IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 71147/17

In the matter between:

THE 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 PHUTI 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

KINDLY TAKE NOTICE THAT the First Amicus, National Union of Mineworkers, hereby files its Heads of Argument in this matter.

Signed at **Johannesburg** on the **13th** day of **December** 2017

FINGER PHUKUBJE INC. ATTORNEYS
Attorney for First Amicus: National Union of Mineworkers
Email: thuso@fpinc.co.za
chris@fpinc.co.za
Ref: Mr. Finger/ Mr Modisane/NUM/649/17
c/o Nonyane Incorporated
37 Jansen Street, The Orchards Ext 3
Pretoria, 0182
PO Box 42109
Boordfontein, 0201
Tel: 012 549 5824
Fax: 012 549 7257

TO :

The Registrar of the
above Honourable Court
Pretoria

AND TO :

NORTON ROSE FULBRIGHT SOUTH AFRICA INC
Attorneys for applicant
15 Alice Lane
Sandton
Tel : 011 685 8500
Fax : 011 301 3200
Ref : CMI259/ Mr AP Vos/ Ms K Kalyan
Email:andre.vos@nortonrosefulbright.com
kirthi.kalyan@nortonrosefulbright.com
c/o Mothle Jooma Sabdia Inc
Ground Floor,Duncan Manor
Cnr Jan Shoba (Duncan) & Brooks Streets
Brooklyn,Pretoria
Tel : 012 362 3137
Fax : 012 362 4139
Email : ebrahimJ@mjs-inc.co.za

For: Respondent

AND TO:

CENTRE FOR APPLIED LEGAL STUDIES
Attorneys for Second to Fourth Applicants
1st Floor, DJ du Plessis Building
1 Jan Smuts Avenue
Braamfontein
Ref: Ms W Phama
Email: wandisa.phama@wits.ac.za
c/o Savage Jooste Attorneys Inc
141 Boshoff Street
Nieuw Muckleneuk
Pretoria

For: Second to Fourth Applicants

AND TO:

LAWYERS FOR HUMAN RIGHTS
Attorneys for Fifth to Eight Applicants
Democracy Centre
357 Visagie Street
Pretoria
Ref: LHR/Mining/Lou/M08/
Att: Ms T Mugunyane/Ms L du Plessis
Email: louise@communitylaw.co.za
Tel: 012 320 2943
Fax: 012 320 6852

For: Fifth to Eighth Applicants

AND TO:

SERFONTEIN VILJOEN & SWART
Attorneys for Amicus: Solidarity Trade Union
165 Alexander Street
Brooklyn
Pretoria
Tel: 012 362 2556
Fax: 012 362 2557
Email: jd@svslaw.co.za
Ref: MR CLAASSEN/fb/CS0227

For: Second Amicus Curiae

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

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CHAMBER OF MINES OF SOUTH AFRICA	First Applicant
MINING AFFECTED COMMUNITIES UNITED ACTION	Second Applicant
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MINISTER OF MINERAL RESOURCES	Respondent
And	
NATIONAL UNION OF MINEWORKERS	First *Amicus Curiae*
SOLIDARITY TRADE UNION	Second *Amicus Curiae*

NUM'S HEADS OF ARGUMENT

Introduction

1. This is an application by the Chamber of Mines of South Africa ('*the Chamber*') and seven other applicants who seek review and setting aside of the Broad-

Based Black Economic Empowerment Charter ('*the Charter*'), which was published in June 2017.[1]

2. The National Union of Mineworkers ('*NUM*') applied for and has now been admitted in these proceedings as a friend of the Court.[2] It takes the role of addressing additional constitutional considerations that it submits have not been properly attended to by the main parties for the Court to consider when adjudicating this application.

3. NUM's accepts that, generally, the Charter is fraught with provisions which render it reviewable. However, it disagrees with the Chamber's contention that the Charter must be expunged in *toto* and that the Minister does not have the powers or authority to review the Charter.

4. Also, NUM does not agree that there was no proper consultation during the development stages of the Charter. Finally, NUM does not accept that some of the provisions of the Charter will have negative effects on the mining industry and the South African economy in general.

5. We expound on the issues from the preceding paragraph detail below.

6. Suffice to mention at this stage that, as *Amicus Curiae*, NUM limits its participation in this application to deal with the following issues:

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[1] Charter as published in Government Gazette No. 40923 on 15 June 2017.
[2] See the Court's order of 24 November 2017.

6.1. purpose of the Charter;

6.2. background to the development of the Charter;

6.3. brief factual matrix concerning public participation in the formulation and promulgation of the Mining Charter 2017;

6.4. consultation, that is, the meaning and extent of public participation in the context of the Constitution;

6.5. interpretation of section 100(2)(a) of MPRDA;

6.6. does Charter have binding effect?

