

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Case No.: _____/2020

In the matter between:

**ASSOCIATION OF MINeworkERS AND
CONSTRUCTION UNION**

Applicant

and

**MINISTER OF MINERAL RESOURCES
AND ENERGY**

First Respondent

CHIEF INSPECTOR OF MINING

Second Respondent

**MINISTER OF CO-OPERATIVE
GOVERNANCE AND
TRADITIONAL AFFAIRS**

Third Respondent

MINERALS COUNCIL SOUTH AFRICA

Fourth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

JEFFREY KEHLA MPAHLELE

do hereby make oath and say:

- 1 I am an adult male South African citizen.

- 2 I am the General Secretary of the Association of Mineworkers and Construction Union ("AMCU"), the Applicant, with addresses at 25 Botha Rd, Clewer, Emalahleni, 1039.

- 3 I am duly authorised to depose to this affidavit on behalf of AMCU.

- 4 Save to the extent that the context indicates otherwise the facts deposed to herein are within my personal knowledge and belief. To the extent that I make legal submissions in this affidavit, I do so on the advice of my legal representatives, whose advice I believe to be correct.
- 5 Where I refer to the State Respondents, I refer to the First, Second and Third Respondents unless otherwise indicated.
- 6 This is an application to compel the First Respondent (“the Minister”) and the Second Respondent (“the Chief Inspector”) to exercise their statutory powers to protect mineworkers during the Covid-19 pandemic. Both the Minister and the Inspector have powers under the Mine Health and Safety Act 69 of 1996 (“MHSA”).
- 7 Despite the particular vulnerability of mineworkers to Covid-19, the Minister has either failed to decide whether to exercise his power to declare a “health hazard” and issue the necessary measures to protect mineworkers, or has decided not to. Similarly, the Inspector has failed to exercise his power to issue guidelines and make them binding on mining companies. These failures create a serious health hazard for mineworkers. This application seeks to remedy those failures.
- 8 This affidavit is structured as follows:
 - 8.1 **Part I** describes the parties;
 - 8.2 **Part II** gives an overview of the application;
 - 8.3 **Part III** addresses jurisdiction and compliance with this court’s directives;

- 8.4 **Part IV** establishes AMCU's standing;
- 8.5 **Part V** outlines the relevant legal framework;
- 8.6 **Part VI** sets out the necessary factual background;

I. PARTIES

- 9 The Applicant is the Association of Mineworkers and Construction Union (“AMCU”), a registered trade union in terms of the Labour Relations Act 66 of 1995 (“LRA”) and the MHSA. AMCU represents more than 100 000 mineworkers across 112 mines, seven commodities, and seven provinces.
- 10 The First Respondent is the Minister of Mineral Resources and Energy, the Honourable Minister Gwede Mantashe (“the Minister”). The Minister is cited in their capacity as both the political head of Mineral Resources and Energy and the representative of the national government. The Minister exercises powers and responsibilities in terms of the MHSA. The Minister’s office is in Pretoria.
- 11 The Second Respondent is the Chief Inspector of Mining (“the Chief Inspector”), a statutory office created in terms of section 48(1) of the MHSA, that, subject to the control and direction of the Minister, exercises powers and responsibilities in terms of the MHSA. The Chief Inspector’s office is in Pretoria.
- 12 The Third Respondent is the Minister of Cooperative Governance and Traditional Affairs, the Honourable Minister Dr Nkosazana Dlamini-Zuma (“the COGTA Minister”). The COGTA Minister is cited in her capacity as both the political head of Cooperative Governance and Traditional Affairs and the representative of the national government. The COGTA Minister exercises powers and responsibilities in terms of the Disaster Management Act 57 of 2002 (“DMA”) and its current declaration of a national disaster and regulations pertaining to the Covid-19 pandemic. The COGTA Minister’s office is in Pretoria.

- 13 The Fourth Respondent is the Minerals Council South Africa (“the Minerals Council”), an employer’s organisation registered in terms of section 97(1) of the LRA with its offices situated at 5 Hollard Street, Marshalltown, Johannesburg. It has been cited as the employer’s organisation that represents the major mining companies in South Africa, and for its role in seeking to standardise the management of Covid-19 on mines in South Africa. No relief is sought against the Minerals Council.
- 14 AMCU acknowledges that mining companies will be affected by the relief sought by AMCU and may wish to participate in these proceedings. While AMCU has not cited all of the more than one hundred mining companies as parties to this application, AMCU proposes certain prayers in part A of this application to:
- 14.1 Ensure the widespread distribution of this application to mining companies; and
- 14.2 Provide for the unopposed joinder of any mining company seeking to participate in this application.
- 15 This relief is explained and motivated for in more detail in the affidavit of George IB Kahn.

II. OVERVIEW

- 16 The highly infectious Covid-19 has swept across the globe, infecting over two million individuals and claiming more than 150 000 lives. While South Africa has not been spared from the scourge of Covid-19, it has moved quickly to minimise the virus's spread.
- 17 One of the most effective measures to combat Covid-19 is social distancing. Social distancing entails maintaining space between individuals to avoid exposure to the virus and thus slow its spread. When the virus first arrived in South Africa, the South African government encouraged the populace to engage in voluntary social distancing.
- 18 As voluntary social distancing was not sufficient, South Africa imposed social distancing through a national 'lockdown' that requires all of South Africa's residents to remain at home except to obtain or provide essential goods or services. Those who intentionally breach the lockdown face criminal sanctions.
- 19 Given the nature of mining operations, mineworkers are particularly at risk of contracting Covid-19 at their workplace. In the absence of thorough, best-practice protocols to mitigate the spread of Covid-19, it is only a question of when, not if, we can expect widespread Covid-19 infections on mines. Infections on mines will then spread into mining-affected communities and beyond.
- 20 In spite of this, between 15 March and 16 April 2020, the Respondents refused to impose binding obligations on mining companies regarding the management

of Covid-19, despite AMCU's repeated pleas. When regulations were finally promulgated, they were superficial and woefully inadequate.

- 21 While drastic and severe regulations have been imposed upon the vast majority of South African society, the mines have, for the most part, been left to self-regulate. While some mines will voluntarily act responsibly to address the risk of Covid-19 spreading amongst mineworkers and the communities where they live, the abdication of the Department of Mineral Resources and Energy's ("DMRE") responsibility to regulate is not only unacceptable but unlawful and unconstitutional.
- 22 The Minister has a responsibility and a duty to ensure mineworkers' safety that goes above and beyond assuming companies will act in the best interest of mineworkers.
- 23 As AMCU's repeated efforts to engage with the Minister on the need to protect mineworkers' health and safety have been rebuffed or ignored, this application is brought as a last resort to seek orders:
 - 23.1 Reviewing and setting aside the Minister and/or Chief Inspector's decision to not promulgate national regulations and/or guidelines that impose binding obligations on employers to protect mineworkers from the Covid-19 pandemic under section 76 of the MHSA, alternatively in terms of s 9(3) read with s 49(6) of MHSA; and
 - 23.2 Substituting for those decisions, to the extent possible and appropriate, decisions to declare the Covid-19 pandemic a health hazard under section

76(1) of the MHSA, alternatively to require employers to prepare and implement codes of practice to deal with the Covid-19 pandemic and obliging the Chief Inspector to prepare guidelines for this purpose;

23.3 Remitting the matter to Minister and/or Chief Inspector to act under sections 76(2), alternatively, 9(3) of the MHSA and, if substitution is not granted, to consider acting under sections 76(1) and (2) and/or sections 9(2) and (3).

