

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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Case no:

In the matter between:

The Chamber of Mines of South Africa

Applicant

and

Minister of Mineral Resources

Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

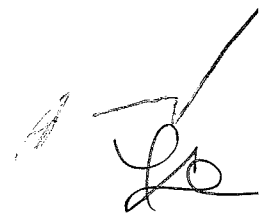
TEBELLO LAPHATSOANA CHABANA

hereby say on oath that:

PART 1: INTRODUCTION

THE PURPOSE OF THE APPLICATION

- 1 The Chamber and its members are fully committed to the transformational objects of the MPRDA and have given concrete and substantial expression to that commitment. They are in consequence wholly opposed



to attempts to subvert those objectives by the unlawful publication of instruments which purport to give effect to such objectives but in fact undermine them. The instrument which is the subject of this application will, if implemented, destroy the very industry whose survival is necessary to give effect to the objects of the MPRDA.

2 The purpose of this urgent application is to interdict the implementation of the "REVIEWED BROAD BASED BLACK-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING AND MINERALS INDUSTRY, 2016" ("the 2017 Charter") published by the respondent ("the Minister") on 15 June of this year, pending the final determination of an application to review and set aside the 2017 Charter, such application to be brought within 60 days of the grant of the relief sought in the notice of motion hereto.

3 The publication of the 2017 Charter had, and continues to have, a disastrous effect upon the mining industry as a whole, as well as investors and employees of that industry. The shock induced in all role players within the mining industry, including financial commentators, has been so profound that an amount in excess of R50 billion was wiped off the market value of shares in listed mining companies.¹ The effect of the 2017 Charter has indeed been so profound that Moody's, one of the top three sovereign

¹ The calculation of that loss in value is attached marked "FA1".



- ratings agencies, characterised the 2017 Charter as “credit negative”, implying that it may lead to a further cut in South Africa’s credit rating.²
- 4 The 2017 Charter has also been met by universal disbelief and condemnation on the part of mining lawyers. In short, the publication of the 2017 Charter has been an unmitigated disaster, both for the mining industry as a whole and for South Africa.³
 - 5 Furthermore, as will appear from what is said below, the publication of the 2017 Charter was so obviously beyond the powers of the Minister that it is difficult to believe that he and those who advised him honestly believed that such publication constituted a legitimate exercise of power under section 100(2)(a) of the MPRDA.
 - 6 The 2017 Charter is furthermore so confusing and confused, and so contradictory in its core provisions, that not only are the mining companies who are supposedly obliged to comply with the 2017 Charter perplexed as to what they are required to do, but legal experts themselves are confused and find themselves unable to provide clear advice to their mining and investment clients as to the meaning and effect of the 2017 Charter.
 - 7 In publishing the 2017 Charter the Minister has purported to exercise powers which reside exclusively with Parliament. He has, in other words, plainly usurped the role of parliament.

² This does not mean that there will be a further cut. It does however mean that the 2017 Charter has contributed to a negative outlook.

³ A note prepared by Roger Baxter, the Chief Executive Officer of the applicant, explaining the impact of the 2017 Charter in the context of a contracting South African mining industry is attached marked “FA2”. His affidavit confirming the contents of his note is attached hereto.



- 7.1 Thus, for example, he has replaced the definition of “*historically disadvantaged person*” in section 1 of the MPRDA and the term “*historically disadvantaged South Africans*” in section 100(2)(a) - for whose benefit the Charter contemplated in section 100(2)(a) was to be developed - with his own definition of “*Black persons*”. The definition of “*Black Person*” impermissibly widens the scope of those who may benefit from the provisions of the Charter to include not only persons or communities disadvantaged by unfair discrimination before the Constitution took effect, but also Africans, Coloureds and Indians who became citizens of the Republic of South Africa by naturalisation on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date.
- 7.2 In other words, for reasons best known to himself, the Minister, through the publication of the 2017 Charter, now seeks to benefit a category of persons who were never disadvantaged by unfair discrimination before the Constitution took effect. One is left to speculate why the class of beneficiaries was broadened in this way and who the newly advantaged beneficiaries are to be.
- 7.3 This material increase in the scope of the persons benefiting from the charter contemplated by section 100(2)(a) is so inconsistent with the object set out in section 2(d) of the MPRDA, with section 100(2)(a) of the MPRDA and with the decided cases dealing with the purpose of the

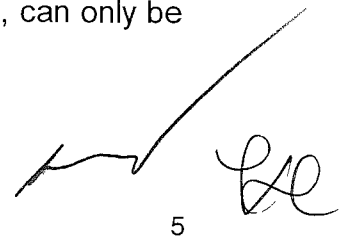


MPRDA that it is difficult to believe that the Minister did not realise that he was acting unlawfully.

8 Another example of gross regulatory overreach which is so obvious that it could not have been overlooked by the Minister concerns foreign controlled and registered companies supplying the South African mining and minerals industry with mining goods and services. In this regard the 2017 Charter provides that "Foreign Companies" (as defined) must contribute a minimum of 1% of their annual turnover generated from local mining companies towards the Mining Transformation and Development Agency. In imposing a turnover tax, the Minister has not only purported to exercise extra-territorial jurisdiction – which is clearly beyond his powers (not least of all because they are not subject to the MPRDA), he has also attempted to usurp the powers of the Minister of Finance.

9 In summary, the 2017 Charter represents a most egregious case of regulatory overreach. The act of publication was and is harmful not only because of the content of the 2017 Charter, and the vague and contradictory language employed to convey that content, but also because of the clear threat to the separation of powers which that act presents.

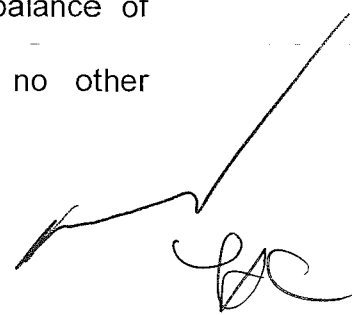
10 The vast and systemic damage which the publication and threatened enforcement of the 2017 Charter has and continues to inflict upon the financial and reputational interests of not only the Chamber's members, their employees and investors but also the country as a whole, requires, it is submitted, urgent redress. Such redress, in the short term, can only be



had by way of an urgent interdict. In due course, this court will be asked to set aside the 2017 Charter as an unlawful exercise of power. But in the interim, and in order to avoid further harm and hopefully restore a degree of confidence not only in the mining industry as an investment opportunity but also in this country's institutions, urgent relief is necessary.

11 In this latter regard I point out that the 2017 Charter has an immediate effect on applicants for new prospecting and mining rights. There is no provision that existing applications are to be treated as if the 2017 Charter had not come into effect. Consequently applicants who have submitted applications on the basis of the position as it was prior to 15 June 2017 must now go back to the drawing board. Such applicants would have gone to great expense and trouble to put together applications complying with the DMR's requirements prior to the publication of the 2017 Charter. Agreements would have been entered into with BEE partners and stakeholders on the basis of such requirements and funding structures would have been put in place to support such agreements. If the 2017 Charter is implemented, those agreements and funding structures will have to be undone, at great expense, inconvenience and reputational damage.

12 It is submitted that the Chamber has met all the requirements for an urgent interim interdict. The relief sought is undoubtedly urgently required. A *prima facie* right to such relief has been made out. The balance of convenience clearly favours the Chamber and there is no other

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appropriate remedy available to the Chamber. In what follows I shall set out the grounds upon which the Chamber intends in due course to seek an order reviewing and setting aside the 2017 Charter. Since in this application the Chamber is only called upon to set out a *prima facie* right to such relief, those grounds are neither exhaustive nor set out fully. That will be done in the review itself.

