IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 20341/19

In the application of:

MINERALS COUNCIL OF SOUTH AFRICA	Applicant
And	
MINISTER OF MINERAL RESOURCES AND ENERGY	First Respondent
SOUTH AFRICA DIAMOND AND PRECIOUS METAL REGULATOR	Second Respondent
MINING AFFECTED COMMUNITIES UNITED IN ACTION	Third Respondent
WOMEN AFFECTED BY MINING UNITED IN ACTION	Fourth Respondent
MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA	Fifth Respondent
BAKGATLA BA SEFIKILE COMMUNITY	Sixth Respondent
LESETHLENG COMMUNITY	Seventh Respondent
BABINA PHUTI BA GA-MAKOLA COMMUNITY	Eighth Respondent

KGATLU COMMUNITY	Ninth Respondent
ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	Tenth Respondent
UNITED ASSOCIATION OF SOUTH AFRICA	Eleventh Respondent
NATIONAL UNION OF MINEWORKERS	Twelfth Respondent
SOLIDARITY TRADE UNION	Thirteenth Respondent
SOUTH AFRICAN MINING DEVELOPMENT ASSOCIATION	Fourteenth Respondent

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THIRD & FOURTH RESPONDENT'S CONCISE HEADS OF ARGUMENT

INTRODUCTION

1. The Third and Fourth Respondents file these concise heads of argument pursuant to the filing of their answering papers after having been joined to the Applicant's application for the review and setting aside of various provisions of the Mining Charter. The replying affidavits by the Applicant ("the Council") and the First Respondent ("the Minister") have also been taken into consideration.

2. Whilst the Third and Fourth Respondent agree that the Mining Charter is a binding instrument, it is submitted that the present iteration of the Mining Charter stands to

be reviewed and set aside. The grounds of review which we propose however, are different to that as set out by the Applicant.

3. Much of the arguments and points between the Applicant and the First Respondent has been thoroughly canvassed in these parties' heads of argument prepared for the initial hearing of the matter before the Third and Fourth Respondents were joined. There is a great deal of overlap between the points raised by both the Minister and the Council, which are agreed upon by the Third and Fourth Respondent. As such, we will not be elaborating on these points save where there is a divergent position.

4. Having been joined as Respondents to this matter by the above Honourable Court, Third & Fourth Respondent abide by the above Honourable Court's decision.

5. The positions and submissions made by the Council and the Minister regarding the contents of the answering affidavit, particularly in relation to the relevance and admissibility of the publicly available and reliable annexed reports and journal articles, are noted. It is maintained that the question of the relevance of the content of our affidavits and annexures is for the Honourable Court to determine and decide upon. For the convenience of the Court and learned colleagues, a schedule setting out the exact page numbers for the particularly pertinent information is annexed to these heads of argument. Further submissions regarding the contents of the affidavit, the reports, and the articles, will be made at the hearing of the matter.

6. In addition, we note the above Honourable Court's position in paragraph 2 of its' revised judgment dated 30 June 2020 in this same matter:

> *"A key issue in the 2017 case and in this case too, is whether the Charter is law or policy. The issue has been pronounced upon by this Court in the 2017 matter. The 2017 matter involved the same parties. Other issues relating to specific clauses in the two Charters have also been pronounced upon by this Court in the 2017 matter. Nevertheless, the applicant deemed it appropriate to re-raise the same issues before this Court, notwithstanding the fact that they have already been pronounced upon and are presently the subject of an appeal before the SCA.[1]"*

7. For the aforementioned reason, we will not be making submissions as to the legal or binding nature of the Charter or the Minister's powers in terms of section 100(2) of the Mineral And Petroleum Resources Development Act[2] (MPRDA) as we are at *idem* with the Minister's submissions - that the Minister is empowered to create the instrument which will facilitate the transformative objectives of the Constitution, the MPRDA, and the Mining profession, and that such instrument, being the Charter *is* binding in principle. Any suggestion that the Charter is not, in principle, binding on parties, we submit, defeats the very purpose for which it has been developed.

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[1] *Minerals Council South Africa v Minister of Mineral Resources and Another* (20341/19) [2020] ZAGPJHC 171 (30 June 2020) at para 2.
[2] Mineral And Petroleum Resources Development Act No. 28 Of 2002.

8. The main submissions and contributions of the Third and Fourth Respondent to this application therefore focus on the meaningful participation of communities in the development of legally binding instruments which apply to them.

