IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

In the matter between: **CASE NO:** 71147/17

CHAMBER OF MINES OF SOUTH AFRICA	First Applicant
MINING AFFECTED COMMUNITIES UNITED IN ACTION	Second Applicant
WOMEN FROM MINING AFFECTED COMMUNITIES UNITED IN ACTION	Third Applicant
MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA	Fourth Applicant
SEFIKILE COMMUNITY	Fifth Applicant
LESETHLENG COMMUNITY	Sixth Applicant
BABINA PHUTHI BA GA-MAKOLA COMMUNITY	Seventh Applicant
KGATLU COMMUNITY	Eighth Applicant

and

MINISTER OF MINERAL RESOURCES	Respondent

and

NATIONAL UNION OF MINEWORKERS	First *Amicus Curiae*
SOLIDARITY TRADE UNION	Second *Amicus Curiae*

FILING SHEET

DOCUMENTS TO BE FILED:

1. Fifth to eighth Applicants' Heads of Argument

DATED AND SIGNED AT PRETORIA ON THIS 18TH DAY OF DECEMBER 2017.

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FIFTH TO EIGHT APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1. The MPRDA seeks to bring about a fundamental transformation in access to mineral resources in South Africa.[1] It seeks to give effect to the recognition in section 25(4)(a) of the Constitution that "reforms to bring about equitable access to all South Africa's natural resources" are in the public interest.

2. This transformation has however been disastrous for many rural communities on whose land prospecting and mining operations ("mining operations") are carried on.

3. The fifth to eighth applicants are four rural communities that currently host mining operations on land that they have used or owned for decades. They bring this application on their own behalf, in the interests of their members, and in the interests of similarly placed communities and their members.[2]

4. As mine hosting communities, the fifth to eighth applicants are representative of a constituency that bears the brunt of the negative socio-economic and environmental impacts associated with mining activities.

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[1] Minister of Mineral Resources and others v Sishen Iron Ore Co (Pty) Ltd and another 2014 (2) SA 603 (CC) para 83.
[2] Fifth to eighth applicants' Founding Affidavit para 19 vol 19 page 1947

5. These communities receive little or no direct benefit from the mining on their land. Instead, they are poverty-stricken, prevented from exploiting their land to its full potential, and in a constant struggle to meet basic needs, despite the wealth-generating operations underway on their land or around them.

6. Section 100 of the MPRDA addresses "Transformation of [the] minerals industry":

6.1 Section 100(2)(a) obliges the Minister to develop a broad-based Charter that will set the framework, targets and time-table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources.

6.2 Section 100(2)(b) requires that the Charter must set out how the transformational objects referred to in sections 2(c), (d), (e), (f) and (i) can be achieved:

6.3 Section 2(d) refers to the need 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 exploitation of the nation's mineral and petroleum resources.

6.4 Section 2(i) refers to the need to ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.

7. The current circumstances of the fifth to eighth applicants demonstrate that previous versions of the Mining Charter (published in 2004 and 2010) failed to do what the MPRDA requires. The 2017 Charter also fails in this regard.

8. The result is that the MPRDA has not only not achieved its stated goals as far as mine hosting communities are concerned: it has further marginalised those already marginalised communities.

9. The 2017 Charter suffers from fatal deficiencies in the procedure through which it was developed, and fundamental substantive deficiencies in its content.

10. The fifth to eighth applicants seek the following principal relief:[3]

10.1 the review and setting aside of the 2017 Charter;

[3] Fifth to eighth applicants' Notice of Motion vol 19 pages 1934 – 1936. See further fifth to eighth applicants' Founding Affidavit paras 24 - 27 vol 19 page 1949 - 1952

10.2 an order directing the Minister immediately to initiate a new, properly consultative process in order to develop a Mining Charter to replace the 2010 Charter;

10.3 declaratory relief that clarifies the rights and interests of mining affected communities in the context of any new Mining Charter; and

10.4 an order that provides for appropriate interim relief pending the development of this new Mining Charter, in particular with regard to ownership in the holders of mining rights issued after the date of this Court's order.

11. In what follows:

11.1 We first deal with the facts;

11.2 We then submit that the process followed by the Minister in developing the Charter did not satisfy the requirements of PAJA or the requirements of rationality (legality); and

11.3 We then submit that the 2017 Charter is also liable to be set aside on substantive grounds as a result of its inadequacy to achieve it statutory purpose.

THE FACTS

The facts on the ground

12. The facts "on the ground" are undisputed.

13. The fifth to eighth applicants are in the platinum belts of the Limpopo and North West Provinces.[4] They are rural communities, historically dependent on subsistence agriculture and/or grazing. They have strong ties to the land that is now home to various mining operations. They have in common an inability to exploit their land to its full benefit, and a struggle to obtain direct participation in and/or benefit from current or future mining on their land.[5]

14. The fifth to eighth applicants live largely in poverty, facing high levels of unemployment and a daily struggle to meet basic needs.[6] An independent assessment of the circumstances of the fifth applicant describes it as "*a conspicuous image of a neglected mine-hosting village*". It notes the extreme overcrowding of the village, the limited number of schools in the area, a half-built medical clinic, and roads in a state of decay.[7]

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[4] Fifth to eighth applicants' Founding Affidavit paras 11-17 vol 19 page 1945-47

[5] Fifth to eighth applicants' Founding Affidavit para 120 vol 19 page 1980

[6] Fifth to eighth applicants' Founding Affidavit para 120 vol 19 page 1980

[7] Fifth to eighth applicants' Founding Affidavit para 123 vol 19 page 1981

15. The land rights of these communities have been compromised as the mining has been undertaken on their land. We set out below how this has happened. None of this is denied by the Minister.

16. The fifth applicant, the Sefikile community, bought the farm Spitzkop 410 KQ in 1912.[8] The purchase price was paid by members of the community. Apartheid denied Africans registered land ownership, and the land was registered in the name of the state in trust for the Bakgatla ba Kgafela community. The Sefikile community had no historical linkage with the Bakgatla ba Kgafela, but had no choice but to allow the registration of the land in this manner.

17. Mining operations started on Spitzkop in 1946. The Sefikile community have since this time gradually lost the land which they historically used for grazing and ploughing. This loss has been accompanied by the influx of some 700 people onto their land, related to the mining operations. The community have not received any benefits from the mining on their land. They experience water contamination, cracking of houses as a result of the blasting by the mine, dust pollution, and the occupation of their land by mine workers.

