REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

Date: 30 June 2020 Signature

CASE NO: 20341/19
(43806/19)

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

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JUDGMENT

The Court

Introduction and a telescopic view of the case

[1] On 27 September 2018 the first respondent, the Minister of Mineral Resources, acting in terms of powers conferred upon his office by s 100(2) of Mineral and

Petroleum Resources Development Act[1] (the MPRDA) published a *Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry*[2] (the 2018 Charter). The 2018 Charter is the last in a series of Charters promulgated since the enactment of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution) and the MPRDA, with the original Charter being promulgated on 13 August 2004. One of these Charters, promulgated on 15 June 2017[3] (the 2017 Charter), is particularly relevant to the issues raised in this matter.

[2] The applicant, the Minerals Council South Africa, is aggrieved by various clauses in the 2018 Charter. Accordingly, it has brought this application wherein it seeks to review and set aside the said clauses (the review application). Some of these clauses display similarities to ones contained in the 2017 Charter. The applicant was also aggrieved by those clauses. It has successfully challenged those clauses in a matter that was before this Court[4] and which was presided over by a differently constituted bench (the 2017 matter/the 2017 case). That matter is now pending on appeal before the Supreme Court of Appeal (the SCA case). 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

[1] Act 28 of 2002.
[2] Government Notice 1002, Government Gazette No. 41934, dated 27 September 2018, and amended by the Amendment in Government Notice 1421, Government Gazette No. 42130, dated 20 December 2018.
[3] This Charter is titled "*Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry*" and it was promulgated on 15 June 2017 by publication in Government Notice 581, Government Gazette No 40923. Both attend to the same subject matter and are both promulgated in terms of s 100(2) of the MPRDA.
[4] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others* 2018 (4) SA 581 (GP)

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. Some[5] of the grounds that the applicant relies upon for the relief it seeks in this matter are identical to those it relied upon in the 2017 matter. There, as here, it relied upon the provisions in the *Promotion of Administrative Justice Act,*[6] and in the alternative on the principle of legality enshrined in s 1(c) of the Constitution.[7] The question as to whether this Court should pronounce on the same issues between the same parties that are presently before the SCA was raised *mero motu* by the Court. However, for reasons that will become obvious in due course, it is not necessary to deal definitely with the question.

[3] The respondents oppose the relief sought. They contend that there is no merit in the complaint of the applicant. But, they say, there is another serious problem with the application. It is that the applicant has failed to join important, necessary and relevant parties to the matter, and that until these parties have been joined the merits of the applicant's complaint should not be adjudicated at all, alternatively it should be delayed until those parties have been properly joined to the proceedings. The contention was pertinently raised in the answering affidavit. In reply the applicant disagreed with the respondents' contention that the application should founder for failure to join any party. In its view all the parties necessary, relevant and holding an interest in the matter have been brought to Court. It accordingly asked for the non-joinder challenge of the respondents to be dismissed.

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[5] The applicant claims that it is only some of the grounds that are the same. However, when asked which grounds were different, it was unable to elucidate.
[6] Act. 3 of 2000.
[7] Noting that South Africa constitutes a single, sovereign democratic state, s 1(c) of the Constitution prescribes that "*the supremacy of the Constitution and the rule of law*" be one of its founding values.

[4] However, a while later the applicant reconsidered its stance. It brought a conditional application wherein it requested this Court to give directions as to which parties are to be joined and how pleadings should be served on those parties. The request is conditional upon this Court being persuaded to agree with the respondents that certain parties have to be joined in the matter. It elected not to file a founding affidavit in support of this application. Instead, it relied on the contents of its replying affidavit as support for the conditional application. The respondents delivered a lengthy answering affidavit expanding on the factual averments contained in its answer to the review application. The applicant replied thereto. There are therefore two broad issues before this Court: the non-joinder of various parties and the merits of the review application. The conditional application would only be relevant if the respondents succeed on the non-joinder issue. This is so because the applicant remains firm and steadfast in its conviction that the non-joinder complaint lacks all merit and that the counter-application only requires attention if this Court were to find it to be mistaken in that regard. At the hearing both issues (the non-joinder and the merits) were addressed comprehensively with the understanding that, should the Court find merit in the non-joinder point, it would only issue an order consistent with that finding while leaving the determination of the merits of the applicant's case for another day.

