REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 20341/19

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

21 September 2021 .....

In the matter between:

MINERALS COUNCIL OF SOUTH AFRICA **Applicant**

And

MINISTER OF MINERAL RESOURCES AND ENERGY **First Respondent**

SOUTH AFRICA DIAMOND AND PRECIOUS METAL REGULATOR **Second Respondent**

MINING AFFECTED COMMUNITIES UNITED IN ACTION **Third Respondent**

WOMEN AFFECTED BY MINING UNITED IN ACTION **Fourth Respondent**

MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA **Fifth Respondent**

BAKGATLA BA SEFIKILE COMMUNITY	**Sixth Respondent**
LESETHLENG COMMUNITY	**Seventh Respondent**
BABINA PHUTI BA GA-MAKOLA COMMUNITY	**Eighth Respondent**
KGATLU COMMUNITY	**Ninth Respondent**
ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	**Tenth Respondent**
UNITED ASSOCIATION OF SOUTH AFRICA	**Eleventh Respondent**
NATIONAL UNION OF MINEWORKERS	**Twelfth Respondent**
SOLIDARITY TRADE UNION	**Thirteenth Respondent**
SOUTH AFRICAN MINING DEVELOPMENT ASSOCIATION	**Fourteenth Respondent**

SUMMARY: Statutory Interpretation – section 100(2) of the Minerals and Petroleum Resources Development Act ("MPRDA") – in light of the language of section 100(2) of the MPRDA, its ordinary meaning, the context in which it appears and the apparent purpose for which it is directed, section 100(2) of the MPRDA does not empower the Minister of Mineral Resources to make law. Therefore, the 2018 Mining Charter is not binding subordinate legislation but an instrument of policy. This interpretation is consistent with the objects of the MPRDA as called for by section 4(1) thereof.

JUDGMENT

Kathree-Setiloane J (Van der Schyff J and Ceylon AJ concurring)

[1] At issue in this application is whether the 2018 Mining Charter is a formal policy document setting out a policy developed by the first respondent, the Minister of Mineral Resources ("the Minister"), in terms of section 100(2) of the Minerals and Petroleum Resources Development Act[1] ("the MPRDA") or a *sui generis* form of subordinate legislation. The determination of this issue is important as it will inform the way forward for all future mining charters developed under section

[1] No. 28 of 2002.

100(2)(a) of the MPRDA and provide clarity on the framework within which rights holders may exercise their rights and the limitations of the Minister's regulatory powers.

[2] The applicant is the Minerals Council of South Africa ("Minerals Council"). It seeks to review and set aside certain clauses[2] ("the challenged clauses") of the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 ("the 2018 Charter") under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). It seeks, in the alternative, a declarator that the challenged clauses are inconsistent with the principle of legality in section 1(c) of the Constitution and that they be set aside.[3]

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[2] Listed in the amended notice of motion. See footnote 3 below for contents of the amended notice of motion.

[3] The Minerals Council seeks the following relief in the application:

'1. Reviewing and setting aside the following clauses of the [Mining Charter, 2018] Broad-based Socio-economic Empowerment Charter for the Mining and Minerals Industry, 2018 (Mining Charter, 2018) published in Government Notice 1002, Government Gazette No. 41934, dated 27 September 2018 (as amended by the Amendment in Government Notice 1421, Government Gazette No. 42130, dated 20 December 2018) ("the 2018 Charter") in terms of sections 6(2)(a)(i), 6(2)(d), 6(2)(e)(i), 6(2)(e)(iii), 6(2)(e)(vi), 6(2)(f)(i), 6(2)(f)(ii), 6(2)(h), and/or 6(2)(i), of the Promotion of Administrative Justice Act, 3 of 2000 ["PAJA"]:

1.1. the introductory sentence of clause 2.1 insofar as it provides that "a mining right holder must comply with the following";

1.2. clause 2.1.1.2, 2.1.1.5, 2.1.1.6 and 2.1.6.2, insofar as they apply to the renewal of a mining right;

1.3. clause 2.1.1.4;

1.4. clauses 2.1.3.2 and 2.1.4;

1.5. clauses 2.1.5.2 and 7.2;

1.6. the proviso to clause 2.1.6.1, in clauses 2.1.6.1.1 to 2.1.6.1.4;

1.7. the heading of clause 2.1.6 in so far as it refers to "existing rights";

1.8. the definition of "beneficiation" and clauses 2.1.7.1 (including clauses 2.1.7.1.1 to 2.1.7.1.5) in the following respects:

1.8.1. setting aside the definition of beneficiation and substituting it with the definition of beneficiation in section 1 of the Mineral and Petroleum Resources Development Act, 2002;

1.8.2. setting aside the words "against a BEE Entrepreneur" where they appear in clause 2.1.7.1;

1.8.3. setting aside the words "a maximum of 5 percentage points of a BEE Entrepreneur" where they appear in clause 2.1.7.1.1;

Background

[3] This application was previously heard by a Full Court of this Division ("Full Court") on 5 May 2020. It heard argument on both the merits as well as a preliminary point raised by the Minister relating to the non-joinder of the 3rd to 13th respondents. On 20 June 2020, the Full Court ordered the joinder of these respondents and postponed the merits for hearing by this Court. Ultimately, only the 3rd, 4th, 5th, 6th, 8th , 9th, 10th and 12th respondents ("the joined respondents") filed opposing affidavits in the review application.

[4] The joined respondents comprise three host communities who are affected by mining operations, three organisations who represent such communities ("mining communities") and two trade unions. The mining communities are the 3rd respondent – Mining Affected Communities United in Action ("MACUA"); the 4th respondent – Women Affected by Mining in Action ("WAMU"); the 5th respondent – Mining and Environmental Justice and Community Network of South Africa ("MEJON"); the 6th respondent – Bakgatla ba Sefikile Community ("Bakgatla Community"), the 7th respondent – Lesethleng Community; the 8th respondent – Babina Phuti ba Ga-Makola Community ("Babina Phuti Community") and the 9th respondent – Kgatlu Community. These respondents are collectively referred to as "the community respondents" in the judgment. The two trade union respondents are the 10th respondent – The Association of

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1.8.4. setting aside the whole of clauses 2.1.7.1.2 to 2,1.7.1.5;

1.9. clause 2.2;

1.10. Insofar as the following clauses relate to existing or new licences and permits issued in terms of the Diamonds Act, 1986 and the Precious Metals Act, 2005, clauses 4, 6.2, 7.1 , 7.3, 8.7, 8.8, 8.9 and 9.2; and

1.11. clause 9.1.