18. The community have no effective remedy in terms of either the 2017 Charter or previous Charters. They also do not have a remedy in terms of section 54(3) of the MPRDA, as a surface rights agreement has been signed with the Ba Kgafela chieftaincy.

[8] Fifth to eight applicants' Founding Affidavit, paras 100-104 vol 9 pages 1974-5.

19. There have apparently been transactions between the traditional authority and the mines in terms of which substantial money is paid to the chieftaincy and its commercial structures. None of this money is channelled to the Sefikile community, who live in abject poverty. Their requests for access to these documents have been refused by the state, and they have had to resort to legal proceedings in terms of the Promotion of Access to Information Act. Their experience underlines the need for the Charter to ensure transparency and accountability.

20. The sixth applicant, the Lesethleng community,[9] is a constituent part of the greater Bakgatla-Ba-Kgafela tribe. Around 1916, the community decided to buy a farm for crop and stock farming, as the farm on which their village is situated is not suitable for farming. The decision to buy rather than rent or enter into sharecropping was motivated by the fact that this would afford the community security of tenure at a time when Africans access to farming land was severely restricted. The community therefore bought the farm Wilgespruit 2JQ, having raised the purchase price from members who could contribute.

21. Transfer took place in 1919. Again, because of apartheid law and practice, the land was registered in title to the state, which held it in trust. As the community was not recognized as a separate entity by the government, the title reflects the land as held in trust on behalf of the Bakgatla-Ba-Kgafela tribe. Since then, the 13 dikgoro have carried on crop and stock farming on Wilgespruit as owners of the farm.

[9] Fifth to eight applicants' Founding Affidavit, paras 105-116 and 125 vol 9 pages 1975-8, 1982.

22. The community was, before the initiation of mining, one of the most productive farms in the area. Today, good portions of the agricultural land have been fenced off for mining operations, depriving those farmers of an income.

23. In 2004, IBMR obtained a prospecting right in respect of the farm. In 2008,it was granted a mining right. In 2012 a portion of this mining right (that part which applies to the so-called Sedibelo-West portion of Wilgespruit) was excised from IBMR's mining rights in favour of PPM. Cession to PPM of the mining right to the remainder of the Wilgespruit is currently in process. IBMR also entered into a surface lease agreement with the Bakgatla-Ba-Kgafela Tribal Authority.

24. The mining activities conducted on Wilgespruit have over time eroded the community's ownership of the land. Mining on the Sedibelo-West portion of Wilgespruit commenced towards the end of 2013. The community has since then lost all use and occupation of that portion of the farm.

25. PPM contends that it consulted with the owners and lawful occupiers of Wilgespruit in the manner required by the MPRDA. The community deny this. They were not once in the entire process notified or consulted in their capacity as owners of Wilgespruit in the manner required by the MPRDA.

26. Activity and preparation for mining on the remainder of Wilgespruit commenced in 2014. This has severely disrupted the community's use of the farm. They sought and obtained a spoliation order against the PPM in 2015, restoring to them the possession of the remainder of Wilgespruit.

27. Towards the end of 2015, PPM successfully applied to court for the eviction of the community and individual members from the remainder of Wilgespruit. The North West High Court and the Supreme Court of Appeal refused leave to appeal. The community has applied for leave to appeal to the Constitutional Court, and is awaiting a decision in that regard.

28. If the Constitutional Court dismisses the application of the Lesethleng community or its appeal, the result will be that despite the community's use of the land for over 100 years, they will lose it through an eviction order obtained by the mine.

29. These events demonstrate the need for the 2017 Charter to be strengthened in relation to consultation, transparency, and the protection of land tenure and surface rights. They demonstrate the need for the 2017 Charter to address tenure security and surface rights in an effective and constitutionally consistent manner, in order to give full effect to its statutory function of facilitating transformation of the mining industry and ensuring the socio-economic upliftment of mining-affected communities.

30. The seventh applicant, the Babina Phuthi Ba Ga-Makola community (Makola),[10] is located in the Steelport Valley, in Limpopo Province. The Makola community historically held indigenous title in the land which they occupied and used. The community were forcibly removed from these properties in 1957. They have fought ever since to have their ownership recognised. They have lodged land claims under the Restitution of Land Rights Act over the farms Boschkloof 331 KT, De Goedeverwachting 332 KT, and Mooimeisjesfontein 363 KT.

31. Mining activities are now taking place on that land. The community have made a claim to land where mining activities have already taken place, and land where further expansion is planned. They assert a strong constitutional right in respect of the land. The likelihood is that even if their claim succeeds, they will not recover their land.

32. The eighth applicant (Kgatlu)[11] owns the Goedetrouw 366LR farm, north-west of Polokwane in Limpopo. The farm was included in a prospecting right granted in 2015 to a local subsidiary of Platinum Group Metals (PTM), a company listed on the Toronto Stock Exchange.

33. Most members of the Kgatlu community own homes on the property, and many use it for grazing and small-scale agriculture. The community understands on the basis of discussions with the company and its documents which available through the Toronto Stock Exchange that PTM envisions that the Goedetrouw farm, together with two

[10] Fifth to eight applicants' Founding Affidavit, paras 13, 15 vol 9 pages 1945, 1947.
[11] Fifth to eight applicants' Founding Affidavit, para 14-16 vol 9 pages 1946-7.

neighbouring farms, will in future host a major, fully-mechanized platinum operation, including a tailings dam, plant, and power sub-station.

34. The Kgatlu community will depend on the future Mining Charter to obtain an ownership stake in the mine. They are dependent on the development of a Mining Charter that reflects the interests of the hosting community and provides robust protection in this regard.[12]

35. Scholarly assessment demonstrates that all of this is typical of mine hosting communities. Mining affected communities typically derive few benefits from the mineral wealth generated in their immediate environments.[13] To the contrary, they routinely suffer adverse transformation of their environment, social structure, and economy.[14] This results in conflicts rooted in distribution of benefits, differences in culture between corporate and community actors, and the absence or poor quality of on-going processes for consultation and communication.[15]

36. Transformation clearly requires a Charter which protects the land rights and interests of affected communities; which assures them active participation in and financial benefit from mining on their land; and which provides transparency and accountability. The 2002 and 2010

[12] Fifth to eighth applicants' Founding Affidavit paras 16 vol 19 pages 1946
[13] Fifth to eighth applicants' Founding Affidavit para 122 vol 19 page 1980
[14] Fifth to eighth applicants' Founding Affidavit para 122 vol 19 page 1980
[15] Fifth to eighth applicants' Founding Affidavit para 122 vol 19 page 1980

Mining Charters failed to fulfil this statutory transformative mandate. The 2017 Charter in its current form will similarly fail.