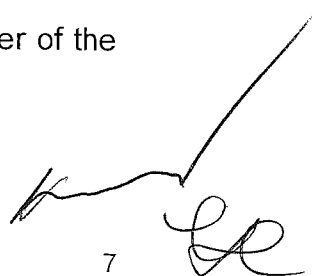
DEPONENT

13 I am the Senior Executive: Public Affairs and Transformation of the Chamber of Mines of South Africa. I took office on 1 July 2016 but I have been involved with the former Senior Executive: Transformation and Stakeholder Relations of the Chamber, Mr Ambrose Vusumuzi Richard Mabena (**Mabena**), in the Chamber's efforts in regard to the engagement with the respondent and his Department. A copy of Mr Mabena's confirmatory affidavit is filed evenly herewith.

14 I am duly authorised to represent the Chamber in launching this application and deposing to this affidavit on its behalf.

15 The facts in this affidavit are true and correct and, unless otherwise stated or the contrary appears from the context, are within my personal knowledge. Legal submissions in this affidavit are made on the advice of the Chamber's legal advisors.

16 I respectfully refer to the confirmatory affidavit of Mabena and supporting affidavit of Roger Alan Baxter (**Baxter**), the Chief Executive Officer of the



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applicant, who have personal knowledge of the facts set out below and which are filed herewith

DEFINITIONS

- 17 In this affidavit, the following definitions are used:
- 17.1 the Mineral and Petroleum Resources Development Act, 2002 is the **MPRDA**;
- 17.2 the Department of Mineral Resources is the **DMR**;
- 17.3 the Charter contemplated by section 100(2)(a) of the MPRDA is "*the Charter*";
- 17.4 the "Scorecard for the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (including the Charter)" published in Government Notice 1639, Government Gazette 26661 dated 13 August 2004 is the **Original Charter**;
- 17.5 the "Amendment of the Broad-based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry" published in Government Notice 838, Government Gazette 33573 dated 20 September 2010 is the **2010 Charter**;
- 17.6 the "Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 (Reviewed Mining Charter, 2017)" published in Government Notice 581, Government Gazette No. 40923 dated 15 June 2017 is the **2017 Charter**;

- 17.7 Historically Disadvantaged South Africans as used in the Original Charter and 2010 Charter are **HDSAs**⁴ (although, as set out below, the reference to HDSAs has been unlawfully substituted in the 2017 Charter with “Black Person” and “Black Owned Company”); and
- 17.8 where appropriate, the Original Charter, the 2010 Charter and the 2017 Charter will be referred to collectively as the **Charters**. These three Charters are attached as “**FA3**”, “**FA4**” and “**FA5**”.

THE PARTIES

- 18 The applicant is the Chamber of Mines of South Africa (**Chamber**) and carries on business at 5 Hollard Street, Johannesburg.
- 18.1 The Chamber is a voluntary association with power to sue and be sued in its own name. The Chamber is also registered as an employers’ organisation in terms of section 96(3) of the *Labour Relations Act, 1995*.
- 18.2 The Chamber’s members comprise mining finance companies and mines operating in the gold, coal, diamond, platinum, lead, iron ore, rutile, zircon, ilmenite, leucoxene, monazite, magnetite and other associated minerals, antimony and copper mining sectors. A list of the Chamber’s members is attached as “**FA6**”. The members of the

⁴ The MPRDA does not define HDSA, Black Person or Black Owned Company. The MPRDA defines the term “historically disadvantaged person”, which has a materially different meaning. Section 100(2)(a) employs the term “historically disadvantaged South Africans”, but there can be little doubt that that term was intended to be a reference to the defined term “historically disadvantaged person”. As pointed out below, it was not competent for the Minister to publish a charter in terms of section 100(2)(a) of the MPRDA to address the historic disadvantages of any group other than HDSAs.

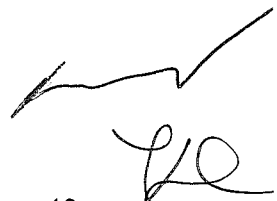
Chamber affected by this application are those mining companies which are either holders of, or applicants for, prospecting rights, mining permits and mining rights under the MPRDA. In this affidavit, I refer to these affected members of the Chamber as **mining companies**.

18.3 In terms of paragraph 2(a) of its constitution, one of the objects and powers of the Chamber is to “advance, promote and protect the mining and other interests of its members” and to “assist... in the prosecution... of actions involving questions the decisions whereof are likely to affect the common interests of its members”. A copy of its constitution is attached as “FA7”.

18.4 The Chamber is the principal advocate of major policy decisions endorsed by the mining companies and represents these to various organs of South African national and provincial governments and to other relevant policy-making and opinion-forming entities, both within South Africa and abroad. The Chamber also works closely with the various employee organisations in formulating these positions where appropriate.

18.5 The Chamber is a signatory to the Original Charter and represents the industry in the forums established in order to review performance under the Charters.

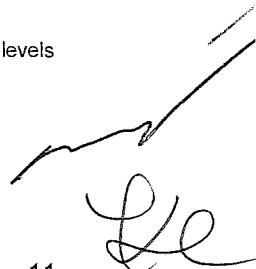
18.6 The Chamber brings this application on its own behalf and in the interests of its members.



18.7 As a prelude to what follows, I would emphasise that the Chamber and its members fully support the transformation objectives of the MPRDA and the Original Charter and have made significant progress on all elements of the Original Charter, including meeting and exceeding the ownership target. The Chamber's members continue to support and facilitate HDSA ownership even in the face of the collapse of mining equities and constrained markets. This created significant momentum in HDSA ownership, in the mining sector and beyond. All of this is demonstrated by the fact that, as set out in annexures "FA8" and "FA9" hereto, as at the end of 2014 meaningful economic empowerment participation achieved by HDSAs had been 38% on average⁵, with meaningful economic value transfer of more than R159 billion. The Chamber submits that annexures FA8 and FA9 demonstrate the Chamber's members' commitment to transformation and to the spirit of the Charters.

19 The respondent is the Minister. The Minister is cited in this application in his official capacity as the Minister responsible for the MPRDA and by virtue of the powers conferred upon him by the MPRDA including, in particular, by section 100(2). His office is situated at Trevenna Campus, 71 Meintjes Street, corner of Meintjes and Francis Baard Streets, Block 2B 2nd Floor, Sunnyside, Pretoria. Service of this application on the Minister will be effected on the State Attorney, Pretoria, in terms of the provisions

⁵ As will be pointed out below, that figure assumes that, in accordance with the Original Charter, empowerment levels once achieved are not eroded by the exit by HDSAs from their investments.



of Rule 4(9) of the Uniform Rules of Court.

PART 2: BACKGROUND

THE ORIGIN, NATURE AND FUNCTION OF THE CHARTER UNDER THE MPRDA

20 The MPRDA was assented to on 3 October 2002, and took effect from 1 May 2004.

21 The (relevant) objects set out in section 2 of the MPRDA were at the time formulated as follows:

"The objects of this Act are to –

...

(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;

(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;⁶

(e) promote economic growth and mineral and petroleum resources development in the Republic;⁷

⁶ This provision was amended in terms of the Amendment Act 49 of 2008 wef 7 June 2013 and now provides as follows: "substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;"

⁷ This provision was amended in terms of the Amendment Act 49 of 2008 wef 7 June 2013 and now provides as follows: "promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;"

(f) promote employment and advance the social and economic welfare of all South Africans;

(g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;

...

(i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.

- 22 The legislature sought to achieve these objects by the enactment of the MPRDA, which constitutes a radical departure from the previous system of mineral and mining law applicable in South Africa. The manner in which the legislature chose to give effect to these objects is to be found in the provisions of the MPRDA and only in the provisions of the MPRDA.
- 23 The MPRDA, in a number of sections, requires that an assessment be made by the Minister in the decision-making process whether, or the extent to which, an applicant has given effect to the objects of the MPRDA in section 2(c), (d), (e), (f) and/or (i). (See, for example, sections 12(3)(d)⁸, 17(1)(f)⁹, 17(4)¹⁰, 23(1)(h),¹¹ 55(1)¹² and item 7(2)(k)¹³ in Schedule II of the MPRDA).

⁸ S 12(3)(d) provides that: "(3) Before facilitating the assistance contemplated in subsection (1), the Minister must take into account all relevant factors, including— ... (d) the extent to which the proposed prospecting or mining project meets the objects referred to in section 2 (c), (d), (e), (f) and (i)."

