

**IN THE LABOUR COURT OF SOUTH AFRICA  
HELD IN JOHANNESBURG**

Case No.: J427/2020

In the application of:

**MINING AFFECTED COMMUNITIES  
UNITED IN ACTION**

**Applicant**

to be admitted as *amicus curiae* in the matter between::

**ASSOCIATION OF MINeworkERS AND  
CONSTRUCTION UNION**

**Applicant**

And

**MINISTER OF MINERAL RESOURCES  
AND ENERGY**

**First Respondent**

**CHIEF INSPECTOR OF MINING**

**Second Respondent**

**MINISTER OF CO-OPERATIVE  
GOVERNANCE AND TRADITIONAL AFFAIRS**

**Third Respondent**

**MINERALS COUNCIL SOUTH AFRICA**

**Fourth Respondent**

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**AMICUS CURIAE: HEADS OF ARGUMENT**

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## I INTRODUCTION

1. *“We know how to bring the economy back to life. What we do not know is how to bring people back to life. We will, therefore, protect people’s lives, then their livelihoods.”*<sup>1</sup> These words are attributed to the President of the Republic of Ghana, Nana Akufo-Addo. The sentiment expressed herein by President Akufo-Addo is credited for providing much needed perspective during a period where governments across the globe were grappling with the various economic and social challenges posed by the advent of Covid-19.
2. Save for a few exceptions, governments across the globe have similarly acted with the necessary haste to protect the lives of their citizens whilst also trying to protect their livelihoods. In this regard, South Africa’s response to Covid-19 has generally been viewed as exemplary.
3. Mindful of the role of amicus<sup>2</sup> and without delving into the merits of the main application, it would appear that this matter raises important and complex questions relating to the statutory route that ought to be embarked upon in order to protect mineworkers during the Covid-19 pandemic.

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<sup>1</sup> <https://www.thelondoneconomic.com/politics/president-of-ghana-provides-much-needed-perspective-in-these-troubling-times/29/03/>

<sup>2</sup> In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 719 (CC) para 5.

4. This is an application in terms of Rule 19 of the Labour Court Rules for the admission of MACUA as an amicus curiae in the main urgent application that was instituted by AMCU.
  
5. We shall argue that MACUA's submissions are different to those of the AMCU, the Minerals Council and the State Respondents. Mining affected communities are vulnerable stakeholders in mining. MACUA essentially instituted this application in order to advance submissions that shall ensure that the Minister and/or the Chief Inspector exercise their statutory powers in a manner that also protects mining affected communities during the Covid-19 pandemic irrespective of the statutory provisions that they wish to invoke. Furthermore, as an affected stakeholder, we shall argued that mining affected communities should also be consulted during the regulation formulation process. It is worthy to note that MACUA's application for admission as amicus is not opposed.
  
6. For the sake of convenience, the nomenclature used in AMCU founding affidavit, the First to Third Respondents answering affidavit and the Fourth Respondents answering affidavit is adopted herein. We shall therefore refer to the Applicant as "AMCU", the First Respondent as the "Minister", the Second Respondent as the "Chief Inspector", the Third Respondent as the "COGTA Minister" and the Fourth Respondent as the "Minerals Council". Where reference is made to the First to Third Respondents collectively, we refer to them as the "State Respondents". The applicant for admission as amicus is conveniently referred to as MACUA.

7. The submissions relating to MACUA's its interest in these proceedings and standing are canvassed in the founding affidavit, we do not repeat them herein. This written submission is dedicated to addressing the issue relating to the socio-economic circumstances of mining affected communities and addressing the legal framework underpinning the position adopted by MACUA in these proceedings. Thus, these heads of argument are structured as follows:

- 7.1. Part II sets out the socio-economic circumstances of mining affected communities
- 7.2. Part III addresses the position adopted by MACUA in these proceedings.
- 7.3. Part IV sets out the conclusion and submissions in relation to costs.

## **II SOCIO-ECONOMIC CIRCUMSTANCES OF MINING AFFECTED COMMUNITIES**

8. Over the years South Africa has established a comprehensive legislative framework to enable the mining industry to operate in a manner that protects and promotes the well-being and safety of mining affected communities. The framework was intended to facilitate sustainable and equitable development of South Africa's mining industry, while enabling and promoting inclusive growth and prosperity. While the legislative framework has the potential to drive positive social and economic development, particularly at the local level, it is MACUA's considered

view that there is a disjuncture between the intended impact of the legislative framework and the lived reality of many mining affected communities.