6.7. criticism of the Charter;

6.8. an analysis of comparable foreign laws regulating the mining industry, in particular, regarding local participation in the industry; and

6.9. conclusion.

Purpose of the Charter

7. The main objective of the MPRDA which are transformational in nature are embedded in section 2 of the Act, which include:

7.1. the promotion of equitable access to the nation's mineral and petroleum resources;[3]

7.2. to substantially and meaningfully raise opportunities for Historically Disadvantaged South Africans ('*HDSA*') to partake in the mining industry and to derive benefit from so participating;[4]

7.3. by promoting economic growth and mineral and petroleum resources development.[5]

8. Furthermore, MPRDA makes its (legitimate purpose) transformation objectives more identifiable by requiring the Minister to develop the Charter within six months of its promulgation. In particular, we add, MPRDA requires the Minister to set the targets and time frames for entry into the mining industry of HDSA's.

9. Read in the context of the provisions of section 100(2) of MPRDA, the Charter is a government's means that seeks to achieve the much needed transformation of the mining industry so as to derive benefit for South Africans generally.[6] Put in proper perspective, the Mining Charter represents government's sole mechanism which is designed to achieve mutually symbiotic sustainable economic growth and broad based economic empowerment, and meaningful transformation of the mining industry.

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[3] Section 2(c).
[4] Section 2(d).
[5] Section 2(e).
[6] NUM FA p33 at para 69.

10. Its ultimate purpose is to ensure that South Africans in general derive benefit from the Country's wealth of minerals and petroleum resources.

Background to the 2017 Charter

11. We respectfully submit that the development of the Charter was made possible by the provisions of the Minerals and Petroleum Resources Development Act, 2002 ('*MPRDA*').[7] We submit with respect that the provisions of section 100(2)(a)[8] of the Act should be read as empowering the Minister to develop, review and amend the Charter. The Act imposes an obligation on the Minister to transform the mining industry through development of the Charter.

12. In this regard we submit that the power or duty imposed upon the Minister to develop the Charter include the power to review and, where appropriate, amend the Charter so as to ensure that the purpose for which the Act required of the Charter is achieved.[9]

13. The powers that are conferred on the Minister, with the concomitant obligations, are there to ensure that one of the main purposes of the empowering statute,

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[7] Act No. 28 of 2002.

[8] Section 100(2)(a) reads: *"To ensure the attainment of the Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources."* (Own emphasis)

[9] Moleah v University of Transkei 1998 (2) SA 522 (TkH); Also, City of Cape Town v Claremont Union College 1934 AD 414 at 420-422.

that is, to ensure that transformation in the mining industry as a whole takes place.[10]

14. In this connection, therefore, we disagree also with the contention raised by Solidarity that the Minister does not have the power to issue a further charter or amendments to the Original Charter.[11]

15. As discussed earlier, the requirement that legislative prescripts should be interpreted to mean that powers that are expressly granted include those powers that are reasonably necessary or incidental to the powers expressed in legislation.[12] We simply disagree with the notion that the development and adoption of the Charter was a once off affair, incapable of review or amendment.

16. Concerning the full extent of powers of the Minister, we refer to the SCA judgement in **MEC: Department of Education North West Province and Another v FEDSAS** the Supreme Court of Appeal recently affirmed this position where it held that:

> *"[19] The assertion that the MEC had simply no power to promulgate the hostel regulations, militates against the established principle of interpretation that powers expressly granted must be interpreted to include those powers reasonably necessary or incidental to those powers. See City of Cape Town v Claremont Union College 1934 AD*

[10] NUM FA p30 at para 61.
[11] Solidarity HoA p6 at para 10.1.
[12] (021/2016) [2016] ZASCA 192 (1 December 2016).

414 at 420 recently followed in Engen Petroleum Limited v The Business Zone 1010 CC trading as Emmarentia Convenience Centre [2015] ZASCA 176 para 21." (Own emphasis)

17. For similar reasons, therefore, any contention which is made to the effect that the Minister does not have powers to review, issue a further Charter or to make amendments to the existing Charter stands to be rejected by the Court.

18. We submit that that section 100(2)(a) of the MPRDA imposed a duty upon the Minister to ensure that the Charter is developed within six months of its promulgation, to address issues such as transformation of the industry, is merely a starting point. Transformation is not a once-off event but a process that is achievable over time.

19. To achieve true transformation, an effort from all stakeholders is needed to ensure that the industry is transformed and that South Africans, generally, can derive some benefit from it. We align with the views expressed by Yacoob J in the well-known **Grootboom**[13] judgement where he held that the enjoyment of socio-economic right is not solely the responsibility of government, but that the private sector has to play its role as well.