2. In the alternative to prayer 1, declaring that the clauses mentioned in prayers 1.1 to 1.11 above are inconsistent with the principle of legality enshrined in section 1(c) of the Constitution, 1996 and setting them aside.

3. Directing the first respondent to pay the costs of this application, such costs to include the costs of three counsel.'

Mineworkers and Construction Union ("AMCU") and the 12th respondent – National Union of Mineworkers ("NUM"). They are collectively referred to as "the trade unions respondents" in the judgment. Except for the Lesethleng Community, all the other joined respondents were represented and made submissions at the hearing before this Court.

Parties' Contentions

[5] The Minister, the second respondent, namely the South African Diamond and Precious Metals Regulator ("the Regulator") and the trade union respondents oppose the relief sought by the Minerals Council. The community respondents do not oppose the relief sought by the Minerals Council. They, however, seek certain relief on grounds other than those raised by the Minerals Council. In brief, those grounds are twofold. The first is that there was inadequate consultation with them and their members prior to the publication of the 2018 Charter which does not adequately give effect to the Minister's obligations under section 100(2) of the MPRDA. And the second is that the 2018 Charter not only fails to substantially address the environmental degradation and gender based injustice which mining causes, but it also fails to address the poverty and inequality of mining-affected communities which mining exacerbates. The overarching concern raised by the community respondents is that, despite mine hosting communities bearing the disproportionate burden of the negative impacts of mining activities; including environmental pollution, air borne diseases, loss of their farm and grazing land, forced displacement and the loss of community, amongst other things,[4] they have received little to no direct benefit from these mining and prospecting operations. They accordingly argue that the

[4] *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC at para [19]

2018 Charter does not go far enough in addressing the objects of the Constitution, the MPRDA in general and section 100(2) in particular.

[6] The Minister and the Minerals Council make common cause on the question whether the community respondents are entitled to seek relief on grounds not raised by the Minerals Council in its founding affidavit. Their basis for this argument is that the community respondents are not applicants in the application but rather co-respondents with the Minister, and since there is no lis between them and the Minister, they are not entitled to bring a new review application against their co-respondent, the Minister. I will return to this issue later in the judgment.

[7] The question in dispute concerns the ambit of the powers of the Minister under section 100(2) of the MPRDA to make law in the form of subordinate legislation, and the legal nature and role of the 2018 Charter in the context of the MPRDA. At issue, therefore, is whether the 2018 Charter constitutes law or policy. A related question is whether the development of the 2018 Charter constitutes administrative action which stands to be reviewed on the grounds set out in PAJA or whether it stands to be tested against the principle of legality.

[8] There are two sharply divergent views on the issue of whether the 2018 Charter constitutes law or policy. The Minister, supported by the Regulator and the joined respondents, contends that section 100(2) of the MPRDA empowers him to make law through the development of the 2018 Charter, hence that Charter (which he developed) constitutes *a sui generis* form of subordinate legislation which is directly binding on holders of mining rights.

[9] The Minerals Council contends, to the contrary, that the 2018 Charter is a formal policy document developed by the Minister in terms of section 100(2) of the MPRDA. To this effect, it argues that the 2018 Charter is binding on the Minister whenever he considers an application for a mining right by virtue of the provisions of section 23(1)(h) of the MPRDA. This provision only permits the Minister to grant a mining right if, amongst other things, the grant of such right would be in accordance with the charter contemplated in section 100(2) of the MPRDA. The Minerals Council, therefore, maintains that the 2018 Charter is

only binding on holders of mining rights to the extent that its terms have been lawfully incorporated by the Minister into such mining rights.

The Framework of the MPRDA

[10] The Legislature enacted the MPRDA on 1 May 2004. It makes provision for the equitable access to, and the sustainable development of, the nation's mineral and petroleum resources. It constitutes a radical departure from the previous system of mineral and mining law that applied in South Africa.[5]

[11] The Preamble to the MPRDA acknowledges *inter alia* that South Africa's mineral resources belong to the nation and that the State is the custodian thereof. It also reaffirms the State's commitment to reform, to bring about equitable access to South Africa's mineral and petroleum resources, and its commitment to security of tenure in respect of prospecting and mining operations.

[12] The transformative object of the MPRDA was recognised in *Agri SA,*[6] where Moegoeng CJ explained that the MPRDA was enacted to redress the gross inequalities between the majority of black South Africans who are "unable to benefit directly from the exploitation of mineral resources as a result of their landlessness, exclusion and poverty" and white South Africans who wield real economic power.

[13] Section 3(1) of the MPRDA provides that mineral and petroleum resources are the common heritage of all people of South Africa and the State is the custodian thereof for the benefit of all South Africans. In *Maledu*,[7] the Constitutional Court stated that the MPRDA in recognising that the custodianship of South Africa's

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[5] The White Paper from which the MPRDA stems, recognises the constitutional constraints of changing the current mineral rights system but acknowledges that the State has a duty to take legislative and other measures to enable citizens to gain access to rights in land on an equitable basis and to bring about reform in land rights (including mineral rights) to redress the results of past racial discrimination. It states that the "Government's long term objective is for all mineral rights to vest in the State for the benefit of and behalf of all the people of South Africa.

[6] *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 1.

[7] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019 (2) SA 1 (CC) para 50.

mineral and petroleum resources vests in the State, “has as one of its primary objects the transformation of the sector” and the empowerment of citizens who “were previously excluded from participating in the exploitation of the country’s mineral and petroleum resources”.

[14] The objects of the MPRDA are to:[8]

(a) recognise the internationally accepted right of the State to exercise sovereignty over all the minerals and petroleum resources within the Republic;

(b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;

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

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

(e) promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;

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

(g) provide for security of tenure in respect of prospecting; exploration, mining and production operations.

[8] Sections 2(a) to (i) of the MPRDA.

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

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

[15] Section 100(2) entitled "Transformation of minerals industry" provides**:**

> '(a) 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.
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> (b) The Charter must set out, amongst others how the objects referred to in section 2(c), (d), (e), (f) and (i) can be achieved.'

[16] Section 4(1) of the MPRDA *inter alia* provides that when interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must be preferred over any other interpretation which is inconsistent with such objects.