The 2009 and 2015 Mining Charter Assessments

37. The undisputed facts show that previous versions of the Mining Charter failed to address effectively the historical inequalities associated with the industry, and to facilitate the socio-economic upliftment of mining affected communities such as the fifth to eighth applicants.

38. In 2009 and again in 2015, the Department of Mineral Resources (**"the Department"**), at the behest of the then Ministers, undertook detailed assessments of the efficacy of the 2004 and 2010 Mining Charters in achieving their legislated mandates. That mandate was *inter alia* to ensure the socio-economic upliftment of the communities most impacted by mining operations.

39. The 2009 Assessment and the 2015 Assessment revealed significant failures in respect of the socio-economic upliftment of mining affected communities.[16]

40. The 2009 Assessment revealed a "*gloomy picture*" of the extent to which the objectives of the Mining Charter had been achieved, and the "*urgent need*" for a revised Charter.[17] It highlighted the lack of collaboration with communities, and the developmental impact of the industry on affected communities as a result of the disjuncture between consultation and collaboration with mining affected communities. If

[16] Record of Review vol 3 pages 197 – 98, 223-24, 255 and 264

[17] Record of Review vol 3 page 187

further identified a "*narrow empowerment approach of handpicked individual[s] disguised as representing the broader interests of host communities.*"[18]

41. The 2015 Assessment assessed the efficacy of the 2010 Charter that had emerged from the findings of the 2009 Assessment. It reached stronger conclusions. It noted, for example, that only 36% of mining rights holders had met their mine community development targets,[19] despite the fact that "*mining host communities have historically endured a disproportionate negative socio-economic impact from the development of mining.*"[20]

42. The Preamble of the 2017 Charter reflects the Minister's intention to address the failings of previous Mining Charters in respect of mining affected communities. It echoes the finding in the 2015 Assessment that "*a proliferation of communities living in abject poverty continues to be largely characteristic of the surroundings of mining operations*".

43. The failure of previous Charters effectively to address these challenges required the Minister to develop the 2017 Charter in order to do so.

[18] Record of Review vol 3 page 197

[19] Record of Review vol 3 page 264

[20] Record of Review vol 3 page 255

THE LEGAL FRAMEWORK

Fair procedure under PAJA

44. We submit that the decision by the Minister to develop and publish the 2017 Charter constitutes administrative action under PAJA.

45. "Administrative action" is defined in PAJA in relevant part as:

> ...any decision taken, or failure to take a decision, by-
> (a) an organ of state, when ...
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) A natural or juristic person, others than an organ of state, when exercise a public power or performing a public function in terms of an empowering provision,
>
> which adversely affects the rights of any person and which has a direct, external legal effect...."

46. A decision is *"any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision..."*.

47. The Constitutional Court has explained that:[21]

> "...one of the constitutional responsibilities of the President and Cabinet Members in the national sphere ... is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute "administrative action" within the meaning of s 33."

[21] President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) para 142.

48. The Minister submits, in his answer to the Chamber of Mines, that *"the definition of PAJA expressly excludes decisions taken in the exercise of executive or legislative functions"*.[22] This is with respect fundamentally misguided.

48.1 It is correct that in terms of section 85(2)(a) of the Constitution, the authority of the executive includes *"implementing national legislation except where the Constitution or an Act of Parliament provides otherwise"*.

48.2 But as Chaskalson CJ pointed out, this does not have the result that all exercise of executive authority falls outside the meaning of "administrative action". He pointed out that the exercise of executive authority under section 85(2)(a) is not listed in the exclusions from "administrative action".

48.3 The implementation of legislation is a hallmark of administrative action: *"To have excluded the implementation of legislation from PAJA would have been inconsistent with the Constitution"*. Further, "*PAJA does not deal with who exercises executive authority in respect of rule-making. It deals with the circumstances in which the exercise of the executive authority is subject to review."*[23]

[22] Minister's Answering Affidavit to the First Applicant para 157 vol 4 page 356

[23] Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) at paras 125 – 126, 134 ("New Clicks")

49. In other words, the exercise of the executive authority is sometimes subject to review under PAJA. Certain exceptions are identified by PAJA. The exercise of executive authority under section 85(2)(a) is not one of them. The implementation of legislation lies at the heart of administrative action. This is the legal status that the Minister correctly accords the 2017 Charter.[24]

50. We submit that it is not necessary to analyse whether the Mining Charter constitutes "law". We point out however that in *Fedsure* the Constitutional Court held: [25]

> "...Laws are frequently made by functionaries in whom the power to do so has been vested by a competent legislature. Although the result of the action taken in such circumstances may be 'legislation' the process by which the legislation is made is in substance administrative. The process by which such legislation is made is different in character to the process by which laws are made by deliberative legislative bodies such as elected municipal councils. Laws made by functionaries may well be classified as administrative; laws made by deliberative legislative bodies can seldom be so described."

51. We submit that the making of the 2017 Charter plainly constitutes administrative action to which PAJA applies.

The principle of legality

52. The Minister's conduct is also constrained by section 1(c) of the Constitution, which encapsulates the principle of legality.

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[24] Minister's Answering Affidavit to the First Applicant para 142 - 143 vol 4 pages 348 - 349

[25] *Fedsure Life Assurance and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 27.

53. The Constitutional Court has given content to this principle, by holding that a body or individual exercising public power must act:

53.1 within the powers lawfully conferred on it;[26]

53.2 in good faith and with accurate construction of those powers;[27] and

53.3 in a manner that is not arbitrary or irrational.[28]

54. Rationality has both substantive and procedural requirements. Rationality review *"is concerned with the evaluation of a relationship between means and ends: the relationship, connection or link between the means employed to achieve a particular purpose on the one hand and the purpose or end itself."*[29] The Constitutional Court has explained the approach which is to be taken to the procedural element of rationality:

> "The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to

[26] Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council paras 57 -59

[27] President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC) para 148

[28] Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC) para 85

[29] Democratic Alliance v Minister of International Relations and Cooperation and others para 64.

> the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."[30]

55. The procedure used by the Minister to develop the Charter must be rationally connected to the end which is sought to be achieved, namely the transformational goals of the MPRDA – including in relation to the communities living in the areas in which the mines are operating.

