does not have the power to revisit any element of the 2004 charter has been dealt with above. It also applies in relation to beneficiation. I submit further that allegations of retrospective application of the 2017 charter are ill-conceived.

257. The provisions of the 2004 charter and the 2017 charter are admitted to the extent that they accord with those charters.

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258. The 2017 charter deals with beneficiation in a manner that aims to develop industrialisation, facilitate de-racialisation and encourage the entry of black persons into the mining industry. The chamber's three complaints regarding the beneficiation element in the 2017 charter are without merit.

259. There is no discrimination against mining right holders who have already met the 30% ownership target (at paragraph 65.3.1 of the founding affidavit). The chamber's contentions in this regard are ill-conceived.

260. The chamber's second complaint, once again, reveals its true views. The chamber is clamouring to avoid black ownership in the mining industry, so much so that it advocates that a rights holder should be able to off-set the entire 30% HDSA ownership target (at paragraph 65.3.2 of the founding affidavit). This is contrary to the intention of the charter and the objects of the MPRDA.

261. The chamber's third complaint is that the 2017 charter does not give any indication of how the 11% off set is to be calculated (paragraph 65.3.2 of the founding affidavit). This is incorrect. The post-amble to paragraph 2.1.4 of the 2017 charter states that –

> "*The processes and mechanisms that shall determine the offset of each mineral value chain, shall be provided for by the Minister, by way of Government Gazette, as envisioned in section 26 (2) of the MPRDA*".

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262. I refer this court to the undertaking given by myself not to implement the provisions of the 2017 charter either directly or indirectly. I submit that this prevents me from publishing in the Government Gazette the processes and mechanisms that shall determine the off-set of each mineral value chain.

263. Save as aforesaid these allegations are denied.

SALE OF MINING ASSETS

AD PARAGRAPHS 66 TO 68

264. The 2017 charter provides, in essence, that in order to ensure effective and meaningful participation of black persons in mining and mineral industry, a holder who sells its mining **assets** must give black owned companies a preferential option to purchase. This is a laudatory objective that accords with the objects of the 2017 charter, the MPRDA and the Constitution.

265. The chamber complains about this. First, it contends that the meaning of "mining assets" is not defined, vague and possibly *ultra vires* section 11 of the MPRDA (at paragraph 66 of the founding affidavit). I deny this. I submit that the interpretation that best fits with the spirit, purport and object of the charter, section 100(2) of the MPRDA and the Constitution is the appropriate

interpretation to adopt. The chamber resorts to the most strained interpretations of every provision of the 2017 charter in a bid to subvert the charter by contending that it is potentially problematic.

266. Secondly, the chamber complains that paragraph 2.1.3 "*confers a right of first refusal but contains no mechanism and hence contravenes the rule of law requirements*" (at paragraph 67 of the founding affidavit). But this is incorrect. Such rights of first refusal are uncontroversially incorporated into agreements and observed and enforced on an everyday basis.

267. Thirdly, the chamber attempts to equate this requirement in the 2017 charter as akin to a species of property deprivation. This is incorrect and denied. There is nothing arbitrary about the right of first refusal. It does not amount to a deprivation of property. And, in any event, there is no lack of compensation. I do not understand why the chamber assumes that the right of first refusal would be at anything less than market related prices.

268. Save as aforesaid these allegations are denied.

NON-COMPLIANCE WITH THE 2017 CHARTER

AD PARAGRAPHS 69 TO 74

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269. The chamber complains, in essence, that the charter is not law and therefore that non-compliance therewith cannot be visited with the consequences set out the relevant provisions of the MPRDA.

270. This complaint has been dealt with above in relation to the nature, purpose and effect of the 2017 charter. In short, it is binding law. The chamber's attempts to subvert the charter by arguing that it is a non-binding guideline are regrettable and rejected.

APPLICATION OF CHARTER UNDER DIAMONDS ACT

AD PARAGRAPHS 75 TO 77

271. The chamber's vague complaint appears to be that the 2017 charter is somehow *ultra vires* the provisions of the Diamonds Act 56 of 1986 ("the Diamonds Act").

272. These allegations are denied. This is a question of statutory interpretation that will be addressed at the hearing of the matter.

273. Save as aforesaid these allegations are denied.

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THE NON-OWNERSHIP ELEMENT OF THE 2017 CHARTER

PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT

274. It is trite that mining development presents a catalyst for other economic development. From a policy perspective, the Department adopted an integrated value-addition approach. According to this policy approach, the mining activity must extend to and be associated with economic activity that occurs beyond just mining and deals with, for example, suppliers of goods and services in the mining industry.

275. This is a relatively uncontroversial approach. The Department considered various regulatory frameworks in multiple jurisdictions, including Canada, Australia and several Latin American countries and found that this approach is prevalent and accepted. It is sometimes referred to as "value addition" which is a broad concept that, depending on the context and jurisdiction, includes *inter alia* beneficiation of minerals, skills development, and other elements of the 2017 charter.

276. The Department conservatively estimated, based on an average calculated over several 'good' and 'bad' years, that the procurement budget for the mining industry is approximately R250 billion annually. The purchasing power inherent in that, if carefully and appropriately harnessed, is sufficient to assist in

influencing economic policy and conduct in the mining industry in particular, and in the adjoining related economic areas.

277. In short, government sought to use the mining industry's purchasing power and concomitant influence to encourage the consumption (and production) of goods and services of South African origin. On the face of it, there is no dispute that this policy imperative is to be accepted and applied in the present instance. (However, as demonstrated below, the chamber's submissions reveal its constant refrain to be one of pro-transformation in favour of the objectives underpinning the MPRDA, yet in the same breath its conduct seeks to subvert those very objectives).

278. In short, government sought to use the mining industry's purchasing power and concomitant influence to encourage the consumption (and production) of goods and services of South African origin.

279. The procurement element of the charter is a deliberate intervention by stakeholders to create new avenues for HDSA supplier participation in the mainstream economy, to bridge the divide between the two economies, as espoused in the Broad Based Black Economic Empowerment Act No. 53 of 2003. It is precisely for this reason that this policy imperative first featured in the 2004 charter.

279.1. Note 8 to the 2004 charter provided that *"[i]n terms of procurement the mining company should commit to an increase of procurement from HDSA companies over the 3-5 year time frame and agree to a monitoring system"*.

279.2. As set out in the 2004 charter, the scorecard represented 5 year targets. Under the header of "Procurement" in the scorecard, holders of rights were required to answer "Yes" or "No" to the following three questions:

- *"Has mining company given HDSA's preferred supplier status?*
- *Has the mining company identified current level of procurement from HDSA companies in terms of capital goods, consumables and services?*
- *Has the mining company indicated a commitment to a progression of procurement from HDSA companies over a 3 - 5 year time frame in terms of capital goods, consumables and services and to what extent has the commitment been implemented?"*

279.3. The definition of Broad Based Socio-Economic Empowerment (BBSEE) under the 2004 charter is also relevant. It refers in relevant part to "*a social or economic □strategy, plan, principle, approach or act, which is aimed at … Transforming such industries so as to assist in, provide for,*

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initiate, facilitate or benefit from the ... Involvement of or participation in the procurement chains of operations."

279.4. Paragraph 4.6 of the 2004 charter deals with the heading of "Procurement" and provides as follows:

> *"Procurement can be broken down into three levels, namely: capital goods; services; and consumables.*
>
> *Stakeholders undertake to give HDSAs a preferred supplier status, where possible, in all three levels of procurement. To this end stakeholders undertake to:*
>
> - *Identify current levels of procurement from HDSA companies;*
> - *Commit to a progression of procurement from HDSA companies over a 3 to 5-year time frame reflecting the genuine value added by the HDSA provider;*
> - *Encourage existing suppliers to form partnerships with HDSA companies, where no HDSA Company tenders to supply goods or services; and*
> - *Stakeholders commit to help develop HDSA procurement capacity and access Department of Trade and Industry (DTI) assistance programmes to achieve this.*
>
> *List of suppliers: It is envisaged that information on all HDSA companies wishing to participate in the industry will be collected and published. All participants in the industry will assist the DTI*

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in compiling such a list that will inter alia be published by government on the Internet and updated regularly."

280. The above is apparently not disputed by the chamber. On the contrary, on its own version, it is accepted.

281. The 2009 assessment by the Department made the following findings regarding procurement:

"*The assessment illustrates that 89 percent of companies have not given HDSA companies preferred supplier status, while 80 percent have not indicated commitment to the progression of procurement from HDSA companies over a 3-5 year time-frame. The current reported level of procurement from HDSA companies averages a mere 37 percent of companies, although companies could not always ascertain the ownership and management control status of their HDSA suppliers.*

Procurement of capital goods, consumables and services managed and dispensed by the mining companies continues to be skewed in favour of their preferred untransformed suppliers to the detriment of HDSA companies.

HDSA companies largely benefit from procurement contracts for the provision of consumables and non-core services such as providing cleaning facilities, toilet paper and other trivial activities.

The value of HDSA procurement expenditure as a percentage of total procurement remains below 3 percent, consistent with the insignificant provisions of preferred supplier status to HDSA companies. There is no evidence that stakeholders have identified levels of procurement from the HDSA companies and developing HDSA procurement capacity as per their undertaking at the time of adopting the Charter. This demonstrates lack of commitment by mining companies to advance the procurement element of the Mining Charter. The pervasive resistance by the industry to meaningfully engage the services of HDSA companies continues to delay the achievement of broader economic freedom" (emphasis added).

282. For the above reasons, the 2010 charter incrementally built on and amended the procurement requirements.

282.1. The 2010 stakeholder's declaration which preceded the charter recorded the following commitment *inter alia* by the chamber in relation to procurement:

> "*Realising that procurement provides an important market opportunity for goods and services and that lack of access to market is a major impediment to growth and expansion of enterprises, parties commit to:*

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- *Adhere to fundamental principles of enterprise development, irrespective of the mining company's turnover;*
- *Develop mechanisms for multinational suppliers of capital goods to the mining industry, which are operating in South Africa to contribute towards social development.*"

282.2. This commitment, building on the 2004 charter, was then given effect to in the provisions of the 2010 charter. Clause 2.2, under the heading "*Procurement and Enterprise Development*", provided as follows:

> "*Local procurement is attributable to competitiveness and transformation, captures economic value, presents opportunities to expand economic growth that allows for creation of decent jobs and widens scope for market access of South African capital goods and services. In order to achieve this, the mining industry must procure from BEE entities in accordance with the following criteria, subject to the provisions of clause 2.9-*
>
> - *Procure a minimum of 40% of capital goods from BEE entities by 2014;*
> - *Ensure that multinational suppliers of capital goods annually contribute a minimum of 0.5% of annual income generated from local mining companies towards socio-economic development of local communities into a social development fund from 2010;*

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- *Procure 70% of services and 50% of consumer goods from BEE entities by 2014. The targets above are exclusive of non-discretionary procurement expenditure*".

