All South African Law Reports May 2018 [2018] 2 All SA 391 (GP)

a

Chamber of Mines of South Africa v Minister of Mineral Resources and another

b GAUTENG DIVISION, PRETORIA
PM MABUSE, NTY SIWENDU JJ AND FG BARRIE AJ

Date of Judgment: 4 April 2018 Case Number: 41661/2015

Sourced by: H Schutte and R Mamabola Summarised by: DPC Harris

c *Mining, Minerals & Energy – Mining right holders – Duties and obligations – Effect of Charters published by Minister – Targets set for participation or ownership by historically disadvantaged South Africans – Obligation to achieve and maintain targets.*

Editor's Summary

d The applicant was the Chamber of Mines of South Africa, which was a voluntary association of entities (referred to in the judgment as "the mining companies") involved in mining activities.

e In August 2004, the Scorecard for the Broad based Socio-economic Empowerment Charter for the South African Mining Industry ("the Original Charter") was published. The Amendment of the Broad based Socio-economic Empowerment Charter for the South African Mining and Minerals Industry ("the 2010 Charter") was published in 2010. The parties were in dispute about the application of the two Charters to mining rights granted under the Mineral and Petroleum Resources Development Act 28 of 2002, and to holders of such rights.

f Declaratory relief was sought in this application, to obtain clarity on the empowerment obligations of mining right holders.

g **Held** – The majority of the court held that the issues to be determined were whether a mining company has a perpetual and recurring obligation to meet a 26% ownership target after the grant of a mining right; whether the Minister can use the enforcement powers in the Mineral and Petroleum Resources Development Act to compel compliance with the 26% target; how compliance with the 26% HDSA target should be calculated; and whether certain contested provisions of the 2010 Charter identified by the parties were *ultra vires* and void.

h "HDSA" referred to "historically disadvantaged South Africans". The Charters set target levels for HDSA participation or effective HDSA ownership at 15% as a 5-year target and 26% as a 10-year target. The principal underlying issue of dispute between the parties related to the situation where a mining company that had been granted a mining right had achieved the 26% target but the HDSA participants in the transaction had subsequently disposed of their interests, causing the mining company's HDSA participation/ownership levels to fall below 26%. The question was whether a mining rights holder was obliged, in terms of the Charters, to take steps to restore the 26% level and maintain that level indefinitely. That was what was contended by the respondents, whereas the applicant argued against any duty of continuing compliance.

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j After setting out the relevant sections of the Mineral and Petroleum Resources Development Act, the Court examined the nature of a typical mining right, and the rights and obligations attached to such right. It then moved on to consider the status of the Charters. It concluded that neither Charter specified

an ongoing obligation to achieve and maintain a 26% HDSA participation or ownership level. More importantly, the status of the 2010 Charter was found to be fallible as it was only the Original Charter that the Minister had been empowered to develop in terms of section 100 of the Act. *a*

The majority of the Court therefore granted the applicant the declaratory relief sought, as set out in the order. *b*

In a dissenting judgment, the contrary view was taken. The judge therein found the Charters not to be mere policy or guidelines, and took the view that an enduring obligation to maintain the relevant targets was intended.

Notes *c*

For Minerals and Petroleum see:

- *LAWSA* Second Edition (Vol 18, paras 1–386)
- MO Dale, L Bekker, FJ Bashall, M Chaskalson, C Dixon, GL Grobler, CDA Loxton, *SA Mineral and Petroleum Law* (updated looseleaf – Issue 23, September 2017) LexisNexis *d*

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Affordable Medicines Trust and others v Minister of Health and others 2005 (6) BCLR 529 (2006 (3) SA 247) (CC) – **Referred to** .... 428 *e*

Agri South Africa v Minister for Minerals and Energy (Afriforum and others as amici curiae) 2013 (7) BCLR 727 (2013 (4) SA 1) (CC) – **Referred to** 417

Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd [2001] 4 All SA 68 (2001 (4) SA 501) (SCA) – **Referred to** 446

Albutt v Centre for the Study of Violence and Reconciliation and others 2010 (5) BCLR 391 (2010 (3) SA 293) (CC) – **Referred to** .... 445 *f*

Bareki and another v Gencor Ltd and others [2006] 2 All SA 392 (2006 (1) SA 432) (T) – **Referred to** 460

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others 2004 (7) BCLR 687 (2004 (4) SA 490) (CC) – **Referred to** 422

Bellairs v Hodnett and another 1978 (1) SA 1109 (A) – **Referred to** .... 460 *g*

Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others 2011 (3) BCLR 229 (2011 (4) SA 113) (CC) – **Referred to** 417

Bothma-Batho Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk [2014] 1 All SA 517 (2014 (2) SA 494) (SCA) – **Referred to** 422

City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd [2010] 1 All SA 1 (2010 (3) SA 589) (SCA) – **Referred to** .... 441 *h*

Department of Land Affairs and others v Goedgelegen Tropical Fruits 2007 (10) BCLR 1027 (2007 (6) SA 199) (CC) – **Referred to** 422

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1998 (12) BCLR 1458 (1999 (1) SA 374) (CC) – **Referred to** .... 441 *i*

Government of the Republic of South Africa and others v Grootboom and others 2000 (11) BCLR 1169 (2001 (1) SA 46) (CC) – **Referred to** 447

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a *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd and others* [2011] 1 All SA 364 (SCA) – **Referred to** 417

Holomisa v Argus Newspaper Ltd [1996] 1 All SA 478 (1996 (2) SA 588) (W) – **Referred to** 439

Howick District Landowners Association v Umgeni Municipality and others b [2007] 1 All SA 139 (2007 (1) SA 206) (SCA) – **Referred to** 427

Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others: In re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others 2000 (10) BCLR 1079 (2001 (1) SA 545) (CC) – **Referred to** 422

c *Khumalo and others v Holomisa* 2002 (8) BCLR 771 (2002 (5) SA 401) (CC) – **Referred to** 439

Latib v The Administrator, Transvaal 1969 (3) SA 186 (T) – **Referred to** 427

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Mazibuko v City of Johannesburg 2010 (3) BCLR 239 d (2010 (4) SA 1) (CC) – **Referred to** 461

Member of the Executive Council for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute 2014 (5) BCLR 547 (2014 (3) SA 481) (CC) – **Referred to** 459

Minister of Education v Harris 2001 (11) BCLR 1157 e (2001 (4) SA 1297) (CC) – **Referred to** 427

Minister of Finance and another v Van Heerden 2004 (11) BCLR 1125 (2004 (6) SA 121) (CC) – **Referred to** 450

Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign and another as amici curiae) 2006 (1) BCLR 1 (2008 (2) SA 311) (CC) – **Referred to** 441

f *Minister of Mineral Resources and others v Mawetse (SA) Mining Corporation (Pty) Ltd* [2015] 3 All SA 408 (2016 (1) SA 306) (SCA) – **Referred to** 423

Minister of Mineral Resources and others v Sishen Iron Ore Co (Pty) Ltd and another 2014 (2) BCLR 212 (2014 (2) SA 603) (CC) – **Referred to** 417

Minister of Minerals and Energy v Agri South Africa (Centre for Applied Legal g *Studies as amicus curiae)* [2012] 3 All SA 266 (2012 (5) SA 1) (SCA) – **Referred to** 417

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National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others 1998 (12) BCLR 1517 (1999 (1) SA 6) (CC) – **Referred to** 453

h *National Iranian Tanker Co v MV Pericles GC* [1995] 1 All SA 493 (1995 (1) SA 475) (A) – **Referred to** 460

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg 2008 (5) BCLR 475 (2008 (3) SA 208) (CC) – **Referred to** 461

i *Pharmaceutical Manufacturers Association of SA and others; In re: Ex parte Application of President of the RSA and others* 2000 (3) BCLR 241 (2000 (2) SA 674) (CC) – **Referred to** 459

President of the Republic of South Africa v SARFU 1999 (10) BCLR 1059 (2000 (1) SA 1) (CC) – **Referred to** 442

Roux v Health Professionals Council of South Africa and another j 2011 JDR 1132 – **Referred to** 443

S v Lawrence; *S v Negal*; *S v Solberg* 1997 (10) BCLR 1348 (1997 (4) SA 1176) (CC) – **Referred to** 451

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Thoroughbred Breeders' Association v Price Waterhouse [2001] 4 All SA 161 (2001 (4) SA 551) (SCA) – **Referred to** 422

University of the Free State v Afriforum and another [2017] 2 All SA 808 (2017 (4) SA 283) (SCA) – **Referred to** 446

Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd 2011 (2) BCLR 207 (2011 (1) SA 327) (CC) – **Referred to** 453

Xstrata (Pty) Ltd and others v SFF Association [2012] JOL 28829 (2012 (5) SA 60) (SCA) – **Referred to** 417

Judgment

BARRIE AJ:

The parties

[1]

1.1 The applicant in this matter is the Chamber of Mines of South Africa ("the Chamber").

1.2 The Chamber is a voluntary association of entities that are involved with the mining of minerals in South Africa. The Chamber in its founding papers describes these as "mining finance companies and mines operating in the gold, coal, diamond, platinum, lead, iron ore, rutile, zircon, ilmenite, leucoxene, monazite, magnetite and other associated minerals, antimony and copper mining sectors". I shall in this judgment refer to such companies as "mining companies".

[2]

2.1 The first respondent is the Minister of Mineral Resources of the Republic of South Africa ("the Minister").

2.2 The Minister is cited in the matter in her/his official capacity as the Minister of State to whom the powers and functions of the "Minister of Minerals and Energy" as referred to in the Mineral and Petroleum Resources Development Act 28 of 2002 ("the MPRDA" or "the Act") have been assigned in accordance with section 97 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").[1]

[3] The second respondent is the Director-General of the Department of Mineral Resources ("the Director-General"). The Department of Mineral Resources ("the DMR") is now the department of state in the national sphere of government that is referred to as the "Department of Minerals and Energy" in the MPRDA.

1 By Proclamation 44 of 2009 published in *Government Gazette* 32367 of 1 July 2009.

a

The "friends of the court"

[4] The Court admitted two "friends of the Court" in terms of rule 16A(8) of the Uniform Rules of Court.

[5]

b

5.1 The first "friend of the Court" is the Serodumo sa Rona Community Based Organisation ("Serodumo").

5.2 According to Serodumo's application papers submitted to the Court in terms of rule 16A it is "a not-for-profit organisation with legal capacity based within the Bapo community, located in the North West Province". It is stated to exist for the purpose of acting in the overall interests of the Bapo community with respect to, in particular, the objects of:

c

> "improving the quality of life and poverty alleviation within the Bapo community, protecting and promoting the Bapo community's socio-economic development rights regarding land and property ownership, mineral rights and beneficiation, education and related civil rights"

d

> And:
>
> "(w)orking in collaboration with other organisations that mainly deal with societal development, democracy and constitutional rights".

[6]

e

6.1 The second "friend of the Court" is the National Empowerment Fund (the "NEF"). The NEF is a corporate body established in terms of the National Empowerment Fund Act, 1998.[2]

6.2 Section 3 of Act 105 of 1998 describes the NEF's objects to be:

> ". . . to facilitate the redressing of economic inequality which resulted from the past unfair discrimination against historically disadvantaged persons by:

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> (a) providing historically disadvantaged persons with the opportunity of, directly or indirectly, acquiring shares or interest in State Owned Commercial Enterprises that are being restructured or in private business enterprises;

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> (b) encouraging and promoting savings, investments and meaningful economic participation by historically disadvantaged persons;
>
> (c) promoting and supporting business ventures pioneered and run by historically disadvantaged persons;
>
> (d) promoting the universal understanding of equity ownership among historically disadvantaged persons;

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> (e) encouraging the development of a competitive and effective equities market inclusive of all persons in the Republic;
>
> (f) contributing to the creation of employment opportunities; and
>
> (g) generally employing such schemes, businesses and enterprises as may be necessary to achieve the objects of this Act."

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Terminology

[7] Section 103 of the MPRDA provides for the delegation of powers conferred and the assignment of duties imposed on the Minister by or

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2 In terms of which it is described as "the Trust".

under the Act to the Director General or any officer of the DMR. References in this judgment to acts of the Minister should be understood to encompass reference to acts of persons to whom the Minister's powers and duties may have been or may be delegated.

[8] The Minister and the Director-General will herein be referred to collectively as "the respondents". References to "the parties" are to the Chamber, on the one hand, and the Minister and the Director-General, on the other, as respectively the applicant and respondent parties to the proceedings.

[9] References to the "Transitional Arrangements" in Schedule II to the MPRDA ("Schedule II") regarding the conversion of "old order rights" to rights in terms of the MPRDA shall be in the past tense on the premise that the conversion processes are now, by virtue of the time limitations that applied in terms of Schedule II, in the past. The terms "old order rights" and "old order mining rights" shall refer to such rights as defined and referred to in Schedule II.

[10] I shall when referring to applicants for or holders of mining rights use the neuter reference to simplify the syntax (on the supposition that applicants/holders would in most instances be corporate entities).

The issues

[11] At issue in these proceedings is the application to mining rights granted under the MPRDA and to the holders of such mining rights of:

11.1 the "Scorecard for the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (including the Charter)" ("the Original Charter") that was published in *Government Gazette* 26661 by Government Notice R1639 of 13 August 2004; and

11.2 the "Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry ("the 2010 Charter") that was published in *Government Gazette* 33573 by Government Notice 838 of 20 September 2010.

[12] The parties provided a joint practice note to the Court in terms of which they described the nature of the application serving before the Court as:

> "An application for declaratory relief brought by agreement between the Chamber of Mines, the Minister of Mineral Resources and the Director-General of the Department of Mineral Resource (DMR) in order to obtain certainty regarding the empowerment obligations of mining rights holders."

[13] The joint practice note describes the issues to be determined as follows:

> "It is common cause that the disputes that arose between the parties, and that must be determined by this Court, raise the following four questions:
>
> 1. Does a mining company have a perpetual and recurring obligation to meet a 26% ownership target after the grant of a mining right or the conversion of an old order mining right?
>
> 2, Can the Minister use the enforcement powers in the MPRDA to compel compliance with the 26% target?
>
> 3. How is compliance with the 26% HDSA target to be calculated?

a

4. Are the contested provisions of the 2010 Charter identified by the parties *ultra vires* and void?"[3]

[14] Counsel for the Chamber during his argument in reply handed up a draft order setting out the relief that the Chamber seeks in the matter, it differs in minor respects from what is set out in the Chamber's notice of motion in that it omits one prayer[4] and rewords two of the original prayers.[5]

b

[15] There was no objection to the draft order being received and the Chamber's notice of motion stands amended in accordance with it. The applicant now seeks orders from the Court:

"1. Declaring that:

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1.1 once the first respondent or his delegate is satisfied in terms of section 23(1)(h) of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) that the grant of the mining right applied for will further the objects referred to in sections 2(d) and (f) of the MPRDA, in accordance with The Broad-based Socio-economic Empowerment Charter for the South African Mining industry (Original Charter) published in Proclamation GNR 1639 *Government Gazette* 26661 of 13 August 2004 and developed by the first respondent in terms of section 100(2)(a) of the MPRDA or will be in accordance with the Amendment of the Broad-based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry published in Government Notice 838, *Government Gazette* 33573 dated 20 September 2010 (2010 Charter) and grants such right, the holder thereof is not thereafter legally obliged to restore the percentage ownership (howsoever measured, *inter alia* wholly or partially by attributable units of South African production) controlled by historically disadvantaged persons (as defined in section 1 of the MPRDA (HDPs) or historically disadvantaged South Africans as defined in the Original Charter and in the 2010 Charter) (HDSAs) to the 26% target referred to in the Original Charter and in the 2010 Charter where such percentage falls below 26%;

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1.2 once the first respondent or his delegate converts an old order mining right in terms of item 7(3) of Schedule II to the MPRDA and the holder of such converted right complies with the undertaking provided in terms of item 7(2)(k) the holder of such converted mining right is not legally obliged to restore the percentage ownership (howsoever measured, *inter alia* wholly or partially by attributable units of South African production) controlled by HDPs or HDSAs to the 26% target referred to in the Original Charter and in the 2010 Charter where thereafter such percentage falls below 26%;

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h

1.3 a failure by a holder of a mining right or converted mining right to meet the requirements of the Original Charter or of the 2010 Charter, and in particular a failure to maintain (should the Court find that there is an obligation to do so) a 26% HDP or HDSA ownership level, does not constitute a contravention of 'this Act' as defined in section 1 of the MPRDA, and in particular does not

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3 The reference to "HDSA" in the joint practice note is a reference to "Historically Disadvantaged South Africans" as defined in the Original Charter and in the 2010 Charter.

4 Para 1.5 of the notice of motion.

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5 Paras 1.1 and 1.6 of the notice of motion.

constitute a contravention for the purposes of sections 47(1)(a) or 93(1)(a), and further does not constitute an offence for the purposes of section 98(a)(viii);

1.4 neither the Original Charier nor the 2010 Charter requires the holder of a mining right to continue to enter into further empowerment transactions to address losses in HDP or HDSA ownership once the 26% ownership level has been achieved;

1.5 paragraph 2.1 of the 2010 Charter does not retrospectively deprive holders of mining rights or converted mining rights of the benefit of:

1.5.1 the capacity for offsets which would entail credits/offsets to allow for flexibility;

1.5.2 the continuing consequences of empowerment transactions concluded by them after the coming into force of the MPRDA, which benefits were conferred by the Original Charter;

1.5.3 the right, where a company has achieved HDSA participation in excess of any set target in a particular operation, to utilise such excess to offset any shortfall in its other operations;

1.5.4 the entitlement to offset the full value of the level of beneficiation achieved by the Company against its HDSA ownership commitments; and

1.5.5 all forms of ownership and participation by HDPs and HDSAs, and not only those which fall within the definition of 'meaningful economic participation' as defined in the 2010 Charter, being taken into account;

1.6 paragraph 3 of the 2010 Charter does not render holders of mining rights or converted mining rights who fail to comply with the Original Charter or with the 2010 Charter and the MPRDA in breach of the MPRDA and subject to the provisions of section 47 thereof read in conjunction with sections 98 and 99.

2. Directing that the respondents shall pay the costs of the application, such costs to include the costs of two counsel."

[16] The orders that the Chamber seeks and what this case is about can only be understood with reference to the provisions of the two documents at issue. The Original Charter and the 2010 Charter as published in the *Government Gazette* accordingly accompany this judgment.

[17] The matters at issue relate to what is referred to as "HDSA participation in terms of ownership for equity or attributable units of production" in the Original Charter[6] and "Effective HDSA ownership"[7] in the 2010 Charter. The term HDSA is an acronym for the term "Historically Disadvantaged South African" as referred to and defined in the Original Charter and the 2010 Charter respectively.[8] The charters set target levels for

6 See item 7 of the "scorecard" forming part of the Original Charter.

7 See the "Definitions" clause of the 2010 Charter.

8 The definitions are not identical; the phrase "historically disadvantaged South African" ("HDSA") comes from s 100(2) of the MPRDA. S 100 does not employ the term "historically disadvantaged person" ("HDP") as defined in s 1 of the MPRDA.

a such "HDSA participation" of "Effective HDSA ownership" at 15% as a 5 year target and 26% as a 10 year target.[9]

[18] The principal underlying issue of dispute between the parties pertains to instances where mining companies that had been granted mining rights under the MPRDA had concluded and executed so-called Black Economic Empowerment ("BEE") transactions and had, in doing so, achieved the 26% target specified in the Original Charter (or the 2010 Charter), but the HDSA participants in the relevant BEE transactions had by 2014 or subsequently disposed of their interests, thus causing the mining companies' HDSA participation/ownership levels to fall below the 26% target. The issue is whether such mining right holders are in terms of the charters obliged to take steps to achieve that the 26% level be restored and then be maintained at that level indefinitely. The view of the Chamber and its members is that the MPRDA does not place a duty of continuing compliance upon the holder of a mining right – once an applicant for a mining right has satisfied the requirements of section 23(1)(h) or item 7(2)(k) in Schedule II and been granted a mining right, it cannot be required thereafter to do so again, failing which its right will be placed in jeopardy. The respondents, on the other hand, take, the view that a holder of a mining right has a continuing obligation to maintain the 26% HDSA ownership level and that a failure to do so constitutes a contravention of the charters, of the terms of their mining rights and of the MPRDA.

[19] The Original Charter did not specify such an obligation. That appears, albeit somewhat obliquely, from clause 4.7 thereof which provides that:

> "In order to measure progress on the broad transformation front the following indicators are important:
>
> - The currency of measure of transformation and ownership could, *inter alia*, be market share as measured by attributable units of South African production controlled by HDSA's.
> - That there would be capacity for offsets which would entail credits/offsets to allow for flexibility.
> - The continuing consequences of all previous deals would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production.
> - Government will consider special incentives to encourage HDSA companies to hold on to newly acquired equity for a reasonable period."

[20] The 2010 Charter, on the other hand, suggests otherwise, again somewhat obliquely[10]. it states in paragraph 2.1 as follows:

> "Effective ownership is a requisite instrument to effect meaningful integration of HDSA into the mainstream economy. In order to achieve a substantial change in racial and gender disparities prevalent in ownership of mining assets,

9 The exact dates by which these targets were to have been achieved is not entirely clear, but they seem to have been contemplated as end of year targets that are supposed to have been achieved by end-2009 and end-2014.