9. Despite extensive regulation and notable attempts by mining companies and government to implement progressive and sustainable projects, current industry practice is characterised by inconsistent legal compliance and reflects concerning legislative gaps. As a result, many mining affected communities continue to experience significant levels of poverty and systemic inequality. This reinforces the notion that the benefits of mining operations disproportionately favour mining companies and the State, and are often to the detriment of mining affected communities.
10. Furthermore, existing socio-economic challenges in mining affected communities are compounded by a lack of coordination and cooperation among industry stakeholders and a general disregard for South Africa's unique context. These challenges are heightened in rural or remote communities, where there is inadequate access to basic services, poor infrastructure, endemic unemployment and high levels of poverty.
11. The legal framework governing South Africa's mining industry seeks to: advance the socioeconomic welfare in mining affected communities and enable the beneficiation of mineral extraction for all South Africans; transform the industry through the empowerment and meaningful participation of historically disadvantaged South Africans; promote environmentally sustainable mining operations; and promote a globally competitive industry. However, consistent with

global experiences, South Africa continues to witness a disjuncture between the national and local benefits of mining. Experience has shown that many mining affected communities are often worse off as a result of the negative social, economic and environmental impacts of the industry.

12. In fact, in South Africa, mining has not only denied people the resources for nutrition but has resulted in the direct infringement of their right to health. Mining has been linked with illnesses such as tuberculosis, silicosis and other respiratory illnesses.

13. The environmental impact of mining includes erosion, formation of sinkholes, loss of biodiversity, and contamination of soil, groundwater, and surface water by chemicals from mining processes. In urbanised environments mining may also produce noise pollution, dust pollution and visual pollution.

14. In many mining affected communities, mining has led to a loss of natural resources on which communities rely for their livelihoods and well-being, including water resources, agricultural land due to pollution of their water sources, air and shifting of topsoil through mining activities such as blasting.

15. While the public are advised to wash their hands frequently to avoid exposure to the virus, in many mining affected communities levels of access to safe potable piped water are low. Many mining affected communities do not have access to clean running water, washing their hands on a regular basis as required by government is almost impossible. Given the frequent impacts of mining on water,

companies and the State Respondents need to make sure communities are able to access sufficient water, especially at a time when water is critical for preventing the spread of Covid-19. In most cases mining companies have pre-existing obligations with respect to access to water in terms of their social and labour plans.

16. Large scale mining, especially where labour is not recruited locally, often leads to a significant housing backlog, as is notorious in an area such as Rustenburg. As the case of Marikana has shown, the social and labour plan housing obligations in order to offset these impacts are often not complied with. The result in many mining-affected communities is crowded settlements exacerbated by the lack of water and services.

17. At a time in which social distancing and staying at home is required to prevent the spread of Covid-19, the lack of adequate access to housing and the necessary water and sanitation is a recipe for a humanitarian catastrophe. Of particular concern during the Covid-19 pandemic and the exposure due to the re-opening of mining are limited access to health facilities (to treat patients) compounded by transport challenges.

**Impact of mining on communities that render them especially vulnerable to Covid-19**

***Environmental Health***

18. The environmental right in Section 24 of the Constitution seeks to ensure that one is not exposed to an environment that is harmful to their health and well-being. A healthy environment therefore lies at the core of the environmental right.

19. In the matter of *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*, the Constitutional Court emphasised that development cannot subsist upon a deteriorating environmental base.<sup>3</sup> That notwithstanding, as we've highlighted, mining has been linked with illnesses such as tuberculosis, silicosis and other respiratory illnesses.

20. It is widely known that severe cases of Covid-19 are more common amongst people with pre-existing health conditions such as respiratory illnesses. There is, therefore, a real danger that mining-affected communities are particularly vulnerable to severe and even fatal cases of Covid-19 so as to warrant special protection.

### ***Mining and the Right to Health***

21. While not the officially accepted definition, the preamble of the World Health Organisation defines the right to health as “*a state of complete physical, mental and social well-being.*”<sup>4</sup> The right to health is therefore not only the right to access health care, but it is also the right to conditions that do not put your health at risk.

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<sup>3</sup> *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) para 44.

