



**THE RATIONALE FOR STATE CUSTODIANSHIP OF MINERAL RESOURCES UNDER THE  
MPRDA: A CONCEPTUAL ANALYSIS OF EQUITABLE ACCESS TO THE MINING INDUSTRY AND  
BLACK ECONOMIC EMPOWERMENT**

By

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## ABSTRACT

The dissertation investigates the rationale behind the state custodianship of mineral resources in South Africa, as enshrined in the Mineral and Petroleum Resources Development Act (MPRDA) 28 of 2002. This legislative framework marked a significant shift from private to state control over the country's mineral wealth, aiming to correct historical injustices rooted in colonial and apartheid policies. Central to the MPRDA is the pursuit of equitable access to the mining industry and the advancement of Black Economic Empowerment (BEE), which are considered crucial components of the broader socio-economic transformation agenda.

The research provides a theoretical analysis of how the custodianship model functions within the context of South Africa's Constitution, particularly section 25, which mandates the state to use its resources for public interest and social justice. The state's role as custodian is evaluated through its legislative and regulatory actions, focusing on how it facilitates access to mining opportunities for historically disadvantaged groups.

Key aspects of the analysis include the interaction between the MPRDA, the Broad-Based Black Economic Empowerment Act (BBBEEA) 53 of 2003, and the Mining Charter of 2018, which aim to promote economic inclusivity in the mining sector. The study critically assesses whether these policies have successfully transformed the ownership structures of mining enterprises and promoted meaningful black participation in the industry. It highlights the various challenges that persist, including bureaucratic inefficiencies, financial barriers, and fronting practices, which undermine the goals of black economic empowerment.

Methodologically, the dissertation employs a desktop and doctrinal legal research approach. The desktop method involves collecting information from secondary sources such as textbooks, academic journals, dissertations, government statistics, whitepapers, and newspapers. Meanwhile, the doctrinal legal research method utilises primary legal sources such as case law, legislation, and policy documents. The study identifies both the successes and shortcomings of the state custodianship model, particularly the role of the Minister of Mineral Resources in granting mining rights and ensuring that these rights align with the objectives of equitable access and transformation as espoused in the MPRDA.

The dissertation concludes that while progress has been made in transforming the mining industry under state custodianship, significant gaps remain. These include insufficient support for emerging black mining businesses, the limited success of ownership transfers, and the inconsistent application of the Mining Charter due to its nature as policy and not law. The research advocates for more robust regulatory oversight, better financial mechanisms, and more proactive state involvement to ensure that the transformation goals of the MPRDA are fully realised.

## **KEYWORDS**

Mining industry;

State custodianship;

Equitable access;

Historically disadvantaged;

Black economic empowerment;

Emancipation;

Meaningful participation.

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## CHAPTER ONE: INTRODUCTION

### 1.1 INTRODUCTION

South Africa has a rich mining history.<sup>1</sup> For over a hundred years, mining has consistently been one of the key pillars of the country's economy.<sup>2</sup> For instance, between 1970 and 1980,<sup>3</sup> the sector contributed 21 per cent to the country's Gross Domestic Product (GDP).<sup>4</sup> This period is mentioned deliberately because it was considered the peak of the mining industry for the country's economic welfare, where for every R100 injected into the country's economy, R21 came from the mining proceeds.<sup>5</sup> This peak was also characterised by an increased employment rate of more than 760,000 individuals employed in the year 1987, resulting in good turnover and economic growth in the country.<sup>6</sup> As the years progressed from this peak period, between 1970 and 1998, the industry's contribution to the country's economy declined significantly by eleven per cent,<sup>7</sup> and by a further three per cent in 2016, and then from 2016 to 2022 by 0.43 per cent.<sup>8</sup> As of the 2024/25 financial year, mining alongside quarrying has been reported to have contributed around 8.3 per cent to the gross domestic product (GDP), which shows an increase of 0.73 per cent compared to 2022 and presently.<sup>9</sup> Despite the significant decline in the industry's contribution to the country's economy compared to the peak reached in the 1980s,

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<sup>1</sup> Elmarie Van Der Schyff 'South African mineral law: A historical overview of the State's regulatory power regarding the exploitation of minerals' (2012) 64 *New Contree* 132; F T Cawood & R C A Minnitt 'A historical perspective on the economics of the ownership of mineral rights' 1998 *The Journal of Southern African Institute of Mining and Metallurgy* 369.

<sup>2</sup> Linda Muswaka 'An analysis of the legislative framework concerning sustainable mining in South Africa' (2017) 31 *Speculum Juris* at 17.

<sup>3</sup> According to Stats SA, the period 1970 to 1980 marks the highest contribution that mining has ever made to the Gross Domestic Product in all its history in South Africa. See Stats SA 'Mining: A brief history' available at <https://www.statssa.gov.za/?p=9720>, accessed 23 March 2023.

<sup>4</sup> Stats SA 'Mining: A brief history' available at <https://www.statssa.gov.za/?p=9720>, accessed 23 March 2023; Elmarie Van Der Schyff 'South African mineral law: A historical overview of the State's regulatory power regarding the exploitation of minerals' (2012) 64 *New Contree* 132; Talifhani Khubana Chantal Rootman & Elroy Eugene Smith 'Antecedents of shared value: Perceptions within the South African mining industry' (2022) 19 *The Journal of Contemporary Management* 132-67; Ofentse Marutle & Olebogeng David Raw 'The significance of mining infrastructural development on South African economy from 1980 – 2013: An economic centric approach' (2017) 9 *The Journal of Economics and Behavioural Studies* 73-81; Bill Freund 'The significance of the minerals-energy complex in the light of South African economic historiography' (2009) 71 *Transformation* 3-25.

<sup>5</sup> Stats SA op cit note 3; Khubana et al. op cit note 4. This means that for every R100 produced in South Africa, 21 per cent of each R100 came from the mining industry.

<sup>6</sup> Ibid Stats SA; Temitope LA Leshoro 'Does economic growth lead employment in South Africa?' (2013) 5 *The Journal of Economics and Behavioural Studies* at 336-339; Duncan Hodge 'Growth, employment and unemployment in South Africa' 30 March 2009 at 7-8, available at <https://econrsa.org/wp-content/uploads/2022/06/wp119.pdf>, accessed 21 November 2024.

<sup>7</sup> Stats SA op cit note 6.

<sup>8</sup> Ibid; Dieketseng Maleke 'Mineral production achieved high production value in 2022: Mineral's Council of South Africa' IOL available at <https://www.iol.co.za/business-report/companies/mineral-production-achieved-high-production-value-in-2022-minerals-council-of-south-africa-8aa4deca-bc34-43d1-9338-ab6fcd45b6b0>, accessed 11 April 2023.

<sup>9</sup> Trading Economics 'South Africa GDP and growth rate' available at <https://tradingeconomics.com/south-africa/gdp-growth>, accessed 25 November 2024.

statistics and scholarship show that the mining industry continues to play a significant role in the economic welfare of the country and its citizens.<sup>10</sup>

Nevertheless, a greater proportion of the country's population has derived very little to no benefit from the economic contributions. The study problematises exactly this issue. South Africa continues to be one of the most unequal societies in the world, plagued by various forms of socio-economic and cultural injustices, and stricken by severe poverty that ravages mainly the black communities.<sup>11</sup> Reasons for all these are wide and ranging, but this study laments the structural exclusion and gate-keeping against the disadvantaged black majority from mainstream economic activity (ie mining for present purposes).<sup>12</sup> There is no gainsaying that trends such as these are forces that render the country extremely unequal and exclusionary as it is presently, especially on matters concerning the socio-economic development and emancipation of the previously disadvantaged.<sup>13</sup> Further, this phenomenon is exacerbated by factors such as lack of access to key productive resources, including quality education, skills set needed for a particular industry, and inequality of opportunity when race is included in the picture.<sup>14</sup> The cause of the exclusion and inequality is primarily due to the colonial regime,<sup>15</sup> which spanned from the middle of the seventeenth century to the twentieth century and saw the birth of the Union of South Africa early in the twentieth century (ie in 1910).<sup>16</sup> Following the Union, the apartheid regime came into force in 1948, and it intensified the exclusion and inequality.<sup>17</sup> During the colonial and apartheid periods, a major factor that fuelled exclusion was the limited access to land for black communities due to land dispossession and discriminatory apartheid laws, which rendered many black people landless and without ownership rights.<sup>18</sup> The system of regulation that applied during the colonial period continued into the Union of

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<sup>10</sup> Johannes Fedderke & Farah Pirouz 'The role of mining in the South African economy' (2002) 5 *SAJEMS* at 4; N V Moraka & M Jansen Van Rensburg 'Transformation in the South African mining industry – looking beyond the employment scorecard' (2015) 115 *The Journal of the Southern African Institute of Mining and Metallurgy* at 669; Linda Muswaka 'An analysis of the legislative framework concerning sustainable mining in South Africa' (2017) 31 *Speculum Juris* at 17; Jodi Lyndall Pelders *Tired of socio-economic stress: Socio-demographic contributors to fatigue of mine workers in South Africa* (unpublished PhD thesis, University of the Witwatersrand, 2020) at 5.

<sup>11</sup> Black communities should be considered Black, Indian, and Coloured people. Further, they will be referred to as Blacks interchangeably, considering the context and manner of grammar and syntax.

<sup>12</sup> Reene Horne 'Patterns of empowerment and disempowerment in the South African mining sector' (2017) 9 *African Review of Economics and Finance* 3 at 8-9.

<sup>13</sup> The World Bank 'New World Bank report assesses sources of inequality in five countries in Southern Africa' <https://www.worldbank.org/en/news/press-release/2022/03/09/new-world-bank-report-assesses-sources-of-inequality-in-five-countries-in-southern-africa>, accessed 21 September 2023.

<sup>14</sup> *Ibid.*

<sup>15</sup> Mariusz Lukasiewicz 'Republics, revolutions and racialisation: The South African Republic at the 1889 Paris Exposition Universelle' (2024) 69 *Historia* at 45-9; Francis Wilson 'Minerals and migrants: How the mining industry has shaped South Africa' (2001) 130 *JSTOR* at 103-04.

<sup>16</sup> Erna Olivier & Willem H Olivier 'The colonisation of South Africa: A unique case' (2017) 73 *Theological Studies* at 1 & 4.

<sup>17</sup> Margot Strauss 'A historical exposition of spatial injustice and segregated urban settlement in South Africa' (2019) 25 *Fundamia* at 155.

<sup>18</sup> *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd* [2014] (3) SA 603 (CC) paras 3 & 13; Leepo Modise 'The Natives Land Act of 1913 engineered the poverty of Black South Africans: a historico-ecclesiastical perspective' (2013) 39 *Studia*

South Africa, albeit there was a gradual change in it; it adapted to serve the needs of the Union better.<sup>19</sup> Furthermore, the Roman-Dutch principle of *cuius est solum eius est usque ad coelum et usque ad inferos*<sup>20</sup> bolstered the exclusion of those who were without land because it meant that the land and what is beneath and above it, as well as its fruits thereof, belonged to the owner.<sup>21</sup> Mathiba holds that, intrinsically, mining rights were bound to the ownership of the land in which the minerals were embedded, both in and under, in terms of the South African mining jurisprudence at the time.<sup>22</sup> This legal position gained more consideration during the Dutch era when the Cape became its colony in 1652.<sup>23</sup> The application of this property law principle meant that the owner of the land was considered not only the owner of the surface but also the proceeds of the land, which extended to the space below and above.<sup>24</sup> Automatically, the ownership of the soil vested the benefits derived from mining rights in the landowner according to the principle.<sup>25</sup> Hence, there was a compelling recognition of private property rights over the minerals so concerned.<sup>26</sup>

In contrast, the emergence of a constitutional dispensation in 1994 brought about significant changes that saw, amongst other things, the promulgation of the Mineral and Petroleum Resources Development Act (from now on referred to as the MPRDA),<sup>27</sup> later in 2002, which introduced the vesting of the country's mineral resources under the state's custody.<sup>28</sup> At its core, the constitutional dispensation envisions a society founded on social justice, equality, socio-economic development, and the creation of opportunities for all previously underprivileged South Africans to participate fully in economic industries that will improve their livelihoods.<sup>29</sup> Thus, the passing of legislative instruments such as the MPRDA, as an example, seeks to answer the question

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*Historiae Ecclesiasticae* at 1-11; Dylan Anton Sparks 'Land in South Africa: Dispossession, constitutionalism, political expediency' (2019) 223 *Senior Projects Spring* at 5-6 & 9-33; Eraste Nyirimana 'Land rights, landlessness and political unrest in the United Monarchy of Israel: Reading 1 Samuel 22:1-8 from the perspective of struggle for land ownership in Southern Africa' (2014) 113 *Scriptura: Journal for Contextual Hermeneutics in Southern Africa* 1-16; Rick de Satge 'Double dispossession? A history of land and mining in South Africa's former homelands' 28 April 2022, available at <https://storymaps.arcgis.com/stories/69cef24d9dc0477a8f20125f2010bc34>, accessed 02 October 2024.

<sup>19</sup> Hanri Mostert *Mineral Law: Principles and Policies in Perspective* (2012) 20.

<sup>20</sup> This principle means that the landowner owns everything on the surface and below the piece of land that he or she owns, including minerals. Because of this principle, common law dictated that the right to prospect for, mine, and dispose of base minerals solely belonged to the landowner. See *Minister of Minerals and Energy v Agri South Africa* (458/2011) [2012] ZASCA 93 para 61.

<sup>21</sup> Cawood & Minnitt op cit note 1 at 370.

<sup>22</sup> Gaopalelwe Mathiba *Towards a meaningful engagement approach to mining-induced displacements in South Africa: A legal comparative perspective* (unpublished PhD thesis, University of Cape Town, 2023) at 132.

<sup>23</sup> Mathiba op cit note 22.

<sup>24</sup> *Ibid*; The Law Quarterly Review 'Cuius est solum eius est usque ad coelum usque ad inferos' (1931) 47 *Law Quarterly Review* at 14.

<sup>25</sup> *Minister of Minerals and Energy v Agri South Africa* supra note 20.

<sup>26</sup> Mathiba op cit note 22.

<sup>27</sup> Mineral and Petroleum Resources Development Act 28 of 2002.

<sup>28</sup> Hugh Macmillan 'Plus ça change? Mining in South Africa in the last 30 years – an overview' (2017) 44 *Review of African Political Economy* 272 at 277.

<sup>29</sup> Mark Heywood 'Economic policy and the socio-economic rights in the South African Constitution, 1996-2021: Why don't they talk to each other?' (2021) 11 *Constitutional Court Review* at 2-9 (own emphasis).

of transformation, healing the divisions of inequality and social injustice, and elevating the underprivileged in most of South Africa's population.

With the above information in mind, this study examines the rationale for the state custodianship of South Africa's mineral and petroleum resources. In doing this, the study traces the historical background and exploration of how the regulation of mineral rights evolved over the years and the motivations for consolidating state control in the form of the state custodianship model. The historical context is crucial for understanding how legislative reforms have been developed in response to historical injustices and the marginalisation of black communities in the mineral resource sector. The state's role as custodian of mineral resources is evaluated in terms of policy demands, among others, to ensure equitable distribution of resources and the contribution to broader national development initiatives, including community development, creation of wealth, and employment required for the empowerment of communities.<sup>30</sup> The other aspect of the study is to investigate whether equitable access and black economic empowerment as transformative powers have been utilised to their full potential in South Africa and whether this has resulted in any improvement of the system towards black passengers. This investigation includes a brief analysis of the barriers that continue to hinder meaningful participation by historically marginalised groups, such as bureaucratic hurdles, fronting practices, lack of meaningful participation in the mining sector by blacks, insufficient financial support and mineral beneficiation, and lack of access to relevant expertise and networks. Additionally, the research evaluates the efficacy of the various regulatory instruments and policy interventions that have been put in place, such as the Mining Charter, among other transformation-oriented initiatives. The study also assesses whether the model of state custodianship has been effective in facilitating equitable access to mineral resources and promoting black economic empowerment as a transformative measure. The discussion explores how the state's custodial role has been operationalised, examining both policy successes and areas where implementation has faltered. In this regard, the proposed research will discuss the current mining sector practice, considering the objectives of the MPRDA regarding equitable access and black economic empowerment, with the aid of scholarly work and case law.

## **1.2 BACKGROUND**

Since its beginning in the second half of the nineteenth century, the South African mining industry has been defined by colonisation, racial exploitation, and discrimination, limiting black communities' ability to benefit from

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<sup>30</sup> The *White Paper for A Minerals and Mining Policy for South Africa* (GN 2359 in GG 19344 of 20 October 1998) para 1.1.3.2; F T Cawood & R C A Minnitt 'Identification and distribution of mineral rents in southern Africa' (2002) *The Journal of the South African Institute of Mining and Metallurgy* at 290-1 & 294.

and participate fully in mining through to the twentieth century.<sup>31</sup> Furthermore, laws such as the Precious Stones Act (PSA)<sup>32</sup> and the Mining Rights Act (MRA)<sup>33</sup> further excluded black (or Bantu) people from obtaining prospecting and mining rights, placing these rights under state control, except in homeland areas where they were held in trust by the South African Bantu Trust.<sup>34</sup> In 1969, the Bantu Mining Corporation was instituted to guide the exploitation of black and white homeland resources.<sup>35</sup> The Corporation was initially tasked with overseeing existing mining operations and representing African individuals and communities in their dealings with white-owned companies.<sup>36</sup> Its mission included promoting black ownership in mining and preparing Africans to manage some mineral firms independently.<sup>37</sup> However, throughout its brief existence, the Corporation primarily enabled white mining companies to exploit mineral resources within the homelands.<sup>38</sup> The emergence of the apartheid regime, which spanned from the years between 1948 and 1994, did more to benefit the white minority population through the privatisation of mineral resources as was provided by the Minerals Act,<sup>39</sup> temporarily until the constitutional dispensation.<sup>40</sup> The exclusion from partaking in the mining activities was characterised by limited or no mining rights given to the blacks and no ownership entitlements in the industry,<sup>41</sup> amongst other things, except for those in the homelands.<sup>42</sup> Describing this position, Mogoeng CJ (as he was) stated that though South Africa has been richly endowed with minerals, the apartheid architecture placed 87 per cent of the mineral resources and the land in the hands of only thirteen per cent of the population.<sup>43</sup> He went on to state that the black majority is still in abject poverty due to unemployment, while the white minorities overwhelmingly hold economic power.<sup>44</sup> This is primarily because blacks are unable to benefit directly from the exploitation of mineral resources, as issues of landlessness, exclusion, and poverty still confront them.<sup>45</sup>

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<sup>31</sup> Cawood & Minnitt op cit note 1 at 370-2.

<sup>32</sup> The Precious Stones Act 73 of 1964.

<sup>33</sup> The Mining Rights Act 20 of 1967.

<sup>34</sup> Mostert *Mineral Law: Principles and Policies in Perspective* 51.

<sup>35</sup> Jeffrey Butler Robert I Rotberg & John Adams *The Black Homelands of South Africa: The political and economic development of Bophuthatswana and Kwazulu* ed (2006) 216.

<sup>36</sup> Butler et al. op cit note 35.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> 50 of 1991.

<sup>40</sup> Cawood & Minnitt op cit note 1 at 371; Sixta R Kilambo 'Black economic empowerment policy and the transfer of equity and mine assets to Black people in the South Africa's mining industry' 2021 *South African Journal of Economic and Management Sciences* at 2; S Du Plessis 'Nationalising South African mines: an economic asset' (2013) 113 *Journal of the Southern Institute of Mining and Metallurgy* 31.

<sup>41</sup> The PSA and the MRA promoted this. See note 34 above.

<sup>42</sup> *Agri SA* supra note 20 para 1.

<sup>43</sup> *Agri SA* supra note 42.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

From 1948 to 1994, some movements and changes served as forerunners of democracy. In 1955, the Freedom Charter<sup>46</sup> was drafted and adopted following its moot at the annual congress of the African National Congress (ANC) in the year 1953.<sup>47</sup> The Freedom Charter provided that the wealth of South Africa is the common heritage of all its people and should be restored to them.<sup>48</sup> Furthermore, the Charter indicated that '[t]he mineral wealth beneath the soil, the banks, and the monopoly industry shall be transferred to the ownership of the people as a whole.'<sup>49</sup> This was aimed at addressing the issue of exclusion due to colonial rule and the 1960s' legislation, as seen in the previous paragraph, and privatisation, which vested the mineral resources in private entities and landowners, predominantly white, as the Minerals Act provided.<sup>50</sup>

Following the preceding developments in the political and legal spheres of the country was the culmination of democracy in 1994, which brought significant changes leading to the birth of the MPRDA in 2002 and the Broad Based-Black Economic Empowerment Act (BBBEEA)<sup>51</sup> in 2003, with the sole purpose of redressing past injustices that took place regarding the subject at hand (ie equitable access to and black economic empowerment in the mining industry under the custodianship model). Consequently, the Mining Charter<sup>52</sup> of 2004 was prepared, and subsequently, the Mining Charter<sup>53</sup> of 2018, and the latter is currently operational. The 2018 Mining Charter seeks to give effect to section 9 of the Constitution which advocates for equality, and to section 100(2)(a) of the MPRDA, which necessitates the achievement of the government's objectives of redressing past injustices. Furthermore, the Charter seeks to harmonise the transformation policies of the government.