282.3. "*Non-discretionary procurement expenditure*" was defined in the 2010 charter to mean "*expenditure that cannot be influenced by a mining company, such as procurement from the public sector and public enterprises*".

282.4. The accompanying scorecard to the 2010 charter required set targets for procurement compliance, which had to be met by 2014 (ten years from the 2004 charter). These targets were: 40% of procurement spend on HDSA in relation to capital goods, 70% of procurement spend on HDSA in relation to services, and 50% of procurement spend on HDSA in relation to consumable goods. These categories of capital goods, consumables and services, echoed the terminology employed in the scorecard to the 2004 charter.

282.5. Apart from strengthening the scorecard (by moving away from a simple yes/no binary response to quantifiable targets), the 2010 charter also introduced an effective monitoring and compliance system. This included annual audited reports that would have to be provided by mining companies, as well as consequences for companies who failed to comply with the 2010 charter.

283. As demonstrated above, in relation to the chamber's 2010 annual report, the chamber unequivocally and expressly accepted, adopted and encouraged the implementation of the 2010 charter.

284. Moreover, the chamber is of the view that it not only complied with the targets set out in the 2010 charter in relation to procurement, but that it exceeded them. In this regard, I attach as "**AA50**" a schedule headed "*Chamber of Mines of South Africa Assessment of Mining Charter 2014 targets*":. It shows *inter alia* that on the chamber's own version:

284.1. Its assessment of whether its members met the targets for HDSA procurement of capital goods and consumable goods was "*achieved well*";

284.2. Its assessment of whether its members met the targets for HDSA procurement of services was "*good progress made*"; and

284.3. It contended that the 2014 targets were broadly aligned with the 2010 charter requirements, based on a weighted average.

285. The 2015 assessment described above, however, revealed *inter alia* that there was material non-compliance if the relevant data was properly and more accurately assessed on a non-weighted basis:

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285.1. In relation to capital goods, the percentage of right holders meeting the 40% target is 39.1% when the data is not weighted. (But 81.6% of mining right holders (weighted) met the 2014 target of spending 40% of their total expenditure on capital goods sourced from BEE entities).

285.2. With respect to procurement of services from BEE entities, 32% of the rights in the not-weighted dataset met the target of 70%. (It is noteworthy that 64.8% of mining right holders met the 2014 target when data is weighted by employment).

285.3. On procuring consumables from BEE entities, the not-weighted data shows that 57.8% of rights met the 2014 target of 50%. (There is, however, a marked increase when weighing the data with employment, with mining right holders meeting the target increasing to 82.7%).

286. The 2017 charter imposes a minimum 70% target for the domestic procurement of mining goods, a minimum 80% target for the domestic procurement of general services, a 100% target for the domestic procurement of mineral sample analysis services, and a 1% contribution of annual turnover from foreign suppliers generated from its local mining and to be paid to a special fund, the Mining Transformation and Development Agency ("the MTDA").

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287. What is apparent from the above description of the indisputable facts are the following three points:

287.1. First, the policy imperative underpinning domestic procurement is not sudden or in least surprising. It has not been launched by stealth on the chamber for the first time in the 2017 charter. Nor is it exceptional. It applies in many other jurisdictions the world over.

287.2. Secondly, and relatedly, as demonstrated above and elsewhere in this affidavit, the chamber has constantly been engaged on this issue and has been consulted on procurement issues at a detailed level throughout the process of drawing the 2004 charter, and its successive changes in the 2010 charter and the 2017 charter.

287.3. Thirdly, the chamber fully supported and was in agreement with the 2004 charter, and the 2010 charter (despite their more recent claim to the contrary).

288. It is against this factual and legal context that the chamber's complaints about certain procurement aspects of the 2017 charter must be assessed.

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Mining goods

289. The chamber makes several complaints about the 2017 charter in relation to the procurement target for mining goods. As demonstrated below none of these complaints has any merit.

Alleged impossibilty to determine what are South African Manufactured Goods

290. The chamber's first complaint essentially is that it impossible to determine what constitutes "*South African Manufactured Goods*" (at para 80 of the founding affidavit). That expression is defined in the 2017 charter as meaning "*goods where at least 60% of the value added during the assembly and/or manufacturing of the product is realised within the borders of the Republic. The calculation of value added for the purposes of this definition excludes profit mark-up, intangible value (such as brand value) and overheads*".

291. The chamber argues that the holder of the right under the MPRDA cannot determine the 60% value-add without insight into profit mark-up, intangible value (such as brand value) and overheads.

292. But this is an ill-conceived objection. This is because the 2017 charter under the heading "Verification of local content" para (a) states that –

"A Holder shall, when submitting the annual Mining Charter report contemplated in paragraph 2.9 to the Department of Mineral Resources, provide proof of local content for goods and services in the form of certification from the South African Bureau of Standards (SABS)".

293. In other words, the 2017 charter resolves this dilemma for the holder and places it in the hands of the SABS. SABS is a statutory body that was established in terms of the Standards Act, 24 of 1945) and continues to operate in terms of the latest edition of the Standards Act, 8 of 2008) as the national standardisation institution in South Africa, mandated *inter alia* to:

293.1. develop, promote and maintain South African National Standards (SANS);

293.2. promote quality in connection with commodities, products and services; and

293.3. render conformity assessment services and assist in matters connected therewith.

294. In short, the holder of a right is not required to 'see through' to a supplier's financial position in order to determine whether that holder has met the definition of South African Manufactured Goods. The SABS, with its array of statutory tools, is tasked with doing that and certifying qualifying suppliers of

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South African Manufactured Goods. The chamber's reading of the 2017 charter seeks to suggest otherwise. But it is not a reasonable or an appropriate reading. Nor does it best accord with the objects underpinning the 2017 charter and section 100(2) of the MPRDA.

Alleged ambiguity in "Must be set aside"

295. The chamber's second complaint is that the phrase "*must be set aside*" is unclear (at para 81 of the founding affidavit). The relevant provision of the 2017 charter in which the phrase "*must be set aside*" arises, is as follows:

> "*A Holder must spend a minimum of 70% of total mining goods procurement spend on South African Manufactured Goods. The abovementioned 70% of the total goods procurement spend shall be apportioned in the following manner:*
>
> *(a) A minimum of 21% of total mining goods procurement spend must be set aside for sourcing South African Manufactured Goods from Black Owned Companies;*
>
> *(b) A minimum of 5% of total mining goods procurement spend must be set aside for sourcing South African Manufactured Goods from Black Owned Companies with a minimum of 50%+1 vote female*

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Black Person owned and controlled and/or 50% +1 vote Youth owned and controlled; and

(c) *A minimum of 44% of total mining goods procurement spend must be set aside for sourcing South African Manufactured Goods from BEE Compliant Manufacturing Companies*" (emphasis added).

296. The chamber contends that the phrase "*must be set aside*" suggests that money need not actually be spent on mining goods, but instead provision can be made for possible future spend. To put it in its proper perspective, the chamber's argument boils down to the following: There is a possibility of another interpretation. Such possibility gives rise to vagueness. Therefore, because of this vagueness, the 2017 charter in violation of the rule of law.

297. But the chamber's argument is incorrect. If there is more than one reasonable interpretation to be accorded to this phrase "*must be set aside*" in the relevant context, the interpretation that best fits with the spirit, purport and object of the charter, section 100(2) of the MPRDA and the Constitution is the appropriate interpretation to adopt. That is a matter of common sense and trite law.

Alleged unfair and harsh application of 2017 charter

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298. The chamber's third related complaint is that if a rights holder is actually required to spend HDSA procurement in relation to mining goods, but there is no relevant HDSA supplier with the capacity to provide the mining goods, "*this would operate harshly against a Holder*" (at para 82 of the founding affidavit). The chamber's argument is, in essence, as follows: Assume that there are no HDSA suppliers to meet the targeted 70% spend. In such an instance, a rights holder would necessarily be penalized by the application of the 2017 charter. That would be unfair.

299. However, the chamber's argument is incorrect. The Department has always, since 2004 to date, always applied the provisions of the charter with a measure of common sense and flexibility and an appreciation of practical reality. That spirit of fairness and flexible approach is captured and built into the 2017 charter. Paragraph 2.9 of the 2017 charter provides that "[*t*]*he Department shall monitor and evaluate the Holder's implementation of this Mining Charter of 2017, taking into account the impact of material constraints which may result in not achieving the set target*" (emphasis added). Therefore, assuming that there genuinely was no capacity of HDSA suppliers of mining goods in a particular instance, this is definitely a factor that the Department would weigh in consideration in applying and enforcing the 2017 charter.

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Alleged lack of clarity regarding majority black owned company

300. The chamber's fourth complaint is that it does not understand what is mean by the phrase "*Black Owned Companies with a minimum of 50%+1 vote female Black Person owned and controlled and/or 50% +1 vote Youth owned and controlled*" (at para 84 of the founding affidavit).

301. But the chamber's complaint is difficult to understand. This is particularly so because, as indisputably demonstrated above, the chamber was intimately involved in the consultative process that culminated in the 2017 charter. The chamber was first made aware of the exact wording it now complains of as being vague and uncertain in the meeting before the parliamentary portfolio committee on 16 November 2016. Furthermore, in the chamber's meetings with the Department on 18 and 19 January 2017 this formulation was again expressly pointed out to the chamber. Yet there appears to be no record whatsoever of the chamber previously raising this point in all its consultations and submissions, including those just prior to the finalisation of the 2017 charter. The chamber's most recent submission dealing with the procurement issue, dated 24 March 2017, is attached hereto marked "**AA51**". It deals with the issue of procurement extensively and the chambers concerns in that regard. Nowhere does the chamber claim that it does not understand this expression. I add that no member of the Department who has periodically engaged the chamber recalls any chamber representative previously raising

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this point. Therefore, it appears that the chamber's inability to understand this expression has been sudden and has arisen in the course of the launch of these proceedings.