[13] Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC).

20. From the **Goodboom** judgement we also find that the Court recognised that the majority of South Africans live in deplorable conditions, that is, in abject poverty. Yacoob J noted:[14]

> *"This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. ..."*

21. Although the judgement's focus was on poor people who could not do much for themselves and who needed social assistance, we submit the conditions under which the majority of labourers in the mining industry and the mining communities live under are no different as they continue to live in abject poverty. This is largely the effect of lack of transformation of the industry, which, in turn, breeds tension between the workers and mining communities.[15]

22. Since the first Mining Charter ('*the Original Charter*') was promulgated in 2004,[16] now thirteen years after the fact, introducing necessary measures which were aimed to transform the industry and to eradicate the pains of the past where the majority of South Africans were denied an opportunity to benefit from the industry, much has not changed.[17] With the adoption of the Original Charter, we submit, that for the first time in history, the Country had a legislative instrument[18] which took positive steps towards transforming the industry which

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[14] *Ibid* at para [93].
[15] NUM FA p18 at para 36.
[16] Original Charter was promulgated on 01 May 2004.
[17] Assessment of the Broad-based Socio-economic Empowerment Charter for the South African Mining Industry (Mining Charter), May 2015 at p18 of the report.
[18] The MPRDA generally and the Charter.

notoriously marginalized the majority groups or working class and women for reason that are deplorable.

23. The Original Charter was first reviewed and amended in 2010. This was done without any complaint being raised by the Chamber that is, concerning the Minister's powers to review and/or amend the Original Charter.

24. We submit with respect that the complaint that the Minister lacks powers to review and/or amend the Charter are unfounded and aimed at maintaining the status quo of an industry that benefits only the minority, while labourers and host communities are subjected to atrocious conditions.

25. In view of the report by Minister Ramatlhodi, it became necessary for measures to be taken to ensure that transformation becomes more than just written legal or legislative texts. The report sparked the process of, once again, reviewing the Charter to ensure the transformation objectives of the MPRDA are realised.[19]

26. This was necessitated by the undeniable reality that, as late as 2014 and even currently, the majority of the mining companies represented by the Chamber of Mines have reneged on their commitment to reach the targets to transfer 26% equity to Historically Disadvantaged South Africans (which is hereafter called the *"HDSA"*) as espoused in the Original Charter.[20]

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[19] NUM FA p20 at para 39.
[20] NUM FA p20 at para 40.

27. The Department began the process of reviewing and taking necessary steps to improving the lives of the mining workers and the host communities who, up to this stage, live in squalor in spite of the lucrative mining activities taking place around them.

28. We briefly outline the consultative processes that unfolded below, and in which NUM participated.

Consultation processes

29. The Charter, or its development, has implications on a substantially large society from mining companies, the workers and mining communities. This list is by no means exhaustive. The South African economy has for decades been anchored on the mining industry.

30. It is well-known by now that the Promotion of Administrative Justice Act, 2000[21] ('*PAJA*') has its origins from section 33 of the Constitution.

31. The Constitution requires that every person has a right to an administrative action that is '*lawful, reasonable and procedurally fair*'.[22] Furthermore, the Constitution guarantees that every person whose rights have been adversely affected by an administrative decision is entitled to be provided with reasons for that decision or action.[23]

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[21] Act No. 3 of 2000.
[22] Section 33(1) of the Constitution.
[23] Section 33(2) of the Constitution.

32. The law has become settled under the current constitutional dispensation that, whenever an administrative body or person intends to take a decision or action that may carry adverse effect on others has to ensure that such a decision or action is procedurally fair.[24]

33. What constitutes a fair administrative procedure depends on the circumstances of each particular case. Section 3(2)(b) of PAJA enumerates measures which must be complied with for an administrative action to be considered procedurally fair, including that:

33.1. adequate notice of the nature and purpose of the proposed administrative action be given;

33.2. the administrator must make available a reasonable opportunity for people to make representations; and

33.3. there must be a clear statement of the administrative action.

34. Section 4(1) of PAJA deals specifically with administration action which affects the public and it provides that:

"4.(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether—

[24] Section 3(1) of PAJA.

(a) to hold a public inquiry in terms of subsection (2);

(b) to follow a notice and comment procedure in terms of subsection (3);

(c) to follow the procedures in both subsections (2) and (3);

(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or

(e) to follow another appropriate procedure which gives effect to section 3."