Interpretation of s 100(2) of the MPRDA

[17] Section 100(2) enjoins the Minister to develop a charter that will set the framework for targets and a timetable for attaining the object in section 2(d) of the MPRDA which is essentially to expand opportunities for historically disadvantaged South Africans to enter into and actively participate in the mining industry, and to benefit from the exploitation of the mining and beneficiation of mineral resources. Section 100(2)(b) adds that the charter must set out how the

objects referred to in sections 2(c), (d), (e), (f) and (i) of the MPRDA can be achieved.

[18] The Constitutional Court confirmed the proper approach to statutory interpretation in *Waymark*[9] as follows:

> 'The principles of statutory interpretation are by now well-settled. In *Endumeni*, the Supreme Court of Appeal authoritatively restated the proper approach to statutory interpretation.[10] The Supreme Court of Appeal explained that statutory interpretation is the objective process of attributing meaning to words used in legislation. This process, it emphasised, entails a simultaneous consideration of –
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> (a) the language used in the light of the ordinary rules of grammar and syntax;
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> (b) the context in which the provision appears; and
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> (c) the apparent purpose to which it is directed.
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> Allied to these factors, courts must also interpret legislation to promote the spirit, purport and objects of the Bill of Rights. Again, courts should not unduly strain the reasonable meaning of words when doing so.'[11] [footnote omitted]

[19] Section 4(1) of the MPRDA provides that when interpreting its provisions, a court must prefer a reasonable interpretation which is consistent with its objects over any other interpretation which is inconsistent with such objects. There was some debate during argument about how section 4(1) should be interpreted. In *Aquila Steel*[12] the Constitutional Court understood this to equate to a purposive or contextual approach to interpretation which gives effect to the "transformational objectives" of the MPRDA. I would add that the interpretation

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[9] *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* 2019 (5) SA 29 (CC) paras 29-31.

[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[11] *See also Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) para 28.

[12] *Aquila Steel v (South Africa) (Pty) Ltd v Minister of Mineral Resources and Others* 2019 (3) SA 621 (CC) at para 80.

must give effect to all the objectives of the MPRDA as they are interrelated and interdependent.

[20] A contextual approach to statutory interpretation pays particular attention to context in statutory construction. This is a requirement of section 39(2) of the Constitution which requires legislation to be construed in a manner that promotes the spirit, purport and objects of the Bill of Rights. Context is, however, not limited to the language of the rest of the statute which may throw light on the meaning of the words being interpreted, "but also includes its scope and purpose and to a limited extent its background".[13] However as repeatedly held by the Constitutional Court, a contextual or purposive reading of a statute must always "remain faithful to the actual wording of a statute".[14] It follows from this that the purposive approach to statutory interpretation which section 4 of the MPRDA calls for cannot justify an interpretation which has insufficient regard to the language which the Legislature chose to express itself in.

Use of the term "charter"

[21] The Legislature specifically chose to use the term "charter" in section 100(2)(a) of the MPRDA. Although the Legislature has not, in recent times, used this term to describe a law, there are a handful of instances in the early 19th and 20th centuries when the Legislature used it to do exactly that. For example, it was used to describe two enactments of the Cape Colony, namely the Charters of Justice of 1827 and 1932 which regulated the legal profession in the Cape at the time.[15] Indeed, a handful of foreign jurisdictions such as Canada (Charter of

[13] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 91 citing *Jaga v Donges NO and Another; Bhana v Donges and Another* 1950 (4) SA 653 (A) at 662-3 approvingly.

[14] *Bertie Van Zyl (Pty) Ltd and Another v Minister of Safety and Security and Others* 2010 (2) SA 181 (CC) para 22. See also: *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28, where the Constitutional Court held that the ordinary grammatical meaning of a relevant statutory provision remains a fundamental tenet of statutory interpretation.

[15] The 1832 Charter was repealed by the Supreme Court Act 59 of 1959.

Rights and Freedoms forms part of its Constitution Act, 1982) and England (Magna Carta (Great Charter of Freedoms)) also use the term "charter" to describe legislative instruments. The term is also used in international law. For example in the Charter of Fundamental Rights of the European Union and the African Charter on Human and Peoples' Rights,[16] amongst others.

[22] While I accept that the term "charter" as an instrument of law is not unknown in South Africa, the use of the term, in itself, is not determinative of whether the Legislature intended it to be an instrument of law or policy. The use of the term "charter" in section 100(2) of the MPRDA must be viewed in the context of the statutory provision in which it is used, as well as the context of the legislation as a whole.

[23] It is not insignificant, in this regard, that the words "law" and "regulation" are mentioned in various other sections of the MPRDA. Why, if subordinate legislation had been intended, was the singularly unusual word "charter" used? Indeed, the words "law" and "regulation" are mentioned in various other sections of the MPRDA. A clear and distinct indication that subordinate legislation was not intended by the Legislature in section 100(2) of the MPRDA, is the specific inclusion of section 107 which expressly authorises the Minister to make subordinate legislation. Why, if the Legislature intended for the charter, contemplated in section 100(2), to be subordinate legislation, did it not simply call it regulations. In that event, there would have been no reason to call it a charter. Notably, the definition of the term "Act" in section 1 of the MPRDA also does not include the term "charter". If the Legislature intended the charter to constitute subordinate legislation, it would surely have included it in the definition of "Act". This, to me, is an indicator that the use of the word "charter" in section 100(2)(b) was deliberately chosen by the Legislature to indicate that something other than a law was to be "developed".

[24] It is admissible to consider how the concept of the "charter" was understood and implemented by the Minister and the mining industry directly after

[16] Also known as the Banjul Charter.

commencement of the MPRDA (in 2004) until 2010. It has been held that where a statute may fairly be interpreted in either of two ways, custom may well be invoked to tip the balance."[17] This was reiterated by the SCA in *CSARS v Bosch,*[18] where it stated that a valuable pointer to the correct interpretation of a statutory provision, is evidence which shows that it has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation. The SCA held that evidence of the conduct of such persons is admissible as it provides proof of how reasonable persons in their position would construe the provision in question.[19] The SCA said that this is entirely consistent with the approach to statutory interpretation that examines the words in context and seeks to determine the meaning that should reasonably be placed upon those words.[20]

[25] As such, regard may be had to the wording of the Original Charter published in 2004 to ascertain what was intended and understood by government and the industry alike with respect to the term "charter". The Original Charter was a formal document recording a pact between the government and industry, co-signed by them, in which they committed themselves to a framework for progressing the empowerment of HDSAs in the mining and minerals industry with a timetable and aspirational targets. It sets out the factors that would be taken into account (read with the scorecard) in making licensing decisions.