⁹ S 17(1)(f) provides: "(1) The Minister must within 30 days of receipt of the application from the Regional Manager, grant a prospecting right if— ... (f) in respect of prescribed minerals the applicant has given effect to the objects referred to in section 2 (d)." There are as yet no such prescribed minerals.

- 24 Section 23(1)(h) of the MPRDA, which deals with the granting of a mining right, contains an express reference to the Charter by providing that the Minister must grant a mining right *inter alia* if – “(h) the granting of such right will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan”.
- 25 Sections 25(2)(h) and 28(2)(c) of the MPRDA require holders of mining rights annually to report on the extent of their compliance with the provisions of sections 2(d) and (f), the charter contemplated in section 100 and the social and labour plan.
- 26 There are no other provisions in the MPRDA which expressly or impliedly refer to or require compliance with the Charter.
- 27 Section 100(2) of the MPRDA in its original form provided¹⁴ the following:

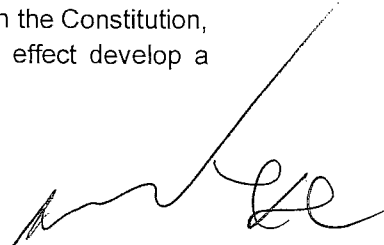
¹⁰ S 17(4) provides: “(4) The Minister may, having regard to the type of mineral concerned and the extent of the proposed prospecting project, request the applicant to give effect to the object referred to in section 2 (d).”

¹¹ S 23(1)(h) provides: “(1) Subject to subsection (4), the Minister must grant a mining right if— ... (h) the granting of such right will further the objects referred to in section 2 (d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan.”

¹² S 55 provides: “(1) If it is necessary for the achievement of the objects referred to in section 2 (d), (e), (f), (g) and (h) the Minister may, in accordance with section 25 (2) and (3) of the Constitution, expropriate any land or any right therein and pay compensation in respect thereof.”

¹³ Item 7(2)(k) provides that the holder of an old order mining right must as part of the lodgement for conversion, lodge “an undertaking that, and the manner in which, the holder will give effect to the object referred to in section 2(d) and 2(f)”.

¹⁴ This provision was subsequently amended in terms of the *Amendment Act 49 of 2008*. The provision as amended now reads as follows: “(a) To ensure the attainment of the Government’s objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a



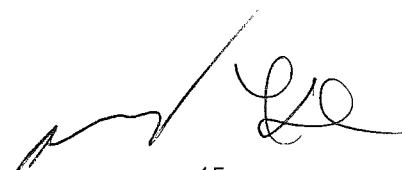
"(2)(a) To ensure the attainment of Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad based socio-economic empowerment Charter that will set the framework-targets and timetable for effecting the entry of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources.

(b) The charter must set out, amongst others how the objects referred to in section 2 (c), (d), (e), (f) and (i) can be achieved."

28 The mandate to the Minister in section 100(2) to "develop" a "Charter" does not fall into a well-known juristic niche. What is clear however, is that section 100(2) cannot be interpreted as a mandate to the Minister to legislate; indeed, if this were so, the section would be unconstitutional for the following reasons:

28.1 In the Republic, the legislative authority of the national sphere of government is vested in Parliament, as set out in sections 43(a) and 44 of the Constitution, 1996. In terms of section 44(1)(a)(ii) and (iii), the National Assembly has the power to pass legislation with regard to any matter (subject to certain exclusions which are not relevant for present purposes) and to assign any of its legislative powers, except the power to amend the Constitution, to any legislative *body* in another sphere of

broad-based socio-economic empowerment Charter that will set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources." (the underlined parts were inserted by the amendment.)



government (i.e. in the provincial or local sphere). The Minister is not a "legislative body" but part of the executive.

28.2 The executive authority of the Republic is vested in the President by section 85 of the Constitution, 1996, who exercises the executive authority, together with other members of the Cabinet (consisting of the Deputy-President and Ministers), by *inter alia* implementing national legislation, and developing and implementing national policy.

28.3 There is a separation of powers between the legislative, executive and judicial branches of government, which entails that the branches of government may not usurp power from one another. Each branch of government must perform its constitutionally allocated function, consistently with the Constitution.

28.4 The executive has no power to legislate or to interfere with acts of the legislature. Executive acts on a broader basis than contemplated by section 85(2) of the Constitution would usurp the powers of the legislature to legislate, and would conflict with the doctrine of the separation of powers.

29 What is also clear is that the Charter is a creature of statute. The nature, purpose and scope of the Charter must accordingly be found within the four corners of the MPRDA, which is the empowering legislation.

30 Upon a proper interpretation of the provisions of the MPRDA (mentioned above) which deal with and refer to the Charter, it is submitted that the

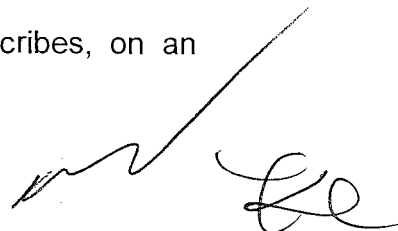


Charter is intended to guide (on the basis of a published document) the Minister's discretion in decision-making processes in making an assessment on whether, or the extent to which, an applicant has given effect to the objects referred to in section 2(c), (d), (e), (f) and (i) of the MPRDA where provisions of the MPRDA require the Minister to make such an assessment (as is required by sections 12(3)(d), 17(1)(f), 17(4), 23(1)(h) and 55(1) and item 7(2)(k) in Schedule II of the MPRDA as stated above).

31 At the same time, the Charter is thus intended to provide a formal indication to the public of what the Minister will regard as "furthering" or "giving effect to" the objects referred to in section 2(c), (d), (e), (f) and (i) of the MPRDA as contemplated in *inter alia* section 23(1)(h) and item 7(2)(k) of the MPRDA.

32 The Charter is thus not a regulation and does not constitute subordinate legislation. Instead, it constitutes a formal guideline or statement of policy, mandated by section 100 of the MPRDA.

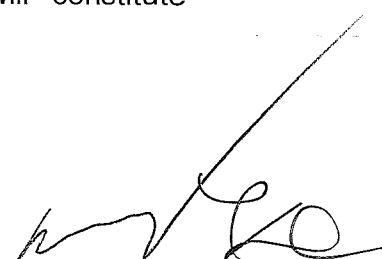
33 A policy, formal or otherwise, is not legislation and remains a guideline. It could never be applied so as to have the force of law or to preclude an applicant for a mining right from adopting other means of furthering the objects or giving effect to the objects of the Act. Section 100(2)(b) indeed requires that the Charter should set out how the objects referred to in those sections can be achieved. In this regard, it is important to note that section 100(2)(b) does not require that the Charter prescribes, on an



exclusive basis, what must be done in order to achieve the objects of those provisions.

34 Notwithstanding the fact that the 2017 Charter does not constitute law, when the Minister considers an application for a mining right he must in terms of subsection (1)(h) decide whether the granting of the right will be “in accordance with the charter contemplated in section 100”. In that context the 2017 Charter will certainly adversely affect the rights of applicants and have a direct, external legal effect for the purposes of the definition of “administrative action” in section 1 of the Promotion of Administrative Justice Act, 2000 (“PAJA”).

35 Whether the development and publication of the 2017 Charter constitute administrative action for the purposes of PAJA outside of that context is a more difficult question. I have been advised that it does because, although in law the Charters (including the 2017 Charter) constitute the expression of policy, in practice the Minister and his functionaries take the view that the Charters constitute law, and as pointed out below insist that holders who breach the Charters risk having their rights suspended or cancelled. In practice therefore the publication of the Charters have the capacity to adversely affect the rights of “any person” and have a direct external legal effect. Moreover, in the case of the 2017 Charter, it explicitly provides that non-compliance with the ownership, Mine Community development elements and human resource development elements will constitute breaches of the MPRDA.

