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JOHANNESBURG (miningweekly.com) – Mining industry employers’ organisation Chamber of Mines’ (CoM’s) urgent interdict application to halt the implementation of the third iteration of the Mining Charter – published by Mineral Resources Minister **Mosebenzi Zwane** on June 15 – is likely to succeed, says Webber Wentzel partner **Rita Spalding**.

One of the reasons is that Section 100(2)(a) of the Mineral and Petroleum Resources Development Act (MPRDA) only empowers the Minister to develop a broad-based socioeconomic empowerment charter. “It does not grant the Minister the power to alter, vary and/or revise such a charter,” says Spalding.

The section also requires that the Minister exercise his or her authority to develop a broad-based socioeconomic empowerment charter "within six months from the date on which this Act takes effect". The MPRDA took effect on May 1, 2004, which means that the revised charter was published too late – by more than 13 years.

“ . . . the Minister’s amendment of the Mining Charter is beyond the scope of Section 100(2)(a) and is, thus, ultra vires”, or beyond one's legal power or authority, she points out.

Spalding notes that to give effect to the charter, Parliament would have had to pass the MPRDA Amendment Bill first. Although the Bill seeks to amend Section 100(2)(a) to enable the Minister to change or vary a charter it has been in limbo since 2013.

Spalding points out that Parliament cannot pass the MPRDA Amendment Bill now and “miraculously give the Minister the powers ex post facto to implement the charter, which he has already gazetted and brought into force”.

Webber Wentzel partner **Jonathan Veeran** explains that Parliament is responsible for the passing of legislation, and the executive (Ministers) for the creation of regulations. “The purpose for this aspect of separation of powers is to free up time in Parliament but also serves as a check and balance on the different branches of the State”.

He adds that South African law makes a distinction between policy derived from an enabling provision in legislation and policy derived in the absence of such legislation. For a policy to be binding, however, it must be derived through an enabling provision contained in legislation, such as Section 100(2)(a) of the MPRDA in respect of the Mining Charter.

Veeran explains that the MPRDA enables the Minister to develop policy, but only in a narrow sense: “The Minister can do only what he is empowered to do by legislation.”

Therefore, exceeding this power of legislation – amending the charter when the current legislation does not permit that – is in violation of the Constitution, as it contradicts the rule of law principle provided for in Section 1(c) of the Constitution, he explains.

OTHER ISSUES AND AMBIGUITIES

One of the main contentions by the CoM is that it was not properly consulted on the drafting of the charter. Webber Wentzel candidate attorney **Diann Bishunath** notes that Section 100(2)(a) of the MPRDA does not strictly oblige the Minister to consult with anyone.

However, she stresses that the Minister has, with the first two charters, consulted with other stakeholders as a rule of practice. Hence, CoM members had a legitimate expectation that they would be consulted in the development Of Mining Charter III.

“The preamble to the original charter and its 2010 successor specifically notes that ‘this is a document which is agreed to by government, labour and business’. So, in this context, the Minister has created a subtle obligation to consult,” she states.

Additionally, the charter requires that new mining right holders must ensure that black shareholders hold a minimum of 30% in the company, with a minimum of 8% being held by employees, 8% by mine communities (in a community trust) and 14% black economic-empowerment (BEE) entrepreneurs.

She notes that this is problematic because the term 'community trust' is not defined in the Charter and, moreover, such a trust must be created and managed by the Mining Transformation and Development Agency, “which is yet to be constituted”.

Veeran notes that while the support of BEE entrepreneurs “is a seemingly good development, in our experience, the DMR does not view all 'established' black-owned companies as BEE entrepreneurs”.

Spalding comments that the charter also stipulates that “subject to solvency and liquidity requirements, a right holder is required to pay 1% of its annual turnover to black shareholders”. This implicitly creates a different class of shares, which would require the amendment of the company’s Memorandum of Incorporation. Since shareholders holding the same class of shares are to be treated equally, the implementation of this provision without the creation of a separate class of shares would result in a contravention of the Companies Act.

In terms of procurement, right holders are obligated to ensure that 70% of their procurement spend is used on mining goods manufactured by BEE entities and that 80% of services be performed by BEE entities.

Veeran says the imposition of local procurement requirements, particularly the local manufacturing requirements, might amount to South Africa breaching its

obligations under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS).

“Imposition of restrictions on investment designed to protect and foster domestic industries and prevent the outflow of foreign exchange reserves are not permitted under Articles III and XI of GATT and GATS.”

Spalding notes that these, and “numerous other material ambiguities, owing to poor drafting, provide a strong case for the CoM to obtain an interdict.”

MPRDA’s Stuttering Progress

The Mineral and Petroleum Resources Development Act Amendment Bill, passed by the National Assembly (NA) in 2014, was referred to the President for approval, who referred it back to Parliament in 2015, citing concerns. In November last year, following a debate, the NA again passed the Bill and sent it to the National Council of Provinces (NCOP) for its assent.

However, the NA’s Portfolio Committee on Mineral Resources had noted that the 2013 consultation period in the NCOP and provincial legislatures was too short, and recommended that the Select Committee on Land and Mineral Resources (SCLMR) restart the legislative process. This was necessary, as adequate public participation is stipulated by Section 72(1)(a) of the Constitution.

As a result, all nine provincial legislatures scheduled and completed public hearings on the MPRDA Amendment Bill, with the SCLMR holding additional public hearings on June 13, 20 and 27.

Now that the public participation obligations have been met, the Bill is to be amended by the NCOP. Thereafter, it will return to the NA and, if passed, it will be sent back to the President for approval.

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