Legislative governance and transformation in the South African mining sector: The legal nature of the 2018 Mining Charter

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DEDICATION

I dedicate this achievement to my family, my achievement is your achievement.

"Greatness of a man is judged by the seeds he leaves behind, the seeds you have planted will grow to become big trees that will provide shades and fruits, they will resemble the stars and beacons that provide guidance through the dark spaces of the land and the sea."- MC Morolo

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The good Lord of every possibility, in the Holy Book, at the Proverbs 1:8-9, as it reads:

"8 Listen, my son, to your father's instruction and do not forsake your mother's teaching. 9 They are a garland to grace your head and a chain to adorn your neck."

ABSTRACT

Historically, mineral rights in South Africa were regarded as valuable assets in the hands of landowners, based on the property law principle of *cuius est solum, eius est usque ad coelum et ad inferos.* The principle describes the vertical extent of a landowner's right to land; to include not only the surface, but also the substrata and airspace. Accordingly, the owner of a piece of land had the exclusive rights associated with ownership over the minerals beneath such land. Regrettably, because of the colonial and apartheid policies that applied in the country, land ownership generally resided in the hands of the white minority. Consequently, the majority of black South Africans were denied access to mineral rights as they either could not afford land, or were denied access through erstwhile *Natives Land Act* of 1913. Following democratisation in 1994, a changing political and economic landscape redefined the property rights paradigm within which mineral resources are regulated from private ownership to state custodianship.

The introduction of the *Mineral and Petroleum Resources Development Act* 28 of 2002 (the MPRDA) brought about fundamental changes in the mineral resources sector. The MPRDA effectively advocates for equitable access to the nation's mineral resources. One of its objectives is to substantially and meaningfully expand the opportunities of Historically Disadvantaged South African's (HDSAs) to participate in the exploitation of mineral and petroleum resources.

The provisions of section 100(2) of the MPRDA placed an obligation on the Minister of Mineral Resources and Energy to develop a Broad-Based Socio-Economic Empowerment Charter (hereinafter referred to as the Mining Charter or the Charter) to redress historical socio-economic inequalities in the South African minerals industry. Notable issues arose following the Minister of Mineral Resources and Energy's contention to suggest that section 100(2) empowers him to develop a Mining Charter (2018) in the form of subordinate legislation to achieve transformational objectives. It follows that the Mining Charter might constitute subordinate legislation that is legally binding to mining rights holders. The legal nature of the Mining Charter however

remained contested. The necessity for clarity and certainty in relation to the legal nature of the Mining Charter became particularly evident in tensions between the mining industry and Minister of Mineral Resources and Energy.

In March 2019, the Minerals Council South Africa brought an application for judicial review of the Mining Charter. The Court in *Minerals Council South Africa v Minister of Mineral Resources and Energy, and Others* (Case no. 20341/19) held that the MPRDA does not empower the Minister to make law, and as such, the Mining Charter is not binding subordinate legislation but rather an instrument of policy. In order to determine whether the Charter's implementation is conducive for transformation, the primary objective of this mini-dissertation is to assess and evaluate the efficacy of the legal nature of the Mining Charter in transforming the South African mineral sector, as contemplated through *Minerals Council South Africa v Minister of Mineral Resources and Energy, and Others* (Case no. 20341/19 [21 September 2021]).

Keywords: Mining Charter, land ownership, mineral rights ownership, transformation, MPRDA, economic empowerment, Black Economic Empowerment.

LIST OF ABBREVIATIONS AND ACRONYMS

B-BBEE Act	Broad-Based Black Economic Empowerment Act 53 of 2003
B-BSEE	Broad-Based Socio-Economic Empowerment Charter
BEE	Black Economic Empowerment
DMRE	Department of Mineral Resources and Energy
EEA	Employment Equity Act 55 of 1998
ESOP	Employee Share Ownership Scheme
FDI	Foreign Direct Investment
HDSAs	Historically Disadvantaged South Africans
MACUA	Mining Affected Communities United in Action
MCSA	Minerals Council South Africa
MEJCON-SA	Mining and Environmental Justice and Community Network of South Africa
MHSA	Mine Health and Safety Act 29 of 1996
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
MRA	Mining Rights Act 20 of 1967
MTRA	Mining Titles Registration Act 16 of 1967
NEMA	National Environmental Management Act 107 of 1998
PAJA	Promotion of Administrative Justice Act 3 of 2000
PPPFA	Preferential Procurement Policy Framework Act 5 of 2000
WAMUA	Women Affected by Mining United in Action

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1 INTRODUCTION

1.1 Background to the study

The mining industry in South Africa is built on a legacy of inequality and exploitation. The system of marginalisation of the majority of South Africans, facilitated by a system of exclusionary policies under the colonial and apartheid regimes, categorically barred the majority of South Africans from participating in mainstream economic activities, including activities in the mining sector.[1] This is, for example, particularly clear in South Africa's erstwhile legislative framework regulating land tenure.

It is trite that the so-called 'land issue' was one of the primary means by which black South Africans were oppressed and marginalised under the apartheid regime. Initially, under the *Natives Land Act*[2] (the *Natives Land Act*), only 7% of the country's total land surface was set aside for 'native reserves'. This Act effectively prohibited black South Africans from buying or renting land outside the delineated areas. Despite the fact that the 'reserve' increased to 13% of land surface with the promulgation of the *Native Trust and Land Act*[3] (the *Land Act*), the fact remained that the white minority that comprised 20% of the South African population had access to almost 87% of the country's available land, while the remaining 13% of land was available to the 80% black population.[4] Clearly, this system of land tenure limited black South Africans' right to own land.

The introduction of the *Group Areas Act*[5] further generally provided for the establishment of racially segregated group areas, controls on the acquisition of immovable property, and the occupation of land and premises. The Act restricted ownership and land occupation of black people by introducing 'controlled areas'. The *Group Areas Act* disallowed non-whites from acquiring immovable property in controlled areas.[6] Here, the apartheid regime systematised segregation through the control of land as immovable property.[7] In fact, the *Group Areas Act* became an effective instrument to separate development of races in South Africa. The Act granted the Minister of the Interior the mandate and authority to forcibly

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[1] SAGOV *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* 6.
[2] *Natives Land Act* 27 of 1913.
[3] *Natives Trust and Land Act* 18 of 1936.
[4] Luhabe "The moral bases of a stakeholder society" 136.
[5] *Group Areas Act* 41 of 1950.
[6] Section 5(1)(a) of the *Group Areas Act* 41 of 1950.
[7] Section 8 of the *Group Areas Act* 41 of 1950.

remove non-whites from valuable pieces of land to allow for white settlement, and the forced removals were predicated on inherent discriminatory and oppressive legislation, restricting the black population's freedom of movement and access to land in general.[8]

In due course, mineral rights increasingly became valuable assets in the hands of South Africans owning land, which were predominantly white landowners. This development can be traced to the common law property principle of *cuius est solum*.[9] This principle afforded the landowner the right to the surface of the land and also to what lies beneath it.[10] In the context of minerals, the principle meant that the owner of the land is the primary owner of the minerals beneath such land surface.[11] The application of the *cuius est solum* principle meant that the landowner remained the owner of the unsevered minerals until they were severed from the land.[12] Thereafter, through the notion of severance, mineral rights in respect of the land could be separated from the title of the land or alienated or dealt with separately.[13] The implication is that the owner of the land would still remain owner of the minerals beneath the land. However, interference with such minerals was curtailed through separate title from the land.[14]

The apartheid regime coerced black people into accepting the transfer of land[15] and minerals to white prospectors who made mineral discoveries.[16] Certainly, racial exclusion from opportunity under colonial and apartheid rule was biased towards supporting white minorities.[17] The colonial and apartheid policies were thus developed to effectively prevent black people from acquiring any significant mineral deposits of any nature in South Africa, hence it restricted and limited their participation in the mining industry to that of labourers.[18]

In due course, there was a shift in mineral policy towards privatisation and deregulation.[19] The apartheid regime was systematically transferring state function in the form of mineral

[8] Henrard 1996 *Jura Falconis* 493.
[9] Mostert *Mineral Law: Principles & Policies in Perspective* 7.
[10] Mostert *Mineral Law: Principles & Policies in Perspective* 7.
[11] Mostert *Mineral Law: Principles & Policies in Perspective* 7.
[12] Silberberg and Schoeman *The law of property* 421.
[13] Mostert *Mineral Law: Principles & Policies in Perspective* 7.
[14] Mostert *Mineral Law: Principles & Policies in Perspective* 7.
[15] Section 26 of the *Group Areas Act* 41 of 1950.
[16] Belinkie 2015 *Cornell Int'l LJ* 238.
[17] WorldBank *An incomplete transition: Overcoming the legacy of exclusion in South Africa* 6.
[18] *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC), para 3.
[19] Mostert *Mineral Law: Principles & Policies in Perspective* 57.

rights and ownership into the hands of the predominantly white private sector.[20] The introduction of the *Minerals Act*[21] seemingly represented the interest of white minorities. The right to prospect, mine and dispose of mineral resources was no longer vested in the hands of the state.[22] The *Minerals Act* encouraged alienation of mineral rights held by the state, so that all the mineral rights would be held by (white) private sector entities.[23] This development effectively confirmed and strengthened the common law position of *cuius est solum*. The *Minerals Act* did not apply to independent or Bantustan states. For instance, Transkei passed the *Diamond Act* in 1981 and Bophuthatswana passed the *Land Control Act* 39 of 1979 which established that prospecting was considered through ministerial permission.

In the late 1980s, a changing political and economic landscape was imminent, which influenced the direction and structure of the mining industry. Advertently, the first democratic general elections held on 27 April 1994 led to political reforms that ended the reign of the apartheid regime and introduced a new legal order, including a transformation of the South African mining sector.[24] The first democratically elected government of South Africa promulgated the *Constitution of the Republic of South Africa* (the Constitution).[25]

To redress the historical inequalities and give effect to section 9 (equality clause) of the Constitution, the newly elected government promulgated the *Mineral and Petroleum Resources Development Act* (the *MPRDA*).[26] The preamble of the *MPRDA* advocates for the promotion of equitable access to the nation's mineral resources and the need to redress past racial discrimination in the South African mineral and petroleum industries.[27] The *MPRDA* provides for the state to exercise sovereignty over all the mineral and petroleum resources within the Republic,[28] in order to give effect to the principle of state custodianship of the nation's mineral and petroleum resources.[29] The *MPRDA* is designed to promote

[20] Mostert *Mineral Law: Principles & Policies in Perspective* 57.
[21] *Minerals Act* 50 of 1991.
[22] Mostert *Mineral Law: Principles & Policies in Perspective* 42.
[23] Kaplan and Dale *A Guide to the Minerals Act, 1991* 14.
[24] Van der Schyff *Property in Minerals and Petroleum* 7.
[25] *Constitution of the Republic of South Africa* 1996.
[26] *Mineral and Petroleum Resources Development Act* 28 of 2002 (the *MPRDA*).
[27] Preamble of the *MPRDA* 28 of 2002.
[28] Section 2(a) of the *MPRDA* 28 of 2002.
[29] Section 2(b) of the *MPRDA* 28 of 2002.

equitable access to the nation's mineral and petroleum resources to all people of South Africa.[30] The critical and most important objective of the *MPRDA* is to –

> Substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from exploitation of the nation's mineral and petroleum resources.[31]

To ensure transformation in the mining industry, section 100(2)(a) of the *MPRDA* placed an obligation on the Minister to develop a Broad-Based Socio-Economic Empowerment Charter (the Mining Charter) which set out the framework for the entry and active participation of Historically Disadvantaged South Africans (HDSAs) into the mining industry. The Mining Charter can be defined as –

> A social or economic strategy, plan, principle, approach or act which is aimed at redressing the results of past discrimination based on race and gender of historically disadvantaged persons in the minerals and petroleum industry … and to facilitate ownership participation in existing or future mining, prospecting, exploration and beneficiation operations.[32]

Specific elements outlined in the Mining Charter that seek to empower HDSAs include but are not limited to ownership, preferential procurement, employment equity, mine community development and mineral beneficiation. The Mining Charter set measurable targets and timetables for monitoring implementation thereof.[33] It is against the political and regulatory background set out above that the Mining Charter was initially considered as an instrument to deracialise ownership patterns in the mining industry and to promote equitable access to the nation's mineral resources for all South Africans.[34]

1.2 Problem Statement

Section 100(2)(a) of the *MPRDA* provides for the development of a Mining Charter as an instrument to ensure that government objectives of redressing historical, social, and economic inequalities as stated in the Constitution are achieved. The Mining Charter has set the framework and clearly articulates specific targets and a timetable for effecting the entry into and active participation of historically disadvantaged South Africans into the mining

[30] Section 2(c) of the *MPRDA* 28 of 2002.
[31] Section 2(d) of the *MPRDA* 28 of 2002.
[32] GG 33573 GN 838 of 20 September 2010, definitions.
[33] Section 100(2) of *the MPRDA* 28 of 2002.
[34] GN 1002 in GG 41934 of 27 September 2018, at 4.

industry.[35] There is no dispute that the object of subsection 2 of the *MPRDA* is transformative in nature, and such transformation lies in the provision of section 100 of the *MPRDA.* The Mining Charter has therefore been pitched as a mechanism for addressing the much-needed transformation in the mining industry. For example, the latest version of the Charter, released by the Department of Mineral Resources and Energy (DMR) on 26 September 2018, featured some transformative amendments.[36] These included *inter alia*, issues related to pending mining rights applications and an increased BEE shareholding from 26% to 30% in the next five years.[37] Moreover, the Charter provided that applications for new mining rights should have a minimum 30% BEE shareholding, which shall include economic interest plus corresponding percentage of voting rights per mining right or in the mining company which holds a mining right.[38]

To give effect to meaningful economic participation, the Mining Charter provides that an existing mining right holder who has achieved a minimum 26% BEE shareholding is recognised as compliant for the duration of the mining right.[39] Furthermore, the Mining Charter provides that recognition of continuing consequences in respect of existing rights shall not be transferable and shall lapse upon transfer of such mining right.[40] Nevertheless, the Minerals Council South Africa (MCSA) was aggrieved by certain clauses of the Mining Charter and it accordingly brought a review application to set aside certain clauses of the Mining Charter.[41] For example the mining industry had concerns regarding non-recognition of continued consequences of BEE transactions as compliant after BEE partners had diluted or disposed of their ownership. The industry was generally of the view that once a BEE transaction has successfully led to empowerment, the transformation objectives were satisfied even if a shareholder that is empowered decided to withdraw from ownership,[42] in line with the so-called 'once empowered, always empowered' principle. The principle presupposes that mining rights holders that entered into historic empowerment transactions

[35] Section 100(2)(a) of the *MPRDA*.
[36] GN 1002 in GG 41934 of 27 September 2018.
[37] Clause 2.1.2 in GN 1002 in GG 41934 of 27 September 2018.
[38] Clause 2.1.3.1 in GN 1002 in GG 41934 of 27 September 2018.
[39] Clause 2.1.1.1 in GN 1002 in GG 41934 of 27 September 2018.
[40] Clause 2.1.1.4 in GN 1002 in GG 41934 of 27 September 2018.
[41] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others* CN 41661(2015) 4 April 2018.
[42] Toxopeus 2017 https://hsf.org.za/publications/hsf-briefs/mining-charter-third-version-what-are-the-legal-issues.

be recognised as forever compliant, even where empowerment parties exited the transaction.[43]

In the case of *Chamber of Mines v Minister of Mineral Resources and Another,*[44] the parties brought an application for declaratory relief by agreement to obtain certainty with regard to empowerment obligations of the mining rights holders, in particular, recognition of continued consequences of BEE transactions claimed by mining companies even after disposal or dilution of HDSA's ownership.[45] Moreover, the mining industry contended that the amendments of the Mining Charter(s) fell outside the ambit of the *MPRDA* and, as such, the Minister was not empowered by the *MPRDA* to amend, review or substitute the Charter.[46] In a majority judgment, the Pretoria High Court held that, once the Minister or his delegate had granted the mining right applied for, in terms of the *MPRDA*, the holder was not thereafter legally obliged to restore the percentage ownership initially controlled by those HDSAs if it later fell below the prescribed 26%.[47] The majority judgment recognises the continued consequences of previous ownership transactions, notwithstanding that ownership levels were diluted.