56. Substantively, the Minister is required to develop a Mining Charter that is reasonably capable of fulfilling this purpose. A Mining Charter that does not meet this test is not compliant with section 100(2)(a) of the MPRDA, and fails the test of legality.

Participatory democracy

57. Ours is a participatory democracy. The right to consultation and participation is underpinned by the principle of participatory democracy which suffuses the Constitution:

> "[138] .... This notion of participatory democracy was again used and applied in both judgments in Matatiele and Ambrosini in deciding matters relating to parliamentary processes.
>
> [139] This understanding of the inherent value of participation and engagement also underlies many of the decisions of this court. Many provisions of the Constitution require the substantive involvement and engagement of people in decisions that may affect their lives. This court has recognised this in relation to political decision-making, access to information, just administrative action, freedom of expression, freedom of association, socio-economic rights, adequate housing and protection from arbitrary

[30] Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC) para 51.

> eviction or demolition of homes, under the Constitution. And in the field of labour dispute resolution there is clear recognition of the notion of good faith consultation in order to arrive at agreement. What is thus clear is that participation and engagement are central to our constitutional project, a reflection of our 'negotiated revolution'."[31]

A FAILED PROCEDURE

58. We submit that the procedure which the Minister followed in the process of developing the Charter patently failed to fulfil his obligation of procedural fairness under PAJA, the obligation of rationality, and his obligation to facilitate meaningful and adequate public participation.[32]

59. Under the circumstances, it is not surprising that the 2017 Charter does not adequately reflect or protect the rights and interests of mining affected communities.

The facts in relation to consultation

60. The 2017 Charter was initially drafted on the basis of representations made by "*relevant stakeholders*" at a 2016 meeting attended by representatives of industry, organized labour, and government.[33] Mining affected communities were not present or represented.

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[31] Head of Department, Department of Education, Free State Province v Welkom High School and others 2014 (2) SA 228 (CC) para 138, 139.

[32] Minister's Answering Affidavit at para 40 vol 21 page 2232.21

[33] Minister's Answering Affidavit paras 15 to 17 vol 21 pages 2232.12 - 2232.13

61. The draft 2017 Charter was published in the Government Gazette, with a call for comments within 30 days.[34] A Media Statement was published on the Department's website, and was reported on in the media.[35]

62. The Department received just over 60 written representations from stakeholders. One was from a mining affected community organization, the Serudumo Sa Rona Community Based Organisation.[36]

63. The Minister has put up a report by the Department which says "The following communities were consulted on the Reviewed Mining Charter 2017":[37]

63.1 Two consultations with "communities" in Limpopo;

63.2 One consultation with traditional leaders in North-West;

63.3 One "community consultation" in the Free State;

63.4 One consultation with "various community organisations and representatives";

63.5 One consultation with the Centre for Applied Studies at the University of the Witwatersrand; and

[34] Minister's Answering Affidavit paras 20 – 21 vol 21 pages 2232.14 - 2232.15

[35] Minister's Answering Affidavit para 21 vol 21 page 2232.15

[36] Minister's Answering Affidavit Annexure "AA3" vol 22 pages 2232.69 – 2232.219; see, in particular, page 2232.135

[37] Minister's Answering Affidavit Annexure "AA9" vol 22 page 2232.90.

63.6 One consultation with the South African Mining and Beneficiation Co-operatives.

64. The Minister does not identify the affected communities which were consulted.

65. It is common cause that hundreds – if not thousands – of mining affected communities in South Africa are materially affected by the 2017 Charter. The Minister has defined them as "stakeholders" in this process.[38] The preamble to the 2017 Charter specifically contemplates the improvement of life for these communities as one of its primary aims.[39]

66. We submit that even on the most generous interpretation, the seven identified "consultations" cannot constitute proper consultation with the hundreds or thousands of communities which are affected. There was no community consultation at all in six of the nine provinces; and one consultation in a province can hardly amount to adequate consultation with the affected communities.[40] Most fundamentally, there was no apparent attempt to identify and reach the communities actually affected.

No procedural fairness under PAJA

[38] Minister's Answering Affidavit at para 28 vol 21 page 2232.17.

[39] First Applicant's Founding Affidavit Annexure "FA5" vol 2 page 162.

[40] Compare the more extensive public participation process described in Land Access Movement of South Africa and others v Chairperson, National Council of Provinces and others 2016 (5) SA 635 (CC) para 20-47, which was found to be inadequate.

67. Section 33 (1) of the Constitution establishes the right to administrative action that is "procedurally fair". PAJA gives content to that right.

68. Section 3(2)(a) provides that a fair administrative procedure in relation to administrative action which materially and adversely affects the rights or legitimate expectations of a person depends on the circumstances of each case. The same must apply to section 4, which deals with administrative action affecting the public. The requirements of procedural fairness are context-specific:

> "Regarding the procedural aspect of the right to fairness, the applicant's case was based on the provisions of s 3 of PAJA. This section acknowledges in express terms that the required standard for procedural fairness differs from case to case. The facts and circumstances of a particular case determine the content of procedural fairness required." [41]

69. It is therefore important to evaluate the facts of each case to assess the content of procedural fairness required in that case.

70. Section 4 of PAJA sets out various possible mechanisms for procedurally fairness in relation to administrative action which affects the public. The administrator may follow another procedure which gives effect to section 3: section 4(1)(e). We submit that the first thing the administrator must do is identify the parts of the public which are affected, and then attempt to reach them. It is plain that the Minister did not do this.

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[41] *Walele v City of Cape Town* 2008 (6) SA 129 (CC) para 27. See also the minority judgment of O' Regan ADJC at para 123 to 126

71. The standard by which to assess the sufficiency of a participation process is reasonableness, dependent on the circumstances of the case.[42] This assessment requires taking into account all relevant factors, including the procedure adopted by the functionary for public participation, the nature and importance of the legislation in question, and whether there is a need for its urgent adoption.[43]

72. In New Clicks Sachs J said the following of the right to participate in law-making (a right with less content than is guaranteed by section 33 of the Constitution and PAJA):[44]

> "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is afforded to members of the public and all interested parties to know about the issues and to have an adequate say"

73. We submit that the steps the Minister undertook with regard to public participation were clearly insufficient to fulfil the requirements of section 4 of PAJA, or of proper public participation as a general matter. The simple and undeniable fact is that Minister failed to consult the mining affected communities. He did not afford them a reasonable opportunity to know about the issues and to have an adequate say.