<sup>4</sup> Preamble to Constitution of the World Health Organisation



22. The link between mining and various respiratory illnesses is undeniable. This link is evidenced by cases such as *Nkala and Others v Harmony Gold Mining Company Limited and Others*<sup>5</sup> which was application to obtain certification of a class action. The purpose of the class action was to claim damages on behalf of mineworkers who had contracted silicosis and tuberculosis and the families of mineworkers who have died of silicosis and tuberculosis. The mineworkers contracted silicosis and tuberculosis on South African gold mines as a result of their prolonged exposure to excessive levels of silica dust.

23. For people living in poverty, their health may be the only asset on which they can also exercise other economic and social rights, such as the right to work or the right to education. Physical health and mental health therefore enable adults to work and children to learn, whereas ill health is a liability to the individuals themselves and to those who must care for them. Individuals' right to health also cannot be realised without realising their other rights, the violations of which are at the root of poverty.

### **Access to water**

24. Section 27(1) (b) states that everyone has the right to sufficient. In the opening paragraph of the judgment, the Constitutional Court in *Mazibuko and Others v City of Johannesburg and Others* acknowledged that “*water is life. Without it, nothing*

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<sup>5</sup> *Nkala and Others v Harmony Gold Mining Company Limited and Others* 2016 (5) SA 240 (GJ).

*organic grows. Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die.”<sup>6</sup>*

25. As previously highlighted, while the public are advised to wash their hands frequently to avoid exposure to the virus, in many mining affected communities’ levels of access to safe potable piped water are low. Many mining affected communities do not have access to clean running water, washing their hands on a regular basis as required by government is almost impossible.

### ***Food security***

26. In rural communities, the land is an important source of sustenance. Community agriculture and livestock provide food and therefore saves many from hunger even those not employed in the formal economy. Produce is also often sold on a small scale to the market providing basic income. Mining frequently disrupts and removes this source of security and livelihood through dispossession of land and rights to land, and pollution which damages both crops and causes death of livestock.

27. Mining at best only employs a very small fraction of communities, especially newer mines in sectors such as platinum which are increasingly mechanised. Coupled with the impacts on food security, this unemployment means that many in mining-affected communities are going hungry at a time when weakening of immune systems is especially likely to lead to mortality.

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<sup>6</sup> Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC) para 1.

## ***Housing***

28. As previously highlighted, many mining affected communities are in crowded settlements exacerbated by the lack of water and services. At a time in which social distancing and staying at home is required to prevent the spread of Covid-19, the lack of adequate access to housing and the necessary water and sanitation is a potential recipe for a humanitarian catastrophe.

## ***Women and children***

29. It is common cause that in practice the burden of unpaid productive labour, including the usual domestic tasks and caring for the ill fall on women. Obstacles in accessing water, for example, already increase this burden on women, which in turn detracts from time and energy for livelihoods.

30. In this context, should Covid-19 be allowed to spread in mining affected communities, the burden on women is likely to be compounded. Further, they will be exposed to the virus as carers of family members who are infected. Unless targeted prevention measures are put in place and health facilities are scaled-up in mining affected communities, Black working class and poor women in communities are likely to suffer the worst of this pandemic.

31. Children are also a particularly vulnerable group. Given that many in mining affected communities are likely to have compromised immune systems due to the pollution associated with mining, for children this could mean severe illnesses being suffered by their parents, grandparents and other caregivers.

32. Thus, health and safety measures which include washing of hands, screening and testing, quarantining or self-isolation and the maintenance of a strong immune system, bear no meaning in mining affected communities who have no access to water, housing, nutrition and healthcare, amongst others. Many mineworkers live in mining affected communities. The approach to dealing with the Covid-19 pandemic should be coordinated. It therefore makes little sense to for instance screen and test miners but make no efforts to integrate this with the screening and testing within mining affected communities.

### **III POSITION ADOPTED BY AMICUS IN THESE PROCEEDINGS**

#### **Overview**

33. The mines, mineworkers and mining affected communities are intrinsically interlinked. This is unique relationship. Evidence of this relationship is contained in various legislative provisions such as the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), Social Labour Plans and the Based Socio- Economic Empowerment Charter for the Mining and Minerals Industry, 2018 (Mining Charter). Mining affected communities are indeed a stakeholder in mining.