10 But made more explicit in terms of the "scorecard" forming part of the 2010 Charter.

and thus pave the way for meaningful participation of HDSA for attainment of sustainable growth of the mining industry, stakeholders commit to:

- Achieve a minimum target of 26 percent ownership to enable meaningful economic participation of HDSA by 2014;
- The only offsetting permissible under the ownership element is against the value of beneficiation, as provided for by Section 26 of the MPRDA and elaborated in the mineral beneficiation framework.

The continuing consequences of all previous deals concluded prior to the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002 would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production."[11]

[21] The differences between the Original Charter and the 2010 Charter regarding what can be taken into account by way of "continuing consequences of all previous deals" and "offsets" for purposes of determining the HDSA participation/ownership towards the 15/26% levels are at the heart of the dispute. That has to be understood also in the context that the respondents' stance is that the provisions of the 2010 Charter apply to all mining rights granted under the MPRDA since its inception, ie including rights granted before the Minister's publishing the 2010 Charter on 20 September 2010[12].

[22] One of the prickly issues between the parties is whether the Minister may apply the provisions of the MPRDA to compel compliance with the 26% HDSA ownership level in the charters. Of particular importance in this regard is paragraph 4 of the 2010 Charter that provides that:

> "Non-compliance with the provisions of the Charter and the MPRDA shall render the mining company in breach of the MPRDA and subject to the provisions of Section 47 read in conjunction with Sections 98 and 99 of the Act".[13]

Relevant provisions of the MPRDA

[23] The MPRDA was extensively amended by the provisions of the Mining and Petroleum Resources Development Amendment Act 49 of 2008 ("Act 49 of 2008"). The amendments effected by the various sections of Act 49 of 2008 came into operation on different dates (and some have yet to be put into effect). Most of the provisions, however, came into operation on 13 June 2013. In the context of the matter the rights, obligations and limitations attaching to a mining right granted in terms of the MPRDA are, in a practical sense, principally relevant with reference to the wording of the MPRDA in its original form, as at the time when it came into operation, as opposed to the amended provisions arising in

11 The value of beneficiation that a mining company can set off "against a portion of its HDSA ownership requirements" is in terms of para 2.3 of the 2010 Charter limited to 11%.

12 "Effective as of the 13th September 2010".

13 See below. S 47 of the MPRDA grants the Minister powers to cancel or suspend mining rights if (among others) the holder thereof conducts mining in contravention of the MPRDA or breaches any material term of the right at issue. Ss 89 and 99 apply criminal sanctions to persons who, among other things, fail to comply with "any directive, notice, suspension, order, instruction or condition issued, given or determined in terms of this Act", or with "any other provision of this Act".

a terms of Act 49 of 2008 that came into operation on later dates.[14] However, the relief that the Chamber seeks and, accordingly, the subject matter of this judgment, is not limited to the MPRDA's original wording. In providing the wording of the MPRDA below the emphasis is on the wording of the Act as at the time that it was put into operation. The b wording of sections newly inserted or that amended or substituted the original provisions is provided, but mostly, where practicable, in the footnotes.

[24] Because of the amendments that Act 49 of 2008 wrought, the intertemporal application of the provisions, pre- and post-amendment, has to be c kept in mind. The principles that govern the question whether rights granted and vested in terms of legislation are affected by subsequent enactments are relevant in that regard.[15] However, although this judgment has to be understood in relation to any mining right granted after 1 May 2004 with reference to the provisions of the MPRDA that operated at the time that the right was granted (which is the reason why I provide the d pre- and post-amendment wording), the amendments to the MPRDA in terms of Act 49 of 2008 that came into operation subsequent to 1 May 2004 by way of substitution or addition of sections and subsections do not affect the substance of the conclusions that I draw.

[25] The long title and preamble to the MPRDA provide that:

e "MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT 28 OF 2002 ACT

To make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources; and to provide for matters connected therewith:

Preamble

f RECOGNISING that minerals and petroleum are non-renewable natural resources;

ACKNOWLEDGING that South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof;

AFFIRMING the State's obligation to protect the environment for the benefit of present and future generations, to ensure ecologically sustainable devel- g opment of mineral and petroleum resources and to promote economic and social development;

RECOGNISING the need to promote local and rural development and the social upliftment of communities affected by mining;

REAFFIRMING the State's commitment to reform to bring about equitable h access to South Africa's mineral and petroleum resources;

14 The mining rights affected by the dispute(s) between the parties would mostly have been granted under the terms of the MPRDA as at the time when it came into effect on i 1 May 2004.

15 The provisions of s 12 of the Interpretation Act are relevant in that regard, as well as the principle, usually expressed as a presumption of statutory interpretation, that enactments do not, generally, interfere with vested rights, ie legislation applies prospectively and not retrospectively, unless retrospective application is expressly or by necessary implication prescribed (construed in accordance with relevant provisions of the Constitution and j passing muster in terms of those). See regarding these subjects Joubert *The Law of South Africa* (2ed) Vol 25, part 1 at paras 305–307 and 341.

BEING COMMITTED to eradicating all forms of discriminatory practices in the mineral and petroleum industries;

CONSIDERING the State's obligation under the Constitution to take legislative and other measures to redress the results of past racial discrimination;

REAFFIRMING the State's commitment to guaranteeing security of tenure in respect of prospecting and mining operations; and

EMPHASISING the need to create an internationally competitive and efficient administrative and regulatory regime,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows."

[26] Section 1 of the MPRDA defines certain terms used in the Act with reference to specified meanings that apply "unless the context indicates otherwise". Among these are the following terms that appear in sections of the MPRDA that are relevant hereto:

"'broad based economic empowerment' means a social or economic strategy, plan, principle, approach or act which is aimed at –

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

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

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

(ii) the participation in or control of management of such operations;

(iii) the development of management, scientific, engineering or other skills of historically disadvantaged persons;

(iv) the involvement of or participation in the procurement chains of operations:

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

(vi) the socio-economic development of communities immediately hosting, affected by the of supplying labour to the operations; and

(vii) the socio-economic development of all historically disadvantaged South Africans from the proceeds or activities of such operations;'[16]

"'community' means a coherent, social group of persons with interests or

16 Para (vi) of the definition was substituted by s 1(b) of Act 49 of 2008 (with effect from 7 June 2013). It now reads:

"(vi) the socio-economic development of communities immediately hosting, affected by supplying labour to operations; and . . . "

a

rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law;[17]

"'environment' means the environment as defined in the National Environmental Management Act, 1998 (Act 107 of 1996);"

"'historically disadvantaged person' means –

b

(a) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect;

(b) any association, a majority of whose members are persons contemplated in paragraph (a);

(c) any juristic person other than an association, in which persons contemplated in paragraph (a) own and control a majority of the issued capital or members' interest and are able to control a majority of the members' votes;"[18]

c

"'holder', in relation to a prospecting right, mining right, mining permit, retention permit, exploration right, production right, reconnaissance permit or technical co-operation permit, means the person to whom such right or permit has been granted or such person's successor in title;"

d

"'mine', when used as a verb, means any operation or activity for the purposes of winning any mineral on, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto;'"[19]

e

17 The definition of "community" was substituted by s 1(c) of Act 49 of 2008 (with effect from 7 June 2013). The definition now is:

"'community' means a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community".

f

18 Subpara (c) of the definition was substituted by s 1(i) of Act 49 of 2008 (with effect from 7 June 2013). It now reads:

"(c) a juristic person, other than an association, which –

(i) is managed and controlled by a person contemplated in paragraph (a) and that the persons collectively or as a group own and control a majority of the issued share capital or members' interest, and are able to control the majority of the members' vote; or

g

(ii) is a subsidiary, as defined in section 1(e) of the Companies Act, 1973, as a juristic person who is a historically disadvantaged person by virtue of the provisions of paragraph (o)(i)."

19 The definition of "mine" was substituted by s 1(m) of Act 49 of 2008 (with effect from 7 June 2013), it now reads:

h

"'mine' means, when –

(a) used as a noun –

(i) any excavation in the earth, including any portion under the sea or under other water or in any residue deposit as well as any borehole, whether being worked or not, made for the purpose of searching for or winning a mineral;

(ii) any other place where a mineral resource is being extracted, including the mining area and all buildings, structures, machinery, residue stockpiles, access roads or objects situated on such area and which are used or intended to be used in connection with such searching, winning or extraction or processing of such mineral resource; and

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(b) used as a verb, in the mining of any mineral, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto, in, on or under the relevant mining area."

j

"'mineral' means any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits, but excludes -

(a) water, other than water taken from land or sea for the extraction of any mineral from such water;

(b) petroleum; or

(c) peat."

"'mining right' means a right to mine granted in terms of section 23(1);"

"'this Act' includes the regulations and any term or condition to which any permit, permission, licence right, consent, exemption, approval, notice, closure certificate, environmental management plan, environmental management programme or directive issued, given, granted or approved in terms of this Act, is subject."

[27] Section 2 of the MPRDA originally provided that:

"2 Objects of Act

The objects of this Act are to –

(a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral 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, to enter 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;

(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;

(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 socioeconomic development of the areas in which they are operating."[20]

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20 Sub-ss (d) and (e) substituted by s 2 of Act 49 of 2008 (with effect from 7 June 2013). The sub-ss, now read:

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

(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."

a [28] Section 3 of the MPRDA originally provided that:

"3 Custodianship of nation's mineral and petroleum resources

(1) Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.

b (2) As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may –

(a) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and

c (b) in consultation with the Minister of Finance, determine and levy, any fee or consideration payable in terms of any relevant Act of Parliament.

(3) The Minister must ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and d social development."[21]

[29] Section 4 of the MPRDA provides that:

"4 Interpretation of Act

e (1) When interpreting a provision of this Act any reasonable interpretation which is consistent with the objects of this Act must be preferred over any other interpretation which is inconsistent with such objects.

(2) In so far as the common law is inconsistent with this Act, this Act prevails."

[30] Section 5 of the MPRDA originally provided that:

f "5 Legal nature of prospecting light, mining right, exploration right or production right, and rights of holders thereof

(1) A prospecting right, mining right, exploration right or production right granted in terms of this Act is a limited real right in respect of the mineral or petroleum and the land to which such right relates;

g (2) The holder of a prospecting right, mining right, exploration right or production right is entitled to the rights referred to in this section and such other rights as may be granted to, acquired by or conferred upon such holder under this Act or any other law;

(3) Subject to this Act, any holder of a prospecting right, a mining right, exploration right or production right may -

h (a) enter the land to which such right relates together with his or her employees, and may bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the

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21 Sub-s (b) substituted by s 3 (a) of Act 49 of 2003 [with effect from 7 June 2013) and sub-s (4) added by s 3 (b) of Act 49 of 2008 (with effect from 7 June 2013). The sub-ss now read:

"(b) in consultation with the Minister of Finance, prescribe and levy, any fee payable in terms of this Act.

j (4) The State royalty must be determined and levied by the Minister of Finance in terms of an Act of Parliament."

purposes of prospecting, mining, exploration or production, as the case may be;

(b) prospect, mine, explore or produce, as the case may be, for his or her own account on or under that land for the mineral or petroleum for which such right has been granted;

(c) remove and dispose of any such mineral found during the course of prospecting, mining, exploration or production, as the case may be;

(d) subject to the National Water Act, 1998 (Act 36 of 1998), use water from any natural spring, lake, river or stream, situated on, or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole required for use relating to prospecting, mining, exploration or production on such land; and

(e) carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of this Act.

(4) No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without –

(a) an approved environmental management programme or approved environmental management plan, as the case may be;

(b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and

(c) notifying and consulting with the land owner or lawful occupier of the land in question."[22]

[31] Section 6 of the MPRDA provides that:

"6 Principles of administrative justice

(1) Subject to the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), any administrative process conducted or decision taken in terms

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22 Sub-s (1) was substituted by s 4(a) of Act 49 of 2008 (with effect from 7 June 2013), Sub-s (3)(a) was substituted by s 4(b) of Act 49 of 2008 (with effect from 7 June 2013), a new sub-s (3)(cA) was inserted by s 4 (c) of Act 49 of 2008 (with, effect from 7 June 2013) and sub-s (4) was deleted by s 4 (d) of Act 49 of 2008 (with effect from 7 June 2013). The new sub-ss now provide that:

"(1) A prospecting right, mining right, exploration right or production right granted in terms of this Act and registered in terms of the Mining Titles Registration Act, 1967, (Act 16 of 1967), is a limited real right in respect of the mineral or petroleum and the land to which such right relates.

. . .

(3) (a) enter the land to which such right relates together with his or her employees, and bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purpose of prospecting, mining, exploration or production, as the case may be;

. . .

(cA) subject to section 59B of the Diamonds Act, 1986 (Act 56 of 1986), (in the case of diamond) remove and dispose of any diamond found during the course of mining operations."

a of this Act must he conducted or taken, as the case may be, within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness.

(2) Any decision contemplated in subsection (1) must be in writing and accompanied by written reasons for such decision."

b [32] Section 22 of the MPRDA originally provided that:

"22 Application for mining right

(1) Any person who wishes to apply to the Minister for a mining right must lodge the application –

(a) at the office of the Regional Manager in whose region the land is situated;

c (b) in the prescribed manner; and

(c) together with the prescribed non-refundable application fee.

(2) The Regional Manager must accept an application for a mining right if –

(a) the requirements contemplated in subsection (1) are met;

d (b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land; and

(3) If the application does not comply with the requirements of this section, the Regional Manager must notify the applicant in writing of that fact within 14 days of the receipt of the application and return the application to the applicant.

e (4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing –

(a) to conduct an environmental impact assessment and submit an environmental management programme for approval in terms of section 39, and

f (b) to notify and consult with interested and affected parties within 180 days from the date of the notice.

(5) The Minister may by notice in the *Gazette* invite applications for mining rights in respect of any land, and may specify in such notice the period within which any application may he lodged and the terms and conditions subject to which such, rights may he granted."

g [33] Act 49 of 2008 amended section 22 of the MPRDA quite extensively.[23] The section now provides that:

"22 Application for mining right

(1) Any person who wishes to apply to the Minister for a mining right must simultaneously apply for an environmental authorisation and must lodge the application –

h (a) at the office of the Regional Manager in whose region the land is situated;

(b) in the prescribed manner; and

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23 Sub-s (1) was amended by sub-s 18(a) of Act 49 of 2008 (with effect from 8 December 2014), sub-s (2) amended by s 18 (b) of Act 49 of 2008 (with effect from 7 June 2013), sub-s (2)(c) added by s 18(c) of Act 49 of 2008 (with effect from 7 June 2013), sub-s (3) substituted by s 18(d) of Act 49 of 2008 (with effect from 7 June 2013), sub-s (4)(a) substituted by s 18(e) of Act 49 of 2008 (with effect from 8 December 2014), sub-s (4)(b) substituted by s 18(e) of Act 49 of 2008 (with effect from 8 December 2014) and
j sub-s (5) substituted by s 18(f) of Act 49 of 2008 (with effect from 8 December 2014).

(c) together with the prescribed non-refundable application fee.

(2) The Regional Manager must, within 14 days of receipt of the application, accept an application for a mining right if –

(a) the requirements contemplated in subsection (1) are met;

(b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land; and

(c) no prior application for a prospecting right, mining right or mining permit or retention permit, has been accepted for the same mineral and land and which remains to be granted or refused.

(3) If the application does not comply with the requirements of this section, the Regional Manager must notify the applicant in writing within 14 days of the receipt of the application.

(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing –

(a) to submit the relevant environmental reports, as required in terms of Chapter 5 of the National Environmental Management Act, 1998, within 180 days from the date of the notice; and

(b) to consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports.

(5) The Regional Manager must, within 14 days of receipt of the environmental reports and results of the consultation contemplated in subsection (4) and section 40, forward the application to the Minister for consideration."

[34] Section 23 of the MPRDA originally provided that:

"23 Granting and duration of mining right

(1) Subject to subsection (4), the Minister must grant a mining right if -

(a) the mineral can be mined optimally in accordance with the mining work programme;

(b) the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally;

(c) the financing plan is compatible with the intended mining operation and the duration thereof;

(d) the mining will not result in unacceptable pollution, ecological degradation or damage to the environment;

(e) the applicant has provided financially and otherwise for the prescribed social and labour plan;

(f) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act 29 of 1996);

(g) the applicant is not in contravention of any provision of this Act; and

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

(2) The Minister may, having regard to the nature of the mineral in question, take into consideration the provisions of section 26.

(3) The Minister must refuse to grant a mining right if the application does not meet all the requirements referred to in subsection (1).

a

(4) If the Minister refuses to grant a mining right, the Minister must, within 30 days of the decision, in writing notify the applicant of the decision and the reasons.

(5) A mining right granted in terms of subsection (1) comes into effect on the date on which the environmental management programme is approved in terms of section 39(4).

b

(6) A mining right is subject to this Act, any relevant law, the terms and conditions stated in the right and the prescribed terms and conditions and is valid for the period specified in the right, which period may not exceed 30 years."

c

[35] Section 23 was also quite extensively amended by Act 49 of 2008.[24] The section now provides that:

"23 Granting and duration of mining right

(1) Subject to subsection (4), the Minister must grant a mining right if -

(a) the mineral can be mined optimally in accordance with the mining work programme;

d

(b) the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally;

(c) the financing plan is compatible with the intended mining operation and the duration thereof;

(d) the mining will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation is issued;

e

(e) the applicant has provided for the prescribed social and labour plan;

(f) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act; 1996 (Act 29 of 1996);

(g) the applicant is not in contravention of any provision of this Act; and

f

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

(2) The Minister may, having regard to the nature of the mineral in question, take into, consideration the provisions of section 26.

g

(2A) If the application relates to the land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community.

(3) The Minister must, within 60 days of receipt of the application from the Regional Manager, refuse to grant a mining right if the application does not meet the requirements referred to in subsection (1).

h

(4) If the Minister refuses to grant a mining right, the Minister must, within 30 days of the decision, in writing notify the applicant of the decision and the reasons.

(5) A mining right granted in terms of subsection (1) comes into effect on the effective date.

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24 Sub-s (1)(d) was substituted by s 19(a) of Act 49 of 2008 (with effect from 8 December 2014), sub-s (1)(e) substituted by s 19(b) of Act 49 of 2008 (with effect from 7 June 2013), sub-s (2A) inserted by s 19(c) of Act 49 of 2008 (with effect from 7 June 2013), sub-s (3) substituted by s 19(d) of Act 49 of 2008 (with effect from 7 June 2013) and sub-s (5) substituted by s 19(e) of Act 49 of 2008 (with effect from 7 June 2013).

j

(6) A mining right is subject to this Act, any relevant law, the terms and conditions stated in the right and the prescribed terms and conditions and is valid for the period specified in the right, which period may not exceed 30 years." *a*

[36] Section 25 of the MPRDA originally provided that:

"25 Rights and obligations of holder of mining tight *b*

(1) In addition to the rights referred to in section 5, the holder of a mining right has, subject to section 24, the exclusive right to apply for and be granted a renewal of the mining right in respect of the mineral and mining area in question.

(2) The holder of a mining right must –

(a) lodge such right for registration at the Mining Titles Office within 30 days of the date on which the right – *c*

(i) becomes effective in terms of section 23(5); or

(ii) is renewed in terms of section 24(3);

(b) commence with mining operations within one year from the date on which the mining right becomes effective in terms of section 23(5) or such extended period as the Minister may authorise; *d*

(c) actively conduct mining in accordance with the mining work programme;

(d) comply with the relevant provisions of this Act, any other relevant law and the terms and conditions of the mining right;

(e) comply with the requirements of the approved environmental management programme; *e*

(f) comply with the requirements of the prescribed social and labour plan;

(g) pay the State royalties; and

(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."[25] *f*

[37] Section 47 of the MPRDA originally provided that:

"47 Minister's power to suspend or cancel rights, permits or permissions

(1) Subject to subsections (2), (3) and (4), the Minister may cancel or suspend any reconnaissance permission, prospecting right, mining right, mining permit or retention permit if the holder thereof - *g*

(a) is conducting any reconnaissance, prospecting or mining operation in contravention of this Act;

h

25 Sub-s.(2)(a) of s 25 was substituted by s 21(a) of Act 49 of 2008 (with effect from 7 June 2013), sub-s (2)(e) was substituted by s 21(b) of Act 49 of 2008 (with effect from 8 December 2014) and sub-s (2)g) was substituted by s 21 (c) of Act 49 of 2008 (with effect from 7 June 2013). The relevant sub-ss now provide that the holder of a mining right must: *i*

"(a) lodge such right for registration at the Mineral and Petroleum Titles Registration Office within 60 days and the right has become effective;

. . .

(e) comply with the conditions of the environmental authorisation;

. . .

(g) in terms of any relevant law, pay the State royalties; and. . . " *j*

a

(b) breaches any material term or condition of such right, permit or permission;

(c) is contravening the approved environmental management programme; or

(d) has submitted inaccurate, incorrect or misleading information in connection with any matter required to be submitted under this Act.

b

(2) Before acting under subsection (1), the Minister must –

(a) give written notice to the holder indicating the intention to suspend or cancel the right;

(b) set out the reasons why he or she is considering suspending or cancelling the right;

c

(c) afford the holder a reasonable opportunity to show why the right, permit or permission should not be suspended or cancelled; and

(d) notify the mortgagor, if any, of the prospecting right, mining right or mining permit concerned of his or her intention to suspend or cancel the right or permit.

d

(3) The Minister must direct the holder to take specified measures to remedy any contravention, breach or failure.

