

**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

**ANGLO AMERICAN SOUTH AFRICA (PTY) LTD
RUSTENBURG PLATINUM MINES LTD
ANGLO AMERICAN PLATINUM LTD
SISHEN IRON ORE MINE (PTY) LTD
ANGLO OPERATIONS (PTY) LTD
DE BEERS CONSOLIDATED MINES (PTY) LTD**

Intervening Parties

FOUNDING AFFIDAVIT: ADMISSION AS AMICUS CURIAE

I, the undersigned,

MESHECK MANDLENKOSI MBANGULA

do hereby state under oath that:

1. I am an adult male National Coordinator of Mining Affected Communities United in Action (“MACUA”), a voluntary movement of mining affected communities who seek to strengthen people living in poverty, especially women, and the communities affected by mining to build their determination, self-confidence and resistance skills, with the objective of building the capacity of communities to participate in processes that directly affect them. MACUA operates in eight provinces affected by mining in South Africa. MACUA in principle operates from situated at 1 Jan Smuts Avenue, Braamfontein.

2. By virtue of my position as the National Coordinator of MACUA, I am duly authorised to depose to this affidavit on behalf of MACUA, the applicant for admission as amicus curiae herein. I also attach hereto the resolution annexed and marked as “**MR1**”. The resolution was taken via teleconference. This affidavit was prepared under circumstances of extreme urgency. Given the urgency of this matter, the lockdown and despite our best efforts, we have not been able to obtain the signature of all the committee members.

3. The facts contained herein are to the best of my knowledge both true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge. To the extent that I make legal submissions in this affidavit, I do so on the advice of my legal representatives, whose advice I believe to be correct.
4. For the sake of convenience, the nomenclature used in the Applicants founding affidavit, the First to Third Respondents answering affidavit and the Fourth Respondents answering affidavit is adopted herein. I 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, I shall refer to them as the “State Respondents”.
5. I have read the founding affidavit filed hereto on behalf of AMCU, the answering affidavit filed herein on behalf of the State Respondents and the answering affidavit filed herein on behalf of the Minerals Council.

I INTRODUCTION

6. I am advised that Rule 19 of the Labour Court Rules allows any person interested in any proceedings before this Court to, on application to the Judge President or any judge authorised by the Judge President, be admitted to the proceedings as an amicus curiae on the terms and conditions and with the

rights and privileges determined by the Judge President or any judge authorised to deal with the matter.

7. This is therefore 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. From a procedural perspective, this application could only be made once all the parties to this application had filed their respective affidavits.

8. This affidavit is structured as follows:

8.1. Part II addresses this Court jurisdiction.

8.2. Part III addresses MACUA's standing.

8.3. Part IV sets out MACUA's interest in these proceedings.

8.4. Part V sets out the contextual socio-economic circumstances of mining affected communities.

8.5. Part VI addresses the position adopted by MACUA in these proceedings.

8.6. Part VII sets out the conclusion and submissions in relation to costs.

II JURISDICTION

9. Section 157(1) of the Labour Relations Act 66 of 1995 ("LRA") states that the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere

in terms of this Act or in terms of any other law are to be determined by the Labour Court.

10. MACUA is neither a trade union, an employer nor an employer organisation. As more fully described below, MACUA is a national movement of mining-affected communities united around the empowerment of women, the disabled and youth, in pursuit of economic, environmental and social justice.

11. As shall become apparent, MACUA essentially seeks to advance submissions that are primarily based on the interpretation of the Mining Health and Safety Act 29 of 1996 (“MHSA”).

12. Section 84 of the MHSA states that the Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of any provision of this Act. I am therefore advised that this court has the requisite jurisdiction to entertain MACUA’s substantive submissions as amicus, if so admitted.

13. Ultimately the nature of the Covid-19 pandemic requires mining affected communities to be heard and also be protected. It is our considered view as an organisation that mines, mineworkers and mining affected communities are intrinsically interlinked.

III STANDING

14. In this application MACUA seeks to make submissions relating to the vulnerability of mining affected communities during this pandemic. MACUA also seeks to highlight that communities are key stakeholders in mining and that they should also be consulted and allowed to participate in processes that seek to promulgate regulations that will apply to mines during the pandemic.

15. MACUA's submissions seek to 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.

16. MACUA further brings this application:

- 16.1. On their own behalf in terms of section 38(a) of the Constitution.
- 16.2. On behalf of their members of and their respective constituents, in terms of section 38(e) of the Constitution.
- 16.3. In the interest of all people living in mining affected communities in South Africa; and
- 16.4. In the public interest in terms of section 38(d) of the Constitution.

IV INTEREST OF AMICUS IN THESE PROCEEDINGS

17. 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 become significantly poorer as a result of mining operations around or on their land and 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 articulate their interests or face their continued exclusion and impoverishment. This could be achieved through a context analysis which recognised the impacts of mining on communities, and the active participation of communities in the decision-making processes that affect them.