34. For instance, in order to ensure effective transformation, the MPRDA requires the submission of the social labour plan as a pre-requisite for the granting of mining or production rights. The social labour plan requires applicants for mining and production rights to develop, amongst others, mining community development plan.

35. Furthermore, the Mining Charter states that mining communities form an integral part of mining development, which requires a balance between mining and mine community's socio- economic development needs. A mining right holder must meaningfully contribute towards mine community development.

36. Moreover, mining affected communities environmental and health rights are recognised by the MHSA. In this regard, the MHSA places certain duties on the State Respondents and on mines to ensure the protection of mining affected communities. Mining affected communities are therefore stakeholders.

### **MACUA Submissions**

37. AMCU instituted this application in order to compel the Minister and the Chief Inspector to exercise their statutory powers to protect mineworkers during the Covid-19 pandemic. According to AMCU the Minister and the Inspector have powers under MHSA.<sup>7</sup>

38. The position adopted by the Minerals Council is that mining industry guidelines should be issued by the Chief Inspector in terms of section 9(2) and (3) read with section 49(6) of the MHSA, requiring employers to establish codes of practice. According to the Minerals Council these codes of practice can be amended from time to time and can address the particular requirements and concerns of the

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<sup>7</sup> FA p18 para 6.

particular mines. The Minerals Council is of the view that a national standard is inappropriate because the risk of infection by Covid-19 is mine-specific.<sup>8</sup>

39. Furthermore, the Minerals Council submits that the complexity of eliminating and mitigating the Covid-19 hazard will depend on the type of mining, the depth, environmental conditions and the design and layout thereof. For this reason, the Minerals Council is of the view that it is appropriate for the Chief Inspector to issue guidelines in the Gazette and to require employers to prepare and implement codes of practice which are mine specific, taking into account all relevant circumstances.<sup>9</sup>

40. However to the State Respondents, the Minister intends issuing directions in terms of Regulation 11 B(7) and Regulation 10(8)(c) of the Disaster Management Act 57 of 2002 on Monday 27 April 2020 or as soon as possible thereafter requiring that every employer carrying out activities at a mine must implement appropriate measures to protect the health and safety of workers, which measures must be contained in a standard operating procedure and which must be developed in consultation with organised labour at the mine.<sup>10</sup>

41. According to the Minister this approach is appropriate because the directions he issues will then be linked to the state of disaster that has prompted them.<sup>11</sup> Furthermore, the State Respondents contend that proceeding by way of direction under the Regulations permits the Minister easily to coordinate with other

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<sup>8</sup> Minerals Council AA para 68.

<sup>9</sup> Minerals Council AA para 71.

<sup>10</sup> State Respondents AA para 44 p501.

<sup>11</sup> State Respondents AA para 47 p502.

Departments, particularly the National Department of Health, and to revise or amend any directions he gives to harmonise with other directions or regulations.<sup>12</sup>

42. MACUA's submissions are different to those of the AMCU, the Minerals Council and the State Respondents. Mining affected communities are vulnerable stakeholders in mining. MACUA essentially instituted this application in order to advance submissions that shall ensure that the Minister and/or the Chief Inspector exercise their statutory powers in a manner that also protects mining affected communities during the Covid-19 pandemic irrespective of the statutory provisions that they seek to invoke. Furthermore, as an affected stakeholder, mining affected communities should also be consulted during the regulation formulation process. In advancing its submissions, MACUA shall also refer to the following statutory provisions:

- 42.1. Section 5(2)(b) of the MHSA.
- 42.2. Section 8(1)(c) of the MHSA.
- 42.3. Section 49(1)(e) of the MHSA.
- 42.4. Section 76 (2)(f) of the MHSA.

43. I address each of these provisions below.

44. Section 5(2)(b) of the MHSA stipulates that as far as reasonably practicable, every employer must ensure that persons who are not employees, but who may be

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<sup>12</sup> State Respondents AA para 48 p502.

directly affected by the activities at the mine, are not exposed to any hazards to their health and safety.

45. Furthermore, section 8(1)(c) of the MHSA stipulates that every employer must prepare a document that establishes a policy concerning the protection of persons who are not employees but who may be directly affected by the activities at the mine.

46. In addition section 49(1)(e) of the MHSA compels Inspector to determine and implement policies to promote the health and safety of persons at mines and any person affected by mining activities.