35. The administrative action in the present case involves the development and publication of the Mining Charter 2017 ('*the Charter*'). The development of the Charter followed a laborious process that began during or about the year 2015, when the Minister of Mineral Resources published an intention to amend the then existing Charter.[25]

36. PAJA empowers on the administrator concerned to decide a procedure that will be followed when giving the right to procedurally fair administrative action.[26] The procedure envisaged can take either the form of public consultation or notice and comment.

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[25] Government Gazette of 15 April 2016.
[26] Sub-section 4(1) (a) and (b).

37. Notice of the reviewed Charter, in draft form, was first published in the government gazette on 15 April 2016,[27] calling upon any interested member of society, generally, and stakeholder or role players in the industry, specifically, to submit their written representations to one Ms. Sibongile Maile within thirty days of publication.

38. On 31 May 2016, albeit after the thirty day deadline, NUM prepared and submitted its written representations to the Department's chosen recipient.[28] The submissions covered the following areas, *inter alia*:

38.1. question of ownership,[29] where it was proposed that workers must be afforded 10% initial (unencumbered) ownership, which will ultimately grow to reach 15%;

38.2. second was the issue of procurement, in terms of which NUM proposed that the industry should procure 40% initially in 2018 and ultimately 60% by 2022 of its goods from companies that comply with BEE legislation and policies;[30]

38.3. the question of beneficiation;[31]

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[27] Government Gazette No. 39933 of 15 April 2016.
[28] Annexure NUM4 p131.
[29] NUM FA p21 at para 45.1.
[30] *Ibid* at para 45.2.
[31] At para 45.3.

38.4. employment equity imperatives, with motivation for black people to hold 60% of executive positions, that is, by 2022;[32] and

38.5. the improvement of housing and living conditions for the workers.[33]

39. NUM made further written representations to the Department on 08 March 2017 and proposed further measures to be taken into account when the final draft of the Charter is produced.[34] We elect not to restate the further submissions only in the interest of brevity.

40. We have alluded to the fact that other parties with interest have taken the opportunity to also make representations to the Department. One such party is the South African Institute of Race Relations NPC, which delivered its representations on 13 May 2016.[35]

41. Furthermore, we have become aware that Solidarity (the Second Amicus Curiae) also submitted its written representations to the Department on 13 May 2016.

42. In doing this, we submit that both the SAIRR and Solidarity, as was the case with NUM, were responding to the publication in the Gazette of the draft reviewed Charter on 15 April 2016.

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[32] At para 45.4.
[33] At para 45.5.
[34] NUM FA p23 at para 46.
[35] Annexure NUM 6 at p146.

43. In the case of **Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others**[36] the court quoted with approval an extract from the case of **Doctors for Life International v Speaker of the National Assembly**[37] and recognised that the administrative body has discretion to determine how best to facilitate public participation.

44. What is important in the context of PAJA is that:

44.1. an administrator must take steps to facilitate public participation; and

44.2. those affected by the administrative action must be afforded a reasonable opportunity to participate effectively prior to the decision been finalised.

45. We submit respectfully that the review of the Charter was appropriately published in the Government Gazette and that the Department gave those who are affected, in one way or the other, by the Charter to make and submit their written representations.

Interpretation of section 100(2) and section 2 of MPRDA

46. Much is made by the First Applicant and Solidarity on the powers of the Minister to legislate. We readily accept that the Minister does not have the powers to do more than he is empowered. Section 2(c) and (d) intends to promote equitable

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[36] 2011(11) BCLR 1158 (CC).
[37] 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

access of to the nation's minerals and petroleum resources to all South Africans.

47. Further, it proposes foster economic growth and mineral and petroleum resources development in the Republic.

48. To achieve these objectives, in particular the granting of access to mineral and petroleum resources to all South Africans, the legislators have enacted section 100(2)(a) of MPRDA which reads:

> *"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 for targets and time table for effecting entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from exploitation of mining and mineral resources and the beneficiation of such mineral resources."* (Own emphasis added)

49. This provision can be divided in a number of segments, namely:

49.1. first, for its recognition of the continuing history of social and economic inequalities;

49.2. second, for imposing an obligation on the Minister to develop a broad-based socio-economic empowerment Charter within six months of the Act coming into effect;

49.3. third, for setting targets and timetables required for the attainment of the set targets for entry of HDSA's into the industry;

49.4. fourth, to allow South Africans to benefit from the exploitation of mining and mineral produce.

50. Lynching directly into the third pillar, supra, the question to be asked is: '*what is the Minister to do if the targets are not met within the timeframes set?*' If we go along the route proposed by Solidarity, and the Chamber in the application for interim interdict, the Minister's hands are tied and he cannot review and amend the Charter. Such interpretation of the provisions of section 100(2) (a) is narrow and leads to an absurdity. Also, it renders the purpose of the legislation ineffective.

