2018 Mining Charter is policy, not law!

By Jonathan Veeran, Bruce Dickinson, & Rita Spalding from Webber Wentzel

The High Court has ruled that the 2018 Mining Charter is policy, not law, and has set aside various aspects of the Charter as unconstitutional. While sound, this judgment is likely to be appealed.

On 21 September 2021, the High Court of South Africa, Gauteng Division, Pretoria handed down judgment in the matter between the Minerals Council South Africa v *the Minister of Mineral Resources and Energy and Others* (case no. 20341/18).

The Minerals Council had brought an application, under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), seeking to review and set aside certain clauses of the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 (the 2018 Charter). In the alternative, the Minerals Council sought a declarator that the challenged clauses are inconsistent with the principle of legality and should be set aside.

The application was previously heard on 5 May 2020, after which the Court ordered the joinder of the joined respondents and postponed the merits for hearing. The joined respondents comprise host communities affected by mining operations, organizations representing those mining communities, and trade unions. The trade union respondents opposed the relief sought by the Minerals Council. The communities did not oppose the relief sought by the Minerals Council but sought additional relief on the basis that: (i) there was inadequate consultation with them prior to the publication of the 2018 Charter; and (ii) that the 2018 Charter fails to substantially address environmental degradation and gender-based injustice caused by mining, as well as the poverty and inequality of mining-affected communities.

The matter was heard before a full bench comprised of Kathree-Setiloane J, Van der Schyff J, and Ceylon AJ. The Court ruled in favour of the Minerals Council, with Kathree-Setiloane J writing the judgment and Van der Schyff J and Ceylon AJ concurring.

Key Points

The question before the Court was the power of the Minister of Mineral Resources and Energy (the Minister) under section 100(2) of the Mineral and Petroleum Resources Development Act (MPRDA) to make law in the form of subordinate legislation, and whether the 2018 Charter constitutes law or policy.

The Minister argued that section 100(2) of the MPRDA empowered him to make law through the development of the 2018 Charter and that the 2018 Charter thus constitutes a sui generis form of legislation which is binding on the holders of mining rights. The Minerals Council contended that the 2018 Charter is a formal policy document developed by the Minister in terms of the MPRDA and is therefore binding on the Minister when he considers applications for mining rights, in accordance with section 23(1)(h) of the MPRDA. This provision permits the Minister to grant a mining right only if, amongst other things, the grant would be in accordance with the Charter contemplated in section 100(2) of the MPRDA.

Kathree-Setiloane J concluded that a contextual approach must be adopted in interpretating section 4 of the MPRDA.

In interpreting the language of the MPRDA, Kathree-Setiloane J noted that section 100(2)(a) empowers the Minister to '*develop a broad-based socio-economic empowerment Charter that will set the framework for targets and timetable for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry*…'. While the word 'charter' is recognized in South African law, it is noted that the more commonly used 'law' and 'regulation' are used in the MPRDA. Indeed, the Minister is expressly authorized to make subordinate legislation in section 107.

Kathree-Setiloane J concluded that the word 'charter' was chosen deliberately by the Legislature to indicate something other than a law. Similarly, the word 'develop' is not used by the Legislature to describe law-making, but with reference to formulating policy. Furthermore, the permissive rather than peremptory wording of section 100(2) indicates that the Legislature did not intend the Charter to be subordinate legislation, as the Legislature would have used peremptory wording if the Charter was intended to be anything other than guiding principles. Kathree-Setiloane J concluded the interpretation

2018 Mining Charter is policy, not law!
(continued)

of the MPRDA by noting that if section 100(2) were to be construed as a delegation of the power to make legislation, it would offend the doctrine of the separation of powers and lead to further unbridled law-making.

Having concluded that the language of the MPRDA does not give the Minister the power to make law in the form of subordinate legislation, Kathree-Setiloane J considered the purpose of section 100(2), which is transformational. Contrary to the argument of the Minister, the transformational objectives of the section do not require that the Charter take the form of subordinate legislation. The MPRDA contains an enforcement structure, as no person may mine without a mining right and section 23(1)(h) stipulates that the Minister may only grant such a right if it will further the transformational objects of the Act's section 2(d) and (f), in accordance with the Charter contemplated in section 100(2). The holder of a mining right is also obliged to report on compliance with the objects of the MPRDA and compliance with the Charter, in terms of sections 25(2)(h) and 28(2)(c). Therefore, the purpose of section 100(2) is fulfilled without the 2018 Charter constituting binding law.

The Minister advanced the argument that the transformation of the mining industry has been ineffective. Transformation could be expedited if the 2018 Charter was directly enforceable law. Kathree-Setiloane J noted that a failure to achieve the objects identified in section 100(2) of the MPRDA is a legitimate concern; however, the Minister's argument failed to account for additional factors contributing to transformation, such as security of tenure, conversion of old order rights into new order rights, and the Minister's own failure to make regulations in terms of section 107 regarding the achievement of the objectives set out in sections 2(c), (d), (e), (f), or (i) of the MPRDA.

In light of the above, Kathree-Setiloane J declared, inter alia that:

Section 100(2) does not empower the Minister to make law and that the 2018 Charter is therefore not binding subordinate legislation but is rather an instrument of policy.

Certain clauses of the 2018 Charter are reviewed and set aside in terms of PAJA. Inter alia, the following aspects of the 2018 Charter have been found to be unconstitutional:

i. Provisions which require compliance with the 30% Historically Disadvantaged South African (**'HDSA'**) ownership requirement upon renewals and/or transfers of rights issued under the MPRDA;
ii. Provisions which require the implementation of mandated structures, such as community, employee, and HDSA entrepreneur schemes;
iii. The provisions which render the HDSA ownership requirement applicable to holders of permits under the Diamonds Act, 1986 and the Precious Metals Act, 2005;
iv. Provisions which allow for a beneficiation offset;
v. The provision dealing with preferential procurement; and
vi. The enforcement provisions which allow for suspension and cancellation of rights in the event of non-compliance with the 2018 Charter.

Implications

The judgment is explicit that the 2018 Charter is not binding legislation, It is only binding on the holder of a mining right to the extent that its terms were lawfully incorporated by the Minister into the mining right. The implication of the judgment is therefore that a mining right holder will not be required to 'top up' its empowerment credentials on renewal of the mining right and will have more flexibility in structuring empowerment transactions. The judgment is sound in law but is likely to be appealed.

Nadine Van Tonder