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Dear Readers,

With the new season's rains arriving for Johannesburg this week, we hope you have been keeping well.

This edition of our newsletter focusses on the recent court case which ruled the Mining Charter did not amount to legislation, as well as keeping you up to date with the most recent legal notices and amendments.



The Mining Charter is not law, and here's what it means for you

Sarah Burford, Associate

On 21 September 2021, the High Court in Pretoria handed down its judgment in the matter of Minerals Council of South Africa vs Minister of Mineral Resources and Energy and thirteen others [Case No.20341/19]. In this matter, the Minerals Council of South Africa instituted an application to review and set aside certain principles of the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 ("Mining Charter"). A number of key clauses of the Charter were also set aside, including the re-empowerment clause which required mining rights holders to maintain black economic empowerment (BEE) ownership targets of 26% for pre-existing mining rights and 30% for new mining rights.

The first question the Court determined that needed answering was whether Section 100(2) of the Minerals and Petroleum Resources Development Act, 2002 ("MPRDA") empowered the Minister of Mineral Resources and Energy ("Minister") to publish the Mining Charter insofar as it suggested that it was a legislative instrument.

Based on this finding, the Court would then ascertain as to whether the contested provisions in the Mining Charter were in fact binding as with 'regular' legislation that had been gazetted.

Minerals Council Argument:

The Minerals Council argued that the Mining Charter was a formal policy document developed by the Minister in terms of section 100(2) of the MPRDA. Consequently, the Mining Charter was therefore 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 (which states "Subject to subsection (4), the Minister must grant a mining right if - the granting of such right will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan". 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.



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Minister's Argument:

The Minister argued that section 100(2) of the MPRDA empowers him to make law through the development of the Mining Charter, therefore the Charter (which he developed) constitutes a sui generis (unique) form of subordinate legislation which is directly binding on holders of mining rights.

Court's Ruling:

The Court considered the legal nature and role of the Mining Charter in the context of the MPRDA regulatory scheme. The Court found that Section 100(2) of the MPRDA did not empower the Minister to make law and consequently, the Mining Charter was not, as the Minister had argued, binding on holders of mining rights. It was ruled that the Mining Charter was a Policy Document and not subordinate legislation.

As a result, only select provisions of the Charter were actually reviewed and set aside. These clauses included 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. As a result of the Mining Charter being officially declared as 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.

However, the Court stated that there were still legal means through which the Minister could indirectly enforce the contents of the clauses of the Charter which were set aside. 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". 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.

It is therefore possible for the Minister to enforce the objects of the Mining Charter by attaching conditions to the granted mining rights or through the promulgation of regulations in terms of the MPRDA.

Where to next?

This matter will prove an interesting chronicle to follow as the DMRE decides on which other measures to enforce the now almost-redundant contents of the Mining Charter. Certainly, it would appear that the most straight forward manner would be for the Minister to promulgate regulations which are based on the contents of the now-set aside provisions of the Mining Charter. For example, as we know, BEE shareholding must be confirmed prior to the granting of a mining right, meaning that such conditions can hardly be realistically attached to a mining right if the shareholding is already confirmed. However, at the time of writing this piece, no party has indicated whether it will appeal the ruling.



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National Legislation

National Environmental Management Act 107 of 1998 - GN 765 in GG 45058 of 27 August 2021 - Proposed Financial Provisioning Regulations, 2021 - for comment

Financial Markets Act 19 of 2012 - BN 108 in GG 45058 of 27 August 2021 - Proposed amendments to the A2X Listing Requirements - for comment

Financial Markets Act 19 of 2012 - BN 109 in GG 45058 of 27 August 2021 - Proposed amendments to the JSE Interest and Currency Derivatives Rules and the JSE Derivatives Rules - for comment

Magistrates' Courts Act 32 of 1944 - GN 783 in GG 45064 of 27 August 2021 - Appointment of places within the district other than the Seat of the Magistracy for the holding of a court published and GN 962 in GG 38268 of 28 November 2014 amended with effect from 30 August 2021

Petroleum Products Act 120 of 1977 - GN R784 in GG 45068 of 31 August 2021 - Regulations regarding petroleum products specifications and standards for implementation published and previous regulations published under GN R627 in GG 28958 of 23 June 2006 repealed with effect from 1 September 2021

Petroleum Products Act 120 of 1977 - GN R794 in GG 45080 of 1 September 2021 - Amendment Regulations regarding the Mandatory Blending of Biofuels with Petrol and Diesel, 2021

Petroleum Products Act 120 of 1977 - GN R790 in GG 45077 of 31 August 2021 - Regulations in respect of the single maximum national retail price for illuminating paraffin published with effect from 1 September 2021

Petroleum Products Act 120 of 1977 - GN R791 in GG 45077 of 31 August 2021 - Regulations in respect of petroleum products published and GN R677 in GG 44927 of 3 August 2021 substituted with effect from 1 September 2021

Petroleum Products Act 120 of 1977 - GN R792 in GG 45077 of 31 August 2021 - Regulations in respect of the maximum retail price of Liquefied Petroleum Gas supplied to residential customers published with effect from 1 September 2021



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Provincial Legislation

Western Cape

Local Government: Municipal Systems Act 32 of 2000 - LAN 21557 in PG 8481 of 30 August 2021 - Cederberg Local Municipality - Waste Management By-law

Promotion of Access to Information Act 2 of 2000 - LAN 21561 in PG 8482 of 31 August 2021 - West Coast District Municipality - Manual on the Promotion of Access to Information

Constitution of the Western Cape 1 of 1998 - PN 88 in PG 8486 of 3 September 2021 - Assignment of powers and functions relating to traditional and Khoi-San affairs to the Provincial Minister responsible for local government published with effect from 30 August 2021

North West:

Constitution of the Republic of South Africa, 1996 and Local Government: Municipal Systems Act 32 of 2000: Rustenburg Local Municipality - PN 140 in PG 8264 of 31 August 2021 - By-laws for the hire and use of community, sports, arts and culture facilities

Constitution of the Republic of South Africa, 1996 and Local Government: Municipal Systems Act 32 of 2000 - PN 140 in PG 8264 of 31 August 2021 - Rustenburg Local Municipality: By-laws relating to public cemeteries



Notable Topics:

More than 200 000 miners vaccinated:

<https://www.businesslive.co.za/bd/national/2021-09-26-more-than-200000-miners-vaccinated/>

SA Mines to invest in massive 2 GW of renewable energy:

<https://www.news24.com/fin24/companies/mining/sa-mines-to-invest-in-massive-2gw-of-renewable-energy-20210923>

Mantashe must abandon plans to develop 1,500MW of coal-powered electricity, or face court case, say activists

<https://www.dailymaverick.co.za/article/2021-09-23-mantashe-must-abandon-plans-to-develop-1500mw-of-coal-powered-electricity-or-face-court-case-say-activists/>

Leading the Way for Women in Mining:

<https://miningnews.co.za/2021/08/12/leading-the-way-for-women-in-mining/>

IAMGOLD sets commitment to achieve net negative emissions by 2050:

<https://www.mining-technology.com/news/net-negative-emissions/>



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