[26] As I understand it, a pact of this nature would be the very antithesis of a law which results from the unilateral exercise of legislative or executive power.[21] In *Marshall,*[22] the Constitutional Court cautioned that the approach sanctioned by

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[17] *Rex v Lloyd* 1920 AD 474 at 486 per Mason AJA. See also p 477 by Juta JA. See also: LAWSA *Statute Law and Interpretation* First Re-issue Vol 25, part 1, para 358.

[18] *CSARS v Bosch* 2015 (2) SA 174 (SCA) at par 17.

[19] Id.

[20] Id.

[21] See: *Minister of Mineral Resources and Others v Mawetse (SA) Mining Corporation (Pty) Ltd* 2016 (1) SA 306 (SCA) para 24.

[22] *Marshall and Others v Commission for the South African Revenue Service* 2019 (6) SA 246 (CC) at para 70.

the SCA in *CSARS v Bosch* would not apply where the practice is unilaterally established by one of the litigating parties. As contended for by the Minerals Council, the 2010 and 2018 Charters were unilaterally adopted by the Minister in a marked deviation from the expectations of the signatories of the Original Charter and the common practice of the State and private stakeholders. These charters repealed the 2004 Charter and for the first time adopted a prescriptive approach by imposing sanctions for non-compliance.

[27] The Minister hereby sought to change the interpretation held by all concerned since commencement of the MPRDA for a period of about 6 years. I consider the Original Charter as being a clear illustration of how the Minister and industry alike would have interpreted section 100(2) of the MPRDA at the time. It was plainly not intended to be an instrument of subordinate legislation, as now contended for by the Minister.

[28] On 26 June 2002, when the MPRDA Bill B15A-2002 was adopted by Parliament (which included provisions for the development of a charter), the Minister (at the time) addressed Parliament and explained the legislative purpose in the Charter in the following terms:

> ' … in addition, we are bringing a charter which we will be working on together with the industry so that when we table it, it will be a launch not by Government alone, but something that will be launching and bringing to the public together.
> As I have said, we have included those definitions in the main body of the Bill, but in addition to that we also have the charter.
> The other issue that came up during the hearing in relation to these two issues that I have referred to was quantification. Again, in the charter we are going to quantify what quantum of empowerment will be expected, as hon members can imagine, we want meaningful empowerment.
> Of course, we are going to quantify the charter. People have been throwing around a figure of 25% empowerment that is going to be in the charter. What we can say as a department is that we want historically disadvantaged people to be minority owners in the existing mines. However, we want to see meaningful minorities in accordance with the Companies Act which is 26 % plus.'

[29] The Minister contends that it is clear from the contents of this speech as well as the White Paper[23] that preceded the Bill that the charter contemplated in section 100(2)(a) of the MPRDA was intended to be binding subordinate legislation. As pointed out by the Minerals Council, the flaw in this argument is that these sources, while relevant to the interpretation of section 100(2) of the MPRDA, do not assist the Minister in establishing the interpretation he contends for. In this regard, the passages quoted above from the Minister's address to Parliament explaining the legislative purpose of the charter is more consistent with an intention that the charter would constitute a jointly developed statement of policy than subordinate legislation. The speech of the Minister of Environmental Affairs & Tourism is also not indicative that law-making powers were intended to be conferred by clause 100 of the Bill. His statement that the "purpose of the Bill was to bring clarity to the issue of economic empowerment and to indicate what industry is expected to do" (as opposed to what it is required to do) suggests the publication of a policy rather than the making of a law. The interpretation that the charter, contemplated in section 100(2), is not subordinate legislation is also not inconsistent with any of the values or objectives espoused in the White Paper.

Use of the term "develop"

[30] A further indicator that the Legislator did not intend for the "charter" contemplated in section 100(2) to be an instrument of subordinate legislation but rather a formal document of policy is the use of the word "develop" in section 100(2)(a). I am aware of no piece of legislation (and none has been pointed out to me) where our Legislature has employed the term "develop" to describe the making of a law. It is often used with reference to the formulation of policy. An example is section 85(2)(b) of the Constitution where the term "developing" is used in the context of the formulation of policies.[24] On the contrary, the power

[23] Relevant aspect of White Paper quoted in footnote 2 of the judgment.

[24] Section 85(2) of the Constitution provides:

to make regulations is almost invariably expressed in legislation by a provision that a Minister "may make or enact" regulations regarding certain specified matters.[25] Consequently, I disagree with the Minister's contention that there is no meaningful difference in the distinction between the use of the word "develop" in section 100(2)(a) of the MPRDA and any of the normal phrases employed by the Legislature (such as "make" or "enact") when legislation or subordinate legislation is contemplated. That the power to "develop a charter" contemplated in section 100(2)(a) is *sui generis*, does not mean that it has the force of law.

[31] In terms of section 85(2)(b) of the Constitution the President exercises executive authority, together with the other members of the Cabinet, by developing and implementing national policy. The Minister contends that the interpretation which the Minerals Council ascribes to section 100(2) is fundamentally incompatible with the power conferred by section 85(2)(b) of the Constitution because it is "low level bureaucratic power", which Khampepe J described in *Minister of Defence and Military Veterans*[26] as merely involving the application of policy in the discharge of the daily functions of the state. I disagree.

[32] The charter has elements of both section 85(2)(a) of the Constitution (the implementation of legislation by the executive) and 85(2)(b) of the Constitution (the development of policy by the executive). In *Ed-U-College*[27] the Constitutional Court held that policy formulated by the executive outside of the legislative framework involves a political decision and will generally not

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'(2) the President exercises the executive authority, together with the other members of the Cabinet by –

(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

(b) developing and implementing national policy;

(c) …'

[25] See for example section 107 of the MPRDA.

[26] *Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC)* at paras 47-49.

[27] *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College (PE)* 2001 (2) SA 1 (CC).

constitute administrative action, however, policy formulated by the executive in the exercise of implementing legislation may often constitute administrative action.[28] The charter, in my view, falls in the latter category as it is intended to facilitate the implementation of the MPRDA, as contemplated in section 85(2)(a) of the Constitution. It accordingly constitutes administrative action.

[33] The Minister furthermore contends that the word "develop" entails something of an organic quality which accounts both for the consultative process by which the charter is developed and also the need for revisions of the charter from time to time. This argument has no merit as there is no logical correlation between the need for revision of the charter from time to time, and the use of the term develop. Subordinate legislation such as regulations are frequently revised but they are "made" and not "developed". All laws, which are enacted undergo a process of publication in draft form and comment before enactment or promulgation. Yet the word "develop" is never used to describe the making of laws.

