TITLE OF RESEARCH REPORT

TRANSFORMING THE MINING INDUSTRY: IN SEARCH OF LEGAL CERTAINTY AND MEANINGFUL EMPOWERMENT

by

STUDENT NUMBER

810065

Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

Supervisor: Prof. Tumai Murombo

Date: 28 February 2023

DECLARATION

I, **810065**, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

Word Count: **10380**

ABSTRACT

The South African government adopted the Broad-Based Socio-Economic Empowerment Charter for the Mining Industry in 2004 pursuant to section 100(2)(a) of the Mineral and Petroleum Resources Development Act, 2002 to regulate empowerment in the mining industry. Since then, various iterations of the Mining Charter have been published. The legal challenges resulting from the different interpretations of the attainment of the goals set out in the Mining Charter have resulted in uncertainty regarding empowerment and have been the subject of much judicial attention. One of the fundamental issues with the Mining Charter is its status and the lack of authority of the Minister of Mineral Resources and Energy to publish subsequent updated iterations. The growing regulatory burden and uncertainty has increasingly hampered efforts to transform the mining industry. Considering the importance of transformation of the mining industry, this paper analyses the legal and policy impediments to achieving empowerment and proposes solutions to bring about certainty.

Table of Contents

I INTRODUCTION **5**

II HISTORICAL BACKGROUND AND CONTEXT **8**

III THE REGULATORY REGIME **10**

a) The Original Mining Charter 14

b) Review of Compliance with the Original Mining Charter and the Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2010 16

c) The Once Empowered, Always Empowered Principle 18

IV CRITIQUE OF THE EXISTING FRAMEWORK **26**

V PROPOSED REFORMS TO EMPOWERMENT FRAMEWORK **31**

VI CONCLUSION **36**

I. INTRODUCTION

The South African mining industry was the bedrock of the apartheid economy.[1] Prior to the attainment of democracy in 1994, economic participation in the mining industry was exclusively reserved for the white minority because of entrenched colonial rule and apartheid laws. Black people were barred by law from enjoying the economic benefits of the mineral wealth of the country and were subjected to treacherous exploitation entrenched by the migrant labour system, developed to sustain the mining industrial boom.[2] Owing to this reality, one of the key objectives of the first democratic government was to transform and deracialise the mining industry.

The Constitution of the Republic of South Africa, 1996 (Constitution) recognises the importance of transformation. Section 9 of the Constitution provides that 'everyone is equal before the law and has the right to equal protection and benefit of the law'. Furthermore, section 9 makes provision for the state to adopt legislative and other policy measures to promote equality. To this end, the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) was adopted on 3 October 2002 and came into force on 1 May 2004. The MPRDA abolished the private ownership of minerals and provides that 'mineral resources are the common heritage of all the people of South Africa and the state is the custodian thereof'.[3] Making the state the custodian of mineral resources meant that the state, through the Department of Mineral Resources and Energy (DMRE), can promote the transformation objects of the MPRDA. One such object is to substantially and meaningfully expand opportunities for historically disadvantaged persons (HDPs) to enter into and actively

[1] A Minerals and Mining Policy for South Africa, 1998, 3. To date, the mining industry continues to play a pivotal role in the South African economy. According to the Minerals Council's Facts and Figures Book 2021, in 2021 alone, the mining industry's 'direct contribution to GDP grew by 36% to R481 billion and the mining industry employed about 458 954 people'.
[2] *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 1.
[3] Section 3 of the Mineral and Petroleum Resources Development Act 28 of 2002.

participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources.[4] Eighteen years has passed since the MPRDA came into force, yet the industry remains, to a large extent, untransformed and wealth remains concentrated amongst the white minority.[5] The slow paced transformation has been largely attributed to the uncertainty created by the mining charter envisaged in section 100(2)(a) of the MPRDA, which is the primary tool elected by the legislature to drive transformation in the mining industry.[6] Since the publication of the Broad-Based Socio-Economic Empowerment Charter for the Mining Industry, 2004 (the Original Mining Charter) in 2004, three iterations of the mining charter, each more stringent and confusing than the other, have been gazetted. Over the past 18 years, the mining charter has been the subject of various judicial challenges because of the legal uncertainties associated with it. As a matter of law, the root cause of the legal uncertainty arises from the fact that the empowering provision authorising the Minister of Mineral Resources and Energy (Minister) to develop a charter does not state expressly what the legal consequence or status of a charter developed in terms of that section would be and there is a constant shifting of the goal posts in relation to the empowerment obligations of mining companies which interferes with vested rights.

Given the urgency of the transformation agenda, this research report analyses the legal and policy impediments to achieving transformation in the mining industry. Transformation in the context of the mining industry denotes facilitating the ownership of mining assets by black people, skills development, promoting employment equity

[4] Section 1 of the Mineral and Petroleum Resources Development Act 28 of 2002.
[5] Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018, 9.
[6] It is important to note that there are various other factors which have contributed to the slow pace of transformation in the industry. Transformation, is not just about ownership of mining assets by HDPs. It is about employment equity, the sustainable development of mining communities by the mining industry, procurement of goods and services from HDPs, skills development. With this in mind, it is acknowledged that the transformation project is an ongoing project. Some of the factors that have hampered transformation include the failure of the DMRE to develop an efficient mining cadastral system; the backlogs in granting mining titles and lack of financial support for HDPs.

in line with the demographics of the country, mine community development and a general de-racialisation of the industry.[7] Much has been written about the mining charter and its efficacy to foster transformation. This paper discusses in detail the mining charter's blanket regulation approach, disregard for vested rights, and the inadequacies of this approach. The paper also proffers possible legal reforms to address the weaknesses in the current provisions mandating the charter, its functions and implementation as provided for in the MPRDA.

In discussing the challenges with transformation and the mining charter's shortcomings, this paper will explore the following questions: i) what is the status of the mining charter and does this status impede transformation in the mining industry? ii) What are the shortcoming of the mining charter in respect of mining companies that have successfully empowered, entities that have complied with the mining charter but have not delivered value for their black economic empowerment partners and entities that are fronting? iii) what is the interplay between the once empowered, always empowered principle and the mining charter? and iv) what are the possible policy and legal reforms to address the weakness of the legislative provisions mandating the mining charter and its functions and implementation?

To address some of these vexed questions relating to transformation, this paper will first discuss the historical background of the South African mining industry. This is particularly significant for purposes of measuring the progress made in achieving transformation in the mining industry. This paper will then consider the regulatory regime governing transformation in the South African mining industry, with a specific focus on the different iterations of the mining charter, the once empowered, always empowered principle and judgments that have been delivered in respect of the mining

[7] Broad-Based Socio-Economic Empowerment Charter for the Mining Industry, 2004, 3.

charter. Thereafter, this paper analyses the shortcomings with the existing regulatory framework and proposes reforms to remedy the shortcomings.