[5] Before scrutinising the non-joinder challenge put up by the respondents it is necessary to record that on 27 January 2020 the applicant issued a notice in terms of rule 16A of the Uniform Rules of Court drawing the public's attention to the application. The notice was published on the notice board at court. The notice

informed any party interested in the application that it may "*with the written consent of the parties … be admitted as amicus curiae, upon such terms and conditions as may be agreed upon in writing by the parties*"; alternatively, that party should apply to the Court to be admitted as an *amicus curiae.* In the latter case that party should describe its interest in the proceedings as well as set out "*clearly and succinctly the submissions*" it "*shall advance, … the relevance thereof to*" the proceedings, and "*the reasons for believing that the submissions will assist the Court and are different from the submissions of the other parties*." The applicant relies on the notice as part of its attempt to meet the case of non-joinder raised by the respondents.

The concept of non-joinder in our law

[6] A most helpful judgment on the issue of non-joinder remains the decision of the Appellate Division in *Amalgamated Engineering Union,*[8] for it is a judgment that is comprehensive in scope and penetrating in its analysis. Fagan AJA, extrapolating from the learning in the case of *Bekker*[9] decided in 1844, recorded the two essential principles of our law as being:

> "(1) that a judgment cannot be pleaded as *res judicata* against someone who was not a party to the suit in which it was given, and (2) that the Court should not make an order that may prejudice the rights of parties not before it."[10]

The second principle applies even in a case where the necessary party had an opportunity to intervene prior to the issuance of a judgment, for it is imperative that the Court should "*avoid all possibility of prejudicing parties not before the Court.*"[11]

[8] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A.D.).
[9] *Bekker v Meyring, Bekker's Executor* (1828-1849) (2) Menzies 436.
[10] *Amalgamated Engineering Union*, n 8, at 651.
[11] Id at 653.

This, Fagan AJA demonstrates, was a hallmark of all the decisions in cases where the issue of non-joinder surfaced:

> "Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect the party's interests. There may also, of course, be cases in which the Court can be satisfied with the third party's waiver of his right to be joined, e.g. if the Court is prepared, under all the circumstances of the case, to accept an intimation from him that he disclaims any interest or that he submits to judgment. It must be borne in mind, however, that even on the allegation that a party has waived his rights, that party is entitled to be heard; for he may, if given the opportunity, dispute either the facts which are said to prove his waiver, or the conclusion of law to be drawn from them, or both." [12]

[7] The party that stands to be prejudiced is thus said to have "*a direct and substantial interest*" in the litigation. Essentially our law, in principle, holds that any party which has an interest in a particular matter should be joined in the matter. It should not just be any interest but one that is "*direct and substantial*", which would make it a party necessary for the finalisation of the matter (necessary party). The necessary party would naturally have an interest in the order that the court may make. Should a plaintiff or applicant fail to join a necessary party, the defendant or respondent is entitled to demand the joinder of that party.

[8] There is a concomitant duty on the court to enquire "*whether the order it is asked to make may affect a third party not before the Court, and, if so, whether the Court should make the order without having that third party before it.*"[13] The latter option

[12] Id at 659-660.
[13] *Amalgamated Engineering Union*, n 8, at 649; *Morudi and Others v NC Housing Services and Development Co Limited and Others* 2019 (2) BCLR 261 (CC) at [32].

should not be adopted if the order "*cannot be sustained and carried into execution without necessarily prejudicing the interest of parties who have not had an opportunity of protecting their interest by reason of their not having been made parties to the cause.*"[14] In that case the court would be required to either order such joinder, or be satisfied that the third party had waived its right to be joined.[15] Once that party had waived its right to be joined, it becomes bound by the order the court will make in its absence.

[9] The concept of a direct and substantial interest means "*an interest in the right which is the subject-matter of the litigation*".[16] The direct and substantial interest, in other words, has to be one that gives rise to a legal right. It would therefore have to be a legal interest.[17]

[10] The question whether the potentially affected interest is a direct and substantial one that constitutes a legal interest,[18] needs to be determined on a case and context-specific basis. Particular regard would have to paid to the special characteristics of the case as well as to the impact the relief sought by an applicant would have on the non-joined affected parties.[19] It is therefore important to discern the context within which this litigation is conducted.

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[14] *Bekker*, n 9, at 442, quoted in *Amalgamated Engineering Union*, n 8, at 653.
[15] *United Watch & Diamond Co (Pty) Ltd & Others v Disa Hotels Ltd & Another* 1972 (4) SA 409 (C) at 415E-F; *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) at [11].
[16] *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and Others* 2015 (2) BCLR 182 (CC) paras [186]-[187]; *International Trade Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) paras [11]-[12]; *Absa Bank Ltd v Naude NO* 2016 (6) SA 540 (SCA) par [10].
[17] *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC) at par [56].
[18] *Gordon v Department of Health, Kwa-Zulu Natal* 2008 (6) SA 522 (SCA) at 529C.
[19] *Polokwane Taxi Association v Limpopo Permissions Board and others* (490/2016) ZASCA 44 (30 March 2017) par [15].