302. In any event, I point out that this is a matter of legal interpretation. The words are to be construed and made sense of in their proper context against the objects underpinning the charter. The chamber's contention that they cannot be made sense of is incorrect.

Alleged failure by Minister to show HDSA supplier capacity

303. The chamber's fifth complaint is that the 2017 charter might possibly not be capable of implementation because the Minister has not provided the chamber with any evidence of sufficient HDSA supplier capacity to meet the 2017 charter procurement targets (at para 85 of the founding affidavit). This complaint is contradictory, ill-conceived and incorrect.

304. The chamber's complaint is riddled with a fundamental contradiction. On the one hand, in asserting this argument, the chamber suggests that there might not be sufficient HDSA supplier capacity to meet the 2017 charter procurement targets. On the other hand, as described above, the chamber itself is of the view that it not only complied with the (lower but still substantial) targets set out

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in the 2010 charter in relation to procurement, but that it exceeded them. In this regard, I refer to two examples of the chamber confirming the existing HDSA supplier capacity for mining goods:

304.1. The chamber's revised written submission on the draft 2017 charter, submitted to the chamber in October 2016, confirms the chamber's view that there is domestic HDSA supplier capacity for mining goods. It states at page 7 thereof, under the heading "*Procurement, Enterprise and Supplier Development*", as follows:

> "***Procurement, Enterprise and Supplier Development can be a catalyst for growth***
>
> - *Consumables and parts of the mining equipment can be produced economically in SA.*
> - *SA industry has the expertise, funding support and baseline off take.*
> - *The vision must be for a South African parts and consumables Hub for Africa and for operations of OEM locally and internationally (The Mining and Innovation Hub initiative is as an example).*
> - *Our expertise developed for local produced consumables and services can be exported*" (emphasis added).

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304.2. The chamber's schedule headed "*Chamber of Mines of South Africa Assessment of Mining Charter 2014 targets*" which appears as annexure "**" also demonstrates the chamber's view that there is sufficient HDSA supplier capacity for meeting the mining goods target. In it, the chamber affirms:

304.2.1. its assessment of whether its members met the targets for HDSA procurement of capital goods and consumable goods, as "*achieved well*";

304.2.2. its assessment of whether its members met the targets for HDSA procurement of services, as "*good progress made*"; and

304.2.3. that the 2014 targets were broadly aligned with the 2010 charter requirements, based on a weighted average.

304.3. I point out that in the past several weeks the Department has chased up several prominent chamber members to provide the Department with their compliance reports insofar as procurement was concerned. This demonstrated, without exception, that they had all complied with the 2010 charter procurement targets. Copies of these reports are attached hereto as "**AA52**" to "**AA56**". In many instances, they claim to have exceeded those targets. I also point out that it demonstrates that

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these mining companies, contrary to what the chamber is submitting, appear to be seized with a clear understanding of the relevant wording.

305. The chamber's complaint is contradictory for a further reason. On the one hand, the chamber and its members claim to have been complying with their procurement obligations for at least 13 years and have collectively spent billions of rands on building HDSA supplier capacity. But on the other hand, the chamber complains and suggests that there is insufficient HDSA supplier capacity which, I submit, can only be attributable to non-compliance by rights holders with their obligations under the charter over the last 13 years.

306. The chamber's complaint is incorrect because it appears to be based on the mistaken assumption that the Minister is obliged to provide evidence of the existence of a requisite pool of black suppliers before he can amend the charter in relation to procurement. There is no such obligation on the Minister to provide any evidence to the chamber. Furthermore, the chamber fails to appreciate that the consultation process was extremely wide and in-depth and included parties other than the chamber.

307. The chamber's complaint is incorrect for a further reason. It fails to have regard to the effective HDSA mining goods procurement target in the 2017 charter, and the relatively minor and incremental change from the previous position under the 2010 charter.

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307.1. Under the 2010 charter a rights holder had to procure 40% of all its capital goods from BEE entities.

307.2. Under the 2017 charter a rights holder has to spend 70% of its mining goods procurement on South African Manufactured Goods. South African Manufactured Goods are in turn defined as goods where at least 60% of the value added during assembly and/or manufacturing is realised in South Africa.

307.3. Therefore, under the 2017 charter a holder must spend an effective rate of 42% on domestic mining goods (70% of 60%). This is only a 2% increase on the capital goods target set out under the 2010 charter, which as demonstrated above, the chamber and its members fully accepted and purportedly implemented.

307.4. Furthermore, the position under the 2017 charter is far more flexible in favour of the rights holder than that under the 2010 charter. It allows the rights holder to structure its HDSA procurement targets more flexibly, so as to accommodate, for example, joint ventures with foreign suppliers and the use of foreign parts in the assembly of local products. The formula under the 2010 charter was not as flexible.

308. The chamber's complaint is also wrong because it fails to take into account the transitional arrangements for procurement in the 2017 charter.

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308.1. Paragraphs 2.11(c) stipulates that a rights holder has three years within which to implement the HDSA procurement targets.

308.2. Paragraphs 2.11(e) provides that, in relation to mining goods, the first year target is 15% of the 70%, the second year target is 45% of the 70%, and the third year target is the full 70%.

308.3. Paragraphs 2.11(d) states that after this three-year period, the transition period may upon request by the rights holder be extended by a further two years in terms of paragraph 2.11 (d) of the 2017 charter.

308.4. In these circumstances, there can be no question of hardship to the rights holder. Similarly, questions about capacity of HDSA suppliers become academic at best. The chamber's persistence with its arguments in the face of these provisions which it is intimately familiar with, is most revealing.

309. The chamber's complaint is incorrect for yet a further reason, namely that it fails to have regard to the actual facts. As a matter of practice, the Department always applied the charter in a flexible and sensitive manner that took into account the individual circumstances of each rights holder. This was also in relation to monitoring and implementing procurement. The following is typically

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what transpired where a rights holder experienced difficulty in meeting its HDSA requirements.

309.1. If a rights holder approached the Department and contended that it was unable to comply with its target HDSA procurement obligations the Department did not inflexibly treat the rights holder with contempt and in a high-handed manner.

309.2. On the contrary, the Department arranged workshops and indabas where it introduced rights holders and HDSA suppliers. The Department invited all HDSA suppliers in the relevant area to a workshop with rights holders to present and showcase their capacity. These were termed black industrialist or procurement workshops. The Department intentionally facilitated these workshops between the parties in order to identify suitable HDSA capacity and potential capacity for rights holders. I attach hereto several examples of attendance registers of such meetings with mining companies the majority of whom are chamber members attached as "**AA57**".

309.3. In addition to this, the Department also made presentations to rights holders, individually and collectively, on procurement. The Department provided rights holders in the course of such presentations with HDSA supplier lists of mining goods and services, and encouraged them to interview prospective HDSA suppliers. The suppliers drawn from such

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supplier are reflected in the above lists. This almost always had the result of assisting a rights holder who was otherwise unable to comply with its HDSA procurement targets.

310. The chamber's complaint is also ill-conceived. The chamber and its members cannot now, through their own conduct of not complying historically and incrementally with procurement targets, suddenly contend that the targets are too difficult to achieve from their baseline. In other words, if there is insufficient HDSA supplier capacity, this can only be attributable to non-compliance by rights holders with their obligations under the charter over the last 13 years. It is untenable for the chamber and its members to use their historical non-compliance with procurement targets in the 2004 charter and the 2010 charter to build up the relevant procurement HDSA capacity for mining goods, to justify their future inability to comply with slightly more onerous procurement targets in the 2017 charter.

311. The chamber's complaint is ill-conceived for a further reason. The chamber fails to appreciate the flexibility built into the 2017 charter and given effect to in practice by the Department since the commencement of the 2004 charter.

311.1. Paragraph 2.9 of the 2017 charter provides that "*[t]he Department shall monitor and evaluate the Holder's implementation of this Mining Charter of 2017, taking into account the impact of material constraints which may result in not achieving the set target*" (emphasis added).

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311.2. Accordingly, if in any given case a rights holder under the MPRDA faces a non-compliance notice in relation to its HDSA procurement target, in circumstances where such rights holder correctly asserts in its defence that there are no HDSA suppliers, a court will certainly come to the assistance of that rights holder.

Alleged unlawful anti-competitive conduct by black HDSA suppliers

312. The chamber's sixth complaint is that the 2017 charter will encourage black owned companies to artificially keep their prices high and anti-competitively hurt mining companies (at para 86 of the founding affidavit). Simply put, the chamber's argument is as follows: Assume that there are sufficient black-owned suppliers to meet rights holders' 70% HDSA targets for the supply of mining goods. Assume further that these black-owned suppliers will break the law and collude to keep prices artificially high. This will hurt mining companies. But the chamber's complaint is incorrect for at least three reasons.

313. It (incorrectly) assumes that black-owned suppliers will break the law and collude to keep prices of mining goods artificially high. I can't imagine why the chamber would suggest that black-owned suppliers have a propensity to break

the law. I invite the chamber to explain to the court why it is suggesting that this would be the case.

314. The chamber's complaint further (incorrectly) assumes that black-owned suppliers who do break the law, will not be dealt with in accordance with the law. There is nothing in the 2017 charter that authorizes black-owned suppliers or any other suppliers to collude and artificially create high prices for mining goods in contravention of any law, including the Competition Act 89 of 1998. If they do so, they will face the full consequences of the law. Again, I invite the chamber to explain to the court why it is suggesting that black-owned suppliers who do break the law by unlawfully inflating and maintaining artificial extortionist prices in the relevant market, would receive special treatment and not be dealt with as any other contravener.

315. The chamber's complaint is also based on a fundamental contradiction and wild speculation.

315.1. The chamber contradicts itself in this argument because the argument asserts that there are sufficient HDSA suppliers of mining goods, yet elsewhere in the founding affidavit the chamber denies that there is such capacity.

