

Mining Charter: policy, not law

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The High Court of South Africa, Gauteng Division, Pretoria has handed down judgment in the matter between the Minerals Council of South Africa v the Minister of Mineral Resources and Energy and Others (case no 20341/18) ruling that the 2018 Mining Charter is policy, not law, and has set aside various aspects of the Charter as unconstitutional.



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

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.

Key Points

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.

In light of the above, Kathree-Setiloane 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:
 1. 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.
 2. Provisions which require the implementation of mandated structures, such as community, employee and HDSA entrepreneur schemes.
 3. The provisions which render the HDSA ownership requirement applicable to holders of permits under the Diamonds Act, 1986 and the Precious Metals Act, 2005.
 4. Provisions which allow for a beneficiation offset.
 5. The provision dealing with preferential procurement.
 6. 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.

ABOUT THE AUTHOR

Jonathan Veeran is an expert on the regulatory aspects of, and transaction structuring in, the mining and oil & gas industries. Bruce Dickinson specialises in mergers and acquisitions in the mining industry, the structuring of mining companies, mining transactions and projects, as well as the development and operational aspects thereof. Rita Spalding is an expert in all aspects of mining and mineral law. She has substantial experience in structuring and negotiating commercial transactions, conducting due diligence investigations relating to mergers and acquisitions and compliance audits in respect of mining companies.