IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 71147/17

Application for intervention as parties:

MINING AFFECTED COMMUNITIES UNITED IN ACTION First Applicant

WOMEN FROM MINING AFFECTED COMMUNITIES UNITED IN ACTION Second Applicant

MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA Third Applicant

In the matter between:

CHAMBER OF MINES First applicant

and

MINISTER OF MINERAL RESOURCES First Respondent

FOUNDING AFFIDAVIT

I, the undersigned

MESHECK MANDLENKOSI MBANGULA

hereby state under oath:

1. I am an adult Chairperson of **Mining Affected Communities United in Action (MACUA),** a voluntary movement specialising with capacitating communities and activists on issues of the environment when dealing with corporations, transitional corporations and government. MACUA operates in all eight provinces affected by mining in South Africa. MACUA in principle operates from 27 Clieveden Avenue, Johannesburg, Gauteng.

2. As the chairperson of the first applicant I am duly authorised to depose to this affidavit and to bring this application on its behalf. I attach, marked **"MMM1",** a copy of the resolution signed by the members of the committee. I also attach the supporting affidavits of **GLADYS NESTER NDEBELE** the Chairperson of **Women from Mining Affected Communities United in Action (WAMUA),** a women's movement within MACUA. The Affidavit is attached and marked **"MMM2".** I further attach the supporting affidavit of **THELMA THANDEKILE NKOSI** the Chairperson of the second applicant, **Mining and Environmental Justice Community Network of South Africa (MEJCON).** The affidavit is attached and marked **"MMM3".**

3. Save where I state otherwise, or where the contrary appears from the context, the facts herein stated fall within my personal knowledge and I believe them to be true and correct. Where I make legal submissions, I do so on the advice of the applicants' legal representatives, which advise I accept as correct.

THE SCHEME OF THIS AFFIDAVIT

4. I structure this affidavit as follows:

PART A: Urgent Application

4.1 I set out the background to this application;

4.2 I explain why the application is urgent;

Part B: Intervention Application

4.3 First in an introductory section, I explain the relief sought in the main application, and the context in which it arises.

4.3.1 The nature of the Application

4.3.2 Factual background

4.4 Second, I describe the interveners and demonstrate their direct and substantial interest in the matter

4.4.1 MACUA as a Stakeholder in Mining

4.4.2 Knowledge of the 2017 Mining Charter

4.4.3 Provisions of the Mining Charter which warrant meaningful engagement with Mining Affected Communities

4.5 Thirdly, I identify the submissions the interveners intend to advance in the main application:

4.5.1 Our legal basis for demanding meaningful engagement in the development of the Mining Charter

4.5.2 Impact of the exclusion of mining affected communities in decisions relating to the Mining Charter

4.6 Fourth, I conclude by asking for what I am advised is an appropriate order.

PARTIES

The applicants in intervention

5. The first applicant in the application for intervention is **MINING AFFECTED COMMUNITIES UNITED IN ACTION (MACUA)** an organisation formed in the interests of mining affected communities. A copy of MACUA's subscribing document detailing its vision and mission is attached and marked "**MMM4**".

6. The second applicant in the application for intervention is **Women from Mining Affected Communities United in Action (WAMUA)** an organisation formed in the interests of women in mining affected communities as a structure within MACUA. WAMUA shares the same subscribing document with MACUA.

7. The third applicant in the application for intervention is the **MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA (MEJCON)** an organisation formed in the interests of mining affected communities. A copy of MEJCON's constitutions detailing is vision and mission is attached and marked **"MMM5"**.

The applicants in the main application

8. The applicant in the main application is the **CHAMBER OF MINES, SOUTH AFRICA (the Chamber)** and carries on business at 5 Hollard Street, Johannesburg. The Chamber of Mines is represented by Norton Rose Fulbright, on whose offices all service of process shall be served. Norton Rose Fulbright is situated at 15 Alice Lane, Sandhurst, Sandton.

The respondents

9. The respondent is the **MINISTER OF MINERAL RESOURCES (the Minister)**, whose offices are situated at corner of Meintjes and Francis Baard Street (Formerly Schoeman Street), Sunnyside Pretoria. Service will be affected on the attorneys of the Minister Goitseona Pilane Attorneys Inc. No. 72, 6th Avenue, Florida, Johannesburg, South Africa.

STANDING

10. The applicants bring this application in order to assert their constitutional rights to just administrative action in terms of section 33 of the Constitution and section 6 of the Promotion of Administration Justice Act 3 of 2000.

11. The first and second applicant further bring this application:

    11.1 On their own behalf in terms of section 38(a) of the Constitution;

    11.2 On behalf of their members of and their respective constituents, in terms of section 38(e) of the Constitution;

    11.3 In the interest of all people living in mining affected communities in South Africa; and

    11.4 In the public interest in terms of section 38(d) of the Constitution.

PART A:

BACKGROUND TO THE APPLICATION

12. On 26 June 2017 the Chamber of Mines lodged an urgent interdict application in which it sought an order prohibiting the Minister from implementing or applying the provisions of the 2017 Mining Charter in any way directly, or indirectly, pending the final determination of an application for judiciary review and setting aside of the Minister's decision to publish the 2017 Mining Charter.

13. Following the Chamber of Mines having issued its urgent application and

after negotiations between the Chamber of Mines and the Minister, the Minister then gave an undertaking not to implement the 2017 Charter pending a judgment in a review application. With effect the urgent application was never heard by this Court. The terms of this undertaking were made an order of court by this Honourable Court dated 14 September 2017. A copy of the Minister's undertaking is annexed hereto and marked **"MMM6".**

14. The Review application was, by agreement between the Chamber of Mines and the Minister, and upon the direction of the Judge President was set down for hearing on the 13th and 14th of December 2017 before a full a bench of the High Court.