51. We respectfully submit that the proper interpretation of the provisions of section 100(2) (a) is one that enables the Minister to review the successes, or failures, of the targets set out in the Original Charter against the timeframes set. Should the Minister find that the industry has failed to achieve the objective set, then, it must follow that the Minister is empowered to employ measures necessary to ensure the attainment of the objects of the Act, which is to transform the industry and ensure that South Africans benefit from the wealth of mineral resources.

52. Thus, the literal interpretation as adopted by Solidarity is manifestly inappropriate.

53. We submit that the proper manner of interpreting the provisions of section 100(2)(a) is one that was considered by the Supreme Court of Appeal in the **FEDSAS** case, supra, where the court held that:

> *"[18] All legislation must be read in a manner which promotes the spirit, purport and objects of the Bill of Rights (s 39(2) of the Constitution). This is an obligation placed on courts regardless of the approach adopted by the litigants. See Phumelela Gaming and Leisure Ltd v Gründlingh & others [2006] ZACC 6; 2007 (6) SA 350 (CC) paras 26-27. Additionally, all statutory instruments must be interpreted purposively, contextually and consistently with the Constitution. See Stratford & others v Investec Bank Ltd & others [2014] ZACC 38; 2015 (3) SA 1 (CC) para 19; Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18."* (Own emphasis)

54. The purpose of section 100(2) (a) of MPRDA, read in context with the entire Act, is common cause in that it seeks to eradicate inequality within the mining and minerals industry.

55. The disparities in the mining sector are enduring. This is in accordance with the findings reached by Minister Ramatlhodi in his report.[38] The Minister recorded

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[38] See, note 17 above.

that there has been slow progress in embracing the broad-based empowerment ownership in the meaningful economic participation of HDSA's. Importantly, for NUM, the Minister concluded that the mineworkers[39] and mining communities[40] have still not been empowered.

56. In a similar situation of enduring disparities and inequality, a case where a party likewise contended that the Minister was not empowered by legislation to make regulations, as subordinate legislation, the case of **Member of the Executive Council for Education, Gauteng and Another v Federation of Governing Bodies For South African Schools**[41] the court held that the mere fact that the provincial legislation did not expressly confer powers upon the MEC to make regulations did not render regulations that were promulgated by the MEC *ultra vires*. In this case the Court held that:

> *"[16] ... The enduring disparities in the education system which are a legacy of the apartheid system are a matter of common knowledge and have been repeatedly acknowledged by our courts. The need for sustained reform in our public education system is firmly established. ..."*
> (Own emphasis)

57. We submit respectfully that the Mining Charter is an instrument with which the executive is empowered to ensure that the prevailing disparities, sustained for

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[39] About two thirds.
[40] Almost fifty percent.
[41] MEC for Education, Gauteng v FEDSAS (20420/2014) [2015] ZASCA 149 (16 October 2015). This judgement was confirmed by the Constitutional Court in Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another [2016] ZACC 14 at para 50.

decades though a number of apartheid legislation such as Mines and Works Act,[42] are permanently removed from the mining industry.

58. Given the transformational background to the development of the Charter,[43] we submit respectfully that the Minister's powers to develop, review and amend the impugned Charter is consonant to the transformation agenda of the Constitution as embedded in its section 24.

59. The drive to achieve equality is a fundamental of section 100(2) (a) as encapsulated in the Charter.[44] The prevailing disparities in the industry constitute an affront to the constitutional values espoused in section 9 of the Constitution, the equality clause.

60. In the premises, we submit that the development of the Charter 2017 does not, as the Chamber and Solidarity contend, constitute a breach of the principles of legality on this ground. Also, we submit with respect that by developing the Charter the Minister has not acted *ultra vires*.

Does Charter have binding effect?

61. Transformation of society generally is a constitutional virtue, which is not subject for negotiation. The provisions of section 9(2), read with subsection (4) of the Constitution are quite clear in this regard.

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[42] Act No. 12 of 1911.
[43] Section 100(2)(a) of MPRDA.
[44] Section 9(2) of the Constitution.

62. A proper reading of the provisions of this section of MPRDA can only lead to a conclusion that the Charter, generally, is intended to be an instrument that bestows upon government, in particular the Minister, the powers to ensure that there is transformation in the mining industry.

63. The Constitutional Court has recently expounded on the principle of interpretation, explaining the principles, in the case of **Cool Ideas 1186 CC**[45] in which the Court held as follows:

> *"A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*
>
> *(a) that statutory provisions should always be interpreted purposively;*
>
> *(b) the relevant statutory provision must be properly contextualised; and*
>
> *(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso*

[45] Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC).

is closely related to the purposive approach referred to in (a)."