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[42] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (cc) para 45

[43] Land Access Movement of SA v Chairperson of the NCOP 2016 (5) SA 635 at para 60 ("Land Access")

[44] New Clicks 2006 (2) SA 311 (CC) at para 630

74. The Minister says it would be impractical to consult with each and every community. The fifth to eighth applicants do not contend that the Minister was required to consult with each and every one of the hundreds of mining affected communities in South Africa.[45] What he was required to do is identify the communities affected, and make a good faith and reasonable attempt to give all of them an opportunity to participate. On his own version, he did not do that.

75. Consultation is not a matter of going through the motions. What is required is a meaningful engagement with those affected. This involves two steps: ensuring they are aware or given the platform to engage; and ensuring that the consultation results in consideration of their input. The second cannot happen without the first.

76. In *Scalabrini* the H igh Court held:[46]

> "...First, a substantive level, consultation entails a genuine invitation to give advice and a genuine receipt of that advice .... Consultation is not to be treated perfunctorily or as a mere formality... This means, inter alia, that engagement after the decision-maker has already reached his decision or once his mind has already become 'unduly fixed' is not compatible with true consultation... Secondly, At the procedural level, consultation may be conducted in any appropriate way determined by the decision-maker, unless a procedure is laid down in the legislation. However, the procedure must be one which enables consultation in the substantive sense to occur. This means that sufficient information must be supplied to the consulted party to enable it to tender helpful advice; sufficient time must be given to the consulted party to enable it to provide such advice; and sufficient time must be available to allow the advice to be considered..."

[45] Fifth to the eighth applicants' Founding Affidavit vol 19 pages 1940 to 1988.

[46] Scalabrini Centre and Others v Minister of Home Affairs and Others 2012 (3) SA 531 (WCC) para 72

77. On the Minister's own version, the initial version of the 2017 Charter was prepared without any community input[47] - this despite the fact that the failure of previous Mining Charters to ensure mine community development was one of the reasons for the drafting of the document.[48]

78. The Minister invited representations on platforms to which the largely rural and poor affected communities, including the applicants, do not have access.[49] The Minister has not disclosed in which newspapers the notices were published. The advertisement and the draft 2017 Charter appear to have been published only in English,[50] despite the fact that many residents of rural communities cannot read English.[51]

79. Courts have been particularly protective of the rights of marginalized parties in the context of fair consultative process.[52] Sachs J wrote in *Doctors for Life*:[53]

> "Public involvement...[is] of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections"

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[47] Minister's Answering Affidavit para 16 vol 21 pages 2232.12 – 2232.13.

[48] First Applicant's Founding Affidavit Annexure "FA5" vol 2 page 162 – 164

[49] Fifth to eighth applicants' Founding Affidavit para 50 vol 19 pages 1957 – 1958

[50] Minister's Answering Affidavit Annexure "AA1" vol 22 pages 2232.66 – 2232.67

[51] Fifth to eighth applicants' Founding Affidavit Annexure "OK12" vol 21 pages 2149 – 2157

[52] Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others 2008 (5) BCLR 475 (CC) para 15

[53] Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC) para 234

80. More was required of the Minister than publications on inaccessible platforms, in a language that many mining affected communities do not speak or read. Far from being afforded the opportunity to be listened to, most mining communities were unaware that a consultative process was underway at all. This was the case for the fifth to eighth applicants.

81. The Minister's claim of "extensive" engagement with stakeholders as sufficient consultation with mining-affected communities, rings hollow in the light of what followed.[54] When comment was called for on the draft 2017 Charter, just over 60 representations were submitted.[55] Of these, one was from a mining affected community organization.[56] This limited response from a key class of stakeholder should have raised an alarm for the Minister and his Department.

82. The Minister's approach to consultation with mining affected communities was ad hoc, unstructured, and extremely limited. The Minister made no genuine effort to ensure that this group of interested and affected parties was afforded the reasonable opportunity to "know about the issues and have adequate say". To the contrary, his effort represented little more than empty ritual.

83. The "consultation" was insufficient, unreasonable and unfair. It did not comply with section 4 of PAJA.

[54] Minister's Answering Affidavit para 51 vol 22 page 2232.25

[55] Minister's Answering Affidavit Annexure "AA3" vol 22 pages 2232.69 – 2232.219

[56] Minister's Answering Affidavit Annexure "AA3" vol 22 page 2232.135

Procedural inadequacy under the principle of legality

84. Rationality requires that the procedure selected by the Minister must be rationally related to the objective sought to be achieved, and the purpose for which the power is conferred upon him.

85. The Minister has a statutory obligation to develop the Mining Charter. The purpose of the Mining Charter is to ensure the fulfilment of the objects set out in the MPRDA, in order to fulfil the transformational imperative embedded in the Act and in the Constitution. The Minister is obliged to develop an amended Mining Charter that achieves this. The procedure he chooses must be rationally related to that objective.

86. The Minister's failure to implement a public participation process that collected input from a wide range of mining affected communities necessarily undercut his ability to address the negative impacts of mining on those communities. By not seeking and obtaining information and input from those affected as to the impact of mining on their lives, and how this could be changed in order to achieve the purpose of a Mining Charter, he disabled himself from properly carrying out the task which the MPRDA imposes on him.

87. In the absence of proper engagement with this critical constituency, the Minister cannot know whether and to what extent the purpose of his power has been served, and whether and to what extent it will be served by the new Mining Charter.

88. The fifth to eighth applicants have described how their daily lives, and the lives of other affected communities, are impacted by the mining operations on their land.[57]

89. The 2017 Charter must be the product of, and must reflect, the involvement and contribution of those who are affected. Mine hosting communities cannot be termed "stakeholders" by the Minister,[58] and then be treated as mere passive recipients of whatever benefits that the Minister sees fit to include in a Mining Charter, which will fundamentally affect their rights and interests.

90. We submit that the Minister failed in this respect. The process undertaken by the Minister did not and could not properly elicit and consider the views of the mining affected communities. The process was therefore irrational.

91. We submit below that in fact, the 2017 Charter fails to ensure the achievement of the objects of the MPRDA. This is a direct result of a failure properly to consult.

92. The Minister's failure to consult or adequately consult the mining affected communities renders the process irrational. The product of that process, namely the 2017 Mining Charter, therefore falls to be set aside.

