

# Corporate & Commercial ALERT

16 AUGUST 2023



INCORPORATING  
KIETI LAW LLP, KENYA

## IN THIS ISSUE

### Where to from here? Considerations following the 2023 MPRDA Review Summit regarding the objects of transformation policy

The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), which came into force on 1 May 2014, was a revolution in South Africa's regulation of mineral resources, specifically with regards to the exploitation of minerals, the vesting of custodianship in the minerals to the state in order to ensure equitable access to mineral and resources, and for ensuring the expansion of opportunities to historically disadvantaged persons.

 FOR MORE  
INSIGHT INTO  
OUR EXPERTISE  
AND SERVICES

## Where to from here? Considerations following the 2023 MPRDA Review Summit regarding the objects of transformation policy

The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), which came into force on 1 May 2014, was a revolution in South Africa's regulation of mineral resources, specifically with regards to the exploitation of minerals, the vesting of custodianship in the minerals to the state in order to ensure equitable access to mineral and resources, and for ensuring the expansion of opportunities to historically disadvantaged persons.

However, over the years the MPRDA has shown certain gaps and shortfalls, prompting industry players to express their grievances as to its effectiveness. The general sentiment is that certain provisions of the MPRDA remain vague, eliciting legal challenges, but there have also been concerns about the inconsistent application of the MPRDA as well as its misaligned interpretation in relation to other applicable legislation in the mining industry.

On 13 July 2023, the Department of Mineral Resources and Energy (DMRE) invited various dignitaries, heads of industry, trade unions and key stakeholders to address the 2023 MPRDA Review Summit on the lessons that have been learnt to date in the implementation of the MPRDA and to discuss possible amendments to be made.

One of the main discussion points centered around whether the transformation objectives set out in section 100(2) of the MPRDA are being

adequately met and whether the applicability of the "once empowered, always empowered" principle should be revoked in furtherance of transformational objectives.

### Transformation

In the matter of *Minerals Council of South Africa vs Minister of Mineral Resources and Energy and 13 Others* [2022] (1) SA 535 (GP), the Minerals Council of South Africa brought an application to the High Court to review and set aside certain provisions of the 2018 Mining Charter (Charter).

The overarching question the court had to consider was the extent of powers granted to the Minister of Mineral Resources and Energy (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 Charter in the context of the MPRDA.



The graphic features a gold diagonal stripe across a light blue background. At the top left, it displays 'The LEGAL 500 EMEA' logo. Below this, the text reads: 'Corporate, Commercial/M&A 2023 Rankings'. Further down, it states: 'Corporate & Commercial practice is ranked in Tier 1.', 'CDH Kenya's Corporate & Commercial practice is ranked in Tier 3.', 'Leading Individuals: Willem Jacobs | David Pinnock', 'Recommended Lawyers: Vivien Chaplin | Peter Hesselting Justine Krige | Sammy Ndolo David Thompson | Roxanna Valayathum Njeri Wagacha', 'Next Generation Lawyers: Justine Krige', and 'Hall of Fame: Ian Hayes'.

## Where to from here? Considerations following the 2023 MPRDA Review Summit regarding the objects of transformation policy

CONTINUED

Section 100(2) of the MPRDA provides as follows:

*"(a) 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.*

*(b) The charter must set out, amongst others how the objects in section 2 of the MPRDA can be achieved."*

The Minister and the DMRE were of the view that section 100(2) of the MPRDA empowers the Minister to make law through the development of the Charter, which would be legally binding on holders of mining rights. The converse was argued by the Minerals Council in that the Charter is a policy document only, providing direction to the Minister whenever he considers applications for a mining right.

The salient grounds on which the court concluded that section 100(2) of the MPRDA does not empower the Minister to make law through the Charter, were:

- A contextual or purposive interpretation must be adopted to give effect to the transformational objectives of the MPRDA. Further, that the formation of the Charter was not intended to be an instrument of subordinate legislation but rather to guide the Minister when granting an application for a mining right in terms of section 23(1)(h) of the MPRDA.