Use of the word "can"

[34] Section 100(2)(b) provides that the charter must set out how the objects in sections 2(c), (d), (e), (f) and (i) can be achieved. On its ordinary grammatical meaning, the word "can" in section 100(2)(b) is permissive and not peremptory. Its specific use indicates that the Legislature did not intend for the charter to be subordinate legislation. Had the contrary been intended, then the Legislature would simply have used the word "must" instead of "can" in the latter part of the subsection. Properly construed, the word "can" does not limit holders of mining rights to achieve the objects of the MPRDA in the specific manner identified in the charter. They would be free to achieve them in other ways as well provided that they are achieved. In other words, the ways specified in the charter would be guiding principles.

[35] Assuming, as the Minister suggests, that "can" means "must" and "develop" means "make" and that the Legislature intended in section 100(2) to delegate

[28] *Ed-U-College* at para 80.

legislative powers to him, then section 100(2) would mean that the Minister must make subordinate legislation to set out how the objects in section 2(c), (d), (e), (f) and (i) of the MPRDA must be achieved. This would amount to a delegation of plenary legislative power to make further legislation to give effect to the objects of the Act, which is the function of the Legislature. This, to my mind, would offend against the doctrine of separation of powers.

[36] To construe section 100(2) as a delegation of subordinate legislative power, would lead to the further difficulty of unbridled law-making. This would also offend against the doctrine of separation of powers as it contains no parameters, no guidance, and no constraints. By way of illustration, if as contended for by the Minister, the words "amongst others" in the subsection is construed to mean that the function and purpose of the charter involves more than simply addressing the objects of sections 2(c), (d), (e), (f) and (i) of the MPRDA, then section 100(2)(b) must be read as placing an obligation on the Minister to address matters that are not stipulated in the charter. Not only would this result in the Minister having unbridled powers to regulate matters which he is expressly not empowered to regulate, but he would never be able to know whether he has discharged his obligations or not.

Purpose and Context

[37] What is the purpose of section 100(2)(a) in the context of the MPRDA insofar as it requires the Minister to develop a charter? The objects of the identified subsections of section 2 are, for the most part, transformative in nature. Transformation lies at the very heart of this provision. I, however, fail to understand how the transformational objective in section 100(2) of the MPRDA suggests that the Legislature contemplated the making of laws as opposed to the development of policy when enacting the provision. On a proper construction of section 100(2), the achievement of the MPRDA's transformational objectives does not require that the charter take the form of subordinate legislation.

[38] Section 100(1)(a) and (b) of the MPRDA enjoins the Minister to develop a housing and living conditions standard and a code of good practice for the mining industry, respectively. As in the case of section 100(2), section 100(1) also has a transformational focus but neither of these instruments constitute subordinate legislation. Notably, the Code of Good Practice, published in terms of section 100(1)(b), expressly states in its introduction that it is "statement of present policy". Similarly, the Housing and Living Conditions Standard, also published in terms of section 100(1)(a) of the MPRDA, declares that its purpose is to "develop basic guidelines aimed at fostering suitable housing and living conditions for mine workers".

[39] The Minister argues that the transformation objects of the MPRDA cannot be achieved unless the charter is binding subordinate legislation. The flaw in this argument is that it ignores the enforcement structure provided by the MPRDA. The enforcement structure is integral to the wider context of the Act as it underpins its transformative objectives. It, therefore, cannot be ignored in the interpretive process.

[40] The enforcement structure of the MPRDA is the following:

(a) Section 5A of the MPRDA provides that no person may mine on any area without a mining right. Section 23(1)(h) stipulates that the Minister may only grant a mining right if the granting of such right will further the objects referred to in section 2(d) and (f) in accordance with the charter contemplated in terms of section 100(2), and the prescribed social and labour plan.

(b) How does the Minister ensure this in practice? The standard mining right and standard converted mining right[29] contain a recordal of the specific empowerment agreement which is to be placed before the Minister as part of the applicant's application, and on which the

[29] Annexures 8(1) and 8(2) to the Founding Affidavit.

Minister relies for the grant of the right. It impose an obligation on the holder of the rights to honour such agreement by way of a term.

(c) In terms of the standard term 17[30] in particular, the Minister includes in the mining right an obligation on the holder of the right to comply with an empowerment agreement which satisfies the requirements of the charter. The holder's obligation to give effect to the objects in sections 2(d) and (f) of the MPRDA in accordance with the charter is thus concretised and individualised in this manner; within the four corners of the legislation.

(d) Section 23(6) of the MPRDA provides that a mining right is subject to the terms prescribed by the Minister. Section 25(2)(d), in turn, requires the holder to comply with the "relevant provisions of this Act, any other relevant law and the terms and conditions of the mining right". This obliges the holder to comply with the specific empowerment agreement it entered into as a term of its right. Significantly, the term "charter" is not mentioned in section 25(2)(d) of the MPRDA. This omission is an important indicator for determining whether the charter is enforceable or not.

(e) After the grant of the right, the holder is obliged in terms of sections 25(2)(h)[31] and 28(2)(c)[32] of the MPRDA to report on its compliance

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[30] The standard term 17 entitled "Provisions relating to section 2(d) and (f) of the [MPRDA] reads:

> 'In the furthering of the objects of this Act, the Holder is bound by the provisions of an agreement or arrangement dated ... entered into between the holder / empowering partner and ... (the empowerment partner) which agreement or arrangement was considered by the Department for the purposes of compliance with the requirements of the Act and/or Broad Based Economic Empowerment Charter developed in terms of the Act and such agreement shall form part of this right'.

[31] Section 25(2)(h) of the MPRDA provides that the holder of a mining right must submit the prescribed annual report, detailing the extent of the holder's compliance with the provisions of sections 2(d) and (f), the charter contemplated in section 100 and the social and labour plan.'

[32] Section 28(2)(c) of the MPRDA provides that the holder of a mining right or mining permit, or the manager of any processing plant operating separately from a mine, must submit to the

with sections 2(d) and (f), the social and labour plan and the charter contemplated in section 100(2) thereof. If the holder fails to comply with the terms of its right, the Minister is authorised to invoke the provisions of section 47 of the MPRDA. Section 47(1)(b) entitles the Minister to suspend or cancel a mining right if the holder thereof breaches any material term of such right. This would include any terms incorporated in the right to give effect to the charter.