(4) If the holder does not comply with the direction given under subsection (3), the Minister may act under subsection (1) against the holder after having –

e

(a) given the holder a reasonable opportunity to make representations; and

(b) considered any such representations.

(5) The Minister may by written notice to the holder lift a suspension if the holder –

f

(a) complies with a directive contemplated in subsection (3); or

(b) furnishes compelling reasons for the lifting of the suspension."[26]

g

26 The introductory part of sub-s (1) of s 47 was amended by s 38(a) of Act 49 of 2008 (with effect from 7 June 2013), sub-s (1)(c) substituted by s 38(b) of Act 49 of 2008 (with effect from 8 December 2014), sub-s (1)(d) substituted by s 38(c) of Act 49 of 2008 (with effect from 7 June 2013) and sub-s (2)(d) substituted by s 38(e) of Act 49 of 2008 (with effect from 7 June 2013). The Minister's powers to suspend or cancel the rights at issue now, in terms of the new sub-ss (1)(c) and (d), arise if the holder "or owners":

h

"(c) is contravening any condition in the environmental authorisation; or

(d) has submitted inaccurate, false, fraudulent incorrect or misleading information for the purposes of the application or in connection with any matter required to be submitted under this Act".

In terms of sub-s 2(d) the Minister must now:

i

"(d) notify the mortgagee, if any, of the prospecting right, mining right or mining permit concerned of his or her intention to suspend or cancel the right or permit." (Underlining added).

A new sub-s (1)(e) has been added by s 38(d) of the Mineral and Petroleum Resources Development Amendment Act, 49 of 2008, a provision which has still to be put into operation. It reads:

j

"(e) has conducted the transactions mentioned in section 11(1) before obtaining the necessary prior written approval of the Minister."

[38] Section 100 of the MPRDA originally provided that:

"100 Transformation of minerals industry

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

(a) and after consultation with the Minister for Housing, develop a housing and living conditions standard for the minerals industry; and

(b) develop a code of good practice for the minerals industry in the Republic.

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

(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."[27]

[39] Schedule II specifies the "Transitional Arrangements" in terms of which old order rights to explore or prospect for and mine minerals were converted to rights under the MPRDA. Item 7 of Schedule II deals with the conversion of old order mining rights.

[40] Act 49 of 2008 amended the original wording of item 7 of Schedule II. The amendments were put into operation with deemed retrospective effect from 1 May 2004.[28] In the amended form item 7 provides that:

"7 Continuation of old order mining right

(1) Subject to sub-items (2) and (8), any old order mining right in force immediately before this Act took effect continues in force for a period not exceeding five years from the date on which this Act took effect or the period for which it was granted, whichever period is the shortest, subject to the terms and conditions under which it was granted or issued or was deemed to have been granted or issued,

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27 Sub-s (2)(a) of s 100 was substituted by s 70 of Act 49 of 2008 (with effect from 7 June 2013). it now reads:

"(2) (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."

28 Nothing hinges on the retrospectivity for purposes of this judgment. Sub-item (1) of item 7 was substituted by s 83(a) of Act 49 of 2003, sub-item 2(g) amended by s 83(b) of Act 49 of 2008 (but, erroneously referred to as 1(g)), sub-item (2)(k) substituted by s 83(c) of Act 49 of 2008 (with effect from 1 May 2004), sub-items (3A), (3B) and (3C) were inserted by s 83(d) of Act 49 of 2008 (with effect from 1 May 2004), and sub-item (5) substituted by (the incorrectly numbered) s 83(d) of Act 49 of 2008 (with effect from 1 May 2004).

a

(2) A holder of an old order mining right must lodge the right for conversion within the period referred to in sub-item (1) at the office of the Regional Manager in whose region the land in question is situated together with –

(a) the prescribed particulars of the holder;

b

(b) a sketch plan or diagram depicting the mining area for which the conversion is required, which area may not be larger than the area for which he or she holds the old order mining right;

(c) the name of the mineral or group of minerals for which he or she holds the old order mining right;

c

(d) an affidavit verifying that the holder is conducting mining operations on the area of the land to which the conversion relates and setting out the periods for which such mining operations conducted;

(e) a statement setting out the period for which the mining right is required substantiated by a mining work programme;

d

(f) a prescribed social and labour plan;

(g) information as to whether or not the old order mining right is encumbered by any mortgage bond – or other right registered at the Deeds Office or Mineral and Petroleum Registration Office;

(h) a statement setting out the terms and conditions which apply to the old order mining right;

e

(i) the original title deed in respect of the land to which the old order mining right relates, or a certified copy thereof;

(j) the original old order right and the approved environmental management programme or certified copies thereof; and

(k) documentary proof of the manner in which, the holder of the right will give effect to the object referred to in section 2(d) and 2(f) an undertaking that, and the manner in which, the holder will give effect to the object referred to in section 2(d) and 2(f) [*sic*].

f

(3) The Minister must convert the old order mining right into a mining right if the holder of the old order mining right –

(a) complies with the requirements of sub-item (2);

g

(b) has conducted mining operations in respect of the right in question;

(c) indicates that he or she will continue to conduct such mining operations upon the conversion of such right;

(d) has an approved environmental management programme; and

(e) has paid the prescribed conversion fee,

h

(3A) If the applicant does not comply with the requirements of the sub-item (2) and (3), the Regional Manager must in writing request the applicant to comply within 60 days of such request.

(3B) If the applicant does not comply with sub-item 3A, the Minister must refuse to convert the right and must notify the applicant in writing of the decision within 30 days with reasons.

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(3C) If the application relates to land occupied by the community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community.

(4) No terms and conditions applicable to the old order mining right remain in force if they are contrary to any provision of the Constitution or this Act.

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(5) The holder must lodge the right converted under sub-item (3) within 90 days from the date on which he or she received notice of conversion at the Mineral and Petroleum Titles Registration Office for registration and simultaneously at the Deeds office or the Mineral and Petroleum Titles Registration Office for deregistration of the old order mining right, as the case may be.

(6) If a mortgage bond has been registered in terms of the Deeds Registries Act, 1937 (Act 47 of 1937), or the Mining Titles Act, 1967 (Act 16 of 1967), over the old order mining right, the mining right into which it was converted must be registered in terms of this Act subject to such mortgage bond, and the relevant registrar must make such endorsements on every relevant document and such entries in his or her registers as may be necessary in order to give effect to this sub-item without payment of transfer duty, stamp duty, registration fees or charges.

(7) Upon the conversion of the old order mining right and the registration of the mining right into which it was convened the old order mining right ceases to exist.

(8) If the holder fails to lodge the old order mining right for conversion before the expiry of the period referred to in sub-item (1), the old order mining right ceases to exist."

[41] Item 8 of Schedule II was also amended with deemed retrospective effect from 1 May 2004.[29] In the amended form item 8 provides that:

"8 Processing of unused old order rights

(1) Any unused old order right in force immediately before this Act took effect, continues in force, subject to the terms and conditions under which it was granted, acquired or issued or was deemed to have been granted or issued, for a period not exceeding one year from the date on which this Act took effect, or for the period for which it was granted, acquired or issued or was deemed to have been granted or issued, whichever period is the shortest.

(2) The holder of an unused old order right, has the exclusive right to apply for a prospecting right or a mining right, as the case may be, in terms of this Act within the period referred to in sub-item (1).

(3) An unused old order right in respect of which an application has been lodged within the period referred to in sub-item (1) remains valid until such time as the application for a prospecting right or mining right, as the case may be, is granted and dealt with in terms of this Act or is refused."

The Interpretation Act

[42] Certain provisions of the Interpretation Act 33 of 1957 ("the Interpretation Act") are relevant.

[43] Section 1 of the Interpretation Act provides that:

"1 Application of Act

(1) The provisions of this Act shall apply to the interpretation of every law (as in this Act defined) in force, at or after the commencement of this Act in the Republic or in any portion thereof, and to the interpretation of all by-laws, rules, regulations or orders made under the authority of

29 Sub-item 1 of item 8 was substituted by s 84 of Act 49 of 2008, with effect from 1 May 2004.

a any such law unless there is something in the language or context of the law, by-law, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein."

[44] Section 2 of the Interpretation Act then goes on to define the term "law" to mean:

b "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law."[30]

[45] Sections 10(1) and (3) of the Interpretation Act provide that:

"10 Construction of provisions as to exercise of powers and performance of duties

c (1) When a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires,

. . .

(3) Where a law confers a power to make rules, regulations or by-laws, the power shall, unless the contrary intention appears, be construed as in-

d cluding a power exercisable in like manner and subject to the like consent and conditions (if any) to rescind, revoke, amend or vary the rules, regulations or by-laws."

[46] Section 12 of the Interpretation Act provides that:

"12 Effect of repeal of law

e (1) Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted.

(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not -

f (a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

g (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,

h and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed."

The typical mining right

i [47] The Chamber's Counsel during argument, with the consent of the respondents' Counsel, handed up a document that was explained to the Court to be the "2007 version" of a "typical mining right" granted in

j 30 The defined meanings apply, "unless the context otherwise requires or unless in the case of any law it is otherwise provided therein".

terms of the MPRDA. The document ("the typical mining right") is a template that the DMR used for purposes of granting a mining right. It embodies standard terms and conditions that apply to a mining right granted in terms thereof.[31]

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[48] The typical mining right contains a definition clause. That clause specifies that:

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> "'Mining right' is as defined in the Act and includes all the Annexures to it, agreements and inclusions by reference;"
>
> . . .
>
> "'Social and Labour Plan', is as contemplated in regulation 46 of the Regulations to the Act and is as reflected in the attached Annexure to this mining right."

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[49] Clause 17 of the typical mining right specifies that:

> "17. Provisions relating to section 2(d) and (i) of the Act
>
> In the furthering of the objects of this Act, the Holder is bound by the provisions of an agreement or arrangement dated *DAY MONTH YEAR* entered into between the Holder/empowering partner and *NAME OF EMPOWERMENT PARTNER* (the empowerment partner) which agreement or arrangement was taken into consideration for purposes of compliance with the requirements of the Act and/or Broad Based Economic Empowerment Charier developed in terms of the act and such agreement shall form part of this right."

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[50] Clause 18 of the typical mining right specifies that:

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> "18. Social and Labour Plan
>
> 18.1 The holder must annually, not later than three months before the end of its financial year, submit detailed implementation plan to give effect to Regulation 46(e)(i), (ii) and (iii) in line with the Social and Labour Plan.
>
> 18.2 The holder must annually, not later than three months after finalisation of its audited annual report submit a detailed report on the implementation of the previous year's social and labour plan."

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[51] Clause 13.1 of the typical mining right provides under the heading '"13. Cancellation or Suspension" that:

> "13.1 Subject to section 47 of the Act this mining right may be cancelled or suspended if the 'Holder':
>
> 13.1.1 submits inaccurate, incorrect and/or misleading information in connection with any matter required to be submitted under the Act;
>
> 13.1.2 fails to honour or carry out any agreement, arrangement, or undertaking, including the undertaking made by the Holder in terms of the Broad Based Socio Economic Empowerment Charter and Social and Labour plan, on which the Minister relied for the granting of this right;
>
> 13.1.3 Breaches any material term and condition of this mining right;

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31 Such a standard document was referred to in the respondents' answering affidavit "by way of illustration" with reference to clause 17 of the typical mining right. Presumably the terms of the typical mining right were not cast in stone and, in given circumstances, the template would have been suitably altered to cater for the circumstances that applied to particular cases. Presumably, further, the template that the typical mining right evidences may have changed since 2007.

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13.1.4 Conducts mining operations in contravention of the provisions of the Act;

13.1.5 Contravenes the requirement of the approved Environmental Management Programme; or

13.1.6 contravenes any provisions of this Act in any other manner."

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The advent of the Original Charter and the 2010 Charter respectively

[52] The MPRDA was signed into law on 3 October 2002. It came into operation, as referred to already on 1 May 2004.

[53] It is not necessary for purposes of this judgment to address the momentous changes that the MPRDA brought about regarding the granting, exercising and regulation of rights to prospect and explore for and exploit minerals in our country, nor the rationale of the MPRDA from a historical perspective, nor the constitutional justifiability thereof. These matters have been thoroughly and illuminatingly addressed in the judgments of the Constitutional Court in *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others*[32], *AgriSA v Minister for Minerals and Energy*[33] and *Minister of Mineral Resources and others v Sishen Iron Ore Co (Pty) Ltd and another*[34] as well as of the Supreme Court of Appeal in *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd and others*[35], *Xstrata (Pty) Ltd and others v SFF Association*[36] and *Minister of Minerals & Energy v AgriSA*.[37]

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[54] It is common cause that the Minister did comply with the duty imposed in terms of section 100(2)(a) of the MPRDA within the six month period from the date on which the MPRDA came into operation on 1 May 2004.

[55] The Original Charter was "developed" through a process of extensive consultation that the then Minister of Minerals and Energy initiated after the MPRDA had been enacted. The consultations involved representatives of the then Department of Minerals and Energy, the Chamber, the South African Minerals Development Association ("SAMDA") and the

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32 *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others* 2011 (4) SA 113 (CC), in particular [1]–[3], [28]–[41] [also reported at 2011 (3) BCLR 229 (CC) – Ed].

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33 *AgriSA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC), in particular at [1]–[3], [7]–[12], [25]–[70], [78], [80]–[94] [also reported as *Agri South Africa v Minister for Minerals and Energy (Afriforum and others as amici curiae)* 2013 (7) BCLR 727 (CC) – Ed].

34 *Minister of Mineral Resources and others v Sishen Iron Ore Co (Pty) Ltd and another* 2014 (2) SA 603 (CC), in particular at [3]–[17], [40]–[60], [83]–[88] [also reported at 2014 (2) BCLR 212 (CC) – Ed].

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35 *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd and others* [2011] 1 All SA 364 (SCA) at paras [20]–[24].

36 *Xstrata (Pty) Ltd and others v SFF Association* 2012 (5) SA 60 (SCA) at para [1] [also reported at [2012] JOL 28829 (SCA) – Ed].

37 *Minister of Minerals and Energy v AgriSA* 2012 (5) SA 1 (SCA), particularly at [1], [12]–[98], [104]–[115] [also reported as *Minister of Minerals and Energy v Agri South Africa (Centre for Applied Legal Studies as amicus curiae)* [2012] 3 All SA 266 (SCA) – Ed].

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National Union of Mineworkers ("NUW") ("the stakeholders"[38]). The consultation process culminated in written agreement being reached on 11 October 2003 on a proposed charter as contemplated in terms of section 100(2) of the MPRDA, which charter was then later published in the *Government Gazette* on 13 August 2004.

[56] Government subsequently, during 2008, established a formal consultation forum called the Mining Industry Growth, Development and Empowerment Task Team ("the MIGDETT"). This occurred against the background of what is often referred to as "the 2008 global economic crisis".

[57] The MIGDETT still exists. It is a tripartite forum in which government, industry and labour are represented.[39] It involves representatives of the various stakeholders at a high level.[40] A Steering Committee comprising representatives of the stakeholders, headed by the Director-General, acts as a type of secretariat for the MIGDETT. The MIGDETT structures also comprise three subcommittees being the Industry Stability Technical Task Team, the Competitiveness, Growth and Transformation Technical Task Team and the Sustainable Development Technical Task Team.

[58] The MIGDETT's brief was, among other things, to address transformation of the mining industry in South Africa against the backdrop of the global economic situation that had arisen. It is not clearly apparent from the papers before the Court whether the MIGDETT came into being also in pursuit of the ongoing engagement process contemplated in terms of paragraph 4.14 of the Original Charter, it is likely that it did, albeit that the MIGDETT's objectives may have a wider compass. Fact is that the MIGDETT did involve itself with potential revision of the Original Charter, including possible changes to the scorecard and to some of the definitions used in the Original Charter. Potential amendments were put forward in the course of the MIGDETT's endeavours with a view to achieve changes to the Original Charter by agreement. By mid-2010 no overall agreement had been reached in such regard.

[59] On 30 June 2010 agreement was, however, reached between the participants to the MIGDETT process[41] in terms of a document titled "Stakeholders' Declaration on Strategy for the Sustainable Growth and Meaningful Transformation of South Africa's Mining Industry" ("the Stakeholders' Declaration"). Although it is not expressly stated in the Court papers, it appears that the Stakeholders' Declaration was agreed to

38 More stakeholders became involved in the consultation processes at a later time, as is referred to below. References to "the stakeholders" will, where appropriate, include reference to the expanded group of participants.

39 Government by the DMR, mining companies by the Chamber and SAMDA, and labour by the trade unions NUM, the United Association of South Africa and Solidarity. The Association of Mining and Construction Union ("AMCU") was not originally included, but did become involved at a later time.

40 With the DMR being represented by the Minister, at times the Deputy Minister, the Director-General and the Deputy Directors-General, the Chamber by its president, its two vice-presidents and its chief executive officer, SAMDA by its chairperson and its president and organised labour by the presidents and general secretaries of the participating trade unions.

41 At that stage still not including AMCU.

a and issued because the parties to the MIGDETT felt it necessary to reaffirm their commitment to address matters co-operatively in circumstances where a substantial divide had arisen between their viewpoints on a number of issues.

b [60] The subject matter of the Stakeholders' Declaration is, largely, the same as that of the Original Charter. It was, and no doubt remains, an important document insofar as it confirmed the commitment of the stakeholders to continue to co-operate towards achieving the objectives that it recorded. Relevant is that "COMMITMENT 6" of the Stakeholders' Declaration included a commitment to "finalise the review of the Mining Charter by c August 2010".

[61] Albeit that the Stakeholders' Declaration of 30 June 2015 was, evidently, intended to pave the way towards achieving an agreed revised charter, no such agreement was reached, whether by August 2010 or at all.[42] In these circumstances, the then Minister caused the 2010 Charter to be published d in the *Government Gazette* on 20 September 2010.

Events after publication of the 2010 Charter

[62] Engagement between the Chamber and the respondents continued after publication of the 2010 Charter, including via the MIGDETT forum. This is chronicled in the Chamber's founding papers and is not in dispute.

e [63] Although expressed in reasonably neutral terms in the parties' papers, it is quite evident that publication of the 2010 Charter and its aftermath resulted in the goodwill and spirit of co-operation appearing from the Original Charter, and even from the Stakeholders' Declaration of 30 June 2010, evaporating.

f [64] The areas of dispute between the Chamber and the respondents crystallised in the process and they proved insoluble. In those circumstances agreement was reached at a meeting between the Minister and the president of the Chamber in Cape Town on 29 March 2015 that the disputed matter would be submitted to adjudication by the Court, as referred to g already.

The rights and obligations attaching to a mining right

[65] At issue in these proceedings, as referred to already, is what the rights and obligations are that attach to a "new order" mining right granted in terms of the MPRDA, and whether, how and to what extent such rights and h obligations are determined or affected by, respectively, the Original Charter and the 2010 Charter.

[66] Section 5(1) of the MPRDA specifies that a right granted (and registered) in terms of the Act, including a mining right,". . . is a limited real right in respect of the mineral or petroleum and the land to which such right re- i lates". Section 5(2) goes on to provide that the holder of such a right, including a mining right "is entitled to the rights referred to in this section

j 42 Despite what the respondents refer to as an "extensive process . . . to engage the stakeholders".

and such other rights as may be granted to, acquired by or conferred upon such holder under this Act or any other law".

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[67] Section 23(6) of the MPRDA specifies, on the other hand, that a mining right ". . . is subject to this Act, any relevant law, the terms and conditions stated in the right and the prescribed terms and conditions."[43]

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[68] The rights and obligations attaching to a mining right in terms of the provisions of the MPRDA itself are, principally, those specified in sections 5(3), 25, 28, 43, 52, 54 and 101.

[69] The definition of a "mining right' in section 1 of the MPRDA as "a right to mine granted in terms of section 23(1)" suggests that a mining right can in terms of the MPRDA only come into existence by grant in terms of section 23, That would be correct at this time, but not in relation to the second avenue that the MPRDA created for mining rights to come into existence, ie by conversion of an old order mining right in terms of item 7 of Schedule II.

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[70] The pathway to obtain the granting of a mining right by lodging an old order mining right for conversion in terms of Schedule II was available to holders of such mining rights until 30 April 2009, unless the conversion related to an "unused old order right", in which event the application process had to have been initiated by 30 April 2005.[44] After those dates the only pathway available was to proceed by way of application in terms of section 22 of the MPRDA, which remains the case.

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[71] Lodgement of an old order mining right for conversion under the transitional arrangements occurred in terms, of "Form J", the form that the Minister prescribed in terms of regulation 79 of the MPRD Regulations for that purpose. The form sought information regarding "Ownership of Participation by Historically Disadvantaged South Africans", requesting the applicant to mark "the appropriate- block" to choose between the options of "HDSA controlled: 50% plus 1 vote HDSA", "Strategic Partnership; 25% plus 1 vote HDSA" and "Broad-based Ownership HDSA dedicated mining unit trusts, employees share or ownership schemes". The applicant had also, among other things, to provide:

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> "An undertaking to give effect to the objects of section (2)(d) and (f) of the Act describing the manner to accomplish these requirements."