Nevertheless, in a dissenting judgment, Siwendu J argued that the Mining Charter under MPRDA is not a policy or guideline, and that compliance with the Charter is a statutory condition for the granting of a mining right or converted mining right.[48] Moreover, ownership must be maintained or held throughout the life of a mining right.[49] The emphasis of the minority judgment is that the Mining Charter is distinct and it qualifies as a statutory instrument aimed at ensuring that the objectives of the MPRDA are realised. A failure by a mining rights holder to maintain the 26% BEE ownership level contravenes the MPRDA.[50]

Despite the majority judgment, there is a legitimate uncertainty pertaining to the legal nature of the Mining Charter, especially as to whether it constitutes policy or law as envisaged in the provisions of section 100(2) of the MPRDA and in view of South Africa's

[43] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others* CN 41661(2015) [4 April 2018, para 18.
[44] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others* CN 41661(2015).
[45] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*, para 12.
[46] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*, para 12.
[47] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*, para 109.
[48] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*, para 235.
[49] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*, para 237.
[50] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others* para 241.

past. This uncertainty is relevant if one observes the arbitrariness of the Minister's discretionary powers to continuously review and change the obligations imposed by the Mining Charter(s). Emanating from the judgment, which recognises the 'once empowered always empowered' principle, the problems in respect of existing mining rights holder's re-empowerment obligations during the renewal and transfer of existing rights still remained a bone of contention.[51] Moreover, the issues pertaining to perpetual top-up requirements from 26% to 30% of BEE shareholding on pending applications for mining rights fuelled regulatory uncertainty in the mineral industry.[52]

To address the uncertainty as to the legal nature of the Mining Charter, and in an attempt to curb challenges, the High Court in *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others*,[53] recently grappled with the Charter's legal nature. This study assesses and evaluates the court's judgment, which pronounced that section 100(2) of the *MPRDA* does not empower the Minister to make law, that the Mining Charter is not subordinate binding legislation, and that it is rather an instrument of policy.[54] Based on this recent judgment, it is necessary to assess and evaluate the efficacy of the Mining Charter as an instrument to drive transformation in the mining industry.

1.3 Research question

In light of the judgment in *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others* (CN 20341/19), the question is whether the legal nature of the Mining Charter is conducive to transformation in South Africa's mining sector?

1.4 Research aim and objectives

The primary objective of this study is to determine, assess and evaluate the potential impacts of the judgment in *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others* on the Mining Charter's potential in transforming South Africa's mining sector.

In order to achieve the above objective, the following secondary objectives are set -

[51] Clause 2.1.1.2 in GN 1002 in GG 41934 of 27 September 2018.
[52] Clause 2.1.2.1 and 2.1.2.2 in GN 1002 in GG 41934 of 27 September 2018.
[53] *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others* CN 20341/19 [21 September 2021].
[54] *Mineral Council South Africa v Minister of Mineral Resources and Energy and Others,* para 59.

- To theoretically examine perspectives on governance and transformation in order to provide insights into the relevance and necessity for transformation in the minerals industry.
- To examine the legislative framework that governs the South African minerals industry post-constitutional democracy.
- To critically assess and evaluate how the courts, through their judgments, have interpreted the legal nature of the Mining Charter and how legal certainty may allow for regulatory stability in the minerals industry.
- To draw conclusions and make recommendations as to the useful implementation of the Mining Charter as an instrument of transformation in the mining industry.

1.5 Research Methodology

The study is based on a desktop-based literature review. The main legal sources under review are relevant statutes and cases, which would constitute the primary sources. The secondary sources consulted included textbooks and scientific articles published in national and international journals, as well as electronic materials.

1.6 Framework of the Study

This mini-dissertation is organised into five chapters.

Following this chapter, the second chapter examines the historical foundations of the mineral regulatory framework in South Africa in order to provide a better understanding of the mineral sector, and to provide context within which governance and transformation within the mining sector should be understood.

The third chapter analyses the post-constitutional regulatory framework of South Africa's mining industry. This chapter introduces and critically analyses the Mining Charter, as contemplated in section 100(2) of the MPRDA. The chapter sets out developments and amendments to the Charter, leading to the 2018 Mining Charter. The chapter seeks to ground the uncertainties that have lingered concerning the legal nature of the Mining Charter.

Chapter 4 critically reflects on the Gauteng High Court's deliberation in the judgment of the *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others*.[55] The reflections are expected to not only provide clarity as to the legal nature of the Mining Charter, but to also bring forward guidance as to understanding and implementing the Mining Charter, and how the implications will affect governance and transformation in the South African mining industry.

Chapter 5 summarises the findings and conclusions of the study and provides a number of recommendations for the future interpretation, implementation and development of the Mining Charter in South Africa's mining sector.

[55] *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others* CN 20341/19 [21 September 2021].

2 HISTORICAL FOUNDATIONS OF THE MINERAL REGULATORY FRAMEWORK IN SOUTH AFRICA

2.1 Introduction

The foundations of the country's existing mining legal framework changed fundamentally over the past decades. Statutory transformation of this nature had inevitable and important implications that sought to define the future of mineral legislation. To this end, the aim of this chapter is to examine perspectives on governance and transformation in order to provide understanding of the relevance of transformation in the mineral industry. The first part of the chapter will provide a historical account of the development of the South African mineral industry and the accompanying legal context within which developments took place, (though, to a limited extent). The second part will provide a general understanding of insights and context within which governance and transformation in the mining sector should be understood.

2.2 Historical foundations of mineral law in South Africa

2.2.1 Overview of colonialism and Union period in South Africa

It is widely accepted that South Africa's social and economic disparities can be traced back to colonisation by the Dutch in 1652. The country has one of the longest mining histories in the world and it existed prior to the arrival of European explorers and settlers.[56] It was during this era that statutory measures which regulated mineral exploitation in South Africa started through land tenure arrangements, particularly in the Cape Colony.[57] The land tenure approach that existed at the time was enacted through loan tenure, loan occupation, 15-year quitrent tenure, and through 'freehold', which became the first grant in the Cape of Good Hope in 1657.[58] It follows that the nature and content of 'freehold' differed markedly from other methods of land tenure, wherein the owner has full dominium of the land, which encompasses surface of the land and all minerals under it.[59]

[56] Deane 2005 *Fundamina: A Journal of Legal History* 6.
[57] Van der Schyff *Property in minerals and petroleum* 99.
[58] Van der Schyff *Property in minerals and petroleum* 101.
[59] *Neebe v Registrar of Mining Rights* (1902) TS 65 in Franklin and Kaplan *The Mining and Mineral Laws of South Africa*.

The control of mineral resources during the colonial and Union eras from 1860 to 1964 differed from one region to the other,[60] and depended on the class of minerals and classification of land.[61] The land was classified in terms of private land, state land and alienated state land,[62] which all had a unique procedure for how mineral and surface rights were acquired.[63] This meant different provinces had their own laws applicable to mining rights. In Griqualand for instance, the precious metals, stones and minerals *(which includes gold, silver and platinum)* were regulated through ordinances, which became applicable and extended to other jurisdictions.[64] Consequently, when diamonds were discovered in and around Griqualand,[65] the British colonialists annexed the land and did not acknowledge the autonomy and ownership of the local communities.[66] Through this process, race-based policies were developed to effectively prevent non-whites from acquiring any significant mineral deposits of any nature in South Africa; hence, it restricted and limited their participation in the mining industry to that of labourers.[67]

2.2.2 Cuius est solum principle

As previously stated, mineral rights became valuable assets in the hands of landowners based on the property law principle of *cuius est solum*.[68] South African mineral law has always been based on Roman-Dutch common law, which provides that ownership of the minerals lies in the *dominus* of the soil.[69] The common law presupposes that an owner of the land is the *dominus* of the whole land, which includes above the surface and below it.[70] The owner of the surface is in essence the owner of the land from which the minerals are

[60] There were different statutes for different regions*, Orange Free State Metals Mining Act* 39 of 1942 (OFS); *Precious Base Metals Act* 35 of 1908 (Transvaal); *Precious Minerals Act* 31 of 1898 (Cape).
[61] Mostert *Mineral Law: Principles & Policies in Perspective* 22; Cradock Proclamation of 1813.
[62] Cawood and Minnitt 1995 *Journal of Southern African Institute of Mining and Metallurgy* 370.
[63] Cawood and Minnitt 1995 *Journal of Southern African Institute of Mining and Metallurgy* 370.
[64] Mostert *Mineral Law: Principles & Policies in Perspective* 23.
[65] Griqualand West is an area of central South Africa with an area of 40 000km that form part of the Northern Cape Province. It was inhabited by pre-existing Tswana and Khoisan people and was subsequently colonised. See https://www.sahistory.org.za/place/griqualand-west.
[66] Smalberger 1976 *The International Journal of African Historical Studies* 429.
[67] *Agri South Africa v Minister for Minerals and Energy*, para 3.
[68] Mostert *Mineral Law: Principles & Policies in Perspective* 7.
[69] *Neebe v Registrar of Mining Rights 1902 TS 65* at 85 in Franklin and Kaplan *The Mining and Mineral Laws of South Africa*.
[70] *Neebe v Registrar of Mining Rights* 1902 TS 65 at 85 in Franklin and Kaplan *The Mining and Mineral Laws of South Africa*.

extracted,[71] such that 'the owner of the land is not only of the surface but everything legally inherent thereto, and everything contained in the soil below the surface'.[72]

The right to minerals was therefore one of the rights that could be obtained through ownership of land.[73] As such, minerals under the common law remain the property of the land until such time as those minerals are severed from the land, and it is only then that ownership may vest in the mineral rights holder.[74] In *Erasmus v Afrikander Proprietary Mines Ltd,*[75] the court held that,

> ownership of minerals *in situ* can never be separated from ownership of the land – ownership of them remains vested in the landowner, irrespective of who may be the holder of the right to the minerals that are extracted and separated from the land, when ownership in the minerals vests in the mineral right holder…[76]

Inherently, the structure of mineral laws in South Africa as developed by the courts and legislature prior to 1994, finds expression in land ownership.[77] The adherence of common law principles has necessitated recognition of severance of rights of minerals through the erstwhile dictates of the *Natives Land Act*.[78] Thus, the limitation to land rights of historically disadvantaged individuals and communities had profound consequences on the ownership of, and access to, mineral resources.[79] Flowing from this, it is obvious that access to the country's minerals prior to 1994 was predominantly bound to the ownership of land.[80] More so, the land question after nearly 30 years of democracy remains a contentious issue, given how it pertains to identity and wealth distribution.[81]

2.2.3 Mining Rights Act 20 of 1967

The earliest consolidated legislation of the apartheid regime with respect to the acquisition of rights to prospect and mine, was through the enactment of the *Mining Rights Act* (the

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[71] *Van Vuuren v Registrar of Deeds* 1907 TS 289.
[72] *Union Government v Marais and Others* 1920 AD 240, para 246.
[73] Franklin and Kaplan *The Mining and Mineral Laws of South Africa* 5.
[74] *Le Roux and Others v Lowenthal* 1905 TS 742 in Franklin and Kaplan *The Mining and Mineral Laws of South Africa* 7.
[75] *Erasmus v Afrikander Proprietary Mines Ltd* 1976 (1) SA 950 (W).
[76] *Erasmus v Afrikander Proprietary Mines Ltd*, page 17.
[77] Van der Schyff *Property in Minerals and Petroleum* 36.
[78] *Natives Land Act* 27 of 1913
[79] Mitchell *et al* 2012 *Journal of the Southern African Institute of Mining and Metallurgy* 152.
[80] Van der Schyff *South African Mineral law: A Historical Overview of the State's Regulatory Power Regarding the Exploitation of Minerals* 132.
[81] Ntsebeza and Hall *The Land Question in South Africa: The Challenge of Transformation and Redistribution* 13.

MRA).[82] The purpose of the *MRA* was to consolidate all pieces of preceding legislation which regulated the prospecting of precious metals, base metals and natural oil.[83] The *MRA* imposed a system of conferral in respect of all mineral rights in respect of precious metals, base metals and natural oil.[84] In essence, prospecting is the first step towards exploitation of all minerals.[85] The power of control and administration of all mining operations vested in the state; however, mineral rights remained in the hands of the landowner.[86] The *MRA* prohibited the issuing of a prospecting permit to any black person, or any association of black persons or any corporate body or company in which black persons hold a controlling interest.[87]

From the earliest years of the discovery of diamonds and precious metals, the policy of the state has been to encourage the search for and exploitation of minerals by rewarding and protecting the interests of the private sector.[88] This meant the state would regulate the exercise of the entitlements that flow from the landowners. The owner of the rights to any precious metal or base mineral is known to be owner of the land, or if the rights to such precious mineral in respect of the land is severed from ownership of the land, then the person in whose name the rights are held becomes registered in the deeds registry.[89] This requirement was concretised by the *Mining Titles Registration Act* (the *MTRA*)[90] to regulate registration of mineral titles, and other rights connected to prospecting and mining, to consolidate control and safeguard the interests of mineral right holders.

2.2.4 Minerals Act 50 of 1991

Given the above, it is evident that state control over minerals was short-lived upon the dawn of democracy, with the introduction of the *Minerals Act.*[91] One of the purposes of the *Minerals Act* "is to regulate the prospecting for and the optimal exploitation, processing and utilisation of minerals …"[92] With regards to prospecting for and mining minerals, the *Minerals*

[82] *Mining Rights Act* 20 of 1967.
[83] Cawood and Minnitt 1995 *Journal of Southern African Institute of Mining and Metallurgy* 371.
[84] Mostert *Mineral Law: Principles & Policies in Perspective* 46.
[85] Franklin and Kaplan *The Mining and Mineral Laws of South Africa* 79.
[86] Section 3(2) of *Mining Rights Act* 20 of 1967.
[87] Section 7(3) of the *Mining Rights Act* 20 of 1967.
[88] Franklin and Kaplan *The Mining and Mineral Laws of South Africa* 1.
[89] Section 1 of the *Mining Rights Act* 20 of 1967.
[90] *Mining Titles Registration Act* 16 of 1967.
[91] *Mineral Act* 50 of 1991.
[92] *Minerals Act* 50 of 1991.