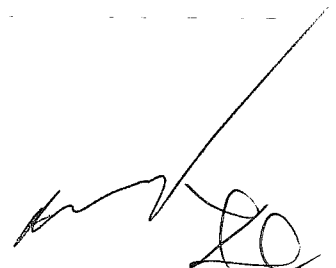
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- 36 I am further advised that when establishing whether the publication of an instrument has a “direct, external legal effect” for the purposes of PAJA one must accept that the instrument has the legal effects which it purports to have.
- 37 Even if it were to be held that the 2017 Charter does not constitute administrative action, its publication would nevertheless constitute a breach of the rule of law principle guaranteed by section 1(c) of the Constitution. For that reason, the Chamber proceeds on the basis that it is entitled to an order reviewing and setting aside the 2017 Charter, either on the basis that its publication constituted unlawful administrative action or alternatively on the basis that it constitutes conduct in breach of section 1(c) of the Constitution.

THE PROCEDURALLY UNFAIR DEVELOPMENT OF THE 2017 CHARTER

- 38 As appears from FA2 hereto, no meaningful consultation took place about the 2017 Charter, which is a completely new Charter and differs materially from the draft published in April 2016 upon which comments were invited. The Chamber will contend in the judicial review application to be instituted, and after receipt of the record in that matter, that the decision to publish the 2017 Charter was accordingly procedurally unfair and stands to be set aside in terms of section 6(2)(c) of PAJA. Suffice it for present purposes to point out that there was no consultation whatsoever with the Chamber on *inter alia* the following ownership aspects:

- 38.1 the payment of 1% of turnover to Black shareholders;



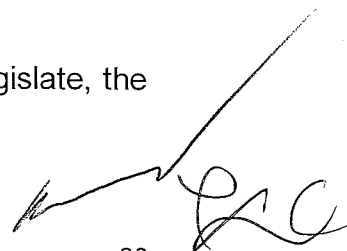
- 38.2 the 30% ownership requirement in respect of mining new rights;
- 38.3 the 51% ownership requirement in respect of new prospecting rights;
- 38.4 the ring-fencing of allocations of ownership to mineworkers and communities;
- 38.5 the requirement that all community trusts must be controlled by the Mining Transformation and Development Agency;
- 38.6 the requirement that Black shareholders must achieve a no debt position within 10 years;
- 38.7 the requirement that Black shareholders can take 30% of the production for their own transport and sales;
- 38.8 the preferential option to purchase South African mining assets that must be given to Black owned companies.

PART 3: GROUNDS FOR REVIEW OF THE OWNERSHIP ELEMENT OF THE 2017 CHARTER

THE NATURE, PURPOSE AND SCOPE OF THE CHARTER TO BE DEVELOPED IN TERMS OF SECTION 100(2) THE MPRDA

39 Executive may not usurp legislative powers of Parliament

- 39.1 As set out above in paragraph 28, the mandate to the Minister in section 100(2) to “develop” a “Charter” does not fall into a well-known juristic niche.
- 39.2 If section 100(2) were intended to empower the Minister to legislate, the

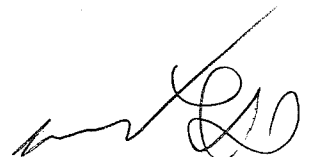


section would conflict with the doctrine of the separation of powers and sections 43 - 44 and 85 respectively, of the Constitution, and would be liable to be set aside as unconstitutional and invalid.

39.3 It is submitted, however, that section 100(2) was not intended to empower the Minister to legislate. The nature, purpose and permissible scope of the Charter accordingly all fall to be determined by the provisions of MPRDA, which is the empowering legislation.

39.4 As stated, the only reasonable interpretation of the relevant provisions of the MPRDA is that the Charter is a formal statement of policy intended to guide the Minister in the exercise of his discretion as to whether, or the extent to which, an applicant has given effect to the objects referred to in section 2(c), (d), (e), (f) and (i) of the MPRDA, where provisions of the MPRDA require the Minister to make such an assessment (as is required, for example, by sections 12(3)(d), 17(1)(f), 17(4), 23(1)(h), 55(1) and item 7(2)(k) in Schedule II of the MPRDA). Most notably, the Minister must, when considering an application for a mining right in terms of section 23 of the MPRDA, be satisfied that the granting of a mining right to a specific applicant will further the objects referred to in section 2(d) and (f) of the MPRDA in accordance with the Charter.

39.5 As shown below, the Minister has far exceeded his powers under section 100(2) and, in effect, seeks to legislate through the backdoor by way of the 2017 Charter. The Chamber's first attack on the 2017

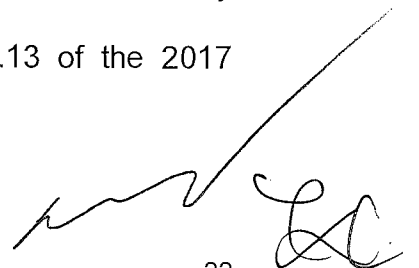


Charter is thus the Minister's lack of power to publish the Charter in the form of what purports to be a legally binding instrument. The contents or scope of the Charter also go far beyond what is contemplated in section 100(2)(a) of the MPRDA. The 2017 Charter seeks not merely to set out a framework, targets and time-table for effecting the entry of HDSA's into the mining industry. It seeks to regulate the mining industry in every sphere and even to impose taxes to enable the Minister's aims to be achieved. One example of gross regulatory overreach is the requirement that Foreign Suppliers must contribute 1% of annual turnover generated from local mining companies towards the Mining Transformation and Development Agency. The Minister quite clearly has no power to impose such a tax.

39.6 It is respectfully submitted that the court should review and set aside the 2017 Charter on the basis that the executive (in the form of the Minister) has sought to usurp the legislature's powers.

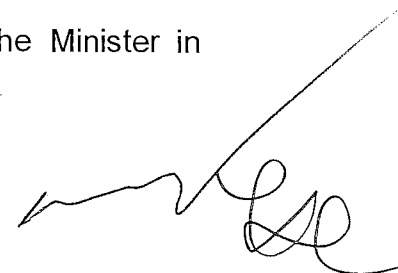
40 The power to amend, review or substitute the Charter

40.1 There is no provision in the MPRDA authorising amendments to or review of the Mining Charter or for development of a new Charter in substitution of the Original Charter and hence both the 2010 Charter and the 2017 Charter are *ultra vires* the MPRDA itself. Such amendments, review or substitution require at least an amendment to the MPRDA to empower the Minister to do so. It cannot be created by the Minister himself in the Charter, as paragraph 2.13 of the 2017



Charter seeks to do, which provision, accordingly, falls to be reviewed and set aside as being unauthorised itself. The draft MPRDA amendment bill (Bill B15D-2013) provides for an amendment to be made to this effect to the MPRDA, by way of insertion of new section 100(4) into the MPRDA. The legislative amendment process must, however, first be concluded by way of enactment by Parliament, assent by the President, and commencement of the resultant Amendment Act by further Presidential proclamation in the Government Gazette.

- 40.2 The Minister's decisions to publish the 2017 Charter (as well as the 2010 Charter) accordingly stand to be reviewed and set aside in terms of section 6(2)(a)(i) of PAJA as not being authorised by the empowering provision.
- 40.3 In addition, and even if the MPRDA were to be so amended, it is submitted that the legislature cannot relinquish its legislative powers to the Minister by authorising, in vague and general terms, the development from time to time of Charters which contain substantive and far-reaching provisions and affect vested rights. It amounts to law-making without going through the legislative process. Indeed, it amounts to ruling by decree, which offends against the rule of law, a foundational principle of our constitutional law, and stands to be reviewed on the basis of section 6(2)(i) of PAJA as being otherwise unconstitutional. The MPRDA would have to be amended substantially in order to authorise the exercise of such power by the Minister in



specific terms.

THE EFFECT OF THE 2017 CHARTER ON EXISTING PROSPECTING AND MINING RIGHTS HOLDERS (paragraph 2.1.2 of the 2017 Charter)

41 The 2017 Charter deals with ownership in paragraph 2.1. Paragraph 2.1.1 deals with new prospecting and mining right holders and paragraph 2.1.2 deals with existing prospecting and mining right holders. I shall first deal with the latter (the effect of the 2017 Charter on existing right holders).