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[72] The relevant application form to be utilised by an applicant for a mining right in terms of section 22 of the Act is "Form D", prescribed by regulation 10 of the MPRD Regulations. The form, similarly to Form J, seeks information regarding "Ownership or Participation by Historically Disadvantaged South Africans", again requesting the applicant to mark "the appropriate block" to choose between the options of "HDSA controlled: 50% plus 1 vote HDSA", "Strategic Partnership: 25% plus 1 vote HDSA" and "Broad-based Ownership HDSA dedicated mining unit trusts, employees share or ownership schemes".

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43 Reg 11 of the Mineral and Petroleum Resources Development Regulations published on 23 April 2004 ("the MPRD Regulations") prescribes that the mining work programme referred to in the regulation shall form part of a mining right granted.

44 See items 7(1) and (2) and 8(1) and (2) of Schedule II.

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a [73] The form (paradoxically different from Form J in this respect) does not request that the applicant provide particulars regarding how "the objects referred to in section 2(d) and (f) and in accordance with the Charter contemplated in section 100 and the prescribed social and labour plan" would be achieved if the mining right applied for were granted. However, regulation 10(1)(n) of the MPRD Regulations provides for "any other specific and additional information, data or documentation that the Minister may request in connection with the information submitted under paragraphs (a) to (m)" to be supplied. This provision would have enabled the Minister and those to whom his powers may have been delegated to obtain the necessary information to reach a conclusion regarding whether the granting of the mining right applied for would "further the objects referred to in section 2(d) and (f) in accordance with the Charter contemplated in section 100 and the prescribed social and labour plan".

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The status of the charters

[74] The concept of a charter is a rather nebulous one. In given circumstances, a charter can be a document setting out objectives or standards of conduct that those subscribing to it aspire to achieve or maintain. Otherwise, it can be a constitutional document of an organisation or corporate entity that binds the members thereof.

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[75] Indeed, whether the charters impose obligations that are enforceable at law is in dispute between the parties. The Chamber characterises the charters as "formal guidelines or statements of policy". The respondents, on the other hand, regard the charters as "legally enforceable instruments with legally binding obligations".

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[76] Section 100(2) of the MPRDA imposed a duty on the Minister to "develop" a charter as described in the section within six months from the date on which the MPRDA took effect. As referred to already, by the time the MPRDA took effect that process had largely been finalised - the participants in the consultation process that the Minister had initiated towards developing the charter had already on 11 October 2003 reached agreement on the terms of the proposed charter. The Minister's carrying out the duty imposed on her/him in terms of section 100 of the Act was finalised by publication of the Original Charter in the *Government Gazette* on 13 August 2004.

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[77] If this Court were for purposes of determination of this matter to have been called upon to pronounce on the binding effect of the Original Charter as a matter of the law of contract, issues of substantial nicety would have arisen to determine who, exactly, are bound by it and what, exactly, the contractual obligations and rights are that arise for the parties bound. The Court is, however, not faced with that task. The Court has to determine what in terms of the MPRDA, interpreted in accordance with the relevant principles of law, including those arising from the Constitution and those specified in the MPRDA itself, the binding effect in respect of holders of mining rights is of, respectively, the Original Charter and the 2010 Charter.

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[78] Interpreting the various relevant and potentially relevant provisions of the MPRDA entails ascribing meaning to them in accordance with the usual

principles applying to the interpretation of legally relevant wording. It entails a "unitary exercise" of ascertaining the objective meaning of the particular provision or provisions that fall to be interpreted, in its/their overall textual setting and in the light, of all other relevant contextual facts.[45] In the case of interpretation of "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law" the process occurs with due regard, throughout, to the primacy of relevant provisions of the Constitution,[46] and also with the provisions of the Interpretation Act in mind.

The status of the Original Charter

[79] Neither section 100 nor any other provision of the MPRDA expressly states what the legal consequence or status would be of the mining charter that it enjoined the Minister to "develop".

[80] "(T)he charter contemplated in section 100" is referred to in four sections of the MPRDA.[47] None of these provides that the charter contemplated in section 100 would as such; and without further ado have any binding effect, ie have force or effect as "an enactment having the force of law" as referred to in the definition of the term "law" in section 2 of the interpretation Act.

[81] "(T)he charter contemplated in section 100" of the MPRDA accordingly finds application and legal significance in an indirect manner only, through application of the other sections of the MPRDA that refer to it.

[82] For purposes of this judgment the application and significance that section 23(1)(h) gives to "the charter contemplated in section 100" are relevant – the Minister is in terms of section 23(1) obliged, among other things, to consider and come to a conclusion whether the granting of the right will, as referred to in subsection (h), ". . . further the objects referred

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45 *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA), at 600, [12] [also reported at [2001] 4 All SA 161 (SCA) – Ed]; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at [18], [24]–[26] [also reported at [2012] 2 All SA 262 (SCA) – Ed]; *Bothma-Batho Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at [12] [also reported at [2014] 1 All SA 517 (SCA) – Ed].

46 *Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others: in re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others* 2001 (1) SA 545 (CC) at [21]–[25] [also reported at 2000 (10) BCLR 1079 (CC) – Ed]; *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA (SCA) at [51]–[53]; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) at [72]–[77] and [89]–[91] [also reported at 2004 (7) BCLR 687 (CC) – Ed]; *Minister of Mineral Resources and others v Sishen Iron Ore Co (Pty) Ltd and another* 2014 (2) SA 603 (CC) at [40]–[47].

47 "(T)he charter contemplated in section 100" is referred to, apart from in ss 23(1)(h) and 25(2)(h), in ss 28(2) and 84(1) of the MPRDA. S 28(2)(c) provides that mining right holders have to submit annual reports detailing, among other things ". . . 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". S 84(1)(i) is worded similarly than s 23(1)(h), but relates to the granting of a "production right" , ie the equivalent of a mining right, but pertaining to "petroleum", as defined in s 1.

a to in section 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan".

[83] The wording of the section 23(1)(h) is problematic though – the syntax does not make sense. Insofar as it refers to respectively section 2(d) and 2(f) of the Act conjunctively with "the Charter contemplated in section b 100" and "the prescribed social and labour plan", the "and' appearing in the enacted subsection before the words "in accordance with" is a drafting error. The subsection can only be read sensibly by omitting the word "and".

[84] The tenor of item 7(3) of Schedule II, read with item 7(2)(k), is different c from that of section 23(1)(h). The relevance and significance of the charter "contemplated in section 100" (as referred to in terms of section 23(1)(h) of the MPRDA) did not arise similarly in terms of item 7 of Schedule II. The Minister was in terms of item 7(3) under obligation to convert an old order mining right into a "new order" mining right if the holder of the right had, among other things, complied with the require- d ments of' item (7)(2). Sub-item 7(2)(k) included that the holder had, when lodging the old order mining right for conversion, to provide "documentary proof of the manner in which, the holder of the right will give effect (to) the object referred to in section 2(d) and 2(f)". In other words, items 7(2) and (3) of Schedule II did not attach any significance to e "the charter contemplated in section 100".

[85] In the case of a conversion of an old order mining right the applicant's lodging an undertaking (in accordance with Form J) that it would give effect to the objects referred to in sections 2(d) and 2(f) of the Act, together with its providing particulars of the manner in which that will be f achieved, constituted compliance with the requirements of item 7(2) insofar as sub-item (k) was concerned. Accordingly, the lodging of the undertaking and particulars was in respect of sub-item (k) sufficient to trigger the Minister's obligation in terms of item 7(3).

[86] In the case of section 23(1)(h) then, the Minister has to assess and come to a conclusion regarding whether the granting of the mining right ". . . will g further the objects referred to in section 2(d) and (f) . . . in accordance with the charter contemplated in section 100". The assessment that has to be done and conclusion drawn are constituents of the administrative action that arises from application of section 23, culminating in the Minister's final decision to grant or refuse the right applied for.[48] Accordingly, h in exercising her/his powers, the Minister has to comply with the requirements for lawful administrative action established by section 33(1) of the Constitution, the Promotion of Administrative Justice Act, 2000, and section 6 of the MPRDA itself.

[87] Every application has, of course, to be assessed on its own merits on the basis of all the information placed before the Minister as prescribed and i that the Minister may, in given circumstances, have chosen to illicit in the process of executing the administrative action involved. Conclusions in

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j 48 See *Minister of Mineral Resources and others v Mawetse* (*SA*) *Mining Corporation* (*Pty*) *Ltd* 2016 (1) SA 306 (SCA) at [24] [also reported at [2015] 3 All SA 408 (SCA) – Ed].

relation to the matters specified in subsections 23(1)(a) to (h) on a preponderance of probability will suffice. Different considerations may apply in respect of the matters specified in section 23(1) depending on whether the applicant is an HDP/HDSA or not, including in relation to the furthering of the objects of section 2(d) and (f). Interrelationships between the various matters specified in terms of section 23(1) in relation to which the Minister has to come to a conclusion will, no doubt also play a role in the overall assessment.

[88] Section 23(6) of the MPRDA implies that the Minister may in granting a mining right specify terms and conditions otherwise than those that are prescribed by regulation.[49] The Minister's doing so would, obviously, again be subject to the tenets of and requirements for lawful administrative action, as referred to already.

[89] In drawing her/his conclusions in terms of section 23(1) the Minister is entitled to take into account the prescribed terms and conditions that will arise if the mining right applied for is granted, as well as terms and conditions that she/he might decide to impose. The Minister would be entitled to gauge whether and to what extent the matters specified in section 23(1) could in relation to the exercising of the right, if granted, be assured by way of the imposition of terms and conditions in the right itself.

[90] The provisions of the typical mining right, particularly those specified in clauses 13.12 and 17, demonstrate how the Minister utilised her/his power to impose terms and conditions in mining rights to contribute towards her/his obtaining the assurance that subsection 23(1)(h) posits. They show that the scheme of things that applied after the Original Charter had been "developed" for purposes of addressing conversions of old order mining rights lodged for conversion in terms of item 7 of Schedule II, as well as applications for mining rights made in terms of section 22 of the Act, encompassed that:

90.1 The Minister[50] would obtain documentary proof from the holder that had lodged an old order mining right for conversion, or the section 22 applicant for a mining right, of the BEE transaction that such holder/applicant had bound itself to towards achieving the

49 The MPRDA in its original incarnation did not expressly confer any such power. That such power exists was, however, confirmed in *Minister of Mineral Resources and others v Mawetse (SA) Mining Corporation (Pty) Ltd* 2016 (1) SA 306 (SCA) at [17], albeit that the judgment relates to prospecting rights and the provisions of s 17(6) of the MPRDA. Sub-s 23(2A) inserted by Act 49 of 2008 now expressly specifies a power to impose conditions as referred to in the sub-s "If the application relates to the land occupied by a community" (ie "community" as defined in s (1). The express power that s 2A confers does not derogate from the pre-existing power to impose terms and conditions. Reg 12 states that ". . . the terms and conditions of a mining right agreed upon will be approved by the Minister". That implies that terms and conditions as referred to in s 23(6) otherwise than those arising by regulation may come about by agreement with prospective mining right holders. The regulation, however, carries no implication that agreement is a prerequisite for the Minister's specifying terms and conditions in a mining right over and above those prescribed by regulation.

50 Or, more likely, the officers of the Department to whom she/he had delegated her/his relevant powers.

a objects specified in section 2(d) and (f) of the MPRDA in accordance with the Original Charter and the relevant prescribed social and labour plan;

90.2 That would put the Minister in a position to assess whether, in the b case of old order mining rights lodged for conversion, the holder of the right had complied with item 7(2)(f) and (k) of Schedule II and, in the case of a section 22 applicant, whether the granting of the mining right would further the objects referred to in section 2(d) and (f) of the MPRDA in accordance with the Original Charter and the prescribed social and labour plan;

c 90.3 However, to ensure, from the Minister's perspective, that the granting of the right would further the objects referred to in section 2(d) and (f) of the MPRDA in accordance with the Original Charter and the prescribed social and labour plan, the agreement or agreements constituting the BEE transaction to which the holder of d the old order mining right or section 22 applicant had committed itself would be incorporated into the mining right granted;

90.4 The mining right granted would, in addition, contain terms specifying that if the holder thereof failed to comply with the relevant BEE transaction and the social and labour plan incorporated into e the mining right, such failure could lead to the suspension or even the cancellation of the mining right.[51]

[91] Section 47(1)(b) grants the Minister the power to cancel or suspend a mining right, among others, if the holder thereof "breaches any material term or condition of such right, permit or permission". The holder of a mining right granted subject to a term as specified in clause 17 of the f typical mining right can, accordingly, be held to account if, as is specified in clause 13.1.2 of the typical mining right, the holder fails to honour the BEE transaction on which the Minister relied for the granting of the right This is reinforced by the provisions of section 98(a)(vi), read with section 99.

[92] The issue in this case relating to the application of the Original Charter to g mining rights granted in accordance with the provisions of section 23 or item 7 is whether mining companies that had executed the BEE transactions referred to and specified in the mining rights issued to them and that had, in so doing, achieved the 26% HDP/HDSA participation/ownership level target specified in the Original Charter, are obliged to take steps to h cause that the 26% HDP/HDSA level be restored if the HDP/HDSA participants in the relevant BEE transactions had disposed of their interests, causing the HDP/HDSA participation level to fall below the 26% target. Arising from my conclusion that "the charter contemplated in section 100" only has legal significance (in the context of the granting of mining rights) through section 23(1)(h), whether such an obligation exists i or not depends entirely on whether it arises in terms of the terms and conditions subject to which the Minister granted the mining right that may be in question.

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j 51 In that manner confirming and emphasising application of s 47 of the MPRDA to the holder of the right.

[93] Accordingly, even if the terms of the Original Charter could have been interpreted to specify an ongoing commitment that a 26% HDP/HPSA participation/ownership level would be achieved and maintained indefinitely, which is not the case, it would not, of itself, have created an obligation in that regard for holders of mining rights enforceable by means of application of section 47 or sections 98 and 98 of the MPRDA.

The status of the 2010 Charter

[94] My conclusion regarding the legal status and the significance of the Original Charter is largely dispositive of the questions arising in this matter in relation to the 2010 Charter as well. The terms of the 2010 Charter can have legal consequence or significance only insofar as they are, in some way or another, reflected in terms or conditions subject to which the Minister grants a mining right.[52] What applies to the Original Charter applies to the 2010 Charter as well. That encompasses that the charter "contemplated in terms of section 100" of the MPRDA does not provide an avenue for the Minister to impose terms and conditions on the holders of mining rights at variance with the terms and conditions that applied in terms of section 23(6) of the Act at the time when the mining rights were granted.

[95] A more fundamental issue arises, however, in relation to the 2010 Charter. That is whether, insofar as section 23(1) refers to "the charter contemplated in section 100" the 2010 Charter can, at all, be regarded as being encompassed in that reference.

[96] The charter "contemplated in section 100" was the charter that the Minister was in terms of section 100(2) of the MPRDA obliged to develop within the six month period referred to in the section. The Minister complied with the duty imposed upon her/him, resulting in the Original Charter coming into existence in accordance with what section 100 specified. Accordingly, the Original Charter is "the charter contemplated in section 100". The 2010 Charter is not.

[97] This conclusion is not affected by application of section 10(1) and section 10(3) of the Interpretation Act, 1957.

[98] The duty that section 100(2) of the Act imposed on the Minister was not a duty that was to "be performed from time to time as occasion requires" as referred to in section 10(1) of the Interpretation Act. A contrary intention to an intention to impose such a duty, as referred to in section 10(1) of the Interpretation Act appears from section 100(2) of the MPRDA.

[99] The implication is that the Minister's issuing the 2010 Charter did not occur in terms of or in compliance with the duty imposed on the Minister in terms of section 100(2).

[100] Section 10(1) of the Interpretation Act distinguishes between provisions conferring powers and those imposing duties. The distinction is apparent from sections 10(2), (4) and (5) as well. Section 10(3), in contradistinction, is limited to "a power conferred', more particularly, a power to

52 If duly imposed in accordance with the provisions of s 33(1) of the Constitution, the Promotion of Administrative Justice Act, 2000, and s 6 of the MPRDA itself.

a make "rules, regulations or by-laws". The reference in section 10(3) to "rules, regulations or by-laws" refers to bindingly regulatory provisions. The "charter contemplated in section 100(2)" is not such. Section 100(2) of the MPRDA imposed a duty on the Minister to develop a charter as referred to in the section within a limited time period. It did not confer a b power on the Minister to make "rules, regulations or by-laws". Accordingly, section 10(3) of' the Interpretation Act does not apply to the charter referred to in section 100(2) of the MPRDA.

[101] However, if I am wrong in my conclusion that section 10(3) of the Interpretation Act does not apply to the charter referred to in section 100(2) of the MPRDA,[53] again, a "contrary intention appears" to a c construction of section 100(2) to allow for the Original Charter to be rescinded, revoked, varied or amended after the six month period specified in the section had lapsed.[54] Section 100(2) specifies the development of a charter for the mining industry as a once-off event to be completed within a specified period of time.

d [102] There is, possibly, room for an argument to be made that the Minister's issuing the 2010 Charter or at least parts of it could have been authorised in terms of the Minister's powers to make regulations.[55] No argument to such effect was addressed to the Court.[56] However, section 107(1)(l) of the MPRDA does provide that the Minister may, by notice in the *Gov-* e *ernment Gazette*, make regulations regarding "any other matter the regulation of which may be necessary or expedient in order to achieve the objects of this Act", I do not on any reasonable construction of the subsection discern any power on the part of the Minister by regulation to impose obligations on the holder of a mining right regarding its ownership or manner of composition with reference to HDPs or HDSAs in f addition to or different from the terms and conditions that applied at the time of the mining right being granted. There is no scope for the Minister by way of regulation to prescribe further or new terms and conditions applying to a mining right that purport to diminish or limit the rights that

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53 In other words, if the provisions of the Original Charter can as a result of the significance that s 23(1)(h) gives to it, be regarded as "rules" and the Minister's developing of the charter contemplated in s 100 can be said to have occurred in the exercise of a power as referred to in s 10(3) of the Interpretation Act (as opposed to in compliance with a duty imposed, as referred to in s 10(2), (4) and (5) of the Interpretation Act).

h 54 Which contrary intention is not detracted from or diminished by construing s 100(2) in overall context, including by reading it with s 23(1)(h), s 25(2)(h), s 29(c) and s 84(1)(i) of the MPRDA.

55 See *Latib v The Administrator, Transvaal* 1969 (3) SA 186 (T), at 190H–191A; *Howick District Landowners Association v Umgeni Municipality and others* 2007(1) SA 206 (SCA) at [19]–[21] [also reported at [2007] 1 All SA 139 (SCA) – Ed].

i 56 Probably for good reason – the respondents had not made out any case in their papers that the 2010 Charter had binding effect as a regulation. The 2010 Charter had, moreover, been issued with express reliance on s 100(2) of the MPRDA. See *Minister of Education v Harris* 2001 (4) SA 1297 (CC) at [15]–[18] [also reported at 2001 (11) BCLR 1157 (CC) – Ed]; *Administrateur, Transvaal v Quid Pro Quo Eiendomsmaatskappy (Edms) Bpk* 1977 (4) SA 829 (A) at 841A – G [also reported at [1977] 4 All SA 849 (A) – Ed]; *Howick District Landowners Association v Umgeni Municipality and others* 2007 (1) SA 206 j (SCA) at [22].

accrued to the holder when the mining right was granted, or by regulation to specify or bring about that non-compliance with such new terms and conditions would render the mining right potentially susceptible to suspension or cancellation or the holder thereof to prosecution.

[103] The arguments presented to this Court on behalf of the friends of the Court and the respondents alike proceeded from the premise that the 2010 Charter was validly issued in accordance with section 100(2). Counsel appearing for Serodumo argued that the charters are "other measures" as referred to in section 9(2) of the Constitution that are ". . . designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination . . .". That is no doubt correct, but it does not of itself give the charters binding coercive legal effect. The principle of legality, as a sub-set of the rule of law, dictates that any coercive legal measure taken by the state must be authorised by law.[57] Section 9(2) of the Constitution has, quite obviously, to be read in conjunction with section 9(1) that provides that '"(e)veryone is equal before the law and has the right to equal protection and benefit of the law". Section 8(2) of the Constitution is a proviso to or qualification of section 9(1) to allow for legislative and other measures to be taken that may protect or advance persons disadvantaged by discrimination, or categories of such persons, even if such measures may, conceivably, operate contrary to the right to equality specified in section 9(1). Any action or conduct of the state (or others) "designed" with the objects referred to in section 9(2) of the Constitution in mind, does not achieve legality merely because of the design behind it. The relevant measure, legislative or otherwise, has to be authorised by law that passes muster in terms of the Constitution.