Act provides that the holder of the right to any mineral in respect of land or tailings or any person who has acquired the consent of such holder shall have the right to enter upon such land for purposes of prospecting or mining for such mineral.[93]

It is evident that the *Minerals Act* essentially recognised the common law rights of the holder of the rights to prospect and mine. The *Minerals Act* provides that the holders of mineral rights, who in this case are landowners, have the prerogative to decide when prospecting and mining activities can take place on their land, and by whom.[94] In essence, the *Minerals Act* repealed the vesting in the state of the right to mine and dispose of minerals and reinstated the common law rights of the holder of rights to minerals, to prospect and mine.[95] Under the terms of the *Minerals Act*, the practice is that in order for the permits, licences and authorisations to be granted, applicants had to prove that they were the holders of the underlying common law rights or that their entitlements originated from the consent of the holder.[96] As such, the *Minerals Act* prohibited prospecting and mining without the necessary authorisations as prescribed.[97] Based on the above, it is evident that the effect of section 5(1) of the *Minerals Act* is that the right to prospect and mine no longer vested in the authority of the state, instead, they were re-directed to the registered holders of common law mining rights.[98] The repeal of state rights to mine was part of the policies that sought to promote privatisation, to deregulate, and to reintroduce the common law position on mineral rights. Such legislative changes were effected on the eve of the democratic dispensation, which actions continue to widen inequalities and fuel racial tensions in mining communities.

Undoubtedly, the holders of mineral rights under the *Minerals Act* and in terms of common law property rights had the latitude to use these rights indefinitely, and such right could not be terminated by the state.[99] This is therefore evidence enough to suggest that the *Minerals Act* played a limited role in reversing the discriminatory policies that excluded black people

[93] Section 5(1) of the *Minerals Act* 50 of 1991.
[94] Van der Schyff *South African Mineral law: A Historical Overview of the State's Regulatory Power Regarding the Exploitation of Minerals* 132.
[95] Section 5(1) of the *Minerals Act* 50 of 1991.
[96] Mostert *Mineral Law: Principles & Policies in Perspective* 71.
[97] Section 2(1) of *Minerals Act* 50 of 1991.
[98] Mostert *Mineral Law: Principles & Policies in Perspective* 59.
[99] Section 5(1) of the *Minerals Act* 50 of 1991.

from accessing the minerals industry.[100] This is primarily because the development of mineral and petroleum resources was historically regulated in a private property rights framework,[101] within which control and access of mineral resources was governed and supplemented by a discriminatory and racially based land-ownership model.[102]

It is evident that the *Minerals Act* complemented the common law position concerning mining by providing protections and remedies of surface rights owners,[103] to settle potential disputes that would have otherwise emanated from the erstwhile *Land Act*,[104] which led to unjust dispossession of land. Therefore, the introduction of the *Minerals Act* at the dawn of democracy did not address the injustices and imbalances of the past, as it perpetuated the privatisation of mineral wealth and intensified monopolisation.[105]

2.3 Transformation in South Africa

2.3.1 Social justice and black economic empowerment

In the context of South Africa, the theory of social justice views black economic empowerment (BEE) as a mechanism to restore equity and fairness,[106] which may lead to increased economic growth in marginalised communities. The ideals behind social justice assert that every person must have the same rights under the law regardless of race, class and gender,[107] and that the state becomes responsible for determining social advantages within the economy.[108] These ideals provide for a standard whereby the distributive aspects of the basic structure of society are addressed.[109]

The distributive aspects of justice consider how a society allocates scarce resources to individuals or groups with competing interests, in particular where there are persistent and continued inequalities,[110] wherein the marginalised feel excluded from participating in mainstream economic activities. Therefore, economic or social exclusion and inclusion refer to the extent to which the benefits of development, social interaction and political

[100] Mostert *Mineral Law: Principles & Policies in Perspective* 69.
[101] Mostert *Mineral Law: Principles & Policies in Perspective* 1.
[102] Van der Schyff *Property in Minerals and Petroleum* 7.
[103] Section 42 of the *Minerals Act* 50 of 1991.
[104] *Natives Land Act* 27 of 1913.
[105] Mitchell *et al* 2012 *Journal of the Southern African Institute of Mining and Metallurgy* 152.
[106] Shai, Molefinyana and Quinot 2019 *Sustainability* 7.
[107] Shai, Molefinyana and Quinot 2019 *Sustainability* 7.
[108] Edigheji *Affirmative Action and State Capacity in a Democratic South Africa* 1.
[109] Rawls 1958 *Philosophical Review* 163.
[110] Roemer *Theories of Distributive Justice* 1.

participation are inequitably distributed.[111] Other perspectives on social justice emphasise self-respect and access to primary goods and services.[112] It follows that self-respect results when one is empowered to gain knowledge and capacity, and such empowerment can enable people to develop their strengths and to be in a position to make decisions.

The broad object of social justice is recognised and entrenched in the *Constitution*, which provides for the right to equality before the law and the right to equal protection and benefit of the law.[113] Admittedly, the nature and object of empowerment policies such as BEE makes it a retributive policy to advance the promotion of economic transformation to enable meaningful participation of black people, and changing the racial composition of ownership and management structures.[114] This transformation effort is thus viewed as a catalyst to address the country's socio-economic problems and its associated impact on different sectors of the economy.[115]

The government, through legislative measures, is thus expected to act authoritatively to transform the structure of the economy in order to reduce poverty, to address wealth inequalities and to grow the economy.[116] The challenge remains insurmountable, as government has to deal with a multiplicity of competing interests of economic growth and redistribution.[117] In other words, government has to strike a balance between embarking on an economic-transformation journey – that is, interests in restructuring ownership patterns and redistribution of assets in favour of the black majority and the interest to promote economic growth and investments.[118] It follows that the success of such transformation policies should be to maximise every citizen's access to equal economic opportunities and redistribution.

2.3.2 Economic empowerment

BEE in South Africa came into being as a mechanism for dealing with structural issues affecting economic growth and racial access to opportunities.[119] The policy frameworks that

[111] Ocampo "Economic Development and Social Inclusion" 33.
[112] Rawls 1958 *Philosophical Review* 168.
[113] Section 9(1) of the *Constitution of the Republic of South Africa,* 1996.
[114] Pooe 2013 *Mediterranean Journal of Social Sciences* 638.
[115] Musonda, Gumbo and Okoro 2019 *Acta Structilia* 71.
[116] Edigheji *Affirmative Action and State Capacity in a Democratic South Africa* 1.
[117] Tangri and Southall 2008 *Journal of Southern African Studies* 703.
[118] Tangri and Southall 2008 *Journal of Southern African Studies* 703.
[119] Andrews *Is Black Economic Empowerment a South African Growth Catalyst?(Or Could it be...)* 32.

shaped the mining sector under apartheid were not aligned with broad distributive aims for the majority of the people; instead, they continued the discriminatory agenda that advanced the well-being of the privileged minority of the population.[120] To some extent, the economic concerns linked to capitalism in the mining sector were portrayed as motivation for industrialisation in South Africa.[121] Therefore, the biggest challenge facing democratic South Africa is securing greater levels of equality and socio-economic and political justice amongst citizens, in particular the black majority.[122]

For purposes of the study and clarity, 'black people' refers to Africans, Coloureds and Indians, together with the broad-based element (which extends to include women, workers, youth, people with disabilities, and people living in rural areas).[123] Black people should also be understood as a category to describe HDSAs. As such, BBE policy advocated for an increase in the number of black people in terms of ownership and management control of enterprises and productive assets.[124]

Various pieces of legislation seek to advance economic empowerment and the 'meaningful economic participation' of black people in the mining industry. Within the context of the Mining Charter, 'meaningful economic participation' refers to identifiable partners in the form of historically disadvantaged persons, including women, as well as qualifying employees and host communities, and may also extend to BEE shareholders with full shareholder rights entitling them to full participation at annual general meetings (while exercising voting rights).[125] Therefore, the objective is to strategically transform the South African economy through ownership and the redistribution of control over the country's mineral resources.[126]

In order to redress the skewed distribution of social and economic opportunity and to begin the process of reintegrating South Africa into the global economy, the *Constitution*

[120] Plagerson and Stuart *Social, Economic and Environmental Policy Complementarity in the South African Mining Sector* 7.
[121] Plagerson and Stuart *Social, Economic and Environmental Policy Complementarity in the South African Mining Sector* 7.
[122] Endoh 2015 *Africa Review* 67.
[123] Section 1 of *B-BBEE Act* 53 of 2003.
[124] Section 1 of *B-BBEE Act* 53 of 2003.
[125] Definitions in GN 1002 in GG 41934 of 27 September 2018.
[126] M'Paradzi and Kalula *Black Economic Empowerment in South Africa: A Critical Appraisal* 1.

acknowledged the interconnectedness of social and economic rights and upheld the principle of social justice with specific emphasis on the needs of HDSAs.[127]

It is worth mentioning that the mining sector was in fact the first to introduce BEE in South Africa, though through a narrow top-down approach with the objective to transfer ownership from white companies to black shareholders.[128] The promotion of BEE in the mining sector has however become a catalyst for populist views on nationalisation due to its narrow approach of benefiting the selected few and politically connected.[129] The patterns of empowerment included elements of patronage and clientelism, which allowed a few black elite to amass wealth through empowerment policies.[130] To some extent, many more BEE transactions that spiralled into other sectors of the economy benefitted the same black elite class. Ultimately, this may have retarded progress on the broad-based empowerment of inclusiveness in the economy. It can therefore be concluded that empowerment policy frameworks have made limited inroads into addressing socio-economic disparities of mineworkers and their respective communities.[131]

2.3.3 Empowerment through education

The mineral industry has been characterised by racism in past practices of job reservation, with limited access to training and development.[132] There was a poorly developed human-resource base, and the concentration of skills was biased towards white people who predominantly occupied positions of authority.[133] Admittedly, this was aggravated by the fact that the majority of mineworkers had not had access to education and training under the apartheid system, which limited the advancement of black workers into management echelons.

With this in mind, the need for a skills-development drive to focus on formal and informal education would act as a catalyst for an empowerment process.[134] Education is an empowerment process that empowers both individuals and groups in order to become

[127] Preamble, the *Constitution of the Republic of South Africa,* 1996.
[128] Horne 2015 *Journal for Contemporary History* 26.
[129] Leon *Journal of Energy & Natural Resources Law* 17.
[130] Horne 2017 *African Review of Economics and Finance* 12.
[131] Horne 2015 *Journal for Contemporary History* 25.
[132] DMR *A Minerals and Mining Policy for South Africa* 42.
[133] DMR *A Minerals and Mining Policy for South Africa* 42.
[134] Brenyah 2018 *Sociology and Anthropology* 567.

productive assets in the economy.[135] Some schools of thought assert that empowerment in respect of education leads to fundamental change at individual level, and more so, a representational change at community level.[136] It follows that managers in some organisations perceive empowerment as the use of procedures to fast-track those without authority into equitable positions.[137]

The general quality of education in South Africa stems from the mining sector's need to have access to skilled labour and to recruit staff with the potential to become skilled and productive.[138] Government policy frameworks regard investment in human capital as a critical instrument that may also reduce inequalities and prepare people to participate in income-generating activities. Scholars and experts assert that educating the nation's workforce increases innovative capacity that may result in improved technological processes that promote efficiencies and economic growth.[139]

Moreover, the promotion of equal opportunities and fair treatment in employment was necessary to eliminate unfair discrimination.[140] Discrimination takes different forms in spheres of society, education and the workplace, including the political space. The need to implement affirmative-action measures to redress unpalatable experiences by designated groups is of necessity,[141] in particular, the empowerment of women. The rationale behind the empowerment of women is based on the assertion that women have been historically discriminated against in terms of representation on boards, executive management and senior management positions.[142] Therefore, there is a considered view that the mining industry as a knowledge-based sector hinges on human-resources development to build capacity in the form of training and development to effect social transformation at the workplace. This seeks to support the view of transformation as a constitutional imperative to develop productive capabilities and to expand socio-economic opportunities for the previously disadvantaged majority of the South African population.[143] However, this has

[135] Brenyah 2018 *Sociology and Anthropology* 567.
[136] Brenyah 2018 *Sociology and Anthropology* 566.
[137] Brenyah 2018 *Sociology and Anthropology* 566.
[138] Cawood 2011 *Journal of the Southern African Institute of Mining and Metallurgy* 470.
[139] Ngepah, Saba and Mabindisa 2021 *South African Journal of Economic and Management Sciences* 1.
[140] Clause 2.4 in GN 1002 in GG 41934 of 27 September 2018.
[141] Clause 2.4 in GN 1002 in GG 41934 of 27 September 2018.
[142] Brenyah 2018 *Sociology and Anthropology* 567; Clause 2.4 of GN 1002 in GG 41934 of 27 September 2018.
[143] Chi Ngang 2019 *South African Journal on Human Rights* 4.

been considered a soft issue when compared to the bigger problem of addressing transformation in the mineral sector.

2.3.4 Mining and the economy

The South African mining industry has long been considered one of the key drivers of economic growth, development and transformation of the country's economy.[144] South Africa, a mineral-rich country, is one of the world's leading mining countries in terms of the variety, quantity and availability of mineral resources.[145] South Africa hosts large reserves of gold, platinum group metals and chrome, manganese ores and the largest reserves of vanadium, zirconium and titanium.[146]

Despite transformation challenges facing the mining industry, the sector contributed R360.9 billion (nominal) to the Gross Domestic Product (GDP), almost 8.1% of total GDP in 2019.[147] The sector contributed R94.2 billion on direct fixed investment, which constitutes 15.6% of total private sector investment.[148] The mining sector employed 454 861 people in 2019, compared to 456 438 in 2018, a slight decline which is consistent with the performance of the sector.[149] Total mineral sales amounted to R538.9 billion, of which R348 billion was from mineral export sales.[150] Although the figures might have slightly changed due to the impact of the Covid-19 pandemic, the significance of mining as a driver for economic development and growth is considered of significant importance to creating employment and advancing the social and economic welfare of all South Africans,[151] particularly in communities where there is mining activity.[152]

Therefore, the importance of mining to the economy may never be under-estimated due to its enormous contribution to both domestic and global economies. The benefits of global transactions in mining countries enhance competitive business contributions to international trade and integration. As such, it follows that economic growth would be realised or achieved

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[144] Vegter 2019 *South African Institute of Race Relations* 1.
[145] Van der Vyver 2012 *De Jure Law Journal* 126.
[146] US Geological Survey 2018 https://d9-wret.s3.us-west-2.amazonaws.com/assets/palladium/production/mineral-pubs/mcs/mcs2018.pdf.
[147] Mining Council South Africa *Facts and Figures: Pocket Book 2019* 5.
[148] Mining Council South Africa *Facts and Figures: Pocket Book 2019* 5.
[149] Mining Council South Africa *Facts and Figures: Pocket Book 2019* 5.
[150] Mining Council South Africa *Facts and Figures: Pocket Book 2019* 5.
[151] Section 2(h) of the *MPRDA* 28 of 2002.
[152] Section 2(i) of the *MPRDA* 28 of 2002.

when global capital outlay enables creation of employment opportunities. Thus, the South African government sees transformation as a problem that can be addressed through economic growth.[153]

2.4 Conclusion

In conclusion, it is clear that policies under the apartheid regime prevented the majority of black South Africans from participating in the mineral and petroleum industries. The introduction of the *Mineral Rights Act* prohibited issuing of prospecting permits or rights to any black persons or any corporate body or company in which black people hold controlling interests.[154] Moreover, the enactment of the 1991 *Minerals Act* encouraged alienation of mineral rights held by the state, so that all the mineral rights would be held by (white) private sector entities.[155] This was also embraced in the *cuius est solum* which expressed the owner of the land as the *dominus* of the whole land that includes the surface and minerals underneath such land.[156] That is, land rights to HDSAs had profound consequences on the ownership of and access to mineral resources.[157] In order to address the imbalances of the past and to restore equity and fairness,[158] empowerment policies were envisaged to bring much-needed upliftment of majority of black South Africans. The content and object of such economic policies make it retributive in nature in order to advance and enable meaningful participation of black people in the mainstream economic activities.[159]

[153] Chi Ngang 2019 *South African Journal on Human Rights* 4.
[154] Section 7(3) of the *Mineral Rights Act* 50 of 1967.
[155] Kaplan and Dale *A Guide to the Minerals Act, 1991* 14.
[156] *Neebe v Registrar of Deeds* 1907 TS 289.
[157] Mitchell *et al* 2012 *Journal of the Southern African Institute of Mining and Metallurgy* 152.
[158] Shai, Molefinyana and Quinot 2019 *Sustainability* 7.
[159] Pooe 2013 *Mediterranean Journal of Social Sciences* 538.