Context of the litigation

[11] This Court is seized with an application to review and set aside certain challenged clauses contained in the 2018 Charter, which was developed under the auspices of the first respondent. It is not contested by the applicant that the first respondent was empowered by section 100(2) of the MPRDA to develop the 2018 Charter.

[12] The MPRDA is a specialised piece of legislation. It is one of a series of interventions by the democratic legislature to give effect to the "*commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution.*"[20] Our country, unfortunately, has to contend with a socio-historical legacy left by a racially discriminatory past that produced poverty and inequality on a vast scale. It is a legacy that, according to the Constitution, cannot and should not be evaded. And that is precisely what the MPRDA does not do. It attends to this legacy by aiming to transform the process as well as the manner by which the mineral wealth and resources of the country are exploited; it is directed at transforming access to the mineral wealth and resources of this country in a manner that benefits all its people, especially those that belong to groups that were previously excluded from participating in and benefitting from the exploitation of this mineral wealth. This transformative object of the MPRDA has been aptly captured in the following *dictum* from our apex Court:

> "[2] That legislative intervention was in the form of [the MPRDA]. Its commencement had the effect of freezing the ability to sell, lease or cede unused old order rights until they were converted into prospecting or mining rights with the written consent of the [Minister]. It also had the deliberate and immediate effect of abolishing the entitlement to sterilise mineral rights, otherwise known as the entitlement not to sell or exploit minerals. This ought to come as no surprise in a country with a progressive

[20] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at [262].

> Constitution, a high unemployment rate and a yawning gap between the rich and the poor which could be addressed partly through the optimal exploitation of its rich mineral and petroleum resources, to boost economic growth." [21]

[13] Together with the Preamble, the Objects of the MPRDA establishes a set of principles that are required to guide every decision taken in terms of the MPRDA. It is evident therefrom that the legislature aimed to rectify past economic and socio-political inequalities while providing for the sustainable development of the nation's mineral and petroleum resources and the creation of a mining regime that is internationally competitive and efficient. [22] When required to do so courts are bound to ensure that actions taken in terms of the MPRDA are consonant with these principles.

[14] The Objects of the MPRDA that are most relevant to understanding the context within which this litigation must be considered, are:

i. promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;[23]

ii. substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;[24]

[21] *Agri SA v Minister for Minerals & Energy* 2013 (4) SA 1 (CC) at [2].
[22] *Agri SA*, n 20, at [26]; *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy and Others* 2014 (6) SA 403 (GP) at [57].
[23] MPRDA s 2(c).
[24] MPRDA s 2(d).

iii. promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;[25]

iv. promote employment and advance the social and economic welfare of all South Africans;[26]

v. provide for security of tenure in respect of prospecting, exploration, mining, and production operations;[27] and

vi. ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.[28]

The objective of the transforming the mining sector is candidly laid out in these Objects. The message they convey is clear: while all South Africans should have access to the mineral wealth, there should be substantial and meaningful expansion of opportunities for persons from historically disadvantaged groups to engage in and benefit from the exploitation of this wealth; the manner in which the mineral wealth is exploited must be one that creates and not destroys employment opportunities; and, particular attention should be paid to ensuring that the welfare of the communities living in and around the mining operations is advanced.

[25] MPRDA s 2(e).
[26] MRDA s 2(f).
[27] MPRDA s 2(g).
[28] MPRDA s 2(i).

[15] That these objectives are laudable is doubtless. In fact, in its papers the applicant keenly indicated that it fully appreciates and supports not just these objectives in particular, but the entire transformational project as set out in the MPRDA. However, the respondents in their answer indict it and its members on the charge that they restrict the commitment to transformation largely to the theoretical level, while avoiding carrying it through with practical effort. They enlist the launching of this application as one piece of evidence supporting their charge. For purposes of this judgment the indictment is of no moment. Of importance though is the need to recognise that one way of achieving the transformational objectives is by ensuring that the mining rights granted provide for and promote the transformation of the industry. And in this regard it is imperative to bear in mind that "[l]*arge-scale transformational legislation of this nature presents challenges of a special kind*".[29]

[16] Section 23 of the MPRDA empowers the first respondent to grant a mining right to any person. It also compels the first respondent to grant a mining right if certain conditions are met by the applicant for the mining right and if, *inter alia*, the granting of the right would advance the Objects referred to in s 2(d) and (f)[30] as well as comply with the Charter (which presently is the 2018 Charter) and the prescribed social and labour plan. It is in this vein that the legislature through s 100(2) imposed the following injunction on the first respondent:

> "(a) To ensure the attainment of the Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based

[29] *Agri SA*, n 20 at [91].
[30] See [14]ii and [14]iv above.