15. A time table was further agreed between the Chamber of Mines and the Minister for filing of a record on expedited basis prior to filing the applicant being the Chamber of Mines' founding affidavit. The Minister duly filed the record on the 19th of September 2017.

16. In terms of the directives issued by the Deputy Judge President the following time frames were made an agreement between the parties:

16.1 17 October 2017: Chamber of Mines to file supplementary affidavit;

16.2 10 November 2017: Department of Mineral Resources was to file answering affidavit;

16.3 22 November 2017: Chamber of Mines to file replying affidavit;

16.4 13 November 2017: Chamber of Mines to file heads of argument;

16.5 5 December 2017: Department of Mineral Resources are to file heads of argument.

17. I am advised that the Chamber of Mines filed the answering affidavit on the 18th of October 2017. It's on these papers that we as the Applicants in this urgent application seek to join as intervening parties in this matter.

Steps taken prior to litigation

18. On 29 September 2017, we consulted with the **Centre for Applied Legal Studies (CALS)** following a decision we had taken as MACUA to intervene in the Chamber of Mines matter against the first respondent regarding the challenge to the 2017 Mining Charter.

19. In our discussions with CALS we made clear we do not support the case of the Chamber of Mines, but wanted to intervene on the basis of the exclusion of mining affected communities during the drafting processes of the 2017 Mining Charter.

20. In the meeting MEJCON and WAMUA also indicated interest to bring a joint case on behalf of the constituents in mining affected communities.

21. During the week of 2 October 2017, we had engagements with our members in various provinces to discuss our intervention in this matter.

22. On 11 October 2017, our attorney, Ms Wandisa Phama addressed a letter to the Deputy Judge President and all the Parties notifying them of our application to intervene as a party in this matter. A copy of the letter is attached and marked **"MMM7".**

23. On 13 October 2017, our attorney, Ms Wandisa Phama directed the

same correspondence to the office of the Judge President, regarding our intervention in this matter.

24. On 12 October 2017, we received a letter from the attorneys of the first respondent indicating that the first respondent shall abide with the decision of the court in relation to interventions by parties like us in the matter. The letter further indicated that the matter may need to roll over to 15 December 2017 in the event that interventions of parties like ours are permitted by the court. The letter of the first respondent is attached and marked **"MMM8".**

25. On 13 November 2017, we received a letter from the attorneys of the Chamber of Mines informing us that the Chamber of Mines is opposed to our intervention disputing that we have a substantial and direct interest in the matter. The letter of the Chamber of Mines is attached and marked **"MMM9".**

26. Although we will leave it for the court to determine our intervention in this matter at the commencement of the hearing, it is worth mentioning that yet again the Chamber of Mines has failed to see mining affected communities as stakeholders to be engaged with in decisions which have impact on our lives. The Chamber of Mines seems to take the view that it should make a case for its inclusion in the drafting of the 2017 Mining Charter and simultaneously call for the exclusion of mining affected communities in the same processes.

WHY IS THIS APPLICATION URGENT

27. As traversed above, this matter is set down to be heard on the 13th and 14th of December 2017. Despite prior notice to the prospective parties in the reviewing application we have not been granted consent to intervene

by specifically the Chamber of mines.

28. In response to our letter dated 11 October 2017 requesting or notifying the parties of our intention to intervene as co-applicants in the matter, the Chamber of Mines responded in a letter dated 13 October 2017 indicating the following:

28.1 *"To the extent that your letter expresses your client's intention to intervene in the judicial review application to be instituted by our client, the Chamber of Mines of South Africa against the Minister, this review has not yet been instituted in accordance with the directives of the Judge President (not the Deputy Judge President to whom you address your letter) the review application has to be instituted by the 17th of October 2017. Accordingly there is presently no application in which your client can apply to intervene.*

28.2 *We are instructed that our client does not consent to your client's irregular request for intervention and the Chamber's intended review application for the following reasons."* The Chamber then lists their reasons.

29. Given the adverse reaction towards any intervention from any parties to the review application the Chamber of Mines sought a meeting with the Deputy Judge President and such meeting was held on the 20th of October 2017.

30. The Deputy Judge President was requested to give directives on the proposed intervention by Lesethleng, Sefikile, Babina, Phuthi, Baga, Makola and Kgatlu Communities as co-applicants in the review application under case number 71147/2017. The 7 communities are all represented by the Lawyers for Human Rights ("LHR"). The Deputy

Judge President was also called to give directives to the proposed intervention by us MEJCON and MACUA as co-applicants represented CALS in the review application under the same case number.

31. The second directive the Deputy Judge President was requested to make or consider was whether a separate review application should be instituted by LHR parties and CALS parties in order for us to pursue the review application in the normal course.

32. In the alternative, a third directive sought was whether an *amici* application by LHR and CALS parties are to be accommodated within the time table for the review application set down for the 13th and 14th of December 2017 and if the Deputy Judge President was amenable to grant the intervention then a proposal that an additional day of the 15th of December 2017 be added as the third court day.

33. The meeting with the Deputy Judge President duly took place on the 20th of October 2017. Present was a representative of the Chamber of Mines, the Minister of Mineral Resources, the proposed co-applicants represented by LHR and ourselves represented by CALS and representatives of the National Union of Mineworkers (NUM) attended the meeting with the Deputy Judge President. After the Deputy Judge President heard representation from all parties concerned, the Deputy Judge President directed that the set time table already allocated by the Judge President in the initial agreement in the review application must still stand.

34. The Deputy Judge President indicated that any intervening party should bring an urgent application for intervention and that this Honourable Court decides whether such party should intervene in the review application.

35. Against this background I am advised that the present matter should be enrolled as an urgent application, and that our non-compliance with the Uniform Rules of Court be condoned to the extent necessary for the reasons that follow:

35.1 Given the truncated timeframes, the Minister is set to file his answering affidavit on the 10th of November 2017. CALS has given an undertaking that these papers would be filed on the 24th of October 2017 in order not to interrupt the processes already laid down and set forth between the parties prior to CALS intervention. The suggested timeframes for filing the intervention application has not been opposed but agreed to by the Minister.