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[57] See Fifth to the eighth applicants' Founding Affidavit paras 120–124 vol 19 pages 1980 -82

[58] Minister's Answering Affidavit at para 28 vol 21 page 2232.17.

FAILURE TO COMPLY WITH AND FULFIL THE OBJECTS OF THE MPRDA

93. The Charter must be capable of achieving the end of transforming the mining industry. It cannot be purely aspirational. It is the central pivot around which the transformational objectives of the MPRDA are to be achieved.

94. The Preamble of the MPRDA identifies the State's obligation to ensure the development of the mineral and petroleum industries in a manner that safeguards the environment and promotes economic and social development, with a focus on the "*social upliftment of communities affected by mining*". We have described above the section 2 objects of the MPRDA which are of particular relevance to this application.

95. Section 100(2)(b) requires that the Mining Charter ensure that the objects of the Act that speak to eradication of discrimination and the upliftment of mining-affected communities will be achieved.

96. The 2017 Charter fails on two connected bases. First, as we have described above, it is the product of a defective consultation and participation process. It consequently fails to reflect proper consideration of the views, experiences and needs of mine affected communities. Second, and as a result, the 2017 Mining Charter fails to

bring about a framework that will ensure effective transformation of the mining industry in relation to mine-affected communities.

97. Insofar as the 2017 Charter fails to fulfil the statutory objective and imperative, it should be set aside, both under PAJA and under the principle of legality.[59]

98. We submit that:

98.1 The 2017 Charter is inconsistent with the Constitution as it fails to equally protect and benefit the affected communities.[60]

98.2 The 2017 Charter fails, contrary to the objectives of the Act, to address the transformative purposes of the mining industry in relation to mine community development - which is essential to address past inequalities,[61] and is the statutory imperative.

98.3 The 2017 Charter reflects a failure to consider relevant considerations, including issues fundamental to socio economic equality such as land rights;[62]

98.4 The 2017 Charter is vague and lacks detail on how its proposed objectives will be met.[63] It does not -[64]

[59] Fifth to eighth applicants' Founding Affidavit para 26 vol 19 page 1950; see also paras 42 – 44 vol 19 at page 1956

[60] Fifth to eighth applicants' Founding Affidavit para 74 vol 19 page 1964

[61] Fifth to eighth applicants' Founding Affidavit para 41 vol 19 page 1955

[62] Fifth to eighth applicants' Founding Affidavit para 96 vol 19 page 1972

98.4.1 address the need for a system for monitoring and evaluation of compliance;

98.4.2 address the need for clear enforcement mechanisms, including effective processes for lodging complaints;

98.4.3 make provision for the publication of the Mining Charter compliance reports;

98.4.4 ensure that affected communities are afforded access to all relevant documents such as the compliance reports.

Land rights: failure to consider relevant considerations

99. The 2017 Charter is reviewable on the basis that relevant considerations were not considered in terms of section 6(2)(e)(iii) of PAJA.

100. This is most clearly reflected in the failure to consider, and address, the fact that hosting communities face significant challenges to their ability to use and benefit from their land. In the case of the seventh applicant, it has no access to this land at all. The experience of the communities generally is that their surface rights are totally subjugated to the mining

[63] Fifth to eighth applicants' Founding Affidavit paras 94 (including 94.1 to 94.4) and 95 vol 19 pages 1971 – 72. See also paras 78 and 84 vol 19 pages 1965, 1967

[64] Fifth to eighth applicants' Founding Affidavit paras 94.1 to 94.4 vol 19 page 1971

rights obtained by mining companies. This has fundamentally damaged the socio economic development of these communities:

100.1 The fifth applicant, the Sefikile community, purchased the Spitzkop farm in 1912.[65] Apartheid laws prevented the registration of the land in their name. Mining began on the community's property in 1946.[66] Today, their access to the land is limited. They receive no benefit from the mining operations that now surround them[67]. To the contrary, they experience constant environmental and noise pollution, cracked homes, and the occupation of their land.[68] The community live in poverty.[69]

100.2 The sixth applicant, the Lesethleng community, face similar circumstances[70]. Their conditions are even more precarious, as today they face eviction at the behest of the mine operating on their land.[71] They too live in poverty.[72]

100.3 The seventh applicant, the Makola community, were forcibly removed from their land in 1957 under apartheid.[73] They have

[65] Fifth to the eighth applicants' Founding Affidavit para 100 vol 19 page 1974
[66] Fifth to the eighth applicants' Founding Affidavit paras 100 – 102 vol 19 page 1974
[67] Fifth to the eighth applicants' Founding Affidavit para 102 vol 19 page 1974
[68] Fifth to the eighth applicants' Founding Affidavit para 102 vol 19 page 1974
[69] Fifth to the eighth applicants' Founding Affidavit para 104 vol 19 page 1975
[70] Fifth to the eighth applicants' Founding Affidavit paras 105-109 vol 19 pages 1975-76
[71] Fifth to the eighth applicants' Founding Affidavit para 115 vol 19 page 1978
[72] Fifth to the eighth applicants' Founding Affidavit para 125 vol 19 page 1982
[73] Fifth to the eighth applicants' Founding Affidavit para 13 vol 19 pages 1945 - 46

fought since then for recognition of their ownership of the land. Today, those efforts are thwarted by the mining on this land.[74] A restitution award would be empty, because they have again lost (through the MPRDA) what they lost under apartheid.

101. This is the common experience of mining affected communities. Yet the 2017 Charter fails to reflect consideration of the intersection of community land rights with mining.[75] Instead, it contains a single provision on the issue of community development (Clause 2.5), which shows no real consideration of the need to protect the land rights of hosting communities, and is in any event so vague as to be of little assistance. We address this below.

102. The Minister has patently failed to consider the close link between socio-economic rights and land rights, particularly in the case of rural communities such as the applicants.[76] Mining affected communities will not be able to achieve socio economic development while their land rights are ignored and destroyed. The 2017 Charter does not address this. It was plainly not considered.

103. A Mining Charter needs to address issues of tenure security, surface rights, and the constitutional land rights of indigenous communities in

[74] Fifth to the eighth applicants' Founding Affidavit para 17 vol 19 page 1947

[75] Fifth to the eighth applicants' Founding Affidavit para 117 vol 19 page 1878

[76] Port Elizabeth Municipality v Various Occupiers 2004 (12) BCLR 1268 (CC) para 19. See also Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 at para 74

relation to the exercise of mining rights. This is necessary to achieve the transformational imperative of the MPRDA.