24 In the alternative, AMCU seeks to review and set aside certain regulations promulgated by the COGTA Minister on 16 April 2020 together with an order compelling the COGTA Minister to issue more robust regulations in terms of section 27(2) of the Disaster Management Act to mitigate the impact of the Covid-19 pandemic on mineworkers.

25 Directions are sought upon remittal to consider the expert opinion referred to below and to afford AMCU the opportunity to comment on any relevant drafts.

26 AMCU also seeks orders condoning non-compliance with the Rules of this Honourable Court with respect to ordinary filing and time periods and the rules and other statutory instruments dealing with the attestation and commissioning of oaths. As set out above, and explained in detail in the affidavit of George Kahn, AMCU also seeks orders to ensure that mining companies that may be affected by the relief sought are aware of this application and may join this application without following the formalities that are typically required by this Court's rules.

27 AMCU also seeks costs against the first respondent and any party opposing this application and further and/or alternative relief.

28 I note that AMCU has brought separate proceedings in the High Court seeking the review and setting aside of exemptions granted to some mining companies from certain regulations together with ancillary and alternative relief. There is no overlap between the causes of action in that matter and in this one.

III. JURISDICTION AND COMPLIANCE WITH DIRECTIVES

- 29 This Honourable Court holds exclusive jurisdiction to determine any dispute about the interpretation or application of any provision of the MHSA.
- 30 The relief sought against the Minister and the alternative relief sought against the Chief Inspector falls squarely under the exclusive jurisdiction of this Honourable Court.
- 31 This Honourable Court holds jurisdiction to deal with the alternative relief made out against the COGTA Minister in terms of section 157(2)(a) of the LRA, as amended, read together with sections 9, 10, 11 12, 23, 24 and 27(1)(a) of the Constitution.
- 32 In order to manage the spread of Covid-19, the Judge President of this Court has issued directives regarding access to the Labour Court during the period of lockdown.
- 33 I am advised that my legal representatives will alert the Registrar to explain in full detail why this application must be considered during lockdown.
- 34 The Applicant seeks an order in part A inter alia that the matter be heard through Zoom or similar electronic means in order to facilitate the hearing of the matter.

IV. STANDING

35 AMCU brings this application:

35.1 in its own interests;

35.2 in the interests of its members;

35.3 in the interests of other mineworkers that are not its members; and

35.4 in the public interest of combatting the present Covid-19 pandemic in South Africa generally as well as in mines and mine-affected communities specifically.

36 In the face of a global pandemic, the spread of Covid-19 on South Africa's mines will mean the spread of the virus to mining-affect communities and beyond. This application will have profound implications for all persons living within the Republic of South Africa, our closest neighbouring countries, and the international community. This crisis transcends international borders and nation-states.

V. LEGAL FRAMEWORK

- 37 The Constitutional Court has confirmed that mineworkers enjoy the constitutional right to freedom and security of the person at their workplace, including and especially the right to bodily integrity.
- 38 Mineworkers also enjoy the right to human dignity,¹ life,² fair labour practices,³ an environment that is not harmful to their health or well-being⁴ and access to healthcare.⁵
- 39 All of these rights are threatened by the Covid-19 pandemic and any return to work on the mines during the pandemic.
- 40 Parliament has passed the MHSAs to give effect to these rights on mines at all times, and particularly when there is a health hazard. It has also enacted the DMA to safeguard the rights of all South Africans – including mineworkers – during a national disaster.
- 41 These rights include a positive duty upon the Respondents to act and exercise their public powers in a manner that safeguards these constitutional rights, especially when a failure to act may likely result in a serious, irreversible infringement of one or more of these fundamental rights. This is apparent from

¹ Section 10 of the Constitution.

² Section 11 of the Constitution.

³ Section 23(1) of the Constitution.

⁴ Section 24(1) of the Constitution.

⁵ Section 27(1)(a) of the Constitution.

s 7(2) of the Constitution which obliges all organs of state to respect, protect, promote and fulfil the rights in the Bill of Rights.

The Statutory Powers

42 In this application, the relevant statutory provisions are:

42.1 Section 76 of the MHSA (Emergency Hazardous Health Condition Directions); and,

42.2 Section 9 of the MHSA, read together with section 49(6) of the Act (Guidelines for Codes of Practices in mining); and,

42.3 Section 27(2) of the DMA, read together with section 3 of the Act and the Third Respondent's declaration of a national state of disaster on 15 March 2020 (Disaster Management Emergency Regulations).

43 First, s 76(1) of the MHSA empowers the Minister to declare, by notice in the Gazette, "*that an environmental condition or a substance present at a mine is a health hazard to employees who are or may be exposed to that condition or substance*". He must consult with the Mine Health and Safety Council before he does so (s 76(1)(a)). He may do so without public consultation if he believes the notice should be published immediately (s 76(1)(b)). Once that declaration is made, the Minister can impose binding conditions and standards on mining employers in order to protect mineworkers (s 76(2)).

- 44 These powers are tailored to sudden and devastating health crises, empowering the Minister to ensure coordinated disaster management in mining for the period of time that the crisis persists.
- 45 They allow the Minister, acting as a representative of the national government, to also ensure coordination with other organs of state and other private sector stakeholders. The jurisdiction of section 76 of the MHSA is exceptionally wide and rapid.
- 46 Second, s 9 of the MHSA, empowers the Chief Inspector to set norms and standards for universal application and implementation on any critical aspect of health and safety in mining. This is through the mechanism of requiring employers to prepare and implement codes of practice on the issue in question which must comply with guidelines published by the Chief Inspector. This allows uniform and standardised minimum approaches on health and safety matters of critical importance. It is not limited to employers' representative organisations' or employees' representative organisations' memberships; it affects the entire mining industry with any specificity that the Chief Inspector may opt for.
- 47 These allow for the Chief Inspector to implement a meaningful coordination and standardisation effort. The scope of section 9 of the MHSA is also wide, but it is slower and more restricted than the Minister's powers in terms of section 76.
- 48 Third, the Disaster Management Regulations, in terms of section 27(2) read with section 3 of the DMA, empower the Minister designated by the President of South Africa, the COGTA Minister in this case, to implement subordinate laws

pertaining to prescribed areas of aspects of disaster management and responses. These regulations may be implemented rapidly and grant wide powers to the section 3 designated Minister.