3 SOUTH AFRICA'S POST-CONSTITUTIONAL MINING REGULATORY FRAMEWORK

3.1 Introduction

The *Constitution* was founded on fundamental values of human dignity, achievement of equality and advancement of human rights and freedom for all, non-racialism and non-sexism. [160] The state is therefore duty bound to ensure that everyone becomes equal before the law and to ensure equal protection and benefits of the law.[161] In accordance with the constitutional mandate, the legislature embarked on a process to review and revise the legislative framework in the mining sector with the objective of redressing past injustices. Consequently, the aim of this chapter is to examine the post-constitutional mineral regulatory framework in the South African minerals industry. The chapter introduces some of the transformative elements of the Minerals and Petroleum Resources Development Act (the *MPRDA*), including the Mining Charter, as provided for in section 100(2) of the *MPRDA.* The chapter sets out developments and amendments to the Charter, leading to the 2018 Mining Charter. The chapter will also indicate instances where uncertainties linger concerning the legal nature of the Mining Charter.

3.2 Post-constitutional mineral related regulatory framework in South Africa

A more egalitarian South African society in the new political dispensation was envisaged, which led to various pieces of legislation being introduced to address the continued inequalities of the past. It is therefore important to examine the current legislative framework regulating the mineral industry in South Africa.[162]

3.2.1 The Constitution of the Republic of South Africa, 1996

As previously stated, the *Constitution* advocates for equality, which provides that everyone is equal before the law, and has the right to equal protection and benefit of the law.[163] It follows that in order to promote achievement of equality, legislative and other measures must be developed to protect or advance persons, or categories of persons, disadvantaged

[160] Section 1 of the *Constitution of the Republic of South Africa,* 1996.
[161] Section 9(1) of the *Constitution of the Republic of South Africa,* 1996.
[162] There are various pieces of laws that could be applicable to mining. These include, for example, the *National Environmental Management Act* 107 of 1998, which requires some authorizations for mining related activities. These kinds of laws are not referred to here, as the discussion seeks to focus on the laws and policies that had a direct impact on transforming labour and mining.
[163] Section 9(1) of the *Constitution of the Republic of South Africa,* 1996.

by unfair discrimination.[164] The *Constitution* places emphasis on commitment to land reform, to bring about equitable access to mineral resources of the Republic. Moreover, the constitutional mandate makes provision for achieving more equitable access to South Africa's natural resources.[165] As supreme law of the Republic, any law and conduct that is inconsistent with the *Constitution* is invalid, and the obligations imposed by it must be fulfilled.[166]

3.2.2 Mine Health and Safety Act 29 of 1996

One of the earliest post constitutional mineral-related legislative developments was the promulgation of the *Mine Health and Safety Act* 29 of 1996 (the *MHSA*). This followed as a result of the findings of the Commission of Inquiry into Safety and Health in the Mining Industry, where it was found that the pre-constitutional legislative framework governing mining health and safety was inadequate.[167] As such, there was a need to transition to new health and safety priorities for miners, who were primarily black. The objectives of the *MHSA* are therefore to protect the health and safety of persons at mines.[168] The *MHSA* requires employers and employees to identify hazards and eliminate, control and minimise risks relating to health and safety at mines.[169] Having established a safety framework, the next step was to develop an overarching minerals policy.

3.2.3 Mineral and Mining Policy: Green Paper 1998

The *Minerals and Mining Policy*[170] recognises that previous legislation and practices inhibited black ownership of assets in mining. Based on the historical fact that South Africa's system of mineral rights was based on a dual system under which mineral rights were owned by the state and private holders, the *Minerals and Mining Policy* recognised the state as custodian of the nation's mineral resources for the benefit of all.[171] From a broad perspective, the *Minerals and Mining Policy* aims to achieve security of tenure in respect of prospecting and mining, and the prevention of hoarding of mineral rights awarded under

[164] Section 9(2) of the *Constitution of the Republic of South Africa,* 1996.
[165] Section 25(4) of the *Constitution of the Republic of South Africa,* 1996.
[166] Section 2 of the *Constitution of the Republic of South Africa,* 1996.
[167] Leon *et al Leon Commission of Inquiry into Safety and Health in the Mining Industry* 157-170.
[168] Section 1(a) of *the Mine Health and Safety Act* 29 of 1996.
[169] Section 1(b) of *the MHSA* 29 of 1996.
[170] DMR *A Minerals and Mining Policy for South Africa*.
[171] DMR *A Minerals and Mining Policy for South Africa* 16.

erstwhile legislation.[172] As a result, it targeted the necessity to address racial inequalities by ensuring that people who were previously excluded from the mining industry gained access to mineral resources and benefits from exploitation of the country's resources.[173] It also introduced matters with respect to social justice and BEE, which advocate for the participation of previously disadvantaged individuals in the South African economy.[174] These envisioned changes were expected to lead to equity of opportunity in respect of access to ownership and management in the mining industry. In other words, one could argue that the *Minerals and Mining Policy* presupposes that ownership and control of the mineral industry should be de-racialised. This de-racialisation could only be possible if there was equity in employment.

3.2.4 Employment Equity Act 55 of 1998

The preamble of the *Employment Equity Act* 55 of 1998 (the *EEA*) recognises the existence of discriminatory laws and practices, and the continued disparities in employment, occupation and income in the labour market experienced as a result of apartheid.[175] There is therefore a concerted effort to promote constitutional rights to equality, by eliminating unfair discrimination in employment, ensuring the implementation of employment equity to redress the effects of discrimination and, importantly, achieving a diverse workforce representative of all the people in South Africa.[176] The purpose of the *EEA* is to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination.[177] There is also a need to implement affirmative action measures to redress the disadvantages in employment experienced by designated groups (black people, and women in particular), and ensuring equitable representation in all categories and levels in the workplace.[178]

3.2.5 Preferential Procurement Policy Framework Act 5 of 2000

Equity itself was never going to be sufficient, as there was indeed a need for deliberate efforts to ensure that black people could reach a position where they could be key role

[172] DMR *A Minerals and Mining Policy for South Africa* 16.
[173] DMR *A Minerals and Mining Policy for South Africa* 36.
[174] DMR *A Minerals and Mining Policy for South Africa* 37.
[175] Preamble, *Employment Equity Act* 55 of 1998.
[176] Preamble, *Employment Equity Act* 55 of 1998.
[177] Section 2(a) of the *Employment Equity Act* 55 of 1998.
[178] Section 2(b) of the *Employment Equity Act* 55 of 1998.

players. This could be done through, for example preferential procurement which, within the context of BEE, refers to the purchasing of goods and services from preferred suppliers.[179] A law which was promulgated to partly address this was the *Preferential Procurement Policy Framework Act* 5 of 2000 (the *PPPFA*). The *PPPFA* provides a framework for implementation of a preferential procurement policy with specific goals that include contracting with persons, or categories of persons, that were historically disadvantaged by unfair discrimination based on race, gender or disability.[180] In essence, the purpose of the *PPPFA* is to increase the participation of HDSAs and the small medium and micro enterprises (SMMEs) in the public sector's procurement system. This suggests that procurement opportunities will be biased towards providing contracts to enterprises owned by black people who have demonstrated the capacity to deliver on services, including minerals-related services.

3.2.6 Mineral Petroleum Resources Development Act 28 of 2002

The *MPRDA* repealed the *Minerals Act* (of 1991) and the common law, and its introduction heralded a new mineral dispensation, whose transformation objectives are based on fundamental principles and values explicitly expressed in the *Constitution*[181] and the *Minerals and Mining Policy.* The preamble of the *MPRDA* reaffirms the state's commitment to changes and brings about equitable access to South Africa's mineral and petroleum resources.[182] Moreover, the *MPRDA* is a reflection of the state's commitment to eradicate all forms of discriminatory practices in the mineral and petroleum industries.[183] Therefore, the state is under an obligation to take legislative and other measures to redress the results of past racial discrimination.[184] The recognition and promotion of local and rural development and the social upliftment of communities affected by mining is consequently an objective of the *MPRDA*. As a result, the *MPRDA* recognises that mineral resources are the common heritage of all South Africans, and that the state is the custodian for the benefit of the people.[185] Therefore, the primary objective of the *MPRDA* is to ensure attainment of government objectives of redressing historical socio-economic inequalities and to ensure broad-based

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179 Van der Merwe and Ferreira 2014 *SAJEMS* 546.
180 Section 2(d)(i) of the *Preferential Procurement Policy Framework Act* 5 of 2000.
181 Section 9 of the *Constitution of the Republic of South Africa,* 1996.
182 Preamble, *MPRDA* 28 of 2002.
183 Preamble, *MPRDA* 28 of 2002.
184 Preamble, *MPRDA* 28 of 2002.
185 Section 3(1) of the *MPRDA* 28 of 2002.

and meaningful participation of black persons in the mining and minerals industry.[186] The *MPRDA* is discussed further below.

3.2.7 Broad-Based Black Economic Empowerment Act 53 of 2003

The introduction of *Broad-Based Black Economic Empowerment Act* 53 of 2003 (the *B-BBEE* Act) overlapped with the enactment of the *MPRDA* 28 of 2002. The *B-BBEE Act* was introduced to establish a legal framework for promotion of black economic empowerment, and to empower the Minister to issue the code of good practice and publish transformation charters.[187] The preamble of the Act provides for the promotion and achievement of the constitutional right to equality, increasing broad-based and effective participation of black people in the economy, and promoting higher growth rates, increased employment and more equitable income distribution.[188]

A primary objective of *B-BBEE Act* is to promote economic transformation in order to enable meaningful participation of black people in the economy.[189] A further objective is the need to achieve substantial change in the racial composition of ownership and management structures and in skilled occupation in the mining industry to promote transformation.[190] Most importantly, increasing the extent to which communities, workers, cooperatives and black women own and manage existing and new enterprises, thereby increasing access to economic opportunities is a target of *B-BBEE Act*.[191] In addition, the empowerment of rural and local communities through access to land ownership and skills that will enable them to participate in mainstream economic activities is another objective.[192]

In order to achieve the stated objectives and purpose of the Act, the Minister of the Department of Trade and Industry gazetted the Codes of Good Practice in terms of the Act that sought to address issues of interpretation and clarification of the definition of *B-BBEE Act*,[193] qualification criteria for preferential procurement purposes,[194] and indicators to

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186 Section 100(2) of the *MPRDA* 28 of 2002.
187 *Broad-Based Black Economic Empowerment Act* 53 of 2003.
188 Preamble, *B-BBEE Act* 53 of 2003.
189 Section 2(a) of the *B-BBEE Act* 53 of 2003.
190 Section 2(b) of the *B-BBEE Act* 53 of 2003.
191 Section 2(c) of the *B-BBEE Act* 53 of 2003.
192 Section 2(f) of the *B-BBEE Act* 53 of 2003.
193 Section 9(1)(a) of the *B-BBEE Act* 53 of 2003.
194 Section 9(1)(b) of the *B-BBEE Act* 53 of 2003.

measure compliance with *B-BBEE Act*.[195] Furthermore, the *B-BBEE Act* provides that the Code of Good Practice must specify targets with regard to implementation of the Act and timelines within which the targets must be achieved.[196] The Act also calls for differentiation between black men and black women to ensure that the promotion of equality for women is prioritised accordingly.

3.3 The transformative aspects of the MPRDA

The above discussion broadly shows that the South African governance framework has made a commitment to transforming the minerals sector as a form of redressing past unjust distribution of ownership of land and mineral resources. The main legal instrument, however, remains the *MPRDA*, because it is the comprehensive law detailing the mineral and petroleum regulatory space in South Africa. In the discussion below, an attempt will be made to indicate some aspects of the *MPRDA* which could facilitate transformation.

3.3.1 State custodianship of rights

The recognisable milestone of the *MPRDA* was to return all mineral rights to the custodianship of the state for redistribution.[197] These changes were achieved through the cancellation of the old-order mineral rights and by requiring, current and future mine owners to apply for new-order rights;[198] such changes were accommodated through transitional arrangements as outlined in the provisions of the *MPRDA*.[199] Evidently, this serves to confirm that the *MPRDA* ended the property law system of the *Minerals Act* and introduced an administrative law based conditional state licencing system.[200] The conversion of private mineral rights to that of state property effectively reversed South Africa's history of racial possession of mineral property seized without compensation during the colonial era, and redistributed to mining capital as private rights.[201]

Critical to the objective of the *MPRDA* is to give effect to the principle of state custodianship of the nation's mineral and petroleum resources.[202] In *Maledu and Other v Itereleng*

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195 Section 9(1)(c) of the *B-BBEE Act* 53 of 2003.
196 Section 9(4) of the *B-BBEE Act* 53 of 2003.
197 Sorensen 2011 *International Journal of Environmental Studies* 174.
198 Schedule II of the *MPRDA* 28 of 2002.
199 Schedule II of the *MPRDA* 28 of 2002.
200 Leon 2012 *Journal of Energy & Natural Resources Law* 9.
201 Capps 2012 *Review of African Political Economy* 325.
202 Section 2(b) of the *MPRDA* 28 of 2002.

Bakgatla Mineral Resources (Pty) Ltd and Another,[203] the Constitutional Court held that the MPRDA recognises the state as custodian of South Africa's mineral resources and its primary object is to promote transformation of the mining sector and empower people who were previously excluded from participation in and exploitation of mineral resources.[204] It becomes clear that the country's mineral and petroleum resources have been declared by law to be the property of the people, vested in the state as custodian on behalf of the people of South Africa.[205] By implication, the natural resources, which include all mineral resources and ownership of all minerals, is vested in the state on behalf of the people. The custodianship principle is premised on South Africa's permanent sovereignty over mineral and petroleum resources.[206] Such sovereignty is supposedly accompanied by responsibility on the state to ensure sustainable development of mineral resources within its own borders in a manner that promotes environmental protection and socio-economic development.[207]

3.3.2 Mineral licensing under the MPRDA

Section 3(1) of the *MPRDA* provides that mineral and petroleum resources are the common heritage of all the people of South Africa, and the state is the custodian of such benefits to South Africans. It then follows that as a custodian of the mineral resources, the Minister (as empowered by the *MPRDA*) has the authority to grant, issue, refuse, control, administer and manage any prospecting rights, mining right, reconnaissance permit and exploration right.[208] Moreover, one of the fundamental objects of the Act is to promote equitable access to the nation's mineral and petroleum resources to all people in the Republic,[209] and to substantially and meaningfully expand opportunities of historically disadvantaged persons to participate and to benefit through exploitation in the mineral industry of the nation's natural resources.[210]

Therefore, the licensing process and requirements under the *MPRDA* have become necessary instruments to ensure entry of black people into the mining industry. The applications for prospecting or mining rights have to be lodged at the office of the Regional

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203 *Maledu and Other v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019 (2) SA 1 (CC).
204 *Maledu and Other v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another*, para 50.
205 Van der Schyff *Property in Minerals and Petroleum* 263.
206 Section 2(a) of *MPRDA* 28 of 2002.
207 Van der Zwan 2013 *The Journal of Applied Business Research* 641.
208 Section 3(2) of the *MPRDA* 28 of 2002.
209 Section 2(c) of the *MPRDA* 28 of 2002.
210 Section 2(d) of the *MPRDA* 28 of 2002.

