

CORPORATE & COMMERCIAL AND MINING & MINERALS

ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Is equitable access into the mining industry ensured?

South Africa's economy expanded by 1,6% in the third quarter of 2022, according to the Stats SA GDP outlook published on 6 December 2022, and the mining industry increased its economic output by 2,1%, maintaining its status as one of the main contributors to the country's GDP and employment. With this in mind, the questions to be asked are: What are the current barriers to entry? Is the industry exclusionary or accessible for small business entrepreneurs and historically disadvantaged communities looking to participate in the mining industry? What mechanisms/systems are in place to ensure transformation within the mining industry?



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Is equitable access into the mining industry ensured?

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In the recent judgment of *Rustenburg Platinum Mines Limited and Another v The Regional Manager, Limpopo Region, Department of Mineral Resources and Others* (1109/2020) [2022] ZASCA 157 (18 November 2022) the Supreme Court of Appeal (SCA) looked to address some of these questions by considering the interpretation of section 17(2) of the Mineral Petroleum Resources Development Act 28 of 2002 (MPRDA). The SCA held that the purpose of the MPRDA is to ensure that the extraction of minerals is not concentrated in the hands of large mining corporations and that there is equitable access into the mining industry, thus upholding the transformation objectives of the MPRDA.

Discretion afforded to the Minister

Prior to the amendment of section 17(2), the court's interpretation was restrictive and did not take into account the objectives of the MPRDA.

Section 17(2) specifically states that:

"(2) The Minister [of Mineral Resources and Energy] must within 30 days of receipt of the application from the regional manager, refuse a prospecting right if:

- (a) the application does not meet all the requirements referred to in subsection (1);*
- (b) the granting of such right will result in the concentration of the mineral resources in question under the control of the applicant and their associated companies with the possible limitation of equitable access to mineral resources."*



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The effect of this section is to grant discretion to the Minister to refuse any application for prospecting or mining rights if acceptance would not promote equitable access, substantial and meaningful expansion of opportunities for historically disadvantaged people and communities to enter into and benefit from the extraction of any mineral resources, or promote economic growth and the development of the country.

The SCA emphasised that the Minister is to uphold the transformation objectives of the MPRDA when considering any application for a prospecting right or mining right and that exercising such discretion would avoid a concentration of mineral resources in the hands of one entity

and not give effect to an exclusionary act. Reference was had to section 2, which conveys the purpose for which the MPRDA was enacted.

Section 2 of the MPRDA sets out, amongst others, the following objectives:

- to give effect to the principle of the state's custodianship of the nation's mineral and petroleum resources;
- to promote equitable access to the nation's mineral and petroleum resources; and
- to 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.

Interpretation

The SCA reiterated that the context in which a statute was drafted is fundamental for its interpretation and that statutes should maintain the spirit, purpose and objectives of the Bill of Rights. Further, the general factual background to the statute, such as the nature of its concerns, the social purpose to which it is directed and, in the case of statutes dealing with specific areas of public life or the economy, the nature of the areas to which the statute relates provides the context for the legislation.

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In this respect, reference was made to the Constitutional Court judgment of *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* [2014] (2) SA 603 (CC) where the court held that:

"In view of the fact that Black people did not own land because of dispossession and legal instruments that prohibited ownership, drastic measures were necessary to open up opportunities in the mining industry for the previously excluded majority."

The SCA found that the Deputy Director-General's refusal to grant a prospecting right was neither unfair nor irrational as granting the right would have the effect of "locking up" the area, excluding those who want to access and participate in the industry, and frustrating the transformation objectives of the MPRDA.

It is clear that our courts are mindful of the current landscape and socio-economic disparities within the country and they have made a concerted effort to ensure that all those, specifically historically disadvantaged people and communities, who desire and seek to benefit from and participate in the mining industry are able to do so.

Sandile Shongwe overseen by
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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