- 49 These powers allow the designated Minister to coordinate centralise and rapid implementation of disaster management responses, where existing law or structures are insufficient to safeguard the public. However, they are limited and restricted in terms of section 76(5) of the DMA to a particular time period – initially three months which can be extended month by month.

PAJA and the Principle of Legality

- 50 Mineworkers are also entitled to just administrative action, which can be vindicated under the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) and/or directly through the Constitution’s principle of legality.

- 51 AMCU contends that all the decisions at issue constitute administrative action as defined in PAJA. But even if they do not, they constitute the exercise of public power that must comply with the principle of legality and be lawful and rational.

- 52 The failure of the State Respondents to reasonably and rationally exercise their powers under the MHSA and DMA to protect mineworkers from Covid-19 violates mineworkers’ rights to fair administrative action.

- 53 Several provisions of PAJA are relevant.

54 First, s 6(2)(g) of the PAJA empowers a court to review and set aside the failure to take a decision. In this matter, the Minister and Chief Inspectors' failure to exercise their powers under section 76 and section 9(3) of the MHA are reviewable failures to take decisions as contemplated by section 6(2)(g).

55 Where an administrator fails to take a decision and there is no prescribed period in which such a decision must be made, section 6(3)(a) empowers persons relying upon section 6(2)(g) to "institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision."

56 Second, a variety of provisions of PAJA permit a court to review and set aside decisions that are irrational or unreasonable. These include:

56.1 Section 6(2)(e)(iv) which prohibits decisions that are arbitrary or capricious;

56.2 Section 6(2)(f)(ii) which prohibits decisions that are not rationally connected to: (aa) the purpose for which it was taken; or (bb) the purpose of the empowering provision;

56.3 Section 6(2)(h) which prohibits decisions that are so unreasonable that no reasonable administrator could have taken them.

57 I deal with the appropriate relief in **Part XV** below.

VI. BACKGROUND

- 58 First reported by the World Health Organisation on 31 December 2019, Covid-19 is a highly infectious disease caused by a virus. The Covid-19 virus spreads primarily through droplets of saliva or discharge from the nose or mouth when an infected person coughs or sneezes. It can also be contracted through touching surfaces where the virus is present, when a person then touches his or her face or otherwise allows the virus to be ingested following contact with that surface.
- 59 Covid-19 has an incubation period of seven to fourteen days during which a person may not know they are infected and inadvertently transmit the disease to other people.
- 60 Medical experts have stated that certain people with compromised immune systems or underlying respiratory and other conditions (such as high blood pressure, heart disease, lung disease, cancer or diabetes) are particularly vulnerable to infection and, if infected, face a heightened risk of death.
- 61 Once infected, the disease can cause respiratory failure and death. Many however experience only relatively mild symptoms. It is well known that lung disease is common amongst mineworkers in South Africa.
- 62 By 18 April 2020 the global pandemic of Covid-19 had infected over 2.3 million individuals in more than 200 nations. Over 160 000 people have died of Covid-19 worldwide.

- 63 Recognising Covid-19's grave peril, the President announced a state of disaster on 15 March 2020. The COGTA Minister declared a national state of disaster in terms of section 27(1) of the DMA on 15 March 2020. On 18 March 2020 promulgated regulations under section 27(2) of the DMA ("the DMA Regulations"). The DMA Regulations were amended on 25 March 2020 to introduce the period of lockdown from 23:59, Thursday 26 March 2020 to 23:59, Thursday 16 April 2020. Additional amendments were published on 26 March and 2 April 2020. On 9 April 2020, the President announced the extension of the lockdown period to 30 April 2020. The DMA Regulations were amended accordingly on 16 April 2020.
- 64 The regulations impose sweeping and severe limitations on the freedom of movement and trade. The vast majority of residents are not allowed to leave their homes except to obtain essential goods, while most businesses may only operate remotely. Businesses that are allowed to operate face severe impositions and must fall within the category of essential services.
- 65 Essential services were expected to continue operating during the initial lockdown period. The DMA Regulations provide that essential services include a number of services listed in Part B of Annexure B of the Regulations, item 22, includes "Gold, gold refinery, coal and essential mining".
- 66 On 16 April 2020, the amended regulations to the lockdown were promulgated and unlocked all non-coal mining to operate up to 50% capacity and coal mining to operate at 100% capacity. The regulations, which are discussed in detail below, also impose certain health and safety requirements. While I acknowledge

that these regulations are an attempt to regulate the return of workers to the mines by placing certain obligations on the employer, these provisions fall far short of what is required to ensure that employers implement sufficient measures to mitigate the spread of the Covid-19 virus in the mines.

67 The regulations still afford employers a great deal of discretion to decide what resources to employ in their response to Covid-19 in the workplace. These regulations therefore do not constitute the type of national standard being sought and contemplated in this application.

68 There is ongoing discussion and speculation that the lockdown may be extended further. It is obvious that the Covid-19 health hazard will continue even beyond the end of the lockdown and will likely affect us for the rest of 2020 and possibly into 2021.

69 The regulations have also led to widespread confusion for AMCU's members and others in the industry.

70 After some mineworkers were asked to return to work, the South African Police Union ("SAPU") wrote to the Minister of Police seeking "clear directives on the permissions [mineworkers] are alleging they have to operate." A copy of the letter from SAPU dated 14 April 2020 is attached and marked annexure **JM1**. The Chief Executive Officer ("CEO") of Impala Platinum was arrested for allegedly recalling mineworkers during the lockdown in contravention of the regulations.

71 The acute impact of Covid-19 on the poor in South Africa highlights the class disparities and ongoing racial inequality resulting from and informing the legacy of Apartheid.

VII. MINEWORKERS' SAFETY

72 Mineworkers constitute a category of employment that historically has played an exceptional role in our country.

73 Mineworkers are exceptionally vulnerable to the risk of Covid-19.

73.1 The nature of work on a mine is not conducive to social distancing.

73.2 Underground mining requires the transport of workers in cages for significant distances. The nature of these cages is such that it is very difficult, if not impossible, to achieve social distancing of two metres between individuals.

73.3 Mines also have numerous unavoidable points of contact with other workers both on the surface and underground, as well as dormitories for mineworkers that live in them.

74 The importance of addressing Covid-19 on mines is intensified by the reality that:

74.1 Mineworkers are widely affected by lung diseases, including the hidden pandemics of pulmonary tuberculosis and pneumoconiosis. As Covid-19 is a respiratory illness, any lung diseases will exacerbate the risk faced by mineworkers.