[104] The arguments presented on behalf of the respondents and the friends of the Court were further to the effect that an implied obligation has to be construed from section 23(1) of the MPRDA imposing a self-standing obligation on the part of the person or entity to whom a mining right may be issued to comply with "the charter contemplated in section 100(2)". These arguments relied, essentially, on the overall "scheme" of the MPRDA as reflected principally in terms of section 2 of the Act, interpreted in accordance with the provisions of section 4(1) thereof and section 39(2) of the Constitution, which, so it was argued, imposes a binding and on-going obligation on the holders of mining rights to comply with the charters.

[105] I cannot on the basis of reasonable interpretation in the light of all relevant and potentially relevant provisions of the MPRDA, including its long title and preamble, and with due regard to the spirit, purport and objects of the Bill of Rights contained in the Constitution, construe section 23, or, for that matter, section 25, as imposing any self-standing obligation on the holder of a mining right to comply with "the charter contemplated in section 100", in whatever incarnation, in circumstances where no such obligation had been imposed in the mining right at the time when the mining right was granted.

57 *Affordable Medicines Trust and others v Minister of Health and others* 2006 (3) SA 247 (CC) at [48]–[50] [also reported at 2005 (6) BCLR 529 (CC) – Ed].

a **Conclusion**

[106] I am on the basis of the conclusions that I have reached, as set out above, satisfied that the Chamber is entitled to declaratory relief broadly in accordance with the orders that it seeks in terms of its amended notice of motion.

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[107] The Chamber in terms of its amended notice of motion did not seek any declaration regarding the validity of the 2010 Charter as "the charter contemplated in section 100" as referred to in section 23(1)(h). I am hesitant to sanction the issuing of a declaratory order that may suggest that "the charter contemplated in section 100", as referred to in section 23(1)(h) of c the MPRDA, includes reference to the 2010 Charter. In the circumstances of this matter, however, granting relief that refers to the 2010 Charter is warranted. That should not be understood to suggest that the 2010 Charter was validly issued in terms of the provisions of section 100(2) of the MPRDA, nor that it is "the charter contemplated in section 100", as referred to in section 23(1)(h) of the MPRDA.

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[108] In all circumstances this is quite possibly a matter in relation to which an order that each party should pay its own costs could be appropriate. However, we were not addressed on the issue and, accordingly, the costs order that I propose follows the result.

[109] Accordingly, the following order is made:

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1. In this order:

   1.1 The terms "the MPRDA" and "the Act" refer to the Mining and Petroleum Resources Development Act, 2002;

   1.2 The term "the Original Charter refers to the "Broad-Based Socio-Economic Empowerment Charter for The South Afri- f can Mining Industry" published in terms of Government Notice No 1639 of 2004 in *Government Gazette* 26661 of 13 August 2004;

   1.3 The term "the 2010 Charter" refers to the "Amendment of the Broad-Based Socio-Economic Empowerment Charter for the g South African Mining and Minerals Industry" published in terms of Government Notice No 828 of 2010 published in *Government Gazette* 33573 of 20 September 2010;

   1.4 The term "HDP" refers to "historically disadvantaged person" as defined in section 1 of the MPRDA;

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   1.5 The term "HDSA" refers to "historically disadvantaged South African" as defined in the Original Charter and the 2010 Charter;

   1.4 The term "old order mining right" refers to an "old order mining right' as defined in Schedule II to the MPRDA;

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   1.5 The term "converted mining right" refers to an old order mining right that has been converted to a mining right in accordance with Schedule II to the MPRDA;

2. It is declared that:

   2.1 Once the first respondent or her/his delegate is satisfied in j terms of section 23(1)(h) of the MPRDA that the grant of a

mining right applied for in terms of section 22 of the Act will further the objects referred to in section 2(d) and (f) of the Act in accordance with "the Charter referred to in section 100" as referred to in section 23(1)(h) of the Act, and has granted the mining right applied for, the holder thereof is not thereafter legally obliged to restore the percentage ownership (howsoever measured, *inter alia* wholly or partially by attributable units of South African production) controlled by HDPs or HDSA's to the 26% target referred to in the Original Charter and in the 2010 Charter where such percentage falls below 26%, unless such obligation is specified as an obligation in the terms and conditions stated in the right, as referred to in section 23(6) of the MPRDA;

2.2 Once the first respondent or his delegate converts an old order mining right in terms of item 7(3) of Schedule II to the MPRDA and the holder of such converted mining right complies with the undertaking provided in terms of item 7(2)(k) of Schedule II, the holder of such converted mining right is not legally obliged to restore the percentage ownership (howsoever measured, among others, wholly or partially by attributable units of South African production) controlled by HDPs or HDSAs to the 26% target referred to in the Original Charter and in the 2010 Charter where thereafter such percentage falls below 26%, unless such obligation is specified as an obligation in the terms and conditions stated in the mining right, as referred to in section 23(6) of the MPRDA;

2.3 A failure by a holder of a mining right or converted mining right to meet the requirements of the Original Charter or of the 2010 Charter does not constitute a breach of a material term or condition of the mining right for the purposes of section 47(1)(a) of the MPRDA, and further does not constitute an offence for the purposes of section 98(a)(viii), read with section 99, unless an obligation to meet such a requirement is specified as an obligation in the terms and conditions stated in the mining right, as referred to in section 23(6) of the MPRDA;

2.4 Neither the Original Charter nor the 2010 Charter requires the holder of a mining right or converted mining right to continue to enter into further HDP or HDSA empowerment transactions to address losses in HDP or HDSA participation or ownership once the 26% participation or ownership level as referred to in clauses 4.7 and 4.6 of the Original Charter has been achieved, unless such obligation is specified in the terms and conditions stated in the mining right, as referred to in section 23(6) of the MPRDA;

2.5 Paragraph 2.1 of the 2010 Charter does not retrospectively deprive holders of mining rights or converted mining rights of the benefit of:

2.5.1 the capacity for offsets which would entail credits/offsets to allow for flexibility as referred to in clauses 4.7 and 4.8 of the Original Charter;

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2.5.2 the continuing consequences of empowerment transactions concluded by them after the coming into force of the MPRDA, as referred to in clause 4.7 of the Original Charter;

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2.5.3 the right, where a holder has achieved HDP or HDSA participation in excess of any set target in a particular operation, to utilise such excess to offset any shortfall in its other operations, as referred to in clause 4.7 of the Original Charter;

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2.5.4 the entitlement to offset the value of the level of beneficiation achieved by the holder against its HDP or HDSA ownership commitments, as referred to in clause 4.8 of the Original Charter; and

2.5.5 all forms of ownership and participation by HDPs and HDSAs as referred to in the Original Charter;

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2.6 Paragraph 3 of the 2010 Charter does not serve to render holders of mining rights "in breach of the MPRDA and subject to the provisions of Section 47 read in conjunction with Sections 98 and 99 of the Act" as it expresses itself to do.

3. The respondents shall pay the applicant's costs of the application, such costs to include the costs of two Counsel.

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(Mabuse J concurred in the judgment of Barrie AJ.)

SIWENDU J: (DISSENTING)

Introduction

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[110] I have read the judgment of Barrie AJ.

[111] The judgment departs from the premise that:

111.1 this dispute and the orders sought by the applicant can only be understood in the context of the provisions of the Original Mining Charter and the amended 2010 Mining Charter;

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111.2 the transitional arrangements in Schedule II are to be elevated beyond the intended purpose. It reasons that a Mining Charter will only apply to mining rights granted under section 23(1) and not to a converted old order right under item 7(2)(f) and (k) of Schedule II because item 7 and Schedule II only refers to section 2(d) and (f) but not to the Mining Charter itself; and

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111.3 whether there is an obligation on mine right holders to maintain HDSA ownership is dependent on whether the obligation arises from the terms and conditions to which the right is subject. I am of the view that this is contrary to the SCA decision in *Minister of Mineral Resources Corporation v Mawetse*[58].

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111.4 I respectfully differ from the main judgment, as a matter of constitutional principle that measures to redress an inequitable past equate

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58 [2015] ZASCA 82.

to or are to be construed as "coercive legal measures" of any kind – and – it is not the approach adopted by the applicant and the respondents to the dispute. a

[112] In my respectful view, the epicentre of the disagreement between the parties stems from:

112.1 the interpretation of the MPRDA, b

112.2 the connection between the MPRDA and the Mining Charter; as well as,

112.3 the nature and extent of the powers of the first respondent to amend and enforce a Mining Charter, manifest in the amended 2010 Mining Charter he seeks to enforce. c

[113] The first dispute is about the legal effect of HDSA ownership targets set out in the Mining Charter (s) and the Score Card. Separately from that, is the dispute about the method of the calculation of HDSA ownership, patent in the differences in the method of calculation, between the Original Charter and the 2010 Mining Charter. d

[114] In my respectful view, to determine whether a mine right holder is compelled to maintain the 26% HDSA ownership, it is necessary to interrogate the foundation or source of that obligation, and, confirm or dismiss its extant. This directly implicates whether a Mining Charter developed under the MPRDA is intended to be binding in law and therefore enforceable under the MPRDA or is intended to be a guideline as argued by the applicant. The answer to both questions is at the root of whether a breach of the Mining Charter translates to a breach of the MPRDA. To sever the Mining Charter from the MPRDA cuts it from its source, deftly denies the issues presented before this Court of their proper context and circumvents the complex legal question of their interpretation, which is the very genesis of the dispute. e f

[115] The gravamen of this case centres on sections 2(d) and(f), section 23(1)(h), item 7 Schedule II and sections 100(2)(a) and (2)(b) read together with the objects of the MPRDA and section 25(h). Notwithstanding subsequent amendments to the MPRDA referred to in the main judgment, the substance of these core provisions has remained the same from inception. g

[116] The main judgment draws a distinction between Mining Charter obligations of mine right holders granted under section 23(1) and those of the holders of old order rights under item 7 Schedule II. I disagree with this approach. I am of the view that the sole aim of item 7 Schedule II was to marshal a transitional arrangement, which was time bound. It was not intended to create parallel mining rights. Once converted, all the mining rights are subject to the same regulatory regime under the MPRDA and monitored under the same provisions of the MPRDA. In my respectful view, the applicant correctly approached the Mining Charter obligations requirements relating to the holders of both rights as if they applied similarly. This is because the details of what the older order mine right holder must comply with in terms of section 2(d) and (f) can only be understood by reference to the prevailing Mining Charter. h i

[117] The applicant initially sought to set aside selected provisions of the 2010 Mining Charter. The material question was whether the first respondent j

a is empowered to impose fresh obligations on mine right holders through the amended 2010 Mining Charter, and, therefore acted *ultra vires* the empowering provisions under the MPRDA. The initial relief impugned the legality of the first respondent's action in amending and publishing the 2010 Mining Charter, it called to question the validity of the 2010 Min-
b ing Charter.

[118] The about-turn by the applicant midway the application proceeding is an acceptance of the validity of the 2010 Mining Charter as it remains unchallenged in line with *Oudekraal Estates (Pty) Ltd v City of Cape Town and others*. The applicant was emphatic that it does not seek to invalidate the
c 2010 Mining Charter. As a result, the amended relief confines the remit of this Court only to a determination of whether the amended 2010 Mining Charter can be applied retrospectively and no more.

[119] Contrary to Barrie AJ, I observe that the Interpretation Act is under review[59] as it has not been amended in 60 years. Certain of its provisions may not be compatible with the constitutional dispensation. I align with
d the view that section 10(3) of the Interpretation Act is compatible with a general authorisation to amend statutory instruments provided the amendments do not apply retrospectively.[60]

[120] This Court is faced for the first time with the task of determining the transformation obligations of an important sector in the South African
e economy. The issues raised also call to question the legal standing of the Mining Charter (and other Charters) within the existing hierarchy of legislation under the new constitutional dispensation. The significance of this task means this Court is duty bound to do its utmost to account in full, to the degree relevant, the arguments raised before it and resolve the legal dispute. The fundamental difference in approach as well as the conclusion
f reached in the main judgment necessitate that I elucidate the reasons for my departure and then provide separate reasons for the order I propose.

Background

[121] The parties are as defined in the main judgment. Save to note that the
g first respondent, the Minister of Minerals and Resources, as a member of the cabinet is part of the administration primarily concerned with the implementation of legislation. He also has the functions and powers set out in section 85(2) of the Constitution.[61]

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59 See the *South African Law Reform Commission Paper 06/2017*.
60 See Prof Du Plessis *Interpretation of Statutes*.
61 S 85(2)(e) of the Constitution which provides that:
"The President exercises the executive authority, together with the other members of
i 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) co-ordinating the functions of state departments and administrations;
(d) preparing and initiating legislation; and
j (e) performing any other executive function provided for in the Constitution or in national legislation."

[122] Secondly, Serodumo confined its submissions to the obligation of the mine right holder to "top-up" a diminution in the HDSA ownership as well as to whether a breach of the Mining Charter is a breach of the MPRDA. It made no submissions on the calculation of ownership or the legality of the first respondent's action in amending the Original Charter. The NEF made submissions on the Broad-Based Black Economic Empowerment Act 53 of 2003 ("BBBEE Act") and the approach the Court should adopt to the interpretation of the MPRDA.

[123] Pursuant to the powers conferred by section 100 of the Minerals and Petroleum Resources Development Act 28 of 2002 ("MPRDA"), the first respondent developed and published the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (the "Original Charter"). To give effect to the empowerment objectives of the MPRDA, the Original Charter recorded a commitment by stakeholders to meet a transfer of 26% ownership of mining assets to Historically Disadvantaged South Africans ("HDSA") by each mine right holder. The ownership target of 26% by HDSA's was to be achieved in two phases, namely, 15% of HDSA ownership by 2008 and 26% of HDSA ownership by 2014.

[124] Progress in meeting the empowerment objectives by the mining industry and the impact of the Original Charter in realising these objectives was to be reviewed by 2009. Following a review, in 2010, the first respondent revised and amended the Original Charter. Even though the ownership target of 26% by HDSA was retained, the first respondent changed the principles for calculating the HDSA ownership.

[125] The applicant and the respondents disagree about the extent to which empowerment objectives of the MPRDA and the Mining Charter have been met. The respondents contend that in calculating compliance with the 26% HDSA ownership, mine right holders incorrectly included the "Once Empowered – Always Empowered" principle. They also contend that the review conducted in 2009 revealed that HDSA ownership was concentrated in the hands of few anchor partners and Special Purpose Vehicles ("SPV's") with a handful of beneficiaries, contrary to the spirit of the Freedom Charter and the Mining Charter. They contend that the empowerment objectives have not been met as a result. This application is one of three applications[62] brought by the applicant against the respondents.

[126] The nub of the application, in so far as the purported obligation to maintain the 26% HDSA ownership and the ability by the first respondent to enforce the Mining Charter provisions through the cancellation and penalty provisions of the MPRDA, concerns a determination of the nature and ambit of first respondent's powers under section 100(2) of the

62 *Chamber of Mines of South Africa v The Minister of Mineral Resources and the Director General, Department of Mineral Resources*, case number 71174/2017; *Chamber of Mines of South Africa v The Minster of Mineral Resources and the Director General, Department of Mineral Resources*, case number 43621/17.

a MPRDA. Flowing from the interpretation of the MPRDA and the determination of the first respondent's powers, the question posed before this Court is whether a Mining Charter is intended to be "law" or policy. Simultaneously, the Court is asked to determine the principles for the calculation of the 26% HDSA ownership in terms of the 2010 Mining Char- b ter. The legal questions identified are whether:

126.1 the power to develop a Mining Charter, includes a power to amend it, and, whether the first respondent breached the principle of legality in publishing the 2010 Mining Charter by exercising c powers not conferred to him ("the *ultra vires* claim");

126.2 a breach of a Mining Charter published under the MPRDA translates to a breach of the MPRDA. This translates to whether the first respondent can lawfully enforce the transformation objectives in section 2(d) and (f) of the MPRDA and the Mining Charter un- d der section 47 of the MPRDA ("the legal enforcement of the Mining Charter");

126.3 the respondents can apply the amended 2010 Mining Charter provisions to mining rights granted prior to the amendment ("retrospective application") and whether the first respondent can rely e on consent by the applicant (or its members) to the retrospective application ("retrospective application claim").

[127] The disagreement about the method for calculating the HDSA ownership is that the amended provisions of the 2010 Mining Charter either bring the mine right holder above or below the 26% HDSA ownership target f depending on factors accounted for. A declaratory order is sought on whether once issued with a mining right:

127.1 a mine right holder, has a perpetual obligation to retain and preserve the 26% HDSA ownership throughout the life of the mining g right, and is consequently legally obliged to "top-up" HDSA percentage ownership in cases when it has been diluted or exited; and

127.2 a mine right holder can apply the continuing consequences of previously concluded ownership transactions. This concerns the application of the "Once empowered, always empowered princi- h ple". The application of the principle would vary the determination of whether HDSA ownership must be held throughout the life of the mining right [if found by the Court to be the legal position] and requirement to "top- up" diluted HDSA ownership.

[128] The above issues affect certainty about the mine right holders compliance i obligations under the MPRDA and the Mining Charter. They also affect the HDSA ownership composition and structure of mine right holders.

[129] The application was brought by agreement between the parties, because both consider it necessary for the Court to declare what the empowerment obligations of mining right holders are. The issues before the Court j are fundamental for the attainment of the transformation objectives

envisaged in the MPRDA as well as the need to attain regulatory certainty for the effective functioning of the mining industry[63]. The motivation for seeking a declaratory order, is to clarify the legal interpretation of the provisions in the MPRDA, to avoid a multiplicity of applications by each mine as and when it was told it is not compliant. Regarding the transformation requirements at issue, the applicant approached the requirements relating to the grant of the mining rights under section 23(1) as if they applied similarly to the conversion of the old order rights under item 7 Schedule II.

The provisions of the Original Charter and the 2010 Mining Charter

[130] The 2004 Mining Charter (the "Original Charter") was published in the *Government Gazette* GN 1639 in *GG* 2661 of 13 August 2004. It reflects names of various stakeholders[64], who were party to its development. The stakeholders included the applicant. It records that, it is the outcome of a process of consultation initiated by the first respondent. In this sense, it is a product of industry co-operation.

[131] The Original Charter recognised both active[65] and passive[66] forms of ownership. The applicant submits that the Original Charter is faithful to section 100 of the MPRDA in that it is not prescriptive. It states that:

131.1 The mining industry agrees to achieve 26% HDSA ownership of the mining industry assets in 10 years by each mining company;

131.2 That where a company has achieved HDSA participation more than any set target, in a particular operation then such excess may be utilised to offset any shortfall in its operations;

131.3 Stakeholders agree to meet after every five years to review the progress and to determine what further steps, if any, need to be made to achieve the 28% target.

[132] The 2010 Mining Charter was published in the *Government Gazette* GN 838 *GG* 33573 of 20 September 2010. Its publication follows a Mining Charter impact Assessment Report dated October 2009 by DMR. It constitutes an amendment of the Original Charter. The alterations in respect

63 The MPRDA Amendment Bill has been at limbo since 2014. It was sent back for revision due to allegations that it contained unconstitutional provisions.

64 The Department of Minerals and Energy, The Chamber of Mines of South Africa, The South African Mining Development Association and the National Union of Mineworkers.

65 Active Involvement through HDSA controlled companies (50% plus 1 vote) which includes management control or strategic joint ventures or partnerships (25% plus 1 vote) including management agreements with joint management; Collective Investment through ESOPS and mining dedicated unit trusts majority owned by HDSA's.

66 Passive Involvement (< 0% up to 100%) ownership with no involvement in management, eg ESOPs. It could also be measured by market share as measured by attributable units of South African production controlled by HDSA's with capacity for offset which would entail credit/offsets to allow for flexibility, Continuing consequences of previous deals would be included in calculating such credit offsets in terms of market share as measured by market share of attributable units of production.

a of the meaning and calculation of the HDSA ownership are contained in clause 2.1, 2.3 and 3 respectively and state as follows:

> "2.1 Ownership
>
> Effective ownership is a requisite instrument to effect meaningful integration of HDSA into the mainstream economy, in order to achieve a substantial change in racial and gender disparities prevalent in ownership of mining assets, and thus pave the way for meaningful participation of HDSA for attainment of sustainable growth of the mining industry, stakeholders commit to –
>
> - Achieve a minimum target of 26% percent ownership to enable meaningful economic participation of HDSA by 2014
> - The only offsetting permissible under the ownership element is against the value of beneficiation, as provided for by section 26 of the MPRDA and elaborated in the mineral beneficiation framework
> - The continuing consequences of all previous deals concluded prior to the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002 would be included in calculating such credits/offset in terms of market share as measured by attributable units of production
>
> 2.3 Beneficiation
>
> . . .
>
> Mining companies may offset the value of the level of beneficiation achieved by the company against a portion of its HDSA ownership requirements not exceeding 11 percent.
>
> 3. Non-Compliance
>
> Non compliance with the provisions of the Charter and the MPRDA shall render the mining company in breach of the MPRDA and subject to the provisions of Section 47 read in conjunction with section 98 and 99 of the Act."

[133] The Parliamentary Portfolio Committee on Mineral Resources undertook public hearings with stakeholders, mining communities and mine workers to ascertain public awareness of the revision. In November 2011, hearings were also conducted with the Top 10 Mining Companies on the implementation of the Mining Charter 2010, including the applicant.[67]

[134] The applicant alleges that based on the targets in the Original Charter, the DMR had agreed that 90% of the mines measured not only met the target of 26% HDSA ownership but had in fact exceeded it, bringing HDSA ownership up to 32,5% on average. It further alleges that DMR had not counted transactions from which HDSAs had sold out, or which had otherwise come to an end. In addition, the 2010 Mining Charter requires that transactions should include an employee share-ownership program and community groups, in addition to one or more BEE entrepreneurs[68].