(Own emphasis)

64. It cannot be gainsaid that the purpose of section 100(2) (a), read in context with the MPRDA in its entirety, is that the fundamentals of the Constitution in relation to transformation be met. The only way that the Act does so is through the Charter, which fundamental cannot be met if the Charter is not a binding instrument.

65. This cannot be achieved through the adoption of a Charter that has no binding effect or which merely serves as a guide for the Minister. To read the provision otherwise will be to render insignificant the statutory provision[46] and the Charter.

66. We bolster the contention of NUM by making reference to the authority derived from the case of **Natal Joint Municipal Pension Fund v Endumeni Municipality**,[47] where Wallis JJA held that:

"... Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective

[46] Section 100(2)(a) of MPRDA.
[47] 2012 (4) SA 593 (SCA) at 18.

not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness like result or undermines the apparent purpose of the document. ... The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation of the document." (Own emphasis)

67. The undeniable purpose of the provision that empowers the Minister to develop the Charter is to ensure transformation of the industry through the setting of targets and timeframes for the attainment of the targets. We therefore submit that, once set, the targets must be achieved and the Minister is the functionary to ensure that the targets are met within the set timeframes.

68. To ensure that the targets are met, the Minister must as a necessary or incidental power be able to review and set new targets and timeframes. Otherwise, the development of the Charter has no use for government in ensuring that the industry moves from the apartheid past.[48]

69. That the Charter is intended to have binding effect must also be inferred from the reading of section 25(2) which provides that:

[48] Common law presumption exists in this Country that legislation does not contain futile or meaningless provisions. This presumption forms the crux and basis of the most important principle of interpretation, i.e. that the court has to determine the purpose of the legislation and give effect to it. In the case of **SA Medical Council v Maytham 1931 TPD 45** the court held that futile legislation has to be avoided, and that an attempt. A should be made to promote the 'business efficacy' of a provision. This presumption relates to the reasonable and logical thought processes of the legislature. It is a presumption that the courts endeavour to uphold consistently.

"The holder of a mining right must-

(a) ...;

(h) submit the prescribed annual report, detailing the extent of the holder's compliance with the provisions of section 2(d) and (f), the charter contemplated in section 100 and the social and labour plan."

70. Where a person submits information that is false, fraudulent, and inaccurate or misleading, the Minister is empowered to cancel or suspend any reconnaissance permission, prospecting right, mining right, mining permit, retention permit or holders of old order tights or previous owner of works. These include information on a holders' compliance with the provisions of the Charter in terms of section 100 of MPRDA.

71. We submit that these are all measures which demonstrate that the Charter is not intended as mere guideline with no binding effect. The Constitutional Court in **Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others**[49] embraced a long existing principle which was expounded in **African and European Investment Co. Ltd. v Warren and Others**[50] to the effect that:

"No doubt a schedule or rule attached to a Statute and forming part of it is binding, but in case of clear conflict between either of them and a

[49] 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995).
[50] 1924 AD 308 at 360.

section in the body of the Statute itself, the former must give way to the latter."

72. Our submission is therefore that, given the nature and purpose for which the Charter is required by section 100(2) (a) of MPRDA, it must follow that it will have binding effect and that it is not merely a guiding tool.

73. In addition, the Constitutional Court[51] had this to say about the Parliament's powers to delegate legislative functions:

> *"[51] The legislative authority vested in Parliament under s 37 of the Constitution is expressed in wide terms -'to make laws for the Republic in accordance with this Constitution'. In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution parliament can pass legislation delegating such legislative functions to other bodies."* (Own emphasis)

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[51] Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others, *supra*.

74. The contention that the Minister cannot legislate belies the principles adopted by the court in the preceding paragraph. Of course, as the court noted, the right to delegate legislative powers is not without limitations.[52]

75. Under the present circumstances we submit that the authority delegated to the Minister to promulgate the Charter is uncontroversial and that the contentions[53] raised by both the Chamber and Solidarity should be found to have no merit and, accordingly, rejected.

Criticism of the Charter

76. NUM also finds the substitution of HDSA with the definition of Black Person[54] to be an affront to the broad aims and objects of MPRDA. Being an instrument that is subordinate to the Act, the Charter cannot contradict the provisions of the empowering statute.

77. MPRDA define the concept of HDSA, a concept that is also referred to in section 100(2) (a) of the Act. Section 100(2) (a) is an empowering provision under which the Minister derives powers to develop the Charter. We submit that the Minister's attempt to redefine the concept of HDSA, substituting it with Black Person contravenes the principle that subordinate legislation must contradict its empowering statute.