74.2 HIV/AIDS has a higher prevalence amongst mineworkers than the general population.

- 75 AMCU is seriously concerned about mineworkers' families and their extended communities who may be affected by mineworkers returning to work without effective measures being put in place in the workplace. The Covid-19 risk is not only posed to employees in the workplace, it follows them home and into communities.
- 76 There are almost half a million mineworkers in South Africa. The majority of mineworkers reside in the communities that host these mines.
- 77 Given mineworkers integration into mine-affected communities, any Covid-19 infection at a mine is likely to spread to vulnerable communities surrounding the mine.
- 78 Mineworkers and their communities face significant barriers in accessing healthcare services, particularly in their home communities which are often in rural, underserved areas of South Africa or neighbouring countries with different and less generous healthcare rights than South Africa. It has long been the case that sick mineworkers have brought disease home, including tuberculosis and HIV/AIDS.
- 79 Clear measures to address Covid-19 on mines will drastically mitigate the risk of Covid-19's spread in communities.
- 80 AMCU is committed to getting mineworkers back to work as quickly as reasonable to safeguard our economy, but it is also a devout believer in 'flattening the curve'. AMCU does not want to participate in any action or conduct

that jeopardises the ambitions and actions of the collective government and the National Department of Health's task team on Covid-19.

- 81 The best endeavours of our government and other private institutions are only as good as the weakest link in the chain. The entire Covid-19 battle can be undone by a single major stakeholder. The South African mining sector has the capacity to make or break the efforts of South Africans during the Covid-19 pandemic should they not have an effective approach to ensure that mineworkers return to safe working environments.

VIII. EXPERT OPINION

82 Given the intense risk that AMCU's members may be infected by Covid-19 upon returning to work, AMCU has solicited the views of the following medical experts on addressing Covid-19 in mines:

82.1 Professor Rodney Ehrlich;

82.2 Professor Jill Murray;

82.3 Professor Rajen Naidoo; and

82.4 Professor David Rees.

83 These experts ("the experts") are leading authorities in the sphere of public health and occupational medicine in South Africa, with particular focus on the mining sector.

84 The experts have prepared an expert opinion regarding the risk mineworkers face from Covid-19, as well as the adequacy of the various measures taken to address Covid-19. This opinion, together with the experts' curricula vitae, is annexed hereto marked **JM2**. Confirmatory affidavits by the experts will, as far as possible, be filed as part of this application, although there may be a delay in securing same and it may prove impossible to comply with all of the rules and statutory instruments regulating the attestation and commissioning of affidavits. Condonation will be sought in this regard.

85 In the following sections, I review the various measures to address Covid-19 in the mining sector. I do with the advice of the experts.

IX. DISASTER MANAGEMENT ACT REGULATIONS

- 86 As noted above, when the lockdown commenced it was clear that some mining – particularly coal mining – would be allowed to continue. The regulations were less clear regarding the rest of the mining industry.
- 87 What was plainly missing was any attempt to provide binding regulations on the management of Covid-19 on mines.
- 88 This changed somewhat with the regulations relating to mining operations promulgated on 16 April 2020. Sections 11J and 11K, read with Schedule B Part B, provide the first and only national, binding obligations upon mining companies and/or employers.
- 89 I note that these regulations were promulgated as part of a push to bring mines into operation.
- 90 These lockdown regulations expressly affecting the mining sector, implemented 16 April 2020, constitute the following:

“Energy and petroleum products supply

11 J To ensure the continuous supply of energy and petroleum products to society as referred to in paragraph 6 of Part B of Annexure B-

- (a) collieries that supply Eskom must continue to operate at full capacity; and*
- (b) refineries must operate at full capacity to avoid shortage of fuel, and such operations must include smelters, plants and furnaces*

Mining Operations

- 11K (1) *Mining operations, as referred to in paragraph 22 of Part B of Annexure B, must be conducted at a reduced capacity of not more than 50% during the period of lockdown, and thereafter at increasing capacity as determined by direction issued by the Cabinet member responsible for mineral resources and energy.*
- (2) *The following conditions apply to the starting and increasing of capacity:*
- (a) *A rigorous screening and testing program must be implemented as employees return to work;*
 - (b) *the mining industry must provide quarantine facilities for employees who have tested positive for the COVID-19;*
 - (c) *data collected during the screening and testing programme must be submitted to the relevant authority;*
 - (d) *mining companies must make arrangements to transport their South African employees from their homes to their respective areas of operations;*
 - (e) *workers from neighbouring Southern African Development Community countries must be recalled to their place of employment at the end of lockdown in their respective countries in accordance with these Regulations and regulations applicable in those countries.*
- (3) *The monitoring and impact assessment of seismicity through the Council for Geoscience must be intensified with immediate effect.*

Schedule B – Part B

6. *Electricity (including vital demand management services), water, gas and fuel production, supply and maintenance;*
- 22 *Gold, gold refinery, coal and mining;"*

91 What is critical about the above regulations is that mining is now regarded as an essential service. Coal mines supplying Eskom are allowed to be running at normal operations and all other mines are allowed to be running at half their full capacity operations.

92 The effect then of “unlocking” the remainder of the mining sector, even on this limited scale, contemplates that more than 250 000 mineworkers will be back at work, travelling and/or going underground, if it is understood that the national mining workforce constitutes about half a million people. This is more or less the same as the City of Emalahleni (pop. 262,491) being “unlocked” completely and moving across South Africa and southern Africa.

93 Despite the regulations attempting to regulate the return of mineworkers to the workplace, they remain vague and unclear on the following aspects:

93.1 On how non-coal mines may measure themselves at only 50% operations, i.e. full operations at one company’s mine and the rest shut down for maintenance; and,

93.2 On specifically what kind of quarantine facilities must be provided, i.e. hostels or tents; and,

93.3 On the details of what constitutes “rigorous” screening and testing programs or requiring them any further than beyond employees returning to work; and,

93.4 On what kind of arrangements must be made to transport workers between their homes and their respective areas of operations, i.e. public taxis, mine buses, with or without safety measures, central collection or door to door; and,

93.5 On what happens when all SADC foreign mineworkers must return from their countries at the end of the lockdown, and how that is going to work at borders.

94 These regulations fundamentally say nothing about:

94.1 Social distancing in the context of mining operations, that are sometimes enclosed and artificially ventilated with a single air source passing throughout the entire mine until the exit ventilation shaft, i.e. underground gold and coal mines; and,

94.2 Personal, Equipment and Workplace Hygiene; and,

94.3 Personal protection equipment (“PPE”) and their maintenance, inside or outside the workplace;

94.4 The status of ongoing chronic medical treatment programs, i.e. TB; and,

94.5 Fitness to work during Covid-19, i.e. first-degree silicosis or diabetic; and,

94.6 Training and Education; and,

94.7 Reporting and Investigation requirements; and,

94.8 Assessment of Covid-19 as an occupational disease or not; and,

94.9 Risk Assessments and Codes of Practice; and,

94.10 Entry, Periodic and/or Exit Medicals (red tickets) and their assessments, i.e. spirometry and audiograms (involve transmission possibilities); and

94.11 Medical finding appeals; and,

94.12 Transporting and briefing workers within the workplace, i.e. cages and health and safety pre-shift briefings; and

94.13 Hostel hygiene maintenance protocols'; and

94.14 3rd party control, i.e.: visitors, delivery vehicles, etc.; and

94.15 Potential Quarantine/Isolation venues.

95 According to the experts, these nominal regulations are insufficient for their purpose and far too vague to be an acceptable legal standard binding mining companies and/or employers.