315.2. The chamber resorts to wild speculation as a basis for seeking to strike down the charter by asking the court to envisage a situation that is

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remote and speculative in the extreme. To recap, the chamber is concerned that black-owned suppliers *might possibly* collude with one another, which collusion *might possibly* artificially raise prices of mining goods, which price hike *might possibly* be in contravention of the law, and which contravention *might possibly* not be dealt with by the law. One merely need state the chamber's thesis to demonstrate its incorrectness.

Alleged breach of GATT and TDCA

316. The chamber's seventh complaint is that the 70% target on HDSA procurement in the charter "*is in breach of South Africa's obligations under the General Agreement on Trade and Tariffs (GATT) and the Trade, Development and Cooperation Agreement (TDCA) in that it discriminates against the exports of other member countries*" (at para 89 of the founding affidavit). This complaint is meaningless, ill-conceived and incorrect.

317. The chamber makes this complaint, like most of its others, in an emotive manner in order to invoke support for its interdictory relief. Had the chamber really thought this is a significant or remotely plausible point, it would have made out a proper case in its founding affidavit. It hasn't. Instead the chamber has elected to mention in passing, and in an off-hand manner, an alleged

contravention of GATT the TDCA in the briefest and most general terms possible.

317.1. The chamber does not even identify which particular provision or provisions of GATT and the TDCA it alleges has been breached by the 2017 charter.

317.2. To compound matters, the chamber does not explain how, even if there is a breach of certain (unidentified) articles of GATT and the TDCA, such breach is not capable of being justified by the exemption provisions that might apply internally to the article/s concerned.

317.3. Nor does the chamber explain how, even if there is a breach of certain (unidentified) articles of GATT and the TDCA that is/are not capable of being justified by any internal exemptions to the relevant articles, such breach is not capable of being justified by the general exemption provision under each treaty. In short, the chamber's objection is entirely meaningless.

318. I respectfully submit that the chamber's complaint is ill-conceived and incorrect.

318.1. This is because the provisions of the WTO and GATT and the TDCA are not directly enforceable and justiciable in a South African court, despite the chamber's attempt to effectively do so.

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318.2. Furthermore, and in any event, the threshold of review when considering South Africa's international obligations simply requires a court to assess whether the decision-maker took into account the relevant provisions of any treaties such as the WTO and GATT and the TDCA in making its decision and reaching its conclusions in a *bona fide* manner. The chamber has misconceived the law in this regard.

Summary: chamber's improper approach to this litigation

319. What I wish to highlight to the court, which appears from the paragraphs above, is the chamber's approach to this litigation.

320. The chamber constantly asserts its commitment to transformation. The chamber's stock refrain that is often repeated in its founding affidavit (from the very first sentence), that appears in many of its correspondences to the Department and that finds its way into all its media releases, is as follows: "*The Chamber and its members are fully committed to the transformational objects of the MPRDA and have given concrete and substantial expression to that commitment*".

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321. Yet, the chamber's conduct speaks louder than its words. The chamber advances arguments, as demonstrated, that are so obviously incorrect and demonstrably implausible that they reveal the chamber's true agenda. Despite the chamber's professed commitment to transformation, the chamber raises every and any conceivable argument to impede the implementation of the 2017 charter. I respectfully submit that this is a reasonable and plausible conclusion to be drawn in the circumstances.

322. To underscore this conclusion, I point out to this court that the chamber's arguments:

322.1. are, in the main, predicated on theoretical possibilities and unlikely hypothetical scenarios,

322.2. fail to have regard to the flexible discretion vested in the Department and the Minister to remedy any problems that might arise in the application of the provisions of the 2017 charter,

322.3. fail to have regard to the fact that rights holders have a slew of remedies at their disposal in the event that the 2017 charter is applied in a manner that unlawfully infringes on their rights, and

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322.4. seek improperly and prematurely to anticipate unlikely and hypothetical problems that might or might not arise in the future in a bid to prevent the implementation of the 2017 charter.

Services

323. The chamber makes several complaints about the 2017 charter in relation to the procurement target for services. These are in similar if not identical terms to the chamber's complaints in relation to the procurement target for mining goods. To that extent, they have been addressed above. They are without merit, and denied. I do not wish to repeat my traversal thereof.

Processing of samples

324. Prior to and up until 1994 the mining industry's analytical facilities, and research and development capacity, was resilient and strong. Sampling is required at several and various stages of the mining process. Samples are collected and analysed during exploration. At every point during actual mining samples collected, to test the ore, to test the grade of mineral mined etc. As the extracted mineral is processed, further samples are required to be tested and analysed.

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325. The mining industry's analytical facilities, and research and development capacity employed tens of thousands of professionals. These persons included chemists, geologists, engineers etc. Since 1994, however, the Department has witnessed a discernable shift in the practice of the mining industry in terms of which the analysis of samples and the accompanying research and development is abroad and not in South Africa. This has resulted in the closure of many analytical and research and development facilities. Today the infrastructure and installed capacity for analysis and research and development in the mining industry has been considerably reduced from the position which obtained prior to 1994.

326. The requirement for 100% processing of samples at South African facilities was aimed at stemming the local demise of this ancillary but necessary limb of the mining industry. It was aimed at ensuring skills capacity being retained and developed and infrastructure being utilised instead of being mothballed.

327. The requirement for 100% processing of samples domestically first featured in the 2010 charter. Paragraph 2.8, under the heading "*Sustainable Development and the Growth of the Mining Industry*", recorded *inter alia* as follows:

> "*Stakeholders undertake to enhance the capacity and skills in relevant South African research and development facilities in order to ensure quality, quick tum around, cost effectiveness and integrity of such facilities. To this extent, mining companies are required to utilise South*

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African based facilities for the analysis of samples across the mining value chain" (emphasis added).

328. Compliance with the requirement in the 2010 charter was not immediate. On the contrary, rights holders were provided with a period of 4 years within which to reach 100% compliance, staggered over that 4 year period as follows: 25% in 2011, 50% in 2012, 75% in 2013 and 100% in 2014.

329. As demonstrated above from the chamber's 2009/2010 annual report, the chamber expressly and unequivocally accepted *inter alia* this obligation under the 2010 charter, required all its members to implement the provisions of the 2010 charter (including this obligation) and confirmed that the 2010 charter was a product of extensive consultation with which it agreed. Moreover, as demonstrated above, the chamber's members purported to implement this obligation. Indeed, several of their audited annual reports regarding compliance with the charter indicate that they have had success in complying with this obligation.

330. The Department's 2015 assessment attached as "**AA29**" concluded that *"[w]ith regard to the utilisation of South African based research facilities, the performance is encouraging*" (at paragraph 5) because, based on the information provided by rights holders (including the chamber's members), a majority of the right holders met and exceeded the target of utilising South

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African based research facilities. Therefore, this has proven to be a non-issue until now.

331. The only difference between the 2010 charter and the 2017 charter in this regard is that the requirement for 100% sampling at local facilities has been moved from the chapter on sustainable development and placed under procurement, where it more properly belongs. However, that makes no difference whatsoever to rights holders. Nor do they complain about that movement. Paragraph 2.2 of the 2017 charter, dealing with procurement, provides as follows:

> "***Processing of Samples***
>
> *(a) A Holder must utilise South African Based Companies for the analysis of 100% of all mineral samples across the mining value chain, except in cases where samples are analysed for the purpose of verification of the accuracy of local laboratories.*
>
> *(b) A Holder may not conduct sample analysis using foreign based facilities and/or companies without the prior written consent of the Minister.*"

332. The chamber makes several complaints in relation to the requirement of 100% local sampling. None of these complaints has any merit.

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333. First, the chamber complains that the Minister has not presented any evidence to demonstrate that local companies "*have the capacity to conduct an analysis of 100% of a Holder's mineral samples*" (at paragraph 97 of the founding affidavit), and has not taken this submission by the chamber into account. However, this is incorrect.

333.1. The Department and the Minister did have regard to the chamber's submission in this regard. We did not agree with the chamber's submission.

333.2. Furthermore, this complaint is without merit for the reasons described above. In essence, the Minister is not obliged to demonstrate such capacity and, most importantly, the chamber and its members have themselves expressly, and in writing, confirmed such capacity.

333.3. Finally, in relation to this point, I attach marked "**AA58**" an excerpt of a document headed "*Strategy for sustainable development and meaningful transformation of the South African mining industry*" which was jointly authored and jointly presented by Mr Mosa Mabuza (of the Department) and Mr Roger Baxter (of the chamber) and drawn in about August 2011. This document expressly describes the under-utlisation of local capacity for mineral sampling and research and development in South Africa in the following terms:

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"The research and development capacity that was installed in South Africa pre-1991 remains grossly under-utliised, with the industry almost exclusively using off-shore facilities for its research and development needs notwithstanding the availability of such facilities in the country including state-owned facilities such as Mintek, CSIR and CGS."

334. Secondly, the chamber complains that the Minister's discretion to exempt a right holder from the requirement is open-ended or not bound by any constraints (including time constraints), might be exercised capriciously or arbitrarily, and for that reason it is reviewable (at paragraphs 98 and 99 of the founding affidavit). This complaint is incorrect. It is incorrect because the discretion granted to the Minister is not at all free from legal fetters. On the contrary, as a basic proposition of law, the exercise of any administrative discretion must reasonable failing which it is reviewable under PAJA and/or the principle of legality. Therefore, for example, if the Minister does not respond to a request for an exemption within a reasonable period of time in any given circumstances, the Minister's decision would immediately be reviewable and appropriate relief could be sought from a court.

Verification of local content

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335. As described above, paragraph 2.2 of the 2017 charter, dealing with procurement, provides in relevant part as follows:

> "***Verification of local content***
>
> *(a) A Holder shall, when submitting the annual Mining Charter report contemplated in paragraph 2.9 to the Department of Mineral Resources, provide proof of local content for goods and services in the form of certification from the South African Bureau of Standards (SABS).*
>
> *(b) The responsibility to verify local content lies with the supplier of goods and/or services.*"

336. The chamber complains that the responsibility to verify local content lies with the supplier who is not bound by the MPRDA. Therefore, so the argument runs, the provision is *ultra vires* the MPRDA (paragraph 100 of the founding affidavit). This is incorrect. Further argument in this regard will be addressed to the court at the hearing of this matter.