Manager in terms of section 16(1) and section 22(1) of the *MPRDA* respectively. When the Minister grants a prospecting or mining right, he/she grants (in terms of section 5 of the *MPRDA*) a 'limited real right' to the minerals/petroleum as well as the land to which the rights are associated.[211]

Section 23(1)(h) of the *MPRDA* provides that the granting and duration of the mining right must, amongst others, further the objectives of transformation as per section 2(d) and (f) of the Act. This should take into consideration the object of the *MPRDA*, which calls for substantial and meaningful expansion of opportunities for HDSAs in entering and participating in the exploitation of the nation's mineral and petroleum resources.[212] This provision was tested in *Mawetse SA Mining Corporation (Pty) Ltd v Minister of Mineral Resources and Others*,[213] where the High Court confirmed that a mining right can be denied on the basis of failing to adhere to the BEE and transformational requirements as contemplated under section 2(d) of the *MPRDA* and the Mining Charter.[214] On appeal to the Supreme Court of Appeal, the High Court finding was confirmed. In *Minister of Mineral Resources v Mawetse SA Mining Corporation (Pty) Ltd*,[215] the Supreme Court of Appeal noted that:

> The objects set out in s 2(d) are of cardinal importance when the purpose of the MPRDA and the Mining Charter is borne in mind and, as our courts have stressed, are essential to redress the historical inequalities in the mining industry. Compliance with the request is not merely optional and the grant of the prospecting right was expressly made subject to such compliance. Absent compliance, the DMR was lawfully entitled to refuse to execute the right. Dilokong was non-compliant with s 17(4), read with s 2(d) of the *MPRDA*.[216]

These decisions confirm that the granting of a prospecting or mining right, can indeed be conditional to an applicant meeting transformational imperatives as contemplated sections 2(d) of the *MPRDA*.

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[211] Section 5(1) of the *MPRDA* 28 of 2002; Van der Schyff *Property in Minerals and Petroleum* 256.

[212] Section 2(d) of the *MPRDA*. Moreover, the licencing process also allows for the Minister to impose conditions relating to the participation of a community if such licence is required for minerals located in the community in question. See Section 17(4A), which also gives effect to section 2(d) and (f) of the *MPRDA*.

[213] *Mawetse SA Mining Corporation (Pty) Ltd v Minister of Mineral Resources and Others* CN 20069/12 ZAGPPHC [30/01/2014].

[214] *Mawetse SA Mining Corporation (Pty) Ltd v Minister of Mineral Resources and Others*, para 47.

[215] *Minister of Mineral Resources v Mawetse SA Mining Corporation (Pty) Ltd* 2016 (1) SA 306 (SCA).

[216] *Minister of Mineral Resources v Mawetse SA Mining Corporation (Pty) Ltd*, para 17.

3.3.3 Consultation with interested or affected parties under MPRDA

The introduction of the *MPRDA* brought about the necessary protections for communities to safeguard their interests on their communal land. For purposes of this study, the *MPRDA* provides an understanding of community "means a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law".[217] Considering that mining activities sometimes to take place in under-developed areas, wherein communities endure the disproportionate negative socio-economic impacts of such mining in their locality, consultation becomes the most important aspect of community development in mining communities.[218]

Section 10 of the *MPRDA* requires the authorities to notify through prescribed means, any interested and affected parties of an accepted application, after which such interested and affected parties have 30 days to lodge their comments regarding the application.[219] Furthermore, sections 16(4)(b) and section 22(4)(b) all require a prospective applicant of a prospecting or mining right to consult with landowners, lawful occupiers or interested parties. As confirmed in *Bangwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd and Others,*[220] consultation is necessary and consists of a number of processes:

> The consultation process required by section 16(4)(b) of the Act thus requires that the applicant must: (a) inform the landowner in writing that his application for prospecting rights on the owner's land has been accepted for consideration by the Regional Manager concerned; (b) inform the landowner in sufficient detail of what the prospecting operation will entail on the land, in order for the landowner to assess what impact the prospecting will have on the landowner's use of the land; (c) consult with the landowner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation; and (d) submit the result of the consultation process to the Regional Manager within 30 days of receiving notification to consult.[221]

Consequently, in instances where an application is in relation to lands occupied by a community, the Minister is empowered to impose any conditions that would allow for the participation of the community as well as promote their rights and interests.[222] Also, the

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[217] Section 1 of the *MPRDA* 28 of 2002.

[218] In *S v Smit* 2008 (1) SA 135 (T), para 153, consultation was described as follows: "consultation cannot be a mere process…it has to be a genuine and effective engagements of minds between the consulting and the consulted parties. A mere formalistic attempt to consult does not constitute consultation."

[219] Section 10(1)(b) of the *MPRDA* 28 of 2002.

[220] *Bangwenyama Minerals (Pty) Ltd and Others v Genorah Resources and Others* CCT 39/10 [2010] ZACC.

[221] *Bangwenyama Minerals (Pty) Ltd and Others v Genorah Resources and Others*, para 67.

[222] Section 23 (2A) of the *MPRDA* 28 of 2002.

provisions of the *MPRDA* afford the communities preferent right to apply for a prospecting or mining right before any other prospective applicants can be considered.[223] It therefore goes without saying that these provisions foster peaceful co-existence between mining corporations and local communities affected by mining operations, while also giving communities voices as well as opportunities to benefit from minerals within their space.

Thus far, it is clear that state custodianship, licensing requirements as well as consultation requirements are all aspects that were introduced by the *MPRDA* as means to transform the minerals industry. In addition to these, the *MPRDA* provided for the need for a Mining Charter which would guide mineral policy in South Africa. The discussion will now consider this Mining Charter.

3.4 The Mining Charter

The Mining Charter finds its expression in terms of Section 100(2) of the *MPRDA*, which advocates for transformation in the South African mining industry. Section 100(2)(a) required the Minister to facilitate the development of a broad-based socio-economic empowerment Charter of the *MPRDA* to ensure the attainment of government objectives in redressing historical, social and economic inequalities.

3.4.1 The 2002 Mining Charter

In line with section 100(2), the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry,[224] (2002 Mining Charter) was developed. It had a number of objectives which included, among others, the promotion of equitable access to mineral resources; the substantial and meaningful expansion of opportunities to HDSAs in entering and benefitting from the industry; the expansion of the skills base of HDSAs and the promotion of beneficiation of mineral commodities.[225] In addition to this, the 2002 Mining Charter had a number of undertakings which were a radical departure from the apartheid *status quo*.[226] For example, the Mining Charter sought to capacitate human resources within the mining sector by increasing the number of people with qualifications applicable to the

[223] Section 104(1) of *MPRDA* 28 of 2002.
[224] GN R1639 of GG 26661 of 2004.
[225] Clause 3 in GN R1639 of GG 26661 of 2004.
[226] Because of limited space and focus, only a few of these are described.

mining sector. The Mining Qualifications Authority, along with government and companies would collaborate on this.[227]

Employment equity was an undertaking which would be addressed through commitments by companies to develop and publish employment equity plans which would include targets for HDSAs and women within minerals space.[228] Furthermore, since *B-BBEE Act* and *PPPFA* encourage procurement as a mechanism to address past injustices, and since preferential procurement in general is considered to be a significant policy instrument aimed at reversing apartheid injustices through social and economic objectives,[229] the 2002 Mining Charter had an undertaking to increase HDSA's access to the procurement of capital goods, services and consumables.[230]

As far as communities are concerned, their development remains high on the transformation agenda as far as empowerment is concerned. There is an emphasis on addressing poverty faced by host communities directly affected by mining operations (the Mining Charter calls these Ghost towns).[231] Integrated development plans were noted as the place where commitments could be made.[232] Furthermore, considering that South Africa is by most contemporary measures rated as one of the most unequal countries in the world,[233] there was a numerical undertaking for each company to achieve black participation or ownership of equity to around 26% by 2014.[234] Naturally, at some point the government had to investigate if these undertakings were bearing any fruits and whether companies were adhering to them. Consequently, the government commissioned an impact assessment report in 2009.

3.4.2 The Mining Charter Impact Assessment Report and the 2010 Mining Charter

In 2009, the Department of Mineral Resources and Energy commissioned an independent assessment to evaluate progress regarding the implementation of the 2002 Mining Charter.[235] It seems that there were some ambiguities inherent to the 2002 Mining Charter.

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[227] Clause 4.1 in GN R1639 of GG 26661 of 2004.
[228] Clause 4.2 in GN R1639 of GG 26661 of 2004.
[229] Shai, Molefinyana and Quinot 2019 *Sustainability* 7.
[230] Clause 4.6 in GN R1639 of GG 26661 of 2004.
[231] Horne 2017 *African Review of Economics and Finance* 15.
[232] Clause 4.4 in GN R1639 of GG 26661 of 2004.
[233] Chatterjee, Czajka and Gethin *Estimating the distribution of household wealth in South Africa* 1.
[234] Clause 4.7 in GN R1639 of GG 26661 of 2004.
[235] DMR *Mining Charter Impact Assessment Report* 2009.

The biggest challenge seemed to be on the issue of clearly defined outputs or targets.[236] For example, it was noted that less than half of mining companies had developed or published employment equity plans (37% only).[237] The Department itself had not received audited or even unaudited plans to that end. The result was that groups like women remained underrepresented, at 6%.[238] Ownership remained largely out of the hands of HDSAs,[239] which also led to less procurement opportunities of capital goods and services in the mining sector for HDSAs.[240]

In view of these and other challenges, the Mining Charter was reviewed and a new one was developed in 2010.[241] The 2010 Mining Charter undertook to have, for example, 26% minimum target for ownership within HDSAs.[242] In addition, there was an acceptance/recognition of the continued consequences of all previous transactions or deals which had been concluded prior to the promulgation of the *MPRDA*.[243] Significantly though, new undertakings were added, including commitments to sustainable development, growth and transformation in the mining industry; reporting as well as non-compliance consequences. For example, there was a recognition of the finite nature of natural resources and that they should be exploited without compromising the rights of future generations to enjoy the nation's mineral resources.[244] Furthermore, and in line with 28(2)(c) of the *MPRDA*, companies were mandated to annually report on progress in relation to the implementation of the 2010 Mining Charter.[245] Lastly, the 2010 Mining Charter explicitly made it clear that failure to comply with the Charter constituted breach,[246] which in some way presents the nature of the 2010 Mining Charter as legally binding.

[236] Madinginye *Compliance with the Mining Charter* 11.
[237] DMR *Mining Charter Impact Assessment Report* 7.
[238] DMR *Mining Charter Impact Assessment Report* 7.
[239] Moraka 2015 *Problems and Perspectives in Management* 178.
[240] DMR *Mining Charter Impact Assessment Report* 14.
[241] in GG 33573 GN 838 of 20 September 2010.
[242] Clause 2.1 in GG 33573 GN 838 of 20 September 2010.
[243] Clause 2.1 in GG 33573 GN 838 of 20 September 2010.
[244] Clause 2.8 in GG 33573 GN 838 of 20 September 2010.
[245] Clause 2.9 in GG 33573 GN 838 of 20 September 2010.
[246] Clause 3 in GG 33573 GN 838 of 20 September 2010.

3.4.3 The 2018 Mining Charter

The third iteration of the Mining Charter gazetted on 27 September 2018 brought about further changes,[247] which significantly affected mining rights holders. Meaningful economic participation is now at the centre of the 2018 Mining Charter through effective ownership by HDSAs.[248] Also, some of the changes introduced were however designed to eliminate ambiguities and provide policy certainty for the success of transforming the South African mineral industry. A discussion of all the changes will not be possible in this study, but a few examples could be given. For example, existing mining rights holders with a minimum 26% BEE shareholding are considered compliant for the duration of the mining right.[249] In relation to historical transactions when a mining right is renewed, continued consequences with regard to the existing mining right would not be transferable, and lapse upon transfer of the mining right.[250] Moreover, it will also not be applicable during the lodgement of an application of new mining right.[251] This serves to confirm that, upon renewal or transfer, the mining rights holders would have to comply with the minimum new set target of 30% BEE shareholding. Importantly, but without going into much detail, the most noticeable change is that a minimum 30% BEE shareholding is now required for any new application for a mining right.[252]

Furthermore, changes in respect of procurement, supplier and enterprise development were introduced with specifics. For example, 70% of procured mineral goods must be South African.[253] Significantly, as a way of ensuring inclusive governance and equity, mining boards are also required to now be numerically structured, with minimum of 50% historically disadvantaged persons at the board level, along with at least 20% female representation for example.[254]

What remains significant, especially when considering the nature of the Mining Charter, is the aspect dealing with consequences for non-compliance. This non-compliance is primarily focused on ownership level from a transformational perspective and clause 9 states that "a

[247] GN 1002 in GG 41934 of 27 September 2018.
[248] Clause 2.1 in GN 1002 in GG 41934 of 27 September 2018.
[249] Clause 2.1.1.1 in GN 1002 in GG 41934 of 27 September 2018.
[250] Clause 2.1.1.4 in GN 1002 in GG 41934 of 27 September 2018.
[251] Clause 2.1.1.5 in GN 1002 in GG 41934 of 27 September 2018.
[252] Clause 2.1.3 in GN 1002 in GG 41934 of 27 September 2018.
[253] Clause 2.2.1.1 in GN 1002 in GG 41934 of 27 September 2018.
[254] Clause 2.4.1 in GN 1002 in GG 41934 of 27 September 2018.

mining right holder who has not complied with the ownership element shall be in breach of the *MPRDA* and subject to provisions of section 93, read in conjunction with section 47, 98 and 99 of the Act."[255] These stated *MPRDA* provisions related to offences and non-compliance, with section 99 specifically stating that a license can be suspended or terminated. Again, this potentially implies that the requirements of the Mining Charter have the backing of law. We will turn to this discussion later in chapter 4.

3.4.4 The implications of the 2018 Mining Charter

While the legal nature of the Mining Charter will be discussed in the next chapter, a few points could be mentioned around the implications of some of the changes and some uncertainties they potentially bring out. The obvious issue is that the underlying aspiration is for the mining industry and the mining community to transform towards improved state of being, with the assistance or support of the mining conglomerates.[256] This is why the 2018 Mining Charter unambiguously states that new-rights BEE partners must include BEE entrepreneurs, Employee Share Ownership Schemes (ESOPs) and mining communities. By implication, the ESOPs that were implemented in previous Charters would have to be brought in line with the requirements of the 2018 Mining Charter as gazetted.