104. The 2017 Charter reflects a failure by the Minister to have regard to the relevant consideration of the land rights of communities such as the applicants.

Community development: failure to consider relevant information, vague and confusing provisions, disconnection with empowering provision

105. Clause 2.5 is the primary element of the 2017 Charter concerning the fulfilment of section 2 (i) of the MPRDA, which aims to "*ensure that holders of mining and production rights contribute towards the socio economic development of the areas in which they are operating.*" We submit that Clause 2.5 is vague, reflects a failure to consider relevant information with respect to mining affected communities, and lacks a rational connection to the requirements of the MPRDA.

106. The Minister does not dispute the common circumstances of mine hosting communities in this country, including the applicants.[77] They include an inability to exploit their land to its fullest potential; a struggle to obtain participation in mining operations on their land; unemployment; poverty; and environmental pollution.[78]

[77] Fifth to eighth applicants' Founding Affidavit paras 120 - 125 vol 19 pages 1980 - 1982

[78] Fifth to eighth applicants' Founding Affidavit para 120 vol 19 page 1980

107. The 2015 Assessment undertaken by the Department to measure the effectiveness of the 2004 and 2010 Charters revealed that "mining host communities have historically endured a disproportionate negative socio economic impact from the development of mining" and that the majority of mining rights holders had not met the targets for mine community development set in the 2010 Charter.[79]

108. The Preamble to the 2017 Charter notes that this assessment revealed that "*there remains a long way to go for the mining and minerals industry to be fully transformed*" and "*[w]hereas the MPRDA has transferred the ownership of the mineral wealth of the 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*".[80]

109. One would therefore expect that the Minister would ensure that the single provision (2.5) in the 2017 Charter which addressed the need for socio economic improvement in mining affected communities and in particular hosting communities, would reflect specific imperatives so that rights holders can meaningfully contribute to development and be measured on that contribution. However, clause 2.5 does not do this. Instead:

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[79] Record of Review vol 3 pages 255, 264

[80] First Applicant's Founding Affidavit Annexure "FA5" vol 2 page 163. The preamble to the 2017 Charter refers to an assessment which began in 2014, but which is dated May 2015 (see Record of Review vol 3 page 223, noting that "[a]s of 2014, the Mining Charter had been in force for a decade. This report presents the finding of an assessment in terms of the extent of progress to date").

109.1 The clause does not provide critical definitions and standards;[81] and

109.2 the method of measuring compliance is so vague as to be incomprehensible.[82]

110. We submit that the 2017 Charter fails to establish obligations of mining rights holders that can reasonably achieve the fulfilment of section 2 (i) of the MPRDA with respect to socio economic development. On this basis, it falls to be reviewed in terms of section 6(2)(i) of PAJA, alternatively under the principle of legality.[83]

111. We further submit that the content of Clause 2.5 demonstrates a failure to have regard to the need to address the fact that mining host communities bear a particular burden with respect to the impact of mining.[84] This is despite the results of the 2015 Assessment and the acknowledgement of this need in the Preamble to the Charter.[85] Clause 2.5 simply instructs rights holders to contribute towards "Mine Community Development" in what appear to be two, limited ways; we submit that neither of these will necessarily address the specific needs of mine hosting communities.[86]

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[81] Fifth to eighth applicants' Founding Affidavit para 131 vol 19 page 1985

[82] Fifth to eighth applicants' Founding Affidavit paras 132 - 33 vol 19 page 1985 - 86

[83] Fifth to eighth applicants' Founding Affidavit paras 118 – 119, 131 - 134 vol 19 pages 1979, 1984 - 86

[84] Fifth to eighth applicants' Founding Affidavit para 135 vol 19 page 1986

[85] Fifth to eighth applicants' Founding Affidavit para 136 vol 19 page 1986

[86] Fifth to eighth applicants' Founding Affidavit para 137 vol 19 page 1987

112. The Charter (including Clause 2.5) therefore fails to meet the requirements of section 6(2)(e)(iii) of PAJA, alternatively breaches the principle of legality.

113. We further submit that these failures together have result that the Charter (including Clause 2.5) is incapable of fulfilling the legislative mandate of the MPRDA with specific respect to the development of mine hosting communities.[87] Consequently, the Charter is not rationally connected to a key purpose of the empowering provision (the MPRDA).

Community ownership: vague and confusing provisions, disconnection with empowering provision

114. Clauses 2.1.1.3(b), 2.1.1.9 and 2.1.1.10 (the "ownership provisions") of the 2017 Charter concern the ownership structures to be created for communities in order to enable their participation in the mining operations that affect them. We submit that the principle of substantive economic participation by communities in these operations must be an essential feature of a new Mining Charter in order to give effect to the MPRDA object 2(c), which requires the promotion of "equitable access to the nation's mineral and petroleum resources to all the people of South Africa".[88]

[87] Fifth to eighth applicants' Founding Affidavit para 138 vol 19 page 1987

[88] Fifth to eighth applicants' Founding Affidavit para 76 vol 19 page 1964

115. We submit that the ownership provisions are impermissibly vague, and will deny communities their autonomy and agency, inconsistently with the transformational objectives of the MPRDA.[89] The ownership provisions breach the principle of legality.

116. Our main submissions in this respect are the following:

116.1 The MPRDA was enacted in order to "make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources" and in consideration of "the state's obligation under the Constitution to take legislative and other measures to redress the results of past racial discrimination" as provided in section 9(2) of the Constitution;[90]

116.2 Section 9 of the Constitution provides that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law". The MPRDA reflects this imperative through section 2(c), which includes mining affected communities and in particular hosting communities;[91]

116.3 The 2017 Charter purports to give effect to this principle and object, through the ownership provisions;[92]

[89] Fifth to eighth applicants' Founding Affidavit para 70 vol 19 page 1963
[90] Fifth to eighth applicants' Founding Affidavit para 72 vol 19 page 1963
[91] Fifth to eighth applicants' Founding Affidavit para 74 vol 19 page 1964
[92] Fifth to eighth applicants' Founding Affidavit para 73 vol 19 page 1963

116.4 However, the ownership provisions do not require and enable community participation. Instead the state seeks to take control of community benefits through a state trust to be managed by a "Mining Transformation and Development Agency".[93]

117. We submit that the ownership provisions do not have a rational connection with the empowering provision, as reflected in section 100(2)(b) and object 2(c) of the MPRDA.