II. HISTORICAL BACKGROUND AND CONTEXT

Colonialism and the formal policy of apartheid placed significant entrance barriers for black people into the mining industry.[8] Consequently, black people were excluded from meaningfully participating in the mining industry and benefiting from the country's mineral wealth.[9] Some of the atrocious legislations aimed at systematically excluding black people from participating in the means of production include the infamous Native Land Act of 1913, which initially allocated seven per cent of arable land to black people and allocated the balance of the fertile land to whites.[10] The 1923 Natives (Urban Areas) Act which excluded black people from leasing land in white areas.[11] The 1963 One Man One Business Policy which placed restrictions in respect of the ownership of big business by black people.[12] The Mines and Works Act 12 of 1911, as amended (along with various other so-called colour bar laws), which prevented black people from undertaking any skilled labour in mines and reserved skilled labour to whites and coloureds. As demonstrated above, black people, because of their landlessness and inability to freely partake in productive sectors, were effectively excluded from meaningfully participating in the mining industry.[13] The concomitant result was that the country's mineral wealth, and the economy generally,

[8] Black people were systematically excluded from participating in all sectors of the economy and were severely discriminated against in all aspects of life.
[9] Note 2 above, 1.
[10] South African History Online 'The Native Land Act is Passed' available at *https://www.sahistory.org.za/dated-event/native-land-act-passed*, accessed on 2 February 2022. This allocation was later increased to thirteen per cent.
[11] Kilambo, S.R., 2021, 'Black economic empowerment policy and the transfer of equity and mine assets to Black people in the South Africa's mining industry', South African Journal of Economic and Management Sciences 24(1), a3479, 2.
[12] Ibid.
[13] Note 2 above, para 1.

was concentrated in the hands of the white minority.

In response to these exclusionary laws, the Freedom Charter, which was adopted in 1955 declared that 'mineral wealth beneath the soil, the banks and monopoly industry shall be transferred to the ownership of the people as a whole'. [14] In light of the country's history of racial oppression which permeated every aspect of black lives, the first democratic government was tasked with, *inter alia*, transforming the mining industry. The African National Congress' Reconstruction and Development Programme (RDP) articulated the ruling party's commitment towards achieving equitable access to natural resources.[15] Furthermore, the RDP stated the following in respect of mineral ownership 'We must seek the return of private mineral rights to the democratic government, in line with the rest of the world. This must be done in close collaboration with all stake-holders'.[16] Consequently, the Minerals and Mining Policy (Minerals Policy) was published in 1998.[17] The publication of the Minerals Policy followed an extensive consultative process driven by the Mineral Policy Process Steering Committee which consisted of representatives from the executive and legislative branches of Government, as well as organised business and organised labour. The Minerals Policy recognised that apartheid era legislation inhibited black ownership of mining assets.[18] As such, one of its primary objectives was to deracialise the mining industry and for 'the mining industry to demonstrate rapid, visible and significant transformation in accordance with the rest of South African society'.[19]

At the outset, it must be stated that, contrary to the aspirations articulated in the

[14] The Freedom Charter, 1955 adopted at the Congress of the People at Kliptown, Johannesburg on 25th and 26th June.
[15] The Reconstruction and Development Programme, a Policy Framework, 1994, para 2.10.2.1.
[16] Ibid, para 4.5.
[17] Note 1 above.
[18] Note 1 above, para 34.
[19] Ibid, para 36.

Freedom Charter, the ruling party decided against pursuing the policy of nationalisation in the mining industry as demonstrated in the RDP.[20] This must be understood with reference to the fact that post-apartheid South Africa was built on a negotiated settlement. This meant that various competing interests (including vested interests) had to be balanced. In the mining context, the erstwhile Minerals Act 50 of 1991 provided for private ownership of minerals.[21] During the negotiations for a new dispensation, the protection of private property, as enshrined in section 25 of the Constitution,[22] was secured. Existing mineral rights were also preserved in accordance with the transitional provisions of the MPRDA.[23]

III. **THE REGULATORY REGIME**

It would be remiss to discuss transformation in South Africa without reference to the strategy of Black Economic Empowerment (BEE) or Broad-Based Black Economic Empowerment, as it has come to be known. BEE is a strategy adopted by the ruling party to redress the imbalances of the past. This strategy is recognised in the preamble of the Constitution which makes reference to 'healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights'. This strategy is unique to South Africa[24] and, at its core, seeks to deracialise the economy and advance the interests of black people defined broadly to include Africans, Coloureds and Indians.[25] The Broad-Based Black

[20] This is evident from the preamble of the MPRDA and section 3 of the MPRDA which makes the state the custodian of all mineral and petroleum resources.
[21] Note 2 above, para 80.
[22] Section 25 of the Constitution of the Republic of South Africa, 1996.
[23] Note 3 above, Item 2 of Schedule II provides that its objects are to, among others, ensure that security of tenure is protected in respect of prospecting, exploration, mining and production operations which are being undertaken and to give the holder of an old order right, and an OP26 right an opportunity to comply with the MPRDA.
[24] L.P. Krüger 'South African managers' perceptions of black economic empowerment (BEE): A 'sunset' clause may be necessary to ensure future sustainable growth' Southern African Business Review Volume 18 Number 1 2014, 81.
[25] The full definition being 'a generic term which means Africans, Coloureds and Indians (a) who are citizens of the Republic of South Africa by birth or decent; or (b) who became citizens of the Republic of South Africa by naturalisation – (i) before 27 April 1994; (ii) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date.'

Economic Empowerment Act 53 of 2003 (B-BBEE Act) was brought into effect in 2004 and is an enabling legislation that makes provision for the Government to implement detailed BEE policies and to provide a general framework for the measurement of BEE across all economic sectors.

Dale *et al* states the following in relation to BEE, in the context of the mining industry:[26]

> 'When reference is had to the definition of "broad based economic empowerment" in section 1 of the MPRDA, it is clear that the strategy, plan, principle, approach or act envisaged in that definition will be aimed at, amongst others, redressing the results of past discrimination of historically disadvantaged persons and transforming the mining and petroleum industries to assist in, provide for, initiate or facilitate ownership or benefitting of existing or future mining operations and the socio-economic development of communities affected by mining. This strategy, plan, principle, approach or act will, therefore, also serve to achieve the objects in section 2(d) and (f)…'

From the above quotation, it is clear that the MPRDA and the B-BBEE Act have an overlapping focus i.e. promoting the empowerment of black people. However, the B-BBEE Act does not require the DMRE to apply the B-BBEE Act and the Codes of Good Practice published under the B-BBEE Act when determining the qualification criteria for the issuing of mining rights. As a matter of fact, section 100(2) of the MPRDA enjoins the Minister to develop a code of good practice for the mining industry and this is the clearest indication that parliament wanted an industry specific code for the mining industry.