This redress was to happen through the mechanism of state custodianship of South Africa's minerals under the state, as shown in section 3(1) of the MPRDA. Different views exist regarding what is entailed by custodianship,<sup>54</sup> but for this discussion, custodianship should be understood as the vesting of the minerals of the country in the state for purposes of enjoyment and accessibility to all South Africans, and the state being a conduit facilitator of the redress mechanisms in compliance with the MPRDA.<sup>55</sup> In *Bengwenyama Minerals (Pty)*

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<sup>46</sup> The Freedom Charter of South Africa of 1955.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Section 5(1) of Act 50 of 1991; H M van den Berg 'Ownership of minerals under the new legislative framework for mineral resources' (2009) 1 *Stellenbosch Law Review* 139 at 140.

<sup>51</sup> The Broad-Based Black Economic Empowerment Act 53 of 2003.

<sup>52</sup> GN 1639 GG 26661 13 August 2004.

<sup>53</sup> GN 1002 GG 41934 27 September 2018.

<sup>54</sup> See P J Badenhorst 'Ownership of minerals in situ in South Africa: Australian darning to the rescue?' 2010 *SALJ* 646 at 655-61; Elmarie Van Der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act of 2002* (unpublished LLD-dissertation, North West University, 2007) at 234-44; H M Van Den Berg op cit note 50 at 139-58.

<sup>55</sup> *Agri South Africa* supra note 20 para 68.

*Ltd v Genorah Resources (Pty) Ltd*,<sup>56</sup> the Constitutional Court indicated that the broader purpose of the Act, in its custodial framework, aims to drive transformation and empower historically disadvantaged individuals by entrusting the Minister with the responsibility of granting mining rights and fostering the expansion of equitable access to opportunities.<sup>57</sup>

Against this background, the present discussion examines the nature of custodianship as established under the MPRDA, with particular attention to the context in which the concept of custodianship stems, its aims, and its significance within the South African mining landscape. It further explores the implications of custodianship on equitable access to mineral resources and the advancement of black economic empowerment. In doing so, the analysis evaluates the state's role as custodian, focusing on its effectiveness in facilitating transformation in the sector by examining equitable access to mining opportunities, the advancement of black economic empowerment, and any existing gaps in policy or implementation.

### 1.3 RESEARCH QUESTION

The enactment of the MPRDA and the BBBEEA and the preparation of the Charters (the 2004 and 2018, respectively) mentioned above served as transformative instruments for redressing inequality, lack of equitable access in the mining sector, and the economic empowerment of black communities who suffered under the colonial and apartheid regimes. This was deemed an important action by the state as it depicts the intention sought by transformative constitutionalism. Transformative constitutionalism is a constitutional agenda that aims to build a South Africa that espouses substantial social justice and addresses political and economic realities.<sup>58</sup> It underscores the commitment to redress the past ills and imbalances in the socio-economic and political spheres due to discrimination and unequal opportunities offered to black and white South Africans, respectively.<sup>59</sup> Access to mining as an economic property in South Africa remains a conundrum for the historically disadvantaged (ie the black communities), considering equitable access to mining and black economic empowerment. As mentioned previously in the introduction above and as will be seen in chapters three and four, some systemic and technical issues impede the accessibility of mining to black South Africans.<sup>60</sup> From this angle, the research study seeks to examine the rationale for state custodianship and its effectiveness in promoting black economic empowerment and equitable access to mining. The study asks one main question, accompanied by two sub-questions, namely:

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<sup>56</sup> *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC).

<sup>57</sup> *Bengwenyama* supra note 56 para 31.

<sup>58</sup> Mashele Rapatsa 'Transformative Constitutionalism in South Africa: 20 years of democracy' (2014) 5 *Mediterranean Journal of Social Sciences* at 887.

<sup>59</sup> *Ibid* (own emphasis).

<sup>60</sup> See part 1.1 above.

What is the rationale for adopting state custodianship of mineral resources in South Africa?

- (i) To what extent has equitable access to and black economic empowerment within the South African mining sector evolved, considering the historical context and current policies governing the state's custodial holding of mineral resources?
- (ii) Has the adoption of the custodianship model effectively facilitated equitable access to South Africa's mineral resources and promoted black economic empowerment as a measure of transformation?

#### **1.4 RESEARCH AIMS AND OBJECTIVES**

This research examines the rationale behind the state custodianship of South African minerals, focusing on two imperatives, ie, equitable access to mining and black economic empowerment. The reason for this is to look at the intended purpose of equitable access to mining and black economic empowerment through the custodianship of South African mineral resources to assess the achievement of such purpose and the measures to be employed in achieving it.

The objectives of this research are to:

- (i) Examine the notion of equitable access to mining under the state custodial model of holding mineral resources for the state.
- (ii) Examine the promotion of black economic empowerment under the state custodial holding model of mineral resources.
- (iii) Examine the role that the state ought to play in promoting equitable access to mining and the realisation of black economic empowerment in the mining sector through custodianship and its effectiveness.

#### **1.5 METHODOLOGY**

The study combines both desktop research and doctrinal legal research methodologies. The desktop research methodology, also commonly termed a low-cost technique, involves collecting information from secondary sources such as textbooks, academic journals, dissertations, government statistics, whitepapers, and newspapers, among others.<sup>61</sup> The doctrinal legal research methodology, on the other hand, aims to synthesise legal norms and advance legal doctrines for the legal community by establishing legal rules and principles, and

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<sup>61</sup> Katarzyna Turon & Andrzej Kubik 'Business innovations in the new mobility market during the COVID-19 with the possibility of open business model innovation' (2021) 7 *Journal of Open Innovation: Technology, Market and Complexity* 1-21; B2 International 'An introduction to research methodologies' at 59-61, available at [https://www.b2binternational.com/assets/ebooks/mr\\_guide/04-market-research-ch4.pdf](https://www.b2binternational.com/assets/ebooks/mr_guide/04-market-research-ch4.pdf), accessed 19 June 2024.

applying them to specific factual contexts.<sup>62</sup> It uses and analyses primary sources of law such as legislation, case law, and policy documents, including but not limited to the Freedom and Mining Charters, for the present study.<sup>63</sup>

## **1.6 LIMITATIONS OF THE STUDY**

The study combines desktop research and doctrinal legal research methodologies, as explained in the preceding section. As a result, this study is non-empirical, meaning that it does not use methods of experimentation, interviews, surveys, and other related methods of collecting data in field research. Instead, this study relies on theoretical analysis and existing literature to address the research question. It must be stressed that because the study is non-empirical, it is no less significant as conceptual developments can be of help in shaping policy considerations and wide-ranging technical issues that need to be addressed in developing the law<sup>64</sup> to serve the transformation agenda that is envisioned by the Constitution.

The issues surrounding equitable access to the mining industry and black economic empowerment are wide-ranging, and as a result, it is impossible to cover everything in this miniature study. Instead, this study focuses on gaining a deeper understanding of what equitable access to the mining industry entails and its relationship with black economic empowerment under the custodianship model. This exploration is framed within the context of transformative constitutionalism, a foundational aspect of our democracy, particularly regarding the socio-economic development of marginalised black communities. Consequently, a few areas have been selected for analysis, such as fronting practices, beneficiation, ministerial discretion in granting mining rights, deracialisation of ownership and transfer of equity and mining assets, meaningful participation, and community development, among others, and how these relate to the success and failures of the two imperatives studied (ie equitable access and black economic empowerment).

## **1.7 CHAPTER OUTLINE**

### **1.7.1 Chapter 1: INTRODUCTION**

This chapter gives the background and context and outlines the purpose of the research study.

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<sup>62</sup> Nasir Majeed Amjad Hilal & Arshad Nawaz Khan 'Doctrinal research in law: Meaning, scope and methodology' (2023) 12 *Bulletin of Business and Economics Journal* at 559-560; Mkhululi Nyathi 'Re-asserting the doctrinal legal research methodology in the South African Academy: Navigating the maze' (2023) 140 *SALJ* at 367.

<sup>63</sup> Nyathi op cit note 62 at 373-7.

<sup>64</sup> Tom Ginsburg & Nicholas Stephanopoulos 'The concepts of law' (2017) 84 *The University of Chicago Law Review* at 147-50 (own emphasis).

## **1.7.2 Chapter 2: THE LEGISLATIVE FRAMEWORK REGULATING STATE CUSTODIANSHIP OF MINERAL AND PETROLEUM RESOURCES**

This chapter will examine the rationale for custodianship in the South African MPRDA, as well as its adoption, importance, and significance towards the transformation of the mining sector.

## **1.7.3 Chapter 3: EQUITABLE ACCESS TO THE MINING SECTOR THROUGH THE LENS OF BLACK ECONOMIC EMPOWERMENT**

This chapter will examine the relationship between equitable access and black economic empowerment in the mining industry under the custodianship holding model of South Africa's legislative framework (ie the MPRDA, the BBEEA, and the Mining Charter). The chapter focuses on how equitable access and black economic empowerment in the mining industry ought to be perceived and fulfilled. The chapter discusses some of the mechanisms that the state has employed to create a conducive environment for promoting equitable access to and black economic empowerment in the mining sector and its industries. Further, the chapter highlights a few issues that impede the achievement of the two imperatives.

## **1.7.4 Chapter 4: TRACING THE PROGRESS OF TRANSFORMATION REGARDING EQUITABLE ACCESS TO AND BLACK ECONOMIC EMPOWERMENT IN SOUTH AFRICA'S MINING SECTOR**

The chapter will examine the effectiveness of the custodial holding model, as adopted by the State, in promoting black economic empowerment and facilitating equitable access to South Africa's mineral resources. The chapter does this by examining the extent to which access to mineral resources and black economic empowerment has been achieved by the state in the mining industry and identifying the gaps that exist in the legislative framework.

## **1.7.4 Chapter 5: CONCLUSION**

This chapter will conclude the discussions in the previous chapters and make recommendations.

## **1.8 CONCLUSION**

Mining has long been vital to South Africa's economy, forming a foundation of the country's wealth and economic stability. However, this prosperity has historically benefited certain groups over others, particularly due to the exclusionary practices established during colonialism and apartheid. In response, the state's adoption of custodianship over mining resources represents a commitment to transforming the mining industry and redressing past discriminatory and exclusionary measures. Through policies aimed at equitable access and black economic empowerment, the state seeks to ensure that the wealth generated by mining benefits a broader segment of society.

Given this position, the state's role as custodian must be closely monitored to uphold its responsibility in expanding access to mining opportunities and empowering black communities. While challenges remain in fully realising access and empowerment, there is still meaningful potential for progress, as explored in later sections of this work.

## CHAPTER TWO: THE LEGISLATIVE FRAMEWORK REGULATING STATE CUSTODIANSHIP OF MINERAL AND PETROLEUM RESOURCES

### 2. 1 INTRODUCTION

The South African mineral law regime finds its foundation in the Constitution.<sup>1</sup> The Constitution is the source of all legislative frameworks associated with mineral resources because of its supremacy, and renders any law or conduct inconsistent with its provisions invalid.<sup>2</sup> Section 25 of the Constitution, often referred to as the 'property clause', makes provision for the expropriation of property by the state to advance a public purpose or interest.<sup>3</sup> The public interest imperative encompasses the nation's commitment to land reform and other reforms that perpetuate and promote accessibility to all of the country's natural resources, including but not limited to mineral and petroleum resources.<sup>4</sup> In this regard, the state is constitutionally required to take reasonable legislative measures, inter alia, within its available resources to create conditions conducive to the enablement of its citizens to access land on equitable grounds.<sup>5</sup> The section brings to attention that natural resources as economic property are to be accessed on an equitable basis.<sup>6</sup> As pointed out in chapter one,<sup>7</sup> the provisions of section 25 were enacted to ensure that the new mineral law regime is congruent with the aspirations of the Constitution as far as economic and social transformation are concerned. Consequently, the Mineral and Petroleum Resources Development Act (MPRDA)<sup>8</sup> was enacted in 2002 and came into operation in 2004 as the primary legislation of South African minerals, subservient only to the Constitution.<sup>9</sup>

Considering this background, chapter two seeks to explore the legislative framework of South Africa with respect to the regulation of state custodianship of mineral resources. To undertake such exploration, the MPRDA will be considered in light of its functional elements and purpose as far as the custodianship of minerals is concerned. Furthermore, other instruments such as the Mining Charter and Minerals and Mining Policy will be considered as they play a role in the regulation of the nation's mineral and petroleum resources through state custodianship.

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<sup>1</sup> Constitution of the Republic of South Africa 1996.

<sup>2</sup> See sections 2 and 39(2) of the Constitution.

<sup>3</sup> Section 25(2)(a) of the Constitution.

<sup>4</sup> Section 25(4)(a) of the Constitution (own emphasis).

<sup>5</sup> Section 25(5) of the Constitution (own emphasis).

<sup>6</sup> *Ibid* (own emphasis).

<sup>7</sup> See parts 1.1 & 1.2 of chapter one above.

<sup>8</sup> The Mineral and Petroleum Resources Development Act 28 of 2002.

<sup>9</sup> J D Van Der Vyver 'Nationalisation of mineral rights in South Africa' (2012) *De Jure* at 125-6 (own emphasis).

## 2.2 THE CONSTITUTIONAL SETTING REGARDING STATE CUSTODIANSHIP OF SOUTH AFRICAN MINERALS

The Constitution serves as the first point of departure in matters pertaining to South Africa's mineral resources.<sup>10</sup> As such, it is important to establish the purpose of its pre-eminence to have a broadened understanding and appreciation of custodianship as a model of mineral holding.<sup>11</sup> The underlying objective of state custodianship is that economic and social development can be possible for every South African, especially those who were historically disadvantaged.<sup>12</sup> The country is the most unequal society when it comes to socio-economic development.<sup>13</sup> The transformative nature of the Constitution ensures that South African citizens have an equal opportunity to their 'entitled rights, privileges, and benefits of citizenship'<sup>14</sup> including but not limited to mineral resources through custodianship.<sup>15</sup>

The intent through which the custodial model has been introduced is in keeping with the demands of section 25(4)(a) of the Constitution. The section compels the state to find legislative measures and other means that can be employed to achieve the purpose of equal access to mining as a means of promoting the economic and social development of the South African people.<sup>16</sup> Owing to the progressive nature of the Constitution, these measures became a necessity in bridging the gap caused by spatial and racial segregation, which propelled the continuation of unequal opportunities and socio-economic benefits provided by the mining industry.<sup>17</sup> To realise fairness and equitable access, the MPRDA was enacted with the foregoing principles to ensure that the state is the custodian of South Africa's mineral resources and that everyone gets to benefit from the optimal exploitation thereof to achieve economic emancipation of the historically disadvantaged groups.<sup>18</sup>

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<sup>10</sup> Section 2 of the Constitution (own emphasis).

<sup>11</sup> The pre-eminence of the Constitution as the bedrock of any policy or law adopted is crucial because it shows the state's direction, considering our past. It is essential to start from our founding document to fully understand the intent of legal reform taken in the mining space and other areas.

<sup>12</sup> Section 1 of the MPRDA defines historically disadvantaged persons as those belonging to a community that was previously subjected to unfair discrimination before the Constitution came into force. These persons are Blacks, Coloureds, and Indians.

<sup>13</sup> The World Bank 'New World Bank report assesses sources of inequality in five countries in Southern Africa' available at <https://www.worldbank.org/en/news/press-release/2022/03/09/new-world-bank-report-assesses-sources-of-inequality-in-five-countries-in-southern-africa>, accessed 21 September 2023.

<sup>14</sup> Section 3(2) of the Constitution.

<sup>15</sup> *Agri South Africa v Minister for Minerals and Energy* CCT51/12 [2013] ZACC 9 para 2.

<sup>16</sup> Yazini April 'An analysis of the Mineral and Petroleum Resources Development Act 28 of 2002, and the Nationalisation of Minerals debate in South Africa' (2012) 42 *Africa Insight* at 119.

<sup>17</sup> *Agri South Africa* supra note 15; April op cit note 16.

<sup>18</sup> *Agri South Africa* supra note 15; April op cit note 16 at 118-19.

September-Van Huffel notes that the custodianship model ought to be informed and consistent with the Constitution in all respects; that it is a 'stewardship ethic'<sup>19</sup> aimed at enhancing democracy through public participation of interested and affected parties by way of 'consultation and collaboration.'<sup>20</sup> Subsequently, public participation in the mining industry or elsewhere lies at the core of democracy in that it allows those acting on behalf of the state to be held accountable for what they decide to do with the nation's mineral and petroleum resources.<sup>21</sup> Public participation fosters the proper carrying out of the duty posed on the state actors in that the core values of our democracy, as expounded in the Constitution regarding equality, openness, and non-discrimination, are firmly established.<sup>22</sup>

### **2.3 CUSTODIANSHIP UNDER THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT 28 OF 2002**

The MPRDA can be viewed as a transformative legal instrument regarding the regulation of South African mineral and petroleum resources.<sup>23</sup> This view is informed by the objectives and commitment of the Act as found in its preamble and section 2, highlighting the affirmation of the state's commitment to ensure equitable access to mineral and petroleum resources of South Africa. With the commitment to ensure equitable access to mining, the MPRDA seeks to achieve socio-economic transformation. In so doing, the Act commits to the substantial and meaningful expansion of opportunities for the historically disadvantaged to benefit from the exploitation of mineral and petroleum resources.<sup>24</sup> The commitment is manifested through promoting economic growth, social welfare, and employment and security of tenure as one of the key constitutional objectives regarding socio-economic concerns and rights.<sup>25</sup>

Moreover, the MPRDA seeks to promote the right to a healthy environment and sustainable development that is justifiable in its quest to achieve socio-economic development, through legislative and other measures that ensure environmental and ecological conservation.<sup>26</sup> To ensure that these objectives come to fruition, the concept of state custodianship has been introduced in the MPRDA, and it brought 'fundamental

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<sup>19</sup> This terminology can be understood as a philosophy that emphasises management, usage, and care of resources on behalf of a certain group of individuals in pursuit of wealth creation that will last long. See Cam Caldwell Linda A Hayes Ranjan Karri & Patricia Bernal 'Ethical stewardship – implications for leadership and trust' (2008) 78 *Journal of Business Ethics* at 153.

<sup>20</sup> Anthea-Lee September Van Huffel *A critical analysis of state custodianship and its implications for the South African property regime* (unpublished PhD thesis, University of Free State, 2022) at 58.

<sup>21</sup> Van Huffel op cit note 20 at 59.

<sup>22</sup> Ibid; Section 9(2) & (3) of the Constitution.

<sup>23</sup> Ibid at 11.

<sup>24</sup> Section 2(c) of the MPRDA.

<sup>25</sup> Van Huffel op cit note 20 at 101.

<sup>26</sup> Section 24(a)-(b); Van Huffel op cit note 20 at 101-2.

changes to [how] rights in mineral and petroleum resources may be acquired, held, and exploited.<sup>27</sup> The transformative nature of the MPRDA through custodianship is further bolstered by the fact that when it came into operation, it repealed the Minerals Act,<sup>28</sup> which, through some of its provisions, provided for a 'private property-law-based system of mineral regulation.'<sup>29</sup>

State custodianship is entrenched in section 3 of the MPRDA. The section states that the state is the custodian of the country's natural resources, which are composed of minerals and petroleum for the benefit of South African citizens, and that these resources are a common heritage to the people of South Africa.<sup>30</sup> This means that the state, in a statutorily defined manner, controls and regulates the usage of and accessibility to rights relating to the country's mineral and petroleum resources, and it also oversees the exercise of individual and community rights in the mineral and petroleum resources so defined.<sup>31</sup> In this regard, the Minister of Minerals and Energy (Minister), as defined in section 1 of the Act, is authorised in terms of section 3(2) of the Act with the power to administer, grant, control, refuse, and issue licences for the extraction of minerals.<sup>32</sup> The licenses include a retention permit, a mining permit, a mining right, a prospecting right, a technical cooperation permit, a reconnaissance permit, and an exploration and production right.<sup>33</sup>

Consequently, the state, through the Minister, acts as custodian of the nation's mineral and petroleum resources, as the latter is often given discretion by applicable laws *ex officio*<sup>34</sup> to see to it that accessibility, beneficiation, and active participation by the historically disadvantaged groups in the mining industry become a reality.<sup>35</sup> Acting through the Minister ensures the state's autonomy over all its mineral and petroleum resources, which is realised as an internationally accepted right.<sup>36</sup> The Minister's role in facilitating custodianship can be understood as an overall administration of the country's mineral and petroleum resources, so long as mining rights, prospecting rights, permits, and so forth are concerned.<sup>37</sup>

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<sup>27</sup> Ernst Jacobus Marais 'When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* Court's state acquisition requirement (Part I)' (2015) 18 *PELJ* at 2988.