96 I agree.

97 To the extent they purport to provide the sole binding legal framework regarding the management of Covid-19 on mines, they are not rationally connected to this purpose and are unreasonable.

98 I note the experts' view, which I share, that the DMA is not the most appropriate legislation to deal with these issues and concerns. For one thing, any regulations issued under the Act will fall away when the state of disaster ends.

99 The most appropriate legal framework is the MHSA. It can do what is being attempted under the DMA with no restriction across time until the end of the pandemic. It is the principal legislation to protect the health and safety of mineworkers as well as the health and safety of non-employees affected by the mining operations.

100 The MHSA falls under the DMRE and its powers to lawfully bind and control the conduct of the mining sector reside primarily with the Minister and the Chief Inspector.

X. CONDUCT OF THE DMRE

101 AMCU has pleaded with the DMRE to exercise its powers under the MHSA.

102 It has failed utterly to do so.

103 To date, the DMRE has decided not to issue binding national standards for mining companies.

104 Instead the DMRE has only offered the mining sector the following national statements and documents to guide their Covid-19 responses:

104.1 The Minister's remarks dated 25 March 2020;

104.2 The Chief Inspector's Guiding Principles dated 26 March 2020; and

104.3 The Minister's remarks dated 16 April 2020.

105 Copies of these documents are attached and marked **JM3**, **JM4** and **JM5** respectively.

106 I am advised by our legal representatives that none of these documents constitute enforceable legal instruments.

107 The Minister's remarks are not pursuant to anything in the MHSA and do not have any binding legal effect. The suggestion that mere remarks from the Minister would be binding upon mining companies is absurd. But that has not stopped the DMRE making it.

108 I attach correspondence from Advocate Thabo Mokoena, the Director General of Mineral Resources, signed on 27 March 2020 marked **JM6**. In this correspondence, Advocate Mokoena acknowledges receipt of an application for exemption received from Anglo American Platinum Limited dated 26 March 2020 and annexed hereto marked **JM7**.

109 In the correspondence, Advocate Mokoena purports to consent to Anglo American Platinum conducting mining operations “as set out in your letter subject to the attached regulations and directive from the Minister’s speech.” This ‘consent’ highlights the need for binding regulations.

110 Turning to the Chief Inspector’s Guiding Principles document, which AMCU only received over the Easter weekend, I note that it is not a Guideline contemplated in section 9(3) of the MHSA (“a Section 9(3) Guideline”). In terms of section 49(6), the Chief Inspector “must issue guidelines by notice in the Gazette.” To the best of our knowledge it has not been gazetted. Nowhere does it require employers to adopt codes of practice. It does not even mention codes of practice. Yet codes of practice are the purpose, focus and outcome of section 9(3).

111 An excellent example of a section 9(3) Guideline is the Guideline for the Compilation of a Mandatory Code of Practice for: The Right to Refuse Dangerous Work. This Guideline is a 29-page document that sets out in detail how to prepare a Code of Practice. I do not annexe this guideline so as to not overburden these urgent papers unduly. I note that mines’ COPs on the Right to Refuse Dangerous Work are uniform, detailed, unambiguous, and clear as they had to comply with this detailed guideline.

- 112 Our legal representatives communicated on 14 April 2020 with members of the National Department of Health's task team on Covid-19, including Professor Rajen Naidoo, to alert them to the Guiding Principles document. Professor Naidoo then advised that he was unaware of its existence prior to this.
- 113 Professor Naidoo, a highly respected professor of occupational medicine and global authority on coal mining diseases whose CV is annexed to this application, stated in a preliminary response to reading the Guiding Principles document that "this DMRE document is very superficial, and fails to appreciate the extent and complexities of the problem that workers in the industry are likely to face in the event of "unlocking"."
- 114 He went on further to state that "there has to be a comprehensive assessment of risk at different points of exposure for the worker returning to work: this has been listed to some extent in the document, but fails to elaborate the necessary action and responsibility. Systems of monitoring workers at points of departure from living areas to entry into the workplaces, and in reverse at the end of the shift is critical and must be spelled out in detail."
- 115 He ended his remarks on the document by stating that "[he] think[s] it serves no point in responding point-for-point on the DMRE Guidelines, suffice to say, a more meaningful strategy, a legally binding policy is necessary. "Unlock" permits (if such will ever exist) must be based on well-defined criteria, adherence to a clear mine by mine SOP, which includes public health and occupational health principles."

116 A copy of Professor Naidoo's email to our legal representative is attached and marked annexure **JM8**.

117 I point out at this point our legal representatives were still searching for a gazetted copy of the document to determine whether it was ever issued in terms of section 49(6) of the MHSA.

118 Professor David Rees, another highly respected professor of occupational medicine from the National Institute of Occupational Health ("NIOH"), writing in his personal capacity, further commented on the inadequacy of the Guiding Principles document. A copy of his comments dated 15 April 2020 is attached and marked annexure **JM9**.

119 In particular Professor Rees states in respect of the Chief Inspector's Guiding Principles document that "they rely heavily on the employer having the resources, competence, knowledge and will give effect to the principles. Smaller enterprises are going to find this very difficult, but so will large ones without access to a range of experts. The principles are also merely that, and to be a useful tool to reduce infections, details are needed to take account of the real situation in mining."

120 Professor Rodney Ehrlich, another highly respected professor of public health and occupational medicine from the University of Cape Town, supported the comments of Professors Rees and Naidoo and further critiqued the document as problematic. A copy of his letter dated 15 April 2020 is attached and marked annexure **JM10**.

121 It is noteworthy to further appreciate that these Professors have suggested that the advice to continue with spirometry (lung function) tests may possibly be dangerous and reckless in the current pandemic.

122 We further note the findings of Coulson and Christofides in the article '*Worker health and safety representatives on South African mines*'. The article is attached as annexure **JM11**. The article speaks to the role health and safety officers play on the mines. It provides that while health and safety representatives play an important monitoring role, the reality is that their employer generally restricts any authority they might have, therefore restricting any attempt to hold the employer responsible for non-compliance. Further, they found that in certain circumstances, health and safety representatives are not given sufficient resources to effectively fulfil their duties. Thus, in line with the recommendations made by the Professors expressed above, it is imperative that a national binding standard is created, so as to ensure that employers are held accountable for measures taken on mines, and to prevent health and safety representatives from bearing all responsibility.