The MPRDA is the primary legislation regulating the South African mining industry. The Government acknowledged that the mining industry was particularly plagued with discriminatory legacies that were not common to other industries for example the

[26] Dale et al, South African Mineral and Petroleum Law, page Sch II 75.

migrant labour system and scarcity of skills amongst black people.[27] Therefore, the MPRDA was enacted to give effect to the constitutional imperatives of equality and dignity.[28] Albertyn and Golblatt in "Equality" state the following in relation to equality:[29]

> 'The meaning of equality in any jurisdiction is influenced by the historical, socio-political and legal considerations of the society concerned. An important starting point for understanding equality in South Africa is the nature of the inequalities that have characterized its past and still haunt its present. For centuries that past was defined by the extensive and systematic exclusion and subordination of black people in all aspects of political, social and economic life. Under colonialism and apartheid, the colour of one's skin determined whether one could vote or access quality education, where one could own land or live, the services and amenities one could enjoy, and the nature of availability of economic opportunities. These systems produced and reinforced racially-based inequalities that became part of the structure of economic and social relations. Deep-seated racial prejudice and racial disparities in education, health status, income and employment, access to land and housing persist to this day'.

As confirmed in the above explanation of equality, equality in the mining industry has to be understood with reference to the historical oppression that black people endured under the previous dispensation.

Section 2 of the MPRDA sets out the objects thereof. Key amongst these objects, are the so-called BEE objects, which are namely, to '…(d) *substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources*; and …(f) promote employment and advance the social and economic welfare of all South Africans'.

As mentioned above, the MPRDA regulates the allocation of mining titles to prospective holders. A mining right is granted if the requirements in section 23(1) are

[27] The Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, page 1.
[28] Note 3 above, preamble.
[29] Catherine Albertyn and Beth Golblatt 'Equality' Constitutional Law of South Africa, 2 ed, 35-3.

met. One of the requirements for the grant of a mining right is contained in section 23(1)(h) which provides that the Minister must grant a mining right if the grant will further the object of empowerment contained in section 2(d) and (f) read with the charter contemplated in section 100(2)(a) of the MPRDA. Similarly, prospecting rights are granted if the requirements in section 17(1) are met. This provision provides that the Minister must grant a prospecting right if, *inter alia*, in respect of prescribed minerals the applicant has given effect to the objects referred to in section 2 (d).

The only provisions in the MPRDA which obliges mining companies to comply with section 2(d) and (f) are the granting provisions, namely section 23(1)(h) in relation to new order mining rights, section 17(1)(f) in relation to new order prospecting rights and item 7(2)(k) in Schedule II to the MPRDA in relation to the conversion of old order mining rights (rights that were acquired prior to the commencement of the MPRDA and which remained in force in accordance with the transitional provisions of the MPRDA). Item 7(3) of Schedule II to the MPRDA provides that the Minister must convert the old order mining right into a mining right if the holder of the old order mining right*, inter alia*, complies with the requirements of 7(2). Item 7(2)(k) requires a holder to provide documentary proof of the manner in which, the holder of the right will give effect the object referred to in section 2 (d) and 2 (f).

Section 100(2)(a) of the MPRDA obliged the then Minister of Minerals and Energy to develop a broad-based socio-economic empowerment charter. Section 100(2)(a) specifically states that:

> ‘To ensure the attainment of 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, targets and time-table for effecting the entry of historically disadvantaged South Africans into the mining

> industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources.'

On a plain interpretation of section 100(2)(a), the mining charter is meant to set the framework targets and timetable for effecting entry of HDPs into the mining industry. In a judgment of the High Court discussed below, the court labelled the very concept of a charter as "nebulous", and one that might have different purposes in different circumstances.[30] The court, also stressed the point that section 100 of the MPRDA which enjoined the Minister to develop a charter does not state expressly what the legal consequence or status of a charter developed in terms of section 100 would be.[31] This, as will be argued in this paper, is the source of the legal uncertainty that the mining charter has engendered since its publication in 2004.

Having considered the enabling provisions providing for the development of a mining charter, it is now necessary to consider the different iterations of the mining charter, starting with the Original Mining Charter, in order to consider the obligations incumbent upon mining companies, and the extent to which such obligations foster transformation in the mining industry.

a) The Original Mining Charter

The Original Mining Charter, which was published on 13 August 2004 as the charter envisioned in section 100(2)(a) of the MPRDA, came about as a result of an extensive consultative tripartite process, which involved representatives from government, organised labour and the mining industry.[32] The Original Mining Charter deals with various elements including ownership, human resource development, employment

[30] *Chamber of Mines of South Africa v Minister of Mineral Resources and Director General, Department of Mineral Resources* 2018 (4) SA 581 (GP), para 74.
[31] Ibid, para 79.
[32] Ibid, para 55.

equity, mine community development, housing and living conditions, and procurement. This paper will focus only on the hotly contested ownership element.

The Original Mining Charter preamble locates a strategy: it indicates clearly that the government is not undertaking a policy of nationalisation. The industry must succeed by attaining investment, and address transformation through this lens. The Original Mining Charter, was a first of its kind in the South African mining industry. In respect of the ownership element, it was envisaged that mining companies would attain fifteen per cent empowerment in 5 years (April 2004 to April 2009) and twenty six per cent in 10 years.[33]

Equity ownership was not the only way to achieve compliance with the ownership element of the Original Mining Charter. The methods by which BEE compliance could be achieved, is based on a combination of (i) equity ownership of Historically Disadvantaged South Africans controlled companies;[34] and (ii) the continuing consequences of all previous deals which are included in calculating the credits / offsets in terms of market share as measured by attributable units of production, that is the sale of mining assets to HDSAs.

In light of the 5 year goal set in the Original Mining Charter in terms of which mining companies were required to achieve fifteen per cent empowerment by 2009, the DMRE conducted a review to assess the level of compliance of mining companies with the various elements of the Original Mining Charter including the ownership element. The findings were detailed in a report titled Mining Charter Impact

[33] Note 7 above, Annexure A Scorecard, Item 7.
[34] Defined in the Original Mining Charter as 'any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) came into operation'.

Assessment Report, 2009 (the 2009 Report). The findings and implications of the 2009 Report are discussed in turn below.

b) Review of Compliance with the Original Mining Charter and the Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2010 (2010 Mining Charter)

The high watermark of the 2009 Report was that there was minimal progress in the implementation of the element of ownership.[35] The 2009 Report revealed the following challenges, among others, in respect of compliance with the Original Mining Charter: lack of access to funding and indebtedness of BEE partners, limited flow of dividends to HDSAs to service loan agreements, onerous transaction conditions and financially cumbersome deal structures.[36] In terms of the 2009 Report, BEE ownership was concentrated in a few black beneficiaries and the aggregated ownership was at nine per cent against a target of fifteen per cent.[37] The findings of the 2009 Report demonstrated that the use of a charter (which has been described as nebulous) as opposed to an instrument that has the status of law has the potential to limit the transformation of the mining industry in that no penalties could be imposed on mining companies who failed to attain the goals set out in the Original Mining Charter (this also highlighted a weakness in the MPRDA itself which does not make provision for the failure to comply with the mining charter as a contravention of the MPRDA). The 2009 Report also presented the DMRE with the challenge of having to change the targets set out in the Original Mining Charter to compel mining companies to transform. This blanket change of targets was regulated by the 2010 Mining

[35] Mining Charter Impact Assessment Report, 2009, 3
[36] Ibid, 21.
[37] Ibid, 20.