<sup>28</sup> The Minerals Act 50 of 1991. This was dealt with in chapter one.

<sup>29</sup> P S Botes *The role of ministerial discretionary powers in the granting of rights to minerals* (unpublished LLM dissertation, North-West University, 2016) at 55.

<sup>30</sup> Section 3(1) of the MPRDA.

<sup>31</sup> Botes op cit note at 29.

<sup>32</sup> Section 3(2)(a) of the MPRDA.

<sup>33</sup> *Ibid.*

<sup>34</sup> This means the internal processes of the office of the Minister of Minerals and Energy, as statutorily defined and prescribed by the MPRDA.

<sup>35</sup> Sections 2, 3(c)-(d), & 26(1)-(3); April op cit note 16 at 115.

<sup>36</sup> Section 2(a) of the MPRDA.

<sup>37</sup> Van Huffel op cit note 20 at 88.

### 2.3.1 The Ministerial Role in Custodianship

To carry out custodial duties, the Minister of Minerals and Energy is granted wide discretionary powers as far as the granting of mining rights, permits, prospecting rights, and exploration rights, *inter alia*, are concerned.<sup>38</sup> The regulatory powers entrusted to the Minister are carried out 'by way of an administrative structure.'<sup>39</sup> Van Der Schyff correctly observes that these discretionary powers ought to be exercised with caution and in line with the primary core of ensuring that public rights are not compromised and that benefits to the nation should be seen.<sup>40</sup> To be valid, the discretionary powers come in twofold; first, they must be mandated by legislative provisions within the relevant statute (ie the MPRDA in this case), and second, the powers should be exercised by the specified person *ex officio*.<sup>41</sup> An application relating to prospecting rights can be directed to the Minister by a person who so wishes, and such application should be lodged at the Regional Manager's office in the region where the land is situated and in the prescribed manner.<sup>42</sup> To be valid, the application must comply with the requirements of, among other things, environmental reports that conform to the requirements posed by the National Environmental Management Act (NEMA).<sup>43</sup>

Moreover, the results of consultation with the persons having an interest, affected, owning the land, and those lawfully residing in the designated place for the operation ought to be shown in the prescribed manner.<sup>44</sup> It is upon this premise that the Minister considers the application and decides whether to grant a 'go-ahead' with the prospecting.<sup>45</sup> The requirements imposed by section 17(1) of the MPRDA should be met in granting the right.<sup>46</sup> The applicant needs to have access to financial resources and appropriate technical strengths for the project, the compatible expenditure with the prospecting operation and its duration and work programme, the environmental protection and reasonable pollution that is mitigated, and the upliftment of the objects listed in section 2, amongst others.<sup>47</sup> Meanwhile, the Minister has the power to refuse the application for the prospecting right, providing the applicant with written reasons.<sup>48</sup> The grounds for refusal are that, firstly, the application fails to comply with all the requirements of section 17(1).<sup>49</sup>

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<sup>38</sup> Van Der Vyver op cit note 9 at 136; Sections 23(3), 27(1) & (2) of the MPRDA.

<sup>39</sup> Botes op cit note 29.

<sup>40</sup> Elmarie Van Der Schyff 'Who owns the country's mineral resources? The possible incorporation of the public trust doctrine through the Mineral and Petroleum Resources Development Act' (2008) 4 *SALJ* at 767.

<sup>41</sup> Botes op cit note 29 at 4.

<sup>42</sup> Section 16(1)(a)-(b).

<sup>43</sup> Section 24(1) & (1A) of the National Environmental Management Act 107 of 1998; Section 16(4)(a) of the MPRDA.

<sup>44</sup> Section 16(4)(b) of the MPRDA.

<sup>45</sup> Section 16(5); Botes op cit note 29 at 7.

<sup>46</sup> Section 17(1) has a criterion listed from paragraph (a)-(f) that sets out the requirements needed for satisfying the grant of the prospecting right.

<sup>47</sup> Section 17(1)(a)-(f) of the MPRDA.

<sup>48</sup> Section 17(3) of the MPRDA.

<sup>49</sup> Section 17(2)(a) of the MPRDA.

Secondly, in granting the right, there is a likelihood of concentrating the resources under the control of the applicant and companies associated with it, such that equitable access to mineral resources will be hindered.<sup>50</sup> Botes submits that while the Minister seems like a compliance officer in the granting of the prospecting right due to the prescriptions in the said provision, issues arise when factors such as the minimum finances needed to make the applicant eligible to be granted the right are brought up, as it is not provided for in the section.<sup>51</sup> Accordingly, this statement creates room for assuming that the applicant's financial capability will rely on the Minister's discretion, introducing a subjective rather than objective element to interpreting the provisions.<sup>52</sup>

A person wishing to apply for a mining right can do so to the Minister, and the application, together with the environmental authorisation, must be lodged at the office of the Regional Manager where the land is located and in the prescribed form.<sup>53</sup> Following the application in the prescribed form, the Minister may grant the mining right after carefully considering compliance with the criteria listed in section 23(1).<sup>54</sup> To a great extent, the criteria listed in section 23(1) align with the purpose for which the custodianship of South Africa's minerals has been established.<sup>55</sup> Firstly, the right can be given where there is a high prospect of optimal mining of the mineral *in situ*<sup>56</sup> in congruence with the work programme of mining, which will ensure more accessibility in the mining industry and great economic returns.<sup>57</sup> Secondly, the right will be granted if the applicant has shown that he or she has the financial and technical strengths to undertake the mining project optimally.<sup>58</sup>

Thirdly, the applicant ought to demonstrate that the mining operation will not cause unnecessary and unmitigated pollution and environmental or ecological degradation, which is in keeping up with sustainable development as emphasised in section 24(4)(b)(i) and (iii) of the Constitution and section 2(h) of the MPRDA.<sup>59</sup> Fourthly, the social and labour plan (SLP) has to be provided by the applicant, and the applicant must demonstrate that they can achieve compliance with the provisions of the Mine Health and Safety Act.<sup>60</sup> Moreover, the granting of the right must be in line with the objects mentioned in section 2(d)<sup>61</sup> and (f)<sup>62</sup> as well

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<sup>50</sup> Section 17(2)(b) of the MPRDA.

<sup>51</sup> Botes op cit note 29 at 69.

<sup>52</sup> Ibid at 68 to 69.

<sup>53</sup> Section 22(1)(a)-(b).

<sup>54</sup> Section 23(3) of the MPRDA.

<sup>55</sup> Van Der Vyver op cit note 38.

<sup>56</sup> This word means in that place or location. See Merriam-Webster Dictionary available at <https://www.merriam-webster.com/dictionary/in%20situ>, accessed 10 October 2023.

<sup>57</sup> Section 23(1)(a) of the MPRDA (own emphasis).

<sup>58</sup> Section 23(1)(b) of the MPRDA.

<sup>59</sup> Section 23(1)(d) of the MPRDA.

<sup>60</sup> Section 23(1)(e)-(f) of the MPRDA; The Mine Health and Safety Act 26 of 1996 sections 2&5-17&24, among others (own emphasis).

<sup>61</sup> Section 2(d) provides that historically disadvantaged persons should have expanded opportunities when it comes to entering and participating in the mining industries and benefit from the exploitation of the country's mineral and petroleum resources.

<sup>62</sup> Section 2(f) emphasises the promotion of employment and advancement of the socio-economic welfare of South Africans.

as the Mining Charter as contemplated in section 100, which seeks to promote a broad-based socio-economic empowerment of the historically aggrieved by discrimination and inequality, both in the social and economic spheres.<sup>63</sup> Furthermore, the Minister is required to have consultation with the affected and interested communities or parties wherein the operation would occur and to employ measures necessary to ensure the promotion of their rights, interests, and participation.<sup>64</sup>

In conformity with the commitment to redress past injustices, the Minister, in processing the order of more than one application for a mining right or permit and a prospecting right received in respect of the same mineral, must prefer applications from historically disadvantaged persons over other persons.<sup>65</sup> Section 104(2) of the MPRDA enjoins the Minister to grant an application for a preferential right to prospect or mine, considering that the right will be used for social upliftment and development of the community.<sup>66</sup> As custodian of the state's resources, the Minister ensures that, through preferential treatment in granting prospecting or mining rights, the objects of the MPRDA outlined in section 2, as far as economic and social upliftment of the historically disadvantaged groups is concerned, are realised.

In circumstances where the individuals applying on the same day for the same mineral right are from the category of persons historically disadvantaged, the MPRDA is silent on who is to receive preference, and this is the case even where there would be no persons from the preceding category, but in the same situation.<sup>67</sup> However, section 12(1) of the MPRDA provides that the Minister may assist historically disadvantaged persons in conducting prospecting or mining operations. Subsection (2) notes the criteria that need to be met before facilitating assistance. Consequently, the Minister is enjoined to consider factors such as the need to promote equitable access to South Africa's mineral resources, the financial standing of the applicant, the necessary transformation of the ownership structure of minerals and the industry, and how the proposed project fulfils the objects of section 2 of the MPRDA.<sup>68</sup> The Minister enjoys discretionary power to determine the manner of provision for the assistance that the historically disadvantaged person(s) need.<sup>69</sup>

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<sup>63</sup> Sections 23(h) and 100(2)(a).

<sup>64</sup> Section 23(2A) of the MPRDA (own emphasis).

<sup>65</sup> Section 9(1) and (2) of the MPRDA.

<sup>66</sup> In terms of section 1 of the MPRDA, a community is defined *inter alia* as a group consisting of historically disadvantaged persons who have an interest or are affected by the mining operation that will take place on the land they occupy and have communal rights over.

<sup>67</sup> Hanri Mostert *Mineral Law: Principles and Policies in Perspective* (2012) 91.

<sup>68</sup> Section 12(3)(d) of the MPRDA.

<sup>69</sup> Botes *op cit* note 29 at 60.

### 2.3.2 The Mining Charter of 2018

The Mining Charter<sup>70</sup> was prepared in compliance with section 100(2) of the MPRDA. The objective behind its creation in terms of the said subsection is that governmental objectives in alleviating past social and economic inequalities, as required by the Constitution, would be achieved.<sup>71</sup> As such, a timetable would be set following a framework setting targets that ensure effective entry and participation of the historically disadvantaged in the mining industry and allow them to benefit from the exploitation of mineral resources and the beneficiation of the resources.<sup>72</sup> Through its objects, the Mining Charter expands on the concept of state custodianship as already established by the MPRDA. It first recognises the international principle of state autonomy and exercise of authority over the life of its country[,] including all its mineral wealth.<sup>73</sup>

Secondly, the Charter seeks to reduce 'one-race' dominance in industry ownership patterns by redressing past injustices and imbalances.<sup>74</sup> Thirdly, the Charter seeks to expand opportunities for historically disadvantaged groups to enter the mining industry and benefit from the exploitation of the state's resources in a substantial and meaningful way.<sup>75</sup> Over and above, the existence of the Mining Charter is owed to the government's objective to promote socio-economic transformation, which forms the basis of the Minister's custodial duties in the case of historically disadvantaged persons.<sup>76</sup> Moreover, the objects of the Mining Charter resonate with the custodial intent as expressed in section 3(1) of the MPRDA in that the Charter seeks to ensure that every South African benefits from the mining industry in an equitable fashion regarding equality and employment equity, amongst other things.<sup>77</sup>

As much as the Charter regulates the custodial duties of the Minister in some form or another, there are some concerns about it and its effectiveness due to the judgment passed in *Minerals Council of South Africa v Minister of Mineral Resources and Energy*.<sup>78</sup> In this case, the court had to determine whether the Mining Charter was subordinate law or policy.<sup>79</sup> Considering the usage of language in its ordinary grammatical order, the usage of the word 'Charter' in legislative instruments, and the context and purpose for which it was developed, considering section 100(2) of the MPRDA, the court decided that the Charter is not a binding law but a policy.<sup>80</sup>

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<sup>70</sup> The *Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry* (GN 1421 in GG 42130 of 20 December 2018).

<sup>71</sup> Section 100(2)(a) of the MPRDA.

<sup>72</sup> *Ibid.*

<sup>73</sup> The 2018 Mining Charter op cit note 70 at 12.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> Section 100(2)(a) of the MPRDA (own emphasis).

<sup>77</sup> The 2018 Mining Charter at 4 & 22.

<sup>78</sup> *Minerals Council of South Africa v Minister of Mineral Resources and Energy* (20341/19) [2021] ZAGPPHC 623.

<sup>79</sup> *Minerals Council of South Africa* case para supra note 79 paras 1 & 7.

<sup>80</sup> *Minerals Council of South Africa* case supra note 79 paras 20 23 25-27 36-8 55 & 59.

Veeran et al<sup>81</sup> contend that classifying the Mining Charter as policy rather than law means that mining rights holders are not obligated to top up their empowerment credentials when renewing their rights, and this classification provides greater flexibility in structuring empowerment agreements.<sup>82</sup> Rangasamy argues that the High Court's ruling presents a dilemma and casts significant doubt on whether mining companies will remain dedicated to achieving the transformational goals outlined in the Charter, since the Charter is not a binding law but a mere policy guide.<sup>83</sup> With this in mind, it stands to be seen what effect this has on the custodial objectives of government, as will be discussed in a subsequent chapter.

### 2.3.3 The White Paper for a Minerals and Mining Policy for South Africa

The MPRDA came into being after a deliberate policy review process documented in the White Paper on a Minerals and Mining Policy for South Africa.<sup>84</sup> The policy formulation and review were due to the political upheaval following the dawn of democracy in 1994, which sought to develop the mineral wealth of South Africa to its peak and maximum benefit of its citizens.<sup>85</sup> The process took about two years, from 1995 to 1996, and in 1998, a Green Paper was released for public scrutiny.<sup>86</sup> The proposals submitted during these periods were that mineral rights should be returned to public ownership (ie the state) and that the state-held system of mineral rights ought to be leased to mining companies.<sup>87</sup>

The policy expressed an intention of promoting equitable access to the mining industry, and in its adoption, it was supposed to meet several objectives.<sup>88</sup> These include 'the need for equitable access to resources, economic growth, social welfare, and black economic empowerment.'<sup>89</sup> These objectives were solely designed to ensure that individuals who were previously excluded can be equipped with the skills necessary for competing effectively in the marketplace, and as such, the custodial holding model of mineral and petroleum resources would assist in this regard.<sup>90</sup> Mostert elaborates that the White Paper sought to grant the state power to issue 'prospecting, retention and mining licences to any applicant.'<sup>91</sup> In this way, the Government would be

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<sup>81</sup> Jonathan Veeran Bruce Dickinson & Rita Spalding '2018 Mining Charter is policy, not law!' (2021) 121 *Journal of the Southern African Institute of Mining and Metallurgy*.

<sup>82</sup> Veeran et al op cit note 81 at viii.

<sup>83</sup> Lynton Rangasamy 'What are the prospects for transformation in the mining industry in light of the High Court's finding that the Mining Charter does not constitute law?' 10 November 2022, available at <https://law.uct.ac.za/mineral-law/articles/2022-11-10-what-are-prospects-transformation-mining-industry-light-high-courts-finding-mining-charter-does-not> accessed 26 November 2024.

<sup>84</sup> The *White Paper for A Minerals and Mining Policy for South Africa* (GN 2359 in GG 19344 of 20 October 1998); Mostert op cit note 67 at 76.

<sup>85</sup> Mostert *ibid* at 75.

<sup>86</sup> F T Cawood and R C A Minnitt 'A historical perspective on the economics of the ownership of mineral rights ownership' (1998) *Journal of Southern African Institute of Mining and Metallurgy* at 375.

<sup>87</sup> Cawood & Minnitt op cit note 86.

<sup>88</sup> Mostert op cit note 85.

<sup>89</sup> *Ibid*.

<sup>90</sup> The 2018 Mining Charter para 1.1.2; Mostert op cit note 67 at 76.

<sup>91</sup> Mostert *ibid*.

tasked with the duty to promote equity in the mining sector regarding ownership and management of the industry to the extent that black ownership would be promoted in all stages of the mining industry.<sup>92</sup>

Botes, on the other hand, notes that sustainable environmental management is emphasised by the White Paper in that as much as development is important for economic emancipation and social welfare, a balance between the current needs of the people and future generations should be struck so that the impact of the development on the environment would be minimised.<sup>93</sup> Consequently, the government plays a central role in the management of the environment, and therefore, it should, as a custodian of the country's mineral and petroleum resources, guarantee that development takes place in line with the 'national environmental policy, norms and standards.'<sup>94</sup>

### **3. CONCLUSION**

Chapter two has reviewed the legislative framework that regulates the custodianship of South Africa's mineral and petroleum resources. The MPRDA is the main regulatory statute, as it is informed by the Constitution, which sets the tone and spirit for the MPRDA provisions. The Mining Charter and the White Paper also play a role in the regulation of mineral and petroleum resources as they set out standards and aspirations for the custodial model. The common denominator in these legislative instruments is that the custodial model of regulation is aimed at redressing past injustices and ensuring that socio-economic development is experienced by every South African as far as equitable access to the mining industry is concerned. In the following chapter, an examination of the concept of equitable access and black economic empowerment under the custodial holding model of South Africa's legislative framework will be made to assess the progress envisioned by the legislative instruments discussed in this chapter.

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<sup>92</sup> Ibid; The *White Paper* op cit note 84 paras 2.2. and 2.3.1.

<sup>93</sup> Botes op cit note 29 at 55.

<sup>94</sup> The *White Paper* op cit note 84 para 4.2.

## CHAPTER THREE: EQUITABLE ACCESS TO THE MINING SECTOR THROUGH THE LENS OF BLACK ECONOMIC EMPOWERMENT

### 3.1 INTRODUCTION

Chapter two discussed that one of the fundamental changes brought about by the Mineral and Petroleum Resources Development Act (MPRDA)<sup>1</sup> was the advocacy for the economic emancipation of the historically disadvantaged.<sup>2</sup> For instance, the MPRDA establishes a custodial holding model by the state for South Africa's mineral resources and access to them.<sup>3</sup> Its significance is evident in the emphasis placed on equitable access to the mining industry by all South Africans, particularly the previously disadvantaged groups.<sup>4</sup> Setting the tone for the MPRDA, its Preamble, among others, commits to eliminating all forms of discriminatory habits in the mineral and petroleum industries. Secondly, it establishes the state's obligation to redress the results of racial discrimination experienced in the previous dispensation pertaining to accessing and benefiting from the exploits received from the mining industry. Instead of benefits accruing to the minority of South Africa's populace, the MPRDA endorses the accrual of benefits from exploiting the nation's mineral and petroleum resources to all people of South Africa.<sup>5</sup> In this way, the MPRDA reflects a truly transformative nature regarding access to mineral and petroleum resources as a common heritage for every South African in so far as benefits can reach the previously disadvantaged.<sup>6</sup>

The present chapter examines the concept of equitable access to mining in South Africa and its relationship with black economic empowerment under the state custodial holding model of mineral resources. The primary considerations include the MPRDA, the Broad-Based Black Economic Empowerment Act (BBBEEA),<sup>7</sup> and the Mining Charter, which relate to equitable access to the mining industry and black economic empowerment. The discussion departs from the premise that equitable access should provide equal opportunities for the historically disadvantaged, particularly in terms of their economic and social well-being (ie access to resources, employment opportunities, and skills development, among others). The discussion further

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<sup>1</sup> The Mineral and Petroleum Resources Development Act 28 of 2002.

<sup>2</sup> See part 2.1 of chapter two above.

<sup>3</sup> Elmarie Van Der Schyff 'Who owns the country's mineral resources? The possible incorporation of the public trust doctrine through the Mineral and Petroleum Resources Development Act' (2008) 4 *TSAR* at 758.

<sup>4</sup> Disadvantaged groups include Blacks, Indians, and Coloureds, though grouped together as Blacks in this dissertation.

<sup>5</sup> Sikelela Ndlazi 'Alone in the dark: How the current mining and minerals legal regime continues to fail artisanal and small-scale miners in South Africa' (2021) 25 *Law, Democracy & Development* at 231.

<sup>6</sup> See part 2.3 of chapter two above; Ndlazi op cit note 5 at 230-31 (own emphasis).

<sup>7</sup> The Broad-Based Black Economic Empowerment Act 53 of 2003.

elucidates that achieving equitable access and black economic empowerment in the mining industry requires properly equipping historically disadvantaged individuals with the necessary skills and knowledge competence. Lastly, the discussion also highlights challenges that hinder the success of both these imperatives (equitable access and black economic empowerment).