(f) This is a direct and effective means of enforcing the provisions of the charter which the Minister deems sufficiently important to include in a mining right granted by him. Should the Minister, however, believe that the transformational objectives of the MPRDA are not being fulfilled through the process of incorporating appropriate provisions/terms in mining rights granted by him, he retains the power to make regulations under section 107.

[41] Concerning the omission of the term "charter" in section 25(2)(d), the Minister argues that it is included in the catch-all phrase "any other law". This argument is not sustainable for two reasons. The first is that where the Legislature intended to refer to the term "charter" in the MPRDA, it did so expressly as in sections 23(1)(h), 25(2)(h) and 28(2)(c). Having expressly done so in these provisions, there was no reason for the Legislature not to identify the charter by name in section 25(2)(d) of the MPRDA. The second reason is that by virtue of the power which section 25(2)(d) confers on the Minister, to include the requirements of the charter in the terms and conditions of the mining right, the enforcement of the charter's provisions would be achieved.

[42] Although the term "this Act" is defined in section 1 of the MPRDA to include a number of instruments and documents, including regulations and the terms and conditions of any mining right, it does not include the charter. It would have been

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Director-General an 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.

a simple matter, had the Legislature intended that charters developed under section 100(2) be legally binding, to have included them in the definition of "*this Act*." Had that been done, the reference in section 25(2)(d) would have included the charter.

[43] The Minister advances two further bases for his contention that the transformational objects in section 100(2) could never be achieved unless it is interpreted as conferring upon him the power to make subordinate legislation, in the form of the charter, which is directly enforceable against holders of mining rights. The first is that that the mining industry has not transformed despite attempts at securing a voluntary compliance with earlier charters, and the second is that incorporation of provisions of the charter in mining rights would be ineffectual because of the duration of such rights.

[44] The Minister relies on his own studies in support of the first basis of his argument. The Minerals Council contested those studies by putting up its own which supposedly show that there has been substantial transformation. Whatever the weight of the evidence produced by both parties, none of it can be considered by the Court because what occurred after the MPRDA was enacted is not admissible in interpreting section 100(2). Equally, the accusation that the Minerals Council and its members are bent on preserving the status quo is irrelevant to the proper interpretation of section 100(2) of the MPRDA. Accordingly, the *Plascon Evans* rule which the Minister relies on is of no application on this score.

[45] The second basis of the Minister's argument is premised on the assumption that the majority of mining operations presently undertaken are in terms of converted old order rights. Not only has he produced no evidence to back up this assumption, but the Minister disregards the fact that item 7(2)(k) of Schedule II to the MPRDA required those wishing to convert old order rights, to provide documentary proof of the manner in which the right's holder will give effect to the objects referred to in sections 2(d) and (f) thereof.

[46] The Minister also chooses to ignore the balancing act which the MPRDA performs between the objects of transformation in sections 2(c), (d), (e), (f) and

(i) and security of tenure for holders of mining rights in section 2(g). Schedule II to the MPRDA had its own objects listed in Item 2, the first of which was ensuring security of tenure. Security of tenure plays a central role in the achievement of transformation of the industry. Without it, there would have been no further investment in mining. Security of tenure was therefore essential to achieve the objects of equitable access expansion of opportunities for HDIs; promotion of economic growth in the industry; promotion of employment; sustainable development of the nation's mineral and petroleum resources; and the contribution of rights holders to the socio-economic development of the areas in which they operate.

[47] The Minister, moreover, fails to have any regard to item 8(4) of Schedule II to the MPRDA[33] which specifically provides for the extinction of old order rights which are not converted into new order rights. The significance of this provision is that it prevents the sterilisation of mining rights by making them available to be granted to new entrants under the MPRDA. This is key to transforming the mining industry.

[48] The Minister's argument, that if the charter was not a directly enforceable law, the only available enforcement mechanism would be through the application of section 23(1)(h), and that once the right is granted he is rendered powerless, is also flawed because it ignores section 23(6) of the MPRDA which requires the holder of a mining right to comply not only with the terms and conditions of its right, but also the "prescribed terms and conditions". The term "prescribed" is defined in section 1 of the MPRDA to mean prescribed by regulation. In terms of section 107, the Minister may make regulations regarding "any other matter the regulation of which may be necessary or expedient in order to achieve the objects of this Act". As is expected, the Minister has failed to prescribe any regulations in order to achieve the objects set out in sections 2(c), (d), (e), (f) or (i) of the MPRDA. Nor does he explain what steps he has taken to achieve these

[33] Item 8(4) of Schedule II to the MPRDA provides as follows:

> 'Subject to subitems (2) and (3) an unused old order right ceases to exist upon the expiry of the period contemplated in subitem (1).

objects by requiring the incorporation of appropriate terms and conditions in the mining rights, other than the incorporation of the standard term 17. That being the case, the Minister's core argument, that the transformational objects in the MPRDA cannot be achieved unless the charter has the status of subordinate legislation, is unsustainable.

[49] It is a legitimate concern that since the publication of the Original Charter, there has been a failure to achieve the objects identified in section 100(2) of the MPRDA. But if, as I suspect, that failure is due to the fact that section 100(2) does not on the face of it empower the Minister to produce binding subordinate legislation, then there is a lacuna in the MPRDA. As I am well aware, only the Legislature (and not the courts) can cure such a lacuna. As a matter of fact, the Minister's predecessor tabled an amendment Bill in Parliament which was aimed at, amongst other things, addressing this very problem by including "the charter" in the definition of "this Act", in section 1 of the MPRDA. The amendment was, however, not proceeded with. Although nothing turns on this, it underscores what the obvious solution to the Minister's perceived difficulty is.

[50] During argument, the Minister also criticized the Minerals Council for failing to address the implications of the radical departure from common law principles brought about by the MPRDA and the implications of section 3, in particular, for the interpretation of section 100(2). The Minister relies on the cases of *Maledu*, *Xstrata South Africa (Pty) Ltd and Others v SFF Association*,[34] and *Agri SA (CC)* to demonstrate the implications of this departure. In *Xstrata* the SCA explained this as follows:

> '[The MPRDA] fundamentally altered the legal basis upon which rights to minerals in South Africa are acquired and exercised. Previously such rights vested in the owner of the land on or under which minerals were found. The owner of the land, or a party authorised to do so by the owner, could exploit the minerals subject to the person exploiting the minerals possessing a mining authorisation in terms of the Minerals Act 50 of 1991. Once the MPRDA came into operation all mineral

[34] *Xstrata South Africa (Pty) Ltd and Others v SFF Association* 2012 (5) SA 60 (SCA) at par 1.