Charter.[38] The review of the Original Mining Charter in 5 years from its implementation was agreed to by the signatories of the Original Mining Charter.[39] The review process included stakeholders in what is known as the Mining Industry Growth, Development and Empowerment Task Team, which is a consultation forum established by Government in 2008.[40]

Properly construed, the review process contemplated in the Original Mining Charter is a review of the industry's performance against the targets in the Original Mining Charter. The MPRDA did not contemplate that the mining charter may be amended or reviewed. As such, the publication of the 2010 Mining Charter on 20 September 2010 caused confusion in the industry as to its status i.e. whether it served as a replacement of the Original Mining Charter or whether it was merely an amendment of the Original Mining Charter.

Paragraph 2.1 of the 2010 Mining Charter envisaged that a minimum of twenty six per cent BEE ownership must be achieved by 2014 in order to enable meaningful economic participation. Paragraph 2.1 also provided that the continuing consequences of all previous deals would be recognised (continuing consequences is also known as the once empowered, always empowered principle). The 2010 Mining Charter altered the position stated in the Original Mining Charter in relation to the continuing consequences principle in that only the empowerment transactions which were concluded prior to the MPRDA will continue to be recognised. The Original Mining Charter declared that there would be capacity for offsets which would entail credits or offsets to allow for flexibility. The 2010 Mining Charter, unlike its predecessor, states that the only offsetting permissible would be against the value of

[38] The changing of empowerment targets affected applied to all mining companies irrespective of whether they had in fact empowered HDPs in accordance with the targets set out in the Original Mining Charter.
[39] Note 7 above, para 4.7.
[40] Note 30 above, para 56.

beneficiation.

As highlighted above, the 2010 Mining Charter raised a critical question in relation to empowerment transactions i.e. whether mining companies that had in effect achieved empowerment in accordance with the charter were required to have perpetual empowerment. This is because the 2010 Mining Charter chose to recognise pre-MPRDA empowerment transactions only.[41] This had the effect of undermining empowerment transactions that were concluded successfully in accordance with the Original Mining Charter. In light of the findings of the 2009 Report, it can be argued that the DMRE's approach to empowerment in the mining industry was for mining companies to have BEE partners for the life of the mining right. In other words, if a mining company is granted a mining right based on a particular empowerment transaction presented to the DMRE in accordance with section 23(1)(h) and item 7(2)(k), if the BEE partners are to exit during the life of the mining right, then the mining company must replace such BEE partners in order to ensure that the mining company always has BEE partners. This approach, is not sanctioned in the MPRDA, which only contemplates empowerment in accordance with the mining charter at the time of grant of a mining right.[42] This approach is also at odds with the so-called, once empowered, always empowered principle, discussed below and has created uncertainty, leading to the mining industry seeking intervention from the courts many a times.

c) The Once Empowered, Always Empowered Principle

[41] Item 2.2 of the Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2010.
[42] In other words, the MPRDA does not require that once a mining right holder has been granted a mining right, it should perpetually be empowered in accordance with the charter for the life of that mining right.

The legal uncertainty that the mining charter has come to be associated with, first reared its head when the 2010 Mining Charter was published. From a legal perspective, the uncertainty that arose was that mining houses that have implemented successful historical transactions found themselves in a situation of uncertainty regarding the legal compliance of their historical transactions with the empowerment obligations in terms of the mining charter. Such mining companies would have at the application stage for a new order right or for conversion of an old order right have been granted rights on the basis that they had complied with the legal requirements as required in terms of section 23(1) and item 7(3)(k) of the MPRDA. It is within this context that the once empowered, always empowered principle must be understood. This principle denotes that for purposes of compliance with the mining charter, mining companies can rely or claim recognition for previous BEE transactions notwithstanding the exit of their empowerment partners.[43] It is important to note that the MPRDA itself does not prescribe any obligations as to whether a mining company must maintain its BEE status for the life of the mining right. However, the DMRE – having established from its 2009 Report that there had been very little success with achieving empowerment, had sought to compel mining companies to maintain their BEE status for the life of the mining right.

Following the publication of the 2010 Mining Charter, the Minerals Council South Africa, formerly the South African Chamber of Mines (Minerals Council) approached the High Court and requested it to issue a declaratory order in respect of the empowerment obligations of mining right holders. In *Chamber of Mines of South Africa and the Minister of Mineral Resources*[44] (the Once Empowered Judgment) the

[43] Allan Reid 'Once empowered, always empowered. The vexed question finally answered.' available at *https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Corporate/mining-and-minerals-alert-5-april-once-empowered-always-empowered-the-vexed-question-finally-answered-.html* last accessed on 19 February 2022
[44] Note 30 above.

Minerals Council argued that 'the MPRDA does not place a duty of continuing compliance upon the holder of a mining right — once an applicant for a mining right has satisfied the requirements for grant in terms of section 23(1)(h) or item 7(2)(k) in Schedule II and been granted a mining right, it cannot be required thereafter to do so again, failing which its right will be placed in jeopardy'.[45]

In the Once Empowered Judgment, the court held that 'once the Minister or his delegate is satisfied in terms of section 23(1)(h) of the MPRDA that the grant of a mining right will further the objects referred to in section 2(d) and (f) of the MPRDA in accordance with 'the Charter referred to in section 100', and has granted the mining right applied for, the holder thereof is not thereafter legally obliged to restore the percentage ownership (howsoever measured*, inter alia* wholly or partially by attributable units of South African production) controlled by HDPs or HDSAs to the twenty six percent target where such percentage falls below twenty six per cent, unless such obligation is specified as an obligation in the terms and conditions stated in the right, as referred to in section 23(6) of the MPRDA'.[46] The same will apply to old order rights converted in terms of Schedule II of the MPRDA. The Once Empowered Judgment confirmed what has always been clear from an interpretation of the legislative framework in respect of empowerment in the MPRDA.

In terms of the 2010 Mining Charter, mining companies were required to achieve twenty six per cent HDSA ownership by the end of 2014. As this deadline approached, the DMRE commissioned an audit of the compliance of mining companies, the Minerals Council also conducted its own review. These assessments highlighted sharp differences between the DMRE and the Minerals Council on the

[45] Ibid, para 15.
[46] Ibid, para 109.

extent to which the various targets had been fulfilled.[47] Owing to the outcome of the compliance audit, the DMRE published further iterations of the mining charter which culminated in the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry 2018 (the 2018 Mining Charter).

The 2018 Mining Charter was published by the Minister on 27 September 2018 for implementation. The 2018 Mining Charter was preceded by the following three earlier versions: the draft Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 published on 15 April 2016; and the Reviewed Broad-Based Black Economic Empowerment Charter for the South African Mining Industry, 2017 published on 15 June 2017 for implementation (2017 Mining Charter).