### **3.2 UNDERSTANDING THE CONCEPT OF EQUITABLE ACCESS TO SOUTH AFRICA'S MINERAL RESOURCES**

The Constitution is the starting point for South African mineral and petroleum resources.<sup>8</sup> As chapter two mentions, the legislative framework on equitable access to and economic empowerment in the mining industry is rooted in the Constitution, as these imperatives address socio-economic transformation.<sup>9</sup> The MPRDA does not give a detailed and precise meaning of equitable access to South Africa's mineral and petroleum resources. It only mentions that, firstly, there is a reaffirmation of the state's commitment to reform, and this reform seeks to bring about equitable access to the nation's mineral and petroleum resources.<sup>10</sup> Secondly, it categorises equitable access to the nation's mineral and petroleum resources as one of the fundamental objectives of section 2, intended to be promoted to all South Africans.<sup>11</sup> As a custodian,<sup>12</sup> the state plays a central role in the realisation of equitable access to the nation's mineral and petroleum resources in that it holds the keys to accessing the mining industry through the issuance of licenses and permits thereto.<sup>13</sup> In this role, the state seeks to realise the constitutional objective that every South African should benefit equally from the mineral and petroleum resources.<sup>14</sup>

The enactment of the MPRDA has changed the legal and political agenda from one of exclusivity to one of inclusivity, marked by the redistribution of wealth to all South Africans in the national interest, in contrast to the previous dispensation.<sup>15</sup> It is worth noting that equitable access to the mining sector is rooted in section 9(2)

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<sup>8</sup> See section 25(4)(a), which mentions the commitment to land reform that encompasses equitable access to the nation's natural resources, which encapsulate mineral and petroleum resources as part and parcel.

<sup>9</sup> See parts 2.1 & 2.2 of chapter two above.

<sup>10</sup> Preamble to the MPRDA.

<sup>11</sup> Section 2(c) of the MPRDA.

<sup>12</sup> See the discussion in part 1.3 of chapter one above; *Agri SA v Minister for Minerals and Energy* CCT51/12 [2013] ZACC 9 para 68.

<sup>13</sup> Hendrik Schmidt *The legal meaning of state custodianship in the context of the Mineral and Petroleum Resources Development Act of 28 of 2002* (unpublished PhD thesis, University of Cape Town, 2023) at V.

<sup>14</sup> Anthea-Lee September Van Huffel *A critical investigation of state custodianship and its implications for the South African property regime* (unpublished PhD thesis, University of Free State, 2022) at 27.

<sup>15</sup> Van Huffel op cit note 14 at 38.

of the Constitution.<sup>16</sup> Section 9(2) states that equality encompasses the complete enjoyment of all rights and freedoms. Consequently, legislative and other measures that will advance or protect a category of persons from unfair discrimination may be taken to promote its achievement.<sup>17</sup> In the context of the mining sector, the guarantee sought by section 9(2) of the Constitution requires any inequalities that may impede all people from accessing minerals and benefiting from them to be eradicated immediately.<sup>18</sup>

The principle of inclusive benefit and participation in productive economic assets should be understood as opportunities created for all to access South Africa's minerals.<sup>19</sup> However, historically disadvantaged groups should receive first preference to address the economic imbalance caused by the previous dispensation.<sup>20</sup> Consequently, equitable access to the country's mineral and petroleum resources must be viewed through the lens of South Africa's history of minerals and the Constitutional objective of achieving substantive equality.<sup>21</sup> Put simply, substantive equality assesses the unequal differences that exist in the socio-economic spheres amongst individuals and groups and seeks to bring about a balance to that effect.<sup>22</sup> The main objective, among other important factors, for which the MPRDA was enacted is to achieve this balance, hence the indirect allusion to it in the long title of the MPRDA.

In determining access to South Africa's mineral and petroleum resources, September-Van Huffel analogically explains the process, making a distinction between the demands required in accessing water and mineral and petroleum resources under the public trusteeship and state custodianship models.<sup>23</sup> Water is deemed a basic human right essential for human survival, with access expected to be immediate and obtained directly by each individual.<sup>24</sup> For this reason, access to water is simple and open to everyone for the immediate benefit of the people, because for every community, taps that draw water from the nation's water resources can be installed, making it simple to access water.<sup>25</sup>

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<sup>16</sup> Peshley Thupane Kgoale & Kola O Odeku "Critical analysis of transformative interventions mainstreaming historically disadvantaged black South Africans into the mining sector" (2019) 8 *Journal of Reviews on Global Economics* at 1412.

<sup>17</sup> Section 9(2) of the Constitution.

<sup>18</sup> Tatenda Wayne Muponde *Equitable access to mineral resources in the South African MPRDA: The case of artisanal and small-scale mining* (unpublished LLM mini-dissertation, University of Witwatersrand, 2019) at 14.

<sup>19</sup> Muponde op cit note 18.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Van Huffel op cit note 14 at 80-1.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid (own emphasis).

However, accessing mineral and petroleum resources is a complicated process altogether as it requires a plethora of things, such as technical skills and financial means, among others.<sup>26</sup> The difficulty with direct access to mineral and petroleum resources in South Africa is that the nature of these rights affording access to the earth's resources makes them limited and subject to specific requirements.<sup>27</sup> These requirements necessitate that the applicant shows a high prospect of the mineral being mined, a demonstration that the project will not cause unnecessary and harmful pollution to the environment, and that the project will contribute to the upliftment of the historically disadvantaged, economically and socially.<sup>28</sup> Amidst these, the Minister also has the discretion to grant access, which makes the process lengthy and inaccessible to everyone.<sup>29</sup>

A 2013 study by Motsoeneng, Schultz, and Bezuidenhout estimated that the increasing use of technological devices in the mining process would require a more specialised and focused skill set.<sup>30</sup> These skills can be categorised into soft skills, such as proficiency in mathematics, computation, and reading, as well as environmental and project management skills.<sup>31</sup> The latter is crucial for ensuring mining projects comply with environmental laws, such as minimising tailings production that contributes to air pollution, a task requiring strong project management expertise.<sup>32</sup> The growing demand for digital and autonomous technologies in the mining sector has significantly shifted the skills and qualifications required.<sup>33</sup> Consequently, the future development of technology calls for a highly skilled workforce with expertise in computer systems, mining, metallurgy, and geology.<sup>34</sup> This evolution in skill requirements complicates access to South Africa's mineral and petroleum resources, making entry into the sector legally and financially demanding while requiring specialised knowledge in emerging technologies and environmental management. As a result, the industry remains inaccessible to many, especially to the previously disadvantaged groups.

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<sup>26</sup> Ibid at 81.

<sup>27</sup> Daniel Hertog 'The role of government as allocator of oil and gas rights in South Africa' 15 December 2022, available at [https://law.uct.ac.za/mineral-law/articles/2022-12-15-role-government-allocator-oil-gas-rights-south-africa#\\_ftnref5](https://law.uct.ac.za/mineral-law/articles/2022-12-15-role-government-allocator-oil-gas-rights-south-africa#_ftnref5), accessed 19 June 2024.

<sup>28</sup> See further part 2.3.1 of chapter two above.

<sup>29</sup> Ibid.

<sup>30</sup> Lefaso Motsoeneng Cecile Schultz & Adele Bezuidenhout 'Skills needed by engineers in the platinum industry in South Africa' 2013 *Proceedings of PICMET '13: Technology Management for Emerging Technologies* 21 October 2013 at 1738, available at [https://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=6641643&casa\\_token=W\\_TOb8tKjjUAAAAA:EkLzSmxL9houcl7fysLoif8kTPQY-TqJgVyWmtfkWZWTKrbbgfgPvHIZIAoiC38IO-11Dd76MEa&tag=1](https://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=6641643&casa_token=W_TOb8tKjjUAAAAA:EkLzSmxL9houcl7fysLoif8kTPQY-TqJgVyWmtfkWZWTKrbbgfgPvHIZIAoiC38IO-11Dd76MEa&tag=1), accessed 04 June 2024.

<sup>31</sup> Motsoeneng et al op cit note 30 at 1739-40.

<sup>32</sup> Ibid.

<sup>33</sup> Erik Lund Annika Pekkari Jan Johansson & Joel Loow 'Mining 4.0 and its effects on work environment, competence, organisation and society – a scoping review' 2024 *Mineral Economics* at 6.

<sup>34</sup> Lund et al op cit note 33.

Additionally, mineral resources should be mined conservatively to benefit present and future generations. Moreover, the nature of mineral and petroleum resources makes it impractical for these resources to be distributed directly to all South Africans, as is the case with water.<sup>35</sup> This challenge is due to the requirements needed for access to the resources, including but not limited to large capital costs, above, and a specific set of skills (as highlighted above) required in the industry.<sup>36</sup> With that in mind, a change in the perception of equitable access to these resources is needed. Under the state custodial holding model, access should be understood in a broader, indirect sense, meaning that mining industry funds can be used to develop specific programmes and employment opportunities.<sup>37</sup> Consequently, not every South African can directly access mineral exploitation; better yet, there are certain nationally shared benefits derived from the mining industry that the nation is intended to benefit indirectly from.<sup>38</sup> These benefits include, but are not limited to, employment, community development, revenues from the mining industry, foreign investment, and enhanced international relations.<sup>39</sup> Ultimately, the revenue generated from these activities benefits South Africans, as mining finances contribute to the state treasury and fund programmes for the citizens' benefit.<sup>40</sup>

Commenting on what is enjoined by section 25(4)(a)<sup>41</sup> of the Constitution, former Chief Justice Mogoeng, as he then was, noted that its interpretation stems from the idea that equitable access is to be understood under the broader context of South Africa's gross inequality insofar as wealth is concerned in the country.<sup>42</sup> He further mentioned that the MPRDA's purpose is to widen the scope of accessing business opportunities in the mining industry for all, especially the people disadvantaged by the previous dispensation.<sup>43</sup> Additionally, the lens through which section 25(4)(a) is to be viewed extends beyond just ensuring equitable access; it also focuses on generating employment, improving the socio-economic well-being of South Africans, fostering the development of the nation's mineral and petroleum resources and economic growth for the benefit

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<sup>35</sup> Van Huffel op cit note 14 at 81.

<sup>36</sup> F T Cawood 'New South African Mineral and Petroleum Resources Development Act: Shaping a new investment environment to reflect a diverse society' (2004) 22 *Journal of Energy and Resources Law* at 131-34; Motsoeneng et al op cit note 30; See also part 2.3 of chapter two above; Van Huffel op cit note 14 at 81.

<sup>37</sup> Van Huffel op cit note 14 at 81.

<sup>38</sup> Ibid.

<sup>39</sup> Mpho Tsepiso Tlale 'Conflicting levels of engagement under the Interim Protection of Informal Land Rights Act and the Minerals and Petroleum Development Act: A closer look at the Xolobeni community dispute' (2020) 23 *PELJ* at 5-6.

<sup>40</sup> Tlale op cit note 39 at 6.

<sup>41</sup> Section 25(4)(a) states that the public interest encompasses South Africa's commitment to land reform and those reforms that will bring about equitable access to the country's natural resources.

<sup>42</sup> *Agri SA* supra note 12 para 61.

<sup>43</sup> Ibid.

of all citizens.<sup>44</sup> Section 25(4)(a), therefore, requires the state to guarantee that every South African partakes in the benefits derived from the mining industry, taking into account our history and the need to prevent inequality.<sup>45</sup>

### **3.3 MECHANISMS PUT IN PLACE AS MEANS TOWARD THE ACHIEVEMENT OF EQUITABLE ACCESS TO THE MINING SECTOR**

The Preamble to the MPRDA recognises past injustices regarding access to the mining industry in South Africa and seeks to rectify those injustices. Some measures addressing the injustices of the previous dispensation are emphasised in the Preamble to the MPRDA. Firstly, the state should ensure that vulnerable groups benefit from the extraction and exploitation of mineral and petroleum resources and the displaced communities when mining activities occur in their respective abodes.<sup>46</sup> Secondly, an emphasis is put on the state's task to socially uplift and advance local and rural development as part and parcel of creating a balance in the mining sector that was negated by past discriminatory practices.<sup>47</sup> These measures are regarded as the state's general commitment to ensure equitable access to the nation's mineral and petroleum resources.<sup>48</sup> It should be noted that the MPRDA speaks of equitable access to mining with a view toward the emancipation of historically disadvantaged South Africans, both in the economic and social spheres of life.<sup>49</sup>

Muponde argues that although equitable access is concerned with fairness and reasonableness in ways that ensure people's access to the same opportunities, it goes beyond this narrative in the South African context.<sup>50</sup> She further contends that it is no mere acceptance on the part of the state that certain individuals were excluded and now need to be engrafted back, but it is a matter of correcting the structures that led to such exclusion.<sup>51</sup> Consequently, Mpehle contends that the economic emancipation of South Africans who were marginalised is a mere reverie if there are no effective systems and processes that the government puts in place to increase their participation in the economy rapidly.<sup>52</sup> This, therefore, necessitated the legislative frameworks that are in place in South Africa, such as the MPRDA and the BBBEEA, among others, to deal with matters connected to equitable access to the country's economy.<sup>53</sup>

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<sup>44</sup> Ibid.

<sup>45</sup> Ibid para 62.

<sup>46</sup> Schmidt op cit note 13 at 47; Preamble to the MPRDA.

<sup>47</sup> Preamble to the MPRDA.

<sup>48</sup> Schmidt op cit note 13 at 30.

<sup>49</sup> Kgoale and Odeku op cit note 16 at 1409-10.

<sup>50</sup> Muponde op cit note 18.

<sup>51</sup> Ibid.

<sup>52</sup> Zwelibanzi Mpehle 'Black Economic Empowerment in South Africa: Reality of illusion?' (2011) *Administration Publica* 19 at 141.

<sup>53</sup> Mpehle op cit note 52 at 141 & 143-44 (own emphasis).

With the foregoing, beneficiation of the minerals in the country is one of the mechanisms that the MPRDA enjoins the Minister to promote to ameliorate the past egregious exclusionary injustices.<sup>54</sup> The Minister has limited power to establish beneficiation.<sup>55</sup> Firstly, the Minister must act on the advice from the Minerals and Petroleum Board established in terms of section 57, following a consultation with the Minister of Trade and Industry.<sup>56</sup> Secondly, the beneficiation of minerals must be economically viable.<sup>57</sup> Consulting stakeholders and prescribing measures to advance mineral resources' beneficiation is necessary to prevent the derailment of effective implementation of the beneficiation strategy, ensuring economic viability and timely execution.<sup>58</sup> There is a general consensus that broad beneficiation can open access for active participation and mainstreaming of historically disadvantaged groups into the mining sector to reap benefits.<sup>59</sup> The beneficiation of extracted minerals is considered a potential area for increasing South Africa's economy, development, and job creation.<sup>60</sup> It is not only an area that can enhance the betterment of the country but also a driver for the empowerment of the historically disadvantaged and sanctions the development of emerging entrepreneurs in both side-stream and downstream industries.<sup>61</sup>

The BBBEE Strategy was prepared earlier in 2003 as a forerunner to the BBBEEA in terms of addressing political and socio-economic inequalities.<sup>62</sup> The strategy was prepared to ensure that the government becomes an adaptive economy, showing growth, employment, and equity traits.<sup>63</sup> The BBBEE strategy is a child of the BEE policy formulated and enacted in the mid-1990s.<sup>64</sup> The strategy has much bearing on the BBBEEA and what it envisages insofar as economic transformation and black empowerment are concerned in major economic conduits, including but not limited to mining, for instance. The BBBEEA was enacted to establish a legislative framework for promoting black economic empowerment and enabling the Minister to, amongst other things, issue codes of good practices and publication of transformation charters.<sup>65</sup>

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<sup>54</sup> Section 26(1) of the MPRDA.

<sup>55</sup> Kgoale & Odeku op cit note 16 at 1413.

<sup>56</sup> Section 26(2) of the MPRDA.

<sup>57</sup> Ibid.

<sup>58</sup> Kgoale & Odeku op cit note 55.

<sup>59</sup> Kgoale & Odeku op cit note 49.

<sup>60</sup> Anglo-American 'Beneficiation' available at <https://southafrica.angloamerican.com/our-difference/hidden-transformation/beneficiation#:~:text=Beneficiation%20is%20the%20transformation%20of,in%20downstream%20and%20sidestream%20industries>, accessed 27 February 2024.

<sup>61</sup> Ibid.

<sup>62</sup> The DTIC 'Broad-Based Black Economic Empowerment' available at <https://www.thedtic.gov.za/financial-and-non-financial-support/b-bbee/broad-based-black-economic-empowerment/>, accessed 13 March 2024.

<sup>63</sup> Mpehle op cit note 52 at 140.

<sup>64</sup> Mpehle op cit note 53.

<sup>65</sup> Long title to the BBBEEA.

Fundamentally, the BBBEEA exists to advance economic transformation and enhance economic participation by black people in South Africa.<sup>66</sup> This aims to give effect to the constitutional right to equality, the increased broad-based effective participation of black people in the country's economy, the establishment of a national policy on BBEE to promote the unification of the nation's economy, and the promotion of equal access to government services and opportunities.<sup>67</sup>

Meanwhile, the BBEE forms part of the policy strategies that give effect to the notion of equitable access and economic emancipation of most black South Africans.<sup>68</sup> As part and parcel of the narrative of economic emancipation and equitable access, black economic empowerment requires apt public leadership and carefully concocted structures that will enhance the meaningful participation of the historically disadvantaged in the economic conduit of mining.<sup>69</sup> The mechanism employed to achieve this goal includes the transfer of equity ownership and mine assets from white ownership to black ownership, among other strategies.<sup>70</sup> The target set by the MPRDA for the transfer of equity ownership and mine assets is 26 per cent black ownership and 40 per cent black control of the mine assets.<sup>71</sup> The government hails this method as a strategy to distribute wealth and balance economic opportunities between black and white South Africans (although recently, there have been amendments to the percentages, as will be discussed in chapter four).<sup>72</sup>

One key indicator is that BBEE is achieved when, among other things, the career mobility of black professionals and those at executive and managerial levels in major companies leads to changes in the composition of management structures and ownership.<sup>73</sup> Another is that BBEE is said to be achieved when viable economic empowerment of all black people occurs.<sup>74</sup> The success entails an integration of socio-economic strategies that include, but are not limited to, increased management of enterprises by black people, equitable representation in all occupational levels and categories in the workplace, and human resource skills

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<sup>66</sup> Op cit note 59; Jeannine Van De Rheede 'The Broad-Based Black Economic Empowerment Act 53 of 2003 and the ways in which the commission of fronting practices affects the achievement of its objective' (2020) 7 *African Journal of Democracy & Governance* at 101-18; Anri Heyns *Empowerment through Mine Community Development: How the politics of development perpetuate poverty in mining areas – A legal theoretical analysis* (unpublished LLD thesis, University of Cape Town, 2020) at 4 & 66-7; Tapiwa V Warikandwa & Patrick C Osode 'Regulating against business "Fronting" to advance Black Economic Empowerment in Zimbabwe: Lessons from South Africa' (2017) 20 *PELJ* at 21-2.

<sup>67</sup> Preamble to the BBBEEA.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid (own emphasis).

<sup>70</sup> Sixta Raphael Kilambo 'Black economic empowerment policy and the transfer of equity and mine assets to black people in the South Africa's mining industry' (2021) *South African Journal of Economic and Management Sciences* at 1-2 (own emphasis).

<sup>71</sup> Ibid.

<sup>72</sup> Kilambo op cit note 70 at 2.

<sup>73</sup> Rheede op cit note 66 at 103.

<sup>74</sup> Section 1 of the BBBEEA.

development, among others.<sup>75</sup> Empowerment is a comprehensive concept, particularly within the context of the BBBEE strategy, as it encompasses a broad spectrum of elements. This includes acquiring the knowledge necessary to thrive in the industry or workforce, developing skills for enhanced accessibility, and actual empowerment, which stands in stark contrast to disempowerment.<sup>76</sup>

In the mining context, the strategy is broadly reflected by the aspirations expressed by the Mining Charter.<sup>77</sup> To this effect, one of the objectives of the Charter is to ensure that ownership patterns are deracialised in the mining industry by offsetting past imbalances and injustices and to further empower the historically disadvantaged persons through the utilisation and expansion of their skills base.<sup>78</sup> Furthermore, the Charter emphasises the substantial expansion of socio-economic opportunities to individuals who were deprived in the previous dispensation to enter the minerals and mining industry and benefit from the exploitation of the nation's mineral and petroleum resources.<sup>79</sup>

From observation, the Charter envisages several key objectives regarding BBBEE within the mining industry. Firstly, it aims to facilitate the entrance of historically disadvantaged individuals into the sector. Secondly, it emphasizes the importance of enhancing their skill base to enable meaningful participation in the industry. Thirdly, it seeks to create expanded opportunities for them, including leadership, ownership, shareholding, and deriving benefits from the industry. In this sense, the imperative of equitable access can be considered partially or substantially achieved. The Charter gives a clear intended outcome on the ownership imperative: to give meaningful economic participation, the integration of the historically disadvantaged into the mainstream economy, and effective ownership of the nation's mineral resources thereto.<sup>80</sup>

Another intervention employed in fostering equitable access is assistance to the historically disadvantaged, as stated in section 12 of the MPRDA. The section enjoins the Minister to assist any previously disadvantaged person in conducting prospecting or mining operations.<sup>81</sup> Before the facilitation process, the Minister is required to consider several factors, including the promotion of equitable access to the mining

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<sup>75</sup> Ibid.