42 Imposition of new obligations after the grant of a mining right

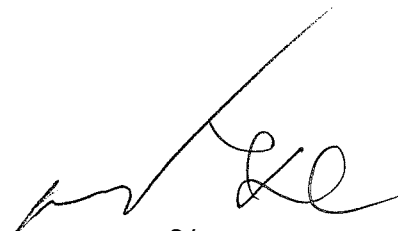
42.1 The introductory sentence of paragraph 2.1, which applies to both new rights holders and existing rights holders, provides as follows:

“In order to give effect to Meaningful Economic Participation¹⁵ and the integration of Black Persons into the mainstream economy; and ensure Black Persons’ effective ownership of the State’s mineral resources, a Holder¹⁶ must comply with the following:”

42.2 The obligations of the holder of (for example) a mining right are set out in the MPRDA (see for example sections 23(6) and 25(2)). The MPRDA does not authorise the Minister to impose additional obligations on holders of mining rights (whether new or existing holders) by way of the

¹⁵ As defined in the 2017 Charter

¹⁶ The holder of a prospecting right, mining right or mining permit, as defined in s 1 of the MPRDA. In what follows, I shall refer to the holder of a mining right by way of example. The definition of Holder included mining permits, retention permits, and reconnaissance permits (/permissions), but there are no Charter compliance requirements in the granting sections 13 (reconnaissance), 27 (mining permits) or 32 (retention permits), so that the inclusion in the 2017 Charter, of references to such permits are *ultra vires* the MPRDA both here in regard to the ownership element and elsewhere in regard to the non-ownership elements.



Charter.

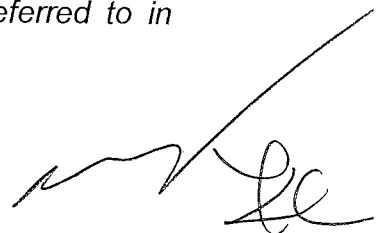
42.3 The MPRDA deals with a holder's duties in respect of the objects in sections 2(d) and (f) of the MPRDA in a specific manner, to wit:

42.3.1 Section 22 provides that application must be made for a mining right in the prescribed manner. Part B of the application form (prescribed in the regulations) requires information on "OWNERSHIP OF PARTICIPATION BY HISTORICALLY DISADVANTAGED SOUTH AFRICANS (HDSA)". It also requires that the application must be accompanied by the prescribed social and labour plan (regulation 46).

42.3.2 Section 23(1) provides that the Minister must grant the mining right *inter alia* if "(h) the granting of such right will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan".

42.3.3 In the case of conversions of old order mining rights, item 7(3) In Schedule II provides that the Minister must convert an old order mining right into a mining right if the holder complies with item 7(2) including item 7(2)(k) which, from 7 June 2013, provided that the holder must lodge:

"(k) documentary proof of the manner in which the holder of the right will give effect to the object referred to in



section 2(d) and 2(f).¹⁷

42.3.4 If the application or conversion is successful, the ensuing mining right is granted on certain terms and conditions, as appears from section 23(6) of the MPRDA. As a matter of departmental practice, the mining right document contains a recordal of the BEE agreement relied upon for the grant of the right and imposes an obligation on the holder to honour the terms of such agreement. In addition, the social and labour plan is approved if it complies with regulation 46.

42.3.5 Once granted, the holder is obliged to comply with the provisions of the MPRDA and the terms and conditions of its mining right.¹⁸ It also has to comply with the provisions of its approved Social and Labour Plan.

42.3.6 After the grant, the holder has the obligation in terms of section 25(2)(h) to report on its compliance with these provisions and documents.

42.4 It is clear from what has been set out above that, before granting an application for a "new order" mining right, or converting an old order mining right, the Minister must satisfy himself that the grant of such right

¹⁷ Prior to 7 June 2013, it read: "(k) an undertaking that, and the manner in which, the holder will give effect to the object referred to in section 2(d) and 2(f)."

¹⁸ In terms of section 23(6) of the MPRDA, the mining right is subject to "this Act". The latter is defined in section 1 of the MPRDA to include any term or condition subject to which the right has been granted.

would further the objects referred to in sections 2(d) and (f), in accordance with the Charter contemplated in section 100(2) and the prescribed social and labour plan. It is clear therefore that the requirements to be met by an applicant in applying for a mining right or lodging an old order right for conversion are those that prevail at the time the application or lodgement is made.

42.5 Once an applicant for a mining right has satisfied the requirements of section 23(1)(h) or item 7(2)(k) in Schedule II and once a decision has been taken to grant a mining right, which is an administrative act,

42.5.1 a holder cannot be required thereafter to do so again, failing which its right will be placed in jeopardy - the MPRDA does not permit it; in fact, it is also an object of the MPRDA in section 2(g) to provide for security of tenure in respect of prospecting and mining operations;

42.5.2 the decision-maker is *functus officio* and may not revisit his decision, save where the MPRDA permits him to do so – but the MPRDA does not permit it.

42.6 Accordingly, a mining right once granted cannot be revoked or cancelled where the requirements have changed after the grant of the right, in the absence of a clear statutory power to do so and there is none. Quite apart from the presumption against retrospectivity when interpreting statutory provisions, there is nothing in the MPRDA which provides, either expressly or by necessary implication, that once a

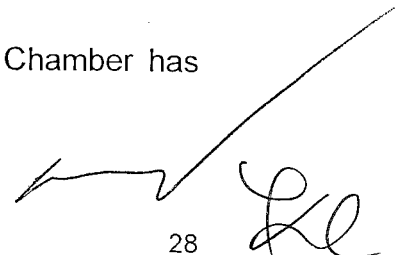
mining right has been granted to an applicant, the applicant will, in order to retain such right, have to meet the new and more burdensome requirements set out in a Charter as revised from time to time.

42.7 It is submitted that the Minister has no power, through the Charter, to impose new obligations on holders of existing rights outside of, and over and above, the terms and conditions of their granted mining rights and approved social and labour plans.

42.8 As is borne out by the background facts set out above and the terms of the 2017 Charter, the Minister and his functionaries hold a contrary view.

42.9 The Chamber will in this regard seek a declaratory order in the judicial review proceedings to be instituted that, upon a proper interpretation of the MPRDA, once the Minister or his delegate has been satisfied in terms of section 23(1)(h) or item 7(2)(k) in Schedule II of the MPRDA that the grant of the mining right applied for or the conversion of the old order mining right will further the objects referred to in sections 2(d) and (f), in accordance with the Charter applicable at the time, and grants such right or conversion, the Minister is not authorised to require, and the holder is not legally obliged to take, steps to further such objects outside of the terms of the holder's mining right or approved social and labour plan and comply with the provisions of newly revised Charters from time to time.

42.10 For the reasons set out above, it is submitted that the Chamber has

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reasonable prospects of success in obtaining such an order.

43 The effect of paragraph 2.1.2 on past transactions: “Recognition” of “Historical BEE Transactions” and “topping-up”

43.1 Paragraph 2.1.2 of the Charter under the heading “Existing Prospecting and Mining Rights Holders” deals with two main topics: the so-called “recognition” of “Historical BEE Transactions” and “Top Up”.¹⁹

43.2 In the first instance, and as appears below, the provisions of paragraph 2.1.2 are not clear. This lack of clarity will give rise to considerable uncertainty. It is submitted that it accordingly offends against the rule of law which requires clarity and consistency so that citizens can establish their position with certainty.

43.3 Paragraph 2.1.2.1 provides that a Historical BEE Transaction (as defined) shall be recognised for the reporting period ending on the date on which the reviewed Charter is published (i.e. 15 June 2017).

43.3.1 This provision is apparently aimed at making it clear that a holder will not retrospectively be regarded as non-compliant.