The most controversial version was the 2017 Mining Charter published on 15 June 2017. In respect of the ownership element, the 2017 Mining Charter provided that a holder who concluded a "Historical BEE Transaction" i.e. a transaction concluded prior to the coming into operation of the 2017 Mining Charter that achieved a minimum twenty six per cent black shareholding or more, must "top up" its black shareholding to thirty per cent at the holder level by 15 June 2018. Ultimately the Minister and the Minerals Council reached an agreement on 13 September 2017 wherein the Minister undertook to suspend the 2017 Mining Charter pending the outcome of a declaratory order.

At the outset, it must be noted that the legal status of the mining charter contemplated in section 100(2)(a) of the MPRDA, and the obligations flowing therefrom was recently considered in the matter *of Minerals Council Of South Africa v Minister Of*

[47]Paul Moore 'Minerals Council South Africa Report shows marked progress towards 2010 Mining Charter Compliance' available at *https://im-mining.com/2019/12/05/minerals-council-south-africa-report-shows-marked-progress-towards-2010-mining-charter-compliance/*, accessed on 19 February 2023.

Mineral Resources and Others Case[48] in September 2021 following a review application launched by the Minerals Council against various provisions of the 2018 Mining Charter. This judgment and its implications will be discussed below.

As regards the ownership element, the 2018 Mining Charter distinguishes between existing rights, new mining rights and pending applications. In respect of existing mining rights, paragraph 2.1.1.1 of the 2018 Mining Charter provides that an existing mining right holder who has achieved a minimum of twenty six percent BEE shareholding shall be recognised as compliant for the duration of the mining right. Paragraph 2.1.1.2 of the 2018 Mining Charter provides that existing mining right holders whose BEE partners exited prior to the commencement of the 2018 Mining Charter, shall be recognised as compliant for the duration of the mining right and such recognition will not be applicable upon renewal. While paragraph 2.1.1.1. of the 2018 Mining Charter therefore recognises the "once empowered, always empowered" principle, paragraph 2.1.1.2 read with paragraph 2.1.6.2 of the 2018 Mining Charter states that such recognition will not apply on renewal of a mining right and therefore limits the application of the principle to the initial mining period. This was an attempt to compel mining companies to conclude new BEE transactions, notwithstanding any historical BEE transactions that they may have concluded.

In respect of new mining rights, paragraph 2.1.3.1. of the 2018 Mining Charter provides that a new mining right must have a minimum of thirty per cent BEE shareholding. The thirty per cent BEE shareholding must be distributed in the following manner (i) a minimum of five per cent non-transferable carried interest to qualifying employees; (ii) a minimum of five per cent non-transferable carried interest or "equity equivalent benefit" to host communities; and (iii) a minimum of twenty per

[48] *Minerals Council Of South Africa v Minister Of Mineral Resources and Others* [2021] 4 All SA 836 (GP).

cent effective ownership in the form of shares to a BEE entrepreneur,[49] five per cent of which must preferably be for women. The 2018 Mining Charter also prohibits any dilution of the shares issued to employees and communities. [50]

The "equity equivalent" to host communities is a monetary donation to be administered as an amount equivalent to the value of five per cent of the issued share capital in the mining right holder at no cost to a trust or similar vehicle set up for the benefit of host communities.[51] The trust or similar vehicle shall be responsible for developing and implementing a host community development programme which is to be approved under this element and does not replace social and labour plan commitments of the mining right holder.

The 2018 Mining Charter suffered from the same legal defects as the 2010 Mining Charter i.e. section 100(2)(a) of the MPRDA does not provide for the development of a further charter by the Minister.[52] For this reason, it was susceptible to legal attack on the basis that the Minister lacks the authority in terms of the MPRDA to develop such a charter, let alone, impose limitations on the once empowered, always empowered principle which effectively meant that mining companies that had successfully empowered will have to re-empower. On 26 March 2019, the Minerals Council filed an application for the judicial review and setting aside of certain clauses of the 2018 Mining Charter. On 21 September 2021, judgment was handed down by a full bench of the High Court of South Africa, Gauteng Division, Pretoria in the matter

[49] Historically Disadvantaged Persons (HDP) (as defined under the MPRDA) or enterprises which are owned by at least 51 per cent HDPs who hold 51 per cent voting right and 51 per cent interest in the entity.
[50] See paragraph 2.3.2(iv) of the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry 2018 which contemplates 'a mining right holder shall ensure that any reduction in shareholding of existing shareholders through the issue of new shares, shall not *reduce* qualifying employees carried interest and host communities' carried interest or equity equivalent benefit.
[51] Ibid, para 2.1.4.1.1.
[52] The 2018 Mining Charter also sought to limit the once empowered, always empowered principle in excess of the powers provided by the MPRDA, which on a proper interpretation, provides that BEE shareholding is only relevant when the Minister grants a mining right.

Minerals Council Of South Africa v Minister Of Mineral Resources and Others[53] (2018 Mining Charter Review Application Judgment). The issue to be decided by the court was the extent of the powers of the Minister in terms of section 100(2) of the MPRDA to make law in the form of subordinate legislation, and the legal nature and role of the 2018 Mining Charter in the context of the MPRDA.[54]

The Minerals Council argued that the 2018 Charter is a formal policy document developed by the Minister in terms of section 100(2) of the MPRDA,[55] and to the extent that the Minister has treated the 2018 Mining Charter as a legislative instrument for the purposes of, among other things, granting or refusing mining right applications and renewals, as the case may be, the Minister has acted beyond the scope of his powers. Whereas the Minister contends that 'section 100(2) of the MPRDA empowered him to make law through the development of the 2018 Charter, hence that Charter (which he developed) constitutes a *sui generis* form of subordinate legislation which is directly binding on holders of mining rights'.[56]

The court analysed the use of the term "charter" in section 100(2)(a) of the MPRDA and found that if the legislature intended for the charter contemplated in section 100(2) of the MPRDA to be subordinate legislation, it would have simply referred to the charter as 'regulations', which it chose not to do and that the language used in section 100(2) of the MPRDA is indicative of a policy, not legislation.[57] The court highlighted that the lack of reference to regulations, does not, in and of itself, suggest that the charter is not binding law. But that what compels one to conclude that the charter is not law is that elsewhere, the MPRDA makes specific reference to law and

[53] Note 48 above.
[54] Ibid, para 7.
[55] Ibid, para 9.
[56] Ibid, para 9.
[57] Ibid, para 23.

regulation. But in the specific case of section 100(2) reference was made to a charter.[58] The court also found that an additional indicator that the legislator did not intend for the charter to enjoy the status of subordinate legislation is the use of the word “develop” in section 100(2)(a).[59] It is not difficult to disagree with this interpretation of the court. If the legislature intended for the mining charter to have legislative effect, this would have been stated expressly in the MPRDA. Better yet, the Minister would have been empowered under section 107 of the MPRDA to make regulations relating to empowerment and the promotion of the BEE objects in the MPRDA. Another issue with the mining charter as a transformation instrument is that the MPRDA itself only deals with empowerment under the granting provisions of the MPRDA. This argument is expanded on further in the section dealing with the shortcomings of the current legislative framework below.

