

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 71147/17

Application for intervention of 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

Applicant

And

MINISTER OF MINERAL RESOURCES

Respondent

REPLYING 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 in capacitating communities and activists on issues of the environment when dealing with corporations, transnational corporations and government.
2. I deposed to the applicants' founding affidavit, and am authorised to depose to this replying affidavit on behalf of all the applicants.
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.
4. I have read the answering affidavit by **Tebello Laphatsoana Chabana** filed on behalf of the Chamber of Mine's (Chamber) answering to the application of MACUA, WAMUA and MEJCON-SA ("the applicants") to intervene in the review application of the 2017 Mining charter.
5. I am advised that it is not necessary for me to deal with all the allegations contained in the answering affidavit. To the extent that any allegation is not expressly admitted herein, it should be read as being denied.
6. The Chamber opposes the intervention application on the purported basis

of:

- 6.1 Lack of urgency;
- 6.2 The differing grounds of review; and
- 6.3 The prejudice the Chamber will suffer as a result of the alleged delay.

URGENCY

AD PARAGRAPHS 12

- 7. I pause to note that both parties are ad idem about the urgency of this application, in its Answering Affidavit Respondents accept that :

- 7.1 Given the urgency of the main application the Deputy Judge President indicated that, if the intervention applications were to be brought, they “could not be brought in the ordinary cause and would probably have to be brought on an urgent basis”. This, the Applicant agrees with and has acted accordingly.

- 7.2 Instituting these urgent proceedings is indeed the correct legal position if one wishes to be part of the special allocation hearing on 13 and 14 December 2017.

7.3 Even in the Applicants proposed timelines we had agreed to comply with the hearing dates as allocated.

8. Therefore, it is against this direction of the Honourable Deputy Judge President and the correct legal basis, that we have lodge these proceedings urgently.

AD PARAGRAPHS 13-14

9. I deny the contents thereof. Although this decision to intervene was made in principle, in order to be effected, it needed to be subject to consultation with the communities and constituencies that comprise the applicants' membership and network.

10. MACUA is made up over 150 community-based organisations and activists, and such consultation and engagement does take significant time and resources. The barriers faced by the MACUA membership are entirely different to those faced by membership of the Chamber. These barriers include:

- 10.1 Geographical dispersal;
- 10.2 Access to funding and resources;
- 10.3 Access to communications;
- 10.4 The translation of the Reviewed Mining Charter.

11. Following the above internal consultations, attorneys of record were consulted on 29 September 2017.

AD PARAGRAPH 16, 17, 18 and 19

12. I deny that the contents of this paragraph. The applicants maintain that urgency arises as a result of avoiding a delay of the application on 13 December 2017. Our case and the Chamber's case is to decide the same issue but on different grounds.
13. In any event, should the Applicants have elected to bring separate review applications the following would have been a possible result:
 - 13.1 The matters would in most likelihood have been consolidated as it seeks to achieve the same outcome, which is to set aside and review the Mining Charter; and/or
 - 13.2 The newly lodged Review application would further suspend the implementation of the Charter pending the second review.
14. I am advised that this will work against not only the Chamber but all parties involved. Therefore the proposed procedure is unnecessary and does not assist the Chambers objective of getting to the finality of this matter.

15. Further, urgency arises to ensure that the matters are argued together to allow for the efficiency of justice and to curb unnecessary administrative delays and costs.
16. The steps taken prior to the decision to institute the application is set out as follows:
 - 16.1 Prior to taking any decisions, the documents were thoroughly examined.
 - 16.2 This entailed broad-based consultation with members, unpacking the meaning of the document, translating the document into the variety of languages spoken by its membership in all 9 provinces of South Africa.
 - 16.3 Further, MACUA membership does not enjoy the ready access to resources and technical expertise enjoyed by members of the Chamber.
 - 16.4 Consequently MACUA took reasonable steps that would need to precede a decision to intervene. However, due to the nature of the organisation outlined above, MACUA was unable to approach the Court with the speed of the Chamber.