35.2 This application has been set down for the 13th and 14th of December 2017. Should the parties succeed in their intervention application the parties in the main review application need to make provision for a hearing of the matter to include MAJCON and MACUA.

36. I am mindful to bring to the Court's attention that the only party which indicated that they will oppose intervention application is Chamber of Mines, the applicant in the main review application, however we must point out that there will be no prejudice to the applicant's case if MAJCON and MACUA are joined as intervening parties simply because no relief is sought against Chamber of Mines. In fact, save for lamenting that the intervening parties should have lodged their own review applications, no prejudice was alleged by the Chamber of Mines. Moreover, if each of the intervening parties were to lodge a separate review application as suggested by the Chamber of Mine, that would result in further delays and a multiplicity of actions, which Rule 10(1) seeks to avert.

37. In any event, substantive or legal interest in the review application is one which seeks relief against the Minister in his role in drafting the 2017 charter, therefore on this score alone there can be no prejudice to the Chamber of Mines as an applicant in the review applicant.

38. I also pause to note that the urgency in this matter is not one that was self-created. The Court's attention is brought to the fact that the review application in itself was only served and filed on the 18th of October 2017. Therefore this intervention application is brought within reasonable time periods after the main review application having been served on the parties and publicly available in the public domain.

39. Finally, I am advised that certifying the matter as one of urgency only seeks to uphold the principles of justice, as to allow the Applicant intervention into the main review application would seek to avoid multiplicity of actions and to avoid wasted costs.

40. I respectfully submit that the present application be enrolled urgently in terms of prayer 1 of the notice of motion

PART A:

INTRODUCTION

NATURE OF APPLICATION

41. The main application instituted by the Chamber of Mines is an application to review and set aside the Broad Based Black-Economic-Empowerment Charter for the South African Mining and Minerals Industry, 2016 (the 2017 Mining Charter).

42. Distinguishably, this application is for an order granting the applicants right to intervene in terms of Rule 10 (1) of the Uniform Rules of Court.

43. As mining affected communities, the applicants have a direct and substantial interest in bringing this application as they are major stakeholders in the mining sector; I deal with this issue below.

44. The applicants further seek an order to have the 2017 Mining Charter reviewed and set aside on the basis that the first respondent failed to meaningfully engage with the applicants in the drafting and the finalisation of the 2017 Mining Charter. Such failure has adverse impacts on the applicants' rights to an environment that is not harmful to health and wellbeing in terms of section 24 of the Constitution, the rights to procedural fairness in terms of section 33 of the Constitution and section 3 of Promotion of Administrative Justice Act[1].

B: INTERVENERS AND THEIR DIRECT AND SUBSTANCIAL INTEREST

Factual Background

45. Historically, the mining sector in South Africa has been regulated and operating without any consideration for mining affected communities both as sending and host communities. There was a lack of interest to avoid the potential negative gender impacts of mining projects. Over the years, communities have lost land, grave yards, and water streams and are sick as a result of pollution that they get from mining operations. Consequently, there was a growing need for the voices of oppressed and often overlooked mining communities to come to the party. This could be achieved through a context analysis, and the active participation of communities in the decision-making process.

[1] Act 3 of 2000.

46. In December 2012, MACUA was established as a movement in the eight provinces where there are mining operations in South Africa for the purposes of raising awareness on issues faced by mining affected communities. We established MACUA to function as a medium between communities and government and mining companies. Mining affected communities wanted to have community members with experiences of being affected by mining to represent communities in negotiation forums with government and other relevant bodies.

47. In the establishment of MACUA, the community elected representatives from each of the nine provinces. When we formed MACUA, NGOs that worked with us were present and assisted us with the logistical aspects of forming a community based organisation.

MACUA as a Stakeholder in Mining

48. Since the establishment of MACUA, we have taken opportunities to assert our concerns and voices through various fora. In so doing we have raised the concerns of mining affected communities and made MACUA known to other relevant stakeholders in mining in particular, the Department of Mineral Resources and mining companies.

49. February 2013 was our first engagement with Government. Members of MACUA including myself attended at the Alternative Mining Indaba, in Cape Town in response to an invitation the Environmental Justice Network ("EJNF"). The ENJF was established in 1994 to serve as an umbrella organisation to coordinate environmental organisations for environmental justice and sustainable development through networking. The Alternative Mining Indaba was in session at the same time as the Mining Indaba attended by corporations and government was in session. It was at the Alternative Mining Indaba that we saw that the Mining

Indaba did not include a platform for communities affected by mining to raise their experiences and issues to both the government and mining companies.

50. At the Alternative Indaba, MACUA discovered that there would be a Mining Lekgotla in August 2013. MACUA took a decision to organise a gathering outside the Sandton Convention Centre where the Mining Lekgotla was taking place.

51. In light with our decision to gather outside the Mining Lekgotla, we filed a notification to gather to Johannesburg Metro police Department (JMPD) in terms of the Regulations of Gatherings Act ("RGA") 205 of 1993. Our notification to gather was denied JMPD Knowing that the concerns of mining affected communities were important issues for consideration at the Mining Lekgotla by both the government and corporations, on the day of the Mining Lekgotla, MACUA decided to hold gathering of 15 people at points of 100 metres away between each group. The decision to gather in groups of 15 was to avoid non-compliance with the RGA and arrests.

52. The organisers of the Mining Lekgotla told us that if we wanted to participate in the event, attendees had to be dressed formally, which meant in suits and ties. This excluded us from the meeting, as many of MACUA's members do not own formal wear. I pause to note the discrimination mechanisms employed by the organisers of the Mining Lekgotla to selectively exclude exploited minorities such as mining community members on non-rational basis.