Having made findings regarding the status of the 2018 Mining Charter, the court concluded that the 2018 Mining Charter is a policy document and does not, *per se*, bind holders of mining rights and prospecting rights.[60] In addition, the 2018 Mining Charter is only binding on holders of mining rights to the extent that its terms have been lawfully incorporated by the Minister into such rights and continuing consequences shall be recognised in relation to applications for new mining rights, renewals and transfer of mining rights. Even if the court found the mining charter to be an instrument with binding effect, this would not negate the fact that the empowering legislation itself is inadequate and therefore if transformation is to be achieved in the mining industry, it must in fact be regulated for in the MPRDA.

[58] Ibid, para 23.
[59] Ibid, para 30.
[60] Ibid, para 59.

IV. CRITIQUE OF THE EXISTING FRAMEWORK

The downfall of the transformation project envisaged in the preamble and objects of the MPRDA lies with the fact that the MPRDA itself does not substantively regulate empowerment, and left it to the Minister, to regulate empowerment on a trial and error basis through the mining charter, which does not enjoy the status of legislation.[61] In an attempt to promote transformation as envisaged in the MPRDA, the Minister has often gone beyond his powers under section 100(2)(a) of the MPRDA as has been confirmed by the Once Empowered Judgment and the 2018 Mining Charter Review Application.

The 2014 assessment of the 2010 Mining Charter conducted by the DMRE concluded that although mining companies have reported to the DMRE to have met or exceeded the twenty six percent BEE ownership target, meaningful economic participation by beneficiaries was not achieved. The reality is that for as long as the DMRE is of the view that the empowerment objects contemplated in the MPRDA have not been met, the DMRE is likely to continue amending the mining charter to achieve these empowerment objects for the Minister to continue to discharge the duty to facilitate the entry and participation of HDPs into the mining industry as the custodian of mineral resources.

The decisions of the High Court in the Once Empowered Judgment and the 2018 Mining Charter Review Application are consistent with a long held industry interpretation that the Minister was not empowered to publish further iterations of the charter.[62] It is accepted that while section 100(2) of the MPRDA empowers the

[61] Legislative acts give effect to policy and follow a legislative process in parliament. On the other hand policy is not subjected to a law making process, often the competent authority is given administrative authority to develop such policy. The empowering provision often uses permissive language.
[62] Note 26 above, Appendix 1 at page App–21.

Minister to 'develop a broad-based socio economic empowerment charter for the South Africa mining industry', it does not expressly empower the Minister to continue to promulgate new iterations of the charter, in the form of the 2010 Mining Charter and 2018 Mining Charter. The MPRDA came into effect on 1 May 2004 and the six month period referred to in section 100(2) expired on 31 October 2004, and with it, the powers of the Minister to develop such a charter.[63] The Minister can only act within the confines of the empowering legislation in the MPRDA. Accordingly, the publication of the three iterations of the charter are in fact *ultra vires* the powers of the Minister. Dale *et al* argues that 'the legislature inserted the six month time limit. It is suggested that the only logical reason was to create certainty regarding the empowerment requirements of the MPRDA which was, at the time when the adoption of the MPRDA was debated in Parliament, one of the most controversial and hotly debated topics surrounding the adoption of this new law. If that view is accepted then the certainty will be undermined if the Minister is allowed, to amend the charters at will. The whole purpose of the six month time limit will be undermined and negated'.[64]

Dale's view seems to suggest that the intention of the legislature, given the pressures of the time, was for transformation to occur on a once-off basis as opposed to it being continuous and evolving with the times. This seems at odds with the preamble of the MPRDA which envisages that there be equitable access to the country's mineral resources. This is also at odds with the requirements for renewal of a mining right under section 23(3)(a), which contemplates that a mining right must be renewed if the applicant has complied with the terms and conditions of the mining right (which terms include a term on BEE ownership) and the MPRDA. Arguably if an applicant for renewal has not given effect to empowerment, the Minister may require that they

[63] Ibid.
[64] Ibid.

give effect to renewal prior to the grant thereof. Furthermore, sections 25(2)(h) and 28(2)(c) of the MPRDA obliges the holder of a mining right to annually report on its compliance with the provisions of the mining charter contemplated in section 100(2)(a). The purpose of the reporting is to allow the Minister to monitor the progress of the holder in relation to compliance with the terms and conditions of the mining right. Thus, if a holder's annual report suggests that the holder is non-compliant, the Minister would be entitled to issue a directive under section 93 or 47 of the MPRDA to compel such holder to comply. This is an indication that the legislature did not intend for empowerment to be a once-off exercise.

The language of section 100(2)(a) is not a model for clarity, however, an argument can be made that reference to targets suggests that the mining charter is reviewable. However, the challenge is that some iterations of the charter, particularly the 2018 Mining Charter purported to replace the Original Mining Charter all together; undermined mining companies that have in fact complied with the Original Mining Charter and 2010 Mining Charter and went beyond the powers of the Minister in section 100(2)(a) by stating that the failure to comply with the ownership element and the mine community development element constitutes a breach of the MPRDA when the MPRDA itself does not sanction this. The shifting of the goal posts in relation to entities that have in fact achieved compliance with the mining charter not only creates uncertainty but also offends the presumption in our law against the retrospective application of statutes.

In the Once Empowered Judgment, the court explained that for the Minerals Council, the charters are 'formal guidelines or statements of policy' while the DMRE sees the charters as 'legally enforceable instruments with legally binding obligations'. The court stressed the point that section 100 of the MPRDA which enjoined the Minister

to develop a charter does not state expressly what the legal consequence or status of a charter developed in terms of section 100 would be.[65] Furthermore, the court finds that 'the charter contemplated in section 100'… 'finds application and legal significance in an indirect manner only, through the application of the other sections of the MPRDA that refer to it', which in the context of granting of mining rights means that the charter only has legal significant through section 23(1)(h) of the MPRDA.[66] The court focuses on the administrative act involved in granting the mining right at the time when the DMRE assesses compliance with section 23(1)(h) of the MPRDA and decides the terms and conditions on which the mining right is to be granted as provided for in terms of section 23(6) of the MPRDA.

In the 2018 Mining Charter Review Application, the Minister argued that the transformation objects of the MPRDA would not be achieved unless the charter is binding subordinate legislation.[67] The court found this reasoning to be flawed on the basis that when the Minister considers an application for a mining right before granting such right, he must satisfy himself that the grant thereof will further the objects in sections 2(d) and (f) of the MPRDA in accordance with the charter.[68] This presents an opportunity for the Minister to impose conditions in the mining right that will give effect to section 2(d) and (f) as contemplated in section 23(6) of the MPRDA.[69] Section 23(6), provides that a mining right is subject to the provisions of the MPRDA and the terms and conditions stated in the right and the prescribed terms and conditions. Regulation 12 of the MPRDA Regulations, 2004, as amended provides that the terms and conditions 'agreed upon' shall be approved by the Minister. In practice, the DMRE has developed a pro forma mining right template

[65] Note 30 above, para 79.
[66] Note 30 above, para 81.
[67] Note 48 above, para 39.
[68] Ibid.
[69] Ibid, para 40.

which is accepted as the ‘prescribed’ terms and conditions in accordance with section 23(6) and Regulation 12. Every mining right is therefore subject to these standard terms and conditions. This, the court finds, presents an opportunity for the Minister to “concretise and individualise” the empowerment obligations within the latter of the law.[70] Hence the effect of the 2018 Review Application Judgment is that the 2018 Mining Charter is only binding on holders of mining rights to the extent that its terms have been lawfully incorporated by the Minister into such rights.