Interpretation of the MPRDA

[135] The applicant and the respondents agree that the MPRDA is founded on the values of the Constitution. One of its main objects is to redress and

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67 National Assembly Report of the Portfolio Committee on Mineral Resources on public hearings on the Mining Charter dated 5 June 2013.

68 Department of Mineral Resources, Assessment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (Mining Charter); May 2015, pp 37–38.

advance equitable access to the country's mineral resources. They also agree that the MPRDA regulates the mining industry which is a vital component of South Africa's economy in terms of contribution to Gross Domestic Product ("GDP") and job creation. This view accords with the Constitutional Court's decision in *Minister of Minerals Resources and others and Sishen Iron Ore Co (Pty) Ltd and another*[69] (*Sishen*).

[136] The significance of the objects of the MPRDA is reinforced by section 4(1) which states in imperative terms 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" (my emphasis.)

[137] An important lens for the interpretation of the MPRDA is in *Agri SA v Minister for Minerals and Energy* (*Agri SA*)[70]. The Constitutional Court held that the MPRDA constitutes an overhaul of decades of a mining regulatory regime founded on common law and private property law. A structural and institutional change was effected. The *dictum* by Justice Froneman validates the overhaul of the institutional legal framework[71]. It also points to the unique and all-encompassing reach of the MPRDA when he states that:

> "The MPRDA is not legislation that explicitly seeks to give effect to and circumscribe a fundamental right in the manner of, for example, the Promotion of Administrative Justice Act, Promotion of Access to Information Act or the Labour Relations Act, but in my view, its provisions need to be interpreted in a manner that is best consistent with s 25. An interpretation that best accords with the spirit and purport and objects of s 25 are what is called for"[72].

[138] Over and above the inherent power of the Court to develop the common law under section 173 of the Constitution, section 39(2) of the Constitution demands that the MPRDA be interpreted through the prism of the Bill of Rights and promote the spirit, purport and objects of the Bill of Rights, in *Agri SA*[73] Justice Froneman pertinently highlights the challenge of interpreting transformative legislation and elucidates the construction between the Constitution and the MPRDA, albeit in that case, it was in the context of property rights. Under the MPRDA, transformation in the sphere of mineral and petroleum law is not underpinned by a single constitutional right but by all the values embodied in the Constitution[74] which include but are not limited to, property, equality, dignity, socio-economic rights, environmental rights, and fair administrative action.

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69 *Minister of Minerals Resources and others v Sishen Iron Ore Co (Pty) Ltd and another* 2014 (2) SA 603 (CC).

70 *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

71 *Agri SA* para [91] states:

"I acknowledge that there is no precedent for this approach. That is because this Court is faced for the first time with legislation that seeks to effect an institutional change to the legal regime that applies to the exploitation of this country's mineral and petroleum resources. Large-scale transformational legislation of this nature presents challenges of a special kind. There is no binding precedent of this Court that precludes a new and fresh approach to the issue." (Footnotes omitted.)

72 *Agri SA* para [85].

73 *Agri SA* paras [85] and [91].

74 Prof Elmarie Van der Schyff, *Property in Minerals and Petroleum* (2016).

a [139] I have taken account of the Constitutional Court cases referred to above as well as the decision in *Holomisa v Argus Newspapers Ltd*[75] that the Constitution has changed the context of all legal thought in decision-making in South Africa[76]. In addition, I have taken account of the decision in *Matiso v Commanding Officer Port Elizabeth Prison*[77] (*Matiso*) by Froneman J (as b he then was) where he held that the Constitution has also had a decisive impact in the conventional hierarchy and status of all legal rules and legislation in South Africa.

[140] Implicitly, these decisions convey that on the facts of the current case, in interpreting the MPRDA and the first respondent's powers, I must have c regard of the constitutional scheme, and distill the underlying constitutional value(s) inherent in the disputed questions where applicable. I am enjoined to apply an interpretation that accords with both the objects of the MPRDA and the spirit and purport of the identified constitutional value(s). As stated by Mahomed J in *S v Mhlungu*[78] constitutionalism is a far more challenging enterprise than that required of ordinary legislative d interpretation.[79] The complexity and interlinked issues in this application demand that they are not shoehorned into a narrow basis. Ultimately, whatever interpretation I arrive at must pivot towards making the objects of the MPRDA realisable.

e **Challenge to the first respondent's powers**

[141] The backbone of the applicant's argument is predicated on the foundation that the power conferred by section 100(2)(a) to develop a Mining Charter is administrative in nature. The applicant contends that the Mining Charter is a policy guideline. There is to be flexibility in its application.

f [142] The premise that the power conferred is administrative, also informs the applicant's challenge of the first respondent's power to amend the Original Charter and publish the 2010 Mining Charter. The applicant submits that section 100 is the sole source of power for the first respondent, Section 100 authorised the first respondent to develop the Mining Charter within a six-month period. The first respondent became *functus officio* g once the Original Charter was published. The first respondent was not authorised to amend the Original Charter or to re-exercise the powers conferred or do so retrospectively. In this regard, the first respondent strayed out of the bounds of the enabling legislation.[80]

h

75 *Holomisa v Argus Newspaper Ltd* 1996 (2) SA 588 (W) [also reported at [1996] 1 All SA 478 (W) – Ed].

76 *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) [also reported at 2002 (8) BCLR 771 (CC) – Ed].

77 *Matiso v Commanding Officer Port Elizabeth Prison* 1994 (4) SA 592 (SE) at 597G–H [also i reported at 1994 (3) BCLR 80 (SE) – Ed].

78 S *v Mhlungu* 1995 (3) SA 867 (CC) [also reported at 1995 (7) BCLR 793 (CC) – Ed].

79 S *v Mhlungu* 1995 (3) SA 867 (CC) paras [68]–[93].

80 Clause 4 states that the first respondent may revise the Mining Charter as and when the need arises. Clause 3 deals with non-compliance with the provisions of the Mining Charter and the MPRDA shall render the mining company in breach of the MPRDA and subject to the provisions of s 47 read in conjunction with ss 98 and 99 of the j MPRDA.

[143] It is further submitted that if the first respondent was to develop a new charter, he had to comply with section 6[81] of the MPRDA which provides for just administrative action, in this regard, if the first respondent's actions are administrative, they are not only subject to section 6(1)[82] of the MRPDA but also to the principle of lawfulness, reasonableness and procedural fairness applies. The applicant relies on the decision in *Minister of Mineral Resources and others v Mawetse* (*SA*) *Mining Corporation* (*Pty*) (*Ltd*)[83] (*Mawetse*) where the Court held that the granting of a mining right is a unilateral administrative act to support both arguments.

[144] The respondents concede that the first respondent was not exercising executive authority or discretion but was acting on "instruction" from Parliament[84] in developing the 2010 Mining Charter. I have understood this to mean the first respondent's actions are founded on a delegation from Parliament. In respect of the claim that the first respondent had to meet the requirements of section 6 of the MPRDA, the respondents argue that the process of the development of the Mining Charter was inclusive and involved all stakeholders. The process was not administratively unfair. The power to develop the Mining Charter does not require consensus.

[145] I am of the view that distilling the nature of the powers conferred by section 100 is the axis from which the questions in paragraph 126.1 and 126.2 above can be resolved.

Nature of the powers conferred by section 100

[146] The first respondent's powers depart from the interpretation of section 100(2)(a)[85] of the MPRDA and dovetail on identifying the nature of the function envisaged by section 100(2)(a). This will also inform whether there is valid legal action by the first respondent. The Constitutional

81 S 6 of the MPRDA.

82 S 6(1) of the MRPDA states that:

"Subject to the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), *any administrative process conducted, or decision taken* in terms of this Act must be conducted or taken, as the case may be, within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness."

83 *Minister of Mineral Resources and others v Mawetse* (*SA*) *Mining Corporation* (*Pty*) *Ltd* 2016 (1) SA 306 (SCA).

84 First and second respondent's head of argument para [19].

85 S 100(2)(a):

"To ensure the attainment of the Government's Objectives of redressing historical, social and economic inequalities as stated in the Constitution, the First Respondent must within six months from the [*sic*] on which this Act takes effect develop a broad based socio-economic empowerment Charter that will set the framework for targets and timetable for effecting the entry into and active participation of historically disadvantaged South African 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."

S 100(2)(b):

"The Mining Charter must set out, amongst others, how the objects referred to in sections 2(c), (d), (e), (f) and (i) can be achieved."

a

Court in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*[86] (*Fedsure Life*) confirmed that:

> "It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by the law."[87]

b

Affirming the same principle in *HOD Free State Department of Education v Welkom High School and others*[88] (*Welkom*) it was held by Khampepe J that:

> "the rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process"[89]

c

[147] The question is whether in developing the Mining Charter, the first respondent implements national legislation, or is authorised to develop a kind of legislation" or policy. The respondents are not explicit about the nature of the power or function conferred by the section 100. They contend that the power to develop policies derives directly from the Constitution and Parliament could not have entrusted the first respondent with a power to develop a policy in terms of section 100(2). As stated above,[90] this infers that the power exercised is not derived from the executive authority envisaged by section 85 of the Constitution.

d

[148] The difficulty of categorisation of decisions as "administrative" or other is evident from the judgment of Sachs J in *Minister of Health v New Clicks South Africa (Pty) Ltd*[91] (*New Clicks*). I am mindful that the *New Clicks* decision does not decisively address the question whether making regulations is an administrative action and reviewable under PAJA. I am also mindful that the Supreme Court of Appeal in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd*[92] holds that making regulations constitutes "administrative" action.

e

f

[149] In the case of the MPRDA the power to pass regulation is conferred by section 107(k) and (l).[93] It was common cause that the first respondent has

g

86 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) [also reported at 1998 (12) BCLR 1458 (CC) – Ed].

87 *Fedsure Life* para [58].

88 *Head of Department, Department of Education, Free State Province v Welkom High School and another; Head of Department, Department of Education, Free State Province v Harmony High School and another (Equal Education and another as amid curiae)* 2014 (2) SA 228 (CC) [also reported at 2013 (9) BCLR 989 (CC) – Ed].

h

89 *Welkom* para [86].

90 See para [30] *supra*.

91 *Minister of Health v New Clicks South Africa (Pty) Ltd* 2008 (2) SA 311 CC para 640 [also reported as *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others (Treatment Action Campaign and another as amici curiae)* 2006 (1) BCLR 1 (CC) – Ed] which refers to a continuum of acts.

i

92 *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010(3) SA 589 (SCA) [also reported at [2010] 1 All SA 1 (SCA) – Ed].

93 S 107(1) provides "The Minister may, by notice in the *Government Gazette*, make regulations regarding:

. . .(k) any matter which may or must be prescribed for in terms of this Act; and

. . .(l) any other matter the regulation of which may be necessary or expedient in order to achieve the objects of this Act."

j

not prescribed regulations under the MPRDA. Therefore, the decision in the *City of Tshwane* does not apply in the present case. I agree with the applicant that the power to develop the Mining Charter is separate from that under section 107(k)(i) [*sic*]. It is not a development of regulations under the MPRDA. I am of the view that the separate allocation of the function in section 100 amplifies the distinct, separate and discrete nature of the provision and power conferred.

[150] To dissect the nature of the powers conferred, the decision of the *President of the Republic of South Africa v SARFU*[94] (*SARFU*) is instructive. The Court held that the source of the power argued by the applicant is a relevant factor but not a decisive one. The Court deemed the *character of the function and* the *subject matter* of the exercise of power relevant in considerations. The Court locates administrative and policy matters along a continuum, in that formulation, the more closely connected the subject matter of the exercise of the power is to the implementation of legislation the more likely that the power will be classified "administrative" in nature. The converse also applies, in that the more closely connected the subject matter of the exercise of the power is to policy matters, the more likely the exercise of the power will <u>not be</u> administrative action.

[151] The guideline by the Constitutional Court states as follows:

> "As we have seen, one of the constitutional responsibilities of the President and Cabinet members in the national sphere (and premiers and members of executive councils in the provincial sphere) *is to ensure the implementation of legislation*. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute 'administrative action' within the meaning of s 33. Cabinet members have other constitutional responsibilities as well. *In particular, they have constitutional responsibilities to develop policy and to initiate legislation. Action taken in carrying out these responsibilities cannot he construed as being an administrative action for the purposes of s 33.* It follows that some acts of members of the executive, in both the national and provincial spheres of government will constitute 'administrative action' as contemplated by section 33, but not all acts by such members will do so.
>
> . . .
>
> Determining whether an action should be characterised as the implementation of legislation or the formulation of policy *may be difficult*. It will, as we have said above, depend primarily upon the *nature of the power*. *A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor* So, too, is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. *While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to fee drawn* in deciding what should and what should not be characterised as administrative action for the purposes of s 33. *These will need to he drawn carefully in the light of the provisions of the Constitution and the*

94 *President of the Republic of South Africa v SARFU* 2000 (1) SA 1 (CC) para 141 [also reported at 1999 (10) BCLR 1059 (CC) – Ed].

a *overall constitutional purpose of an efficient, equitable and ethical public administration This can best be done on a case by case basis.*"[95] (my emphasis) (footnotes omitted).

[152] When read with remarks by Froneman J in *Agri SA*, the formulation in *SARFU* hints at the multi-facet nature of the responsibilities of the first respondent under the MPRDA. Therefore, I have taken account of the full context and the overall scheme of the MPRDA instead of isolating the provisions of section 100 from its overall scheme. While the language used in a statute is the first port of call in arriving at an answer, I have adopted the purposive approach sanctioned by Mhlantla J in *Roux v Health Professions Council of South Africa and another*[96] so as not to strip the provision from its full context.

[153] In my view, the gateway to the answer lies in the meaning attached to "State custodianship"[97] in section 3[98] which flows from the objective in section 2(a) to recognise the State's right to exercise sovereignty over all the mineral and petroleum resources. The custodianship of the State is a fundamental foundational principle of the MPRDA, even though curiously, it is left undefined, in my view the meaning, scope and breadth of the power conferred by custodianship determines the character of the function, the subject matter and in turn, the nature of the powers conferred on the first respondent by section 100.

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95 *SARFU* paras [142]–[143].

96 *Roux v Health Professionals Council of South Africa and another* 2011 JDR 1132 para [19] states:

> "The primary rule in the interpretation of statutes is to give effect to the object or purpose of the statute. The nature of the statute and the purpose for which it was enacted are important when it comes to matters of interpretation. This Court has embraced the purposive approach, whereby statutory words must be interpreted in the context of the statute as a whole including its purpose. In *Stopforth v Minister of Justice*; *Veendendaal v Minister of Justice* this Court confirmed that 'even where the language is unambiguous, the purpose of the Act and other wider contextual considerations may be invoked in aid of a proper construction. It follows therefore that the Act and regulations must be given a purposive construction to give effect to their principal aims and purposes."

97 S 3 provides "Custodianship of nation's mineral and petroleum resources

(1) Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.

(2) As the custodian of the nation's mineral and petroleum resources, the State, acting through the First Respondent, may –

(a) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and

(b) in consultation with the First Respondent of Finance, prescribe and levy, any fee payable in terms of this Act. (Section 3(2)(b) substituted by section 3(a) of Act 49 of 2008 with effect from 7 June 2013).

(3) The First Respondent must ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development.

(4) The State royalty must be determined and levied by the Minister of Finance in terms of an Act of Parliament. (Section 3(4) inserted by section 3(b) of Act 49 of 2008 with effect from 7 June 2013)."

98 S 107(k) and (l).

[154] By virtue of section 3(2), the State has the power and authority to "control", "administer" and "manage" mining rights. Custodianship evokes a broad all-embracing institutional principle. It confers the State with directional authority[99], governing power and oversight[100] over mineral resources. Granting mining rights is inherent, but nevertheless, a constituent component of the power to "control". I am of the view that, the broad reach of custodianship is beyond granting of mining rights. The granting of mining rights is an administrative constituent part of custodianship.[101] When viewed alongside the whole of the MPRDA, there is an advisory Board structure created in section 58, a division of functions between each of the Minister, the Director-General and the Advisory Board and a varying nature in the roles by each. State custodial rights is a signpost to a composite of multi-facet functions and objectives the State should bear in mind when fulfilling the role set out in section 3(2).

[155] Even though at first blush it seems that section 100 concerns implementation of legislation, the crux and subject matter of the function of developing the Mining Charter to give effect to the objects of the MPRDA entails making of complex policy choices on how the MPRDA objectives are to be achieved. When read against all the provisions of the MPRDA, the character of the function of developing the Mining Charter tips the balance inherent in the function to one of developing a legislative instrument rather than one that entails implementation of an administrative function under the MPRDA.

[156] The MPRDA has distinctive and unique features which render it *sui generis* in nature. It is an omnibus repository to a variety of constitutional rights. It effects an institutional change to the legal regime in respect of the legal nature of mining rights and land rights, as well as a change in the institutional structure and arrangements. The variety of functions and their different nature, as well as the allocation of these functions between the first respondent and other structures in the MPRDA are reflective of these changes,

[157] *Mawetse* relied upon by the applicant applies only to that aspect of the function relating to the granting of mining rights. That part of the function is a constituent component of wider custodial functions conferred on the State acting through the first respondent. Consequently, the development of the Mining Charter is neither an administrative process nor a decision envisaged by section 6 of the MPRDA. I find that the development

99 S 3(2) of the MPDRDA grants the first respondent wide regulatory powers in respect of "prescribed matters and matters necessary or expedient to achieve the objects of the MPRDA".

100 S 25(h) of the MPDRA requires a mine right holder to submit annual reports detailing the extent of the holder's compliance with the provisions of s 2(d) and (f), the Mining Charter contemplated in s 100 and the Social Labour Plan. S 28(c) requires the holder of the mining right to submit to the Director General an annual report detailing the extent of the holder's compliance with s 2(d) and (f), the Mining Charter contemplated in s 100 and the Social Labour Plan.

101 I am mindful that this view raises further questions of state ownership of mines and mineral deposits as well as the parameters of state intervention. In addition, the combination of the role of the state as regulator, governor and policy maker are functions that will require resolution in future.

a of the Mining Charter under section 100 is not an administrative act. As an administrative law principle, the *functus officio* doctrine is a misconstruction on this formulation.

[158] This determination does not however insulate the first respondent from a challenge. As stated in *Albutt v Centre for the Study of Violence and Reconciliation*,[102] those holding public power may exercise it to achieve stated objectives only by employing methods that are rationally related to those objectives which must be in the public interest. Therefore, the first respondent's actions, decision and choices must be within the parameters of fairness, lawfulness and rationality which stand independently of legality and validity of his action. On this legal principle and construction, the Mining Charter must be reasonable from conception to implementation.

Is the mining charter "law" or a policy guideline?

[159] The genesis to this vexed question is that when the 2010 Mining Charter was published, compliance by mine right holders was evaluated based on the revised 2010 Mining Charter. The respondents applied it retrospectively. This resulted in minimum compliance by the mining industry as the first respondent viewed the results as a failure to comply with the MPRDA.[103]

[160] The applicant submits that the Mining Charter under the MPRDA is not legislation, but a formal policy guideline mandated by section 100(2). It submits that the Mining Charter is intended to give an applicant for a mining right a formal indication of what the first respondent will regard as "furthering" or "giving effect to" the objects of sections 2(c), (d), (e), (f) and (i) of the MPRPA. It should not be prescriptive nor specify that the objects in section 100(2)(b) can only be achieved in one way as the holder of the mining right may have better ways of achieving the objectives. Doing so would be equivalent to treating the objectives in section 2(d) and (f) as if they were quotas. The applicant further argues that the reference to "framework for targets" in section 100(2)(a) provides yet another indication that the Mining Charter is a policy guideline. By the same token, the applicant accepts that compliance with the Mining Charter is an imperative but argues that compliance is mandatory only at the time of the application for the mining right.

102 *Albutt v Centre for the Study of Violence and Reconciliation and others* 2010 (3) SA 293 (CC) [also reported at 2010 (5) BCLR 391 (CC) – Ed].

103 The applicant submitted that the revision in the 2010 Charter affected offsets which were disallowed, as well as the recognition of the continuing consequences of previously concluded transaction and required a top-up of the diminution in the 26% HDSA ownership. A statement to this effect communicated to the market. There was a fall in the market value of the shares in the mining industry, an indication that non-compliance by the industry and regulatory uncertainty are a market risk which can affect the long-term sustainability of the industry.

[161] For this premise, the applicant banks on *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*[104] (*Akani*):

> ". . . that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise, the separation between Legislature and Executive will disappear."[105]

[162] In opposition, the respondents contend that the Mining Charter is a form of legislation because it is published pursuant to section 100(2)(a). It is a condition for the granting of a prospecting right, mining right and conversion of old order mining rights. The respondents submit that development of policies fall under the ambit of executive powers, conferred by the Constitution, Parliament could not give the first respondent power to develop a policy in terms of section 100(2)[106].