53. We marched at the Mining Lekgotla for about three days, but were not allowed to enter the building. Again, despite our efforts to bring the community voices in the discussions at the Mining Lekgotla, the

organisers of the Mining Lekgotla turned a blind eye to our cause.

54. Towards the end of 2013, MACUA had opportunities to raise concerns of communities affected by mining with the government in the review processes of the Mineral and Petroleum Resources Development Act No. 28 of 2002 (MPRDA). In November 2013, MACUA attended a meeting at the office of the Presidency called by the Department of Mineral Resources. The invitation indicated the first respondent's interest to work with communities on the amendments of the MPRDA. MEJCON was also present at this meeting.

55. Subsequent to the meeting at the Presidency, there was no follow up by the first respondent to engage communities on its processes. We therefore sought to engage the various Provincial Departments of Mineral Resources, to address the issues of the communities in the provinces. The provincial departments did not follow through favourably with the community participation in the processes.

56. In early 2014 MACUA addressed a letter to the Minister of Mineral Resources in which it raised concerns about the manner in which the consultation on the MPRDA was handled. A copy of the letter is attached and marked **"MMM10"**.

57. On 2 April 2017 MACUA, Land Access Movement, and Association for Rural Development, represented by Legal Resources Centre ("LRC") addressed a letter to President Jacob Zuma, requesting that he refers the MPRDA Bill B15B-2013 and the Restitution of Land Rights Amendment Bill B35B-2013 be referred back to Parliament due to the failure of the National Council of Provinces and Provincial Legislatures to take reasonable steps to facilitate public participation. A copy of the

letter is attached and marked **"MMM11"**. We received no response to that letter.

58. MACUA decided to picket in all the provinces reinforcing the issues we raised in our letters. MACUA held pickets at provincial offices of the DMR in Gauteng, North West, Limpopo, Mpumalanga, the Free State and Northern Cape. The gatherings were to call upon the President to refer the MPRDA back to Parliament for proper consultation. Following these pickets we issued a press statement and a copy is attached and marked **"MMM12"**.

59. The pickets were structured in different ways. For example, in Gauteng members of MACUA were picketing outside the DMR provincial offices and when it became apparent that it was not working in our interest; members occupied the offices of the DMR for two hours. MACUA's members requested that the Minister to attend to us. However, the then Minister Susan Shabangu did not make an appearance but promised to respond us.

60. On 13 August 2014, we marched to the Chamber of Mines and handed over a memorandum of 10 demands to the Chamber of Mines, the first respondent, the then Minister of Mineral Resources, Susan Shabangu, Parliament of South Africa and President Zuma. MACUA demanded that the MPRDA in its entirety be 'scrapped' and for the President to return the current bill B15B- 2013 back to Parliament for proper consultations with communities affected by mining.' Furthermore, that Parliament, Government, the Chamber of Mines and organised labour recognize communities affected by mining as legitimate stakeholders and that legislation is passed to that effect. A copy of the memorandum is attached and marked **"MMM13"**.

61. In response to the march, the Chamber of Mines undertook to only address the issues of mines which were part of their constituency. On the issues relating to the MPRDA, the Chamber of Mines informed MACUA that they should raise such issues with government as they were unable to address those issues.

62. MACUA's concerns and issues were not adequately addressed. MACUA decided to call for a meeting with all organisations of communities affected by mining. MACUA members visited all communities in the various provinces consulting in an attempt to draft the "People's Mining Charter", of which its aim and objective was to apprise our comments to the MPRDA.

63. From 24 March up to and including 26 March 2015, MACUA held a meeting in Berea, Johannesburg. The meeting was held with all relevant community organisations to deal with collective issues of communities affected by mining. At the meeting we took a resolution to draft the People's Mining Charter. Organisations at the meeting included MACUA, WAMUA and MEJCON, individual communities and civil society organisations decided to form what is now commonly known as the MPRDA Coalition.

64. The meeting resulted in the draft People's Mining Charter or 'Berea Declaration'. The draft People's Mining Charter was workshopped with all communities affected by mining before it could be adopted as a final document. After the consultation with the communities, the Peoples Mining Charter was adopted on 26 July 2016. A copy of the People's Mining Charter is attached and marked **"MMM14"**.

65. On various occasions we have communicated the People's Mining Charter to both the Chamber of Mines and the Department of Mineral Resources. Even though there have been little attempts made by DMR to engage us on mining related issues, as MACUA, WAMUA and MEJCON we have taken every opportunity to make our movements known to both DMR and Chamber of Mines. With no consultation on the 2017 Mining Charter, it cannot be that the DMR did not know what we stand for and what we do as movements of mining affected communities.

66. The above seeks to indicate that the intervening party has consistently been of the view that they hold a vested interest in the Charter and how its objectives are implemented.

Knowledge of the 2017 Mining Charter

67. Although the first respondent published the Reviewed Broad Based Black Empowerment Charter for South African Mining and Minerals Industry, 2016 ("Draft Reviewed Mining Charter") in 15 April 2016,which draft was not published on another accessible platform, As MACUA we could not access the draft Mining Charter and only become aware of it through Action Aid.

68. From the above, it is evident that our lack of knowledge of the draft Mining Charter was not due to our lack of interest but rather, the lack of accessible publicity around it for mining affected communities.

69. In July 2016, through Action Aid we heard of a meeting that was to be held with stakeholders with an interest in mining at the offices of the first respondent. The meeting was held on 19 July 2016. The first respondent did not invite MACUA to make submissions at that meeting, nonetheless, we attended without invitation.

70. In that meeting, we were at the mercy of other participants such as ActionAid SA which generously gave us the platform to make submissions on the draft review of the Mining Charter 2016 during a time assigned to them. As MACUA we spoke for only 10 minutes. Speaking on behalf of MACUA, my submissions focused on the deficiencies of the process with respect to community participation.