> socio-economic empowerment Charter that will set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources.
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> (b) The Charter must set out, amongst others, how the objects referred to in section 2(c), (d), (e), (f) and (i) can be achieved.

[17] It is in this context then that the 2018 Charter, like its predecessors, was born. It is clearly instrumental in pursuing and materialising the transformational objectives of the MPRDA. It is also in this context that the challenge raised by the applicant must be assessed. And similarly so with regard to the point of non-joinder raised by the respondents. However, there is one final element to the context of the litigation, and that is the process followed by the first respondent before finalising and promulgating the 2018 Charter. For our purposes we need to confine the process to that which was followed during the making of the 2017 Charter and which was followed through with the making of the 2018 Charter.

[18] Following the promulgation of the 2017 Charter the applicant launched proceedings in this Court challenging certain of its clauses. During the course of that challenge, certain other parties applied to intervene or join in the proceedings. They are:

i. Mining Affected Communities United in Action (MACUA), Women from Mining Affected Communities United in Action (WAMUA), and Mining Environmental Justice Community Network of South Africa (MEJCON). All three of these groups were represented by the Centre for Legal Studies (CALS) operating from the University of the Witwatersrand. Their complaint was different from that of the applicant. They maintained, *inter alia*, that they were not consulted

by the first respondent when the 2017 Charter was formulated, and this failure on his part was fatal to the process. They were fundamentally interested parties which were endowed with rights in terms of the MPRDA, which rights were affected by the 2017 Charter. Their application to intervene was successful.

ii. Sefikile Community; Lesethleng Community; Babina Phuthi Ba Ga-Makola Community; and Kgatlu Community. They were represented by the Lawyers for Human Rights. They too complained, *inter alia*, that their interests as mining communities were ignored when the 2017 Charter was formulated as they were not consulted during the formulation process. Their joinder application was successful.

[19] During the formulation of the 2018 Charter they were all consulted and their interests were taken into account before the 2018 Charter was finalised and promulgated. For ease of reference these two sets of parties can be referred to as community parties.

[20] The first respondent established a Mining Charter Transformation Team (MCTT), which consisted of officials from his department as well as representatives from organised labour and organised business – referred to as "*social partners*" by the first respondent (the social partner parties). The mandate of the team, it is not disputed, was "*to re-open discussions and engagements on the Mining Charter with a view to develop a Charter that advanced both growth and transformation within the mining sector.*" The applicant was part of the team. The other parties were the Council for Geoscience (CGS), the South African Mining Development Association

(SAMDA), and the trade unions operating in the mining sector, namely, the Association of Mineworkers and Construction Union (AMCU), the National Union of Mineworkers (NUM), Solidarity (Solidarity), and the United Association of South Africa (UASA) (the trade union parties). Collectively they represent most, if not all, the employees employed in the sector. These parties' interests were taken into account during the formulation of the 2018 Charter. At the same time, by virtue of their participation in the MCTT, they played a significant role in its formulation.

The non-joinder point and the conditional application

[21] To recap. The respondents maintain that the parties referred to in [18] and [20] above, would be prejudicially affected if we were to grant the order sought by the applicant, but these parties have not been cited by the applicant. It follows that they hold a direct and substantial interest in the matter. It is necessary for us to take those interests into account, which can only be done by affording them an opportunity to be heard; those parties hold a legal interest, thus making them necessary parties to the litigation. The point was pertinently raised in their answering affidavit. The applicant vehemently disagreed with the submission, but *ex abundante cautela* elected to bring the counter application.

[22] The applicant's case is that all the parties that are necessary for a fair and exhaustive adjudication of the matter, and for a just determination to be made, are before the Court. In its written argument it claimed that the respondents' non-joinder challenge should be dismissed because the respondents failed to identify which parties have a legal interest in the matter making them indispensable to the proceedings. At best

for the respondents, it says, the respondents would want all the parties that stand to benefit from the provisions of the 2018 Charter to be joined to the proceedings. These parties are too numerous and many of them are unidentifiable. It protests that under these circumstances it has been left guessing who or which party/ies it failed to join to the proceedings. This claim was not, rightly in our view, pursued with vigour during oral argument as it was clear that the parties were identified by the respondents in their papers. They are the ones listed in [18] and [20] above. With regard to these parties the applicant says that they do not have a direct and substantial interest in this matter. The parties may have a passing interest in the matter and therefore it may be convenient to include them. However, their inclusion is not legally required for the matter to be fully ventilated and finally determined between it and the respondents. Both it and the respondents have a primary interest in the matter, but the parties identified in [18] and [20] could only have a secondary interest. They did not promulgate the 2018 Charter nor are they involved in enforcing it. They may have participated in its formulation and they may even potentially benefit from its implementation, but that is insufficient to afford them a legal interest in the matter: they are simply not direct and substantial enough to warrant them being joined to the proceedings.