123 These criticism are all supported by the Expert Opinion attached to this affidavit.

124 The Guiding Principles document is therefore unhelpful to mine health and safety.

125 The DMRE has therefore taken no material action to assist and/or support mineworkers with an exercise of their public power within its exclusive jurisdiction to create national binding standards. What it has done, and the only thing it has

done, is to cater for the mining and prospecting permits of mining companies by gazetting extensions to those permits and relaxing their conditions because of the Covid-19.

126 The DMRE is acting in the interests of mining companies not employers and is failing to fulfil its duty to proactively protect the constitutional rights of mineworkers to a safe and healthy environment.

127 AMCU's pleas for meaningful consultation and national binding standards have gone unanswered. A copy of our 8 April 2020 letter to the DMRE requesting this is attached and marked annexure **JM12**. No response to this letter to date has been received.

128 The DMRE has only communicated to AMCU that it is unlocking 132 mines to re-commence operations under the guise of essential mining, including but not limited to Manganese Metals Company (No. 120), Black Rock Quarries (No. 112), Mineral Sands Resources (No. 107), De Beers Consolidated Mines (No. 101), Tronox Mineral Sands (No. 74), Tshipi e'ntle Manganese (No. 23). A copy of its letter with the annexure of listed mines is attached and marked **JM13**.

129 I do not wish to comment on the logic that gold mining is an essential service, but it is unclear in what regard diamonds are an essential part of the Covid-19 response.

130 The 16 April 2020 amendment to the DMA regulations however makes all mining, irrespective of commodity, an essential service.

131 It is not clear to AMCU whether the Minister and the Chief Inspector have:

131.1 Failed to take a decision whether to exercise their powers under ss 76(1) and 9(3) respectively; or

131.2 Actively decided not to exercise those powers.

132 It makes little difference to the relief AMCU seeks:

132.1 If the Minister and Chief Inspector have failed to take a decision on whether to act, then their failure to decide is unreasonable and must be set aside. Given the urgency of the matter, and the fact that mines are currently going back to work, the delay in reaching a decision is unreasonable.

132.2 If the Minister and Chief Inspector have actively decided not to exercise their powers, then that decision is unreasonable and irrational. There is no other way to protect mineworkers' safety than through the exercise of these powers. The other steps that have been taken are, for the reasons given in the Expert Report, manifestly inadequate. In those circumstances, it is irrational not to exercise the powers they have.

133 AMCU does not seek to dictate precisely what the Inspector's Guidelines should contain, or what steps the Minister should take under s 76(2). The details are for those functionaries to determine. AMCU asks only for an order compelling them to act reasonably and rationally – and that they consider (amongst all other relevant factors), the Expert Opinion.

XI. MINERALS COUNCIL AND INDIVIDUAL COMPANIES

134 The Minerals Council has, to its credit, been more active than the DMRE. Some mining companies are taking the Covid-19 crisis seriously and have implemented measures with some promise.

135 An example of a mine that has developed a protocol with some positive measures is the Marula Operations (Implats Group) in Limpopo. Marula has developed a 22-page Covid-19 response plan, a copy of which is annexed hereto marked **JM14**. The plan includes six stages of Covid-19 protocols:

135.1 Stage 0: International Spread –

No cases in Country of Operation (South Africa, Zimbabwe, Canada)

135.2 Stage I: Confirmed cases in Country of Operation

I(a) Less than <100 confirmed cases

I(b) greater than >100 confirmed cases

135.3 Stage II: Confirmed cases in Region (Province) of Operation

II(a) Less than <100

II(b) greater than >100

135.4 Stage III: Confirmed cases in Municipality of the Operation

III(a) Less than <100

III(b) greater than >100

135.5 Stage IV: Confirmed cases at an Implats Operation

IV(a) Less than <10 (Note 10 cases)

IV(b) greater than >10 -100 (Note 10 cases)

135.6 Stage V: Multiple confirmed cases at an Implats Operation

V(a) >100 -1000

V(b) >1000

136 The Marula Operations Response document records the following under PPE:

“Personal Protective Equipment (PPE) usage:

Various types of PPE are required dependent on the level of exposure the individual is subjected to. Different types of masks will be used e.g. healthcare workers will be supplied with N95 masks as opposed to surgical masks that will be used for employees at the shafts. Medical personnel will require facial visors, surgical gloves, gowns when they must take medical swabs from the people under investigation. Symptomatic individuals who present at the health facility will be issued with surgical masks to prevent spread of germs.”

137 While AMCU would prefer the greatest levels of protection, the incorporation of N95 or FFP2-level masks in certain high-risk areas is a positive measure. The provision of medical surgical-level masks for general workers at the shafts is also comforting. While FFP3-level masks provide near-certain protection, even when generating aerosols that may be infected with Covid-19, they are in short supply. A copy of the UK National Health Service guideline on masks is attached and marked annexure **JM15**.

- 138 The Impala document further recognises the smaller, critical details like that audiometry and lung functions tests should be halted at certain levels. The details about the practicalities of day-to-day operations, numbers of health practitioners required, the contents of supportive medical packs, etc, are also advised on with proper procedures to be administrated.
- 139 However, the problem is that not all mines are treating the Covid-19 crisis with the same level of seriousness as Implats. Absent a common national standard, Codes of Practice and Risk Assessments are diverse and uncoordinated, if they are put in place at all.
- 140 Some may suggest workers use their bandana or scarfs to protect themselves in line with the Minerals Council SOP (discussed more below) – this is not acceptable in a mining environment.
- 141 The Impala documentation is not without its flaws as well and could be improved upon with additional version updates.
- 142 The Minerals Council has developed two Standard Operating Procedures (“SOP”) in respect of Covid-19 dated 23 March 2020 and 9 April 2020 (annexed marked **JM16** and **JM17**).
- 143 These SOPs were developed to assist Council members consider some of the potential measures implicated in the Covid-19 pandemic. The later SOP references an earlier SOP dated 25 March 2020 that AMCU has not seen. It may

refer to the 23 March SOP. AMCU only obtained copies of these SOPs during the week of 13 April 2020.

144 To its credit, these SOPs developed by the Minerals Council are far more detailed and substantial than the DMRE documents.

145 However, they too are vague and lack sufficient detail to regulate a specific operation. They are mostly a collection of recommendations and considerations rather than imperatives and minimum requirements.

146 Most importantly, they are ultimately non-binding on its members and have little if any effect on SA mining or associated companies that are not its members.

147 I draw this Court's attention to the experts' advice in the expert opinion that the Mineral Council's second SOP could well serve as a short term binding regulation, provided it took account of the experts' comments on its shortcoming

148 The Minerals Council has also published a 10-Point Action Plan document that summarises its views on the important aspects for mines in the Covid-19 pandemic. It is vague and offers no details. Its limitations are set out in more detail in the expert opinion. A copy of the Action Plan is attached and marked **JM18**.