43.3.2 Although it is by no means clear, it may also have been intended to mean that such transactions will not be

¹⁹ “Historical BEE Transactions” is defined in the 2017 Charter to mean “those BEE Transactions concluded prior to the coming into operation of the Mining Charter of 2017 that achieved a minimum of 26% Black shareholding or more”.

“Top Up” is defined in the 2017 Charter to mean “the increasing of shareholding of a Black Person in order to reach the minimum thresholds required by the Mining Charter”.



“recognised” after this date. In other words, that a holder may be required after 15 June 2017 to meet the new increased Black ownership levels whatever empowerment transactions it may in the past have concluded.

43.3.3 Whether this is the meaning of 2.1.2.1 and, if so, whether it is absolute or subject to the remainder of the provisions of the paragraph or whether it should be read in conjunction with paragraphs 2.1.2.2 and/or 2.1.2.3 is simply not clear.

43.3.4 It is also not clear how paragraph 2.1.2.1 (read with 2.1.2.3 and 2.1.2.4) on the one hand and paragraphs 2.1.2.9 to 2.1.2.12 on the other hand, are to be reconciled. A possible interpretation, if they are read together, may be that paragraphs 2.1.2.9 to 2.1.2.11 only pertain to the reporting period ending on 15 June 2017 and simply set out the types of deals which would qualify as Historical BEE Transactions. Again, one is left only to speculate about the meaning of these seemingly conflicting provisions.

43.4 For the period commencing on the publication of this Charter (15 June 2017), it seems that paragraph 2.1.2 distinguishes between the following situations:

43.4.1 where a holder previously entered into a transaction which achieved a minimum of 26% black shareholding, but where the “BEE partner/s has exited the BEE Historical Transaction;

or the contract between the Holder and the BEE Partner's has lapsed; or the previous BEE Partner/s transferred its shares to a person/s other than a Black Person" (see par 2.1.2.2);

43.4.2 where a holder has maintained a minimum of 26% Black Person Shareholding after commencement of the 2017 Charter (see par 2.1.2.4); and

43.4.3 where a holder had not achieved a minimum of 26% empowerment by the date the 2017 Charter was published (see par 2.1.2.11).

43.5 Why this distinction is drawn is not clear, however, because in all cases, it seems, the holder is required by the 2017 Charter to "top up" from the level of the holder's actual, existing level of black ownership (whether it is in fact at 26% or below it when the 2017 Charter was published) to a minimum of 30% black ownership (see paragraphs 2.1.2.3 and 2.1.2.4) within a period of twelve months. These provisions are, however, not sufficiently clear to make this statement with any certainty.

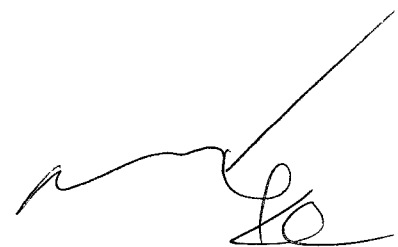
43.6 What it is also not clear, but is one of the possible interpretations of these provisions, is that no "recognition" is given, for purposes of calculating the current level of ownership, to past empowerment transactions where the "BEE partner/s has exited the BEE Historical Transaction; or the contract between the Holder and the BEE Partner's has lapsed; or the previous BEE Partner/s transferred its shares to a person/s other than a Black Person". Only the actual shareholding of



the holder of the right, as it existed at the date of publication of the 2017 Charter, seems to be “recognised” for purposes of the top-up required to reach the new minimum of 30% Black shareholding.

43.7 As stated above, there has long existed a dispute between the Minister and his functionaries, on the one hand, and the Chamber and its members, on the other, about whether or not, once a party which applies for a mining right has satisfied the Minister that the granting or conversion of the right will be in accordance with the Charter contemplated by section 100 of the MPRDA, that party is obliged, after the right has been granted or converted (therefore, as mining right holder), to “top up” the 26% HDSA ownership target (now 30% black ownership), if for one reason or another it falls below that level. This is often referred to as the “*once empowered, always empowered*” issue.

43.8 The Minister and his functionaries have taken the view, already under the previous Charters, that a holder of a mining right has a continuing obligation to maintain a 26% HDSA ownership level (now, 30%) and that a failure to do so constitutes a contravention of the Charters, of the terms of their mining rights and of the MPRDA. The Minister has now apparently sought to formalise this view by requiring a “top up” in such cases (see paragraph 2.1.2.1 to 2.1.2.3). The top-up is, in addition, required to the new level of 30% and it is required within 12 months. Thereafter, according to paragraph 2.9 (second unnumbered



paragraph) and 2.10²⁰ of the 2017 Charter, 100% compliance is required at all times. Top-ups would accordingly continually be required. If, after the initial top-up has been effected within the said 12-month period and the percentage of black ownership of the holder again falls below 30% thereafter due to, for example, the black shareholders selling their shares, the holder is once more obliged to top-up.

43.9 As stated above, there is nothing in the language of section 23 (in particular section 23(1)(h)), or in item 7 (in particular item 7(2)(k)) in Schedule II, which imposes such an obligation upon the successful applicant for, or for conversion to, a mining right. The MPRDA, in particular, does not oblige the holder to restore the percentage ownership by HDSAs or Black Persons to the 26% or 30% target referred to in the Charters where such percentage falls below this level after the grant of the holder's mining right.

43.10 It is submitted that the Chamber's interpretation of the MPRDA is not only in line with the language of the MPRDA, but is also in line with the objectives of the MPRDA, including the expansion of opportunities for HDSAs to invest in the mining industry, and the promotion of employment in that industry, for the following reasons:

43.10.1 If HDSA shareholders or other economic participants in mining companies were to be subject to "perpetual lock-ins", it would

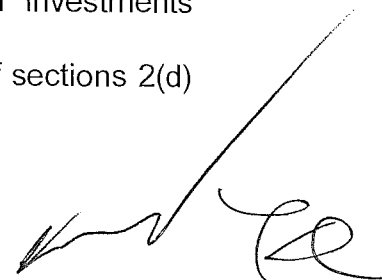
²⁰ Par 2.10 provides: "All targets stipulated in this Mining Charter of 2017 shall be applicable throughout the duration of a mining right (including prospecting and other exploration rights), unless a specific element specifies otherwise."

reduce the value of their investment, materially impair the investment opportunities available to non-HDSAs and discourage investment by HDSAs.

43.10.2 If mining companies were not to subject HDSA owners to perpetual or lengthy lock-in arrangements and were required to continually replace departing HDSA investors, the resultant cost, uncertainty and administrative burden would provide a material disincentive to investment in the mining industry in general and mining companies in particular.

43.10.3 In other words, mining companies can only achieve meaningful empowerment if they allow the HDSA shareholding to be liquid and for the HDSA shareholders to eventually cash out. The consequence of cashing out will be that the HDSA shareholding in the holder of the right diminishes, but there will not be a requirement for another empowerment transaction to be concluded because there has already been an empowerment transaction that has been given effect to.

43.10.4 It is submitted that where a mining right holder has complied with its HDSA obligations by meeting the 26% ownership target, it will, where the BEE transaction successfully led to empowerment, have empowered the HDSA participants in question even if such participants realise their investments and withdraw. The argument that the objects of sections 2(d)



and (f) of the MPRDA are not fulfilled by a mining company if it does not continuously replace one HDSA investor with another, ignores entirely the empowerment and transformational benefits achieved by the departing HDSA investors. It confuses quotas with empowerment objectives. It also fails to have any regard to the economic consequences thereof. It is submitted that it is simply not sustainable for any business.

43.11 Reduction in existing shareholding

43.11.1 Furthermore, in the context of existing rights granted on the basis set out above, paragraph 2.1.2.6 provides that the top-up required by paragraphs 2.1.2.3 and 2.1.2.4 "*shall be effected by a reduction of the remaining shareholders who are not Black Persons in proportion to their respective shareholding in the company*".

43.11.2 It is assumed that the reference to "a reduction of the remaining shareholders" in this paragraph is intended to mean a reduction in the remaining shareholders' shareholding (or a dilution of existing shareholding as it is often called).