[23] It was further contended by the applicant that these and any other unidentified parties could only be said to have a *spes*[31] arising from the provisions of the 2018 Charter. Having a *spes* does not give one a legal interest, so argued the applicant.

[31] Spes was the goddess of hope in ancient Roman religion going as far back as 5th century BC.

[24] In modern terms a *spes* is understood to be a "*hope or expectation*". It is really a case of expectation that something good or something that has been wished for will happen, and in that sense it is a case of looking forward to it happening. While it is a wish or a hope of a forthcoming event, the right that may be attached to it can be sold:

> "A *spes* can be sold; the prospect of a catch of fish can be sold;"[32]

Or even ceded:

> "… a right or a spes may be saleable and yet not subject to attachment. … [and hence] salary and even salary not yet due could be ceded just like any other incorporeal right or just as the chance (*spes*) of any venture could be ceded."[33]

However, it cannot be attached.[34]

[25] Understood in this sense, a *spes*, is restricted to a specific legal person and to a specific thing. It is not general to everyone and it is not open-ended. If someone has a *spes* that can be ceded, it would as a matter of logic follow that that person had acquired a direct and substantial interest in the thing that is expected to materialise. A *spes* can, therefore, in certain circumstances constitute a legal interest in the hands of the holder.

[26] It would now be necessary to examine who the parties are that are not joined to the proceedings and what interest do they have in the proceedings.

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[32] *Mears v Pretoria Eatate and Market Co*.1906, T.S. 661 at 668.
[33] *Consolidated Finance Co., Ltd v Reuvid* 1912 TPD 1019 at 1023.
[34] *Mears*, n 31 at 668.

The community parties

[27] The interest of the community parties referred to in [18] is that the MPRDA confers rights upon them and the 2018 Charter makes specific reference to community organisations in general in a quest to give effect to those rights. Their interests are to be understood in the context of who they are and what their complaint with the 2017 Charter was. These are:

i. MACUA represents a number of communities. It has complained of not receiving benefits form the mining of "*their*" land and of having to "*bear the brunt of the health and environmental degradation and impact of mining.*" A similar complaint was raised by the community organisation, MEJCON. Another organisation, WAMUA, is a women's movement within the MACUA structure. Its concern is that women are marginalised by the mining industry in general and that women's interests, in particular, are downplayed, if not ignored, when mining rights are issued. During the process of formulating the 2018 Charter the three community organisations joined forces by raising common concerns, or by supporting each other's concerns by emphasising the symbiotic relationship between their respective individual ones.

ii. The Sefikile, Lesethleng, Babina Phuthi Ba-Gamakola and Kgatlu are communities which, in their words, "*are directly affected by the mining or prospecting operations around them.*" Their respective interests are to be understood in the context of who they are and how they are affected by mining operations in general, and by the rights conferred upon them by the MPRDA and the 2018 Charter. These are:

a. The Sefikile community is composed of approximately 4000 people who live and farm on land purchased by their ascendants in 1910. Since 1946 mining operations have been under the hand of a company that is a member of the applicant, Anglo Platinum. These operations take place on approximately 40% of the land. The community has complained that a majority of its members live in poverty, are unemployed and struggle to meet their basic needs.

b. The Lesethleng community[35] is composed of approximately 40 families who collectively own the Wilgespruit farm, which their ascendants purchased in 1918. In 2011 the Department of Mineral Resources granted a mining right to a member of the applicant, Pilanesburg Platinum Mines. One of their complaints with the 2017 Charter was that it did not "*strengthen the surface rights of hosting communities.*" The 2018 Charter remedies this.

c. The Babina Phuthi Ba Ga-Makola community is composed of 134 households. It claims to hold land rights on three farms (Boshkloof 331 KT, De Goedeverwachting 332 KT and Mooimeisjesfontein 363 KT) from which they were forcefully removed in 1957. They presently have a land claim over the farms. In the meantime, prospecting and mining rights to the