[163] Cachalia JA writing for the Appeal Court in the *University of the Free State v Afriforum and another*[107] (*UFS*), states that the hallmark of a policy, which is to be gauged from the language used, is that it is not prescriptive and is not binding. The enabling statute which is its source does not create a legal obligation to comply, in the *UFS* case, for example, the universities were free to depart provided there was justification for the departure. Hoexter, on the other hand writes that legislation is about implementing social policies intended to advance the public interests.[108] Legislation applies prospectively; is intended to be in force for an indefinite period and requires publication to be valid. Legislation may require further administrative action for their application for example. The intention of the enabling legislation and or the instrument at issue is apposite.

[164] The *raison d'être* for the MPRDA derives from the constitutional obligation of the State to redress, advance transformation goals and eradicate inequality[109]. The *Sishen* decision refers to the *Department of Land Affairs and others v Goedgelegen Tropical Fruits*[110] which pertinently states that remedial legislation is "umbilically linked" to the Constitution,[111] in this sense, Constitution, the MPRDA and the Mining Charter share the same vital attachment. They derive their oxygen and the nutrients from the Constitution. Contrary to the applicant's argument, locating the vital connection does not offend the principle of subsidiarity in my view.

[165] Even though the State has a free hand in allocating mining rights, there is a pertinent connection between the MPRDA, the Mining Charter and

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104 *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) [also reported at [2001] 4 All SA 68 (SCA) – Ed].

105 *Akani* para [7].

106 First and second respondent's notes on oral argument para 19.1.

107 *University of the Free State v Afriforum and another* 2017 (4) SA 283 (SCA) [also reported at [2017] 2 All SA 808 (SCA) – Ed].

108 Cora Hoexter *Administrative Law in South Africa* (2012) at 52.

109 *Sishen* para [460].

110 *Department of Land Affairs and others v Goedgelegen Tropical Fruits* 2007 (6) SA 199 (CC) [also reported at 2007 (10) BCLR 1027 (CC) – Ed].

111 *Goedgelegen* para [53].

a the granting of a mining right. The Mining Charter sets out a time-table for effecting the entry into the industry by HDSA's. To determine the intention of the enabling legislation, I am of the view that section 23(1)(h), section 100(2)(a) and section 100(2)(b) go hand in glove and must be read together. Under section 23(1)(h), the first respondent is obliged to grant b the mining right in terms of the directory provision in section 23(1)(h) if:

> "the granting of such right will further the objects referred to in Section 2(d) and (f) *and in accordance* with the Mining Charter contemplated in Section 100 and prescribed social and labour plan."

[166] Section 100(2)(a) mandating the development of the Mining Charter c provides that:

> "To *ensure* the attainment of the Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the [First Respondent] 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 the targets and timetable* for effecting the entry into and d active participation of historically disadvantaged South Africans into the Mining Industry and allow South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources."

Section 100(2)(b) states that:

> "The Charter must set out, *amongst others*, how the objects referred to in sec- e tion 2 (d), (c), (e), (f) and (i) *can* be achieved."

[167] Much was made in argument that the construction of section 23(1)(h) has a drafting error because of the use of the wording "and in accordance with." It was argued that it should have read "and shall be in accordance with", alternatively that a comma should have been inserted after "and". f The use of the words "and in accordance with" conveys that compliance with the Mining Charter is in addition to the provisions stipulated in section 2(d) and (f). The applicant accepted that an applicant for the mining right must comply with two hurdles, the objectives in 2(d) and (f) and the Mining Charter. The concession is correctly made.

[168] It is evident from section 23(1)(h) read together with section 100(2)(b) g that the details of what renders the objects of the MPRDA realisable are entrusted to the first respondent through the development of the Mining Charter. The Constitutional Court in the *Government of the Republic of South Africa and others v Grootboom and others*[112] (*Grootboom*) confirms that it is constitutionally competent for the precise "contours and content of the h measures to be adopted"[113] to be entrusted to the Legislature and the executive, who must ensure that such measures are reasonable. Therefore, section 100(2)(a) gave the first respondent a "free hand" to develop the "contours and content" of the Mining Charter.

[169] The substance and content of what an applicant for a mining right or the respondents should consider in assessing an application under section i 23(1)(h) cannot and could not be known fully, but for the details in the Mining Charter. Even though the ultimate evaluation of an applicant's

112 *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) [also reported at 2000 (11) BCLR 1169 (CC) – Ed].
j 113 *Grootboom* para [41].

success in meeting the objectives in sections 2(d) and (f) can only be determined in the future and in due course, a prospective applicant for a mining right must show that the granting of the mining right to it *will further the objects of the MPRDA.* There can be no doubt that section 100(2)(b) envisions that details of what entails compliance with the objectives in section 2(d) and (f) be articulated in the Mining Charter. Neither an applicant nor the respondents can ignore the requirements in [section] 2(d) and (f) stipulated in the Mining Charter when considering an application for mining rights. The use of the conjunction "if" indicates the conditional or contingent nature of the grant of the mining right. The Mining Charter provisions are ground for and an inherent and necessary incident of granting the mining right.

[170] In my view, "can be achieved" means "be able to *be* achieved. The best constitutional interpretation attaching to this is that, it means the objects must "be realisable" in concrete terms. The targets are a time-table for the realisation of the objectives, in this sense, the Mining Charter is a means to an end, in two ways. The first is to make the objects of the MPRDA realisable, and the second is to give oxygen and nutrients to the right to equality because of the umbilical connection of the MPRDA to the Constitution in respect to matters of redress. I do not agree with the contention that the words "can he achieved" in section 100(2)(b) are indicative of the policy nature of the Mining Charter as the interpretation dilutes the MPRDA objectives and their constitutional effect.

[171] In addition, the Mining Charter is intended to contain more than the objectives specified in section 2(d) and (f). Section 100(2)(b) refers to the Mining Charter setting out how the objects in sections 2(c), (e) and (i) *can* be met. Significantly, the use of "amongst others" also reveals that the Mining Charter could contain additional requirements than the express stipulations in sections 2(c), (d), (e), (f) and (i) in the MPRDA.

[172] The applicant also misconstrues the reference to a "framework and targets." The meaning to be ascribed to the reference to a "framework" is no more than a reference to "the design", and "the scheme"[114] or "the contours" of the Mining Charter. In line with the reasoning in *Grootboom*, having resolved the primary question of the institutional legal framework of the location of mining rights in relation to land ownership, as well as the administrative structure through which mining rights will be processed, Parliament elected not to itself legislate the details and modalities of how the transformation objectives are to be met. It entrusted that function to the first respondent. The reference to a "framework and targets" does not alter the kernel of the subject matter and purpose of the Mining Charter. The discretion conferred on the first respondent applies *only* to the *content* of the framework and targets.

114 In the *Certification of the Amended Text of the Constitution of the Republic of South Africa*, the Court dealt with the meaning of "framework" in the context of the (LGTA) and states: "We said that a structural framework should convey an overall 'design' or 'scheme' and should indicate 'how LG executives are to be appointed, *how* LGs are to take decisions and the formal legislative procedures demanded by CP X'".

a [173] The upshot of the argument that the Mining Charter is a guideline, and/or is a policy means that a prospective applicant for a mining right or a mine right holder could develop its own interpretation and framework on how it will comply with section 2(d) and (f) without reference to the Mining Charter. Conceivably, in line with the applicant's approach b during argument, an applicant could ignore the requirements in section 2(c), (e) and (i) because they are not expressly referred to in section 23(1)(h) even though these requirements are pronounced in section 100(2)(b) and are part of the objectives in the MPRDA.

[174] On the construction offered by the applicant, monitoring of compliance c with the main objects of the MPRDA in section 28 of the MPRDA would be conducted on differing criteria at the election and interpretation by each mine right holder. Another result of the applicant's argument is that if the Mining Charter is a policy, it could conceivably be overridden by the enactment of provincial legislation. Schedule 4 Part A and Schedule 5 Part A of the Constitution dealing with allocation of powers and d functions between National Government and Provinces does not specifically deal with mining and mining rights. This result is untenable and conflicts with the *Mawetse* decision. On this score, *Akani* has been incorrectly applied.

[175] I do not find favour with the construction contended for by the applicant. e There is a disharmony between the construction and the desired yield to make the objects of the MPRDA and the constitutional value to attain equitable access to the nations' mining resources realisable.[115] The Mining Charter is a necessary statutory condition for granting a mining right, it is a means to an end, designed to make the objects of the MPRDA realisable. I find that the Mining Charter is a distinct, expressly and separately f authorised statutory instrument. By virtue of the mandatory duty to develop it under section 100(2), entrusted to the first respondent by the Legislature, it qualifies as a form of a delegated statutory instrument. It is intended to be applied uniformly to all prospective applicants and mine right holders. Once the framework has been set, the first respondent, is g not free to depart from it.

Legal characterisation of the Mining Charter

[176] I now turn to the characterisation of the Mining Charter, a matter addressed by the second *amicus*, albeit that it was advanced as a secondary argument. The Court was invited to consider the Mining Charter as an h independent constitutional measure underpinning the right to equality in section 9(2) thus possessed with a "Constitutional force of law". This approach merits consideration against the backdrop of *Matiso* which signals to the effects of the Constitution on the hierarchy of legislation. It also

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115 I use the term legal instrument temporarily since the question of whether the Mining Charter is legislation is in dispute. Hoexter in *Administrative Law in South Africa* (2012) 31 states that delegated legislation is legislation made under the authority of original legislation.

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resonates with the decision in *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources*[116] (*Bengwenyama*) where the Court held that:

> "The Constitution also furnishes the foundation for measures to redress inequalities in respect of access to the natural resources of the country. The Mineral and Petroleum Resources Department Act (Act) was enacted amongst others to give effect to those constitutional norms"[117].

[177] The Constitution has at least 6[118] provisions under the Bill of Rights which enjoin the National Government by legislative and other measures to take measures to make entrenched rights realisable. The Constitution has an additional 7 provisions for the National Government to take specific measures in respect of its structures and institutions.[119] The preamble to the MPRDA carries forth the State's obligation under the Constitution to take legislative and other measures to redress the results of past racial discrimination. Measures therefore are positive action by the State targeted at categories of persons disadvantaged by unfair discrimination. They are designed to promote the achievement of equality.[120]

[178] Even though measures are not defined, they either fall under the rubric of executive decisions which include proclamations, regulations and "other instruments of subordinate legislation" notably, referred to in section 101(3) of the Constitution as well as other policies, programs and strategies adopted by the Executive, on the one hand, but on the other, measures qualify to include delegated legislative or regulatory and statutory instruments which arise by operation of law.

[179] I characterise Broad-Based Black Economic Empowerment Charters as such measures. They are a new feature in our legal discourse and part of the pursuit of an open, equal, fair and just South African society. They may or may not fit in the conventional hierarchy of legislation which was historically based on a different structure of government.[121] Broadly, they either arise from sectoral agreements[122] between industry stakeholders or are developed in terms of enabling legislation[123]. Sectoral agreements even though they are not "law" are given a binding effect by sections 9(1) and 12 of the BBBEE Act which provides for the promulgation of an agreed sectoral Charter. A sectoral Charter is binding among industry players albeit akin to a Social Pact.

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116 *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others* 2011 (4) SA 113 (CC).

117 *Bengwenyama* para [3].

118 S 6(4) dealing with languages; s 9(2) dealing with equality; s 24(b) dealing with environment; s 25(5) dealing with property, s 26(2) dealing with housing and s 27(2) dealing healthcare food and social security.

119 S 125(3), s 139, s 154, s 155, s 165, s 181, s 191.

120 *Minister of Finance and another v Van Heerden* 2004 (6) SA 121 (CC) [also reported at 2004 (11) BCLR 1125 (CC) – Ed]. Even though not asserted directly in this case, I part ways with the submission that the right to equality is to be balanced with other constitutional values. A constitutionally compatible interpretation is that it can be limited only by considerations of rationality and/or fairness.

121 *Matiso supra*.

122 S 9(1) and s 12 of the Broad-Based Black Economic Empowerment Act 53 of 2003.

123 Other than the Mining Charter, the Sugar Industry Agreement is developed in terms of the Sugar Act.

a [180] Dale *et al*[124] classify the 2004 and 2010 Mining Charter as falling within a jurisdictional niche of administrative quasi-legislation and as statutory instruments where the principles of interpretation of statutes must be applied. The Mining Charter has no connection to the Charters under the Broad-Based Black Economic Empowerment Act. Unlike these sectoral b agreements, the Mining Charter is developed pursuant to legislation. Its nature and legal status depends on the construction and interpretation of the provisions of its enabling original legislation, the MPRDA. In my view, the Mining Charter is distinct, and qualifies as a statutory or regulatory instrument aimed at *ensuring* that the objectives of the MPRDA are achieved. The Constitutional Court in *S v Lawrence*; *S v Negal*; *S v Sol-* c *berg*[125] (*Lawrence*) dealing with the meaning of "designed to" or "aimed at" in respect of measures in the interim Constitution held that the phrases mean "[t]o purpose or intend (a thing) to be or do (something)".[126] I am of the view that the use of "ensure" in the MPRDA holds a similar but a more compelling meaning.

d [181] Therefore, I find that, a constitutionally appropriate interpretation of the Mining Charter is that it is a binding regulatory instrument and/or statutory instrument designed to ensure that the objects of the MPRDA and the Constitution are realised, Unlike other sectoral charters, the Mining Charter has a force of the law.

e

Does the 26% HDSA ownership obligation apply throughout the life of the mining right?

[182] It is necessary that I first dispose of the two questions of HDSA ownership and composition of the mine right holder before considering whether the breach of the Mining Charter translates to a breach of the MPRDA.

f [183] The principle that each mine right holder must achieve 26% HDSA ownership target by 2014 finds expression in the Original Charter and is carried through to the 2010 Mining Charter. The applicant argues that there is no express legal obligation to maintain the 26% ownership in the MPRDA. It argues that section 23(1)(h) only applies at the time of the g grant of the mining right during the exercise of the administrative action, it submits that the obligation to have HDSA shareholding must be assessed at the time of the exercise of the administrative action. It argues that unlike the BBBEE Act, the objectives in section 2(d) and (f) of the MPRDA do not establish quotas. What is provided is an opportunity for HDSA's to participate in the mining industry which entails the flexibility h to enter and exit the market.

[184] To substantiate, the applicant submits that the objectives of the Constitution and the MPRDA in turn, empowerment, will have been met by the acquisition of shares by the HDSA, generally, at a discount and through vendor financed loans. Empowerment will have occurred at the time of i the application for the mining right, calculated based on the difference

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124 Dale *et al South African Mineral and Petroleum Law*.

125 *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC) paras [39]–[40] [also reported at 1997 (10) BCLR 1348 (CC) – Ed].

j 126 *Lawrence* para [40].

between the market value of the shares and the cost of acquisition at that time. The holder of the right has no control over the HDSA shareholders unless a "lock-in" provision is provided in the contract or the shares are sold to another HDSA. There is generally a limited pool of HDSA, so the argument went.

[185] The second *amicus* argued that the Court should have regard to the gamut of other BBBEE legislation. It is noteworthy that the amendments to the BBBEE Act came into effect in October 2014 and the amendments to the Codes Gazetted came into effect in May 2015. The mining industry was granted a year's exemption from compliance with the BBBEE Act. I am of the view that revised BBBEE Act stipulates new BEE codes and these are different when compared with the milestones in the Mining Charter.

[186] However, even though measured differently, ownership is a common denominator in the BBBEE Act, the Original Charter and the 2010 Mining Charter. Ownership is amongst the three priority elements making up the minimum threshold with which companies must comply with the BEE Codes, in defining Broad-Based Economic Empowerment, the MPRDA underpins ownership in the mining and prospecting operations as well as in beneficiation operations whether to, up, or downstream. This underscores its importance. Therefore, the sacrosanct nature of ownership as a gateway to building capital and intergeneration wealth and a material ingredient for change cannot be gainsaid.

[187] Section 2(d) refers to the "substantial and meaningful" expansion and active participation and benefit from the exploitation of mining resources. In my view, meaningful participation through ownership postulates that ownership will result in control, an active voice and influence which will infuse the mine right holder, not only with diversity in its composition, but diversity in thinking and action. Diversity underpins the values of the Constitution. In addition, ownership presupposes that there will be a realisation of economic benefits through dividend distribution and cash flow.

[188] The predominant verb in section 23(1)(h), a prerequisite for the granting of the mining right, is cast in the future tense, namely that, the grant of the mining right "will further" the substantial and meaningful expansion and participation by HDSA. I am of the view that this envisages a long-term involvement by HDSA, the outcome of which is intended to be assessed in the future. The argument that the mine right holder need only comply with the 26% HDSA ownership at the time of the application for the mining right means that an HDSA could immediately dispose of its shareholding or the mine right holder could reacquire the HDSA shareholding soon after the grant of the mining right. This would not be consistent with the objects of the MPRDA. I agree with the respondents' submission that if is also not consistent with the normally expected financing terms and structure for the acquisition which are long-term in nature.

[189] It is not clear whether the 26% HDSA ownership is intended to be a minimum or maximum threshold percentage to be achieved to satisfy the objectives of the MPRDA in the long term. There are no guidelines when it is deemed that the objectives will have been attained in each case.

a These questions are a matter of policy determination as opposed to legal interpretation.

[190] The point of the systemic, structural ongoing negative effects of exclusion with its intergenerational effects, as well as the long-term nature of change and redress was made in *National Coalition for Gay and Lesbian Equality v* b *Minister of Justice*[127] (*National Coalition*) the Constitutional Court observed that:

> "It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing c negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.[128]

[200] In my view the nub of the issue entails giving effect to a foundational constitutional value of equality in interpreting MPRDA. As indicated by d Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others*[129] (*Bato Star*) held that:

> "That object is 'the achievement of equality', a foundational value that is affirmed in section 9(2) of the Constitution . . . That context is the constitutional commitment to achieving equality, the foundational policy of the Act to transform the industry consistent with the Constitution and the Act read as e a whole. The process of interpreting the Act must recognise that its policy is founded on the need both to preserve marine resources and to transform the fishing industry, and the Constitution's goal of creating a society based on equality in which all people have equal access to economic opportunities."[130]

[201] The applicant does not dispute the structural nature of the change sought to be achieved, I am of the view that redress and the structural change f sought to be achieved through ownership requires that ownership is interpreted to mean both "control" and realising "economic value" through ownership. This accords with the Constitutional Court's approach in *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Lid*[131] (*Viking Pony*) that:

> g "It is not enough merely to have historically disadvantaged individuals holding the majority shares in a tendering enterprise. The exercise of control and the managerial power actually wielded by the historically disadvantaged individuals, in proportion to their shareholding are what matter."[132]

[202] It seems to me that a disposal of HDSA ownership which leads to a realisation of economic value is not the sole indicator that the ownership h objectives will have been met. Influence, voice and exercise of control and diversity of thought and action are important goals for ownership.

127 *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* i 1999 (1) SA 6 (CC) [also reported at 1998 (12) BCLR 1517 (CC) – Ed].

128 *National Coalition* para [60].

129 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism and others* 2004 (4) SA 490 (CC).

130 *Bato Star* paras [88] and [92].

131 *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC) [also reported at 2011 (2) BCLR 207 (CC) – Ed].

j 132 *Viking Pony* para [46].

The structural intention for the 26% HDSA ownership stated in the Original Charter is to transform the ownership patterns of the mining industry and ensure that 26% of the mining assets are in HDSA hands. Consistent with my finding that the conditional conjunction "if" means a statutory condition from which neither the respondents nor an applicant for a mining right can depart, the HDSA ownership obligation cannot be extricated from the mining right and must be held throughout in line with the duration of the right.

[203] An approach that would defeat or dilute the objects of the MPRDA and the power of the Constitution to transform and attain lasting transformation must be eschewed. Any other interpretation would conflict with the structure of the MPRDA and potentially conflict with section 39(2) of the Constitution to interpret and reason beyond the strictures the ordinary meaning of the words and advance the "spirit and purport" of the Constitution.

[204] I find that the stipulated ownership must be held throughout the life of the mining right. Ownership is the statutory condition of the grant of the mining right, I am mindful that there are unintended consequences flowing from this finding in view of the competing issues dealt with in the section below. Nevertheless, at the heart of the inquiry about ownership is a constitutional value of equality and redress, a matter for legal interpretation. This stands in contradistinction from the "cost of discrimination and the cost of its redress", which are matters for legislative policy.

The application of the "once empowered always empowered principle" and the continuing consequences of past transactions

[205] Flowing from the HDSA ownership question above is the dispute about whether the 26% HDSA ownership obligation can be tempered and/or varied by the application of the "Once Empowered Always Empowered" principle. The Court is required to determine its application. The effect of the principle is that a mine right holder would maintain the historical benefit of its HDSA ownership credentials notwithstanding that there has been a change in the ownership composition and structure because of the disposal or dilution of the HDSA ownership, if found to apply, a mine right holder will have no obligation to "top-up" the diminution in the 26% HDSA ownership.

[206] The "once empowered, always empowered principle" also known as the "continuing consequences" is stipulated in the Original Charter[133] in clause 4.7 as follows: "The continuing consequences of all previous deals would be included in calculating such credit/offsets in terms of market share as measured by attributable units of production". There is no dispute on the facts that certain empowerment transactions were initiated and concluded voluntarily by individual industry participants. These transactions predate the MPRDA, the Mining Charter and BEE legislation.[134]

133 The continuing consequences of all previous deals would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production.