43.11.3 The provision thus mandates that existing shareholders be deprived of shareholding which vests in them together with the rights associated with the shares, and the allocation (by

whatever means²¹) of this shareholding to Black Persons in accordance with paragraph 2.1.2.7 of the 2017.

43.11.4 According to settled principles of our law, I am advised, this deprivation, which is a taking from Peter²² to give to Paul²³, amounts to an expropriation of property. In order to pass constitutional muster under section 25(1) and (2) of the Constitution, a deprivation (which is an expropriation):

- (i) may only take place in terms of law of general application;
- (ii) such law may not be permit arbitrary deprivation of property;
- (iii) may only be done for a public purpose or in the public interest; and
- (iv) is subject to payment of compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

43.11.5 It is submitted that:

- (i) The Charter is not "a law".

²¹ For example, by way of transfer of shares or issue of new shares so as to dilute existing shareholding.

²² I.e. "the remaining shareholders who are not Black Persons" (see paragraph 2.1.2.6).

²³ I.e. Black Persons as defined in the 2017 Charter.



- (ii) The Charter is not “of general application” since it only applies to holders of rights under the MPRDA.
- (iii) The requirement of 30% Black shareholding in the Charter is arbitrary.
- (iv) The Charter does not make provision for the payment of compensation to the expropriated shareholders.
- (v) The mandatory dilution of the rights of non- Black shareholders (for example pension funds or the PIC) is unlawful and inconsistent with the requirement of the Companies Act, 2008 that shareholders be treated equally.

43.11.6 But even if paragraph 2.1.2.6 resulted in mere deprivation, such deprivation would be unlawful since it would be arbitrary and not occur pursuant to a law of general application. The same outcome applies to all the other instances where the Chamber complains that the 2017 Charter has, or will when implemented, give rise to unlawful expropriation.

43.11.7 Paragraph 2.1.2.6 and, by extension, the whole mechanism of a compulsory “top-up”, is accordingly unconstitutional, otherwise unlawful, and liable to be set aside.

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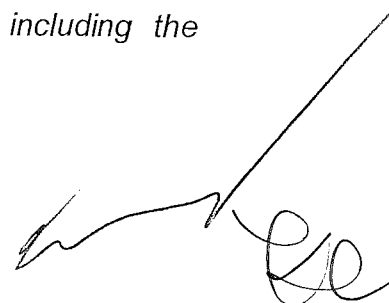
44 **The twelve-month transitional period in respect of the ownership element**

44.1 The 2017 Charter is immediately applicable but it affords existing mining right holders a maximum of twelve months within which to comply with its revised targets and to top-up its Black Person shareholding in accordance with paragraphs 2.1.2.3 and 2.1.2.4.²⁴

44.2 It is submitted that a period of twelve months within which to implement the provisions of paragraph 2.1.2.3 and 2.1.2.4 as read with 2.1.2.6 and 2.1.2.7, and which have already commenced to run on 15 June 2017, is unreasonably short given that these paragraphs require substantial changes to shareholding and finance structures, involving not only existing and new Black Persons, but also persons (including corporate and state entities such as the PIC) whose shareholder rights would have to be diluted. I point out furthermore that the Original Charter provided for 15% effective HDSA ownership in 5 years and the full 26% in 10 years. Since existing holders may need to “top up” by as much as 30% (depending on circumstances and the “correct” interpretation of these ambiguous provisions) a 12-month top up period is hopelessly insufficient.

44.3 In terms of paragraph 2.1.2.8, a holder must already within the first twelve-month period “*ensure that its BEE Partners directly and actively control their share of equity interest in the Holder, including the*

²⁴ See paras 2.1.2.3, 2.1.2.4 and 2.11(a) of the 2017 Charter.

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transportation as well as trading and marketing of the proportionate share of the production". This provision pertains to existing right holders who thus have existing agreements with HDSA's and/or existing shareholder agreements in place. The provision, which is not legislation, has no regard to the basic principles of company law or the law of contract and will require drastic and immediate changes to almost all existing arrangements and/or shareholder agreements.

- 44.4 The transitional twelve-month period (set out in paragraph 2.11(a) of the Charter) is not applicable to new rights. Should the holder of a prospecting right, by way of example, be granted a mining right after 15 June 2017 (the application for which may have been lodged some time ago), the latter will be a new right which will immediately need to comply with the requirements of a new right, there being no transitional arrangements which apply to new rights. There is also no allowance for pending applications. They will be treated as new rights and not as existing rights and shareholding will immediately have to be restructured. This is contrary to the object in section 2(g) of security of tenure (which includes continuity of tenure from prospecting to mining).
- 44.5 The twelve-month period within which to top-up is reckoned from the date of publication of the 2017 Charter (i.e. from 15 June 2017). After the expiry of the initial twelve-month period, there is no period of grace within which a right holder may rectify depletions of its BEE ownership which occur then. The holder may thus be held in breach of its

obligations immediately after a BEE partner or partners have exited, a BEE contract has lapsed or the previous BEE partner has transferred shares to a non-BEE company.

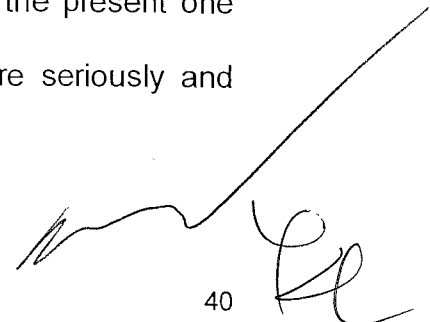
44.6 The above-mentioned provisions or absence thereof are so unreasonable that no reasonable person could have so exercised the power conferred by section 100(2)(a) of the MPRDA, and accordingly stands to be reviewed and set aside under section 6(2)(h) of PAJA. The Minister in this regard also failed to have regard to relevant considerations and information put forward by the Chamber were not considered, as contemplated in section 6(2)(e)(iii) of PAJA.

44.7 In paragraph 2.1.2.12, the non-recognition of renewals is contrary to the object of security of tenure in section 2(g) of the MPRDA (which, as stated, includes continuity of tenure by way of renewals) and contradicts sections 18(3) and 24(3), which do not include re-empowerment as a jurisdictional fact for compulsory grant of renewal applications.

45 Concluding remarks

45.1 The lack of clarity of the provisions of paragraph 2.1.2 mentioned above is a serious breach of the rule of law. This is already a basis to have them reviewed and set aside in terms of section 1(c) of the Constitution as read with section 6(2)(i) of PAJA.

45.2 The need for clarity is paramount in a case such as the present one where existing rights and contractual relationships are seriously and



adversely affected. There can be little doubt that the new ownership requirement of 30%, to be attained within 12 months in the manner set out in the Charter and the possible non-recognition of past empowerment deals (where black shareholders have for example sold their shares) will have grave consequences for current non-Black shareholders.

45.3 It is submitted that there is no rational basis for imposing the new requirements in respect of existing rights and that the manner in which the Minister has sought to do so is not in accordance with the rule of law. It accordingly stands to be reviewed on the basis of section 6(2)(f)(ii)(aa) of PAJA.

45.4 In addition, inasmuch as the envisaged "reduction" of shareholding will render existing agreements impossible of performance and/or deprive shareholders of vested rights, it falls foul of section 25(1) and 25(2) of the Constitution as not being a law of general application, as permitting arbitrary deprivation of property and as not providing for payment of compensation, and accordingly stands to be reviewed in terms of section 6(2)(i) of PAJA as being otherwise unconstitutional.

THE EFFECT OF THE 2017 CHARTER ON NEW PROSPECTING AND MINING RIGHT HOLDERS (paragraph 2.1.1 of the 2017 Charter)

46 Paragraph 2.1.1.1 of the 2017 Charter introduces a new minimum level of 51% Black Person Shareholding for all holders of new prospecting rights.