[35] The Lesethleng community was one of the applicants in *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd* 2019 (2) SA 1 (CC).

mining and mineral resources on the farm have been granted to three companies, the Eastern Platinum, the Southern Sphere Mining and Development Company and to SAMANCO Ferrochrome. Members of the community are "*scattered*" in the area surrounding the farms. They called for the 2018 Charter to empower them by conferring rights on hosting communities, which they intend to take advantage of.

d. The Kgatlu community is composed of 100 families. It owns a farm (Goedetrouw farm). A local subsidiary of a publicly traded company listed on the Toronto Stock Exchange, Platinum Group Metals, has succeeded in obtaining prospecting rights over the mineral resources located on the land. As a hosting community it made common cause with the other three communities.

iii. Both sets of communities qualify as mine hosting communities in the 2018 Charter. This is so because they either own or reside on land where mining operations take place, or they own or reside on land bordering the mining operations.

[28] In *Maledu* the Constitutional Court observed:

> "… given the invasive nature of a mining right, there can be no denying that when exercising her rights, the mining right holder, would intrude into the rights of the owner of the land to which the mining right relates. And the more invasive the mining operations are the greater the extent of subtraction from a landowner's dominium will it entail. On their own version, the respondents accept that it is not possible for them to undertake their mining operations whilst the applicants remain in occupation

> of the farm. It must follow from this that the applicants will be deprived of their informal rights to the farm if the order evicting them from the farm were allowed to stand. "[36]

[29] The observation is particularly pertinent here. It amplifies the respective competing rights and interests of the applicant and the hosting communities. It is not disputed that the 2018 Charter re-balances these competing rights and interests .

[30] In their intervention application in the 2017 matter, these communities maintained that they have a direct and substantial interest in the Charter and that they have factual and legal material which needs to be brought to the attention of the Court so that the matter can be fairly adjudicated. They claimed then that:

> "Justice cannot be done, if only the perspective of big business and government are presented to the Court."

[31] As a result, the 2018 Charter conferred certain rights on community organisations. These are intended to address the concerns of these community organisations. It is furthermore not disputed that all these rights derive directly from the first respondent, *inter alia*, respecting the injunction imposed upon him to "*set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources.*"[37] These rights would be destroyed if the order sought by the applicant is granted, thus endowing them with a legal interest in the matter.

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[36] Id. at [102].
[37] Section 100(2)(a) of the MPRDA.

The social partner parties

[32] The trade union parties, too, share the same interests as the community parties. They have enjoyed a distinct and unique role in the formulation of the 2018 Charter. The applicant recognises them as being indispensable to the sector. Like the trade union parties, SAMDA played a prominent role in the formulation of the 2018 Charter. It represents, *inter alia*, the interests of BEE entrepreneurs, which by definition consists of the "*historically disadvantaged persons*" referred to in s 100(2) of the MPRDA. Its mission statement reads:

> "SAMDA's vision is to be the vehicle for the development of a vibrant and sustainable junior mining sector which contributes towards the growth and prosperity of the mining industry. Its mission is: to create an enabling environment for: raising finance; developing technical and other skills; practicing responsible environmental management and sustainable development; and the maintenance of standards of good practice in the junior mining sector to lobby; government; organised labour; and other stakeholders and institutions to promote mutual understanding to encourage local and international investment to conduct research to understand the sector's needs to promote beneficiation to build African and global alliances and to facilitate the transformation of the mining industry by promoting emerging junior mining operations and those who are historically disadvantaged."[38] (Emphasis added)

[33] In terms of the 2018 Charter host communities, members of the trade unions ("qualifying employees") and BEE entrepreneurs acquired the right to benefit when new mining rights are granted, and when existing rights are renewed or transferred.[39] The trade union parties, members of SAMDA and the host communities are endowed with rights to share in the ownership of the mining companies that are represented by the applicant. The 2018 Charter insists that a minimum of 30% of the shareholding of these companies should be transferred to

[38] http://www.samda.co.za/profile/ accessed on 4 June 2020.
[39] Clauses 2.1.1.2; 2.1.1.4; 2.1.1.5; 2.1.1.6 and 2.1.3 of the 2018 Charter.

persons from "*previously disadvantaged groups*" and prescribes the manner in which this shareholding should be distributed. The prescriptions essentially confer rights on the trade union parties and the members of SAMDA. These issues of ownership are central to the merits of this application,[40] and if the order is granted the rights that inhere in the prescribed 30% shareholding of the "*previously disadvantaged groups*" would be destroyed. The loss of these rights is no trivial matter to these parties. It follows that they have a direct, real and substantial interest in the matter - a legal interest to be exact.