> resources vested in the state as the custodian of such resources on behalf of all South Africans. The right to exploit such minerals was therefore to be conferred by the state by way of mining rights granted in terms of s 23 of the [MPRDA].'[35]

[51] The Minister contends that the MPRDA extinguished the *cuius est solum* principle or the ownership of minerals. The Minerals Council asserts that this is an incorrect statement of the law, as the MPRDA only extinguished the right to exploit minerals and that the owner of the land, in which minerals occur, remains the private law owner of such minerals until they are severed from the land. It seeks support for this proposition in the SCA decision of *Agri SA*[36] where it was held that the *cuius est solum* principle continues to be recognised in our law today, and hence the minerals in the soil under the surface of immovable property are owned by or part of the dominium vested in the owner of the property. The SCA decision went on appeal to the Constitutional Court.

[52] As I understand the majority judgment of the Constitutional Court *(Agri SA (CC))*, penned by Mogoeng CJ, it did not specifically deal with the question of whether the *cuius est solum* principle or the *ownership* of minerals has been abolished by the MPRDA. Although Froneman J in a minority judgment stated in passing that the MPRDA abolished private ownership of minerals which existed under the mining law dispensation that was enacted prior to the Constitution,[37] Mogoeng CJ writing for the majority did not appear to deal with this.

[53] However, on the question of the State's custodianship of the nation's mineral and petroleum resources, the majority judgment in *AgriSA (CC)*[38] makes it clear that the rights to mineral resources does not vest in ownership of the State but that "the State as custodian of the resources is a facilitator or a conduit through which broader and equitable access to mineral and petroleum resources can be

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[35] Id.

[36] *Agri SA v Minister of Mineral Resources 2012 (5) SA 1 (SCA) para 32. The appeal against this decision was dismissed by the CC.*

[37] *Agri SA (CC)* at para 80.

[38] *Agri SA (CC)* at para 68.

realised."[39] Since the question of whether the *cuius est solum* principle (*ownership* of minerals) has been abolished by the MPRDA is not necessary for purposes of determining the issues in this matter, I will not make a finding on it. Crucially, in this regard, the issues in question do not turn on the property law paradigm within which the country's mineral resources are regulated. They have, at their core, the enforcement and limitations of rights and entitlement acquired in terms of the MPRDA.

[54] Returning to the question of the implications of section 3(1) of the MPRDA for the interpretation of section 100(2), NUM submits that the Legislature gave the State custodianship over the countries mineral resources, to enable the Minister to take definite and ongoing action in effecting meaningful transformation of the mining industry. This, according to NUM, is due to Parliament being too far removed from the industry to monitor and liaise with it to adequately address the need for noteworthy and significant transformation. That the Legislature has given the Minister the power in section 100(2) to develop a charter to achieve the transformative objectives of the MPRDA, does not mean that that power entitles him to make binding subordinate legislation. In so far as State custodianship of mineral resources is concerned, neither the Minister nor the joined respondents have explained how the radical changes brought about by the MPRDA or how section 3(1), in particular, affect the plain meaning of section 100(2).

[55] I accordingly see nothing in the context in which section100(2) appears which suggests that it should not be given its ordinary grammatical meaning. Section 100(2) requires that the charter should be "developed" to set a framework for targets and a timetable and set out how the objects referred to in those sections *can* be achieved. That language, in my view, is indicative of a policy, not of legislation.

[39] Id.

The Constitution

[56] As alluded to earlier in the judgment, section 39(2) of the Constitution is integral to interpreting the provisions of the MPRDA. In *Bengwenyama*[40] *and Maledu*[41] the Constitutional Court highlighted the constitutional values of dignity, freedom and equality and the role that the Constitution plays in promoting the achievement of substantive equality by providing for legislative measures to protect and advance persons disadvantaged by unfair discrimination and to redress inequalities in respect of access to natural resources of the country. These cases also make clear that the MPRDA was enacted to give effect to these constitutional values and norms.

[57] Is the interpretation that the charter is not enforceable law consistent with the values of the Constitution? The Minister has failed to identify in what respect this construction of section 100(2) is inconsistent with the values of the Constitution. Insofar as the Minister's reliance on section 9(2) of the Constitution is concerned ("to promote the achievement of equality, legislative and other measures may be taken"), the very question here is whether the charter constitutes legislative measures or other measures. An executive policy measure (in the style of a charter) that gives content to, and embodies, the transformational objectives of the MPRDA, in a set of guiding principles that are aimed at guiding the exercise of the Minister's discretion in granting or refusing a mining right can hardly be described as being inconsistent with the core values of our Constitution. More particularly because these guiding principles also give applicants the benefit of knowing in advance what is expected of them. Accordingly, the interpretation which I ascribe to the charter does not preclude the achievement of any of the constitutional norms and values which are embodied in the transformational objects of the MPRDA.

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[40] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources and Others* 2011 (4) SA 113 (CC) para 3.

[41] *Maledu and Others v Itereleng Mineral Resources (Pty) Ltd and Another* 2019 (2) SA 1 (CC).

[58] The Minister seeks to locate his purported power to make law (in the form of the charter) in the values and norms of the Constitution itself. This is misdirected as the doctrine of subsidiarity precludes him from doing so. As is apparent from the preamble to the MPRDA and its stated objects in section 2, its purpose is, *inter alia,* to give effect to the stated constitutional values. In the circumstances, it is impermissible for the Minister to seek to derive his purported law-making powers directly from the Constitution.[42]

[59] Thus having considered the language of section 100(2) of the MPRDA in light of its ordinary meaning, the context in which it appears and the apparent purpose for which it is directed, I conclude that section 100(2) of the MPRDA does not empower the Minister to make law. In other words, the 2018 Charter is not binding subordinate legislation but an instrument of policy. This interpretation is not inconsistent with the objects of the MPRDA.

[60] This finding is dipositive of the main grounds of review that the challenged clauses of the 2018 Charter are unconstitutional because the Minister lacked the power to publish a charter in the form of a legislative instrument binding upon all holders of mining rights, the breach of which will be visited by the consequences and penalties provided for in the MPRDA. The Minerals Council is therefore entitled to the relief sought in its amended notice of motion.