XII. NECESSITY FOR A BINDING NATIONAL STANDARD

149 Above we have explained that there is much lacking from the actions of the DMRE to date and the current regulations relating to the mining sector.

150 Currently, there is no binding, detailed or coordinated approach to Covid-19 for the mining sector. As a result, mining companies have responded differently to their obligation of implementing measures to mitigate the risk of contraction of the Covid-19 virus in the workplace. This places mineworkers, and mine affected communities, at risk.

151 It is simply unacceptable for the Minister and Chief Inspector to rely upon employer's good faith and to fail to impose binding, national standards.

152 The need for a national binding standard is imperative to protect the safety of the surrounding mining communities. The consequence of employers not implementing sufficient measures to eliminate the risk of workers contracting Covid-19 can have a direct impact on the safety of their families and communities. Further, not ensuring protective measures are put in place can also hamper the effects of the current national lockdown and exasperate the current crisis.

153 The expert opinion states the following:

“Our recommendation is therefore, that a binding, national standard is needed and required, that must clearly formulate the minimum detailed and unambiguous requirements for a mine to follow. This is clearly within the ambit of the DMRE, in consultation with the NDOH task team on Covid-19. The DMRE and the required national standard must be

coordinated with all sectors of the country, and not within its own independent and parallel processes. The National Institute of Occupational Health and National Institute of Communicable Diseases must guide the DMRE, Mine Health and Safety Council, Minerals Council and trade unions on what is required and what comprises adequate standards.” (para 45)

154 I agree.

155 It is also critical for the benefit of the mining companies themselves in respect of the utter confusion that has revolved around the unlocking of the mines noted above.

156 In the long term, and in further endorsement of the experts' recommendations, we would like an opportunity to further engage with all the stakeholders, together with relevant experts, e.g. NIOH and NICD, on how these national standards can be further improved.

XIII. EFFORTS TO ENGAGE

157 This application has been brought as a last resort.

158 AMCU has repeatedly written to the DMRE during the current crisis requesting consultations, assistance, expert guidance, and binding measures. These correspondences have been ignored.

159 On 26 March 2020 AMCU addressed a letter to the Minister in response to the Minister's remarks on the implementation of the lockdown relating to Mining. The letter addressed the fact that the remarks made by the Minister differed from those of the President of the Republic, who said that only essential services in mining and energy will continue operating during the lockdown. However, the Minister's remarks indicated that mining operations will simply be scaled down. AMCU therefore requested that the Minister reconsider this approach, and issue more directives with finer details. In addition, AMCU found it problematic that the DMRE did not consult with trade unions when finalising the Guiding Principles. This letter is attached as **JM19**.

160 On 3 April 2020, an SMS was sent to AMCU on behalf of the Director-General of DMRE inviting AMCU and other stakeholders to an engagement at the DMRE's physical offices in Pretoria on 7 April 2020.

161 On 5 April 2020, AMCU wrote to the Minister of DMRE and again addressed the issues raised in the first letter directed to DMRE (dated 26 March 2020). AMCU further advised the DMRE that unless the meeting was conducted via

teleconference or any other digital platform, AMCU would not be able to attend the meeting. This letter is attached at **JM20**.

162 On 6 April 2020 AMCU again wrote to the Minister of DMRE in an attempt to confirm whether AMCU would be joined to the meeting to be held on 7 April 2020 via teleconference. The DMRE did not respond to this request. The letter is attached as annexure **JM21**.

163 A printout of a newspaper article that covered the consultation meeting is attached and marked Annexure **JM22**.

164 On 8 April 2020, already attached as annexure **JM12**, AMCU again wrote to the DMRE. The letter essentially constituted AMCU's submissions on the implementation of Covid-19 measures in the mining and energy sector in order to safeguard workers' health. Amongst other things, AMCU proposed that a sectoral task team be established to oversee the implementation and compliance of the applicable legislative and regulatory framework. The main objective of the task team would be to develop appropriate guidelines for Codes of Practice (COP) for companies in the mining and energy sector. The guideline for COPs must then be gazetted as a regulation and a safety standard in the sector. Once the regulations are in place, all mines must implement them at their respective mines. Should a company need to deviate from these regulations, it must be done in consultation with their Chief Occupational Medical Officer. The Chief Occupational Medical Practitioner will have the authority to shut down any part of the mine on written notice to the mine manager and may, in consultation with other stakeholders, re-open a closed part of the mine. Only once these

regulations have been promulgated and all mines have submitted their Covid-19 measures to the Chief Inspector for approval, and only if and when such approval is granted, may employers instruct mine workers to return to work.

165 A response to AMCU's letter dated 5 April 2020 from DMRE was received on 8 April 2020. This response did not address the submissions AMCU made, nor did it address their concerns regarding the potential risk posed by the Covid-19 pandemic to mine workers and how employers sought to mitigate these potential risks. The letter is annexed above marked **JM13**.

166 AMCU again wrote to DMRE on 13 April 2020 outlining the concerns and the need for binding regulations to be gazetted to ensure that employers are obligated to put in place measures that will ensure mineworkers return to a safe and healthy work environment. The correspondence made clear that in the absence of these regulations, AMCU will not advise their members to return to work. The letter is attached as **JM23**.

167 We were eventually forced to raise our ongoing concerns with the DMRE through our lawyers. This correspondence, both dated 16 April 2020, is annexed here marked **JM24A** and **JM24B**.

168 Between the time **JM24A** and **JM24B** was sent, the COGTA Minister amended the regulations and expanded the ambit of essential services to include all mining on 16 April 2020.

169 The DMRE once more convened a consultation meeting with stakeholders on 17 April 2020. A copy of our letter to the DMRE dated 16 April 2020 requesting access to the meeting via teleconference or any other digital platform is attached and marked annexure **JM25**. On 17 April 2020, the day of the meeting, I was contacted by the Director General of DMRE who advised that I will be connected to the meeting by teleconference at 13:30. However, this did not happen. To date I have not received any word from the Department of DMRE on why I was not included in this meeting despite their prior commitment to include AMCU in the meeting.

XIV. URGENCY

- 170 Mining companies have already begun recalling their mineworkers to operations with the intention of getting back to full production as quickly as they can. Copies of correspondence evidencing this are attached and marked annexure **JM26**.
- 171 It has already been stated that the DMRE previously unlocked 132 mines, but all mines have now been unlocked with the 16 April 2020 amendment to the DMA Regulations. In the next couple of days to weeks, it is expected that around a quarter of a million mineworkers will return to operations upscaling until the full mining workforce is back at work.
- 172 Our lawyers wrote to the DMRE on 16 April 2020 demanding we be advised what steps are being taken to implement national binding and detailed standards before 17h00 on 17 April 2020. Our legal representatives spelled out for the DMRE the different legal frameworks that it easily could take steps with to implement national standards. A copy of this correspondence is already attached and marked annexure **JM24A**.
- 173 A short time after this lawyers' letter was sent to the DMRE, the COGTA Minister informed the public that the DMA regulations were being amended, with the addition of sections 11J and 11K and changes to Schedule B. Our legal representatives then wrote to the DMRE again advising that the amendments and additions to the DMA regulations were still inadequate and our original demand persisted. A copy of this second lawyer's letter dated 16 April 2020 is already attached and marked annexure **JM24B**.