Furthermore, the 2018 Mining Charter comes at a time when the mining industry is currently on a drive to lay off idle capacity in the form of retrenchments, which casts doubt on the practicality of achieving the ambitious targets as far as employment equity is concerned for example.[257] The recent employment figures indicate a decline from 462 039 employees (in 2019) to 452 866 employees (in 2020).[258] This decline in employment numbers may affect outlook in terms of future planning, and could have a direct impact on transformation. This is even more concerning considering the continued cabinet or political changes that have happened within the Ministry responsible for minerals.[259] Taking into cognisance how strategic mining is to South Africa, that capability of the 2018 Mining Charter to deliver on transformational goals becomes also highly dependent on political will and vision. Yet at the

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[255] Clause 9.1 in GN 1002 in GG 41934 of 27 September 2018.
[256] Heyns and Mostert 2018 *Law and Development Review* 825.
[257] Deloitte 2018 Mining Charter Analysis Deloitte 2019 https://www2.deloitte.com/content/dam/Deloitte/za/Documents/energy-resources/za_deloitte_mining_charter_May2019.pdf.16.
[258] Mining Council of South Africa *Facts and Figures: Pocket Book 2019* 15.
[259] There were five Minister(s) that served on that portfolio of Department of Minerals Resources and Energy since 2014.

same time, excessive re-distributive societal demands through state intervention could ultimately lead to volatility in markets.[260]

There seems to also be some uncertainty for existing rights holders when it comes to BEE. For example, the 2018 Charter provides that new mining rights holders must have 30% BEE which is broken down in 3 ways: to qualifying employees, a 5% non-transferrable carried interest; another 5% non-transferrable carried interest to host communities, as well as 20% effective ownership to a BEE entrepreneur, with 5% envisioned to be women.[261] Consequently, the position of existing mining right holders in relation to whether they would need to reconfigure and align with these requirements of the 2018 Charter is unclear. It can be assumed that they would remain within the same regime. In the event that there is transfer or renewal of mining rights, then there would be a need to meet the BEE make-up of the 2018 Mining Charter.

Lastly, the past has shown that with BEE, there can be fronting practices which undermine the government transformation agenda. Fronting has been common in industries and companies that attempt to circumvent the process of equitable transformation.[262] By way of description, fronting is a "transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives" of BEE laws.[263] With the 2018 Mining Charter specifically calling for 30% BEE ownership, it remains to be seen how the achievement of these targets will not be hindered by fronting. Related to this is the concern on whether fronting could still be an issue if the Mining Charter does not have legal backing. In other words, since policies rarely come with legal consequences, companies might not see the need to comply with BEE requirements.

3.5 Conclusion

In conclusion, the *Constitution* creates the foundation for the need to regulate as well as transform the minerals industry. While the past did not create any opportunities for black people, the post-constitutional framework has the potential to radically transform ownership and benefits from the country's vast mineral resources. The *MPRDA* custodianship role in

[260] Jodice *Political Risk Assessment: An Annotated Bibliography* 33.
[261] Clause 2.1.3.1 Clause 2.2.1.1 in GN 1002 in GG 41934 of 27 September 2018.
[262] Hareeparsad 2015 *Accountancy SA* 2.
[263] Section 1(e) of the *B-BBEE Act* 53 of 2003.

relation to mineral resources created opportunities for the state to lead the way through legislative and other measures like the Mining Charter in seeking to transform the industry while ensuring equitable access. This places the Mining Charter at the centre of transformation, yet as the discussion highlighted in some parts, the exact nature of the Mining Charter is unclear. This is reviewed in the next chapter.

4 PERSPECTIVES ON THE LEGAL NATURE OF THE MINING CHARTER

"Policy uncertainty has bedevilled our economic performance … until we get it right, we won't get the level of investment we want …" Professor Raymond Parsons, economist – NWU Business School

4.1 Introduction

There have been uncertainties as to the legal nature of the Mining Charter(s), and the uncertainties have at times led to confusion between stakeholders in the mining industry. As will be shown in this chapter, case law has brought some form of clarity by indicating that the legal nature of the Mining Charter is as a policy instrument rather than subordinate legislation. This has some implications on whether adherence to the Mining Charter is obligatory, or not. Regardless, it seems that the 2018 Mining Charter was developed as a response to some of these issues. As the cases will show, the 2018 Mining Charter amendment was met with criticism, especially from the mining industry.

Based on the aforementioned, the purpose of this chapter is to evaluate and assess the impact of the court's interpretation on the legal nature of the Mining Charter (2018), with specific reference to the Charter's role in giving effect to the implementation of the Minerals Petroleum Resources Development Act (the *MPRDA*). Moreover, the chapter will assess and highlight the implications that the Mining Charter as a policy instrument would have on legislative governance and transformation in the South African mining industry.

4.2 The Legal nature of the Mining Charter (2018)

The Mining Charter was developed in terms of section 100 of the *MPRDA,* which implies it is supposedly developed in terms of the law. However, the court made a determination in terms of the Mining Charter's enforceability. To reiterate, section 100(2)(a) of the *MPRDA* provides for the development of the Mining Charter as an instrument to -

> ensure the attainment of the Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources.

Considering that the Minister 'must' develop this Charter, it ostensibly assumes delegated powers by the *MPRDA* as an enabling Act. To note, the legislative structure consists of national and provincial legislation, proclamations, regulations, subordinate legislation, municipal legislation, old-order legislation, and the legislation in the new constitutional order. Within this context, and if indeed the Minister is delegated to develop this framework, it could imply that the Mining Charter constitutes subordinate legislation which gives effect to a primary legislative provision. This is specifically because subordinate or delegated legislative enactments are administrative acts whose validity may be reviewed by the courts,[264] and in such a case, the scope of the Mining Charter depends much on the provisions of the *MPRDA*, an enabling law.

To clarify matters, the *Constitution* defines national legislation as "subordinate legislation made in terms of an Act of Parliament",[265] and in respect of provincial legislation as "subordinate legislation made in terms of a provincial Act".[266] Therefore, the *Constitution* and an Act of Parliament may confer delegated legislative powers on certain person(s) or bodies; for example, a Minister who may be authorised to promulgate 'regulations' and 'proclamations' in accordance with the prescription of an enabling legislation of any particular Act of Parliament.[267] However, Parliament may not delegate the power to make original legislation to the executive authority (that is, President or Cabinet Minister), as such delegation may compromise separation of powers principle.[268]

Nevertheless, there are certain general aspects of subordinate legislation that should always be borne in mind. For example, subordinate legislation should not be in conflict with its original or enabling legislation, and persons or bodies authorised to issue such legislation may do so only within the framework of authority assigned to them by an enabling legislation.[269] Such legislation owes its existence and authority to its enabling original legislation.[270] In instances where a court finds enabling legislation unconstitutional, such

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[264] Botha *Statutory interpretation: An introduction for students* 27.
[265] Section 239(a) of the *Constitution of the Republic of South Africa,* 1996, in respect of an Act of Parliament.
[266] Section 239(a) of the *Constitution of the Republic of South Africa,* 1996, in respect of provincial Act.
[267] Botha *Statutory interpretation: An introduction for students* 27; Devos *et al South African Constitutional Law in Context* 165.
[268] *Justice Alliance of South Africa v President of the Republic of South Africa and Others* CCT 53/11, CCT 54/11, CCT 62/11 [2011] para 55.
[269] Botha *Statutory interpretation: An introduction for students* 28.
[270] Botha *Statutory interpretation: An introduction for students* 27.

finding therefore invalidates subordinate legislation issued in terms of such enabling legislation.[271] A point to note, however, is that subordinate legislation could be considered a violation of the separation of powers principle because unelected members (the Minister, for example) obtain law-making powers to broaden the scope of legislation outside of electoral function.[272] It remains necessary though, since original legislation is in most instances drafted in broad and skeletal terms, which are then supplemented by subordinated legislation that would provide details on how enabling legislation objectives could be achieved. The crucial point remains that subordinate legislation must be read and interpreted in line with the enabling Act, and the enabling Act may not be interpreted based on subordinate legislation made under it.[273]

As such, the Mining Charter becomes subject to administration by the Department of Mineral Resources and Energy in terms of the *MPRDA.* Again, if we theorise and consider the 2018 Mining Charter as subordinate legislation, which could be considered binding to all parties and enforceable by government, it must be published by notice in the Government Gazette.[274] However, mere publication does not authenticate the validity of subordinate legislation, as a competent court may test the validity thereof.[275] Any law or conduct that can be found to be inconsistent with the Constitution may be declared invalid by a court of law.[276] It then follows that the High Court, Supreme Court of Appeal, or Constitutional Court may declare legislation (subordinate even) or regulations unconstitutional if they violate the fundamental rights enshrined in the Bill of Rights or if they are in conflict with other constitutional obligations.[277] As will be shown below, this was supposedly the case with the 2018 Mining Charter.

[271] Botha *Statutory interpretation: An introduction for students* 28.
[272] Botha *Statutory interpretation: An introduction for students* 25.
[273] *Freedom of Expression Institute v Chair, Complaints and Compliance Committee* CN 2009/51933, as cited in Botha *Statutory interpretation: An introduction for students* 29.
[274] Government Gazette is used to announce the introduction of legislation to the population to whom it applies.
[275] Section 33(3)(a) of the *Constitution of the Republic of South Africa,* 1996.
[276] Section 2 of the *Constitution of the Republic of South Africa,* 1996.
[277] Section 172 of the *Constitution of the Republic of South Africa,* 1996.

4.2.1 Chamber of Mines South Africa v Minister of Mineral Resources and Another CN 41661/2015 [4 April 2018]

To reiterate and reflect on the context of the problem statement, the issues that pre-date the 2018 Mining Charter were in respect of applications pertaining to mining rights granted under the *MPRDA* and the holder of such mining right.[278] The issues were articulated in the case between the parties, which case will be discussed at length herein.

In *Chamber of Mines South Africa v Minister of Mineral Resources and Another,* the parties made "an application for declaratory relief brought by agreement between the parties in order to obtain certainty regarding empowerment obligations of mining rights holders",[279] with regard to provisions of the Mining Charter (2010). The legal questions to be answered was whether a mining company "has a perpetual and recurring obligation to meet a 26% ownership target after the grant of a mining right or conversion of an old-order mining right" and whether the Minister can "use enforcement powers in the *MPRDA* to compel compliance with a 26% HDSA target?".[280] In essence, the issue was in respect of "continued consequences of historical transactions",[281] wherein mining rights holders that achieved 26% BEE shareholding fell short because their BEE shareholders had disposed of their shares or interest.[282] Consequently, the legal issue was whether such mining rights holders were under an obligation to take deliberate steps to achieve or 'top-up' BEE shareholding of 26% continuously.[283]

In a majority judgment, the Court held that there were no obligations for mining rights holders to top-up their BEE shareholding, unless such requirement is stipulated under section 23(6) of the *MPRDA*.[284] Section 23(6) of the *MPRDA* allows the Minister to attach any obligations to which a mining right has to adhere and be in line with. In relation to whether the top-up of BEE percentage was required, the Court said that the 2010 Mining Charter

> only has legal significance (in the context of the granting of mining rights) through section 23(1)(h), whether such an obligation exists or not depends entirely on whether it arises in

[278] *Chamber of Mines of South Africa v Minister of Mineral Resources and Another,* CN 41661(2015) para 11.
[279] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others* CN 41661/2015, para 12.
[280] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*, para 13.
[281] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*, para 18.
[282] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*, para 28.
[283] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*, para 18.
[284] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*, para 92.

> terms of the terms and conditions subject to which the Minister granted the mining right that may be in question.[285]

Moreover, the Court held that failure to meet the targets did not amount to material breach or an offence in terms of the *MPRDA*.[286] This was however not the end of the judgment, as there was a dissenting judgment. For Siwendu J, the issue was more nuanced, touching on whether the Mining Charter was binding and enforceable or whether it was merely a guiding policy.[287] In a direct way, Siwendu J was of the view that that the Mining Charter was not a policy instrument:

> The Mining Charter is a necessary statutory condition for granting a mining right. It is a means to an end, designed to make the objects of the *MPRDA* realizable. I find that the Mining Charter is a distinct, expressly and separately authorized statutory instrument. By virtue of the mandatory duty to develop it under section 100 (2), entrusted to the First Respondent by the legislature, it qualifies as a form of a delegated statutory instrument. It is intended to be applied uniformly to all prospective applicants and mine right holders. Once the framework has been set, the First Respondent is not free to depart from it.[288]

In summing up of the dissenting judgement, Siwendu J seems to conclude that failure to adhere to the provisions or targets of the Mining Charter amounts to non-compliance with the *MPRDA*. While this seems to be a persuasive argument which allows for the transformation objectives to be pursued through law, it is noted here that the finding by the majority judgment remains the authority in this case. The implication then was that, at least before the 2018 Mining Charter, the preceding Charters were policy documents.

4.2.2 Minerals Council South Africa v Minister of Mineral Resources and Energy and Others CN 20341/19 [21 September 2021]

The 2018 Mining Charter was published after extensive consultation between government, communities, organised labour and the mining industry on 27 September 2018. The parties had however been unable to find an amicable solution to the impasse in respect of certain provisions of the Charter. Due to continued disagreement, the MCSA lodged judicial review proceedings in terms of the *Promotion of Administrative Justice Act*[289] (*PAJA*) for the purposes of setting aside certain provisions of the 2018 Mining Charter. Section 6(1) of *PAJA* provides that any person may institute proceedings in a court or a tribunal for a judicial

[285] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*, para 92.
[286] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*, para 109.
[287] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*, para 114.
[288] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*, para 175.
[289] *Promotion of Administrative Justice Act* 3 of 2000.

review of an administrative action. The court or tribunal has the power to judicially review an administration action, which assumes that an administrator may have acted under delegated authority, which is contrary to empowering legislation.[290]

In *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others*,[291] the main issue was whether the Mining Charter (2018) is a formal policy in terms of section 100(2) of the *MPRDA* or a *sui generis* of subordinate legislation.[292] Moreover, there were questions in respect of the ambit and/or scope of the powers of the Minister under section 100(2) of the *MPRDA* to make law, and the legal nature and role of the 2018 Mining Charter in the context of the *MPRDA*.[293] Additional matters that were prominent in the applicant's (MCSA's) papers included, *inter alia*, recognition of continued consequences of historical transactions,[294] re-empowerment obligations for the renewal and transfer of existing mining rights[295], onerous inclusive procurement, supplier and enterprise development,[296] and others. The MCSA sought a declaratory order that the challenged clauses are inconsistent with the principle of legality as entrenched in the Constitution. The provisions of section 1(c) state that South Africa was founded on supremacy of the Constitution and the rule of law, which then required the court to pronounce on the legal nature of the Mining Charter.

