

Mining Charter: Where to from here?

The new Mining Charter is on ice until the outcome of an urgent application for an interdict by the Chamber of Mines. But this is just the first in what is likely to be a protracted review process,

“We currently have two processes running in parallel—an application for an interdict and an application for judicial review,” says Vanessa Jacklin-Levin, partner at Dentons South Africa.



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The Department of Mineral Resources (DMR) has agreed not to move forward on the implementation of the charter in the meantime. Both parties have agreed to the interdict application to be heard in September, which will give the department time to file its answering affidavit in opposition to the interdict application.

If the court grants the interdict, implementation of the charter will remain suspended until the review process is completed. If the interdict is not granted, the department could technically go ahead with implementation—but that would be risky as the review would not be complete by then. It seems unlikely that the department would proceed with implementation of the Charter with the review unconcluded.

Judicial review

The process of judicial review is the chamber’s real goal, and the interdict application is a separate process to obtain interim relief until the review is concluded. The judicial review is based on section 33 of the Constitution, which confers rights to just administrative action, and the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which gives effect to the section 33 rights.

Under the PAJA an application for judicial review must be lodged within 180 days of the applicant's becoming aware of the decision (which would be 15 June, when the charter was published) or from the date on which internal remedies were exhausted. In the normal course the chamber has until 12 December to deliver its affidavit and notice of motion for the review, but in its interdict application it has asked the court to order that the review must be brought within 60 days of the granting of its interdict application.

"We know that the chamber is going to apply for a review because that is specified in its interdict application," she says. "We should understand that the review is not a trial—no oral evidence is led, and the court will simply rely on affidavits from the various parties and heads of argument on the law."

What will the review achieve? The court could declare invalid the minister's decision to promulgate the charter on any of various grounds set out in section 6 of the PAJA. If so, it could order him to reconsider the decision or possibly even replace it with the court's own decision. The PAJA also allows for an order of damages (which may form part of separate proceedings). If the court does find that the charter is the result of unjust administrative action, says Jacklin-Levin, it will most likely order the minister to reconsider the decision and begin the process of consultation all over again.

"Our jurisprudence indicates that the court would substitute its own decision only in exceptional circumstances, and an award of damages in such a matter seems highly unlikely," she says. "But while the review process is likely to be lengthy, and will further delay a new Mining Charter, we should all welcome this evidence that our constitutional system is working – that is, providing a way for disputes such as this to be ventilated and resolved. It's very important that the Mining Charter receives buy-in from all stakeholders, or it simply will not achieve the desired transformation."

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