AD PRAGRAPHS 20-23

17. The prospects of success of MACUA's case based on the principle of meaningful participation would be substantially diminished were it to be heard subsequent to the judgment in this application. This judgment will be widely viewed to have created certainty in the industry and economy. This will weigh heavily on the prospects of success of any application lodged subsequent to such a judgment.
18. In the absence of MACUA's intervention, the judgment that would be handed down, would in all probability not address the concerns of mine-affected communities. Judgments are only based on what is before the court and the absence of such a critical role player and impacted stakeholder. This would mean that their issues would not form part of the judgment.
19. The Chamber of Mines and the Department of Mineral Resources have consistently failed to recognise community-based organisations as formal stakeholders. This is despite the persistent attempts of community members to be part of the Mining Charter process. Therefore precluding a community voice as part of this case will perpetuate a further exclusion of community rights, interests and voice in any subsequent regime for transformation of the mining sector.

20. For all the above reasons, MACUA submits that this application is urgent and merits to be joined to the hearings on 13 and 14 December 2017.
21. Furthermore it must be noted that this Chambers lodged their review application on the 17 October, short on their heels is the Applicants application to intervene which was served and filed as forewarned on the 24 October 2017.
22. I reiterate that this application was instituted at the behest of the direction of the Judge President as articulated at paragraphs 33 to 35 of the Founding Affidavit.
23. The applicants seek relief against the Department of Mineral Resources, not against the Chamber. The Department of Mineral Resources does not oppose the applicants' intervention.
24. It appears therefore that the main thrust of the Chamber's opposition, is that the applicants will delay the hearing of the main application allocated to 13 and 14 December 2017. As communicated in the applicants' letter to the Judge President on 2 October 2017, the applicants undertook to meet timeframes that would not delay the hearing of the main application, and have accordingly filed our complete application.

25. The appropriate test for the applicants to be permitted to intervene in terms of Rule 10 (1) read with Rule 6(14), requires that a party has a direct and substantial interest, and permits such interested and directed parties to intervene at any stage, prior to judgment.
26. The applicants do not anticipate that their oral argument at the hearing of the main application would necessitate a delay of the hearing and therefore there is no prejudice caused. Thus, the Chamber's main opposition to the intervention is without basis.

THE APPLICANTS' RIGHT TO MEANINGFUL PARTICIPATION

AD PARAGRAPHS 24-27

27. The content of these paragraphs are denied. I am advised that in order to succeed in these intervening proceedings, I must satisfy this court that
- "Substantially the same question of law or fact which if such defendants were sued separately would arise in each separate action."*
28. The following facts are common cause between the parties:
- 28.1 The DMR published the 2017 Mining Charter was published on 15 June 2017; and

- 28.2 Prior to publication of the 2017 Charter no consultation with relevant stakeholders and or affected parties had been announced nor did one take place.
29. It is against this background that the review is now sitting before this honourable court, moreover it is against this very background that the urgent interdict application was launched by the Chambers on 26 June 2017.
30. In the Chambers urgent interdict papers, at paragraph 38 of the Founding Affidavit, it states the following *“As appears from FA2 hereto, no meaningful consultation took place about the 2017 Charter, which is a completely new Charter and differs materially, from the draft published in April 2016 upon which comments were invited.”*
31. Of relevance’s to the applicants is that the Chambers specifically identified that no meaningful participation or consultation with Chambers to place on *inter alia* the following issues, which directly impact mining communities, namely:
- 31.1 The ring fencing of allocation of ownership to mineworkers and communities; and
- 31.2 The requirement that all community trust must be controlled by the Mining Transformation and Development Agency.
32. I pause to note that the above provisions directly and substantially affect the Applicants. I am further advised that should an order be made on any of the

above provisions the result of which will prejudice and/or have a direct impact on the applicants.

33. Chambers continues in their urgent application to state the following :

“The Chamber will contend in the judicial review application to be instituted, and after receipt of the record in that matter, that the decision to publish the 2017 Charter was accordingly procedurally unfair and stands to be set aside in terms of section 6(2)(c) of PAJA”.

34. Furthermore in the review application the Respondent state at paragraph 74, that the review is brought

“in terms of the Promotion of Administrative Justice Act, 200 (PAJA) alternatively in terms of the principle of legality which is founded upon section 1(c) of the Constitution.”

35. I am advised that this is the very basis upon which the applicants bring its review of the 2017 Charter. On this basis alone it must be accepted that not only is there a similar question of fact that ought to be decided but it is also brought into question a similar question of law and legality of the Ministers decision.