The Minister of Mineral Resources contended that section 100(2) of the *MPRDA* empowers him to make law through the development of the Mining Charter, and that the developed Charter constitutes a *sui generis* form of subordinate legislation which is directly binding on holders of mining rights.[297] Conversely, the MCSA argued that the 2018 Mining Charter is a formal policy document developed by the Minister in terms of section 100(2) of the *MPRDA*, and such the Charter is binding to the Minister whenever he considers applications for mining rights in terms of section 23(1)(h) of the *MPRDA*.[298] The provisions of section 23(1)(h) of the MPRDA state that the granting of a mining right will advance the objectives as outlined

[290] Section 6(2)(a)(ii) of the *Promotion of Administrative Justice Act* 2 of 2000.
[291] *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others* CN 20341/19.
[292] *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others*, para 7.
[293] *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others*, para 7.
[294] *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others*, para 2; See Clause 2.1.1.2 in GN 1002 in GG 41934 of 27 September 2018.
[295] *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others*, para 2; See Clause 2.1.1.4 in GN 1002 in GG 41934 of 27 September 2018.
[296] Clause 2.2 in GN 1002 in GG 41934 of 27 September 2018; See *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others*, para 3.
[297] *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others*, para 8.
[298] *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others*, para 9.

in section 2(d) and (f) in accordance with the Charter contemplated in section 100.[299] The object of the *MPRDA* finds expression in *Agri SA v Minister of Minerals and Energy* where it was recognised that the majority of black South Africans were unable to benefit directly from the exploitation of mineral resources due to landlessness, exclusionary policies and poverty.[300]

The provision of section 100(2) of the *MPRDA* had to be interpreted in terms of section 39(2) of the Constitution. Section 39(2) provides that, when interpreting any legislation, every court must promote the spirit, purport and objects of the Bill of Rights. More so, when interpreting the provisions of the *MPRDA*, a court must prefer a reasonable interpretation which is consistent with its objects over any interpretation which is inconsistent with such objects; however, the Constitution reigns supreme. The Court concluded that a contextual approach to statutory interpretation be adopted in interpreting relevant sections of the *MPRDA*. The Court argued that the legislature's decision to use the words 'Charter' and 'develop' indicates that the document was intended to develop *policy* and not law,[301] and that the word 'Charter' as an instrument of law was foreign in South African law.[302]

Furthermore, the legislature's use of the word 'develop' does not find expression anywhere in the legislation developed thus far, and such word was frequently used with reference to formulation of policy.[303] Therefore, the authority to 'develop a Charter' in terms of section 100(2) of the *MPRDA* is *sui generis*, and does not have the force of law.[304] It is further argued that section 100(2)(b) states that the Charter must set out how the objectives in sections 2(c), (d), (e) and (i) 'can' be achieved, which word is considered to be permissive rather than peremptory.[305] It followed that a statutory provision that required exact compliance would be peremptory.[306] Therefore, the specific use of the word 'can' indicated that the legislature did not intend for the Charter to be subordinate legislation.[307]

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[299] Section 2(d) of the *MPRDA* "substantially and meaningfully expand opportunities for historically disadvantaged persons…in the mineral industry"; section 2(f) of *MPRDA* "promote employment and advance the social and economic welfare of all South Africans".
[300] *Agri South Africa v Minister for Minerals and Energy*, para 1.
[301] *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others*, para 21.
[302] *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others*, para 22.
[303] *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others*, para 30.
[304] *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others*, para 30.
[305] *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others*, para 34.
[306] Botha *Statutory interpretation: An introduction for students* 175.
[307] *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others*, para 34.

Be that as it may, the Minister sought to locate purported power to make law in the form of a Mining Charter in the values and norms of the Constitution, which in essence will be in conflict with the doctrine of separation of powers.[308] The principle of separation of powers as expanded by Montesquieu, a French philosopher in the 18th Century, accepts that specific powers and functions are allocated to each arm of the state, and no power can be concentrated in one arm or person to abuse such kind of power.[309] The provisions of section 85(2)(b) of the Constitution clearly articulate for the power(s) exercised by the President together with members of the executive in developing and implementing national policy.[310] Therefore, policy formulated by the executive outside of normal legislative framework is considered to involve political decisions and, as such, would be classified as policy formulated by the executive in implementing legislation, which in the normal course of business would constitute administrative action.[311]

The Court held that section 100(2) requires the Mining Charter to be 'developed' to set the framework and a timetable for targets, while setting out how the objects referred to in those sections can be achieved, which language is an indication of policy, and not legislation.[312]

Evidently, the Court considered setting aside certain clauses of the 2018 Mining Charter which had an impact on the Charter's legal standing in the implementation of the *MPRDA*. The implication is that the provisions of the 2018 Mining Charter that require 30% BEE ownership upon renewal or transfer of rights under the *MPRDA* was to some extent declared unconstitutional.[313] The Charter provided that existing mining right holders who during the existence of a mining right achieved a minimum of 26% BEE shareholding, whose partners exited the transaction prior to commencement of the Charter under discussion, would be recognised as compliant for the duration of the mining right.[314] However, such recognition would not be applicable upon renewal of the mining right.[315] In light of this recent judgment, it is therefore implied that the mining rights holders whose BEE shareholders exited the

[308] *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others*, para 58.
[309] Kohn 2013 Separation of Powers Kohn *The burgeoning constitutional requirement of rationality and the separation of powers: has rationality review gone too far?* 6.
[310] *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others*, para 32.
[311] *Permanent Secretary of the Department of Education of Government of the Eastern Cape Province & Another v Ed-U College (PE)* 2001 (2) (SA) 1 (CC), para 80.
[312] *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others*, para 55.
[313] *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others*, para 68.
[314] See also Clause 2.1.1.2 in GN 1002 in GG 41934 of 27 September 2018.
[315] See also Clause 2.1.1.2 in GN 1002 in GG 41934 of 27 September 2018.

transactions prior to commencement of the Charter would be recognised as compliant upon renewal of the mining right. This in itself brought about clarity and regulatory certainty in terms of implementation of the *MPRDA.*

The provisions relating to the 30% BEE shareholding and the manner of its distribution as part of requirements to qualify for new mining rights, issues pertaining to equity equivalent for host communities, ownership and mine community development ring-fenced elements, disposal of BEE shareholding in respect of existing and new mining rights, clauses pertaining to inclusive procurement, supplier and enterprise development, to list a few, were also considered unconstitutional.[316] Based on the above, and as was the case in *Chamber of Mines South Africa v Minister of Mineral Resources and Another*, it is thus clear that section 100(2) of the *MPRDA* does not empower the Minister to make law, and as such, the 2018 Mining Charter is not binding subordinate legislation but an instrument of policy.[317]

4.3 Implications of the legal nature of the Mining Charter on legislative governance and transformation in the mining industry

Changes to the Mining Charter in lieu of the court judgment(s) have provided some level of clarity and certainty in the minerals industry. The certainty surrounding the legal nature of the Mining Charter does not necessarily affect or impact legislative governance in the South African minerals industry. This is brought about by the fact that the South African *Constitution* reigns supreme,[318] and whatever diverse opinion in the interpretation of any legislation, the Courts would remain the arbiter to such differences. In this context, the supremacy of the *Constitution* means that any law or act that is inconsistent with the *Constitution* has no force or effect, and may be reviewed and declared invalid by a court of law. Hence, the application to review the 2018 Mining Charter flowed from *PAJA* as mandated legislation for upholding the rule of law through the Constitution. The significance of the rule of law is founded on principles that seek to prevent arbitrary administrative action and ensure security of justice, thereby limiting the power of those that have the authority to exercise such power.[319] In this case, it was the Minister's powers being curtailed.

[316] *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others*, para 68.
[317] *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others*, para 59.
[318] Section 2 of the *Constitution of the Republic of South Africa,* 1996.
[319] Sellers "What is the Rule of Law and Why is it so Important?" 3-13

Recent political, social and economic transformation of contemporary societies has brought about challenges and opportunities that require a mutual response, which is guided by the rule of law. In order to achieve transformation objectives, the Constitution provides for legislative measures to be developed to protect and advance persons or categories of persons disadvantaged by unfair discrimination.[320] Moreover, the introduction of the *B-BBEE Act* in its stated objectives provided for the promotion of transformation in order to enable meaningful economic participation of black people in the economy,[321] and the substantial change and racial composition of ownership and management control in private enterprises.[322] The *B-BBEE Act* was clear in terms of the need to develop guidelines for stakeholders in different sectors of the economy to draw up transformation charters in achieving empowerment objectives.[323] It is therefore clear that the development of guidelines is nothing more than a policy instrument to guide the sectors in terms of achieving the object of empowerment laws.

This has in itself brought about legal certainty with respect to implementation of the *MPRDA*. The *MPRDA* serves as authority in regulating the South African minerals industry. It is therefore common cause that legislative governance in the minerals industry is based on a system of state custodianship of mineral resources for the benefit of all South Africans.[324] Therefore, the Minister acting on behalf of the state is conferred with the powers to issue licences, permits and mining rights to applicants that wish to exploit mineral deposits of the Republic.[325] The provisions of the *MPRDA* unambiguously empowered the Minister with such authority as to administer and manage all prospecting, mining and exploration rights, to list a few. The fundamental issue outside of the 2018 Mining Charter is to provide equitable access to the nation's mineral resources, and to substantially expand opportunities to HDSAs to participate in the mineral industry and to benefit through exploitation of such natural

[320] Section 9(2) of the *Constitution of the Republic of South Africa,* 1996.
[321] Section 2(a) of the *B-BBEE Act* 53 of 2003.
[322] Section 2(b) of the *B-BBEE Act* 53 of 2003.
[323] Section (9)(1)(e) of the *B-BBEE Act* 53 of 2003.
[324] Section 3(1) of the *MPRDA* 28 of 2002. In *Maledu and Other v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another*, para 50, the Constitutional Court continued to recognise the state as custodian of South Africa's mineral resources, and its primary objectives to promote transformation in the mineral industry through empowerment of people who were previously excluded from participation in, and exploitation of mineral resources.
[325] Section 3(2)(a) of the *MPRDA* 28 of 2002.

resources as provided for in terms of section 2(c) and (d) of the *MPRDA.* This was confirmed in the case of *Minister of Mineral Resources v Mawetse SA Mining Corporation*.[326]

In this case, the Court held that the Minister might in terms of section 17(4) of the *MPRDA* require that the applicant for prospecting right must comply with the transformational objectives of the *MPRDA* as contained in section 2(d).[327] The legal question was whether the applicant must comply with BEE requirements. The Supreme Court of Appeal (SCA) confirmed that the High Court was correct, finding that –

> the Minister's delegate, the DDG, had lawfully requested Dilokong to comply with the s 2(d) BEE requirement. Dilokong acknowledged the request and had sought to comply with it, without any success. The objects set out in s 2(d) are of cardinal importance when the purpose of the MPRDA and the Mining Charter is borne in mind and, as our courts have stressed, are essential to redress the historical inequalities in the mining industry. Compliance with the request is not merely optional and the grant of the prospecting right was expressly made subject to such compliance.[328]

Accordingly, the decision in the *Mawetse* case provides an opportunity to demonstrate that the granting of the prospecting or mining right, as contained in the *MPRDA*, must contribute towards transformation imperatives as per the provision of sections 2(d) and (f) of the *MPRDA*. The findings of the courts were purely founded upon the application of law, wherein legal principles were applied to reach conclusions. The much-needed transformation agenda is also further demonstrated in the *Bangwenyama case*. The Court held that when legislation creates for a special category of rights to communities, such communities are afforded the opportunity to bring their own application where there are competing interests in respect of application for prospecting rights.[329] Thus, when there are issues of preferential right of communities and land occupied by communities, the *MPRDA* empowers the Minister to impose conditions to promote the rights and interests of such communities, as long as they are within the confinement of the law.[330] This is another indication that seeks to suggest that transformation in the mining industry is embedded in the legislation (*MPRDA*) without the Mining Charter being legally binding.

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[326] *Minister of Mineral Resources v Mawetse SA Mining Corporation* 2016 (1) SA 306 (SCA) para 16.
[327] In particular Section 2(d) of the *MPRDA*.
[328] *Minister of Mineral Resources v Mawetse SA Mining Corporation (Pty) Ltd* para 17.
[329] *Bangwenyama Minerals (Pty) Ltd and Others v Genorah Resources and Others* para 73; Section 104 of the *MPRDA* 28 of 2002.
[330] Section 23(2A) of the *MPRDA* 28 of 2002.

As part of the enforcement structure, evidently the holder of the mining right is obliged to report for compliance with the objects of the *MPRDA* in terms of section 25(2)(h) and section 28(2)(c) of the *MPRDA*. Thus, for example, section 25(2)(h) of the *MPRDA* provides that the holder of a mining right must submit the prescribed annual report, detailing the extent of compliance with the provisions of section 2(d) and (f) of the Act. The *MPRDA* clearly prescribes in its objectives that transformation remains critical for changing the mineral-exploitation landscape in South Africa. Therefore, it is abundantly evident that providing opportunities for HDSAs in terms of section 100(2) can still be achieved without the Mining Charter constituting binding law.

4.4 Policy, regulatory certainty or not?

In recent times, government(s) in developing countries have embraced outward focused policies designated to attract Foreign Direct Investment (FDI) for purposes of economic growth.[331] To attract investment in the mining industry, the regulatory environment should provide much more security of tenure to applicants and holders of prospecting and mining rights. That is, the principle of legal certainty promotes that the law must be clear and unambiguous, and that whoever alleges being prejudiced must have a remedy against arbitrary use of such power.[332] Legal certainty determines the level of investment that can assist investors in terms of decision-making based on risk profile of an investment destination or location.[333] It thus becomes the objectives of the *MPRDA* to provide the security of tenure in respect of prospecting and mining operations to provide regulatory certainty.[334]

The security of tenure in the mining industry requires that mining right holders are provided with some level of certainty to continue into the mining phases if the outcomes of prospecting are deemed positive.[335] In this instance, mineral tenure security addresses the risks and uncertainty associated with transitioning between prospecting and mining.[336] The MPRDA strengthens mineral security tenure of holders of prospecting and mining rights by

[331] Mebratie and Bedi 2013 *The Journal of International Trade & Economic Development*, 108.
[332] Fenwick and Wrbka "The shifting meaning of legal certainty" 1-6.
[333] Fenwick and Wrbka "The shifting meaning of legal certainty" 1-6.
[334] Section 2(g) *of the MPRDA* 28 of 2002.
[335] Van Niekerk *Towards a New Understanding of Mineral Tenure Security: The Demise of the Property-Law Paradigm* 4.
[336] Section 2(a) of Schedule II of MPRDA Transitioning Arrangement.

providing compulsory granting of rights of renewals,[337] which were nearly curtailed by the Minister's discretionary powers and his delegatee in decision-making of either awarding or rejecting of the mining licence or permits.[338]

It follows that security of tenure plays a role in the achievement of transformation in the South African mining industry, notwithstanding the fact that vulnerable communities where mining takes place continue to live in abject poverty.[339] It thus become evident that legislated changes of mineral policy over the years were then adopted to accelerate capital accumulation in the mining industry by eliminating barriers to investments and control of mining rights.[340] For purposes of investments, security of tenure continues to be used as an objective criterion of mining companies when deciding on investment preferences.[341] This seeks to suggest that prospecting and mining rights already awarded must remain protected in order to ensure certainty and continuity in the South African mining industry.

Nevertheless, the Court(s) pronounced on the Charter as a policy instrument, which should be considered as a document setting out objectives and standards of conduct for mining companies aspiring to achieve or maintain the objectives of the *MPRDA*. Therefore, certainty as to the legal nature of the Charter provides a legal framework within which rights holders may exercise their rights, and limit a Minister's discretionary regulatory powers.