[34] On this analysis it is crystal clear that we are not persuaded by the contention that these parties simply have a *spes* derived from the 2018 Charter. It would only be a *spes* if the provisions of the 2018 Charter were not implemented. In our judgment, the 2018 Charter confers rights upon them and does not leave them with a mere "*hope or expectation*".

[35] The interests of stakeholders falling within these three categories are protected in the 2018 Charter irrespective of whether it is law or policy. And, if these interests are considered in light of the greater context of the Constitution and the MPRDA, then, in our view, these interests qualify as "*direct and substantial legal interests*" in this litigation. It is ineluctable in our view, that in the event that the applicant is successful in obtaining an order setting aside the challenged clauses, whatever interests and rights conferred by the 2018 Mining Charter onto these parties will cease to exist. The order will therefore adversely affect the interests of these parties and of any

[40] The issues converge around the phrase "*once empowered, always empowered*" commonly used by the parties. The phrase focusses on the ownership of these companies.

member represented by these parties. Thus, even though in strict legal terms the judgment and order granting the relief sought by the applicant would not be *res judicata* (a matter already judged) in relation to these parties, they would nevertheless be unable to revive their rights unless another court of equal standing was to pronounce that the present relief sought was not competent. In which case there would be two conflicting judgments on the same issue, and that is most undesirable. It creates judicial uncertainty which is neither in the interests of the parties here, nor in the general public interest.

[36] We accept that there may be numerous other stakeholders, especially those that would belong to the community parties, which on our analysis would be able to make out a case that they have a direct and substantial interest in this litigation. But their existence should not preclude the parties identified in [18] from being included in this litigation. They are the parties that have taken the initiative, shown a deep level of interest and participated in the formulation of the 2018 Charter. They have not only demonstrated that they have rights that require protection in the 2018 Charter, they have through great effort and expense actually exercised those rights. Their exclusion from the litigation not only impoverishes the proceedings but could result in them suffering harm should the orders sought by the applicant be granted. The same would apply to the social partner parties.

[37] The applicant contended that these or any other party claiming to have an interest in the matter could take advantage of the rule 16A notice and seek permission to enter the proceedings as an *amicus curiae*. This, it claimed, cured the defect of non-joinder. The respondents raised a number of issues concerning the non-compliance

with the provision of rule 16A by the applicant, which it says, effectively sterilised the notice. For the reason that follows, we do not believe it is necessary to engage with this contention. They also contended that the notice, as is the case in all rule 16A notices, is bare in substance in that it does not cover the evidence that is relied upon, nor does it detail the legal submissions that the applicant wished to make. For this reason, they say, it does not cure the defect of non-joinder.

[38] In our judgment a rule 16A notice is not and can never be a substitute for joining a necessary party to the proceedings. A party that stands to be prejudiced by an order has a legal right to be joined to the proceedings so that it can protect its interests. It must be specifically identified, and the papers must be properly served upon it. A rule 16A notice, which requires it to apply to be admitted as *amicus curiae*, does not do this. More importantly, even if the parties identified in [18] and [20] above were to seek admission as *amicus curiae* they bear the risk of only being admitted "*upon such terms and conditions as may be agreed upon in writing by the parties*" or by the court. In both cases they bear the risk of being severely restrained in their ability to influence the outcome of the proceedings. This is because:

> "[5] The role of an *amicus* is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an *amicus* to try to introduce new contentions based on fresh evidence."[41]

[41] *In Re: Certain amicus curiae applications: Minister of Health v Treatment Action Campaign* 2002 (5) SA 713 (CC) at [5].

[39] Furthermore, should any of the community or social partner parties succeed in being admitted as an *amicus*, it would be denied the opportunity to bring controversial evidence to court. All its evidence would have to be common cause for it to be admissible.[42] It would consequently endure disadvantage which not only prejudices it but would also preclude the court from fully and fairly determining the issues before it. In the latter case, the submission made in their intervention application that justice would not be served if only the voices of "*big business and government*" are heard is valid.

[40] Accordingly, we find that the rule 16A notice has no bearing on the issue of non-joinder.

[41] Finally, the applicant submits that if it failed on the non-joinder point, its conditional application should be granted. We agree. The conditional application asks that we identify which parties must be joined and how the pleadings should be served on these parties. The request is not unreasonable. The parties we say should be joined have clearly identified themselves in the previous litigation. In the case of the community parties, their contact details have been furnished. They were satisfied with having all pleadings being served on their respective attorneys, CALS which is located at the University of the Witwatersrand, the Centre for Socio-Legal studies located at the University of Cape Town and Lawyers for Human Rights. As for the social partner parties the applicant has dealings with all of them, save for SAMDA. The details of SAMDA should be known to the applicant or can easily be

[42] Id at [8].

ascertainable given its involvement in the MCTT. In any event, the attorneys for the respondent could assist in this regard.