36. Furthermore, the applicant does not dispute that the basis on which it seeks to set aside the mining charter is not one advanced in the Chamber’s founding

affidavit. The applicant, however, for the reasons set out below, disputes the inference drawn by the Chamber, namely that this difference in grounds means that the applicant would not be prejudiced if the court was to grant relief in favour of the Chamber.

37. Any judgment that pertains to the legality and status of the Reviewed Mining Charter will lead either to it remaining in effect or being set aside. Either outcome have a significant impact on the applicants and all mine-affected communities for the reason, as averred in the applicants' founding affidavit that multiple provisions of the Mining Charter have a direct impact on the rights and interests of mine-affected communities. The following elements of the Reviewed Mining Charter have a particularly direct impact:

- 37.1 The share of ownership of all mining rights holders reserved for mine communities as well as the vehicle specified for overseeing this share;
- 37.2 A specific responsibility pertaining to mine community development and human resource development.

38. Other provisions, including but not limited to requirements pertaining to procurement from Black people, employment equity, and housing and living conditions also have a significant impact on the rights and interests of mine-affected communities.

39. Therefore, given the impact of the Reviewed Mining Charter on the rights and interests of mine-affected communities, the granting of relief in the

main application in favour of the Chamber, without taking into account the positions of mine-affected communities would significantly impact on the rights and interests of the applicants and their constituents.

40. Therefore the relief sought cannot be sustained and carried into effect without prejudicing the interests of the Applicants.
41. However, and in contrast, MACUA's ground of review will in no way practically prejudice the Chamber's grounds for their relief, first, precisely for the reason that they are distinct.
42. Secondly, The National Union of Mine Workers (NUM) has been joined to these proceedings, without opposition from the Chambers, no prejudice was alleged when this intervening party was joined, The Applicants mere seek to exercise a similar right. In any event, I am advised, that as co applicants the Chamber does not need to respond to allegation so raised by the Applicants, this is further amplified by the fact that no relief is sought against the Chambers.
43. Finally, there can be no prejudice as the Respondent are well aware of the terms of the agreement reached between itself and the Minister on 14 September 2017 , that the Minister will not implement or apply the provisions of the 2017 Charter in any way, directly or indirectly, pending the final determination of the review application.

44. At the meeting with the DJP on the 20 October 2017, the legal representatives of the Minister indicated that the Minister would have no objections to any intervention applications provided they are filed on or before the 24 October 2017; in fact to the contrary, the Minister indicated that the more parties that participate will assist this court. Furthermore on 8 November 2017, the Minister filed a notice to abide by any rule of this Honourable Court. A copy of the Ministers Notice to Abide is annexed hereto and marked as annexure “**MMM1**”.
45. Therefore, the above seeks to indicate that the Chamber has not established any valuable defence, in opposing this intervention application.

AD PARAGRAPH 31

46. I am advised that the following facts founds the applicants standing to institute these proceedings :
- 46.1 The applicants are a voluntary movement specialising in capacitating communities and activists on issues of the environment when dealing with corporations, transnational corporations and government.
- 46.2 2017 Mining Charter is established with the objective to serve as a government instrument designed to achieve mutually symbiotic sustainable growth and broad based and meaningful transformation of mining and minerals industry. The Mining Charter therefore seeks to achieve a number of objectives as set out in section 1(a) – (i) of the Charter.

46.3 The Respondents seek to review and set aside the charter on the basis that, the Charter is unconstitutional to the extent that it usurps the functions of the legislature thus offending against the doctrine of separation of powers which is entrenched as part of the rule of law in section 1(c) in the Constitution and must therefore be set aside in terms of the principles of legality and /or s 6(2) (i) of PAJA and is unauthorised by section 100(MPRDA). The attached on the 2017 Charter extents in relevant portions to the following

46.3.1 Employment Equity;

46.3.2 Mine Community development;

46.3.3 Sustainable development and growth of the mining and minerals Industry ;and

46.3.4 Housing and living conditions

47. I am advised that we as the applicants have a direct interest in any decision or order of this court should a decision be based on any of the above grounds of review, As such the applicants host an interest in the subject matter of the judgment or order sufficiently direct or substantial.

CONCLUSION

48. 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

Chamber of Mines founding papers in the main application being lodged.
Furthermore no relief is sought against the respondent.

49. 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.

DEPONENT

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