71. My presentation included the flawed consultation processes in drafting the Mining Charter, in that the first respondent makes itself available for mining companies but not to communities. I submitted that the meeting should have been held in mining affected areas to be in touch with people. I substantiated the statement with an example that when government seek people's votes, they approach communities, but to address issues as important as the Mining Charter, they use inaccessible means such as government gazettes.

72. I further elaborated on the steps we have taken to be heard, which included pickets and gatherings. I finally concluded by stating that as communities affected by mining, we reject the draft on the basis of the lack of meaningful engagement with us. In the 10 minutes I also presented the People's Mining Charter which we table for consideration in drafting an all-inclusive mining charter.

73. Following that meeting we were informed that the office of the first respondent would engage with us at a later stage, but those undertakings never materialised.

74. MACUA requested a number of meetings with the first respondent to discuss the Mining Charter. The first respondent would accept our

invitations, but cancel the day before the planned meeting without rescheduling.

75. Despite our attempt to engage with the first respondent on the 2017 Mining Charter, we were taken by surprise when we discovered that the first respondent gazetted the 2017 Mining Charter on 15 June 2017. We did not see the government gazette ourselves but we were informed by the MPRDA Coalition on 15 June 2017that the first respondent had gazetted the 2017 Mining Charter.

76. When we found out about the action taken by the Chamber of Mines to review and set aside the 2017 Mining Charter for failure to consult with the Chamber of Mines, we took a decision to intervene in the matter.

77. Our intervention is not aligned to that of the Chamber of Mines, neither do we find ourselves coming into this case from the same perspectives as the Chamber of Mines. We cannot align ourselves with the Chamber of Mines because mining companies themselves have failed in their own processes to include mining affected communities as stakeholders in mining. Our exclusion by mines in more pronounced in the drafting and implementation of Social and Labour Plans.

78. It therefore comes as no surprise to us that when the Chamber of Mines wanted the 2017 Mining Charter to be set aside for lack of engagement with the Chamber, at no point did the Chamber of Mines equally acknowledge the exclusion of mining affected communities in the processes of the 2017 Mining Charter.

79. As mining affected communities we are therefore intervening in our own right as a part with a direct and substantial interest in this matter.

Steps taken prior to litigation

80. On 29 September 2017, we consulted with the Centre for Applied Legal Studies (CALS) following a decision we had taken as MACUA to intervene in the Chamber of Mines matter against the first respondent regarding the challenge to the 2017 Mining Charter.

81. In our discussions with CALS we asserted that we do not support the case of the Chamber of Mines, but wanted to intervene on the basis of the exclusion of mining affected communities during the drafting processes of the 2017 Mining Charter.

82. In the meeting MEJCON and WAMUA also indicated interest to bring a joint case on behalf of the constituents of mining affected communities they work with.

83. During the week of 2 October 2017, we had engagements with our members in various provinces to discuss our intervention in this matter.

84. On 11 October 2017, our attorney, Ms Wandisa Phama addressed a letter to the Deputy Judge President and all the Parties notifying them of our application to intervene as a party in this matter. A copy of the letter is attached and marked **"MMM 7".**

85. On 13 October 2017, our attorney, Ms Wandisa Phama directed the same correspondence to the office of the Judge President, regarding our intervention in this matter.

86. On 12 October 2017, we received a letter from the attorneys of the first respondent indicating that the first respondent shall abide with the decision of the court in relation to interventions by parties like us in the matter. The letter further indicated that the matter may need to roll over

to 15 December 2017 in the event that interventions of parties like ours are permitted by the court. The letter of the first respondent is attached and marked **“MMM 8”.**

87. On 13 November 2017, we received a letter from the attorneys of the Chamber of Mines informing us that the Chamber of Mines is opposed to our intervention disputing that we have a substantial and direct interest in the matter. The letter of the Chamber of Mines is attached and marked **“MMM9”.**

88. Although we will leave it for the court to determine our intervention in this matter at the commencement of the hearing. It is worth mentioning that yet again the Chamber of Mines has failed to see mining affected communities as stakeholders to be engaged with in decisions which have impact on our lives. The Chamber of mines seems to take the view that it should make a case for its inclusion in the drafting of the 2017 Mining Charter and simultaneously call for the exclusion of mining affected communities in the same processes.

Provisions of the Mining Charter which warrant meaningful engagement with Mining Affected Communities

The positive elements for mining affected communities

89. The 2017 Mining Charter has been drafted as a document with a number of provisions for the benefit of communities. The Charter has catered for mine communities and defines a mine community as a community where mining takes place, major labour sending areas, as well as adjacent

communities within a local municipality, metropolitan municipality and/or district municipality.

90. The preamble of the 2017 Mining Charter acknowledges that although the MPRDA has transferred the ownership of mineral wealth of the country to all the people in South Africa, under the custodianship of the state a proliferation of communities living in abject poverty continues to be a large characteristic of the surroundings of mining operations.

91. In its objectives, the Mining Charter undertakes to ensure the enhancement of social and economic welfare of Mine Communities and major labour sending areas in order to achieve social cohesion.

92. The Mining Charter has further made provision for 8% of total shares by the mining right holder to be held in the form of a community trust managed by an agency called the Mining Transformation and Development Agency ("MTDA").

93. There is very little information about the processes the Minister will follow to establish the MTDA, but for that it will be managed by and shall report to the Minister.

94. The 2017 Mining Charter is also silent on the skills that will be taken into account in the appointment of functionaries who will serve in the MTDA. It is unclear whether some of the members of the MTDA will be from mine affected communities, be it sending or host communities.

95. Although we welcome this provision of the 2017 Mining Charter, the Charter is also silent on how communities will have access on the funds held by the MTDA.