174 To date our legal representatives have not received any response to either of these letters.

175 Instead, the DMRE sent another text message on 16 April 2020 to AMCU that another physical consultation meeting would be held on 17 April 2020. AMCU once again wrote to the DMRE asking for permission to attend the meeting electronically. The informal response was that the DMRE would 'try' and accommodate AMCU. A copy of our letter to the DMRE dated 16 April 2020 is already attached and marked **JM25**.

176 The DMRE's Director-General advised me that they would attempt to link the AMCU at 13h30 on that Friday for the physical meeting. However, I waited for hours for the link up with no success. The DMRE did not contact me or link me into the 17 April 2020 discussions.

177 We are presented with no alternative but to bring this application on an urgent basis. The potential for ongoing and immediate harm is very real and serious. Our members and their families face severe prejudice with the risk of death, permanent disability from permanent lung impairment if they survive a serious infection, or painful sickness.

178 Presently the Compensation Commissioner of Labour does not recognise mineworkers as very high or high risk, and therein being afforded with a presumption that their Covid-19 infection is an occupational disease in terms of the Compensation of Occupational Injuries and Diseases Act ("COIDA"). Mineworkers are regarded as medium risk workers only. If infected they could

sue the mines under the common law, but their chances of successfully litigating such a claim is remote to impossible because of the evidential requirements. National binding and detailed standards are their only real hope for the protection of their rights.

179 There is little or no prejudice to the State Respondents with bringing this application on an urgent basis. AMCU has afforded the DMRE numerous occasions an opportunity to engage with our grave concerns. They presumably have already determined reasons for their failure to take meaningful action.

180 There is also little or no prejudice to the Minerals Council and mining companies. No relief is sought directly against them.

181 The ongoing refusal of the State Respondents to perform their responsibilities under their statutory and constitutional obligations will result in irreparable harm to potentially thousands of mineworkers and their families and communities. If the State Respondents remain supine, many will become infected and get sick and some will die. It is not an exaggeration to say that human lives are at stake.

182 It is submitted that the matter is very urgent and deserving of the required condonation to be placed on the urgent roll.

183 I note in conclusion that commissioning this affidavit conventionally has not been possible.

184 I do not own a printer. All print shops in my neighbourhood are closed. I was therefore unable to print a copy of this affidavit.

185 I therefore had to confirm the contents of this affidavit over a video teleconference with a commissioner of oaths.

186 This is set out in more detail in the affidavit of Mr Kahn.

187 I hereby seek condonation for filing this affidavit as it is. I am engaging with my legal team and others at AMCU to find a way to physically commission this affidavit as soon as possible.

XV. RELIEF

188 In terms of s 8 of PAJA and s 172(1)(b) of the Constitution, this Court can grant any order that is just and equitable.

189 AMCU seeks two forms of relief.

190 First, it contends that the following decisions should be reviewed and set aside because they are irrational and unreasonable in terms of PAJA and the principle of legality:

190.1 The Minister's decision not to declare the Covid-19 pandemic a health hazard in terms of s 76(1) of the MHSA. *In the alternative*, if the Minister has not taken a decision, then his failure to decide should be reviewed and set aside.

190.2 The Chief Inspector's decisions: (a) not to enact Guidelines in terms of s 9(3) read with s 49(6) of the MHSA; and (b) his decision not to require employers to enact codes of practice that comply with those guidelines. *In the alternative*, if the Chief Inspector has not taken those decisions, his failure to decide should be reviewed and set aside.

190.3 If the above decisions are not set aside, AMCU seeks an order reviewing and setting aside the COGTA Minister's DMA Regulations on the basis that they are inadequate.

191 Second, once those decisions are set aside, AMCU seeks further relief to ensure that proper decisions are taken to protect mineworkers. It seeks the following relief:

191.1 Substituting the Minister's decision not to declare a health hazard in terms of s76(1) (or his failure to decide whether to declare a health hazard) with a decision to declare a health hazard.

191.2 Substituting the Chief Inspector's decisions not to issue Guidelines under s 9(3) and not to require employers to issue COPs compliant with those Guidelines in terms of s 9(2) (or his failure to take those decisions), with decisions to issue the Guidelines, and to require employers to issue COPs.

192 Substitution is justified because:

192.1 The outcome is a foregone conclusion. Any decision other than to act in terms of ss 76(1) and 9(2)-(3) would be irrational, unreasonable and unlawful.

192.2 This Court is in as good a position as the Minister and the Chief Inspector to make the decision whether some binding, national standards are required.

192.3 It is urgent for the decision to be taken as soon as possible. Every day that elapses risks lives. Remittal would only waste time.

193 AMCU does not seek to dictate what measures the Minister should take in terms of s 76(2), nor what the content of the Chief Inspector's Guidelines should be. It

is for the decision-makers to decide precisely what action to take. AMCU only asks this Court to compel the Minister and the Chief Inspector to take action.

194 *In the alternative* to substitution, AMCU seeks an order compelling the Minister and the Chief Inspector to take the relevant decisions within 5 days, and to consider the Expert Opinion in taking those decisions.

195 *In the further alternative*, if the challenge to the Minister's and the Chief Inspector's decisions fail, but the challenge to the DMA Regulations succeeds, AMCU seeks an order compelling the COGTA Minister to enact new regulations within a fixed time period.

XVI. CONCLUSION

196 In conclusion, AMCU has thousands of members that are in grave danger if national binding and detailed standards for dealing with Covid-19 on mines are not gazetted,.

197 AMCU is not opposing or trying to obstruct the return to work for the mining sector. AMCU merely seeks to protect its members' rights to health and safety through binding obligations upon mining companies.

198 Without detailed national detailed standards, chaos and confusion will continue with dangerous and far-reaching consequences. There is no other real alternative. Arresting CEOs through the criminal justice system will not solve the real and larger problem. Mining companies are also entitled to clear and unambiguous law.

199 While AMCU accepts that some mining companies may rise to the occasion, uncoordinated self-regulation is simply inadequate in the face of the risk mineworkers face. A centralised and universal approach, informed by all stakeholders and the required experts, is required.

200 Wherefore we pray for the relief sought in the notice of motion, including the costs of two counsel.

JEFFREY KEHLA MPAHLELE

I certify that the Deponent has acknowledged that he knows and understands the contents of this Affidavit which was sworn to before me at _____ on this ___ day of April 2020, and that the provisions of the Regulations contained in Government Notice R1258 of 21 July 1972 (as amended) were complied with.

COMMISSIONER OF OATHS