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BULLETIN

High Court Ruling on Mining Charter 2018: "Once Empowered, Always Empowered"

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Once empowered [is] always empowered [after all] – this is the effect of the judgment handed down by the High Court, Pretoria on 21 September 2021 in the matter between *Minerals Council of South Africa vs Minister of Mineral Resources and Energy and thirteen others* [Case No.20341/19] (the "**Judgment**") in relation to the challenge to the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 ("**Mining Charter III**").

The Minerals Council of South Africa instituted its application to review and set aside certain provisions of the Mining Charter III (the "**Review Application**") in terms of section 6(2) of the Promotion of Administrative Justice Act, 2000, alternatively in terms of the principle of legality as set out in the Constitution on the basis that:

- the Minister of Mineral Resources and Energy ("**Minister**") lacks the power to publish Mining Charter III in a manner that suggests that it is a legislative instrument, and doing so amounted to the Minister assuming the functions of the legislature;
- the clauses are unauthorised by section 100(2) of the Minerals and Petroleum Resources Development Act, 2002 ("**MPRDA**") and therefore the decision to publish them as part of Mining Charter III was materially influenced by an error of law.

A copy of our bulletin on the salient features of the Minerals Council's challenge is available [here](#).

The High Court Judgment

The full bench of the High Court (Gauteng Division, Pretoria) characterized the question in dispute that had to be determined as concerning the ambit of the powers of the Minister under section 100(2) of the MPRDA to make law in the form of subordinate legislation, and the legal nature and role of the Mining Charter III in the context of the MPRDA. Therefore, at issue, was whether the Mining Charter III constitutes law or policy.

The Minerals Council contended that the Mining Charter III is a formal policy document developed by the Minister in terms of section 100(2) of the MPRDA. To this effect, it argued that the Mining Charter III is binding on the Minister whenever he considers an application for a mining right by virtue of the provisions of section 23(1)(h) of the MPRDA. This provision only permits the Minister to grant a mining right if, amongst other things, the grant of such right would be in accordance with the charter contemplated in section 100(2) of the MPRDA.

To the contrary, the Minister argued that section 100(2) of the MPRDA empowers him to make law through the development of the

Mining Charter III, hence that the charter (which he developed) constitutes a *sui generis* form of subordinate legislation which is directly binding on holders of mining rights.

Kathree-Setiloane J (with Van der Schyff J and Ceylon AJ concurring), held that having considered the language of section 100(2) of the MPRDA in light of its ordinary meaning, the context in which it appears and the apparent purpose for which it is directed, section 100(2) of the MPRDA does not empower the Minister to make law. In other words, the Mining Charter III is not binding subordinate legislation but an instrument of policy.

Therefore, in its decision, the High Court held that the Mining Charter III is a policy document and not law; and that such finding is dispositive of the main grounds of review that the challenged clauses of the Mining Charter III are unconstitutional because the Minister lacked the power to publish a charter in the form of a legislative instrument binding upon all holders of mining rights, the breach of which will be visited by the consequences and penalties provided for in the MPRDA.

Accordingly, the clauses of the Mining Charter III as challenged by the Minerals Council in the Review Application are reviewed and set aside.

Implication of the Judgment

The Judgment set aside a number of clauses in the Mining Charter, including amongst others:

- clauses 2.1.1.2, 2.1.1.4, 2.1.1.5 and 2.1.1.6, which provided that the recognition of continuing consequences will not be applicable upon the renewal and/or transfer of a mining right and that a renewal of an existing mining right will be subject to the requirements imposed under Mining Charter III at the time when the renewal application is submitted (i.e. 30% BEE shareholding);
- clause 2.1.3.2, which required that the minimum 30% BEE shareholding for new mining rights must comprise of a minimum of 5% non-transferable *carried* interest to each of Qualifying Employees and Host Communities, and a 20% effective ownership to BEE entrepreneurs (5% of which must preferably be owned by women);
- clause 2.1.5.2, which provided that the prescribed minimum 30% target shall apply for the duration of a mining right;
- clause 2.1.71, which permitted a mining right holder to claim the beneficiation equity equivalent against a maximum of 5 percentage points of a BEE Entrepreneur shareholding only;
- clauses 2.2, which dealt with the provisions of Mining Charter III in relation to inclusive procurement, supplier and enterprise development targets;
- clause 7.2, which provided that for mining right holders, the ownership and mine community development elements are ring-fenced, requiring 100% compliance at all times;
- clause 9.1, which dealt with the penalty and enforcement provisions of the Mining Charter III in case of non-compliance.

Therefore, mining right holders who, at any stage during the existence of their mining right achieved a minimum of 26% BEE shareholding, and whose BEE partners exited prior to the commencement of Mining Charter III, will be recognized as compliant with the BEE requirements of the Mining Charter for the duration of the mining right; and such recognition does not lapse on the renewal or on the transfer of the mining right (the so called "*once empowered always empowered*" principle). In other words, existing mining right holders' historical BEE transactions will be recognised for the purposes of the renewal and transfer of existing mining rights and the applicant for renewal or the transferee, as the case may be, will not be required to comply with the BEE ownership requirements applicable to new mining rights.

Although applicants for new mining rights are still required to have a minimum of 30% BEE shareholding, such 30% BEE shareholding does not need to comprise of the 5% (minimum) non-transferable carried interest to each of Qualifying Employees and Host Communities, and a 20% effective ownership to BEE entrepreneurs (5% of which must preferably be owned by women). Mining right holders are free to structure their BEE shareholding as they deem fit.

Moreover, non-compliance with the ownership and mine community development elements of Mining Charter III will no longer render a mining company in breach of the MPRDA, and subject to the provisions of section 93, read with section 47, 98 and 99 of the MPRDA. Accordingly, non-compliance with the Mining Charter III will not render a mining right subject to suspension and/or cancellation in terms of the MPRDA.

Conclusion

It must be noted that not all of the provisions of the Mining Charter III were reviewed and set aside. These clauses include amongst, that new mining rights must have a minimum of 30% BEE shareholding, the clauses which concern employment equity, human resource development, mine community development, and housing and living conditions. Given that the Court held that the Mining Charter III is a policy document rather than a legally binding instrument, mining right holders may, but are not legally obliged to, comply with the remaining requirements imposed under the Mining Charter III.

It must be noted further that section 23(6) of the MPRDA provides that a mining right is subject to the terms 'prescribed' by the Minister. Section 23(6) of the MPRDA requires the holder of a mining right to comply not only with the terms and conditions of its right, but also the 'prescribed terms and conditions'. The term 'prescribed' is defined in section 1 of the MPRDA to mean prescribed by regulation. In terms of section 107 of the MPRDA, the Minister may make regulations regarding "*any other matter the regulation of which may be necessary or expedient in order to achieve the objects of this Act*". In light of the above, the Court indicated that the Minister is entitled to prescribe any regulations in order to achieve the objects set out in sections 2(c), (d), (e), (f) or (i) of the MPRDA.

Moreover, it is open to the Minister to impose elements of the Mining Charter III indirectly, through incorporating the principles as terms and conditions of a mining right.

As at the date of this bulletin, none of the respondents had yet to indicate whether they will appeal the judgment.

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Mining

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