- The transformation objects are inherently achieved in terms of sections 2(d) and 100(2) of the MPRDA and reference to the Charter being binding law would undermine the enforcement structure of the MPRDA, as the granting of a mining right places an obligation on the holder to comply with the relevant provisions of the MPRDA and any other relevant laws and terms of the mining, namely the social and labour plan (SLP), sections 2(d) and (f) of the MPRDA and the Charter as contemplated in section 100(2).
- The MPRDA performs a balancing act between the objects of transformation and security of tenure for the holders of mining rights. The latter is central in achieving the transformation objects of the MPRDA. Failing security and transformation, a negative investment climate would be created in the mining industry, limiting equitable access and expansion of opportunities for historically disadvantaged persons.

## Where to from here? Considerations following the 2023 MPRDA Review Summit regarding the objects of transformation policy

CONTINUED

- Having regard to the wording of the original charter in 2004, and subject to its iterations, the document was deemed to be a pact between the Government and industry, in which they committed themselves to a framework of progressing the empowerment of historically disadvantaged persons in the mining industry. Factors that had to be achieved in making licensing decisions could not be interpreted to require an ongoing commitment to achieve such factors indefinitely, which would be unduly onerous on mining right holders.

### Conclusion

Given the above, one has to consider how the transformation objectives that are currently worded in the MPRDA and enforced by the Minister when granting applications for mining

rights, would be amplified by closely aligning the MPRDA and the Charter as concurrent pieces of legislation and revoking the “*once empowered, always empowered*” principle.

It is evident that the enactment of the Charter, as a policy document to support the Minister in his decision to grant mining rights, achieves the purpose and objectives of transformation set out in sections 2 and 100 of the MPRDA. Further, by virtue of the power which section 25(2)(d) confers on the Minister to include the requirements of the Charter in the terms and conditions of the mining right, the enforcement of the Charter’s provisions can be achieved without amending legislation.

The court envisaged that should the Minister believe that the transformational objectives of the MPRDA are not being fulfilled through

the process of incorporating those provisions in the mining right, then he retains the power to make regulations to that effect under section 107.

The MPRDA also imposes obligations on the holder to report its level of compliance for the subsistence of the mining right, failing which the Minister is entitled to suspend or cancel the mining right in terms of section 47 of the MPRDA.

Should the MPRDA and Charter both be deemed law there may be additional risks of dual and conflicting interpretations between the DMRE and mining right holders regarding the regulation of mining operations. Further, ensuring such checks and balances in respect to transformation compliance may inundate and create further capacity constraints within the DMRE.

In a world where access to investment funding is limited, the last thing South Africa needs currently is greater regulatory uncertainty in its already burdened mining industry.

**Allan Reid and Sandile Shongwe**

## OUR TEAM

For more information about our Corporate & Commercial practice and services in South Africa and Kenya, please contact:



### Ian Hayes

Practice Head & Director:  
Corporate & Commercial  
T +27 (0)11 562 1593  
M +27 (0)83 326 4826  
E [ian.hayes@cdhlegal.com](mailto:ian.hayes@cdhlegal.com)



### David Thompson

Deputy Practice Head & Director:  
Corporate & Commercial  
T +27 (0)21 481 6335  
M +27 (0)82 882 5655  
E [david.thompson@cdhlegal.com](mailto:david.thompson@cdhlegal.com)



### Sammy Ndolo

Managing Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E [sammy.ndolo@cdhlegal.com](mailto:sammy.ndolo@cdhlegal.com)

### Kate Anderson

Director:  
Corporate & Commercial  
T +27 (0)11 562 1105  
M +27 (0)82 418 3784  
E [kate.anderson@cdhlegal.com](mailto:kate.anderson@cdhlegal.com)

### Tessa Brewis

Director:  
Corporate & Commercial  
T +27 (0)21 481 6324  
M +27 (0)83 717 9360  
E [tessa.brewis@cdhlegal.com](mailto:tessa.brewis@cdhlegal.com)

### Vivien Chaplin

Sector Head: Mining & Minerals  
Director: Corporate & Commercial  
T +27 (0)11 562 1556  
M +27 (0)82 411 1305  
E [vivien.chaplin@cdhlegal.com](mailto:vivien.chaplin@cdhlegal.com)