Contribution by Foreign Suppliers

337. As described above, the MPRDA ushered in a new era and a seismic shift in how the limited mineral resources in South Africa are to be perceived and treated. It stipulates that the mineral resources belong to the people of South

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Africa, and the development thereof has to occur in a manner that benefits the people of South Africa throughout the value chain. If one takes capital goods as an example, the fact that the HDSA target for procurements was at 40% in 2010, meant that the balance of 60% of capital goods could still be procured through foreign nationals and foreign companies. These foreign persons would benefit from doing business on the development of mineral resources of South Africa without contributing towards the socio-economic development program. Therefore, an obligation on such suppliers to contribute toward the socio-economic development program was inserted in the 2017 charter.

338. Paragraph 2.2 of the 2017 charter, under the heading "Procurement and Enterprise Development", provided in relevant part as follows:

> "*Ensure that multinational suppliers of capital goods annually contribute a mini-mum of 0,5% of annual income generated from local mining companies to- wards socio-economic development of local communities into a social development fund from 2010*".

339. This placed an obligation on rights holders to ensure that their multi-national suppliers contributed to a social development fund.

340. Government was pre-occupied with implementing other aspects of the 2010 charter. In the ensuing period, it did not as vigorously chase up implementation

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of this aspect of the charter as it did others. Accordingly, some members of the chamber complied more effectively with this aspect of the charter than others.

341. In the Northern Cape, for example, the chamber has a mine manager's forum where they established a fund to collect the monies from multinationals, and appointed themselves as trustees of the fund. In this regard, I point out that many of the chamber's members purported to implement this obligation. Several of their audited annual reports regarding compliance with the charter indicates that they have had success in complying with this obligation. The Department and the Minister's office do not know what they did with the money that came through. In fact, based on information provided to the Department by mining rights holders, and as reflected in the 2015 assessment attached as "**AA29**", "*3.4% (not-weighted) have reportedly met the required target ... Weighted data indicates that 14.9% of the industry has reportedly met and exceeded the target of multinational suppliers contributing towards the social fund*".

342. There were many other companies that approached the Department when it came to reporting on this requirement. Some of them had indicated that they had created a provision within the company for such monies received. Others reported that they were awaiting on the Department and the Minister's office to create a fund in which the monies could be collected and placed. The 2010 charter did not provide a timeline in terms of which government would establish a fund.

343. No rights holder had complained about the principle underpinning the obligation, or the actual obligation. The only complaints the Department ever received in relation to this obligation imposed on rights holders was the manner in which it was to be effected

344. On the contrary, as demonstrated above from the chamber's 2009/2010 annual report, the chamber expressly and unequivocally accepted *inter alia* this obligation under the 2010 charter, required all its members to implement the provisions of the 2010 charter (including this obligation) and confirmed that the 2010 charter was a product of extensive consultation with which it agreed.

345. This obligation on rights holders to ensure a contribution by foreign suppliers is repeated in the 2017 charter at paragraph 2.2 under the heading "*Contribution by Foreign Suppliers*". It provides as follows:

> "*A Foreign Supplier must contribute a minimum of 1% of its annual turnover generated from local mining company/ies towards the Mining Transformation and Development Agency.*"

346. In terms of paragraph 2.11(a), a rights holder has 12 months within which to ensure compliance. Therefore, the 2017 charter has, yet again, incrementally strengthened a long-established and agreed principle. It now stipulates a deadline of 12 months from June 2017 for implementation. It has increased the

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contribution to 1% form 0,5%. And it has provided for a fund, the Mining Transformation and Development Agency ("the MTDA"), into which such monies are to be paid.

347. The chamber raises a number of complaints in relation to this obligation. None of these complaints has any merit.

Alleged breach of the Constitution

348. First, the chamber effectively contends that the foreign supplier contribution is not contemplated in the MPRDA, in particular under the provisions of section 100(2). For that reason, so the chamber's argument runs, it offends various provisions of the Constitution (at paragraphs 103 to 105 of the founding affidavit). But this is incorrect.

349. On a proper analysis, and having regard to the wording, spirit, purport and objects of the MPRDA and the Constitution, the foreign supplier contribution and the payment into the MTDA is entirely lawful.

350. Furthermore, I point out that this attack has never featured by the chamber in relation to the in-principle same obligation under the 2010 charter. On the contrary, as demonstrated above, the chamber and its battery of legal advisors

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expressly and unequivocally accepted and supported the implementation of the obligations under the 2010 charter (including this in-principle same obligation), without demur. After several years they have now decided that they object to such an obligation. This gives rise to the compelling inference that the chamber's conduct is not motivated by its stated commitment to the transformational objectives of the MPRDA, but instead that it is geared toward actively subverting those transformational objectives.

Alleged extra-territorial application of the 2017 charter

351. Secondly, the chamber complains that in certain highly unlikely hypothetical circumstances which *might possibly* arise, the 2017 charter *might possibly* be applied by the Department in a manner which results in it not capable of being enforced against a foreign supplier. The chamber contends further that, in such instance, *if the Department decides to enforce* the 2017 charter against such foreign supplier that has no assets or funds locally, the Department effectively would be enforcing the charter in an extra-territorial manner. That, says the chamber, is unlawful (paragraph 106 of the founding affidavit).

352. This argument is highly speculative. It is also transparently incorrect. If the 2017 charter is not capable of extra-territorial application in any given instance, the Department generally will not be able to enforce it against such foreign

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supplier. If the Department unlawfully attempts to do so, it will no doubt be challenged in court by the very vigilant chamber and some of its members.

353. Furthermore, this is yet another instance of the chamber clutching at straws in an attempt to conjure every possible argument, irrespective of how desperate or poor, in a bid to stymie the implementation of the 2017 charter. As repeatedly described in this affidavit, this repeated conduct by the chamber stands in marked contrast to its stock refrain of "*being fully committed to the transformational objective of the MRDA*".

354. This argument is also incorrect because it fails to appreciate the nature of the obligations imposed upon the rights holder. The MPRDA regulates right holders. If a rights holder fails to comply with the 2017 charter, it will be dealt with in accordance with the provisions of the MRDA. It is there therefore incumbent on the rights holder, when they seek services of foreign suppliers, to ensure that the relevant requirements are met by, for example, inserting a condition into their contractual relationship with that supplier or obtaining the requisite guarantee or other assurances from the foreign supplier.

Alleged breach of the MPRDA through the MTDA

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355. Thirdly, the chamber complains that the purpose, powers and functions of the MTDA have not been set out, and that the Minister does not have an unfettered discretion under the MPRDA in that regard (paragraph 107 of the founding affidavit).

356. It is correct that the MTDA must comply with the requirements of the 2017 charter which, in turn, must comply with the MPRDA.

357. I also point out that but for the broad undertaking which was insisted upon by the chamber, the Department and the Minister would have made substantial progress in setting up the MTDA within the next few months. Therefore, it does not lie in the mouth of the chamber to complain about the lack of the MTDA in circumstances where the Department and the Ministry's hands are tied by the chamber's own conduct.

Alleged irrational cost to mining companies

358. Fourthly, the chamber complains that the cost of abiding this obligation under the 2017 charter ultimately will be borne by the mining companies themselves (at paragraph 108 of the founding affidavit). The chamber contends that, for this reason, it is irrational and falls to be set aside.

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359. But this complaint is obviously incorrect as a matter of law.

360. Moreover, this complaint is entirely misconceived. Almost every obligation under the charter is an obligation placed on those who wish to mine and develop mineral resources. This accords with the fundamental rationale underpinning the MPRDA, namely that the limited mineral resources in South Africa belong to the people of South Africa and any mining and development thereof has to occur in a manner that benefits the people of South Africa throughout the value chain. Those who wish to mine and develop those limited mineral resources belonging to the people of South Africa, must accordingly comply with the attendant obligations in that regard and bear the associated costs.

361. In advancing this complaint, the chamber also betrays a marked failure to appreciate the true costs of not transforming. There are thousands of communities throughout the country who are conveniently located near mines and who provide cheap labour to mines. Many of these communities are disillusioned by the mining industry's focus on narrow profit, and its failure to meaningfully commit towards a broader social, economic and community development transformation agenda. Yet these communities have shown a remarkable patience with mining companies who have, historically over the past 13 years, taken their transformation obligations under the MDRP very lightly. An increasing number of these communities are losing their patience. This has resulted in violence and social upheaval. The real cost of not

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complying with the transformation objectives under the MPRDA, which the chamber appears oblivious to, is what is happening on the ground in those communities. Ultimately, in the long term, that can only have a detrimental impact on a mining company. Unfortunately it seems that the chamber and its members who have brought this application are not focussed on the long term.

362. The significance of this complaint by the chamber should not be underestimated. Through it, the chamber betrays a stark failure to appreciate the very basic value paradigm and objectives underpinning the MPRDA and the Constitution. The chamber demonstrates yet again that despite repeatedly trotting out its stock refrain of being "*fully committed to transformational objectives of the MPRDA*", the chamber in its actual conduct is far-removed from and tries to subvert such transformational objectives.

Alleged lack of clarity on DTI Codes

363. Fifthly, the chamber complains that in the definition of Foreign Supplier "*the reference to level 4 Dti Codes is unclear and indeed meaningless*" (at paragraph 109 of the founding affidavit).

364. But this is a bald allegation that is entirely unsubstantiated. To that extent, it does not permit a response.

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365. In any event, the legal conclusion contended for by the chamber is incorrect. Whatever the chamber's argument is in this regard (they have not revealed it), and to the extent that it is purely a question of statutory interpretation, that will be dealt with by way of argument at the hearing of this matter.

Alleged complaint that MTDA is yet to be formed

366. Sixthly, the chamber complains that the MTDA is yet to be formed but the foreign supplier obligation is immediately binding (at paragraph 110 of the founding affidavit).

367. The chamber's complaint is ill-conceived and, in any event, does not render the 2017 charter vulnerable to attack. This is because a rights holder has got 12 months within which to get their proverbial house in order before the Department enforces compliance with the provisions of the 2017 charter. But for the undertaking demanded by the chamber, the Department and the Minister would have made substantial progress in setting up the MTDA within the next few months.

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368. Accordingly, it does not lie in the mouth of the chamber to complain about the lack of the MTDA in circumstances where the Department and the Ministry's hands are tied by the chamber's own conduct.