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[52] *Ibid*, par [206].
[53] See, Chamber FA p... paras 85 to 95.
[54] Annexure FA5: Chamber FA p167.

78. NUM submits that to substitute a broad and an encompassing definition which protected all categories of HDSA's, including Blacks, is not only contradictory to the provisions of the empowering legislation,[55] but a regression from the gains of the previous Charters. Relying on the authorities set out above,[56] subordinate legislation cannot stand if it is contradictory to the provisions of an empowering statute.

79. We note that both the Chamber and Solidarity address this point and we will not belabour it. However, we highlight that adopting a definition in the Charter that ignores the obvious plight that women suffered under past mining legislative regime is discriminatory. Black Person does not cover the wide scope as did the notion of HDSA, which required no classification based on race.

80. The differentiation that arise from the definitions, in our respectful submission, offends against the equality values enshrined in the Constitution and PEPUDA.[57] To turn a blind eye on questions of gender is inexplicable and, importantly, unjustifiable under the current constitutional dispensation.[58]

81. It is our respectful submission, therefore, that there exists no rational basis for adopting a definition of the concept of Black Person as a replacement of the broad notion of HDSA.

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[55] NUM FA p34 at para 74.
[56] African and European Investment Co. Ltd. v Warren and Others, *supra*.
[57] Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000.
[58] NUM FA p36-36 at para 80.

Comparable foreign laws

82. The Chamber contends that the imposition of higher thresholds amounts to an irrationality and that the Charter should be reviewed and set aside on this ground. This contention is made with due cognisance to two considerations, namely:

82.1. first, on the basis that the owner of prospecting right must maintain at least 51% equity for ownership by Black Person. We have expressed NUM's position with regard to the phrase 'Black Person'. That does not detract from the fact that the real issue in this connection is the imposition of 51% equity; and

82.2. second, the Chamber is aggrieved by the requirement that there must be 30% ownership for Blacks in specified distribution.[59]

83. By increasing the thresholds, the Minister has acted in accordance with the powers conferred upon him in terms of section 100(2) (a) of MPRDA to set targets and timeframes for transforming the mining industry. It has always been the intention of the Act that the Charter is to be employed to set transformation targets and timeframes for achieving such targets.[60]

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[59] Paragraphs 2.1.1.1 to 2.1.1.3 of the Charter.
[60] NUM FA p39 at para 91.

84. The imposition of high(er) thresholds for local participation is not a unique South African concept. It exists in other jurisdictions. This is used to ensure that the mineral wealth of the Country benefits South Africans equitably.

85. In Canada for example, in order to safeguard the Country's benefits or interests, any investment to acquire control of a Canadian business by a non-Canadian is subjected to stringent government review under the **Investments Canada Act** if:[61]

> *"(3) An investment described in paragraph 1(a), (b) or (c) is reviewable under this Part where the value, calculated in the manner prescribed, of*
>
> *(a) the assets acquired, in the case where control of a Canadian business is acquired in the manner described in paragraph 28(1) (c), or*
>
> *(b) the assets of the entity carrying on Canadian business, and of all other entities in Canada, the control of which is acquired, directly or indirectly, in the case where control of a Canadian business is acquired in the manner described in paragraph 28(1)(a), (b) or (d), is five million dollars or more."*[62]

86. Furthermore, Canadian law provides that:[63]

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[61] Section 14(1)-(4) of the Investment Canada Act, effective from 22 June 2017.
[62] *Ibid*, subsection (4).
[63] Section 14(4) of the Investment Canada Act.

"(4) An investment described in paragraph (1)(d) is reviewable under this Part where the value, calculated in the manners prescribed, of the assets of the entity carrying on the Canadian business, and of all other entities in Canada, the control of which is acquired, directly or indirectly, is fifty million dollars or more."

87. Trade agreements are reviewed in Canada so as to protect the interests of business in that Country. This legislation is applicable over transactions in the mining industry which has begun production.

88. The Canadian government, as it can be seen above, employs stringent measures to review any non-citizen who intends taking a controlling stake of a Canadian business, generally, and the mining sector in particular. In terms of Canada's Non-Resident Ownership Policy that is applicable in the uranium mining sector, resident ownership must be at least 51%. Resident ownership of less than 51% gets subjected to reviews in terms of the Investments Canada Act and may be permitted on case by case basis, especially where it can be shown that the project concerned is Canadian controlled.[64]

89. Prominent members of the Chamber, for example Anglo American,[65] still invest in Canada in spite of the requirement for resident ownership stake being at minimum of 51%. There is no reason, therefore, to hold a view that investments will be lost to South Africa on the sole basis that the Charter has introduced a requirement that HDSA's be granted a controlling stake in mining sector. We

[64] NUM FA p40 at para 96.
[65] NUM FA p40 at para 95.

submit that the fear or concern expressed by the Charter in this regard is unfounded.