4.5 Conclusion

In conclusion, the Court judgments had implications in the sense that mining right holders who, during the existence of the 2010 Mining Charter achieved a minimum of 26% BEE shareholding, and whose BEE shareholders or partners exited before the start of the 2018 Mining Charter, would be recognised as compliant with BEE requirements for the duration of the mining right. Moreover, mining rights holders will not be required to top-up their empowerment credentials on renewal of the mining right. The provision and implementation of mandated structures, such as equity equivalent benefit for host communities and employee and HDSA schemes, were also affected by the High Court judgment. Moreover, for purposes of renewal and transfer of the existing mining right, an applicant for renewal

[337] Section 18(1) and (2) of the *MPRDA*; See also s 24(2) of the *MPRDA* 28 of 2002.
[338] Clause 2.1.1.5 in GN 1002 in GG 41934 of 27 September 2018.
[339] *Agri South Africa v Minister for Minerals and Energy*, para 1.
[340] Capps 2012 Review of African Political Economy Capps 2012 *Review of African Political Economy*316.
[341] Dale 1996 *Journal of Energy & Natural Resources Law* 298.

or transferee will no longer be required to comply with the ownership requirements that are applicable to new mining rights. Ultimately, there is no form of regulatory uncertainty, as the Mining Charter's policy role supplements the MPRDA's requirements under section 2(d).

5 CONCLUSIONS AND RECOMMENDATIONS

5.1 Background

This study was undertaken to assess and evaluate the efficacy of the Mining Charter as a policy instrument to drive transformation in the South African mining industry. There is a broad consensus that the development of mineral resources was historically regulated based on private-rights ownership, in which control and access to minerals was regulated by a discriminatory land-based ownership model. The land issue was a primary means by which black South Africans were oppressed and marginalised under the *Natives Land Act* of 1913. Such land policies prohibited the majority of black people from owning land, by implication not having access to mineral and petroleum resources.[342]

Land ownership was synonymous to the common law position *(cuius est solum),* which presupposes that 'owner of the land is also the owner of the minerals beneath the land'.[343] This meant minerals underneath the surface became valuable assets in the hands of South Africans owning the land. This was exacerbated by the enactment of the *Group Areas Act,* which fuelled and promoted racial discrimination through separate development. It is evident that colonial and apartheid policies were thus developed to effectively prevent black people from acquiring any significant mineral deposits of any nature in South Africa, hence it restricted and limited their participation in the mining industry to that of labourers. It can thus be deduced that a correlation between land ownership and the right to mineral ownership existed, which resulted in the widening of economic inequality and marginalising of black people in accessing mineral resources.[344]

In the 1990s, it was evident that a changing political and economic landscape was imminent, which influenced the direction and structure of the South African post-apartheid government. In 1994, a new political dispensation ended apartheid and introduced a new legal order built on the principles of constitutionalism. The promulgation of the *MPRDA* called for the redress of historical imbalances and the promotion of equitable access to the nation's mineral resources for the benefit of all South Africans.[345] This call would partly be fulfilled through the development of a Mining Charter in terms of section 100(2) of the Minerals

342 See discussion in section 1.1 above.
343 *Neebe v Registrar of Deeds* 289.
344 See discussion in section 1.1 above.
345 Preamble of the *MPRDA* 28 of 2002.

Petroleum Resources Development Act (the *MPRDA*). It is against this background that the study was undertaken to assess and evaluate the efficacy of the Mining Charter as a policy instrument to drive transformation in the South African mining industry.[346]

5.2 Revisiting the research question and objectives

To ensure transformation in the South African minerals industry, the *MPRDA* was promulgated to promote equitable access to the nation's mineral resources. However, progress in respect of achieving transformation objectives has been slow, which led to the continuous revisions of the Mining Charter(s). The revisions of the Mining Charter(s) has been a source of disagreement between government, organised labour and the mining sector. For this reason, the question which underpinned this study was as follows: in light of the judgment in *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others*, is the legal nature of the Mining Charter conducive to transformation in South Africa's mining sector?

5.3 Main findings

From chapter 2, it was evident that the domination of British settlers took centre stage all over South Africa with the purpose of exploiting the mineral resources. At that time, there were no colonial powers that had claims or authority over the land; instead, the British colonialists annexed the land and failed to acknowledge the autonomy of the local communities in some of the mining-dominated areas that were annexed. This suggests that race-based policies were developed to effectively prevent non-whites from acquiring mineral deposits of any nature in South Africa. In fact, the introduction of the *Mineral Rights Act* prohibited the issuing of prospecting permits or rights to any black persons or any corporate body or company in which black people held controlling interests.[347] The findings also revealed that land ownership played a crucial role in respect of access to mineral resources. This was also embraced in the *cuius est solum,* which expressed that the owner of the land is the dominus of the whole land and that includes the surface and minerals underneath such land. Thus, the limitation of land rights to black South Africans had profound consequences on the ownership of, and access to, mineral resources. The enactment of the 1991 *Minerals Act* encouraged alienation of mineral rights held by the state, so that all the

[346] See discussion in section 1.2 above.
[347] See discussion in section 2.2 above.

mineral rights would be held by (white) private sector entities. One can thus conclusively deduce that the *Minerals Act* played a less significant role in reversing discriminatory policies that excluded black people from participation in the South African minerals industry.[348]

The literature that has been reviewed presents economic empowerment policies as mechanisms to redress the imbalances of the past in an effort to restore equity and fairness, while bringing much-needed upliftment of Historically Disadvantaged South Africans (HDSAs). The content and object of such economic policies make it retributive in nature in order to advance and enable meaningful participation of black people in the mainstream economic activities.[349] Empowerment policies such as Black Economic Empowerment (BEE) were not without controversy due to their narrowed top-down approach, the objectives of which benefited the selected few and politically connected individuals.[350] It is evident how such patterns of empowerment allowed the black elite to amass wealth at the expense of the so-called new political dispensation.[351] This may be considered as one cause of distraction in advancing transformation in the South African minerals industry.[352]

Emanating from the above, it became clear that a more egalitarian South African society was envisioned, which led to introduction of various pieces of legislation in an effort to redress the historical imbalances of the past. As such, chapter 3 of the study examined the post-constitutional mineral regulatory framework in the South African minerals industry. This was informed by the constitutional principles founded on fundamental values of human dignity, achievement of equality and advancement of human rights and freedom for all, non-racialism and non-sexism.[353] Section 9 of *the Constitution* provides for such protections as equality before the law, read in part with section 25(4) of the *Constitution* which calls for the achievement of more equitable access to the country's natural resources.

The study found that the introduction of the Broad-Based Black Economic Empowerment Act (the *B-BBEE Act*) was the first step to establishing a legal framework for promotion of black economic empowerment. The *B-BBEE Act* advocated for the promotion and

[348] See discussion in section 2.2 above.
[349] Pooe 2013 *Mediterranean Journal of Social Sciences* 538.
[350] Leon *Journal of Energy & Natural Resources Law* 17.
[351] Horne 2017 *African Review of Economics and Finance* 12.
[352] See discussion in section 2.3 above.
[353] Section 1 of the *Constitution of the Republic of South Africa,* 1996.

achievement of right to equality, and increasing broad-based and effective participation of black people in the economy, while promoting higher growth rates, increased employment and more equitable income distribution. The overall object of the *B-BBEE Act* was to ensure meaningful economic participation of black people in the economy, and the need to achieve a substantial change in the racial composition of ownership patterns and management structures in white-owned companies.[354] It is worth mentioning that the introduction of the *B-BBEE Act* coincided with the enactment of the *MPRDA*, which signalled a new mineral dispensation with transformation objectives based on fundamental principles and values expressed in the Constitution.[355] The recognisable milestone of the *MPRDA* was to return all mineral rights to the custodianship of the state for redistribution through powers conferred on the Minister through granting, issuing, refusing, controlling and administering of any prospecting or mining rights.[356] The *MPRDA* reaffirmed the state's commitment to bring about equitable access to South African mineral and petroleum resources.[357] To ensure attainment of the government's objectives of redressing historical, social and economic inequalities, the Minister in terms of section 100(2) of the *MPRDA* developed the Mining Charter as an instrument to effect transformation by meeting specific targets within specified timeframes.

The first iteration of the Mining Charter was developed in 2002, and reviewed and amended in 2010. Subsequent to that, another review was undertaken in 2014 which led to the revised Mining Charter of 2018. Such reviews and amendments were as a result of independent impact assessment surveys commissioned by the Department of Mineral Resources and Energy, which recorded slow progress in achieving the targets set out by the Charters. The developments of the Mining Charter(s) were not without controversy, which led to regulatory uncertainties and strained relations between stakeholders in the mineral industry.[358]

It is clear that the third iteration of the Mining Charter, in 2018, brought about various changes which significantly affected mining rights holders; one of the significant changes concerned the ownership element in relation to empowerment. It is understood that an

[354] See discussion under section 3.2.7 above.
[355] Section 9 and section 25(4) of the *Constitution of the Constitution of the Republic of South Africa,* 1996.
[356] Section 3(2)(a) of the *MPRDA* 28 of 2002.
[357] Preamble of the *MPRDA* 28 of 2002.
[358] See discussion under section 3.4 above.

existing mining right holder who has achieved a 26% BEE shareholding, whose BEE partners exited prior to commencement of the 2018 Mining Charter, shall be recognised as compliant for duration of the mining right, and such recognition will not be applicable upon renewal.[359] What the Charter provides is that the once-empowered always-empowered principle will not be applicable during the renewal of the mining right. In chapter four, the courts had to deal with a question as to whether a mining company has perpetual and recurring obligation to meet a 26% BEE shareholding, and whether the Minister can use the enforcement powers in the *MPRDA* to compel compliance with the 26% target. In *Chamber of Mines South Africa v Minister of Mineral Resources and Another*, it was held that the holder of a mining right is not under obligation to restore the percentage ownership controlled by HDSA's 26% target, unless it is specified in terms of section 23(6) of the *MPRDA* application process.[360] Furthermore, failure to adhere to the Mining Charter was not considered a breach of the *MPRDA.*

Chapter four's discussion of *Mineral Council of South Africa v Minister of Mineral Resources and Energy and Others*, also confirmed that existing mining rights holders who have achieved a minimum of 26% BEE shareholding, whose partners exited the transaction prior to commencement of the 2018 Charter, would be recognised as compliant for duration of the mining right, and even upon renewal of such mining right.[361] Based on the judgment, it is evident that the *MPRDA* does not empower the Minister to make law, and as such, the 2018 Mining Charter is not binding subordinate legislation but an instrument of policy.[362]

5.4 A proposed understanding of the need for economic transformation

It is an accepted fact that the South African mining industry is crucial for the economy to grow, and thereby create employment opportunities and alleviate poverty.[363] This is because South Africa hosts large reserves of minerals. Yet, the challenges of poverty and unemployment in South Africa speak to progress (or lack thereof) in achieving a transformation agenda. The current levels of unemployment (at 34.5% in 2022) is increasing at an alarming rate, which poses critical questions pertaining to the effectiveness

[359] Clause 2.1.1.2 in GN 1002 in GG 41934 of 27 September 2018.
[360] *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*, para 109(2).
[361] See discussion under section 4.2.2 above.
[362] See discussion under section 4.3 above.
[363] Vegter 2019 *South African Institute of Race Relations* 1.

of empowerment policies.[364] Therefore, the state has an obligation to take legislative and other measures to redress the continued economic inequalities. In view of this, the main question for this study was as follows: in light of the judgment in *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others*, is the legal nature of the Mining Charter conducive for transformation in South Africa's mining sector?

What this study had confirmed is that, even as a policy, the 2018 Mining Charter has usefulness that is conducive for transformation, if employed judiciously. This is because the Minister is empowered in the administration of mineral regulation, and in the granting of mining rights, to further the objectives of transformation as per section 2(d) and (f) of the *MPRDA*. Section 2(d), for example, calls for substantial and meaningful expansion of opportunities of historically disadvantaged persons (which includes women and communities) to enter and participate in the mineral and petroleum resources sector, and benefit from exploitation of the nation's resources. These are examples of the goals of the Mining Charter. Consequently, the Minister can tie these goals to the approval of a licence, and this would then give the Mining Charter the backing of law.

Furthermore, when an application of a prospecting right and mining right is lodged by communities, the *MPRDA* provides for the protection, and participation of the communities.[365] As such, when the Minister considers more than one application for a prospecting or mining right, the historically disadvantaged persons should be given preference in an application.[366] The legislation seeks to suggest that direct control of the natural resources of local communities is a precondition for equitable utility of resource wealth and peaceful co-existence between mining corporations and local communities affected by mining operations.[367] It cannot therefore be ignored that mining communities remain vulnerable, poverty stricken, and continue to bear the burden of environmental degradation. Again, the Minister could make use of the Mining Charter's guidelines by integrating it in through section 2(f) of the *MPRDA*, meaning the Charter is not without usefulness. In fact, progress could then be determined through the need and requirement for annual reporting from mining companies. This way, progress on empowerment could be

[364] STATS SA *Quarterly Labour Force Survey (QLFS) Q1:2022* 5.
[365] Section 17A of *MPRDA* read with s 23(4A) of the *MPRDA* 28 of 2002.
[366] Section 9(3) and 104 of the *MPRDA* 28 of 2002.
[367] Mnwana 2014 *Development Southern Africa* 826.

tracked. Therefore, while the *MPRDA* would remain supreme as a statutory instrument to regulate the South African minerals industry and some transformation goals, the Mining Charter (at least insofar as empowerment and ownership are concerned), could be used alongside the *MPRDA*, preferably at the issuance of licenses.

5.5 Answering the research question of the mini-dissertation

The question that needs to be answered is, whether legal nature of the Mining Charter as contemplated in *Minerals Council South Africa v Minister of Mineral Resources and Energy and Others* (CN 20341/19) and is its implementation conducive for transformation in South Africa's mining sector? The provisions of section 100(2) had to be interpreted within the confines of the Constitution, as a supreme law of the Republic. The Courts declared that the legislature's intention with the Mining Charter was to develop policy, and not law.[368] The implications of the judgment are that certainty as to the legal nature of the Mining Charter provides a framework within which mining rights holders may exercise their rights, and limitation of the Minister's regulatory powers.

Therefore, the legal nature of the Mining Charter should be accepted as a policy instrument; however, its implementation is at this stage not conducive for transformation in the South African mining industry. This is based on the fact that most, if not all of the provisions of the 2018 Mining Charter, were set aside.[369] As such, there has never been pronouncement from the Mineral Resources and Energy ministry on way forward with the industry, and how to handle issues pertaining to the Mining Charter. It cannot be *laissez-faire* for allowing voluntary compliance with the Mining Charter without the necessary enforcement structures in place. Therefore, the *MPRDA* would remain supreme as a statutory instrument to regulate the South African minerals industry.

5.6 Conclusion

The state should continue to assume the responsibility to ensure that socio-economic disparities are addressed to achieve a transformation agenda. The Mining Charter is one effort that seeks to do so, and it has the benefit of having the *MPRDA* as a source of legitimacy, especially in the event the Minister decides to tie some of the Mining Charter's

[368] CN 20341/19 paras 25 and 55.
[369] CN41661/2015 para 68.

provisions to mining licences. Yet there are even more possibilities for transformation objectives to be pursued through other provisions. For example, to achieve the objectives of redressing historical, social and economic inequalities as stated in the *Constitution,* section 107 of the *MPRDA* still empowers the Minister to make regulations, which may be necessary to achieve the objectives of the Act. Such regulations should be considered and be coded into law to create the required certainty and stability. Given the transformative nature of the Constitution, this will bring about legal certainty on matters pertaining to the implementation of the *MPRDA* as a regulatory instrument to achieve the transformation agenda.

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