Transitional arrangement in relation to procurement

369. The transitional arrangements set out at paragraph 2.11 of the 2017 charter are there to mitigate any possiblity of alleged hardship occassioned to a rights holder caused by the implementation of the 2017 charter.

370. I point out that there should in fact be no basis for such a claim. This is because the rights holders ought to have incrementally applied the charter from inception (the 2004 charter), then reached the targets set out therein over the ten year period, then dealt with the 2010 charter and taken the incremental steps prescribed therein, and now be in an ideal position to immediately implement the incremental further steps in the 2017 charter. After all, the chamber and its members have consistently submitted, over the last 13 years, that they were generally in compliance with the charter obligations.

371. The chamber complains that there is confusion and a lack of clarity regarding the meaning to be accorded to the transitional arrangements in the 2017 charter (paragraphs 113 to 115 of the founding affidavit). This is incorrect. Properly interpreted, the relevant provisions are as follows:

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371.1. Paragraph 2.11(c) stipulates that a rights holder has three years within which to implement the HDSA procurement targets.

371.2. Paragraph 2.11(e) provides that, in relation to mining goods, the first year target is 15% of the 70%, the second year target is 45% of the 70%, and the third year target is the full 70%.

371.3. Paragraph 2.11(d) states that in relation to all HDS procurement targets, after this three-year period, the transition period may upon request by the rights holder be extended by a further two years in terms of paragraph 2.11 (d) of the 2017 charter.

371.4. At best for the chamber, there appears to be an omission in relation to staggered yearly thresholds for the other HDSA procurement targets over the three-year period. However, that does not in any way detract from the above. It simply means that in respect of those HDSA procurement targets, the rights holders are at liberty to decide how and to what extent they which to phase in compliance with the prescribed target over the three year period, provided that by the end of the three year period, they meet the prescribed target.

371.5. There can be no confusion as claimed by the chamber. Its claim to that effect is, with respect, contrived.

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Procurement: general

372. The chamber's complaint is that when the Minister first proposed procurement targets in April 2016 the chamber made a number of submissions in that regard. However, so the argument runs, when the 2017 charter transitional arrangements were promulgated, a year later in July 2017, the chamber's submissions were not reflected in the revised document. The chamber concludes that the "*only conclusion to draw from this is that the Minister failed to apply his mind to those submissions*" (paragraphs 116 and 117 of the founding affidavit).

373. This is incorrect for several obvious and related reasons. First, as demonstrated above, the Minister's obligation is to consult with all relevant persons, including the chamber. The Minister is not obliged to slavishly follow anyone's submissions entirely or in part.

374. Secondly, in any event, extensive, lengthy, detailed and comprehensive consultations were held with the chamber and other stakeholders. The chamber had every opportunity to engage with the Department and the Minister throughout the evolution of the charter from 2004 to date. This is especially the case between April 2016 and April 2017. These consultations were

substantive, lengthy and meaningful. They resulted in negotiated positions, and a constant back and forth between the Department and the chamber. At times, they resulted in the Department and myself being persuaded on certain aspects, at other times we were not persuaded by the chamber's position. The chamber's failure to disclose this and to claim that it was not consulted is not an act of good faith.

375. Thirdly, in these circumstances, it is incorrect to conclude that the Minister failed to have regard to the chamber's submissions merely because the Minister did not adopt the chamber's submissions. It reveals once again the leitmotif informing the chamber's approach to this litigation: the chamber professes lip service to transformation, but by its conduct it actually seeks to subvert transformation by desperately latching onto every and any argument in a bid to prevent the implementation of the 2017 charter.

EMPLOYMENT EQUITY

376. The chamber does not purportedly dispute the rationale and objectives of employment equity as a core transformational objective. On the contrary, by all accounts its repeated public utterances are to the effect that it supports employment equity. It only appears to express what it contends are legitimate reservations about the pace at which it is being implemented in the circumstances that prevail in South Africa.

377. However, once again, as will be demonstrated below, that is an excuse that is fast wearing thin. The chamber's conduct demonstrates that it is only paying lip-service to employment equity. In reality the chamber is a reluctant participant at best.

378. Employment equity first featured in the 2004 charter in the following respects:

378.1. In terms of the preamble the parties (including the chamber and its members who accept the binding nature of the 2004 charter) recognised *inter alia* that:

> "*The history of South Africa, which resulted in blacks, mining communities and women largely being excluded from participating in the mainstream of the economy, and the formal mining industry's stated intention to adopt a proactive strategy of change to foster and encourage black economic empowerment (BEE) and transformation at the tiers of ownership, management skills development, employment equity, procurement and rural development;*
>
> ...
>
> *The slow progress made with employment equity in the mining industry compared to other industries*" (emphasis added).

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378.2. The parties also noted that a number of laws, including the Employment Equity Act 55 of 1998 "*would also assist socio-economic empowerment*".

378.3. At paragraph 4.1, under the heading "*Undertakings*", all stakeholders (including the chamber and its members) undertook "*[t]hrough the MQA shall undertake to provide skills training opportunities to miners during their employment in order to improve their income earning capacity after mine closure*" (emphasis added).

378.4. At paragraph 4.1, under the heading "*Undertakings*" the following is recorded:

> "*Companies undertake:*
>
> - *To offer every employee the opportunity to become functionally literate and numerate by the year 2005 in consultation with labour;*
> - *To implement career paths to provide opportunities to their HDSA employees to progress in their chosen careers; and*
> - *To develop systems through which empowerment groups can be mentored as a means of capacity building*" (emphasis added).

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378.5. Under paragraph 4.2, dealing with the heading "Employment Equity", the following obligations were noted:

"*Companies shall publish their employment equity plans and achievements and subscribe to the following:*

- *Establish targets for employment equity, particularly in the junior and senior management categories. Companies agree to spell out their plans for employment equity at the management level. The stakeholders aspire to a baseline of 40 percent HDSA participation in management within 5-years;*
- *South African subsidiaries of multinational companies and South African companies, where possible, will focus their overseas placement and/or training programmes on historically disadvantaged South Africans;*
- *Identification of a talent pool and fast tracking it. This fast tracking should include high qualify operational exposure;*
- *Ensuring higher levels of inclusiveness and advancement of women. The stakeholders aspire to a baseline of 10 percent of women participation in the mining industry within 5-years; and*
- *Setting and publishing targets and achievements*" (emphasis added).

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378.6. Apart from the obligations described above, the accompanying scorecard to the 2004 charter required stakeholders to respond annually to the following questions:

> "(*i*) *Has the company published its employment equity plan and reported on its annual progress in meeting that plan?*
>
> *(ii) Has the company established a plan to achieve a target for HDSA participation in management of 40 percent within five years and is implementing the plan?*
>
> *(iii) Has the company identified a talent pool and is it fast tracking it?*
>
> *(iv) Has the company established a plan to achieve the target for women participation in mining of 10 percent within the five years and is implementing the plan?*"

379. However, the rights holders generally treated the transformational objective of employment equity with a begrudging reluctance and tardiness. The severely limited implementation of these employment equity objectives is described in the 2009 assessment, attached as "**AA22**", *inter alia* as follows:

> "*As cornerstone of apartheid discriminatory employment practices, the mining industry remained, to a large extent, unreformed at the time of the promulgation of the Charter. Consequently, stakeholders deemed it*

appropriate to include Employment Equity as an element of the Charter

...

...

Employment Equity Plans and reports

Only 37 percent of mining companies have developed Employment Equity (EE) plans, while a lesser number of companies have published these plans. There is no evidence of EE reports (either audited or unaudited) submitted to the Department of Mineral Resources. These findings demonstrate the intransigence and lack of commitment by the industry to transform.

HDSA participation in management

An average of 26 percent of mining companies achieved a threshold of 40 percent of HDSA participation at management level, while the average achievement for the industry is 33 percent. It has to be noted that HDSA participation includes white women participation, which currently stands at 10 percent. However, it was further established that a large number of HDSA's occupy middle management positions while an insignificant number of HDSA's are in key decision making positions.

Women participation in mining

The results reveal that only 26 percent of mining companies have complied with the 10 percent women (inclusive of white women) participation in mining. However, the average rate of women

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participation is 6 percent, the bulk of whom are represented in support functions with less than 1 percent in core management positions, a large proportion of which represents a preserve for white women.

Talent pool identification and fast tracking

An average of 83 percent of mining companies have not identified talent pool, while only 17 percent are in the process of fast tracking those identified for management positions.

Employment patterns in the mining industry reflect that the majority of HDSA still occupy lower levels of employment and the targeted 40 percent of HDSA participation in management, as espoused in the Charter, has not yet been achieved.

The Human Rights Commission report dated 4th November 2008 confirms the afore-mentioned findings relating to the lack of compliance with the employment equity targets in the mining companies in terms of race and gender representations. This observation is corroborated by the findings of the 9th Employment Equity Commission report, which highlight that white South Africans (female and male) continue to occupy top management positions and earn more than blacks regardless of skills and experience.

The assessment further revealed the prevalence of racially discriminatory practices in the mining industry, which impacted

negatively on the progress towards attainment of equitably transformed workplace.

The lack of investment in HDSA skills development by the industry has created a limited pool of expertise required to effect meaningful gender and racial representation. As a result, retention of a few skilled HDSAs in companies has proven to be a challenge. There is evidence that progress on employment equity remains minimal, with most mining companies developing equity plans for regulatory compliance purposes" (emphasis added).

380. This resulted in the promulgation of the 2010 charter which imposed the following obligations on rights holders in terms of paragraph 2.4 under the heading "*Employment Equity*":

> "*Workplace diversity and equitable representation at all levels are catalysts for social cohesion, transformation and competitiveness of the mining industry. In order to create a conducive environment to ensure diversity as well as participation of HDSA at all decision-making positions and core occupational categories in the mining industry, every mining company must achieve a minimum of 40% HDSA demographic representation at* –
>
> - *Executive Management (Board) level by 2014;*
> - *Senior management (EXCO) level by 2014;*

- *Core and Critical skills by 2014;*
- *Middle management level by 2014;* □
- *Junior management level by 2014.* □

In addition, mining companies must identify and fast-track their existing talent pools to ensure high level operational exposure in terms of career path pro-grammes."

381. The above 40% targets for HDSA representation across all levels of management were also recorded in the accompanying scorecard to the 2010 charter.