THE MEANINGFUL PARTICIPATION OF COMMUNITIES

"Meaningful participation must both through process and outcome, seek to legitimise process and ensure that needs are understood and addressed as between all stakeholders creating accessible open, representative and inclusive platforms through which consultation occurs for impact driven outcomes. Meaningful consultation should not be confined to a tick-box exercise.[3]"

9. As stated in the Third & Fourth Respondents affidavit, large scale mining and its commercial success come at a great human and environmental cost, and have been achieved through the gross exploitation of black people. This exploitation is evident in the dispossession of land, employment in harsh working conditions, and the systematic neglect of mining affected communities which are void of any ownership, profits or benefits. [4]

10. Transformative interventions and the meaningful inclusion of mining affected communities therefore requires immediate and intentional action in order to radically change the status quo. Moreover, the neglect and exclusion of mining-affected

[3] South African Human Rights Commission Report *National Hearing on the Underlying Socio-Economic Challenges in Mining Affected Communities in South Africa* at p.63.
[4] Third and Fourth Respondent's Answering Affidavit (AA) at para 39, p.15 / 001-2502

communities has contributed significantly to the present reality of intense poverty and environmental injustice. The discord between the two - the exploitative history of mining and the startling failure of industry to transform and change these realities - speaks volumes on the necessity of an inclusive, binding, and enforceable Mining Charter.

11. The MPRDA provides for the consultation of affected persons in several sections:

11.1. section 10[5] (where an application for prospecting right, mining right, or mining permit has been accepted),

11.2. section 22(4)(b)[6] in the acceptance of an application for a mining right;

11.3. section 27(5)(b)[7] in applications for, issuing and duration of mining permit;

12. The 2018 Mining Charter also requires the consultation with communities and affected persons in the following sections :

[5] **10. Consultation with interested and affected parties**.—(1) Within 14 days after accepting an application lodged in terms of section 16, 22 or 27, the Regional Manager must in the prescribed manner— (a) make known that an application for a prospecting right, mining right or mining permit has been accepted in respect of the land in question; and [Para. (a) substituted by s. 7 of Act No. 49 of 2008.] (b) call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice. (2) If a person objects to the granting of a prospecting right, mining right or mining permit, the Regional Manager must refer the objection to the Regional Mining Development and Environmental Committee to consider the objections and to advise the Minister thereon.

[6] **22. Application for mining right.:** 22(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing— (a) to conduct an environmental impact assessment and submit an environmental management programme for approval in terms of section 39; and (b) to notify and consult with interested and affected parties within 180 days from the date of the notice.

[7] **A mining permit may only be issued if— (5)** If the Regional Manager accepts the application, the Regional Manager must within 14 days of the receipt of the application, notify the applicant in writing, to— (a) consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports.

12.1. Section 2.1.4.1.4: A mining right holder must, in consultation with relevant municipalities, host communities, traditional authorities and affected stakeholders; identify host community development needs;

12.2. Section 2.5.1: 1 Therefore, a mining right holder must, in consultation with relevant municipalities, mine communities, traditional authorities and affected stakeholders, identify developmental priorities of mine communities.

13. What the Third and Fourth Respondents raise in issue, is the ironic fact that whilst the Mining Charter itself makes provision for meaningful consultation with community stakeholders, the very process which resulted in the 2018 Mining Charter was left significantly wanting of this community consultation and a recognition of the invaluable contribution, role, and footing which communities have with regards to mining.

14. As is further submitted in the Third and Fourth Respondent's affidavit, the key mechanism through which the Mining Charter's transformative objectives can be actually and meaningfully achieved is through meaningful and direct public participation of communities. Meaningful participation of communities in decisions relating to them, also serves to create an environment of stability which the Applicant so emphatically seeks. Any iteration however, of a Charter which has failed to

meaningfully include such communities in its development, is simply, and from the outset, a flawed, cosmetic, arbitrary, and superficial document.[8]

15. To the extent that it is suggested that it is improper or unusual to have provided the above Honourable Court with additional grounds for the review of the Charter over and above those found in the Applicant's amended Notice of Motion, it is submitted that the submissions and arguments made in the answering affidavit are not new to the parties concerned, neither are these submissions inconsistent or prejudicial. At every litigious and consultative opportunity afforded, as demonstrated by the extensive annexures detailing the various meetings, the Third and Fourth Respondents have consistently raised the same issue, and given the same arguments and submissions before the relevant parties. These submissions focus on the meaningful participation of communities in relation to the development of the legally binding instruments which apply to and affect them.

16. It is submitted that the Third and Fourth Respondents have, through the submissions in the affidavits, attempted to provide to both the Honourable Court, and the Minister, with both a legal and practical position: If anything, the Third and Fourth Respondents' submissions should demonstrate that the pivotal nature and importance of the Mining Charter requires meticulous consideration. The Third and Fourth Respondent's submissions demonstrate an opportunity to resolve the

[8] AA Para 43, p.16 / 001-2503

multitude of different cases pertaining to the status, effect, and legality of the 2018 Mining Charter.