The above interpretation offered by the court is rational, however, it fails to consider that when the Minister imposes terms and conditions in a mining right, such terms and conditions must be validly imposed i.e. they must be guided by the mining charter contemplated in section 100(2)(a) of the MPRDA. As previously highlighted section 23(1)(h), in relation to the granting of new mining rights, provides that Minister must grant a mining right if the granting will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100. From this, it is clear that the mining charter is in fact the only guiding instrument that the Minister must have regard to when imposing an empowerment related condition in a mining right. And so when the DMRE realised that the Original Mining Charter was inadequate, the 2010 Mining Charter was published, thereafter it became apparent that even this second iteration was inadequate and therefore the 2017 Mining Charter was published and subsequently the 2018 Mining Charter. Each of these charters were published to try and rectify the inadequacy of the previous version of the charter, the challenge however, was that these iterations are not sanctioned by the MPRDA.

[70] Ibid.

V. PROPOSED REFORMS TO EMPOWERMENT FRAMEWORK

Having identified the MPRDA along with the mining charter, as the biggest hurdles to the achievement of the transformation objects articulated in section 2 of the MPRDA, the questions that arise are, where to from here? If transformation is as important as it is made to be in the various policies of the government, why is the government so married to the concept of a 'charter' as a transformative tool, when by government's own admission, it has failed to achieve transformation? How then should the Minister give effect to the constitutional imperatives of transforming an industry that continues to be dominated by the white minority?

Following the decision of the High Court in the 2018 Mining Charter Review Application, on 2 December 2021, the DMRE informed the Parliamentary Portfolio Committee on Mineral Resources and Energy that it does not intend to appeal the outcome of that judgment citing the fact that an appeal would simply prolong the uncertainty that industry has been grappling with for over a decade. The DMRE indicated that it would explore creating legal certainty through a parliamentary process.[71]

In the 2018 Mining Charter Review Application, the court highlighted that in terms of section 107 of the MPRDA, the Minister may make regulations regarding "any other matter the regulation of which may be necessary or expedient in order to achieve the objects of this Act".[72] Further, the court highlighted that if the failure to achieve the empowerment objects of the MPRDA is attributable to the fact that the mining charter

[71] Lisa Steyn 'Department of Mineral Resources will not appeal Mining Charter Judgment' available at *https://www.news24.com/fin24/companies/mining/department-of-mineral-resources-will-not-appeal-mining-charter-judgment-20211123*, accessed on 19 February 2023.
[72] Note 48 above, para 48.

is not binding subordinate legislation, then there is a lacuna in the MPRDA, which can only be cured by the legislature.

For established mining companies, a major source of uncertainty from the various iterations of the mining charter is that they undermine the once empowered, always empowered principle; and security of tenure of holders of mining rights as contemplated in section 2(g) of the MPRDA. This is because the various iterations of the mining charters do not adequately distinguish between:[73] i) 'entities that have successfully implemented empowerment transactions where HDPs have been meaningfully empowered (Successful BEE Transactions); ii) entities that have concluded and implemented empowerment transactions that comply with the MPRDA, but have actually failed to deliver value for HDPs';[74] and (iii) entities that are fronting (Sham Transactions).

This is best evidenced by the arguments of the Minister in the 2018 Mining Charter Review Application where the Minister argues that the majority of mining operations are currently being undertaken in terms of converted old order rights i.e. rights which were granted under the erstwhile Minerals Act and which were subsequently converted into new order rights.[75] The Minister's argument is that notwithstanding the fact that these entities have given effect to section 2(d) of the MPRDA, as was required in terms of the conversion application process, these entities should be expected to re-empower, for example on renewal of such mining rights, as was required in the 2018 Mining Charter. This undermines the principle of security of tenure espoused in the MPRDA and has been a major contributor to the uncertainty.

[73] Ntsiki Adonisi-Kgame and Mihlali Sitefane 'Empowerment in the mining industry: where to from here?' available at *https://www.ensafrica.com/news/detail/3704/empowerment-in-the-mining-industry-where-to-f* , accessed on 19 February 2023.
[74] Ibid.
[75] Note 48 above, para 45

Successful BEE Transactions should be exempt from having to re-empower for the entire duration of their mining rights i.e. any empowerment requirements that the Minister imposes cannot apply retrospectively. The reality is that as a result of the inadequacy in the MPRDA and mining charters, the legislature has missed the boat with getting such entities to stay empowered for the life of their mining rights. In our law, there is a presumption against the retrospective application of statutes. In *Nkabinde v Judicial Service Commission*[76] the court held that 'A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already passed…'[77]. There are some exceptions that can be employed against this principle, namely, a statute may apply retrospectively where it benefits the subject. This exception applies only if all persons subject to the provisions of a statute would benefit from reliance on the exception. Additionally, the retrospective operations of the statute must be provided for either expressly or by necessary implication, or where the statute deals with past matters and events.[78] In the Once Empowered Judgment, the court found that the 2010 Mining Charter does not retrospectively deprive holders of mining rights of the benefit of the capacity for offsets which would entail credits/offsets to allow for flexibility and the continuing consequences of empowerment transactions concluded by them after the coming in to force of the MPRDA, which benefits were conferred by the Original Mining Charter.[79]

As a fundamental principle of the rule of law, the law must be certain and cannot change at random whenever the Minister feels like it. In the dissenting judgment of

[76] *Nkabinde v Judicial Service Commission* 2014 (12) BCLR 1477 (GJ).
[77] Ibid, para 79.
[78] *Bell v Voorsitter van die Rasklassifikasieraad* 1968 3 All SA 1 (A).
[79] Note 30 above, para 241.

the Once Empowered Judgment, handed down by Siwendu J, the judge highlights that the mining charter is in fact a 'Social Pact or Compact' entered into in good faith and which the Minerals Council has complied with over a long period of time. As such, Successful BEE Transactions should be allowed to benefit fully from the once empowered, always empowered principle.

Given the above and in light of South Africa's history, it is quite clear that transformation is too important a topic to be regulated in a charter which does not itself enjoy the status of subordinate legislation. Therefore, empowerment must be regulated by clear and binding legislation. For this to be achieved, the government must exercise the principle of sovereignty over its natural resources and effect legislative amendments to the MPRDA, as the primary legislation governing the mining industry. In order to achieve certainty, section 100(2) in its entirety, must be repealed. This section has served its purpose. Section 100(2) is a product of its time and reflects the negotiated settlement that post-apartheid South Africa is premised on. At the time, government wanted to reassure industry that vested rights would not be taken away as suggested by Dale,[80] it therefore represents a compromise. It must be recognised by all stakeholders that for transformation to occur, the status quo cannot be preserved.