382. As demonstrated above, in relation to the chamber's 2010 annual report, the chamber unequivocally and expressly accepted, adopted and encouraged the implementation of the 2010 charter.

383. The 2015 assessment report, attached as "**AA29**", assessed the implementation of the 2010 charter, based again largely on information provided by rights-holders. It recorded the following at paragraph 4.5:

> "...*the mining industry exceeded the 40% target set to be achieved by 2014 in the different functional categories. HDSA representation was highest in the core skills category at 75.2%, followed by junior management at 62.8%*.

When the applicable Economically Active Population (EAP) level is taken into account, African males are under-represented in the functional categories of top management, senior management and middle management and African females are significantly under-represented in all categories. Similarly, the coloured race group is significantly under-represented, for both males and females, at all categories. Whereas Asian males are over-represented at board, senior and middle management levels, they are under-represented at junior management and core skills.

On the other hand, Asian females are over-represented at board and senior management and under-represented in the remaining functional categories. White females are over-represented in all categories except at board and core skills. Important to note is that white males still dominate in the higher functional categories being over-represented at all functional categories except at core skills, where their representation is at the EAP demographic level of 6%.

Women participation in mining

Prior to the introduction of the Mining Charter, female representation in the mining industry was insignificant. The 2004 Mining Charter set a target of 10% for representation of women in mining by 2009, however, only 6% representivity was achieved. The overall representation of women in the mining industry has increased to 10.5% by 2014. The reported data shows that there is still a long way to go before women are fully represented in the mining industry" (emphasis added).

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384. The 2017 charter has increased the targets as follows:

"***Board***

A minimum of 50% Black Persons with exercisable voting rights, 25% of which must be black Female Persons.

Executive/Top Management

A minimum of 50% Black Persons at the executive directors' level as a percentage of all executive directors, 25% of which must be Female Black Persons

Senior Management

A minimum of 60% Black Persons in senior management 30% of which must be female Black Persons.

Middle Management level

A minimum of 75% of Black employees in middle management, 38% of which must be female Black Persons.

Junior Management level

A minimum of 88% Black employees in junior management, 30% of which must be female Black Persons.

Employees with disabilities

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A minimum of 3% employees with disabilities as a percentage of all employees, reflective of national and/or provincial Demographics."

385. It is against this legislative and factual background that the chamber's complaints must be considered, something which the chamber has studiously sought to avoid doing in its founding papers.

386. The chamber makes three complaints in relation to the obligations regarding employment equity targets imposed by the 2017 charter on rights holders. None of these has any merit.

Alleged difficulty of immediate imposition

387. The chamber complains that the employment equity targets are imposed immediately but are not capable of being implemented immediately and that this will cause disruption in the mining industry (at paragraphs 120 to 124 of the founding affidavit). But this is incorrect for several reasons, including the following.

388. But the chamber's complaint is incorrect. It fails to have regard to the actual facts. As described above, a matter of practice, the Department always applied the charter in a flexible and sensitive manner that took into account the

individual circumstances of each rights holder. This was also in relation to monitoring and implementing employment equity.

389. Furthermore, on the rights holder's own version, there is capacity for higher employment equity thresholds. The chamber's allied complaint that the targets for Black Women do not take into account the mining industry's existing employment equity profile or the university skills pipeline (at paragraph 126 of the founding affidavit) is incorrect. In other words, there are pools of suitably qualified HDSA persons who are not being employed by the mining industry. In this regard, and by way of example, I attach as "**AA59**" a recent list drawn by the Mining Qualifications Authority established in terms of the provisions of the Mine Health and Safety Act 29 of 1996. It was drawn as at 26 July 2017 by that authority. It shows a current list of qualified graduates from universities or other institutions of higher learning with professional skills relevant to the mining industry (and related disciplines), and who are either unemployed or employed in other sectors. The relevant MQA official will provide a confirmatory affidavit in due course.

390. The chamber's complaint is also ill-conceived. The chamber and its members cannot now, through their own conduct of not complying historically and incrementally with employment targets, suddenly contend that the targets are too difficult to achieve from their baseline. In other words, if there are insufficient pools of qualified persons (which is denied), this can only be attributable to non-compliance by rights holders with their obligations under the

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charter over the last 13 years. It is untenable for the chamber and its members to use their historical non-compliance with employment equity obligations in the 2004 charter and the 2010 charter (including to build up the relevant employment equity capacity), to justify their inability to now comply with slightly more onerous targets in the 2017 charter.

391. The chamber's complaint is ill-conceived for a further reason. As described above, the chamber fails to appreciate the flexibility built into the 2017 charter. The chamber has 12 months within which to implement the employment equity targets. It is not "*immediate*". Furthermore, paragraph 2.9 of the 2017 charter provides that "[*t*]*he Department shall monitor and evaluate the Holder's implementation of this Mining Charter of 2017, taking into account the impact of material constraints which may result in not achieving the set target*" (emphasis added).

Contradictory approach by chamber

392. The chamber complains that the problem is exacerbated because, it notes, white women are now excluded from the qualifying employment pool whereas previously they were included (at paragraph 125 of the founding affidavit). I disagree with the suggestion that there is an insufficient pool of skilled HDSA

persons to meet the employment equity targets for the reasons described above. In any event, I note that the chamber's concern regarding white women is, once again, revealing of its intention to subvert true transformation. The chamber appears to be concerned that the pool of qualified persons is going to be diminished by the exclusion of white women from the definition of Black Person. However, as demonstrated elsewhere in this affidavit, where the definition of Black Person has been sought to be legitimately expanded to include HDSA's that are otherwise unfairly excluded from the pool of qualified persons, the chamber objects. This contradiction in the chamber's approach is telling.

HUMAN RESOURCE DEVELOPMENT

393. The rationale and objectives of human resource development as a core transformational objective is not in dispute. On the contrary, by all accounts its repeated public utterances are to the effect that it supports this.

394. However, as will be demonstrated below, the chamber's conduct demonstrates that it is only paying lip service to the objective of human resource development. In reality through its conduct, the chamber is actively seeking to undermine this transformational objective.

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395. Human resources development first featured in the 2004 charter at para 4.1 in *inter alia* the following terms:

> *"The South African labour market does not produce enough of the skills required by the mining industry. Stakeholders shall work together in addressing this skills gap in the following manner:*
>
> - *Through the standing consultative arrangements they will interface with statutory bodies such as the Mines Qualifications Authority (MQA), in the formulation of comprehensive skills development strategies that include a skills audit;*
> - *By interfacing with the education authorities and providing scholarships to promote mining related educational advancement, especially in the fields of mathematics and science at the school level;*
> - *By undertaking to ensure provision of scholarships and that the number of registered learnerships in the mining industry will rise from the current level of some 1200 learners to not less than 5000 learners by March 2005; and*
> - *Through the MQA shall undertake to provide skills training opportunities to miners during their employment in order to improve their income earn- ing capacity after mine closure.*

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...

Companies undertake:

- *To offer every employee the opportunity to become functionally literate and numerate by the year 2005 in consultation with labour;*
- *To implement career paths to provide opportunities to their HDSA em- □ployees to progress in their chosen careers; and*
- *To develop systems through which empowerment groups can be mentored as a means of capacity building.*"

396. However, there was a lack of progress regarding the implementation of the transformational objective of human resources development. This is reflected at para 3.1 of the 2009 assessment, attached as "**AA22**".

397. This resulted in the promulgation of the 2010 charter which imposed the following obligations on rights holders in terms of paragraph 2.4 under the heading "*Human Resource Development*":

> "*The mining industry is knowledge based and thus hinges on human resource development, constituting an integral part of social transformation at workplace and sustainable growth. To achieve this objective, the mining industry must –*

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- *Invest a percentage of annual payroll (as per relevant legislation) in essential skills development activities reflective of the demographics, but excluding the mandatory skills levy, including support for South African based research and development initiatives intended to develop solutions in exploration, mining, processing, technology efficiency (energy and water use in mining), beneficiation as well as environmental conservation and rehabilitation; as follows –*
  - *Target for 2010 = 3%;*
  - *Target for 2011 = 3.5%;*
  - *Target for 2012 = 4%;*
  - *Target for 2013 = 4.5%;*
  - *Target for 2014 = 5%."*

398. I point out that the above obligation imposed on rights holders was almost the exact same obligation which the parties (including the chamber) had agreed on and signed in the 2010 declaration (see "commitment 7") that is attached as "**AA23**".

399. Furthermore, as demonstrated above, in relation to the chamber's 2010 annual report, the chamber unequivocally and expressly accepted, adopted and encouraged the implementation of the 2010 charter.

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400. The 2015 assessment report, attached as "**AA29**", assessed the implementation of the 2010 charter, based again on information provided by rights holders. It recorded the following at paragraph 4.6:

> "*When weighted, the number of right holders meeting the target increases to 56.8%.*
>
> ...
>
> *Although there are some right holders that have striven to meet this target, there are still a significant number of right holders that have fallen below the requisite threshold.*"

401. The only material difference in the 2017 charter is that the 5% is no longer to be assessed against annual payroll, but instead against a Leviable amount. The chamber motivated for that submission and the Department and the Ministry accepted it. It effectively results in a less onerous requirement being placed on the chamber.

402. However, the chamber now complains about this obligation to invest 5% although it championed and supported it in the 2010 declaration and the 2010 charter and even though its member applied it thereafter. Remarkably, the chamber invokes the equality clause of the Constitution and complains that it is being unfairly discriminated against (at paragraphs 128 to 130 of the founding affidavit). This is obviously incorrect. Moreover it reveals the chamber's bad

faith approach to engaging the transformational objectives underpinning the charter.

403. The chamber also raises a series of other complaints, identical to those considered above in relation to other obligations under the 2017 charter (at paragraphs 131 to 134 of the founding affidavit) against this transformational obligation. These arguments concern the MTDA and the constitutionality of a 5% "*levy*". They are, for the reasons advanced above, incorrect.

MINE COMMUNITY DEVELOPMENT

404. The chamber's attacks against the obligation on rights holders in relation to mine community development follow a similar pattern as described above. There is no merit to any of these attacks.

405. The chamber contends *inter alia* that the obligation is vague (at paragraph 135 of the founding affidavit). This is incorrect. It is a question of statutory interpretation that will be dealt with by way of argument at the hearing of this matter.