17. It is submitted that the Third and Fourth Applicant's submissions allow for the Charter to be reviewed, redeveloped, and improved upon in a complete sense, rather than in a piecemeal fashion. It is submitted that it would be neither in the interests of justice, nor in the interests of constrained legal resources to approach Courts on multiple occasions for successive reviews of the Charter on different bases.

18. Furthermore, should *only* the Applicant's grounds for review be considered, then it would still leave all parties concerned in a position where the Charter remains reviewable on the basis that it is disconnected from the primary purpose for which it was developed, and *another* review application might then need to be brought.

19. Whilst the accuracy and applicability of the Mining Charter is paramount to the development and transformation of Communities and the country as a whole, and obviously, parties must approach Courts where necessary and as is their right; it is feared that successive reviews and applications will have the consequence of significantly delaying this much-needed transformation and development; creating an unstable and unreliable environment, both in terms of 'policy' and in terms of 'practice'. The *"framework for targets and time table for effecting the entry into and*

active participation of historically disadvantaged South Africans into the mining industry[9]*"* would be significantly delayed.

20. Mining-affected community organisations do not have the same resources to repeatedly approach Courts as the Council does. As such, any opportunity, such as this one where the Third and Fourth Respondents have been joined into an existing argument, will be taken in order to give effect to communities' rights of access to Courts and to reiterate a consistent position and interest, especially where such interest has already been recognised by the Courts.

21. The Third and Fourth Applicant seek the review of the Mining Charter on the basis that :

    21.1. offends the principles of legality, in that, it is not rationally related to the purpose for which it was created, and as such, we submit the Charter is inherently ineffective, and arbitrary,

    21.2. Its promulgation was fact procedurally unfair as per section 6 (2)(c) of the Promotion of Administrative Justice Act ("PAJA"), as meaningful consultation with communities did not take place.

    21.3. The Minister failed to take into account the extensive and invaluable contributions of communities as key stakeholders) as per section 6 (2)(e)(iii) of PAJA, thereby failing to take into account relevant considerations

[9] Section 100, Transformation of minerals industry, MPRDA

21.4. The current iteration is not rationally connected to the purpose for which it was taken as per section 6 (2)(f)(ii)(aa) of PAJA,

21.5. the current iteration of the Charter is inherently arbitrary and stands to be set aside and reviewed in terms of section 6 (2)(e)(vi) of PAJA.

MEANINGFUL PARTICIPATION

22. As observed by the South African Human Rights Commission:

> "*Our Courts have time and again expanded the obligation to consult by requiring that consultation must be meaningful, particularly where rights are potentially adversely impacted. The potential for impacts to be acutely adverse and enduring in societies typified by marked and extreme imbalances such as ours mean that both at the level of policy and at the level of practise, meaningful, widespread, inclusive and sustained consultation is a non-negotiable condition for positive impact to be achieved*[10]"

23. Meaningful participation and consultation in the formulation of laws or instruments which bind and apply to populations, are a key component of any democracy. This principle has been confirmed in numerous judgments of various Courts in relation to multiple subjects.

24. The Honourable Court in the matter of *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*[11] states that:

[10] South African Human Rights Commission Report on the National Hearing on the Underlying Socio-Economic Challenges in Mining Affected Communities in South Africa at p.70.

[11] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (4) SA 113 (CC).

'[63] These different notice and consultation requirements are indicative of a serious concern for the rights and interests of landowners and lawful occupiers in the process of granting prospecting rights, It is not difficult to see why: the granting and execution of a prospecting right represents a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen. This is so irrespective of whether one regards a landowner's right as ownership of its surface and what is beneath it "in all the fullness that the common law allows", or as use only of its surface, if what lies below does not belong to the landowner but somehow resides in the custody of the state.'

[64] The purpose of the notification and subsequent consultation must thus be related to the impact that the granting of a prospecting right will have on the landowner or lawful occupier.

[65] One of the purposes of consultation with the landowner must surely be to see whether some accommodation is possible between the applicant for a prospecting right and the landowner insofar as the interference with the landowner's rights to use the property is concerned….Of course the Act does not impose agreement on these issues as a requirement for granting the prospecting right, but that does not mean that consultation under the Act's provisions does not require engaging in good faith to attempt to reach accommodation in that regard.

[66] The consultation process and its result is an integral part of the fairness process because the decision cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render the grant of the application procedurally fair."

25. It is further submitted that having free access to all relevant information, prior to engaging in the consultative process, is a fundamental element of being able to meaningfully consult. Put differently, prior access to relevant information facilitates adequate and meaningful consultation[12]. A central component of consultation is to provide landowners, communities, or occupiers with the necessary information on *everything* that is to be done, so that they can make free, informed, and independent decisions in relation to the representations to be made, and therefore meaningfully consult in the decisions affecting them[13].

26. The Minister contends that consultation processes have in fact taken place, and this may be cosmetically or superficially true. It is however submitted that if one takes into consideration the proportion to which Mining Affected Communities are, in fact, *affected*, compared to the proportion and degree to which the Third and Fourth Respondent have been, on an equal footing, included in consultations and the formulation of the Charter; it is submitted that it will be found that the ratio is wholly

[12] *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* (96628/2015) [2020] ZAGPPHC 485; [2020] 4 All SA 374 (GP); 2021 (1) SA 110 (GP) (11 September 2020) at para 67.
[13] AA at para 47.

disproportionate, and inversely so, thereby rendering the consultation inadequate. It is reiterated that meaningful consultation has not occurred.

27. As the Court held in the critical decision of *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others:*

> "*It is well documented that customary communities such as the applicants, tend to suffer disproportionately from the impacts of mining activities as they are directly affected by the environmental pollution, air borne diseases, loss of their farm land and grazing land, forced displacement and the loss of community amongst other things… Whilst recognising that mining can provide benefits to communities, the Foundation tells the court that, in their experience and in light of various studies in respect of mining on communities, communities are vulnerable to grievous harm that often outweighs any gains. The Foundation is an independent non-governmental organisation established to promote ethical corporate social responsibility and socially responsible investment and, in doing so, they are mandated to monitor the practices of multinational corporations to ensure that they respect human rights, protect the environment and generally to ensure that they conduct their businesses in a manner where profit is not made at the expense of the poor and the marginalised. For this reason, they hold the view that communities should be empowered to determine whether mining should take place on their land. To this extent the Foundation associates itself with the international*

movement to require free, prior and informed consent before mining activities may occur on community land[14]."

28. One can further see the manifestations of the lack of meaningful community consultation through the *absence* of certain glaringly necessary and obvious provisions in the Mining Charter – for example, as stated in the affidavits of both the Third and the Fourth Respondent, the Mining Charter fails to include a requirement for the representation of women and other marginalised groups in processes and structures pertaining to the management of the equity or equity equivalent benefit.

29. As the Court further affirmed in the aforementioned judgment, *"Meaningful consultation entails discussion of ideas on an equal footing, considering the advantages and disadvantages of each course and making concessions where necessary.[15]"*

30. We reiterate that the success of this Charter requires a recognition and practical understanding, that this "chair" has more than just the two legs of the Council and the Minister. The very essence of the Mining Charter and its transformative objectives dictates that mining-affected communities be recognised and treated as core stakeholders and that they be allowed to meaningfully participate in mining decisions and activities in such capacity.

[14] Baleni and Others v Minister of Mineral Resources and Others (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP) (22 November 2018) at para 19.
[15] Ibid at para 89.

COSTS

31. In the event that this application is unsuccessful, we submit that no costs order should be made against Third and Fourth Respondent. The Third and Fourth Respondent were joined by the above Honourable Court on the basis that we have a direct and substantial interest, and on the basis that those interests would be significantly affected by any decision made. We have, in the circumstances, attempted to provide the Honourable Court with those contributions and perspectives, which are genuine, and not frivlous. We further submit that the Third and Fourth Respondent should be protected by the rule established in the matter of *Biowatch Trust v Registrar Genetic Resources and Others*.[16]

32. The trite principle laid out by the Constitutional Court in the Biowatch case is that:

"In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many Courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights

[16] Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC).

of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the State that bears primary responsibility for ensuring that both the law and State conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door."[17]

CONCLUSION

33. Effective community consultation and participation turns the Charter from an abstract theoretical document, into a relevant and applicable framework, pertinent to the Communities' actual experiences. It provides certainty and facilitates a stable framework and environment for all parties involved.

34. The Third and Fourth Respondent pray for and reiterate the need for the current iteration of the Mining Charter to be reviewed and set aside, and for the development of the Mining Charter be started afresh with a specific directive on meaningful consultation and participation of relevant stakeholders, interested parties, and Mining Affected communities. This is sought in order for more effective and

[17] Op Cit 16 at para 23.

community consultation to take place, thereby giving full effect to purpose and ambit of the Mining Charter.

35. The Third and Fourth Respondent further ask this Court to find that that meaningful participation requires the inclusion of all relevant community and other stakeholders in any multi-stakeholder negotiating fora utilised or specifically created for the purposes of formulating any iteration of the Mining Charter.

Adv. A. M Rawhani-Mosalakae

5 February 2021

Centre for Applied Legal Studies – In-house Counsel