Relief sought by the community respondents

[61] Although the community respondents do not oppose the relief sought by the Minerals Council, they nevertheless seek to rely on allegations of procedural defects and/or other grounds of review that are not raised by the Minerals Council in the amended notice of motion. MEJON as well as the Bakgatla, Babina Phuti and Kgatlu communities also seek certain consequential relief and/or review relief setting aside the 2018 Charter in its entirety.

[42] *My Vote Counts MPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC).

[62] Is this permissible given that these respondents are not applicants but rather co-respondents of the Minister? The extent of the joined respondents' rights to participate in the application is fully set out in the judgment and order of the Full Court. It makes clear that the joined respondents enjoy rights under the 2018 Charter which they stand to lose if the relief sought by the Minerals Council is granted. Justifiably, the Full Court joined them as respondents in the application and directed the Minerals Council to serve all pleadings upon them. They were each then entitled to file a notice of intention to oppose and thereafter an answering affidavit. Their joinder did not, however, entitle them to mount a collateral attack on the Minister on grounds different from those relied upon by the Minerals Council.

[63] It is not open to a co-respondent to claim relief unless it enters the litigation as an applicant and seeks that relief on notice of motion. This the community respondents have not done.[43] To the extent that they were not content with the review relief which the Minerals Council seeks against the Minister, the community respondents were required to approach the court with their own review application or apply to intervene as applicants. What they were not entitled to do, was to not oppose the relief sought by the Minerals Council (as they have done) and then seek certain consequential and/or more extensive relief against the Minister when there is no lis between them.

[64] Counsel for WAMUA, MACUA and MEJON respectively, remain resolute that given their assertions in their respective answering affidavits, it was not necessary for them to seek to join or intervene as applicants. Counsel for the the Bakgatla, Babina Phuti and Kgatlu communities, on the other hand, submit that they have brought a counter application against the Minister, hence they was no need for them to join or intervene as applicants. They argue that the review relief they seek, setting aside the 2018 Charter in its entirety, is foreshadowed in their answering affidavit which contains a counter application.

[43] *Kruger and Others v Aciel Geomatics* (Pty) Ltd [2016] JOL 36084 (LAC).

However, on closer scrutiny of their answering affidavit, it is clear that it does not contain a counter application.

[65] In any event, it is not competent for a respondent to bring a counter application against a co-respondent without bringing a counter application against the applicant. In terms of rule 24 of the Uniform Rules of Court, a counter application must be brought against the applicant, and not other parties unless the applicant is included.[44] The only way in which a respondent can permissibly bring a claim against a co-respondent in the absence of a counterclaim against the applicant would be by virtue of rule 13 which regulates third party procedure.[45]

[66] Accordingly, since there is no lis between the community respondents and the Minister, they are not entitled to the review and other consequential relief which they seek against him.

Costs

[67] The Minerals Council does not seek costs against the joined respondents. It seeks the costs of three counsel against the Minister. Considering the complexity of the matter, the costs of three counsel is justified.

Order

[68] In the result, I make the following order:

1. The following clauses of the Broad-Based Socio-economic Empowerment Charter for the Mining and Minerals Industry, 2018 (Mining Charter, 2018) published in Government Notice 1002, Government Gazette No. 41934, dated 27 September 2018 (as amended by the Amendment in Government Notice 1421, Government Gazette No. 42130, dated 20 December 2018) ("the 2018 Charter") are reviewed and set aside in terms

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[44] *Good Hope Plasterers CC t/a Good Hope Construction v E-Junction Property Developers (Pty) Ltd* (9671/2020) [2020] ZAWCHC 162 paras 50-55 (unreported).

[45] *Soundprops 1160 CC v Karlshavn Farm Partnership and Others* 1996 (3) SA 1026 (NPD) at 1031D.

of sections 6(2)(a)(i), 6(2)(d), 6(2)(e)(i), 6(2)(e)(iii), 6(2)(e)(vi), 6(2)(f)(i), 6(2)(f)(ii), 6(2)(h), and/or 6(2)(i), of the Promotion of Administrative Justice Act, 3 of 2000 [“PAJA”]:

1.1. the introductory sentence of clause 2.1 insofar as it provides that "a mining right holder must comply with the following";

1.2. clause 2.1.1.2, 2.1.1.5, 2.1.1.6 and 2.1.6.2, insofar as they apply to the renewal of a mining right;

1.3. clause 2.1.1.4;

1.4. clauses 2.1.3.2 and 2.1.4;

1.5. clauses 2.1.5.2 and 7.2;

1.6. the proviso to clause 2.1.6.1, in clauses 2.1.6.1.1 to 2.1.6.1.4;

1.7. the heading of clause 2.1.6 insofar as it refers to "existing rights";

1.8. the definition of "beneficiation" and clauses 2.1.7.1 (including clauses 2.1.7.1.1 to 2.1.7.1.5) in the following respects:

1.8.1. setting aside the definition of beneficiation and substituting it with the definition of beneficiation in section 1 of the Mineral and Petroleum Resources Development Act, 2002;

1.8.2. setting aside the words "against a BEE Entrepreneur" where they appear in clause 2.1.7.1;

1.8.3. setting aside the words "a maximum of 5 percentage points of a BEE Entrepreneur" where they appear in clause 2.1.7.1.1;

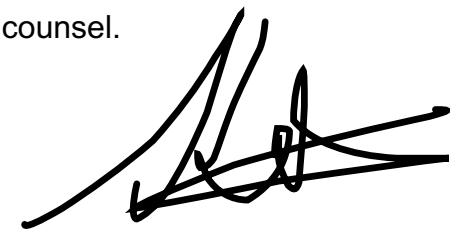
1.8.4. setting aside the whole of clauses 2.1.7.1.2 to 2.1.7.1.5;

1.9. clause 2.2;

1.10. Insofar as the following clauses relate to existing or new licences and permits issued in terms of the Diamonds Act, 1986 and the Precious Metals Act, 2005, clauses 4, 6.2, 7.1, 7.3, 8.7, 8.8, 8.9 and 9.2; and

1.11. clause 9.1.

2. The first respondent is directed to pay the costs of this application, such costs to include the costs of three counsel.



F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION,
PRETORIA

Appearances:

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Instructed by: The State Attorney (Pretoria)

Counsel for third and fourth respondents: A Rawhani-Moslalakae

Instructed by: Centre for Applied Legal Studies

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Counsel for twelfth respondent: D Diamond

Instructed by: Mohale Incorporated

Date of Hearing: 3-5 May 2021

Date of Judgment: 21 September 2021