[42] There is the issue of the *dies* that would apply to pleadings. We are presently experiencing difficult social circumstances brought upon by the outbreak of a pandemic in the world which has resulted in all of us being unable to operate under circumstances we are normally acquainted with. The provisions of the *Disaster Management Act, 57 of 2002* have been implemented nationally. They have fundamentally disrupted normal social life. For this reason, we hold that it is necessary for us to heed this fact when determining the *dies* that should apply to the pleadings.

Costs

[43] Both parties agreed that costs should follow the result, and that employment of two counsel was justified and that success in the conditional application should have no bearing on the cost order. In the circumstances the order will reflect this common ground.

General

[44] The hearing in this matter took place remotely. It was made possible by the co-operation that occurred between the legal representatives of the parties. It was also made possible by the professional manner in which the entire matter was prepared and presented. We take this opportunity to express our gratitude to all of them.

Order

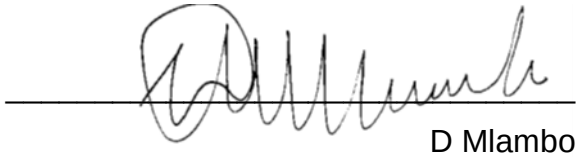
[45] In the circumstances the following order is granted:

1. The following parties must be joined as respondents (the joined respondents) in this application:
   1.1. MACUA (Mining Affected Communities United in Action); WAMUA (Women Affected by Mining in Action); MEJCON (Mining and Environmental Justice Community Network of South Africa);
   1.2. Bakgatla Ba Sefikile Community; Lesethleng Community; Babina Phuti Ba Ga-Makola Community and Kgatlu Community;
   1.3. AMCU (The Association of Mineworkers and Construction Union); UASA (United Association of South Africa); NUM (National Union of Mineworkers); Solidarity; SAMDA (South African Mining Development Association);
2. All pleadings filed of record are to be served upon the parties referred to in paragraph 1 above within 15 days of date of this order;
3. Pleadings must be served in the following manner:
   3.1. on MACUA, WAMUA, MEJCON by handing a copy of the pleadings to a responsible employee or official at the main office of the Centre for Applied Legal Studies at the Wits School of Law and the Centre for Environmental Rights, Cape Town;
   3.2. on AMCU, UASA, NUM, Solidarity and SAMDA by handing a copy of the pleadings to a responsible employee or official at the main office of each of these parties;
   3.3. on the Bakgatla Ba Sefikile Community; Lesethleng Community; Babina Phuti Ba Ga-Makola Community and Kgatlu Community by handing a copy

to a responsible employee or official at the main office of the Lawyers for Human Rights.

3.4. This order and the amended Notice of Motion must also be published in a national newspaper.

4. The joined respondents referred to in paragraph 1 above, are afforded 15 days from the date of publication or receipt of service of the pleadings whichever occurs later, within which to deliver a Notice of Intention to Oppose;
5. Answering affidavits must be filed within one month of notifying the applicant of the intention to oppose.
6. The applicant and the first and second respondents may file replying affidavits to the answering affidavits of the joined respondents within 15 days of receipt of the answering affidavits
7. The applicant is to pay the costs of the application, which costs are to include those occasioned by the employment of two counsel.

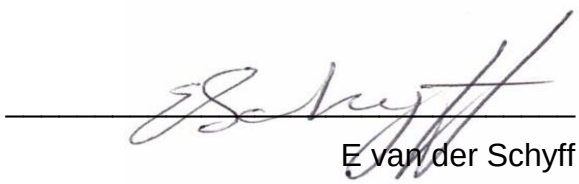


D Mlambo

Judge President of the Gauteng Division of the High Court

B Vally

Judge of the Gauteng Division of the High Court



E van der Schyff

Judge of the Gauteng Division of the High Court

Date of the hearing:	5 May 2020
Date of Judgment:	30 June 2020

Appearances:

Counsel for the Applicant:	Adv. CDA Loxton SC with Adv. JL Gildenhuys SC and Adv. L Sisilana
Instructed by:	Norton Rose Fulbright South Africa Inc.
Counsel for the Respondents:	Adv. CHJ Badenhorst SC with Adv. LI Schäfer
Instructed by:	The State Attorney