47. In connection with any health hazard, section 76 (2)(f) of the MHSA stipulates that the Minister, after consulting the Council, by notice in the Gazette, may provide for any other matter that the Minister considers necessary to protect employees exposed to the health hazard.

48. Mining affected communities are persons who may be directly affected by mining activities as contemplated by the aforementioned statutory provisions. Section 49(1)(e) of the MHSA and section 76 (2)(f) of the MHSA enjoin the Minister and the Inspector to exercise their statutory powers in a manner that protects persons affected by such as mining affected communities during the Covid-19 pandemic. Furthermore, section 5(2)(b) of the MHSA and section 8(1)(c) of the MHSA also places certain horizontal duties on mines to exercise their statutory powers in a



manner that protects persons affected by such as mining affected communities during the Covid-19 pandemic.

49. The State Respondents and the mines also have a duty to ensure that relevant stakeholders, such as mining affected communities, are consulted in the regulations formulation process. The State Respondents accept this duty in their answering affidavit.<sup>13</sup>

50. In *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others*<sup>14</sup> the Supreme Court of Appeal explained that consultation may not always be necessary. It held, instead, that the “*duty will arise only in circumstances where it would be irrational to take the decision without such consultation, because of the special knowledge of the person or organisation to be consulted, of which the decision-maker is aware.*”

51. Similarly in *Matatiele Municipality v President of the Republic*<sup>15</sup> the court held that: “*The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the Legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.*”

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<sup>13</sup> State Respondents AA par 51.

<sup>14</sup> *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (6) SA 421 (SCA) at para 72.

<sup>15</sup> *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) (*Matatiele*) at para 68.

52. Due to the unique nature of the relationship between mines, mineworkers and mining affected communities, the State Respondents and mines should facilitate meaningful engagement with mining affected communities. The failure to facilitate meaningful engagement with mining affected communities despite the impact of decisions on their lives and well-being in our opinion renders any such decision unreasonable and irrational.

53. In *Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes*, the Constitutional Court found that “*what is required is good faith and reasonableness on both sides and the willingness to listen and understand the concerns of the other side. The goal of meaningful engagement is to find a mutually acceptable solution to the difficult issues confronting the government and the residents in the quest to provide adequate housing. This can only be achieved if all sides approach the process in good faith and with a willingness to listen and, where possible, to accommodate one another. Mutual understanding and accommodation of each other’s concerns, as opposed to reaching agreement, should be the primary focus of meaningful engagement. Ultimately, the decision lies with the government. The decision must, however, be informed by the concerns raised by the residents during the process of engagement.*”<sup>16</sup>

54. Given the vulnerability of mining affected communities affected to contracting Covid-19, the threshold of engagement with such communities entails something

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<sup>16</sup> *Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes* 2009 9 BCRL 847 (CC) para 243.

more than passing government gazettes for comments. It is meaningful engagement that is required for these decisions to be reasonable and rational.

## **V CONCLUSION & COSTS**

55. We therefore pray for an order in terms of the notice of motion.

56. Mining affected communities are vulnerable stakeholders in mining. MACUA essentially instituted this application in order to advance submissions that sought to ensure that the Minister and/or the Inspector exercise their statutory powers in a manner that also protects mining affected communities during the Covid-19 pandemic.

57. In instituting this application, MACUA sought the courts audience in this matter in their own behalf in terms of section 38(a) of the Constitution, on behalf of their members of and their respective constituents in terms of section 38(e) of the Constitution and in the public interest in the public interest in terms of section 38(d) of the Constitution.

58. The submission advanced by MACUA before this court have been relevant to the proceedings and have been useful to the court and different from those of the other parties.

59. The rule of practice that costs follow the result does not govern costs orders in this Court. It is submitted that no costs order should be made against MACUA if this application is unsuccessful. It is submitted that MACUA should also be protected by the rule established in the matter of *Biowatch Trust v Registrar Genetic Resources and Others*.<sup>17</sup> MACUA pursued this application in order to protect and vindicate the constitutionally entrenched statutory rights of mining affected communities.<sup>18</sup>

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**LUNGA SIYO**

**LERATO PHASHA**

**COUNSEL FOR MACUA**

**JOHANNESBURG**

29 April 2020

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<sup>17</sup> *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC)

<sup>18</sup> FA para 19.3.