<sup>76</sup> Adri Du Plessis 'The legal combatting of B-BBEE fronting practices in South Africa – past and present' 3 (2022) *Stell LR* at 404; Van Der Rheede op cit note 66 at 103-4.

<sup>77</sup> Anri Heyns and Hanri Mostert 'Three Mining Charters and a draft: How the politics and rhetoric of development in the South African mining sector are keeping communities in poverty' (2018) *The Law and Development Review* at 818-35; Reene Horne 'Patterns of empowerment and disempowerment in the South African mining sector' (2017) 9 *African Review of Economics and Finance* at 3-9; Reene Horne 'Patterns of ownership and labour unrest within the South African mining sector' (2015) 40 *Journal of Contemporary History* at 25-36.

<sup>78</sup> The 2018 Mining Charter para 1 (b) & (d).

<sup>79</sup> Ibid para 1(c).

<sup>80</sup> Ibid para 2.1.

<sup>81</sup> Section 12(1) of the MPRDA.

industry, the financial standing of the applicant, the necessity to transform the minerals and mining industry's ownership structure, and the degree to which the proposed project aligns with the requirements of section 2 (c),<sup>82</sup> (d),<sup>83</sup> (e),<sup>84</sup> (f)<sup>85</sup> and (i)<sup>86</sup> of the MPRDA.<sup>87</sup> The assistance provided in the abovementioned section implies that training and services must be made available to historically disadvantaged persons so that they can conduct their operations properly and effectively.<sup>88</sup>

### **3.4 CHALLENGES ENCOMPASSING EQUITABLE ACCESS IN THE MINING SECTOR**

The enactment of the MPRDA, BBBEEA, and the creation of the Mining Charter collectively aim to transform the country's economic landscape, particularly in the mining sector, by promoting equitable access and black economic empowerment. However, despite these efforts, several challenges persist. This section discusses three main obstacles: insufficient mineral beneficiation for revenue generation, the lack of meaningful empowerment and participation, and fronting.

#### **3.4.1 Lack of Sufficient Mineral Beneficiation for Revenue Generation**

Mineral beneficiation serves as one of the key drivers for promoting equitable access and mainstreaming historically disadvantaged South Africans into the mining sector, creating pathways for job opportunities, economic growth, and meaningful contributions to sustainable development and poverty alleviation.<sup>89</sup> Beneficiation creates ample opportunities for developing a country's welfare and meeting the enormous needs of its people.<sup>90</sup> These opportunities include advancing mechanical technology and developing essential metals and minerals, such as gold, copper, and chrome, which are crucial for smart technology production.<sup>91</sup> Furthermore, beneficiation supports infrastructure that bolsters industries (like tourism) through the construction

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<sup>82</sup> The subsection provides for the promotion of equitable access to the nation's mineral and petroleum resources to all people of South Africa.

<sup>83</sup> The subsection provides for substantial and meaningful participation of historically disadvantaged persons to enter and actively participate in the mining industry and benefit from the exploitation thereof.

<sup>84</sup> This subsection provides for the promotion of economic growth and development of minerals and petroleum resources in the Republic, in particular, the downstream industries through the provision of feedstock, and the development of mining and petroleum inputs industries.

<sup>85</sup> The section provides for the promotion of employment and advancement of the socio-economic welfare of all South Africans.

<sup>86</sup> The section enjoins the holders of mining and production rights to contribute towards the socio-economic development of the places they operate in.

<sup>87</sup> Section 12(3) (a)-(d).

<sup>88</sup> Kgoale & Odeku op cit note 16 at 1413.

<sup>89</sup> Kgoale & Odeku op cit note 16 at 1412.

<sup>90</sup> Kgoale Thupane Peshley *Transformative mineral resources beneficiation legislation: An impetus for socio-economic transformation and poverty alleviation in South Africa* (unpublished LLM-dissertation, University of Limpopo, 2019) at 82.

<sup>91</sup> Kgoale op cit note 90.

of landmarks such as domes, towers, and stadiums, and it aids in infrastructure development with material comprising steel and copper for wind turbines and other essential structures.<sup>92</sup>

Beneficiation adds value to the raw minerals extracted from the earth.<sup>93</sup> When the value addition of minerals has been completed, the minerals are exported to international markets.<sup>94</sup> The exported minerals yield more economic gains for the country of export due to value addition, and economic growth means that more people will have opportunities for employment and access to the downstream phase of the mining industry.<sup>95</sup> One of the challenges South Africa faces in beneficiation that would enhance the indirect access to the mining sector is that the country imports several finished products processed from its minerals.<sup>96</sup> In turn, the imports result in lost opportunity for export revenue and employment creation owing to low beneficiation activity.<sup>97</sup> Furthermore, skills shortages, power supply, identification, access to markets for locally beneficiated products, and infrastructure constraints remain hurdles.<sup>98</sup> Additionally, South Africa is deemed unfit to take the mantle of downstream beneficiation due to high working costs, high electricity and port costs, among others, constrained and expensive infrastructure, and inefficient labour productivity.<sup>99</sup>

### **3.4.2 Lack of Meaningful Empowerment and Participation of the Historically Disadvantaged South Africans in the Mining Sector**

In South Africa, BEE has become a central state policy aimed at dismantling the historical economic exclusion of black South Africans.<sup>100</sup> As part of this effort, the government introduced the BEE policy to encourage deracialisation within the private sector, focusing on equity ownership and control by historically disadvantaged South Africans (HDSAs).<sup>101</sup> Among the African National Congress's (ANC's) strategies, BEE serves as a redistributive mechanism, particularly in sectors such as mining, to bridge income inequalities and foster socio-

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<sup>92</sup> Kgoale & Odeku op cit note 88.

<sup>93</sup> Kgoale op cite note 90.

<sup>94</sup> Kgoale & Odeku op cit note 92.

<sup>95</sup> Kgoale op cite note 90 at 83.

<sup>96</sup> Tarren Bolton 'Significant opportunity lies in increased beneficiation in SA' Mining Review Africa 12 July 2023, available at <https://www.miningreview.com/platinum-group-metals/significant-opportunity-lies-in-increased-beneficiation-in-sa/#:~:text=Despite%20having%20the%20world's%20largest,in%20the%20mining%20sector%20dominated>, accessed 21 February 2024.

<sup>97</sup> Ibid.

<sup>98</sup> Anglo American op cit note 60.

<sup>99</sup> Trevor Tebogo Kola *Mineral beneficiation: A continuing African paradox or a pancea for economic growth and skills development* (unpublished MDIPS, University of Pretoria, 2019) at 34.

<sup>100</sup> Anri Heyns & Hanri Mostert 'Three Mining Charters and a draft: How the politics and rhetoric of development in the South African mining sector are keeping communities in poverty' (2018) *The Law and Development Review* at 803 & 806.

<sup>101</sup> Andrew Bowman 'Black economic empowerment policy and the state-business relations in South Africa: the case of mining' (2019) *Review of African Political Economy* at 224 (own emphasis).

economic transformation.<sup>102</sup> Key frameworks like the Mining Charter and the MPRDA articulate these goals, emphasising equitable access and ownership for HDSAs within the mining industry.<sup>103</sup> While the Mining Charter promotes fair access to mining opportunities, the MPRDA aims to democratise access to mineral and petroleum resources.<sup>104</sup> However, significant challenges have hindered the full realisation of these goals.

Firstly, in the early stages of implementation, the BEE strategy met with alignment problems.<sup>105</sup> In adopting the BEE strategy, the ANC aimed to create a market-friendly approach to wealth redistribution and gradual deracialisation of private sector leadership, envisioning the emergence of a patriotic black capitalist class that would work alongside the government to drive a progressive developmental agenda at the forefront of the economy.<sup>106</sup> However, this developmental agenda met setbacks, as evidenced by BEE asset transfer models during the downturns in commodity cycles in 2008.<sup>107</sup> The volatility of global commodity markets created a compressed form of empowerment in mining companies whereby BEE partners were included as owners but were disadvantaged in terms of structural positions, due to placement 'at subsidiary level and in less viable mining assets.'<sup>108</sup> Consequently, the meaningful transformation of economic control in the manner intended by the Mining Charter and the MPRDA has not been achieved, notwithstanding the establishment of relatively successful BEE holding companies.<sup>109</sup> Additionally, the Department of Mineral Resources (DMR) criticised companies for placing BEE partners at subsidiary levels of management.<sup>110</sup> This practice reduces their effective influence, which contradicts the promotion of equitable access and meaningful contribution within the mining sector.<sup>111</sup>

Secondly, empowerment without adequate resources and support is a myth in fostering equitable access for black people in the mining sector. This assertion is based on the understanding that as far as the policy of transforming the mining industry to include more black people in the participation, distribution of wealth, and offsetting economic opportunities is concerned, the government merely left the process under the whelm of

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<sup>102</sup> Metji Makgoba 'Constructing the symbolic agendas of political and structural transformation with the discourse of Black Economic Empowerment in South Africa' (2021) *African Studies* at 335; Bowman op cit note 101; S V Rungan F T Cawood & R C A Minnitt 'Incorporating BEE into the new mineral law framework for the South African mining industry' (2005) 105 *The Journal of the South African Institute of Mining and Metallurgy* at 736.

<sup>103</sup> Section 100(2) of the MPRDA; Andrew Bowman op cit note 101 (own emphasis).

<sup>104</sup> See part 2.3.2 of chapter two above.

<sup>105</sup> Bowman op cit note 101.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Bowman op cit note 101 at 224.

<sup>110</sup> Ibid at 235.

<sup>111</sup> Ibid (own emphasis).

the market forces limiting the success of the transfer of equity and mine assets to black people.<sup>112</sup> The signatory of the 2004 Charter welcomed the principle of the willing seller–willing buyer approach, given that sellers are not at risk.<sup>113</sup> In this sense, the government remained a regulatory facilitator while transactions of equity and mine assets adhered to market forces by implication.<sup>114</sup> Assets expected to be transferred were huge and demanded capital, which the black people did not have.<sup>115</sup> Moreover, despite recognising the financial constraints faced by historically disadvantaged individuals, the government did not implement mechanisms or provide support for effectively managing and ensuring the success of equity ownership and mine asset transfers.<sup>116</sup>

Thirdly, the mining industry has faced criticism for its limited range of beneficiaries, attributed to factors such as the dilution of black equity, fronting practices, and the stagnant nature of deals promoting BEE.<sup>117</sup> Instead, the industry fosters cronyism, where political connections and personal relationships take precedence in granting economic opportunities, undermining fair access, and hindering genuine economic transformation.<sup>118</sup> Cronyism can be understood as a deliberate favour of friends, colleagues, and business acquaintances by affording them jobs and contracts that yield economic benefits based on political ties and other personal relationships, among others, neglecting those to whom the opportunities deservedly and lawfully ought to be afforded.<sup>119</sup> In the discussion that follows, fronting is expanded on in more detail.

### 3.4.3 Fronting Practice

The economic isolation of black South Africans has been a hurdle that the government of South Africa sought to overcome by developing, among others, initiatives such as the BEE policy, which aims to achieve social transformation and economic equality.<sup>120</sup> The BEE policy was made to enhance the economic welfare of South Africans by enabling them to acquire equity ownership and adequate executive representation in major entities.<sup>121</sup> On the contrary, fronting practices have negated the aspirations and purposes of black economic emancipation, thus making it impossible for black South Africans to attain equitable access to various economic

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<sup>112</sup> Kilambo op cit note 70 at 2.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid at 3.

<sup>118</sup> Kilambo op cit note 112.

<sup>119</sup> Musa Nxele 'Crony capitalist deals and investment in South Africa's platinum belt: a case study of Anglo-American Platinum's scramble for mining rights, 1995 – 2019' (2022) 49 *Review of African Political Economy* at 398.

<sup>120</sup> Aubrey Sibanda 'Weighing the cost of "BEE Fronting" on best practices of corporate social responsibility in South Africa' (2015) *Speculum Juris* at 27.

<sup>121</sup> Sibanda op cit note 120.

assets (with mining as the economic asset of discussion).<sup>122</sup> Fronting is described as arrangements or acts that undermine the achievement of the objectives set by the BBBEEA or their implementation, so that black persons are inhibited from participating in core activities of enterprises to which they are appointed as labourers.<sup>123</sup> This activity is referred to as 'window-dressing'.<sup>124</sup>

Fronting also entails a deliberate misrepresentation of facts about the extent of compliance with enabling legislation; meanwhile, the obligations (ie economic upliftment of black people among others) of the BBBEEA are circumvented in the process.<sup>125</sup> The aims and objectives of black economic empowerment are defeated through the mainstreaming of black people in these major companies, in that black people are used as fronts and not actual wielders of power, wealth, and control.<sup>126</sup> The persisting problem causes challenges in terms of the achievement of substantive equality and the inclusion of black people in the mainstream economic industries of the country, resulting from the growing rate of fronting practices.<sup>127</sup> Matotoka and Odeku<sup>128</sup> posit that the usage of fronting nullifies substantive equality and empowerment by employing individuals in managerial positions who are not qualified for the posts to create an illusion of compliance with legislation.<sup>129</sup> When placed in managerial positions where these individuals are fronts, the result is employment inequity, in the sense that they do not actively perform according to the scope of their employment because of, among others, underqualification and, in turn, are unable to enjoy benefits supposed to be ordinarily received by personnel in their positions.<sup>130</sup> To make matters worse, fronting results in appointed individuals not having the required experience to boost their management skills due to a lack of skills development and necessary qualifications.<sup>131</sup>

In *Electronic Mining Supplies CC v Mabelane*,<sup>132</sup> the court, noting that fronting is a crime, described it as the present-day exploitation of personnel through the shameful abuse of a well-intentioned and lawful mechanism created with the noble aim of redressing the past ills that existed in the previous dispensation.<sup>133</sup>

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<sup>122</sup> Treasure Hlayisani Mathebula & Kolawole Olusola Odeku 'An analysis of post-apartheid anti-fronting interventions fostering mainstreaming of the Black South Africans into corporate sector' (2023) 12 *Laws* at 2 & 3.

<sup>123</sup> Section 1 of the BBBEEA.

<sup>124</sup> Du Plessis op cit note 76 at 402.

<sup>125</sup> Sibanda op cit note 120 at 23.

<sup>126</sup> Mathebula & Odeku op cit note 122.

<sup>127</sup> Mathebula & Odeku op cit note 122 at 3.

<sup>128</sup> Motlhatlego Dennis Matotoka & Kolawole Olusola Odeku 'Exposing the use of fronting to circumvent mainstreaming of African women to managerial positions in the South African private sector' (2022) 24 *Journal of International Women's Studies* at 2-4.

<sup>129</sup> Matotoka & Odeku op cit note 128 at 1.

<sup>130</sup> Matotoka & Odeku op cit note 128 at 3.

<sup>131</sup> Matotoka & Odeku op cit note 128 at 6.

<sup>132</sup> *Electronic Mining Supplies CC v Mabelane* (807/2015) [2018] ZAGPPHC 648.

<sup>133</sup> *Mabelane* supra note 132 para 11.

Fronting re-echoes the exclusion of black people from accessing productive economic assets.<sup>134</sup> For this reason, the BBEEA was developed by the people of South Africa through their democratic government to change this course.<sup>135</sup> Emphatically, the BBEEA was enhanced to combat and address fronting practices.<sup>136</sup> Earlier, when the practice of fronting was emerging to hinder the economic empowerment of black South Africans, it was perceived in *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality*<sup>137</sup> as a cruel practice. The challenge posed by fronting is that the person or entity supposedly to benefit financially from the award of tender is not the one to whom the award is intended.<sup>138</sup> The individual is rather used as a front and often has no capacity or competence to execute what is tendered to him or her.<sup>139</sup>

Consequently, those with capacity, such as multinationals in this case, exploit incapacitated individuals, particularly by taking advantage of their status as historically disadvantaged persons, to gain financial benefits.<sup>140</sup> This practice amounts to fraud, undermining the legislative mechanisms intended to ensure economic gains for the rightful beneficiaries (ie the historically disadvantaged).<sup>141</sup> Fronting can also be described as an act of signing up black people as shareholders in what are essentially white companies, where they do not wield any real power.<sup>142</sup> This was evident in the case between *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd*.<sup>143</sup>

In this case, *Hydro-Tech* lodged a complaint that historically disadvantaged groups were not remunerated or allowed to partake in the management of Viking proportionate to their shareholding and positions as directors.<sup>144</sup> Upon the progression of the case, the Constitutional Court finally issued an order regarding the allegations made by *Hydro-Tech*.<sup>145</sup> The order overturned the Supreme Court of Appeal's ruling and directed the City of Cape Town to investigate *Hydro-Tech's* allegations against *Viking*, including whether historically disadvantaged majority shareholders in *Viking* actively managed and controlled the company as claimed in the complaint, commensurate with the degree of their ownership.<sup>146</sup>

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<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> *Mabelane* supra note 132 para 13.

<sup>137</sup> *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2014 2 All SA 493 (SCA) paras 11 & 15.

<sup>138</sup> *Esorfranki* supra note 137 para 26.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd* (CCT 34/10) [2010] ZACC 21 para 2.

<sup>143</sup> *Viking* supra note 142.

<sup>144</sup> *Viking* supra note 142 para 7.

<sup>145</sup> *Viking* op cit note 142 para 59.

<sup>146</sup> *Viking* supra note 144.

Van Der Rheede comments that this form of fronting illustrates how black people may sometimes be included in enterprise management structures but are often excluded from participating in the entity's decision-making processes.<sup>147</sup> Furthermore, fronting practices become evident when certain economic derivatives received by an enterprise, due to its BBBEE status, do not proportionally benefit black people as outlined in a particular legal instrument.<sup>148</sup> Also, fronting takes the form of concluding a legal contract with a black person to masquerade as compliance with the policy of BEE without granting the person economic benefits due to them or expected under the position they hold in an enterprise.<sup>149</sup>

Fronting continues to be the scourge of the mining industry. The then BBBEE Commissioner Zodwa Ntuli indicated that out of 822 complaints from 2016, 687 (83.5 per cent) were due to fronting.<sup>150</sup> The number of cases of fronting complaints escalated to 909 from June 2016 to March 2021.<sup>151</sup> The mining industry is a significant contributor to fronting, alongside the transport, construction, and engineering sectors.<sup>152</sup> The general feeling is that this scourge of fronting needs to be eradicated if South Africa wishes to achieve its goal of an inclusive economy.<sup>153</sup> The former Commissioner elucidated that the Commission regards compliance with the BBBEE Act as crucial in achieving the envisaged reform in patterns of ownership through the transfer of productive assets of South Africa's economy to black people.<sup>154</sup>

### 3.5 CONCLUSION

This chapter discussed the concept of equitable access to the mining sector and its relationship to black economic empowerment. Equitable access to the mining sector has been observed to mean more than just entry and participation within the industry. It means empowerment, assistance, and an increase in the skills base of the previously disadvantaged so that they can contribute substantially and meaningfully within the mining industry without neglecting the reaping of economic benefits equitably by all.<sup>155</sup> The custodial holding of mineral

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<sup>147</sup> Van Der Rheede op cit note 66 at 111.

<sup>148</sup> See note 123.

<sup>149</sup> Ibid.

<sup>150</sup> The DTIC 'More than 680 cases of fronting place pressure on success of B-BBEE Act' 22 October 2020, available at <https://www.thedtic.gov.za/more-than-680-cases-of-fronting-place-pressure-on-success-of-b-bbee-act/>, accessed 15 November 2024.

<sup>151</sup> Mining Weekly 'Fronting an obstruction to mining sector transformation, barrier to women empowerment' 27 August 2021, available at <https://www.miningweekly.com/article/fronting-an-obstruction-to-mining-sector-transformation-barrier-to-women-empowerment-2021-08-27>, accessed 22 October 2024.

<sup>152</sup> The DTIC op cit note 150.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Rheede op cit note 147.

resources by the state and the formulation of the BBBEE strategy establish, to a great extent, the foundation for the achievement of equitable access; however, certain practices such as fronting and cronyism *inter alia* hinder the progress of equitable access and black economic empowerment. Moreover, some governmental structural discrepancies, such as the lack of adequate mediums to provide the required skills for meaningful participation in the mining industry and enforcement of laws and policies seeking to ensure equitable access and black economic empowerment, slow down the full realisation of the results sought. Furthermore, the relationship between the state and large multinational companies in mining has declined. The intermingling of these factors has led to the partial achievement of equitable access.