### Clem Daniel

Director:  
Corporate & Commercial  
T +27 (0)11 562 1073  
M +27 (0)82 418 5924  
E [clem.daniel@cdhlegal.com](mailto:clem.daniel@cdhlegal.com)

### Andrew Giliam

Director:  
Corporate & Commercial  
T +27 (0)21 481 6363  
M +27 (0)83 359 7069  
E [andrew.giliam@cdhlegal.com](mailto:andrew.giliam@cdhlegal.com)

### John Gillmer

Joint Sector Head: Private Equity  
Director: Corporate & Commercial  
T +27 (0)21 405 6004  
M +27 (0)82 330 4902  
E [john.gillmer@cdhlegal.com](mailto:john.gillmer@cdhlegal.com)

### Allan Hannie

Director:  
Corporate & Commercial  
T +27 (0)21 405 6010  
E [allan.hannie@cdhlegal.com](mailto:allan.hannie@cdhlegal.com)

### Peter Hesseling

Director:  
Corporate & Commercial  
T +27 (0)21 405 6009  
M +27 (0)82 883 3131  
E [peter.hesseling@cdhlegal.com](mailto:peter.hesseling@cdhlegal.com)

### Quintin Honey

Director:  
Corporate & Commercial  
T +27 (0)11 562 1166  
M +27 (0)83 652 0151  
E [quintin.honey@cdhlegal.com](mailto:quintin.honey@cdhlegal.com)

### Willem Jacobs

Director:  
Corporate & Commercial  
T +27 (0)11 562 1555  
M +27 (0)83 326 8971  
E [willem.jacobs@cdhlegal.com](mailto:willem.jacobs@cdhlegal.com)

### Brian Jennings

Director:  
Corporate & Commercial  
T +27 (0)11 562 1866  
M +27 (0)82 787 9497  
E [brian.jennings@cdhlegal.com](mailto:brian.jennings@cdhlegal.com)

### Rachel Kelly

Director:  
Corporate & Commercial  
T +27 (0)11 562 1165  
M +27 (0)82 788 0367  
E [rachel.kelly@cdhlegal.com](mailto:rachel.kelly@cdhlegal.com)

### Yaniv Kleitman

Director:  
Corporate & Commercial  
T +27 (0)11 562 1219  
M +27 (0)72 279 1260  
E [yaniv.kleitman@cdhlegal.com](mailto:yaniv.kleitman@cdhlegal.com)

### Justine Krige

Director:  
Corporate & Commercial  
T +27 (0)21 481 6379  
M +27 (0)82 479 8552  
E [justine.krige@cdhlegal.com](mailto:justine.krige@cdhlegal.com)

### Dane Kruger

Director:  
Corporate & Commercial  
T +27 (0)21 481 6362  
M +27 (0)74 914 1402  
E [dane.kruger@cdhlegal.com](mailto:dane.kruger@cdhlegal.com)

### André de Lange

Sector Head: Agriculture, Aquaculture  
& Fishing Sector  
Director: Corporate & Commercial  
T +27 (0)21 405 6165  
M +27 (0)82 781 5858  
E [andre.delange@cdhlegal.com](mailto:andre.delange@cdhlegal.com)

### Jaco Meyer

Director:  
Corporate & Commercial  
T +27 (0)11 562 1749  
M +27 (0)83 477 8352  
E [jaco.meyer@cdhlegal.com](mailto:jaco.meyer@cdhlegal.com)

## OUR TEAM

For more information about our Corporate & Commercial practice and services in South Africa and Kenya, please contact:

### Anita Moolman

Director:  
Corporate & Commercial  
T +27 (0)11 562 1376  
M +27 (0)72 252 1079  
E [anita.moolman@cdhlegal.com](mailto:anita.moolman@cdhlegal.com)

### Wayne Murray

Director:  
Corporate & Commercial  
T +27 (0)21 405 6018  
M +27 (0)79 691 0137  
E [wayne.murray@cdhlegal.com](mailto:wayne.murray@cdhlegal.com)

### Francis Newham

Executive Consultant:  
Corporate & Commercial  
T +27 (0)21 481 6326  
M +27 (0)82 458 7728  
E [francis.newham@cdhlegal.com](mailto:francis.newham@cdhlegal.com)