96. In relation to procurement, the 2017 Mining Charter contains new targets for mining goods and services. The 2017 Mining Charter requires a mining rights holder to identify what goods and services are available within the community where its mining operations are taking place and where feasible give preference to suppliers within that community.

97. This is another provision mining affected communities welcome. However, without our engagement in the drafting of this Charter, we could not raise concerns with the first respondents of the need to avoid a situation when such procurement arrangement only benefit traditional authorities as it has been the case in the past.

98. The 2017 Mining Charter 2017 also increases targets for Black Persons to be employed at different levels of management and importantly requires that half of those positions be occupied by black women.

99. The provision increasing the targets of employment of Black Persons in the Mining Charter is of paramount importance to mining affected communities. As matters stand and acknowledged in the preamble of the 2017 Mining Charter mining affected communities live in abject poverty and high unemployment rates. A provision calling for the employment of Black Persons would receive much support from mining affected communities. our exclusion in the negotiation processes of the 2017 Mining Charter make it hard for mining affected communities to access information on how such provisions could be implemented.

100. In relation to Human Resources Development the 2017 Mining Charter expressly provides that expenditure on human resources development is to be allocated to training of both employees and community members who are not employees. This provision of the 2017 Mining Charter is important for improving the quality of lives of people living in mine

affected community as skills development may increase their employment chances.

101. It is not only the positive provisions of the 2017 Mining Charter that we find to be imposing a duty on the first respondent to engage with us. In provisions that we find to have a negative impact on mining affected communities, an engagement with us by the first respondent would have created a space for mutual understanding and reaching resolutions to mitigate differences.

The negative elements for mining affected communities

102. We find the absence of the following issues in the 2017 Mining Charter to be negative elements of the Charter which could have been mitigated by our inclusion in the negotiations around the Charter:

102.1 The absence of requirements for restitution and compensation of communities for the harmful impacts of mining;

102.2 The absence of mechanisms and processes to address the negative gendered impacts of mining;

102.3 The absence of measures to ensure mining affected community development is gender responsive;

102.4 The failure to provide for requirements of good governance, democracy, accountability and transparency in the MTDA;

102.5 The absence of recognition that the rights and interests of communities, including communities living according to African Customary Law, cannot be reduced to those of traditional leadership;

102.6 The failure to provide requirements for meaningful direct community participation in the design, implementation and monitoring of social and labour plans and other mining affected community developments;

102.7 The absence of provisions for community housing; and

102.8 The failure to provide guidance on ensuring fair and transparent local procurement of mining goods and services.

103. The above description of relevant provision and its positive or negative impact on mining communities indicates that the intervening party hold a vested legal interest in the remedies/ relief this Honourable court may grant.

C: LEGAL INTEREST IN THE RELIEF THIS HONOURABLE COURT MAY GRANT

104. Rule 10(1) of the Uniform Rules Of Court reads as follows:

"Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing."

105. I am advised that although Rule 10 refers only to actions, Rule 6(14) stipulates that the provisions of Rule 10 apply mutatis mutandis to applications.

106. The applicant for leave to intervene must show that it has 'a direct and substantial interest' in the subject matter of the action. See: *National Director Of Public Prosecutions v Zuma* 2009 (2) SA 277(SCA) at 308G; *Investec Bank Limited v Mutemeri* 2010 (1) SA 265 (GSJ) at 278E-F. The test for a direct and substantial interest is the whether there is a legal interest in the subject matter of the litigation that may be prejudicially affected by the judgement of the court.

107. The purpose of the applicants' entry into the *lis* is aimed at a change in the orders the Chamber of Mines seeks. It is motivated by the need to foster the inclusion of the community and the enforcement of the rights of the communities affected by mining. There can be no denying that mining affects host communities as well as sending communities. Any endeavour by government to inter alia protect the rights and interests of these communities, gives rise to a direct and substantial interest. The intervening parties have a legal interest in the matter

Whether the intervening parties has standing to challenge the respondent's decision in review proceedings.

108. The intervening parties are in the same position is the applicant in that:

108.1 They are members of the communities affected directly by mining;

108.2 The respondent recognized their importance in the process, by inviting them to consultative meetings during the pre-drafting process. Can We maintained however that such invitation was woefully short the requirements for consultation infects in fact foul shorts to such an extent that it can be regarded as non-existent.

108.3 The regulatory framework governing mining gives prominence to the consideration of the needs of communities directly affected by mining.

108.4 In a country where the legacy has been to ignore communities that are affected by activities of around them it is most important and that their rights are recognised and enforced by this court.

108.5 The complaint of the Chamber of Mines and those of the intervening parties are interwoven.

108.6 It is no minor coincidence that some of the aims and objectives of the mining charter cannot be implemented without the cooperation and input of the intervening parties.

109. It is clear that if an order is made based on any of the above submissions made by the Chambers of Mines then judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest.

110. I am advised that the above establishes that communities have a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned.

D: THE APPLICANTS SUBMISSION TO INTERVENE SHOULD SUCCEED

Legal basis to demand meaningful participation

111. Public participation is a key element in ensuring participatory governance in South Africa. The right to public participation in constitutionally entrenched and further espoused to through the inclusion of provisions mandating public participation and consultation in various pieces of legislation.

112. I will commence by address public participation as provided in legislative processes. And subsequently deal with provisions of the MPRDA that require a facilitation of public consultation in procedures relating to the extractives industry.

113. The objective of this exposition is to highlight the constitutional obligations on the Department of Mineral Resources ("DMR") to consult with mining affected communities in the drafting of the Mining Charter, 2017.

Public Participation a legislated Right

114. Section 59(1)(a) of the Constitution provides that the National Assembly, as the apex legislative body, must facilitate public involvement in the processes of the Assembly and its committees. Additionally, the National Assembly must conduct its business in an open manner and include the public in committee sittings unless it is reasonable and justifiable in an open and democratic society to conduct such sittings in private. The

Constitution mandates the National Council of Provinces as well as provincial legislatures to facilitate public involvement in the same way.