The next chapter will explore the progress of transformation in achieving equitable access and black economic empowerment. It will assess the state custodianship model's effectiveness and the role of governmental interventions in advancing these two transformation imperatives. The analysis will determine whether these initiatives go beyond mere window dressing and reflect a tangible lived reality.

## CHAPTER FOUR: TRACING THE PROGRESS ON TRANSFORMATION REGARDING EQUITABLE ACCESS TO AND BLACK ECONOMIC EMPOWERMENT IN SOUTH AFRICA'S MINING SECTOR

### 4. 1 INTRODUCTION

The South African legislative framework on equitable access and black economic empowerment in the mining sector reflects the state's commitment to creating opportunities for integrating historically disadvantaged individuals into various economic enterprises, including mining. As discussed in chapters two and three above,<sup>1</sup> key measures adopted by the South African government to ensure equitable access and black economic empowerment include the adoption of the Mining Charter<sup>2</sup> as policy. Moreover, the adoption of the Mineral and Petroleum Resources Development Act (MPRDA)<sup>3</sup> and the Broad-Based Black Economic Empowerment Act (BBBEA)<sup>4</sup> as primary legislative instruments is central in catering to the two imperatives of developing the historically disadvantaged.<sup>5</sup> The secondary steps emanate from directives issued by these legal instruments, including developing a skills base for the historically disadvantaged, creating employment, advocating meaningful participation in crucial managerial positions in multinational mining companies, and aligning policy and governmental interventions.<sup>6</sup> While these measures signify progress, criticisms have arisen regarding challenges in implementing certain policy objectives, such as mine community development, from a business or company perspective.<sup>7</sup> Mine community development is considered as one of the critical components of the broader transformation agenda. However, when multinationals fail to meet this development goal, they often argue that inconsistent legislation and overlapping policies hinder compliance.<sup>8</sup> They also contend that the broad and sometimes ambiguous nature of transformation requirements can negatively impact business operations.<sup>9</sup> Heyns and Mostert note that the inability to accurately define the mining community for purposes of development

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<sup>1</sup> See parts 2.3 of chapter two & 3.3 of chapter three above.

<sup>2</sup> Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry 2018.

<sup>3</sup> Mineral and Petroleum Resources Development Act 28 of 2002.

<sup>4</sup> The Broad-Based Black Economic Empowerment Act 53 of 2003.

<sup>5</sup> Developing the historically disadvantaged in the context of this study means equipping the previously underprivileged with skills that are necessary to participate meaningfully in the industry. Furthermore, it entails the granting and creation of opportunities to partake in the industry and receive economic benefits. For a more detailed view, see parts 3.2 & 3.3 of chapter three & part 4.3 of chapter four above.

<sup>6</sup> See parts 2.3.2 of chapter two 3.3 of chapter three & 3.4.1 of chapter three above; Metji Makgoba 'Constructing black economic empowerment in South African mining: Government v corporate discourse' (2019) 78 *African Studies* at 2-13.

<sup>7</sup> For further discussion, see Anri Heyns 'Mining community development in South Africa: A critical consideration of how the law and development approach the concept "community"' (2019) 12 *Law and Development Review* at 561-93.

<sup>8</sup> N V Moraka 'Interpretation of transformation – perspectives from mining executives in South Africa' (2016) 116 *Journal of Southern African Institute of Mining and Metallurgy* at 456.

<sup>9</sup> Moraka op cit note 8.

leads to the employment of the poverty alleviation rhetoric, which in turn creates unrealistic expectations from communities that mining companies cannot meet, applying more pressure on the already volatile relationship between them.<sup>10</sup> However, these sticky issues are beyond the scope of this dissertation.<sup>11</sup>

Chapter four explores the key factors influencing the successful implementation of legislation and policies aimed at promoting equitable access and black economic empowerment within South Africa's extractive industry. It assesses the extent to which these legal and policy frameworks have been fulfilled, juxtaposed with the state's shortcomings in realising their objectives. This analysis considers developments in the post-apartheid era, particularly following the enactment of the BBBEEA and the MPRDA. The analysis draws on recent literature and case law that demonstrate progress in promoting equitable access and black economic empowerment within the mining industry, as well as the influence these efforts have had on broader economic development and the social welfare of historically disadvantaged South Africans. The discussion is limited in scope to issues such as skills development, ownership and control, local community development, and funding.

## **4.2 THE PROGRESS OF TRANSFORMATION IN THE MINING SECTOR THROUGH THE LENS OF EQUITABLE ACCESS AND BLACK ECONOMIC EMPOWERMENT**

Undoubtedly, South Africa's transition to democracy and the adoption of empowerment policies and laws by the new government aimed at addressing the social, economic, and political challenges faced by the historically disadvantaged.<sup>12</sup> However, these efforts were met with significant obstacles stemming from the legacy of discrimination and exclusion.<sup>13</sup> The major challenge was balancing a smooth transition of power and political functioning on the one hand and the enactment of policies to correct and reverse past injustices as required by transformative constitutionalism.<sup>14</sup> Crucial decisions and steps were to be taken carefully in the quest to ensure

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<sup>10</sup> Anri Heyns & Hanri Mostert 'Three Mining Charters and a draft: How the politics and rhetoric of development in the South African mining sector are keeping communities in poverty' (2018) 11 *Law and Development Review* at 805.

<sup>11</sup> For further reading on these issues, see Moraka op cit note 8 at 455-63; A Heyns op cit note 7 at 561-93; Heyns & Mostert op cit note 10 at 801-41. Cronyism is another issue that hinders the intended transformation and its subsequent occurrences. In this context, Cronyism refers to the practice of granting economic opportunities or advantages to certain black capitalists based on personal relationships or favouritism rather than merit or broader societal benefit. This undermines the intended transformation goals, as it diverts resources and opportunities away from marginalised communities that are meant to benefit from the economic empowerment initiatives in the mining sector, thereby perpetuating unproductive economic outcomes for the majority. See Musa Nxele 'Crony capitalist deals and investment in South Africa's platinum belt: a case study of Anglo-American Platinum's scramble for mining rights, 1995 – 2019' (2022) 173 *Review of African Political Economy* at 395 – 416.

<sup>12</sup> Nupur Rawat *An analysis of empowerment policies regarding historically disadvantaged South African ownership and management of natural resources in South Africa* (unpublished LLM thesis, University of Pretoria, 2019) at 9.

<sup>13</sup> Rawat op cit note 12.

<sup>14</sup> Ibid; Jackie Dugard 'Evaluating transformative Constitutionalism in South Africa: A view from the mineral rights adjudication looking glass' (2021) 39 *Nordic Journal of Human Rights* at 373-90; Joel M Modiri 'Conquest and constitutionalism: first thoughts on an alternative jurisprudence' (2018) 34 *South African Journal on Human Rights* at 300-25; Jason Brickhill & Yana Van Leeve

inclusive participation and mainstreaming of the majority population in the economy.<sup>15</sup> One of the essential steps that had to be taken to facilitate the course of inclusion and participation is the deracialisation of business ownership entirely through focused black economic empowerment policies and laws.<sup>16</sup> This position is due to the status quo prevalent in the previous dispensation, whereby the white minority groups occupied virtually all managerial positions in mining companies.<sup>17</sup> The step to deracialise aimed to dismantle the racial barriers that had long restricted the black majority from entering the mining industry, addressing the discriminatory policies and practices of the past that denied them opportunities to acquire the skills needed to compete effectively.<sup>18</sup> To address past injustices, new policies and laws were introduced to combat discrimination and build the capacity of historically disadvantaged individuals, enabling them to take on managerial roles in mining companies and contribute meaningfully to the industry.<sup>19</sup> Another crucial step the government took through legislation to facilitate black economic empowerment and equity is a strategy to redress discrimination against historically disadvantaged South Africans in the minerals and petroleum industry and the value chain thereof.<sup>20</sup> Furthermore, a transformation of the industry to assist in the provision for the initiation of, among others, socio-economic development of all historically disadvantaged South Africans from the proceeds or activities of mining operations, involvement in procurement chains, development of the skills set and benefiting from existing or future mining, prospecting, exploration or production operations and the socio-economic development of host communities.<sup>21</sup>

#### **4.2.1 Transformation and Managerial Positions Occupied by the Historically Disadvantaged in Mining Companies**

In the South African context, transformation is perceived as the catalyst to address socio-economic problems and the impact these problems have on various sectors and the economy.<sup>22</sup> It is a governmental strategy aimed

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'Transformative constitutionalism – Guiding light or empty slogan?' (2015) *ACTA* at 141-71; Sanele Sibanda 'When do you call time on a compromise? South Africa's discourse on transformation and the future of transformative constitutionalism' (2020) 24 *Law, Democracy & Development* at 384-406.

<sup>15</sup> Rawat op cit note 12 at 10.

<sup>16</sup> Ibid; (own emphasis)

<sup>17</sup> N H Phaladi & K O Odeku 'Challenges of post-apartheid mining transformation in South Africa' (2015) *The Scientific Journal for Theory and Practice of Socio-economic Development* at 420.

<sup>18</sup> Phaladi & Odeku op cit note 17.

<sup>19</sup> Ibid.

<sup>20</sup> The BBBEEA, section 1 (own emphasis).

<sup>21</sup> Ibid.

<sup>22</sup> Innocent Musonda Trynos Gumbo & Chioma Okoro 'An assessment of transformation strategies in South Africa: A multi-case study of the accounting, financial services, government and construction sectors' (2019) 26 *Acta Structilia* at 77; See also Peshley Thupane Kgoale & Kola Olusola Odeku 'Critical analysis of transformative interventions mainstreaming historically disadvantaged black South Africans into the mining sector' (2019) 8 *Journal of Reviews on Global Economics* at 1409-19; Mark Heywood 'Economic policy and

at restructuring to foster cultural change by instilling new core values, promoting equitable access to resources and opportunities, and enhancing the skills base of the historically disadvantaged.<sup>23</sup> In the mining industry, it is considered a regulatory requirement and a business imperative.<sup>24</sup> This means that the government involvement and business enterprises must be seen as mutually inclusive duties to implement transformation imperatives required by legislative and policy instruments.<sup>25</sup> Transformation also entails changing the economic structure and employment profile.<sup>26</sup> It is also viewed as the slow process of transforming gender and race inequalities, cultural change, change of mindsets, equalising rights and opportunities, embracing diversity, and attaining social justice.<sup>27</sup> Moreover, the drivers involved include but are not limited to socio-economic, technological, political, and legal factors.<sup>28</sup>

As early as 2013, the former Minister of Mineral Resources, Ms. Susan Shabangu, in her budget speech, emphasised that mining houses would implement the government's transformation agenda, 'come hell or high water.'<sup>29</sup> From that time, a very slow progress has been witnessed in terms of transformation regarding the achievement of the imperatives aimed at mainstreaming the previously disadvantaged into the mining economy through ownership, management, and control.<sup>30</sup> By introducing the Mining Charter of 2002, the mining industry has seen changes in meeting the imperative of black ownership and control of mining companies. Insofar as the transformation propelled by the Charter is concerned, the ownership model is closely linked with control. The MPRDA and the Charter required white-owned and foreign-owned enterprises operating in the country to ensure that the historically disadvantaged attain 40 per cent control of mine assets and transfer 26 per cent of the value of equity ownership.<sup>31</sup> Currently, the value of equity ownership and mine assets to be

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the socio-economic rights in the South African Constitution, 1996 – 2021: Why don't they talk to each other?' (2021) 11 *Constitutional Court Review* at 1 to 37; Nthabiseng Violet Moraka 'Transformation review in the South African mining industry: barriers affecting compliance to the Mining Charter' (2015) 13 *Problems and Perspectives in Management* at 177-84; Kola Olusola Odeku & Olufunmilayo F Odeku 'Transforming the mining industry in South Africa: Issues, challenges and prospects' (2015) 12 *Bangladesh e-Journal of Sociology* at 89-96.

<sup>23</sup> Moraka op cit note 8 at 456.

<sup>24</sup> Musonda et al. op cit note 22.

<sup>25</sup> Andrew Bowman 'Black economic empowerment policy and state-business relations in South Africa: the case of mining' (2019) 46 *Review of African Political Economy* at 225-30.

<sup>26</sup> Musonda et al. op cit note 22.

<sup>27</sup> Ibid at 79;

<sup>28</sup> Ibid.

<sup>29</sup> N V Moraka & M Jansen Van Rensburg 'Transformation in the South African mining industry – looking beyond the employment scorecard' (2015) 115 *The Journal of the Southern African Institute of Mining and Metallurgy* at 671.

<sup>30</sup> Moraka & Van Rensburg op cit note 29.

<sup>31</sup> Sixta R Kilambo 'Black economic empowerment policy and the transfer of equity and mine assets to Black people in the South Africa's mining industry' (2021) 24 *South African Journal of Economics and Management Sciences* at 1-3.

transferred is 30 per cent, and control of mine assets has increased to 50 per cent in terms of the 2018 Mining Charter,<sup>32</sup> which is operational.<sup>33</sup>

The observation that has been made is that while governments seek to employ the transformation initiatives, the aim is mainly concerned with maximising export earnings and income tax advantages and royalties derived from corporations rather than overtly demanding citizens' inclusion in equity ownership and control issues.<sup>34</sup> Meanwhile, Bowman and Kilambo emphasise that transforming the industry is a state business issue that needs the government to use selective economic interventions and control state finance to support programmes and cooperation between businesses and the state.<sup>35</sup> Therefore, in the quest to transform the industry, considering the uncertainties and risks of transformation, the government needs to realise that, by law and policy, it has a positive role in assisting with the transformation initiatives and should not pass its duty to multinationals.<sup>36</sup>

A research interview was conducted by Moraka and Van Rensburg with ten senior executives with the intent of examining initiatives taken by mining companies to transform the mining industry and the challenges faced.<sup>37</sup> Using probability purposive sampling, individuals from mining companies listed on the Johannesburg Securities Exchange were chosen, with the companies varying in size from small enterprises to large multinational corporations.<sup>38</sup> The study discovered that the difficulties that bar the transformation include, among others, the inability to recruit suitable candidates to fill high-level positions, competition for talent, and cultural diversity,<sup>39</sup> mining is not always a first option as a career choice, and there is a lack of government support in relation to adequate mentoring programs that will foster the success of transformation in the industry.<sup>40</sup>

Despite the challenges that have been outlined in recent years, the industry has been able to see some developments in inclusive and meaningful participation in the aspect of ownership and control. Kilambo,<sup>41</sup> in her PhD thesis and related studies, examined the representation of black people on the boards of various mining

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<sup>32</sup> Mining Charter of 2018.

<sup>33</sup> 2018 Mining Charter para 2.

<sup>34</sup> Sixta R Kilambo 'Black peoples' control of South Africa's mining industry in the post-apartheid South Africa' (2023) 14 *The Extractive Industries and Society* at 1.

<sup>35</sup> Bowman op cit note 25 at 226 & 239-40; Kilambo op cit note 31 at 3.

<sup>36</sup> Moraka & Van Rensburg op cit note 29 at 676 (own emphasis).

<sup>37</sup> Moraka & Van Rensburg op cit note 29 at 669.

<sup>38</sup> Ibid.

<sup>39</sup> The participants explained that since the industry is male dominated, there are certain prejudicial stereotypes that revolve around gender. In cases where women are promoted to managerial positions, such promotions are met with opposition and bias. Consequently, males do not want to have women as superiors, justifying that women ought to be subservient to men. See Moraka & Van Rensburg op cit note 29 at 674.

<sup>40</sup> Ibid at 673.

<sup>41</sup> Kilambo op cit note 34 at 1-10.

companies. Her research analysed data from a sample of 72 mining companies, including 56 listed on the Johannesburg Stock Exchange and 16 unlisted entities, to assess the extent of black representation in leadership roles.<sup>42</sup> Three categories were used to subdivide the companies, the first being foreign companies (those not registered in South Africa with foreign headquarters); the second being white-owned companies (those with South African registration and owned by white people, most of which conglomerates belonged to); and the third being those that meet BEE ownership requirements (those owned by black people).<sup>43</sup>

The study reveals that black-owned companies comprised a more significant portion of black people represented on the board, standing at 52.3 per cent (22 out of 42).<sup>44</sup> There was, however, a significant drop in the white category to 18.8 per cent (10 out of 53) regarding black representation on the board. In the foreign category, it was even lower by 10 percent (5 out of 50) of black representation on the board.<sup>45</sup> When the number of executive and non-executive people was combined in all these categories, the study revealed that the black representation stood at 32.2 per cent.<sup>46</sup> Generally, higher-level management remains substantively dominated by whites, especially males, in all categories.<sup>47</sup> The reason for these issues is the nature of the ownership structures employed in the industry. These structures include, among others, pyramid structures, consortia, block ownership, foreign ownership, and formulation of consortia.<sup>48</sup> These structures make it hard for unskilled members to manage due to, among others, complicated administrative issues.

Other issues lie with the problem of the historically disadvantaged to meet their debts and, in turn, dispose of their shares to pay debts, thus reducing the level of ownership and management expected by the policy.<sup>49</sup> Another all-pervading issue is the lack of experience to occupy executive positions in the mining industry because the industry is capital-intensive and risky.<sup>50</sup> Due to the risks that come with mining for the investors, careful consideration of management personnel (in so far as experience and skills are concerned) at the higher level ought to be exercised to ensure that economic investments are managed optimally so that they can return to the state's treasury for economic use and development of the country upon maturing.<sup>51</sup> To change the status

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<sup>42</sup> Ibid at 2.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid at 7.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid at 4-7 & 9.

<sup>48</sup> Ibid at 3-7.

<sup>49</sup> Ibid at 9.

<sup>50</sup> Kilambo op cit note 34 at 4 & 7; F T Cawood 'Threats to the South African minerals sector – an independent view on the investment environment for mining' (2011) 111 *Journal of South African Institute of Mining and Metallurgy* at 469.

<sup>51</sup> N H Phaladi *Implementation of laws regulating mining industry transformation in South Africa* (unpublished LLM dissertation, University of Limpopo, 2016) at 13 (own emphasis).

quo, Moraka and Van Rensburg, in the interviews conducted in their study,<sup>52</sup> found that initiatives that can be taken to promote and execute the transformation required by the policy include offering graduate and management development programmes to hone the skills set of their recruits and those who have been long serving to make them able to qualify for executive positions.<sup>53</sup>

#### **4.2.2 Preferential Treatment and Refusal of Granting a Prospecting Right**

Transformation can be viewed through another lens in terms of the emancipation of the previously disadvantaged. As noted in chapter two,<sup>54</sup> the MPRDA, in terms of section 104(2), enjoins the Minister to grant an application for a preferential right in terms of prospecting or mining, considering that such a right will be used for, among others, social upliftment and development of a community,<sup>55</sup> whether benefits will accrue to the community in question.<sup>56</sup> In granting preferential rights, a background check has to be made as to whether or not the person applying for a particular right is historically disadvantaged.<sup>57</sup> Over and above, section 9(2) of the MPRDA enjoins the Minister, on receipt of applications for processing in respect of prospecting, mining rights, or mining permits, when those applications are received on the same day, to give preference to historically disadvantaged persons. In considering this legislative framework, the Constitutional Court in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*<sup>58</sup> noted that the MPRDA, in broader terms, seeks to transform and empower the historically disadvantaged by giving preferential treatment.<sup>59</sup>

In terms of section 17(2) of the MPRDA, the Minister is afforded powers to refuse to grant a prospecting right lodged with a regional manager if it is seen that the granting of such right will result in the concentration of minerals under an applicant and their associated companies with a potential of undermining or limiting equitable access to mineral resources. As alluded to in chapter three,<sup>60</sup> equitable access is one of the fundamental objectives of the MPRDA.<sup>61</sup> Secondly, it enforces equality and seeks to remove all barriers that may impede a specific group of individuals' equal access and enjoyment of benefits from the mining sector. Additionally, it aims to enforce the general landscape of transformative constitutionalism<sup>62</sup> whereby historically disadvantaged South

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<sup>52</sup> See note 29.

<sup>53</sup> Moraka & Van Rensburg op cit note 29 at 672.

<sup>54</sup> See part 2.3.1 of chapter two above.

<sup>55</sup> Section 104(2)(a) of the MPRDA.

<sup>56</sup> Section 104(2)(c) of the MPRDA.

<sup>57</sup> Themba Mathebula 'Transitioning old order mining rights into new mining rights: A critical analysis' (2023) 26 *PELJ* at 12.

<sup>58</sup> *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* CCT 39/10 [2010] ZACC 26.

<sup>59</sup> *Bengwenyama* case supra note 58 para 31.

<sup>60</sup> See part 3.2 of chapter three above.

<sup>61</sup> See the Preamble to the MPRDA and section 3.2 of chapter three.

<sup>62</sup> See part 1.3 of chapter one above.