### David Pinnock

Joint Sector Head: Private Equity  
Director: Corporate & Commercial  
T +27 (0)11 562 1400  
M +27 (0)83 675 2110  
E [david.pinnock@cdhlegal.com](mailto:david.pinnock@cdhlegal.com)

### Allan Reid

Director: Corporate & Commercial  
T +27 (0)11 562 1222  
M +27 (0)82 854 9687  
E [allan.reid@cdhlegal.com](mailto:allan.reid@cdhlegal.com)

### Jess Reid

Director:  
Corporate & Commercial  
T +27 (0)11 562 1128  
M +27 (0)83 571 6987  
E [jess.reid@cdhlegal.com](mailto:jess.reid@cdhlegal.com)

### Megan Rodgers

Sector Head: Oil & Gas  
Director: Corporate & Commercial  
T +27 (0)21 481 6429  
M +27 (0)79 877 8870  
E [megan.rodgers@cdhlegal.com](mailto:megan.rodgers@cdhlegal.com)

### Ludwig Smith

Director:  
Corporate & Commercial  
T +27 (0)11 562 1500  
M +27 (0)79 877 2891  
E [ludwig.smith@cdhlegal.com](mailto:ludwig.smith@cdhlegal.com)

### Tamarin Tosen

Director:  
Corporate & Commercial  
T +27 (0)11 562 1310  
M +27 (0)72 026 3806  
E [tamarin.tosen@cdhlegal.com](mailto:tamarin.tosen@cdhlegal.com)

### Roxanna Valayathum

Director:  
Corporate & Commercial  
T +27 (0)11 562 1122  
M +27 (0)72 464 0515  
E [roxanna.valayathum@cdhlegal.com](mailto:roxanna.valayathum@cdhlegal.com)

### Roux van der Merwe

Director:  
Corporate & Commercial  
T +27 (0)11 562 1199  
M +27 (0)82 559 6406  
E [roux.vandermerwe@cdhlegal.com](mailto:roux.vandermerwe@cdhlegal.com)

### Andrew van Niekerk

Head: Projects & Infrastructure  
Director: Corporate & Commercial  
T +27 (0)21 481 6491  
M +27 (0)76 371 3462  
E [andrew.vanniekerk@cdhlegal.com](mailto:andrew.vanniekerk@cdhlegal.com)

### Njeri Wagacha

Partner | Kenya  
T +254 731 086 649  
+254 204 409 918  
+254 710 560 114  
E [njeri.wagacha@cdhlegal.com](mailto:njeri.wagacha@cdhlegal.com)

### Charl Williams

Director:  
Corporate & Commercial  
T +27 (0)21 405 6037  
M +27 (0)82 829 4175  
E [charl.williams@cdhlegal.com](mailto:charl.williams@cdhlegal.com)

### Christelle Wood

Director:  
Corporate & Commercial  
T +27 (0)11 562 1372  
M +27 (0)83 498 2850  
E [christelle.wood@cdhlegal.com](mailto:christelle.wood@cdhlegal.com)

### Emma Hewitt

Practice Development Director:  
Corporate & Commercial  
T +27 (0)11 562 1635  
E [emma.hewitt@cdhlegal.com](mailto:emma.hewitt@cdhlegal.com)

### Alecia Pienaar

Counsel:  
Environmental Law  
T +27 (0)82 863 6279  
E [alecia.pienaar@cdhlegal.com](mailto:alecia.pienaar@cdhlegal.com)

**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

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.

**PLEASE NOTE**

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

**JOHANNESBURG**

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E [jhb@cdhlegal.com](mailto:jhb@cdhlegal.com)

**CAPE TOWN**

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E [ctn@cdhlegal.com](mailto:ctn@cdhlegal.com)

**NAIROBI**

Merchant Square, 3<sup>rd</sup> floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E [cdhkenya@cdhlegal.com](mailto:cdhkenya@cdhlegal.com)

**STELLENBOSCH**

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E [cdhstellenbosch@cdhlegal.com](mailto:cdhstellenbosch@cdhlegal.com)

©2023 12564/AUG