115. This onus on the legislative arms of government indicates the Constitution's commitment to participatory governance; where elected leaders are obliged to give meaningful considerations of the views of the public in decision-making processes. In two pivotal cases, the obligation of the legislature to facilitate public participation was pronounced. These cases are ***Doctors for Life International v Speaker of the National Assembly and Others and Matatiele Municipality v President of the Republic of South Africa & Others.***

116. In engaging the question on the applicable standard of reviewing legislative conduct in relation to facilitating public participation, the court in *Doctors for Life* made the following integral finding: For the conduct of a legislative body to be considered reasonable in respect of meeting the constitutional requirements for public involvement in the sections 59, 72 and 118 of the Constitution, the following two aspects must be met:

116.1 The relevant legislative body must provide meaningful opportunities for public participation in legislative-making procedures. This would include making sufficient effort to ensure that the public has adequate information informing them of their right to be involved in such decision-making procedures and the different avenues through which they can participate; and

116.2 The relevant legislative body must take measures to ensure that persons interested in participating are given a meaningful and effective opportunity to be heard and their views must be actually considered by members of the legislature.

117. This is the minimum standard that legislative conduct in relation to public participation and consultation must comply. If the conduct of a legislative body does not meet this step then that conduct is likely to be unlawful and unconstitutional.

118. DMR's failure to meaningfully engage with mining affected communities and other relevant stakeholders such as women, mine employees and mining federations stands in contravention of the principles set out above. The lack of meaningful engagement is further contrary to the constitutional provisions embodied in the above-described sections and therefore constitutes conduct that falls sort of the standard of reasonable and is likely to amount to unlawful and unconstitutional conduct.

The MPRDA and public participation

119. The MPRDA regulates, amongst others, the granting of mining right applications, closure of mines and the regulation of mining activities. The objectives of the Act are to expressly promote equitable access to the nation's mineral and petroleum resources to all people in South Africa. The Act is also aimed at promoting employment and advancing the socio-economic welfare of all South Africans. A key mechanism through which these objectives can be achieved is meaningful public participation. In light of this, the MPRDA provides the following avenues for public participation in in certain circumstances:

120. In relation to the granting of mining right application, section 10 of the MPRDA provides that within fourteen days of accepting a mining right application, the Regional Manager must make it known that such an application was lodged and accepted and then call upon interested and affected persons to submit their comments in respect of the land in question.

121. In addition to DMT, the MPRDA also imposes an obligation to consult on the mining rights applicant. Within fourteen days of accepting a mining right application, the Regional Manager must notify the applicant to consult with the landowner, lawful occupiers and interested and affected parties on the concerned land and include the results of such consultation in the applicant's environmental impact assessment.

122. These provisions espouse an ethos of participation in the determination of mining related matters. Read with the above constitutional provisions and judicial pronouncement on the legislature's obligation to ensure public participation, it is apparent that sound, meaningful public participation during the drafting of the Mining Charter is a necessary precursor to establish subsequent public consultation on the actual content of the Charter.

123. The Minister is empowered by section 100(2) of the MPRDA to develop the Mining Charter. An empowering provision granting the Minister the obligation to pass secondary legislation makes the decision of the Minister administrative action.

Administrative Action in decision making regarding the mining charter

124. Section 33 of the Constitution provides that:

> *"(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
>
> *(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*

(3) National legislation must be enacted to give effect to these rights, and must –

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration."

125. PAJA has been promulgated to give effect to section 33 of the Constitution. The Act provides that the Act was promulgated "*[t]o give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996".*

126. Section 6 of PAJA provides for the circumstances in which litigants can bring a review application of a decision they consider to be administrative action.

127. Administrative action is defined in section 1 of the act as:

"Any decision taken or any failure to take a decision by

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of the state, when exercising a public power or

performing a public function in terms of an empowering provision".

128. Section 6 of PAJA lists the grounds upon which an administrative decision can be brought under review. The section provides that:

> *"(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.*
>
> *(2) A court or tribunal has the power to judicially review an administrative action if –*
>
> *(a) the administrator who took it –*
>
> *(i) was not authorised to do so by the empowering provision;*
>
> *(ii) acted under a delegation of power which was not authorised by the empowering provision; or*
>
> *(iii) was biased or reasonably suspected of bias;*
>
> *(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*
>
> *(c) the action was procedurally unfair;*
>
> *(d) the action was materially influenced by an error of law;*
>
> *(e) the action was taken –*
>
> *(i) for a reason, not authorised by the empowering provision;*
>
> *(ii) for an ulterior purpose or motive;*
>
> *(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;*
>
> *(iv) because of the unauthorised or unwarranted dictates of another person or body;*

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself –

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to –

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

(3) If any person relies on the ground of review referred in subsection 2 (g), he or she may in respect of a failure to take a decision, where –

(a) (i) an administrator has a duty to take a decision;

(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision;

or

(b) (i) an administrator has a duty to take a decision;

(ii) a law prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision before the expiration of that period institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period."

129. In ***Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others*** the Constitutional Court developed the test of reasonableness in administrative decision. The court held that in considering whether the decision was reasonable or not depends on the circumstances of each case.[2] In terms of the decision in *Bato Star* what is reasonable depends on whether a decision maker in the shoes of the decision maker would have arrived to the same decision taken by the decision maker.

130. The Constitutional Court further held that "factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of

[2] Para 45.

factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected."

131. Taking a decision as an organ of state, the first respondent should have facilitated meaningful engagement with mining affected communities. The failure to facilitate meaningful engagement with us despite the impact of his decision on our lives and well-being in our opinion renders the decision of the first respondent unreasonable and irrational.