Africans are given particular preference to redress past injustices regarding socio-economic development at most, among other things. In *Rustenburg Platinum Mines Ltd v The Regional Manager, Limpopo Region, Department of Mineral Resources (DMR)*,<sup>63</sup> the Supreme Court of Appeal (the SCA) dealt with a matter that included, among others, a refusal to grant a prospecting right application by the DMRE's Deputy Director-General (DDG). The overarching reason for refusal was based on section 17(2) of the MPRDA, as cited and expounded above. The contention raised by the appellant was that the DDG gave no adequate reasons as to why the application was refused, but that the DDG merely stated what the MPRA states, and such was found to be arbitrary.<sup>64</sup>

Another contention was that granting a prospecting right to an individual automatically excludes or prevents others from obtaining it in respect of, for instance, the same land and mineral.<sup>65</sup> Furthermore, it was contended that granting such a right to an applicant who holds a mining right in terms of the MPRDA, in theory, results in a concentration of such mineral resource under the control of the approved applicant. Therefore, the legislature's intention could never have been to impose a blanket bar to grant a prospecting right to a mining right holder. Consequently, the appellant argued that the refusal was without good cause and arbitrary.<sup>66</sup> On appeal, it was argued that the idea that granting a prospecting right would concentrate mineral resources and limit equitable access to it was unfounded.<sup>67</sup>

In the ruling, the SCA, *inter alia*, considered the judgment in *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd*.<sup>68</sup> In *Sishen*, the Constitutional Court succinctly laid down the fundamentals of the circumstances in which the MPRDA and its objectives were developed and passed. It was noted that in discharging its obligations to transform the mining industry, one of South Africa's major sectors, the MPRDA was passed by Parliament.<sup>69</sup> As the Preamble to the MPRDA holds, all forms of discrimination had to be eradicated, and equal access to the nation's mineral and petroleum resources, as held in custody for all by the state, had to be guaranteed to ensure that transformation succeeds.<sup>70</sup> In the face of blacks being denied land ownership through dispossession and restrictive legislation, drastic measures were needed to create

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<sup>63</sup> *Rustenburg Platinum Mines Ltd v The Regional Manager, Limpopo Region, Department of Mineral Resources (DMR)*(1109/2020) [2022] ZASCA 157.

<sup>64</sup> *Rustenburg Platinum Mines Limited* case supra note 63 para 27.

<sup>65</sup> *Rustenburg Platinum Mines Limited* case supra note 63 para 26.

<sup>66</sup> *Rustenburg Platinum Mines Limited* case supra note 63 para 26.

<sup>67</sup> *Rustenburg Platinum Mines Limited* case supra note 63 para 33.

<sup>68</sup> *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd* [2013] ZACC 45.

<sup>69</sup> *Sishen Iron Ore Company (Pty) Ltd* case supra note 68 para 10.

<sup>70</sup> *Sishen Iron Ore Company (Pty) Ltd* case supra note 68 para 10.

opportunities in the mining industry for the historically excluded majority, which became a central aim of the MPRDA's objectives.<sup>71</sup>

In addressing the refusal issue, the SCA noted that in interpreting the provisions of the MPRDA, the facts of the case, the context, and the purpose for enacting the concerned provisions are paramount.<sup>72</sup> The SCA stated that it is well-established that context is crucial in the interpretation of written instruments. The spirit, purport, and objects of the Bill of Rights must guide the interpretation of statutes. One key aspect of context is the entirety of the enactment itself. Additionally, the factual background of the statute, including the nature of the issues it addresses, its social objectives, and, for laws that pertain to specific sectors of the economy or public life, the nature of the areas the statute relates to, all contribute to the context of the legislation.<sup>73</sup> Citing the Constitutional Court in *Sishen Iron Ore Company (Pty) Ltd*, the SCA held that the MPRDA seeks to promote transformation by ensuring equitable access to mineral resources for all South Africans, creating opportunities for historically disadvantaged individuals to partake in the mining and petroleum industries, and advancing the socio-economic well-being of the entire population.<sup>74</sup> With that in mind, the state has an obligation to promote the achievement of these objectives.<sup>75</sup>

In concluding the judgement, the SCA noted a few important points. Firstly, it was pointed out that, should the prospecting right be given to the appellant, it would not immediately be used to attain the aims of the MPRDA. Secondly, should the right be granted, as the DDG reasoned, other potential miners, particularly those from historically disadvantaged communities, would stand little chance of accessing the market for a long period. This is because the appellant had vast amounts of unmined platinum in another mine, directly or indirectly, by related entities; in any case, it would have considerable access to minerals in question already. Thirdly, it was ascertained that the appellant was a subsidiary of Anglo Platinum, one of the country's largest mining companies. The application could not be supported because the appellant and Anglo Platinum were already in a dominant position, and an ideal opportunity was for a control created for historically disadvantaged persons to enter the South African and world PGM industry successfully.<sup>76</sup> Consequently, the appeal was dismissed.

What can be observed from the *Rustenburg* case is that our Courts are determined to make concerted efforts to ensure that everyone, especially the previously disadvantaged people and communities who have an

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<sup>71</sup> *Sishen Iron Ore Company (Pty) Ltd* case supra note 68 para 13.

<sup>72</sup> *Sishen Iron Ore Company (Pty) Ltd* case supra note 68 para 56.

<sup>73</sup> *Sishen Iron Ore Company (Pty) Ltd* case supra note 68 para 57.

<sup>74</sup> *Sishen Iron Ore Company (Pty) Ltd* case supra note 68 para 45.

<sup>75</sup> *Sishen Iron Ore Company (Pty) Ltd* case supra note 68 para 45.

<sup>76</sup> *Rustenburg Platinum Mines Ltd* case supra note 63 para 65.

earnest desire to participate and benefit from the mining industry, can do so. This determination comes with mindfulness of South Africa's socio-economic landscape and the disparities within the country.<sup>77</sup> In its reasoning in *Rustenburg Platinum Mines Ltd*, the SCA observed that preferential treatment serves as a barrier against the monopolisation of the industry by any dominant entity or individuals from a specific group. Instead, opportunities to enter and participate in the mining industry should be expanded to everyone, with special emphasis on historically disadvantaged persons, particularly black people, which includes Coloureds, Indians, and Blacks.

The inclusivity promoted by preferential treatment is deeply intertwined with the state's duty to advance the realisation of the objectives of the MPRDA. This responsibility is particularly significant when addressing the socio-economic conditions of South Africa's historically disadvantaged black population. The MPRDA's goals, especially those aimed at rectifying past injustices and fostering equitable access to the nation's mineral resources, are essential for uplifting communities that have long been marginalised. The approach in the case shows the commitment of the judiciary to act in favour of statutory transformation as propelled by the MPRDA.

#### **4.2.3 Mining Community Development Initiatives**

Another way to assess the progress of transformation in the mining industry is by analysing the socio-economic development initiatives undertaken by mining companies, as mandated by policy and legislative frameworks, for the benefit of South African citizens. Although a specific aspect (ie a small niche) within the broader spectrum of black economic empowerment and efforts to promote equitable access to mining for the historically underprivileged, mining community development remains a crucial factor in advancing the transformation of the mining industry in line with black economic empowerment and equitable access imperatives. By far, one of the objectives that the MPRDA seeks to fulfil is that mining and production rights holders (often mining companies) should contribute to the industry through the socio-economic development of the areas where they operate.<sup>78</sup> The imperative of developing mine communities is motivated by little witness or no transfer of mineral wealth for the benefit of the historically disadvantaged communities in the post-apartheid era, which has seen the exclusion of mining community interests.<sup>79</sup>

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<sup>77</sup> Sandile Shongwe & Allan Reid 'Is equitable access into the mining industry ensured?' 25 January 2023, available at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2023/Practice/Corporate/combined-corporate-and-commercial-and-mining-alert-25-january-2023-is-equitable-access-into-the-mining-industry-ensured.html#:~:text=The%20SCA%20held%20that%20the,transformation%20objectives%20of%20the%20MPRDA>, accessed 09 September 2024.

<sup>78</sup> Section 2(j) of the MPRDA (own emphasis).

<sup>79</sup> Tinashe Sithole 'The politics of extractive industry governance in post-apartheid South Africa: A case study of Platinum Group Metals' (2024) 21 *African Renaissance* at 167.

A commonly held view that has been occurring in recent years among mining communities is that the carrying out of mining operations by mining companies in host communities often brings harm that outweighs the benefits,<sup>80</sup> with host communities receiving minimal or no tangible advantages from the mining and prospecting activities.<sup>81</sup> They experience forced displacement, the loss of economic stability within the community, and, ultimately, the erosion of their cultural way of life, among others.<sup>82</sup> Due to these issues, the relationship between mining operators and communities has declined because of considerable mistrust and antagonism.<sup>83</sup> Findings indicate that mines are oblivious to the community's needs, resulting in project initiatives that are interpreted by them as resistance on the part of communities to partake in these activities.<sup>84</sup>

A typical example of how this has played out over the years is the one found in *Baleni v Minister of Mineral Resources*.<sup>85</sup> In *Baleni*, where the dispute centred around mining in the Xolobeni community in the Eastern Cape, one of the key concerns raised by the community was that approving the mining operations without their consent could lead to significant conflict between members who might benefit and those who would suffer severe disadvantages.<sup>86</sup> The community was not entirely opposed to the idea of allowing mining operations to take place; instead, they wanted a thorough explanation of the likelihood of impacts the mining operations would have on them and the guarantee of compensation for the harm that would result from that place, and in resettlement issues that the members would be placed elsewhere given their willingness to be displaced and resettled.<sup>87</sup> Consequently, community development initiatives are perceived as mere window dressing and artificial.<sup>88</sup> This perception is often reinforced by the absence of clear distinctions between governmental and corporate responsibilities in relation to the development of mining communities, fostering a cycle of blame-shifting in which neither party assumes full accountability, ultimately stalling meaningful development and leaving affected communities in a continued state of underdevelopment.<sup>89</sup>

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<sup>80</sup> *Baleni v Minister of Mineral Resources* (73768/2016) [2018] ZAGPPHC 829 paras 19 & 20.

<sup>81</sup> *Minerals Council of South Africa v Minister of Mineral Resources and Energy* (20341/19) [2021] ZAGPPHC 623 para 5.

<sup>82</sup> *Baleni* case supra note 80 paras 18 & 19.

<sup>83</sup> Funeka Yazini April *The governance of mineral resources in South Africa: The case of a selected mining community in Limpopo province* (unpublished LLD dissertation, University of Limpopo, 2017) at 82.

<sup>84</sup> April op cit note 83; Freek Cronje & Charity S Chenga 'Sustainable social development in the South African mining sector' (2009) 26 *Development Southern Africa* at 416-19 & 422.

<sup>85</sup> See note 80.

<sup>86</sup> *Baleni* case supra note 80 para 15.

<sup>87</sup> *Ibid.*

<sup>88</sup> Cronje & Chenga op cit note 84.

<sup>89</sup> *Ibid* at 422.

In a study conducted by Dikgwatlhe and Mulenga,<sup>90</sup> it has been observed that local communities recognise the importance of mining and are not hostile *per se* to mining operations. The study examines how local communities, either near or within mining areas, perceive the socio-economic effects of mining activities on their communities.<sup>91</sup> It involved statistical data analysis, reviews, survey *questionnaires*, and interpretations.<sup>92</sup> Four provinces were used to collect data: Mpumalanga, *Gauteng*, Limpopo, and the North West Province.<sup>93</sup> Among other things, the locals acknowledged the socio-economic impact of mining, giving both positive and negative effects.<sup>94</sup> A highlight of the positives is that the operations provide employment and income for the locals; some companies offer them water, and on the other side, there is risk associated with the instability of mines and the concern for sustenance when the operations come to an end and some issues related to crime as well as some of the problems highlighted in the preceding paragraph.<sup>95</sup>

A good measure that has the potential to cure the above issues is the establishment of a strong tripartite relationship between the government, the community, and the mining companies, as they are all responsible for addressing and resolving the concerns that emanate from mining activities.<sup>96</sup> As such, the power relation between the three stakeholders must be managed to ensure the continued sustainability of communities while promoting their inclusion in economic activities and protecting them from harm.<sup>97</sup>

#### **4.3 ENHANCING EQUITABLE ACCESS AND BLACK ECONOMIC EMPOWERMENT IN SOUTH AFRICA'S MINING SECTOR**

From the discussions above, it has been observed that in some cases, the underlying issue that often impedes equitable access and black economic empowerment is, among others, the lack of required skills that candidates need to enter into the mining industry, which is often described as one of the major obstacles towards the transformation.<sup>98</sup> Contributing to skills lack is that there are no proper career progression plans at certain intervals, and little connection between the skill set required by companies and what is actually occurring.<sup>99</sup>

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<sup>90</sup> P Dikgwatlhe & F Mulenga 'Perceptions of local communities regarding the impacts of mining on employment and economic activities in South Africa' (2023) *Resources Policy* 1-14.

<sup>91</sup> Dikgwatlhe & Mulenga op cit note 90 at 1.

<sup>92</sup> *Ibid* at 3.

<sup>93</sup> *Ibid*.

<sup>94</sup> *Ibid* at 5-7.

<sup>95</sup> *Ibid* at 7-10 (own emphasis).

<sup>96</sup> *Ibid* at 11.

<sup>97</sup> *Ibid*.

<sup>98</sup> Phaladi & Odeku op cit note 17; Phaladi op cit note 51 at 55.

<sup>99</sup> G Mitchell 'Making sense of transformation claims in the South African mining industry' (2013) 113 *Journal of the Southern African Institute of Mining and Metallurgy* at 40.

Mineral beneficiation<sup>100</sup> is labour-intensive and requires a specialised skill set from the workers.<sup>101</sup> For locally beneficiated minerals to compete in international markets, they must meet high standards of quality to generate revenue and improve the living conditions of South Africans.<sup>102</sup> However, inefficient labour productivity, caused in part by a shortage of skills and inadequate infrastructure, limits the global competitiveness of these products.<sup>103</sup> Consequently, mining companies face challenges in exporting higher-value beneficiated products suitable for international markets.<sup>104</sup> Kola notes that the industry lags behind in beneficiation because it operates in a global environment that is more advanced than its current situation, whereby Western counterparts are often more experienced in this field, which hinders the effective participation of developing countries like South Africa.<sup>105</sup> As a result, the country often imports beneficiated products instead of exporting them, leading to lost opportunities for export revenue and job creation.<sup>106</sup> Moreover, historically disadvantaged communities' lack of innovation and technical skills prevents their meaningful participation in the industry.<sup>107</sup> This challenge not only limits their role in beneficiation but also obstructs their integration into the broader economic benefits of the sector.<sup>108</sup> Addressing these issues is critical for achieving true transformation and ensuring that the economic gains from mining are shared equitably.

Cawood<sup>109</sup> notes that the education system contributes to inadequate participation in the mining industry by failing to equip students with the necessary knowledge and skills. He highlights a gap between theoretical education, from undergraduate to postgraduate levels, and a practical understanding of how the industry operates.<sup>110</sup> Without this practical foundation, students are ill-prepared to transition effectively into the mining workforce.<sup>111</sup> Kgoale is of the view that there is a need for urgent skills development and training in the mining industry to ensure a sustainable and competitive implementation of beneficiation both locally and internationally.<sup>112</sup> April argues that for the MPRDA to effectively serve as a tool for beneficiation, its success

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<sup>100</sup> See part 3.4 of chapter three above.

<sup>101</sup> Kgoale Thupane Peshley *Transformative mineral resources beneficiation legislation: An impetus for socio-economic transformation and poverty alleviation in South Africa* (unpublished LLM dissertation, University of Limpopo, 2019) at 83.

<sup>102</sup> Kgoale op cit note 101 (own emphasis).

<sup>103</sup> Trevor Tebogo Kola *Mineral beneficiation: A continuing African paradox or a pancea for economic growth and skills development* (unpublished MDIPS, University of Pretoria, 2019) at 34; See part 3.4 of chapter three above.

<sup>104</sup> Kgoale op cit note 101 at 84.

<sup>105</sup> Kola op cit note 101 at 32.

<sup>106</sup> See part 3.4 of chapter three above.

<sup>107</sup> Kgoale op cit note 101 at 94-5 (own emphasis).

<sup>108</sup> Ibid.

<sup>109</sup> Cawood op cit note 50 at 469-74.

<sup>110</sup> Cawood op cit note 50 at 469 (own emphasis).

<sup>111</sup> Ibid.

<sup>112</sup> Kgoale op cit note 101 at 95 (own emphasis).

hinges on the development of human resources, starting with marginalised schools.<sup>113</sup> The rationale behind this proposition is that schools in the countryside, for example, do not have adequate facilities and resources, which impede their progress to tertiary institutions of learning to pursue mining careers.<sup>114</sup> This factor is a barrier to progress in transformation regarding the elevation of historically disadvantaged socioeconomic conditions because the affected individuals are ill-prepared to satisfy employers' expectations.<sup>115</sup>

Although mining companies have tried to accommodate ill-prepared individuals for the working environment, another factor is that when granted opportunities to progress with education, they perform poorly.<sup>116</sup> A report has been given in Moraka's study by the interviewees that certain students have been granted bursary opportunities as a form of assistance to enter tertiary institutions to pursue mining-related courses.<sup>117</sup> Despite the assistance, students fail their first and second years of studying due to the quality of education received prior to entering tertiary education.<sup>118</sup> To deal with this issue, the government is encouraged not just to monitor and regulate progress in transformation but also to drive change actively. Such an approach will make sure that schools are properly equipped with the necessary resources and facilities to operate optimally, with more emphasis on key subjects such as science and mathematics, as the industry demands them.<sup>119</sup> This then brings to the fore the business-state relationship of collaboration that will likely improve service delivery and community development.<sup>120</sup>

Masuku<sup>121</sup> notes that companies should invest in leadership programmes, internships, adult education programmes, bursaries awarded to staff members, and portable skills to enhance their employees' skills.<sup>122</sup> An implementation of this initiative subscribes to the idea that human resource development is central to mineral beneficiation.<sup>123</sup> The positive impact of this initiative is that there are potential benefits to the mining company, including but not limited to better productivity, loyalty, and an image boost to the company due to a more robust social licence to operate in a host community.<sup>124</sup> Of utmost importance in the quest to develop the skills base is

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<sup>113</sup> April op cit note 83 at 42 (own emphasis).

<sup>114</sup> Ibid; Moraka op cit note 29 at 676.

<sup>115</sup> April op cit note 113 (own emphasis).

<sup>116</sup> Moraka op cit note 29 at 675.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid at 676 (own emphasis).

<sup>120</sup> Ibid.

<sup>121</sup> Bheki Masuku 'Skills development in mining – a solution to a changing industry' The Southern African Institute of Mining and Metallurgy 08 December 2023, available at <https://www.saimm.co.za/press-releases/1063-skills-development-in-mining-a-solution-to-a-changing-industry>, accessed 19 September 2024.

<sup>122</sup> Masuku op cit note 121 (own emphasis).

<sup>123</sup> April op cit note 83 at 42.

<sup>124</sup> Masuku op cit note 121.

investment in those skills that matter for the success of the company's work, such as soft skills and technical skills.<sup>125</sup> Meanwhile, companies can be encouraged to provide the necessary training, joining hands together with the government in doing so, for instance, initiatives like Adult Basic Education Training for those that had no prior education but wish to learn and hone their skill set as one of the means to address issues of competence and employability.<sup>126</sup> Education is considered the main component for the MPRDA to take off in the quest to transform the industry by promoting black participation.<sup>127</sup>

Another issue that serves as an impediment is the lack of funding for the entrance of black-owned or controlled mining companies, as highlighted in part 4.2.1 above. The unavailability of capital in a capital-intensive industry like mining is one of the things that the government can seek to address by trying to assist black-owned companies' finances, especially those aspiring to maximise the opportunities granted by the MPRDA and the Mining Charter.<sup>128</sup> Kilambo proposes that considering the methods used to finalise BEE deals is crucial, as it directly affects how black people can achieve control.<sup>129</sup> In this aspect, financing through debt and BEE deal structures is key to conveying some impediments black people encounter.<sup>130</sup> The method involves vendors offering shares without a charge to historically disadvantaged individuals, expecting those shares to be repaid later through dividends and other external funding sources.<sup>131</sup> Failure to pay the debts timeously results in overaccumulation of debts, forcing numerous black-owned companies to relinquish their shares and mining assets to creditors or face liquidation.<sup>132</sup> This speaks to the huge issue of financing required by the industry and how the lack thereof impedes the progress of transformation in the aspect of control and management by black people. As highlighted in part 4.2.1 above, to mitigate the issue of funding for the previously disadvantaged, the government is encouraged to form collaborations with multinational mining companies to establish programmes and economic interventions that will assist with capital issues to achieve the progressive realisation of transforming the industry as aimed by the MPRDA and the Charter.

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<sup>125</sup> Ibid.

<sup>126</sup> Phaladi op cit note 50 at 57; G Mitchel op cit note 99.

<sup>127</sup> April op cit note 83 at 158.

<sup>128</sup> Kilambo op cit note 31 at 4.

<sup>129</sup> Ibid at 5.