MK MAT 7

406. The chamber also complains about the MTDA. That complaint is identical to the chamber's complaint considered above in relation to other obligations under the 2017 charter. It is, for the reasons advanced above, incorrect.

407. The chamber complains that the 2017 charter obligation in respect of mine community development is the same as rights holders' obligations under their SLPs (regulated by MPRDA regulations), except for a problematic timing difference between the two. But the chamber's complaint is ill-conceived. The charter simply reinforces existing SLP obligations. The contention that there is a timing difference between these identical respective obligations is incorrect. This is because an SLP has to be renewed every 5 years. At any time in the year a rights holder should be implementing its SLP. Rights holders are already under a continuing obligation in that regard. The SLP reporting requirement is also annual. There can be no problem regarding the immediate implementation of the 2017 charter obligation in this regard. It simply requires the rights holder to comply with what it already should be complying with under its SLP.

SUSTAINABLE DEVELOPMENT AND GROWTH OF THE INDUSTRY

408. The chamber's attacks against the obligation on rights holders in relation to sustainable development are without merit.

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409. The chamber's main contention that this objective in the 2017 charter does not fall within the purview of the empowering provision of the MPRDA is incorrect (at paragraph 139 of the founding affidavit). It is artificial to contend, as the chamber effectively does, that health and safety and sustainable development are not part of a socio-economic development obligation.

410. The chamber's complaint that its submissions were not taken into account (at paragraph 140 of the founding affidavit) are incorrect for the reasons described above in response to the identical complaint regarding other charter obligations. In essence, they were taken into account. However, they were not adopted.

411. The chamber's complaint that this obligation already features in other statutory instruments is, likewise, not a concern (at paragraph 141 of the founding affidavit). This is because the 2017 charter simply reinforces existing obligations. No issues arise from that. Nor has the chamber been able to specifically identify any. If and when such issues do arise, the Department will deal with them accordingly.

412. Without a shred of evidence, the chamber complains that the relevant percentages in relation to research and development to be spent on historically black academic institutions were "*plucked out of nowhere*" (at paragraphs 142 and 142.1 of the founding affidavit). This is incorrect. The Department considered *inter alia* the financial statements of a sample of rights holders, considering their total expenditure, their research and development, their

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history of spending, and the 2017 charter targets for the procurement of goods in order to determine these percentages.

413. The chamber complains that the wording "*must be spent on South African Historically Black Academic Institutions*" is unclear (at paragraphs 142 and 142.2 of the founding affidavit). This is incorrect.

414. The chamber complains that there is no evidence that these institutions have relevant research capacity. But there is no obligation imposed on the Minister to provide such evidence to the chamber. Nor does the chamber squarely contend on oath that there are no historically black institutions that have the requisite capacity. In any event, if a rights holder runs into any difficulty because of a lack of institutional capacity, the 2017 charter caters for this. Paragraph 2.9 provides that "*[t]he Department shall monitor and evaluate the Holder's implementation of this Mining Charter of 2017, taking into account the impact of material constraints which may result in not achieving the set target*" (emphasis added). Furthermore, in this regard, I refer to the above-described statements where the chamber has itself expressly acknowledged the gross under-utilisation of local research and development capacity and facilities.

415. The chamber raises other complaints regarding infringements of the Constitution which it also raises in the context of other charter obligations (at paragraphs 142 and 142.4 of the founding affidavit). These have been dealt with above. There is no merit in any of them. They also reveal the chamber's

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failure to appreciate the change wrought by the MPRDA and the values underpinning that Act and the charter.

HOUSING AND LIVING CONDITIONS

416. The chamber's complaint that this obligation already features elsewhere under the MPRDA, therefore it is claimed the Minister inclusion thereof under the 2017 charter is ultra vires. This is incorrect. At worst, the 2017 charter simply reinforces existing obligations. No issues arise from that. Nor has the chamber been able to specifically identify any. In any event, this complaint reveals the chamber's failure to appreciate the role and transformational objectives underpinning the charter.

PARAGRAPHS 2.13 AND 2.14

417. The chamber fails to appreciate that the charter cannot be cast in stone at a particular point in time (in 2004). The power to amend or repeal the 2004 charter is foreshadowed in the MPRDA.

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REQUIREMENTS FOR AN INTERIM INTERDICT

AD PARAGAPHS 146 TO 156

418. I respectfully submit that the chamber has not met the requirements for an interim interdict. For the reasons set out above, the chamber has not set out a *prima facie* right.

419. The chamber's allegations of reasonable apprehension of harm are overstated. They do not accord with the practice of the Department in applying the charter or in the provisions of the 2017 charter requiring its flexible and sensitive application.

420. The chamber's complaint that R50 billion has been wiped off mining stocks is, with respect, bizarre. When any legislative or policy change in the country is mooted and debated, it effects those in economic control who might choose in the short term to sell their stocks. To use the litmus test of the short-term movement in mining stocks in response to a policy and legislative shift as a gauge for the lawfulness of those policy/legislative interventions, is incorrect. To do so without reference to trends in global markets and commodities in particular, and without reference to the particular South African context (and the full gamut of facts set out above), is remarkable.

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421. There is an alternative remedy that applied in relation to the 2004 charter and the 2010 charter as well. Where any rights holder (including chamber member) is disgruntled by the application of the 2017 charter, they can engage with the Department and failing that come to court.

422. The balance of convenience does not favour the grant of an interim interdict. The longer it takes for transformation to be implemented, the more minerals are exploited from the Republic of South Africa without such exploitation having benefitted HDSA. This undermines the very objects underpinning the 2017 charter, the MPRDA and the Constitution.

423. Save as aforesaid, these allegations are denied.

CONDONATION

424. This answering affidavit was due on 31 July 2017. It is being filed a week later, on 7 August 2017. The reasons for this are as follows:

424.1. On the weekend of 30 July 2017 I was required to travel abroad for a few days, together with several senior Department officials and advisors, all of whose contributions were vital to dealing with this affidavit.

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424.2. The founding papers straddle dozens of complex issues and make sweeping allegations and conclusions which are unfounded and which do not have regard to the history, context, facts and the proper policy underpinnings of the 2017 charter. It took a longer period of time than initially anticipated in order to deal with those aspects, as demonstrated in this relatively fuller answering affidavit. This was compounded by the fact that multiple employees of the Department, across various branches, had to be drawn in to provide their concerted input.

425. I respectfully submit that the late filing of the answering affidavit has occasioned no material prejudice to the chamber. My attorney offered to afford the chamber a further week for the filing of its reply. Furthermore, my attorney also agreed to a simultaneous exchange of heads of argument (the previous position was that the chamber would file first, and the Minister's legal team would file a week later). A copy of my attorney's correspondence in this regard is attached marked "**AA60**". In that manner, I respectfully submit, there has been no prejudice occasioned to the administration of justice in that the heads of argument and finalized indexed and paginated papers will serve before the court in accordance with the original agreed deadline, and certainly well in advance of the hearing.

426. In these circumstances, to the extent required, I respectfully seek the condonation of this court for the late filing of this answering affidavit.

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SERIATIM

AD PARAGRAPH 2

427. I note that the chamber does not seek to bring its review application expeditiously, within a time period calculated from the date of the *launching* of the present application. Instead, it seeks to await a resolution of the present application before it considers launching its judicial review application 60 days thereafter. There is no good reason for this.

AD PARAGRAPH 3

428. The so-called disastrous effects of the 2017 charter have been dealt with above.

429. I note that the chamber's miscommunications and mischaracterisations of the charter have contributed considerably to the negative press.

AD PARAGRAPHS 4 TO 12

430. These allegations have been dealt with above.

431. Save as aforesaid these allegations are denied.

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AD PARAGRAPHS 13, 14 AND 16

432. These allegations are noted.

AD PARAGRAPH 15

433. It is denied that all the allegations in the founding affidavit are true and correct.

AD PARAGRAPHS 17 TO 19

434. I point out that the chamber does not attach a resolution of its members who have voted in favour of the present litigation or the challenge to the charter. I invite the chamber to do so. Furthermore, I invite the chamber to indicate to this court the extent to which the content of the 2017 charter was debated with its members and what the outcome was.

435. Save as aforesaid, these allegations are noted.

AD PARAGRAPHS 20 TO 40

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436. These allegations have been dealt with above.

437. Save as aforesaid these allegations are denied.

AD PARAGRAPHS 41 TO 55

438. These allegations have been dealt with above.

439. Save as aforesaid these allegations are denied.

AD PARAGRAPHS 56 TO 77

440. These allegations have been dealt with above.

441. Save as aforesaid these allegations are denied.

AD PARAGRAPHS 78 TO 156

442. These allegations have been dealt with above.

443. Save as aforesaid these allegations are denied.

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AD PARAGRAPH 157

444. I agree that this application requires urgent resolution.

445. Save as aforesaid these allegations are denied.

AD PARAGRAPH 158

446. Absent the application of the 2017 charter, I note that the chamber, once again, acknowledges the express and lawful application of the 2004 and 2010 charters.

AD PARAGRAPH 159

447. These allegations are noted.

AD THE SUPPORTING AFFIDAVIT OF MR ROGER ALAN BAXTER

AD PARAGRAPHS 1 AND 3 TO 6

448. These allegations are noted.

MK 11.7.7

AD PARAGRAPH 2

449. It is denied that all the allegations in Mr Baxter's affidavit and the founding affidavit are true and correct.

AD THE CONFIRMATORY AFFIDAVIT OF MR AMBROSE VUSUMUZI RICHARD MABENA

AD PARAGRAPHS 1 AND 3

450. These allegations are noted.

AD PARAGRAPH 2

451. It is denied that all the allegations in the founding affidavit are true and correct.

MOSEBENZI JOSEPH ZWANE

This signed and sworn at Pretoria on this the 07th day of August 2017, the deponent having sworn that the deponent knows and understands the contents of this

affidavit, that the oath which the deponent has taken in respect thereof is binding on the deponent's conscience, and that the contents of this affidavit are both true and correct.

Mabumetja Klaas Mabote
PREMIUM TOWERS, PRETORIA
COMMISSIONER OF OATHS
PRACTISING ATTORNEYS, R.S.A

COMMISSIONER OF OATHS