134 Anglo American sold 35% stake in Johnic to National Empowerment Consortium and in turn to the Johannesburg Consolidated Investment ("JCI") on or about 1996. Ernst & Young Report (2005).

a [207] The "once empowered always empowered principle" is rejected by the respondents, They argue that MPRDA is concerned with the transformation of the profile of the whole mining industry. The intent is to create an industry that will proudly reflect the promise of a non-racial South Africa. They submit that the legislative concern is not with individual shareholders, and that there are examples where other sectors successfully concluded transparent broad-based inclusive schemes.[135]

[208] The respondents argue that two modes of HDSA participation were envisaged, namely, equity transfers and/or participation or acquisition of attributable units of production which are assets in the hands of the HDSA. They submit that a diminution in the shareholding can only occur where the mine right holder elected an equity transfer as a form of empowerment. The mine right holder can restrict the sale of shares to other HDSA or "lock-in" the HDSA shareholders. They submit that the correct construction is that clause 4.7 applied to credits and offsets of transactions concluded prior to the Original Charter and could not have been intended to apply to transactions yet to be concluded, in addition, it does not apply in respect of the sale of shares but to transactions where there was an acquisition of attributable units of production.

[209] I have considered the submissions made, and, observe that the mining industry is subject to global competition and global commodity prices. Where a mine right holder elects an equity transfer as a model for empowerment, and that HDSA owner exits early from the mine right holder, there may be a concomitant call on the capital of the mine right holder to maintain the 26% HDSA ownership obligation. This will affect capital allocation required by the mine right holder from time to time. There is a potential for dilution of pre-existing shareholders, a potential effect on dividend flow; with a potential reduction in the net present value of the mine right holder which might detract future investments in the sector. Prohibitive ongoing transaction costs are likely each time the mine right holder must "top-up" the reduction in HDSA ownership.

[210] Equally, whether ownership in the mine right holder yields the desired MPRDA objectives (substantive issues dealt with in the 2009 review) merits remark. There will no doubt be extraneous factors affecting the share price and in turn the value accruing to HDSA owners. As in any other shareholding, ownership translates to the assumption of risk in the shareholding by the HDSA. The 26% HDSA ownership is a minority interest in the mine right holder which may, subject to the structure be a significant or non-significant shareholding. The price of the equity acquisition, the transaction structure, and any mismatch in the design of the generally highly geared funding structure and the cost of funding the equity transfer, and the market risk means there is no guarantee that economic value will accrue to the HDSA. In addition, there may be a call for capital in the mine right holder regardless of how the mine right holder is managed which may result in a dilution of the HDSA, factors which may

135 MTN Zakhele, Phuthuma Nathi, Yebo Yethu are examples of publicly traded BBBEE economic empowerment schemes.

be beyond its control. The mine right holder will have nevertheless obtained the mining right and traded for the benefit of all other shareholders without a reciprocal economic value transfer to the HDSA. Equally, when the HDSA is "locked-in" there is a negative effect as the HDSA will be precluded from selling the shares when it could have been particularly beneficial to sell, in any event, where restricted trading in the shares is permitted, the shares are likely to trade at a discount to reflect the acquisition discount provided to the HDSA.

[211] There are clearly policy, economic, financial and contractual consequences for the mine right holder, the HDSA and the whole industry. There are also recognised limitations to the Court's decision-making powers, one of which is that the Court may not and will not dictate or stipulate contractual terms for parties. The decision in *S v Lawrence* above refers to Professor Hogg who also confirms that courts will generally not sit in judgment on legislative policies or economic issues. As was observed by the majority Court in *Agri SA*, the inevitable tension in interests and choices in the difficult task of seeking to achieve equitable distribution of wealth is likely to occupy South Africa for many years[136]. The question of the application of the "Once Empowered Always Empowered" principle is not a simple one.

[212] At face value and on a literal reading of the application papers and considering the arguments advanced, the "Once Empowered Always Empowered" principle accords with the submission offered by the respondents. The meaning to be ascribed to the word "previous" has significance.

[213] In supporting the contention that "previous" applies to transactions concluded before the MPRDA, the respondents correlate this with the long-term nature of the funding. They contend that the applicant's interpretation is not consistent with the generally long-term nature of the funding structures supporting the HDSA acquisition. Nevertheless, in my view, subject to cyclical growth in commodities, it is conceivable that an HDSA could exit the mine right holder within 3 to 5 years of the acquisition and the grant of the mining right for value. Therefore "previous" could include such transactions that fall within the lifetime of the Original Charter and the 2010 Mining Charter onwards.

[214] The second argument against the application of the principle was that it was intended to cover the acquisition of assets and not equity transfers. However, the Original Charter refers to both "active" and "passive" involvement. In addition, the scorecard, which is the tool for measurement of compliance with the Mining Charter reads as follows:

> "Has the Mining Company achieved HDSA participation in terms of ownership for equity or attributable units of production of 15% in HDSA hands within 5 years and 28 percent in 10 years?"

The scorecard as well as the Original Charter envisages equity transfers as well as the acquisition of assets. The submission by the respondents does not accord with the scorecard used to measure HDSA ownership compliance.

136 *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

a [215] There is no dispute that there were transactions concluded voluntarily by individual mines before the MPRDA and the Original Charter. There is also no dispute that the Original Charter intended to cater for those transactions. I find that the principle applies to those transactions. However, in so far as its application to transactions concluded after the MPRDA and the b Original Charter, I am of the view that given the dispute in interpretation, the matter is not as clear-cut. To determine the issue on the papers as they stand without more, risks the Court taking an interpretative approach to what entails a policy determination without sufficient evidence. I err on the side of caution and make no order in this regard.

c
Is the breach of the Mining Charter a breach of the MPRDA?

[216] The applicant argues that "this Act" as defined in the MPRDA excludes the Mining Charter and there is no power to stipulate that the breach of the Mining Charter is the breach of the MPRDA. There is no penalty for non-compliance under the MPRDA and sections 47 and 83 relied upon d do not apply. Section 47 states that provided there are reasons for the suspension or cancellation, and the mine right holder is afforded reasonable opportunity to make representations on the issue, Section 47(b) grants the Minister powers to suspend or cancel rights where amongst others, the mine right holder "breaches any material term or condition of such right, e permit or permission". This provision was included in the 2010 Mining Charter.

[217] The applicant argues that it could not be said there was a breach of material terms and conditions of the mining right because the terms and conditions of the granting of the mining right were never prescribed by the first respondent. The argument is that there is no standard mining f right before the. Court. The applicant submits that section 93 has no relevance as it deals with breaches pertaining to mining operations. The complaint is that the 2010 Mining Charter attempts to arrogate to the first respondent new enforcement powers not authorised by the empowering legislation. Unlike the BBBEE Act, the MRPDA does not give the first respondent powers to enact quotas.

g
[218] It is correct that the definition of "this Act" does not refer to the section 2(d) and (f) objectives or the Mining Charter. The Act is defined as follows:

> "This Act includes the regulations and any term or condition to which any permit, permission, license right, consent, exemption, approval notice, closure h certificate, environmental management plan, environmental management programme or directive issued, given, granted or approved in terms of this Act is subject"[137].

The definition cannot be read in isolation but together with section 23. The first respondent's discretion is tightly circumscribed by section 23. i The use of the verb "*must*" in section 23 indicates that the respondents are not free to depart from the requirements of the section when they are met by an applicant. The conjunction "*if*" in the section seals my view that the grant of the mining right is conditional on an applicant satisfying the

j 137 S 1 of the MPRDA.

requirements in section 2(d) and (f), the details of which are spelt out in the Mining Charter. As determined earlier, the Mining Charter also includes the details relating to the provisions in section 2(c), (e) and (i), it also includes other requirements the first respondent may decide evident by the use "*amongst others*" in section 100(2)(a). Repetition of these requirements signifies their importance.

[219] *Mawetse* held that the grant of the mining right is a unilateral administrative act and occurs outside the ambit of an existence of a contract. I am of the view that a statutory condition for the grant has been created and imposed by section 23. The conditions referred to are not contractual. Meeting the requirements in section 23(1)(h) is a fetter to the granting of the mining right or conversion of the old order right. The future realisation of the MPRDA objectives detailed in the Mining Charter is an integral and decisive factor to the granting the mining right.

[220] There is a regulatory correlation and connection between the design of the Mining Charter and the end sought to be achieved by the MPRDA. The effect of the construction by the applicant is that, the "end" which is the meeting of the recurrent objectives of the MRPDA will have no significance. This construction cannot be sustained. It does not pivot towards meeting the objects of the MPRDA. It dilutes and has the potential to defeat them instead. I find that, a breach of the Mining Charter with be a breach of the MPRDA as the breach of the Mining Charter will constitute a failure to meet the express objectives of the MPRDA.

The legality complaint

[221] This complaint pertains to the source of the first respondent's power to amend the Original Charter. It is premised on the view that the first respondent only has the power conferred by section 100(2)(a). The applicant's challenge of legality quintessentially impugns the purported exercise of the power by the first respondent. The essence of the issue is whether the free hand conferred on the first respondent to develop the Mining Charter also confers a power to amend the Original Charter?

[222] The argument regarding legality is not that the Mining Charter conflicts with a provision of the Bill of Rights. The thrust to the challenge is not grounded on the irrationality of the provisions of the 2010 Mining Charter and/or that the means adopted in the Mining Charter do not justify the end either, or that the 2010 Mining Charter is irrational and not connected with the objectives of the MPRDA. It is that it offends the constitutionally entrenched principle of legality in that the powers conferred on the first respondent by section 100 do not allow the first respondent to "substitute one policy for another". The power was limited to the development of the Original Charter, which was to be achieved within the prescribed period of six months.

[223] The argument is buttressed by the submission that the first respondent breaches the doctrine of separation of powers if he arrogates for himself greater powers than intended and regulated. It is submitted that: the executive policy-making functions have been employed to arrogate for the first respondent greater powers including enforcement powers than the Legislature had intended.

a [224] The principle of legality is integral to the principle of the rule of law. In *Pharmaceutical Manufacturer Association of SA*; *In re*: *Ex parte President of RSA*[138], it was held that the principle demands that the first respondent must act lawfully and legitimately within the four corners of the powers conferred. When the power conferred to him by Parliament in sec-
b tion 100 is exercised, the principle of legality also demands that the first respondent must comply with the Constitution.

[225] Curiously, the applicant inexplicably retreated during argument from the prayers to set aside certain provisions of the 2010 Mining Charter, presumably because the legal rationale for setting aside those provisions per-
c meate and cannot be extricated from the whole 2010 Mining Charter. The applicant was explicit in the argument that it does not seek a review of the 2010 Mining Charter. The complaint about legality was not pursued. Had it been so, I would have determined that the principal issue pertains to the broad powers which have been conferred by parliament without qualification or circumscribed borders for the first respondent.
d The powers akin to original plenary powers, may well be beyond the strictures of section 44(4) of the Constitution. In that event, the legality complaint would have been a constitutional matter under section 167(4)(e) or the Constitution arising from an improper delegation of authority. Fortunately, in view of the amended notice of motion, this Court is no longer required to determine this.
e
[226] Given the above, it is no longer necessary for this Court to decide the issue. Justice Cameron explains, among others, as follows in *MEC for Health*, *Eastern Cape and another v Kirland Investments* (*Pty*) *Ltd t/a Eye & Lazer Institute*[139] (*Kirland*):

> "The fundamental notion - that official conduct that is vulnerable to challenge
> f may have legal consequences and may not he ignored until properly set aside - springs deeply from the rule of law, The Courts alone, and not public officials, are the arbiters of legality"[140].

Until challenged, the 2010 Mining Charter and its provisions remain in force in line with *Kirland* and *Oudekraal Estates* (*Pty*) *Ltd v City of Cape*
g *Town and others*.

Retrospective application of the mining charter

[227] I now turn to the argument against retrospective application of 2010 Mining Charter. This directly affects the administrative component of the respondents' function as well as the statutory terms of the grant of the
h mining tight. The argument that the first respondent is *functus officio* after issuing the mining right is not misconceived in this context because of the administrative nature of the function of granting mining rights. It was

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i 138 *Pharmaceutical Manufacturers Association of SA and others*; *In re*: *Ex parte Application of President of the RSA and others* 2000 (2) SA 674 (CC) [also reported at 2000 (3) BCLR 241 (CC) – Ed].

139 *MEC for Health*, *Eastern Cape and another v Kirland Investments* (*Pty*) *Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) [also reported as *Member of the Executive Council for Health*, *Eastern Cape and another v Kirland Investments* (*Pty*) *Ltd t/a Eye and Lazer Institute* 2014 (5) BCLR 547 (CC) – Ed].

j 140 *Kirland* para [103].

submitted that the first respondent cannot impose new obligations through an amended Mining Charter. This squarely touches on whether the 2010 Mining Charter obligations can be applied retrospectively by the imposition of new targets and/or obligation.

[228] There is a common law presumption against retrospectivity which has been repeatedly sanctioned by our Courts, in *National Iranian Tanker Co v MV Pericles GC*[141] (*Pericles*) the then Appeal Court held as follows:

> "There is at common law a *prima facie* rule of construction that a statute (including a particular provision in a statute) should not be interpreted as having retrospective effect unless there is an express provision to that effect or that result is unavoidable on the language used. A statute is retrospective in its effect if it takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already past. (This definition appears to merge two canons of interpretation: the presumption against retrospectivity and the presumption against interference with vested rights. This, however, is not of great moment, as both canons lead in the same direction . . ."[142]

[229] While it cannot be said that the 2010 Mining Charter confers rights, it reflects a change in the method for the calculation of HDSA ownership target, as well as the ability of mine right holders to utilise exceeded targets or off-set the value derived from beneficiation amongst others. These changes alter the statutory condition of the grant after the issue of the mining right.

[230] The common law presumption against retrospective rule-making is a constitutional concern and has been held to be contrary to the rule of law in *S v Mhlungu and others*[143]. Consideration of fairness demand that mine right holders are given an opportunity to know what the law is so that they can conform and adjust their conduct accordingly. These principles would apply even if the development of the 2010 Mining Charter was an administrative action. They do not impinge the first respondent's ability to develop new Mining Charter requirements or conditions in respect of new applications.

[231] The effect is that once issued with a mining, right, the statutory conditions for the grant cannot be changed retrospectively. The 2010 Mining Charter can only validly apply to mining rights issued after its promulgation. It cannot apply or bind mining rights issued or mine right holders who were granted mining rights under the Original Charter.

Consent to the 2010 Mining Charter by stakeholders

[232] Given the context of this dispute, it is necessary that I deal with reference made by the respondents to "consent" by industry stakeholders. The applicant agrees that both the Original and 2010 Mining Charters are products of industry co-operation. While there is no express legal requirement

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141 *National Iranian Tanker Co v MV Pericles GC* 1995 (1) SA 475 (A) [also reported at [1995] 1 All SA 493 (A) – Ed]; *Bellairs v Hodnett and another* 1978 (1) SA 1109 (A) 1148F–G; and *Bareki and another v Gencor Ltd and others* 2006 (1) SA 432 (T) [also reported at [2006] 2 All SA 392 (T) – Ed].

142 *Pericles* at 483H–484A.

143 *S v Mhlungu and others* 1995 (3) SA 867 (CC).

a for the first respondent to consult, the significance of the mining industry to the economy makes consultation pivotal to the development of the Mining Charter. It is an affirmation of the egalitarian ethos that ought to underpin the co-operative nature of the relationship necessary between the first respondent and various stakeholders to give shape to the content b of the "Trade-Off" or compromise albeit that the first respondent will have the last word on the issue.

[233] The argument by the applicant that purported consent will not convert an otherwise unauthorised act to an authorised one is legally correct. *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC)[144] (*Mazibuko*) c supports this reasoning.[145] Even though there is no express duty to consult stakeholders in the mining industry, the Constitutional Court in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg*[146] Yacoob J stressed that where a municipality's strategy, policy or plan is expected to affect many people, there is a greater need for "structured, consistent and careful engagement".[147] From the *Occupiers* d *of 51 Olivia Road*, it emerges that a binding agreement or Social Pact or Compact on issues of policy can emerge from "meaningful engagement" with stakeholders.[148]

[234] The respondent's argument is that, the Stakeholder Declaration and good faith agreement in June 2010 are reflected in the 2010 Charter, This, to- e gether with the time that has elapsed before taking issue, may have informed the applicant's retreat from setting aside the whole or some of the provisions of the 2010 Mining Charter. The applicant must have been alive to the fact that it would have been disentitled to relief under PAJA given the lapse of time. Though unexplained, the retreat seems consistent with the acceptance of the existence of a Social Pact or Compact entered f in good faith at the industry level, and, with which the applicant has complied over a long period before this application.

Conclusion

[235] I am of the view that the Mining Charter under the MPRDA is not a g policy or guideline. Compliance with the Mining Charter is a statutory condition for the grant of a mining right or converted mining right. It is intended to apply to all mine right holders. Once promulgated the respondents and mine right holders are not free to depart from the requirements of [section] 23(1)(h) read in conjunction with the Mining Charter.

h [236] I decline the relief in respect of paragraph 3 of the 2010 Mining Charter. I find that a failure by a holder of a mining right or converted mining right to comply with the Original Charter or the 2010 Mining Charter in

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144 *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) [also reported at 2010 (3) BCLR 239 (CC) – Ed].

145 *Mazibuko* paras [70]–[72].

146 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) [also reported at 2008 (5) BCLR 475 (CC) – Ed].

147 *Occupiers of 51 Olivia Road* para [19].

j 148 *Ibid*.

breach of MPRDA is subject to the provisions of section 47. A breach of the Mining Charter translates to a breach of the MPRDA. a

[237] To give effect to the HDSA ownership requirements in the Mining Charter and the objectives in the MPRDA, the 26% HDSA ownership stipulated in the Mining Charter is a statutory condition for the grant of a mining right or converted mining right. The statutory condition cannot be extricated from the mining right. It must be held throughout the life of the mining right. b

[238] Individual members of the applicant voluntarily concluded transactions before the coming into effect of the MPRDA and the Original Charter. I find that reference to "previous" transactions applies to these transactions. The Original Charter intended to cater for those transactions the "Once empowered, always empowered" principle applies to those transactions. c

[239] I make no determination on whether the determination in paragraph 237 above can be varied through the application of the "Once empowered, always empowered" principle in respect of those transactions entered *after* the coming into effect of the MPRDA and the Original Charter for reasons stated in the judgment. d

[240] Consistent with the finding that a mining charter under MPRDA is a statutory instrument with a force of law which is intended to be binding, the 2010 Mining Charter cannot be applied retrospectively but can only apply to mining rights granted after its promulgation. e

[241] Even though the applicant seeks a cost order against the respondents, and the issue of costs was not vigorously argued, the matter is of importance to both parties and is before the Court by agreement. It is fair that each party must pay its own costs. In the result, I would make the following order: f

1. A mine right holder granted a mining right under section 23(1) of the MPRDA and/or a holder of the old order mining right converted in terms of items 7(3) and 7(2)(k) of Schedule II of the MPRDA is legally obligated to maintain the 26% HDP or HDSA ownership reflected in The Broad Based Socio-Economic Empowerment Charter for the Mining Industry, Published under Proclamation GNR 1639 *Government Gazette* 26661 of 13 August 2004 and the amended Broad Based Socio-Economic Empowerment Charter for the Mining Industry Published in Government Notice 838, *Government Gazette* 33573 dated 20 September 2010 throughout the life of the mining right. g h

2. A failure by a mine right holder or the holder of the converted mining right to meet the requirements of the Original Charter or the 2010 Mining Charter, and, in particular, a failure to maintain the 26% HDSA ownership level is a contravention of the MPRDA, and, constitutes a contravention for the purposes of section 47(1)(a). i

3. Notwithstanding the orders in paragraphs 1 and 2 above, and, in respect of transactions concluded *before* the coming into force of the MPRDA and the Original Charter, paragraph 2.1 of the 2010 Charter does not retrospectively deprive holders of mining rights or the j

a holders of converted mining rights granted and/or converted the benefit of:

3.1 the capacity for offsets which would entail credits/offsets to allow for flexibility;

b 3.2 the continuing consequences of empowerment transactions concluded by them *before* the coming into force of the MPRDA, which benefits were conferred by the Original Charter;

3.3 the right, where a company has achieved HDSA participation in excess of any set target in a particular operation, to utilise c such excess to offset any shortfall in its other operations;

3.4 the entitlement to offset the full value of the level of beneficiation achieved by the Company against its HDSA ownership commitments; and

d 3.5 all forms of ownership and participation by HDPs and HDSAs, and not only those which fall within the definition of "meaningful economic participation" as defined in the 2010 Charter, being taken into account;

4. The amended Broad Based Socio-Economic Empowerment Charter for the Mining Industry published in Government Notice 838, *Gov-* e *ernment Gazette* 33573 dated 20 September 2010 (the 2010 Mining Charter) shall only apply to those mining rights and/or converted old order rights granted and/or converted *after* its proclamation and or publication;

5. Each party is to pay its own costs.

[Paragraph numbering as per original court transcript – Ed.]

For the applicant:
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