118. By placing the instrument of "community participation" in the hands of the state, the ownership provisions effectively undermine the mandate of the MPRDA, which requires that the Charter facilitate equitable access to the nation's resources, together with facilitating the socio economic development of communities most affected by mining. Mining communities can only achieve meaningful empowerment if they have active control of their mining interests. The lack of rational connection between the ownership provisions and the mandate of the MPRDA demonstrates a failure to meet the requirements of section 6(2)(f)(ii)(bb) of PAJA, alternatively a breach of the principle of legality

119. This is squarely raised by the fifth to eighth applicants in their founding affidavit.[94] The Minister does not deny, except by way of a blanket denial, that the ownership structure will deny the affected communities

[93] Fifth to eighth applicants' Founding Affidavit para 73 vol 19 pages 1963 - 64

[94] Fifth to eighth applicants' Founding Affidavit para 70-81 vol 19 pages 1962 – 1981. Minister's Answering Affidavit para 72-74 pages 2232.29 – 2232-30.

agency and control. He offers no MPRDA-compliant justification for this.

120. We further submit that the ownership provisions are in any event fatally vague, in beach of the requirements of 6(2)(i) of PAJA, alternatively the principle of legality. There is no detail with regard to the creation and functioning of the proposed Mining Transformation and Development Agency, nor how and whether communities will benefit from their purported ownership interests through this Agency.

121. We therefore submit that while the ownership provisions purport to give effect to the transformation required by the MPRDA, in fact they do not do so.

Reporting, Monitoring and Compliance: failure to consider relevant considerations, unlawful vagueness, irrational disconnection with empowering provision

122. Clause 2.9 of the 2017 Charter provides the framework for reporting on and monitoring the 2017 Charter through enforcement and compliance mechanisms. It is necessary for the Charter to ensure that the objects of the MPRDA are achieved, in accordance with to the legislative mandate of the Act. However, Clause 2.9 does not provide a regulatory regime which will ensure actual achievement.[95] It is drafted in a manner that is inconsistent with the requirements of the MPRDA, inadequately

[95] Fifth to eighth applicants' Founding Affidavit para 84 vol 19 page 1967

reflects recognition of historical failures of the industry to comply with Mining Charter requirements, and is impermissibly vague.

123. The importance of Clause 2.9 is rooted in the history of non-compliance by the mining industry with obligations of the 2004 and 2010 Charters. The Minister disputes that there has been a lack of compliance.[96] But the 2009 and 2015 Assessments tell another story: they reveal that the fulfilment of relevant Mining Charter requirements was limited in many respects, and in particular in respect of Mine Community Development.[97]

124. In order to fulfil its statutory function, the 2017 Charter has to deal with compliance in a manner that reflects recognition of, and has regard to, the information contained in the 2008 and 2015 Assessments.[98]

125. Clause 2.9 is largely a repeat of what was contained in the 2010 Charter with respect to compliance, and a dilution of a similar provision in the 2004 Charter.[99] Neither the Record nor the Minister shows how a near replica of a previously inadequate enforcement provision will or will likely lead to different results in relation to the 2017 Charter. This can only reflect a failure on the part of the Minister to have regard to the results of the 2009 and 2015 Assessments. The Charter and Clause 2.5

[96] Minister's Answering Affidavit paras 75 – 76 vol 22 page 2232.30

[97] Record of Review vol 3 pages 197 – 198, 203, 223 – 224, 239, and 255.

[98] Fifth to eighth applicants' Founding Affidavit para 92 vol 19 page 1970

[99] Fifth to eighth applicants' Founding Affidavit para 92 vol 19 page 1970

therefore fail to satisfy the requirements of PAJA section 6(2)(e)(iii) of PAJA, alternatively breach the principle of legality.

126. In any event, Clause 2.9 is also impermissibly vague. It fails to specify necessary detail as to the monitoring system that the Department will implement, it sets out no enforcement mechanisms, and it makes no provision for publication of the compliance reports in order to promote transparency and accountability.[100]

127. We submit that a provision so lacking in substance will necessarily result in failures of execution, and will make it impossible for mining affected communities to hold mining rights holders to account. Because an effective enforcement framework is essential to ensuring that the Mining Charter is able to fulfil its statutory objectives, these failures on the part of the Minister reflect a breach of section 6(2)(i) of PAJA through the vague manner in which it is drafted, and section 6(2)(f)(ii)(bb) through the failure to give effect to the requirements of the MPRDA; alternatively, they breach the principle of legality.

THE RELIEF SOUGHT BY THE FIFTH TO EIGHTH APPLICANTS

128. We submit that the 2017 Charter falls to be set aside.

129. The consequence is that the Minister should be directed to start the process afresh, using a properly consultative approach that seeks to

[100] Fifth to the eighth applicants' Founding Affidavit para 94 including 94.1 – 94.4 vol 19 pages 1971 - 72

obtain and consider the views and experiences of mining affected communities across the nine provinces.

130. Declaratory relief in the form prayed for in paragraph 2 of the Notice of Motion would further clarify the fundamental objective of the Mining Charter, in particular respect of mining affected communities.

131. The result of the failure of the 2017 Charter will be further delay in the achievement of the rights of the affected communities under the Constitution and the MPRDA. It would be perverse, and not just and equitable, if the consequence of the Minister's failure were further prejudice to those whose interests the Charter is required to further and protect. Interim remedial relief would be just and equitable.

GEOFF BUDLENDER SC

MPILO SIKHAKHANE

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18 December 2017

TABLE OF AUTHORITIES

CASE LAW:

ITEM	DESCRIPTION
1.	*Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC)
2.	*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affaird* 2004 (4) SA 490 (CC)
3.	*City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA)
4.	*Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP)
5.	*Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC)
6.	*Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC)
7.	*Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC)
8.	*Hospital Association of SA Ltd v Minister of Health* 2010 (10) BCLR 1047 (GNP)
9.	*Joseph v City of Johannesburg* 2010 (4) 55 (CC)
10.	*Land Access Movement of SA v Chairperson of the NCOP* 2016 (5) SA 635
11.	*Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC)
12.	*Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (5) BCLR 475 (CC)

13. *Pharmaceutical Manufacturers Association of SA: in re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)

14. *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC)

15. *Scalabrini Centre v Minister of Home Affairs* 2012 (3) SA 531 (WCC)

16. *Walele v City of Cape Town* 2008 (6) SA 129 (CC)