132. With the administrative decision of this nature, which does not go through common legislative processes through parliament, it becomes even more significant for a decision of this nature to be procedurally fair. In light of the transformative imperatives of the charter which are centred on mining affected communities, the first respondent should have engaged us in the processes of deciding those transformative imperatives.

133. I further submit that, when dealing with vulnerable groups such as mining affected communities, the threshold of engagement with such communities is more than passing government gazettes for comments. It is meaningful engagement that is required for a decision of the first respondent to be reasonable and rational.

134. Courts have developed fascinating discourse on the concept of meaningful engagement as a standard by which to assess meaningful participation of those who are affected by decisions of the state. The Constitutional Court started developing jurisprudence on meaningful engagement between municipalities and communities affected by socio-economic decisions taken by the state in ***Government of the Republic of South Africa v Grootboom 2000 11 BCLR 1169 (CC)***.

135. The Court held that the state was required to act in a manner that is reasonable in its efforts to progressively realise the right to housing. It found that for a programme of the state dealing with the progressive realisation of socio-economic rights to be considered reasonable, it was important for the state to engage with people who were going through an eviction as soon as it became aware of their illegal occupation of the land. In this way, the court expressed the need for the state to engage communities from the onset when decisions which are going to affect such communities, especially the most vulnerable, are to be taken.

136. In a case involving the transformation sector with the acknowledgement of the abject poverty in which mining affected communities live in, it would have been reasonable for the first respondent to engage with us from the onset to negotiate how such transformative imperatives could have been achieved.

137. In ***Port Elizabeth Municipality v Various Occupiers 2004*** **(12) BCLR 1268 (CC**), the Constitutional Court further addressed the issue of engagement between the state and the communities in the realisation of the right to housing in terms of section 26 of the Constitution. The court had to resolve an eviction of a community from an undeveloped piece of land owned by the state in terms of section 6 of the Prevention of Illegal Evictions from, and Unlawful Occupation of, Land Act (PEI). It highlighted the importance of engagement not only as a tool to reach a settlement between the state and the community, but also the value it brings in the process that leads to the outcome of a decision. The Court observed that there were many benefits to facilitating engagement between the state and the affected communities prior to making a decision:

> *"Not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By bringing the parties together, narrowing the areas*

of dispute between them and facilitating mutual give-and-take, mediators can find ways round sticking-points in a manner that the adversarial judicial process might not be able to do. Money that otherwise might be spent on unpleasant and polarising litigation can better be used to facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society."

138. In ***Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes 2009 9 BCRL 847 (CC),*** the Constitutional Court found that even though parties do not have to agree with each other on every issue, what was required in an engagement process was for them to engage in good faith, reasonableness and willingness from both sides to listen and understand each other's concerns. In this case despite our efforts and attempts to engage the first respondent on the 2017 Mining Charter, the first respondent has refused to listen to our contributions, be it through the presentation of the People's Mining Charter or requests to meet.

139. Despite the failure of the first respondent to engage with us on negotiations in the 2017 Mining Charter, we submit that the court could still order the first respondents to engage with us on the 2017 Mining Charter and declare mining affected communities as stakeholders to be engaged with in decision of this nature. It was in the *Olivia Roads* case that the Constitutional Court developed the concept of meaningful engagement as a remedy in eviction matters and the Court indeed developed jurisprudence on how meaningful engagement could be used as a remedy in eviction cases. We submit that although the facts in Olivia Roads are different the principle applies with equal force herein, the invasive effects of mining on communities, meaningful engagement as a remedy could bring about understanding between the first respondent and mining affected communities.

140. Sandra Liebenberg has argued that drawing knowledge from cases such as Olivia Road, 'meaningful engagement' is something that people and the state must do in "good faith, reasonably and with transparency".[3] Meaningful engagement therefore means that before the first respondent made the decision to pass the 2017 Mining Charter it should have approached mining affected communities to discuss its plans and how they would benefit from the Mining Charter.

141. Lillian Chenwi and Kate Tissington have defined meaningful engagement as a form of public participation which happens when communities and the government talk and listen to each other and when they try to understand each other's perspective so that they can reach a particular outcome.[4] They further explain that meaningful engagement is a neutral space where people and the state can discuss and shape options and solutions to complex issues. For such engagement to be meaningful, it must enable individuals and communities to be treated as partners in the decision-making process. In an ideal situation, meaningful engagement should take place at the beginning of any process that may result in litigation.

IMPACT OF THE EXCLUSION OF MINING AFFECTED COMMUNITIES IN DECISIONS RELATING TO THE MINING CHARTER

142. The lack of consultation has exacerbated stresses and anger within communities who are already frustrated by mining. The lack of meaningful engagement with mining affected communities has led to adverse impacts to people living in mining affected areas. It has reduced us to people with no existences and worth.

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[3] Liebenberg, Sandra 'Possibilities and Pitfalls of 'Meaningful Engagement' (2012) 12 African Human Rights Law Journal.

[4] Lilian Chenwi & Kate Tissington 'Engaging meaningfully with the government on Socio economic right: a focus on housing' March 2010 Community Law Centre (UWC) at 9

143. The affidavits of **WAMUA** and **MEJCON** are attached to elaborate further on the effect of exclusion in the 2017 Mining processes.

D:CONCLUSION

144. There can be no prejudice to the respondents should the interveners be permitted to participate in proceedings affecting them. As has been noted, this intervention application has been brought within days of the Chambers of Mines founding papers in the main application being lodged.

145. For the reasons set out above, I ask that the interveners be granted leave to intervene as applicants, and that this affidavit and its annexures be admitted as founding papers filed on behalf of the applicants.

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MESHECK MANDLENKOSI MBANGULA

Thus signed and sworn to at _____on this day of _____ 2017, the deponent having acknowledged that he knows and understands the contents of this affidavit, that he has no objection to taking the prescribed oath and that he considers the oath to be binding on his conscience.

_____

COMMISSIONER OF OATHS