<sup>130</sup> Ibid (own emphasis).

<sup>131</sup> Ibid at 6.

<sup>132</sup> Ibid.

#### **4.4 CONCLUSION**

Chapter four has considered some factors that show the progress of transformation in South Africa's mining sector regarding equitable access and black economic empowerment. The scope of the chapter is limited only to a few selected factors, including those associated with the skills development of the historically disadvantaged, preferential treatment, ownership, mining community development, and management control of mining companies. It has been observed that the significant factor contributing to the slow progress of transformation is the lack of skills required in the mining industry from the side of the historically disadvantaged. This factor is due to the institutional gaps that exist because of the lack of competitive educational and skills development programmes. Another factor highlighted is the lack of funding for impoverished, previously disadvantaged persons who desire to partake in the opportunities offered by the MPRDA and the Mining Charter but cannot do so. In this aspect, the government is encouraged to collaborate with multinational mining companies and devise ways to procure funding for the historically disadvantaged to meet the objectives of the MPRDA. Furthermore, the study observes that the business-state relationship needs to be strengthened so that mining communities can have benefits designed for them through the mining industry. It has been seen that our Courts, through preferential treatment, are trying to maintain the objectives of the MPRDA. Although there is quite a massive disparity between realising the fulfilment of all the objects of the MPRDA regarding equitable access and black economic empowerment due to the slow progress of transformation, there is room to hope for the fulfilment of the outcomes intended by the Act. This hope exists only when there is action on the part of the government to drive these factors home so that they become a reality.

## CHAPTER FIVE: CONCLUSION

### 5.1 INTRODUCTION

The Constitution<sup>1</sup> informs the South African legal landscape on state custodianship of the country's mineral and petroleum resources.<sup>2</sup> It echoes the theme of transformative constitutionalism by addressing the divisions and inequalities of the previous dispensation regarding economic development and the livelihoods of the historically disadvantaged.<sup>3</sup> In particular, section 25(4)(a) of the Constitution establishes the commitment of the state to reforms that are, among others, based on creating equitable access to the nation's mineral resources by all South Africans. This section places a particular emphasis on the historically disadvantaged receiving preference to the opportunities and benefits as a measure to settle the imbalance due to the previous dispensation in so far as economic issues are concerned.<sup>4</sup> Meanwhile, section 9 of the Constitution ensures that all forms of discrimination that may impede equal access and benefit from the industry by the historically disadvantaged are eradicated.<sup>5</sup> The rationale behind the state custodianship model is to create a level ground for accessing opportunities in the mining industry by the historically underprivileged and to afford them a greater privilege of accessing the opportunities and reaping mining benefits in comparison with the exclusion and deprivation that occurred in the previous dispensations (ie the colonial and apartheid regimes especially the latter).<sup>6</sup>

The MPRDA, as a legislative instrument subservient to constitutional design, facilitates the promotion of equitable access to South Africa's natural resources.<sup>7</sup> It expands opportunities to the previously disadvantaged and ensures they participate meaningfully in the mining industry. Meaningful participation in the industry means more than mere access; it includes the state's role in creating structures and programmes to ensure that the participation of the historically disadvantaged is substantive, not just symbolic. In simple terms, this means equipping black people with the skills required in the industry, providing quality education, and assisting with securing prospecting or mining rights, among other support. The vesting of mineral and petroleum resources in the state as custodian reaffirms the commitment to transform the industry and make it more accessible to the black community.<sup>8</sup> The state's role, through the Minister, in facilitating equitable access is one

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<sup>1</sup> Constitution of the Republic of South Africa, 1996.

<sup>2</sup> Section 2 of the Constitution. The section provides that the Constitution is the supreme law of the Republic, that any law or conduct in conflict with it is null and void, and that obligations it imposes must be fulfilled.

<sup>3</sup> See part 1.1 of chapter one above.

<sup>4</sup> See part 2.2 of chapter two & part 3.2 of chapter three above.

<sup>5</sup> See part 3.2 of chapter three above.

<sup>6</sup> See parts 1.1 and 1.2 of chapter one & part 2.3 of chapter two above.

<sup>7</sup> See parts 2.1 & 2.3 of chapter two above.

<sup>8</sup> See part 2.3 of chapter two above.

of the laudable measures to foster equitable opportunities in the sector.<sup>9</sup> The discretionary powers granted to the Minister for granting mining rights must be exercised carefully to ensure that public interests are upheld and that the benefits genuinely accrue to the nation.<sup>10</sup>

Contemporaneously, the BBBEEA and the Mining Charter are pivotal in promoting equitable access to the State's resources. The BBBEEA serves as a legislative response to transforming the economic landscape for historically disadvantaged individuals, complementing the overarching BBEE strategy.<sup>11</sup> It mandates the State to facilitate the participation of these individuals in the mining sector, thereby fostering black economic empowerment. The strategy aspires to integrate black individuals as integral contributors to the South African mining economy by, alongside other factors, equipping them with essential knowledge and skills crucial for success in the industry.<sup>12</sup> This approach emphasises the development of a skilled workforce to enhance accessibility and achieve genuine empowerment.<sup>13</sup>

Conversely, the Mining Charter advances equitable access by seeking to deracialise the ownership structures of companies engaged in mining operations.<sup>14</sup> It promotes the representation of historically disadvantaged individuals at all managerial levels within multinational enterprises, striving to establish a balanced demographic composition between the black majority and the white minority in the industry. The set targets for the transfer of mine assets and equity ownership to black people in the Charter show the positive attitude that the government possesses to ensure that black people attain meaningful participation in the industry and that they, too, have an opportunity to be at the forefront of shaping the economic evolution of the industry and its sector.<sup>15</sup> Furthermore, the Charter underscores the significance of building a robust skills foundation to empower meaningful engagement within the industry. It articulates a clear vision for advancing the ownership imperative, promoting substantial economic participation, integrating historically disadvantaged groups into the broader economy, and fostering genuine stewardship of the nation's mineral wealth.<sup>16</sup>

Notwithstanding the comprehensive mechanisms and well-formulated principles related to state custodianship, equitable access, and black economic empowerment, it remains evident that a significant number of historically disadvantaged individuals have not benefited as envisaged by the legislative framework. The

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<sup>9</sup> See part 2.3.1 of chapter two above.

<sup>10</sup> Ibid.

<sup>11</sup> See part 3.3 of chapter three above.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

persistent inequality in access to mineral and petroleum resources continues to present substantial challenges for these groups, attributable to various issues discussed in the subsequent part. Chapter five delineates the critical findings regarding implementing equitable access and black economic empowerment principles within the South African mining industry, which operates under the auspices of state custodianship. This chapter addresses the overarching question concerning the justification for state custodianship of mineral and petroleum resources in South Africa. In addition, it seeks to assess the extent to which equitable access to mineral resources and black economic empowerment has been achieved in the mining sector and whether the mechanisms employed have proven effective in advancing these objectives as part of the broader transformation agenda.

## 5.2 FINDINGS

From a historical and legislative perspective, the rationale for state custodianship of South African mineral and petroleum resources is to confirm the state's autonomy over its resources.<sup>17</sup> From a socio-economic transformation viewpoint, the *raison d'être* for state custodianship is to ensure that the fundamental principle of inclusive participation and benefit from the state's mineral and petroleum resources is upheld.<sup>18</sup> This is due to the provision of section 3 of the MPRDA, which states that the state's resources are a common heritage for all South Africans, and thus, the benefits derived from them are for common usage and enjoyment. The notion of common heritage affirms the inclusivity that the constitutional arrangement on reforming the mining industry seeks to achieve in line with the equality principle and commitment to ensure that every South African realises equal opportunity in matters connected with socio-economic development. As a conduit facilitator of granting access and enjoyment of mining rights, the state is duty-bound to ensure that the historically disadvantaged are mainstreamed into the economy, that special attention is given to them in accessing the mining industry, and that nothing should be done to hinder their rightful participation.<sup>19</sup>

The study has found that one of the primary responses to realise equitable access and black economic empowerment in South Africa's mining industry is, by far, the adoption of the MPRDA and the BBBEEA, as well as the development of the Mining Charter, alongside others. In their respective spheres, these instruments have one objective: to promote the emancipation of the historically underprivileged in socio-economic contexts.<sup>20</sup> The

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<sup>17</sup> Section 2(a) of the MPRDA; The *Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry* (GN 1421 in GG 42130 of 20 December 2018); See part 2.3 of chapter two above.

<sup>18</sup> See part 2.3 of chapter two above.

<sup>19</sup> See part 1.2 of chapter one above.

<sup>20</sup> See parts 4.2 & 4.3 of chapter four above.

MPRDA, on the one hand, grants equitable access to the nation's resources and also creates an environment conducive to ensuring the attainment of the government's objectives of redressing historical, social, and economic inequalities as provided in the Constitution by empowering the Minister to develop a broad-based socio-economic empowerment, Charter. The Charter sets a framework for targets that will facilitate the entrance and active participation of the historically underprivileged South Africans into the industry.<sup>21</sup> One example of this from the Charter that has been discussed in chapters three and four above is the deracialising of the ownership structures in mining companies operating in the industry to achieve a broader representation of the marginalised black people.<sup>22</sup>

The initiative to deracialise and achieve broad representation is accompanied by the enjoining of the state and mining enterprises to collaborate in equipping the workforce with the education and skills necessary for impactful contribution and management or control by the historically underprivileged in the industry.<sup>23</sup> The deracialising initiative is impeded by fronting, which occurs in the industry. Part 3.4.3 of chapter three above discusses the fronting practice in detail. In light of the case of *Electronic Mining Supplies CC v Mabelane*,<sup>24</sup> chapter three describes this practice as a deliberate misuse of a well-intentioned legislative instrument that promotes the representation of the marginalised in mining enterprises. Through this practice, the marginalised are exploited for economic gain that does not accrue to them, but because they are profiled as fronts of these multinational mining companies, the economic gain accrues to these companies instead of the marginalised for whom the economic gain was intended. Meanwhile, the BBBEEA, as alluded to in part 5.1 above, seeks to empower black people in terms of technical know-how and upskilling as needed in the industry. It criminalises fronting as a means to ensure that meaningful participation and emancipation of black people occur in conformity with the transformation agenda in the mining industry. Despite this effort, fronting continues to thrive in the industry,<sup>25</sup> making it hard for equitable access and black economic empowerment to reach the height intended by legislative and policy reform.

Another important aspect of equitable access identified in this study is that, in the South African context, access to the nation's resources can occur in two ways: direct and indirect, as discussed in part 3.2 of chapter

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<sup>21</sup> See part 4.2.1 of chapter four above.

<sup>22</sup> See parts 3.2 & 3.4.1 of chapter three & 4.2 of chapter four above.

<sup>23</sup> See part 4.2.1 of chapter four above.

<sup>24</sup> *Electronic Mining Supplies CC v Mabelane* (807/2015) [2018] ZAGPPHC 648.

<sup>25</sup> The DTIC 'More than 680 cases of fronting place pressure on success of B-BBEE Act' 22 October 2020, available at <https://www.thedtic.gov.za/more-than-680-cases-of-fronting-place-pressure-on-success-of-b-bbee-act/>, accessed 15 November 2024; See also Mining Weekly 'Fronting an obstruction to mining sector transformation, barrier to women empowerment' 27 August 2021, available at <https://www.miningweekly.com/article/fronting-an-obstruction-to-mining-sector-transformation-barrier-to-women-empowerment-2021-08-27>, accessed 22 October 2024.

three above. The indirect access is linked to the funding derived from the mining industry, which creates employment opportunities and specific development programmes for the South African population.<sup>26</sup> The understanding here is that not every South African is eligible for direct involvement in exploiting mineral and petroleum resources due to the complicated nature of the industry, the bureaucratic hurdles, and the financial means required.<sup>27</sup> However, the mechanism in place for some of those who are not able is the common sharing of national benefits derived from the industry aimed at benefiting the nation, which includes, among others, community development initiatives and certain revenues collected to fund government activities. In essence, the notion of equitable access proposes that the state must ensure that all South Africans partake in the benefits derived from the industry, considering our historical context of economic inequality and the need to transform the industry according to the broader transformation agenda.

Central to the transformation initiative by the state is mineral beneficiation as propelled by the MPRDA. The Minister is responsible for overseeing the establishment of beneficiation on behalf of the state<sup>28</sup>. Over the years, there has been general agreement that beneficiating extracted minerals is a potential area that can increase the country's economy, development, and job creation. The consideration does not end here. Beneficiation is an area that can advance the betterment of the country while being a driver for the empowerment of the historically disadvantaged. It can sanction the development of growing entrepreneurs in the sidestream<sup>29</sup> and downstream industries.<sup>30</sup> Kola<sup>31</sup> mentions that beneficiation is capital and labour-intensive and requires a specialised skill set.<sup>32</sup> Peshley maintains that there is urgency in requiring specialised skills development and training in the industry to ensure a successful implementation locally.<sup>33</sup> The problem in South Africa with this initiative is a lack of beneficiation activity. As a result, the country imports finished products rather than manufacturing locally, improving them and selling them through exporting, which, in turn, generates more wealth

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<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> See part 3.3 of chapter three above.

<sup>29</sup> A sidestream industry refers to an industry that sustains the mining sector and deals in infrastructure such as power, logistics, etc., human resource development, research and development, consumables, and inputs such as capital goods and services. See Daniel Antin 'The South African mining sector: An industry at crossroads' December 2013, at 7, available at [https://southafrica.hss.de/fileadmin/user\\_upload/Projects\\_HSS/South\\_Africa/170911\\_Migration/Mining\\_Report\\_Final\\_Dec\\_2013.pdf](https://southafrica.hss.de/fileadmin/user_upload/Projects_HSS/South_Africa/170911_Migration/Mining_Report_Final_Dec_2013.pdf) accessed 18 November 2024; See also Department of Mineral Resources 'A beneficiation strategy for the minerals industry of South Africa' June 2011 at ii, available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/beneficiation-strategy-june-2011-final-30.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/beneficiation-strategy-june-2011-final-30.pdf), accessed 18 November 2024.

<sup>30</sup> Ibid.

<sup>31</sup> See note 103 of chapter four above.

<sup>32</sup> Ibid at 47.

<sup>33</sup> See part 4.3 of chapter four above.

for the locals and the country's treasury. Some factors contributing to this are skills shortages, infrastructure constraints, and access to markets for locally benefited products.<sup>34</sup>

The study also found that community development lies at the heart of promoting equitable access and black economic empowerment in the industry. The MPRDA, in its objectives, specifically enjoins mining companies that are holders of mining and production rights to contribute to the socio-economic development of the areas where they operate.<sup>35</sup> There is a general consensus amongst various populations in South Africa, according to the study by Dikgwatlhe and Mulenga,<sup>36</sup> that mining yields economic gains in the respective communities and also employment opportunities, which are one of the achievements sought by the notion of equitable access and black economic empowerment. In contrast, there is a general feeling that mining operations do more harm than benefit and that mining companies do not understand what the community needs, which leads to friction.<sup>37</sup> The state, as a facilitator of transformation, remains a bystander when conflicts arise, resulting in stagnating development and subjecting communities to underdevelopment. Seemingly, the state wants to shirk some of its responsibility to take care of its citizens' development to mining companies, which often creates tension and deterioration of good relations among the three stakeholders.

A positive attribute, among others, that shows the progressive realisation of transformation under the auspices of state custodianship, is the preferential treatment granted to the historically disadvantaged regarding prospecting or mining rights. As seen in part 4.2.2 of chapter four above, with reference to the *Rustenburg Platinum Mines Ltd*<sup>38</sup> case, our courts have demonstrated a nationwide commitment to transforming the industry. The preferential standpoint taken in the case demonstrates the resolve to rectify past injustices and foster equitable access to the nation's mineral resources as a measure of uplifting communities that have long been marginalised.

Then again, the study has revealed that in terms of transformation regarding the occupation of managerial positions by the historically disadvantaged, there has been less improvement, especially in white-owned and foreign-owned companies.<sup>39</sup> The main problems are the incapacity and lack of expertise required in

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<sup>34</sup> See part 3.4.1 of chapter three above.

<sup>35</sup> See part 4.2.3 of chapter four above.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Rustenburg Platinum Mines Ltd v The Regional Manager, Limpopo Region, Department of Mineral Resources (DMR)* (1109/2020) [2022] ZASCA 157.

<sup>39</sup> See further part 4.2.1 of chapter four above.

managerial positions that the historically disadvantaged possess, and the complicated ownership structures employed in these multinational entities.<sup>40</sup>

The study shows that the state custodianship model has effectively shaped transformation structures such as the legislative framework and policies. With regard to the state's commitment to ensure that equitable access and black economic empowerment are realised, both in practice and through policy adoption, the transformation has progressed. However, several issues slow this progress, as discussed above. These include fronting practices, a shortage of skilled labour, inadequate education tailored to the mining industry, and financial challenges faced by black-owned companies. Many of these companies struggle with heavy debt, often leading them to sell their shares, relinquish mines to finance debts, or face liquidation.

### 5.3 RECOMMENDATIONS

From the findings above, the study of equitable access to the mining industry and black economic empowerment has shown that various actions must be closely monitored and significantly deterred to realise the transformation agenda that the MPRDA espouses. The government must develop different strategies and approaches to promote access to the mining industry and the emancipation of the historically disadvantaged. Below are some recommendations that might be of assistance.

The MPRDA currently provides the Minister of Mineral Resources significant discretion in granting mining rights. This discretion should be narrowly defined through specific guidelines or amendments to the MPRDA, ensuring that decisions are transparent, equitable, and less susceptible to arbitrariness. The law should require published criteria for granting rights to reduce uncertainty and ensure that historically disadvantaged individuals are prioritised consistently. Establishing a system of mandatory reporting and accountability could ensure that the decisions made by the Minister are subject to regular review and open to legal scrutiny. This would prevent potential abuse of discretion and enhance equitable access. Moreover, this action can help deter cronyism, which is one of the scourges to the full realisation of the transformation sought. The mandatory reporting and accountability system will assist in ensuring that the Minister remains impartial in granting and issuing mining rights.

Concerning fronting, the BBEEA should be amended to provide enhanced legal sanctions for entities found guilty of fronting practices, including heavier financial penalties, revocation of mining rights, and

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<sup>40</sup> Sixta R Kilambo 'Black peoples' control of South Africa's mining industry in the post-apartheid South Africa' (2023) 14 *The Extractive Industries and Society* at 1 & 3-7.

disqualification from future tenders. Additionally, the Mining Charter should incorporate stringent vetting processes for BEE partnerships, ensuring that all compliance claims are thoroughly investigated before mining rights are granted. A centralised BEE compliance authority could be established to monitor and enforce these standards.

To mitigate the issue of funding constraints for black-owned companies, the government is encouraged to partner with multinationals in establishing programmes and economic interventions that will help with capital and perhaps issuing some incentives to multinationals that will encourage cooperation to ease their financial, on mining costs. A legislative framework for financial support can be introduced under the MPRDA, mandating the government to create state-backed financial instruments (eg low-interest loans and grants) for black entrepreneurs seeking to enter the mining industry. This economic framework should have clearly defined eligibility criteria and be legally monitored to prevent misuse or underfunding. Mining companies could be required to contribute a portion of their profits to a government-established financial support fund explicitly aimed at promoting historically disadvantaged individuals' participation in mining activities.

With regard to beneficiation, the government can pass specific laws that would set targets for mining companies' beneficiation of minerals, how much of those were exported, the economic returns derived from the exports, and penalties for non-compliance. Additionally, the government can solicit Western countries that are on par in beneficiation to train its individuals to be equipped and enhance the country's practice and productivity in beneficiation. Specific laws can be passed to tax mining companies for the personnel trained in Western countries.

To address the issue of skills and inadequate education to compete for senior managerial positions in mining multinationals, the government can establish adult basic education training specifically designed for mining purposes to train individuals who lack the expertise that would make them adequate for managerial positions in mining companies. Laws can be passed requiring mining companies to contribute a certain portion to the development of such institutions in addition to what the government would put on the table. In this regard, 30 per cent of the required amounts could be used for establishing the schools. Meanwhile, the Mining Charter's legal status and binding nature should be strengthened to include legally enforceable provisions in respect of the provisions on skills development and capacity building for historically disadvantaged individuals. Mining companies should be legally obligated to contribute to skills training funds or offer mandatory training programmes for their employees, focusing on empowering historically disadvantaged groups to move into managerial and executive positions.

In relation to mining communities, the state should exercise more care in defending community interests where mining operations take place. Instead of being a bystander when conflicts arise, it should take a more proactive role to mend the relationships, create distinct lines of power and responsibility, and protect the interests of all stakeholders, especially its citizens. On consultative processes between mining-affected communities and the multinational mining companies, the government should delegate by law certain members from perhaps the Minerals Council that will represent the interests of the community concerned to ensure that everyone is not disadvantaged by the mining operations that would occur so that the end of conducting mining and developing communities can be achieved benefitting all stakeholders mutually.

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