90. We add that, the condition for minimum local shareholding or participation in the industry exists in other Countries where the members of the Chamber invest. For instance, section 4.-(1) of the **Mining (Minimum Shareholding and Public Offering)** regulations in Tanzania provides that:[66]

> *"The minimum local shareholding requirement of a holder of Special Mining License shall be thirty percent of the total issued and paid up shares."*

91. Local shareholding is defined under the Tanzanian regulations as shares held by a citizen (natural person) or, in the case of corporate body, shares held by a company incorporated under the Companies Act in which citizens or government of the United Republic has beneficial interest of at least fifty percent of the ordinary shares of such company.[67]

92. In addition, the President of Tanzania has now signed into law and additional requirement that government shall own a minimum of sixteen percent stake in mining projects in that Country.[68] Section 10 of the Written Law (Miscellaneous Amendments) Act, 2017 provides that:

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[66] Annexure NUM 8 at p166. The Mining Act Regulations published in Government Gazette No. 286 on 07 October 2016.
[67] *Ibid*, section 1.
[68] Annexure NUM9 p169. The Written Laws (Miscellaneous Amendments) Act No. 4 of 2017.

"In any mining operations under mining license or a special mining license the government shall have not less than sixteen non-dilutable free carried interest shares in the capital of a mining company."

93. As it can be seen, not only is Tanzania employing legislative measures of ensuring that locals participate meaningfully the country's mining and mineral resources development, but government also gets to hold substantial equity in all mining activities.

94. Zimbabwe, another country where the members of the Chamber conduct mining related business, also regulate the minimum equity to be held by locals in various businesses in that country. In this regard, section 3(1)(a) of the **Indigenisation and Economic Empowerment Act, 2007** provides that:[69]

"at least fifty-one per centum of the shares of every public company and any other business shall be owned by indigenous Zimbabweans;

95. Paragraph (b) of that section provides, similarly, that indigenous Zimbabweans shall hold fifty one percent of shares in any company that is formed as a result of merger of two or more companies, or which is the result of an acquisition by a person controlling interest in the business.

96. In accordance with the provisions of section 39(1) of the Constitution, we submit that the court is empowered to consider, when hearing this application, the foreign laws which provide for similar safeguards for ensuring that local

[69] Annexure NUM10 p187. Indigenisation and Economic Empowerment Act No. 14 of 2007.

economic empowerment takes place in the mining industry. We submit that this is a legitimate means of government ensuring that South Africans, in particular HDSA's, derive benefit from mining business.

97. Despite the outcry by the Chamber that the mining industry will (foreign) lose investments if the conditions for local participation in the industry is pitched at the high stakes, NUM's contention is that that is not a proven fact. On the contrary, as we have learnt from other jurisdictions such as Canada, Tanzania and Zimbabwe, the members of the Chamber still find it attractive enough to conduct business in those countries.

98. Opposition to these initiatives is a demonstration of the Chamber's reluctance to participate meaningfully in empowerment initiatives for its employees and the local communities where mining takes effect. The Chamber operates as a gatekeeper to safeguard the interests of large corporates while the majority if South Africans still remain poverty stricken in spite of the mining activities happening around them.

99. We submit that the ground of review that the targets raised in the Charter are irrationally high does not have merit.

Conclusion

100. NUM concludes that the Charter is not going to scare off investors merely by introducing measures for partnering with local businesses. This is a far cry as

in other jurisdictions businesses continue to invest in spite of the conditions being made for partnering local with foreign businesses.

101. Demanding that local or indigenous people should hold controlling stakes in businesses has not slowed down inflow of international investments in other countries on the African continent.

102. While favourable rules is always attractive to investments, it is equally also important to grow local businesses and sustain them through partnering with foreign investors. There is nothing constitutionally offensive in doing so.

103. We submit that:

103.1. the Charter is an important legislative instrument for ensuring that the transformation agenda of the Country is realised. This cannot be achieved through a Charter that is merely a guiding tool with no force and effect;

103.2. accordingly, the Charter should and does have binding effect or the force of law;

103.3. in so far as the definition of Black Person is a substitute for HDSA, the provision is unjustifiable, discriminatory, irrational and must be expunged from the Charter;

103.4. There is no basis for sanctioning the Charter in its entirety on the mere basis that it introduces higher than '*normal*' threshold for local participation in the industry.

DONE AND SIGNED AT SANDTON ON THIS 13TH DAY OF DECEMBER 2017

W Mokhari SC;

M Z Makoti;

S Kunene

The Chambers,

Sandton