The repeal of section 100(2) will necessitate the amendment of section 107 of the MPRDA. Section 107(k) currently provides that 'the Minister may, by notice in the Gazette, make regulations regarding any matter which may or must be prescribed for in terms of this Act'. This section can be amended to give the Minister the authority

[80] Note 62 above.

to make regulations for purposes of giving effect to the empowerment object in the MPRDA i.e. section 2(d). The amended section 107 can read as follows:

> ‘Section 100(1) The Minister may, by notice in the Gazette, make regulations regarding -
>
> (k) the furtherance of the objects in section 2 (c), (d), (e), (f) and (i) of the Act. The Minister may develop regulations that will prescribe minimum levels and different methods of BEE ownership, the duration of BEE ownership in respect of mining titles and any matters ancillary thereto.’

Given the significance of the ownership element, Parliament may also want to legislate into the MPRDA itself the minimum requirement for ownership in mining companies. This seems to be the approach taken by various mining jurisdictions on the continent, including Tanzania. Incorporating such provisions in the legislation will achieve the desired certainty and serve as a guarantee that the requirements will not change constantly. This is because any change that the government may want to make will require that the long and constitutionally sanctioned process of law-making be followed.

Furthermore, amendments to the MPRDA can include the recognition of Successful BEE Transactions and the exemption of those transactions from the requirement to re-empower i.e. the amendments should not apply retrospectively to holders of rights who already met the requirements of the applicable mining charter at the time of the grant of a new order mining right application or conversion of an old order mining right. Such holders would have, at the application stage for a new order right or for conversion, been granted rights on the basis that they had complied with the legal requirements in the mining charter. As has been identified by the courts, the current provisions of the MPRDA make it clear that in regard to the ownership requirements of the mining charter, these requirements were to be met prior to, and for purposes

of, the grant of the mining right. Section 23(1)(h) of the MPRDA must be amended to make specific reference to the requirement that the Minister must grant a mining right if the grant thereof will further section 2(d) but that the mining right holder must maintain this ownership structure in perpetuity.

As regards Sham Transactions, it is recognised that an unintended by-product of the mining charter is the phenomenon of “fronting” which denotes a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of empowerment. The DMRE does not have authority to investigate such practices or take remedial measures against mining houses that perpetuate fronting practices. The DMRE should be capacitated to review empowerment transactions substantially and to assess whether effective empowerment has been achieved. Legislative amendments to the MPRDA would find Sham Transactions as a breach of section 2(d) of the MPRDA, which would need to be remedied accordingly, otherwise, the Minister would need to exercise his powers under section 47 of the MPRDA to suspend or cancel mining rights.

VI. **CONCLUSION**

As has been demonstrated in this paper, the confusion relating to the limited application of the once empowered, always empowered principle; the status of the mining charter, the application of the charter, and the ‘shifting of the goal posts’ through the publication of various iterations of the mining charter and the inadequacies in the MPRDA itself is what has caused significant legal uncertainty within the mining industry and what has contributed significantly to the snail paced progress of transformation in the industry.

The findings of the 2018 Mining Charter Review Application present an opportunity for amendments to be effected to the MPRDA. The process of legislative amendments is long and arduous, however, it is the most sustainable approach (as opposed to continuous court battles on the interpretation of the charter and the status thereof) and would settle the issues highlighted in this paper once and for all. This process will also ensure that input from the public is obtained. Transformation, after all, requires a concerted effort from all stakeholders.

That the MPRDA must be amended cannot be gainsaid. The fundamental principle that must inform any amendments to the MPRDA is that mining companies that implemented Successful BEE Transactions must continue to exercise all of the rights that they are entitled to exercise under the MPRDA without having to enter into new empowerment transactions. They should, in particular, be able to renew, amend, vary, consolidate and extend their rights.

BIBLIOGRAPHY

Books

MO Dale et al, South African Mineral and Petroleum Law, Lexis Nexis, (2022)

Michael Bishop & Stuart Woolman (eds) Constitutional Law of South Africa 2 ed (2013)

Journal Articles

Kilambo, S.R., 'Black economic empowerment policy and the transfer of equity and mine assets to Black people in the South Africa's mining industry', South African Journal of Economic and Management Sciences 2021

L.P. Krüger 'South African managers' perceptions of black economic empowerment (BEE): A 'sunset' clause may be necessary to ensure future sustainable growth' Southern African Business Review Volume 18 Number 1 2014

Case Law

Agri South Africa v Minister for Minerals and Energy 2013 (4) SA 1 (CC)

Chamber of Mines of South Africa v Minister of Mineral Resources and Director General, Department of Mineral Resources 2018 (4) SA 581 (GP)

Minerals Council Of South Africa v Minister Of Mineral Resources and Others 2021 (4) All SA 836 (GP).

Nkabinde v Judicial Service Commission (2014 (12) BCLR 1477 (GJ)

Bell v Voorsitter van die Rasklassifikasieraad 1968 (3) All SA 1 (A)

Statutes

Broad-Based Black Economic Empowerment Act 53 of 2003

Constitution of the Republic of South Africa 108 of 1996

Mineral and Petroleum Resources Development Act 28 of 2002

Mineral and Petroleum Resources Development Regulations, 2004

Policy

A Minerals and Mining Policy for South Africa, 1998

Amendment of the Board Based Socio-economic Empowerment Charter for the South African Mining and Minerals Industry, 2010

Broad-Based Socio-Economic Empowerment Charter for the Mining Industry, 2004

Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018

Freedom Charter, 1955

Reviewed Broad-Based Black Economic Empowerment Charter for the South African Mining Industry, 2017

The Reconstruction and Development Programme, a policy framework, 2019

Internet Sources

Allan Reid ‘Once empowered, always empowered. The vexed question finally answered.’ available at https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Corporate/mining-and-

minerals-alert-5-april-once-empowered-always-empowered-the-vexed-question-finally-answered-.html

Lisa Steyn ‘Department of Mineral Resources will not appeal Mining Charter Judgment’ available at https://www.news24.com/fin24/companies/mining/department-of-mineral-resources-will-not-appeal-mining-charter-judgment-20211123,

Ntsiki Adonisi-Kgame and Mihlali Sitefane ‘Empowerment in the mining industry: where to from here?’ available at https://www.ensafrica.com/news/detail/3704/empowerment-in-the-mining-industry-where-to-

Paul Moore ‘Minerals Council South Africa Report shows marked progress towards 2010 Mining Charter Compliance’ available at https://im-mining.com/2019/12/05/minerals-council-south-africa-report-shows-marked-progress-towards-2010-mining-charter-compliance

South African History Online ‘The Native Land Act is Passed’ available at https://www.sahistory.org.za/dated-event/native-land-act-passed,

Others

Mining Charter Impact Assessment Report, 2009

Makatane Kagisho Jacob Diale Employee Share-Ownership Plans In The Mining Industry– A New Approach To ESOPs, University of the Witwatersrand Johannesburg 2016