18. 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 allow for meaningful engagements between communities, government and mining companies. Mining affected communities wanted to have their right to have community members with experiences of being affected by mining to represent communities in negotiation forums with government and other relevant bodies, recognised.

19. MACUA'S is a national movement of mining-affected communities united around the empowerment of women, the disabled and youth, in pursuit of Economic, Environmental and Social Justice, currently based at the University of the Witwatersrand.

20. MACUA operates nationwide across provinces in a range of mining affected communities. MACUA has at least 25 branches nationally and over a 1000 signed up and paid members. The Organisation seeks to strengthen people living in poverty, especially women and to capacitate communities on environmental and socio-economic issues.

21. MACUA has a unique understanding of the mining landscape, through the lens of excluded and impoverished mining affected communities. 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.

22. MACUA has previously intervened in matters such as *Chamber of Mines of South Africa v Minister of Mineral Resources and Others 2018 (4) SA 581 (GP)* in order to assert the rights of mining affected communities. Furthermore, MACUA has also previously participated in and contributed to the following research reports in the pursuit of the rights of mining affected communities:

22.1. “*Mining In South Africa - Whose Benefit and Whose Burden? Social Audit Baseline Report*” 2018.

22.2. “In Good Company” Report 3rd Edition.

22.3. The South African Human Rights Commission report titled “National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa.”

23. As is stated in the papers of AMCU the phased re-opening of mines will vastly increase the exposure of host communities in particular to Covid-19. In many cases mine workers live in the same communities hence if they are infected their neighbour, spouses and children in the community are also very likely to become infected. Secondly, even where mine workers are from other areas and mainly live on the premises of mining companies, they will use the same transport, services and shop at the same food markets as the broader community. The phased re-opening will lead to far more interpersonal contact, not only on the mine site but also in mining affected communities.

IV SOCIO-ECONOMIC CIRCUMSTANCES OF MINING AFFECTED COMMUNITIES

24. 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.

25. 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.

26. 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.

27. 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.

28. 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.

29. 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.

30. 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.

31. While the public are advised to wash 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.

32. 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.

33. 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.

34. 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.

35. 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.

36. 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.

37. 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.

IV POSITION ADOPTED BY AMICUS IN THESE PROCEEDINGS

Overview

38. It is MACUA's considered view that 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 MHSA, 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.

39. Mining affected communities have the right to an environment that is not harmful to their health or wellbeing and to have the environment protected through reasonable legislative measures. As shall become apparent, the mining communities environmental 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.

40. Furthermore the socio-economic rights listed in Section 27 come into play in relation both to the prevention of the spread of coronavirus (food and water) and treatment (healthcare). Mines typically have commitments in the social labour plans in relation to most of these rights.

41. 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.¹

42. 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

¹ FA p18 para 6.

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 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.²

43. 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.³

44. 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.⁴

² Minerals Council AA para 68.

³ Minerals Council AA para 71.

⁴ State Respondents AA para 44 p501.

45. 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.⁵ Furthermore, the State Respondents contend that proceeding by way of direction under the Regulations permits the Minister easily to coordinate with other Departments, particularly the National Department of Health, and to revise or amend any directions he gives to harmonise with other directions or regulations.⁶

MACUA Submissions

46. 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 rely on the following statutory provisions:

46.1. Section 5(2)(b) of the MHSA.

⁵ State Respondents AA para 47 p502.

⁶ State Respondents AA para 48 p502.

- 46.2. Section 8(1)(c) of the MHSA.
- 46.3. Section 49(1)(e) of the MHSA.
- 46.4. Section 76 (2)(f) of the MHSA.

47. I address each of these provisions below.

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

49. 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.

50. 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.

51. 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.

52. 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 place certain 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.

53. 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.⁷

54. Given 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.

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

⁷ State Respondents AA par 51.

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

56. Given that the main application is based on the interpretation of the provisions of the MHSA, MACUA's submissions are relevant to the proceeding. Save for sporadic references to mining affected communities in AMCU's founding affidavit, none of the other parties to these proceedings have advanced similar submissions herein. I therefore submit that MACUA's submissions will be useful to the court.

V CONCLUSION & COSTS

57. 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.

58. 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.

59. 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.

60. 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*.⁸ MACUA pursued this application in order to protect and vindicate the constitutionally entrenched statutory rights of mining affected communities.⁹

MESHECK MANDLENKOSI MBANGULA

The Deponent has acknowledged that the Deponent knows and understands the content of this affidavit, which was signed and sworn to or solemnly affirmed before me at _____ on _____2020, the regulations contained in

⁸ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC)

⁹ FA para 19.3.

Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS