

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 20341/2019

In the matter between:

MINERALS COUNCIL SOUTH AFRICA

APPLICANT

and

MINISTER OF MINERAL RESOURCES

FIRST RESPONDENT

**SOUTH AFRICAN DIAMOND
AND PRECIOUS METALS REGULATOR**

SECOND RESPONDENT

MINING AFFECTED COMMUNITIES UNION IN AFRICA

THIRD RESPONDENT

WOMAN AFFECTED BY MINING IN ACTION

FOURTH RESPONDENT

**MINING AND ENVIROMENTAL JUSTICE
COMMUNITY NETWORK OF SOUTH SAFRICA**

FIFTH RESPONDENT

BAKGATLA BA SEFIKILE COMMUNITY

SIXTH RESPONDENT

LESETHLENG COMMUNITY

SEVENTH RESPONDENT

BABINA PHUTI BA GA-MAKOLA COMMUNITY

EIGHTH RESPONDENT

KGATLU COMMUNITY

NINTH RESPONDENT

**THE ASSOCIATION OF MINEOWRKERS
AND CONSTRUCTION UNION**

TENTH RESPONDENT

UNITED ASSOCIATION OF SOUTH AFRICA

ELEVENTH RESPONDENT

NATIONAL UNION OF MINeworkERS

TWELFTH RESPONDENT

SOLIDARITY TRADE UNION

THIRTEENTH RESPONDENT

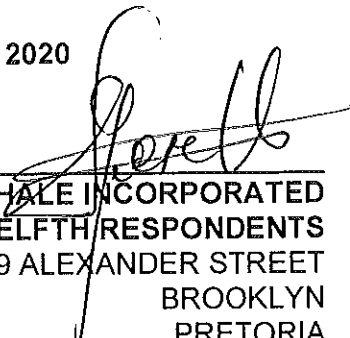
**SOUTH AFRICAN MINING
DVELOPMENT ASSOCIATION**

FOURTEENTH RESPONDENT

FILING NOTICE: 12TH RESPONDENT'S ANSWERING AFFIDAVIT

BE PLEASED TO TAKE NOTICE that the Twelfth Respondent hereby files its Answering Affidavit.

SIGNED AT PRETORIA ON THE 6TH DAY OF NOVEMBER 2020


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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 20341/2019

In the matter between:

MINERALS COUNCIL SOUTH AFRICA

Applicant

And

MINISTER OF MINERAL RESOURCES
SOUTH AFRICAN DIAMOND AND PRECIOUS
METALS REGULATOR

First Respondent
Second Respondent

MINING AFFECTED COMMUNITIES UNION
IN ACTION

Third Respondent

WOMEN AFFECTED BY MINING IN ACTION
MINING AND ENVIRONMENTAL JUSTICE
COMMUNITY NETWORK OF SOUTH AFRICA
BAKGATLA BA SEFIKILE COMMUNITY
LESETHLENG COMMUNITY
BABINA PHUTI BA GA – MAKOLA
COMMUNITY

Fourth Respondent
Fifth Respondent

KGATLU COMMUNITY
THE ASSOCIATION OF MINEWORKERS
AND CONSTRUCTION UNION

Sixth Respondent
Seventh Respondent
Eighth Respondent

UNITED ASSOCIATION OF SOUTH AFRICA
NATIONAL UNION OF MINEWORKERS
SOLIDARITY TRADE UNION
SOUTH AFRICAN MINING DEVELOPMENT
ASSOCIATION

Ninth Respondent
Tenth Respondent

Eleventh Respondent
Twelfth Respondent
Thirteenth Respondent
Fourteenth Respondent

TWELFTH RESPONDENT'S ANSWERING AFFIDAVIT

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les

KOLEKILE DAVID SIPUNZI

Hereby take the oath and state the following:

1.

BACKGROUND:

1.1 I am a major male and General Secretary of the Twelfth Respondent, with main place of business at 7 Rissik Street, Johannesburg, South Africa.

1.2 I have perused the documents filed on record as at the date of this affidavit, liaised with various persons within the twelfth Respondent who has personal knowledge of the matter and I have consulted with the legal representatives for the Twelfth Respondent.

1.3 Having done all the above, the Twelfth Respondent has decided to oppose the relief sought by the Applicant.

1.4 Submissions will be made by the Twelfth Respondent specifically with regards to the legal contention that the Mining Charter is not a binding document, and the subsequent relief enunciated in paragraph 1.4, which seeks to set aside the

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prescribed distributions for BEE shareholding (as referred to in the charter) which reserves 5% shareholding for qualifying employees.

- 1.5 The Twelfth Respondent, having read the papers filed on record, is acting in protection of the interests of its members, which interest will be discussed below. The Twelfth Respondent is in agreement with the First and Second Respondents' submissions in opposition to the relief sought by the Applicant, and files this affidavit to place on record which arguments will be forwarded at the hearing of this matter by its legal team, to allow the Applicant to consider and prepare for such submissions.
- 1.6 As the Twelfth Respondent does not wish to burden the above Court by merely repeating allegations which have been made on other affidavits, the submissions in this affidavit will be confined to paragraphs 41 to 85 (excluding paragraphs 63 and 72-74) of the Founding Affidavit, and paragraphs 114 to 115.
- 1.7 In so far as issues raised in the Founding Affidavit are not addressed in this answer, the Applicant can be taken to be in alignment with the answering papers filed by the First and Second Respondents.

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1.8 This affidavit is filed specifically to place submissions on record which the Twelfth Respondent is of the view was not clearly, or unambiguously made out in this matter up to this point.

1.9 A short summary of the Twelfth Respondent's interest in this matter will be given below. The summary will also contextualize the submissions made by the Twelfth Respondent.

2.

THE INTEREST OF THE NATIONAL UNION OF MINeworkERS:

2.1 The National Union of Mineworkers (NUM) was founded in 1982 and operates across 11 regions nationally which regions are named Carletonville, the Eastern Cape, Free State, Highveld, Kwazulu-Natal, Kimberley, Matlosana, North East, PWV, Rustenburg and the Western Cape.

2.2 The NUM has more than 150 000 members employed mainly in the mining, but also the energy and construction sectors all over the Country.

2.3 The members of the NUM are obviously affected by the Mining Charter in so far as it applies to them as employees at various mines nationally, but also in so far as NUM members are

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employed in Companies which are procured to deliver services in the mining sector.

- 2.4 The NUM therefore represents a significant interest group within the mining sector and acts in its representative capacity to protect the interests of its members.
- 2.5 The mining sector, unlike some other sectors in the economy, is not accessible. There are significant barriers to entry whether that be as a business owner, or an employee.
- 2.6 There is only a limited amount of minerals in the country, and their mining and exploitation is capital intensive. In South Africa, the exploitation of the minerals of the Country has, in the past, been geared solely toward benefiting a select few.
- 2.7 This point is not controversial and has been comprehensively made in these proceedings up to this point.
- 2.8 In addition to the fact that the minerals of this Country have been exploited to the benefit of a select few, the predominantly black African workforce has been shamelessly exploited in the process, and the effects of this exploitation has had devastating and long lasting consequences which are as tangible as ever today as it was 38 years ago when the NUM was founded.

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- 2.9 Since the establishment of the first mine in South Africa, a copper mine which was established near Springbok in the Northern Cape in 1852, the Governments of the day have exploited the black majority who had no political rights and were therefore marginalized in society.
- 2.10 The mining companies throughout the ages, many of whom are members of the Applicant, have benefited from the exploitation of the black majority throughout.
- 2.11 We are in a unique position in that the role players and the actors who were present during these occurrences in the 1890's, and the 1920's or the 1960's for that matter, are still present and mining today to a significant extent, whether it be the majority black workforce, or the Applicant, which was essentially established in 1889.
- 2.12 the *Mineral and Petroleum Resources Development Act 28 of 2002 (the Act)*, was enacted with the abovementioned background in mind, and it is exactly for this reason that the Act states in the preamble (amongst other things) that:
- 2.12.1 Minerals and Petroleum are **non-renewable** natural resources.

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2.12.2 That the State is committed to bring about equitable access to South Africa's mineral and petroleum resources, and;

2.12.3 That the State has a Constitutional obligation to take legislative and other measures to redress the results of past discrimination.

2.13 The purpose of the Act is therefore to undo the racist and sexist legacy of the Mining Industry which has been established and entrenched over the course of the last 170 years, within the limited time available to the Country given the fact that its resources are non-renewable.

2.14 This fact is highlighted by the fact that, until 2006, South Africa was the World's largest gold producer, and in 1970, two-thirds of the World's Gold was produced in South Africa. As at 2018, South Africa is only the World's ninth biggest gold producer and is producing only 13% of what it produced at its peak (taken from an article by Krishan Gopaul for the World Gold Council, accessible at the Goldhub blog at an article posted 18 June

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2019, South African production: Important but no longer globally significant.)¹

- 2.15 Industries such as the Coal Industry could also suffer in the coming years due to the push for more reliance on renewable energy.
- 2.16 It is therefore no coincidence or surprise that the Act recognizes that Minerals and Petroleum are non-renewable resources, and as a result, there is an expiration date attached to their continuing (significant) influence on our society. As an industry, the Mining Industry has a massive amount of work to do in a short time to establish a positive legacy.
- 2.17 As a result, Parliamentary processes cannot adequately address the need for noteworthy and significant transformation in the mining industry. Parliament is too far removed from the Industry to constantly monitor and liaise with it, and to impose

¹ We appreciate that the Applicant may take issue with this as a factual averment, the point that the Twelfth Respondent wishes to make is that minerals are non-renewable and we do not have unlimited time for the Country to benefit from their mining. We believe this to be an uncontroversial point.

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appropriate measures to ensure that, in the end (by end, we mean the total time that the mining industry will still be a significant player in the South African economy) the limited mineral resources of the Country benefited all South Africans.

2.18 For this reason, NUM contends the State was given custodianship over the Countries mineral resources by the Legislature, to enable the executive to take definitive and ongoing action ensuring the abovementioned outcome.

2.19 This fact, we believe, is significantly underplayed by the Applicant in their interpretation of the Act. This is in fact the central issue at play.

2.20 Having set the background against which we believe the Act was enacted, I will now proceed to deal with the relevant parts of the Applicants submissions which we have indicated we will respond to.

3.

AD PARAGRAPH 41 to 46 OF THE FOUNDING AFFIDAVIT:

3.1 The allegations in these paragraphs are denied.

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- 3.2 Section 2 and 3 of the Act are critically important when considering the nature of the Charter as enunciated in section 100(2) of the Act.
- 3.3 Section 2 of the Act sets out the objects of the Act, and section 3 of the Act must be taken to have been enacted to realize these objects.
- 3.4 The concept of Custodianship over the Mineral Resources of the Country, as stated in section 3 of the Act, was therefore enacted to ensure the attainment of the objects as listed in section 2.
- 3.5 The concept of Custodianship is defined by section 3(2)(a) and (b) of the Act, and section 3(2)(a) lists what the Twelfth Respondent will argue are "*competencies*" of Custodianship. These include the discretion to grant, issue, refuse, control, administer and manage any mining right.
- 3.6 The Twelfth Respondent will argue that sections 23, 25 and 28 as referred to by the Applicants embody the right of the state to "*grant, issue or refuse*" any mining right, but that these sections are primarily not concerned with the competencies of the executive to "*control*", "*administer*" or "*manage*" a mining right.

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- 3.7 The Twelfth Respondent will argue that the competencies of the State represented by the executive through the Minister, to control or administer a mining right is, amongst other sections, embodied by section 100 of the Act.
- 3.8 As a result, the main contention of the Twelfth Respondent is that the concept of custodianship is central to the interpretive process in establishing the nature of the provisions of section 100.

4.

AD PARAGRAPH 47 to 50 OF THE FOUNDING AFFIDAVIT:

- 4.1 The contentions in these paragraphs will be opposed by the Twelfth Respondent.
- 4.2 The Twelfth Respondent is of the view that the Charter, when properly interpreted in its context, is law, because:
- 4.2.1 Section 100 appears to envisage "rules" of general application that will apply to a community within society, in this case, the mining industry.
- 4.2.2 Section 100 does not envisage a document concerned with individual disputes, but a document

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concerned with implementing social policies intended to advance the public interest.

4.2.3 Section 100 appears to envisage a document that will operate prospectively.

4.2.4 Section 100 appears to envisage a document that will remain in force for an indefinite period.

4.2.5 The Charter has always been published after extensive consultation with stakeholders.

4.2.6 The Charter as described by section 100 requires, and has in the past required, further administrative action for its implementation.

4.3 Parliament is not the appropriate forum to perform the functions set out in section 100, since section 100 on its plain interpretation envisages a document which will serve a transformative purpose, which will require more regular revision, and consultation, than normal Acts of Parliament.

4.4 This is underscored by the fact that the Charter aims to ensure the achievement of Government's Constitutional objectives, which are not static.

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5.

AD PARAGRAPH 51 to 57 OF THE FOUNDING AFFIDAVIT:

- 5.1 The contentions made in these paragraphs are denied and the Twelfth Respondent will argue against it.
- 5.2 The twelfth Respondent will argue that the function of section 100 is constrained by section 2 of the Act, and the definition of "*Broad Based Economic Empowerment*" in section 1 of the Act.
- 5.3 The Twelfth Respondent therefore disagrees with the Applicant that section 100 as a delegation of power would violate the doctrine of separation of powers.
- 5.4 The concept of custodianship and the objects of the Act, once more, is still especially important in this regard, and the Constitutional Purpose of section 100, specifically with regards to section 9(2) of the Constitution.
- 5.5 The Applicant themselves have benefited from the delegation of legislative authority to the First Respondent, as they have been able to liaise and consult with the Minister while he was compiling the charter, with all other stakeholders, to an extent which they would never have been able to do with Parliament directly. It is submitted that this can be said of all stakeholders.

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5.6 Parliament is submitted to be a less appropriate forum in this particular instance to facilitate the development of the Charter, since Parliament does not concern itself solely with the needs of the Mineral and Petroleum industry, and since, as has been mentioned above, Minerals and Petroleum are non-renewable resources and time is of the essence in establishment and enforcement of the Charter.

6.

AD PARAGRAPH 58 to 62 OF THE FOUNDING AFFIDAVIT:

6.1 The Twelfth Respondent denies these assertions:

6.2 The Twelfth Respondent will argue that sections 22, 23 and item 7 of Schedule II prescribe and clarify the Minister's right to "grant, issue or refuse" a mining right, whereas section 100 clarifies the Minister's right to "control" and "administer" such a right.

6.3 When properly interpreted, the Act envisages the achievement of the section 2 objects of the Act through an ongoing process, and not through singular decisions made at the issuing and renewing of rights.

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6.4 That is why section 25(2)(h) requires the mining rights holder to report on its compliance with the Charter contemplated in section 100.

6.5 There is no sense in the rights holder reporting on compliance with the Charter if compliance was never contemplated by the Act as being necessary.

7.

AD PARAGRAPH 64 to 66:

7.1 These allegations are differed with for the reasons given above.

7.2 Furthermore, apart from the Charter, the Minister is also given powers to control or administer the mining right at (for example) sections 51 and 52, where the Minister can order corrective measures if a mineral is not optimally mined, or in the event of contemplated retrenchments.

7.3 The whole structure of the Act appears to envisage a scenario where the Minister retains custodianship over the Minerals and the right to control, manage or administer the mineral right, even after the granting of a right.

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7.4 A mining right is therefore described as a *limited* real right, as opposed to a real right in the normal sense of the word.

8.

AD PARAGRAPH 67 to 70:

8.1 In respect of these assertions, the Twelfth Respondent agrees with the First and Second Respondents.

9.

AD PARAGRAPH 71:

9.1 For the reasons given above, these assertions will be argued against by the Twelfth Respondent.

10.

AD PARAGRAPH 75 to 85:

10.1 The Twelfth Respondent agrees with the submissions of the First and Second Respondent in this regard. Only the following aspect can be added.

10.2 The Charter is stated in the Act to be enacted to "*ensure the attainment of Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution.*"

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- 10.3 Any measure that aims to (1) ensure an outcome, must be binding, and which seeks to ensure the (2) attainment of Governments objectives, must operate on a continuous basis.

11.

AD PARAGRAPH 114 TO 115:

- 11.1 The twelfth Respondent agrees with the First and Second Respondents submissions in this regard.
- 11.2 Specifically, with regards to the shareholding for employees as enunciated in the current charter, this provision will go a long way towards empowering the members of the Twelfth Respondent.
- 11.3 It will improve transparency, which is much needed at this stage, by affording the Employees in the mining sector an opportunity to Act as shareholders.
- 11.4 All the above factors fall within the objects of the Charter and is submitted to be appropriate.

12.

CONCLUSION:

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- 12.1 An attempt has been made to keep these papers as brief as possible, given the status of the matter at this stage.
- 12.2 The Twelfth Respondent's legal representatives will endeavour to do the same in argument.
- 12.3 Aside from what has been said up to this point by the First and Second Respondent's, the Twelfth Respondent wishes to stress that:
- 12.3.1 The competencies or rights that encompass custodianship is vital when interpreting how the provisions of the Act fit into each other.
- 12.3.2 Government's Constitutional objectives, and the objectives of the Act are not static, and Minerals and Petroleum are non-renewable resources.
- 12.3.3 As a result of the above fact, there is a limited amount of time to effect meaningful transformation in the industry, and custodianship was given over the mineral resources of the Republic to the State.
- 12.3.4 The Charter envisaged in section 100(2) directs how the control, administrative and managing power of

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the Minister over the Mineral resources must be used to achieve the goals of section 2 of the Act.

12.3.5 Sections 22 to 24 of the Act are mainly concerned with the Minister's ability to grant, refuse and issue a mining right, and do therefore not have the bearing on the interpretation of section 100 that the Applicant says it does.

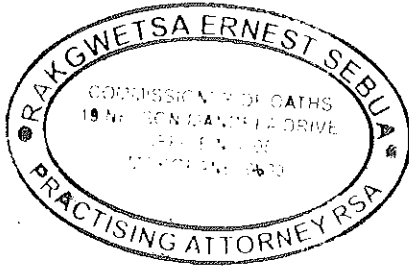
12.3.6 The Twelfth Respondent therefore contends that the Charter in enunciated in section 100 is binding, and the relief sought in this matter by the Applicant not competent.

12.3.7 As the Minister is better situated to develop and implement the Charter than Parliament, and since the ambit of section 100 is constrained by the definition of Broad Based Economic Empowerment in section 1 of the Act, as well as the objects of the Act stated at section 2, there is no reason to interpret the Charter as merely a policy document, since its wording, properly read in context, does not violate the doctrine of separation of powers.

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COMMISSIONER OF OATHS



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