It is submitted that this paragraph is *ultra vires* the MPRDA:



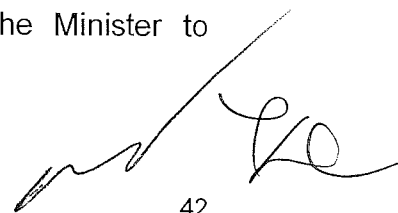
46.1 Section 17(1)(f) provides that the Minister must grant a prospecting right if *in respect of prescribed minerals* the applicant has given effect to the objects referred to in section 2(d). No such minerals have been prescribed but, in any event, this section does not allow the imposition of a 51% minimum black shareholding in respect of all minerals.

46.2 Section 17(4) provides that the Minister may, having regard to the type of mineral concerned and the extent of the (specific) proposed prospecting project, request an applicant to give effect to the object referred to in section 2(d). The Minister must clearly consider each prospecting right application in order to exercise this discretion.

46.3 Sections 17(1)(f) and 17(4) clearly leave no room for the imposition of a 51% prescribed minimum shareholding for all prospecting right applicants and for all minerals.

47 The holder of a prospecting right has an exclusive right to apply for and obtain a mining right in terms of section 19(1)(b) of the MPRDA. As stated, paragraph 2.1.1.1 requires a minimum of 51% Black ownership in the company holding the prospecting right but paragraph 2.1.1.2 requires a minimum of 30% Black ownership in the specific distribution in paragraph 2.1.1.3. There is no apparent reason for the higher threshold in the case of prospecting rights (prospecting being capital intensive with little or no returns) and the difference in threshold and distribution will complicate the transition from prospecting to mining by such a holder.

48 There is no section in the MPRDA which authorises the Minister to

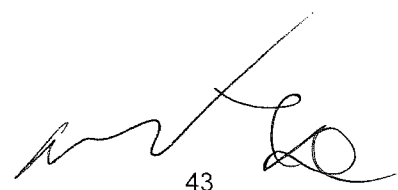


prescribe the specific distribution of shareholding in the case of all new mining rights, as he seeks to do in paragraph 2.1.1.3. As stated above, the Charter is intended to guide the Minister's discretion but cannot exclude the exercise of this discretion in this manner.

49 Paragraph 2.1.1.5 which provides that "any reduction of shareholding of existing shareholders through the issue of new shares, shall not reduce the Black Person shareholding distribution", means that where a company seeks to raise capital for a new venture by issuing shares, only the non-Black Persons' shareholding will be reduced, which in effect means that the Black Persons do not contribute towards receiving such funding.

50 Paragraph 2.1.1.6 goes further. It provides that Black Person shareholding shall vest within 10 years (by no less than 3% annually) and shall be paid for from the proceeds of dividends received by the Black Person shareholders provided, however, that if the total dividends is insufficient, *"the balance owing in respect thereof shall be written off by the Holder or vendor of the shares to the Black Person"*. It should be kept in mind that prospecting projects are by nature capital intensive and do not render any real returns and start-up mining ventures take a long time to become profitable. Dividends are thus unlikely to be paid for a number of years so that, under this paragraph, the shareholding in the holder of the right will vest irrespective of payment, and which will as a result have to be "written off".

51 A provision which requires the "writing-off" of a vested right to receive



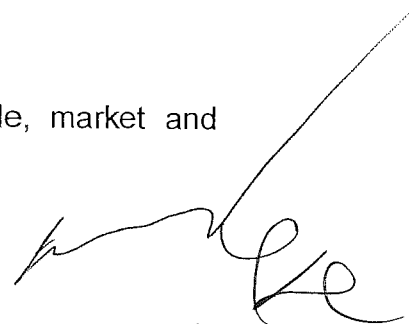
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payment, is a deprivation of property. As stated above, section 25(1) and 25(2) of the Constitution provides that no one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation and if the deprivation amounts to an expropriation, that compensation should be payable. As stated, the Charter is not a law of general application and the paragraph thus already stands to be set aside as being unconstitutional on this basis.

52 In addition to paragraphs 2.1.1.5 and 2.1.1.6 which effectively mean that Black shareholders will contribute very little towards their shareholding and funding of projects, paragraph 2.1.1.7 provides that *"the holder of a new mining right must pay a minimum of 1% on its annual turnover in any given financial year to the Black Person shareholders, prior to and over and above any distributions to the shareholders of the Holder"*.

53 Paragraph 2.1.1.12 is virtually incomprehensible and in any event *ultra vires*. A Holder cannot possibly ensure that a Black Person shareholder "directly and actively control" his, her or its shareholding. The shareholder in question may wish instead to be a passive investor. In any event, it is unclear what might constitute "direct and active control". What a shareholder may do in relation to his/her/its shares will be dictated by the company's Memorandum of Incorporation, the relevant shareholder agreement (to which the Holder may not even be a party) and the Companies Act, 2008.

54 The notion that a Black Person shareholder must trade, market and

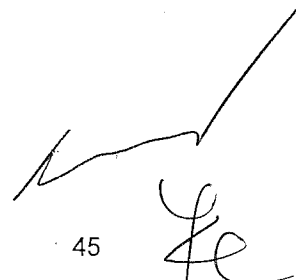


transport his/her/its proportionate share of the production of the company in which the shares are held is stupefying. It is a power which is wholly inconsistent with the fundamental distinction between shareholders on the one hand and the company and its management on the other. The idea of a shareholder being entitled to actively pursue a proportionate share of the business of the company merely by virtue of being a shareholder is entirely inconsistent with the Companies Act, 2008. The further notion that a particular class of shareholder should by means of an instrument issued by the Minister be given that power to the exclusion of other shareholders in addition runs counter to the central principle of shareholder equality enforced by the Companies Act.

- 55 It is submitted that these paragraphs, cumulatively, discriminate between classes of shareholders in a manner which is not sanctioned by the Companies Act and are unreasonable. Notably, paragraphs 2.1.1.4, 2.1.1.8, 2.1.1.9 and 2.1.1.11 impermissibly seek to regulate the shareholders and not the holders of rights under the MPRDA.

OFF-SETS

- 56 Both the Original Charter and the 2010 Charter make reference to the continuing consequences of empowerment deals. The 2017 Charter, without expressly referring to “continuing consequences”, seems only to make provision for off-setting under the ownership element against the value of Beneficiation. Whilst none of these provisions in any of the



Charters are clear, I deal with the topic below on the basis of what seems to be a reasonable interpretation of these sections.

57 Original Charter

57.1 In the Original Charter the term continuing consequences was used to describe how in practice previous deals would continue to be taken into account whenever a right holder's achievement of HDSA ownership is measured.

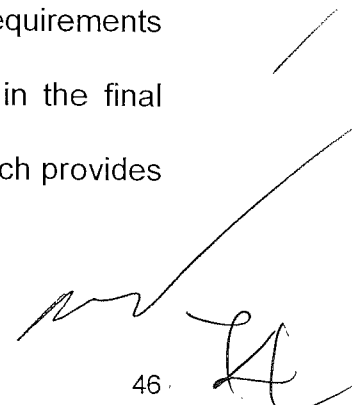
57.2 In the Original Charter, after it dealt with "Active involvement" and "Passive involvement", the following is stated:

"In order to measure progress on the broad transformation front, the following indicators are important:

- The currency of measure of transformation and ownership could, *inter alia*, be market share as measured by attributable units of South African production controlled by HDSA's.
- That there would be capacity for offsets which would entail credits/offsets to allow for flexibility.

The continuing consequences of all previous deals would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production."

57.3 It follows that in the Original Charter a mining company was entitled to take into account, for the purposes of meeting the HDSA ownership targets, previous empowerment deals to the extent to which a "credit" or "offset" arose which could be utilised to meet the HDSA requirements on a later occasion. That approach is explained further in the final bullet point under paragraph 4.7 of the Original Charter, which provides



that in order to increase participation and ownership by HDSAs in the mining industry, mining companies agree:

- “That where a company has achieved HDSA participation in excess of any set target in a particular operation, then such excess may be utilised to offset any shortfall in its other operations.”

58 Paragraph 2.1 of the 2010 Charter provided that it is only the continuing consequences of deals concluded prior to the promulgation of the MPRDA which may be included in calculating credits or offsets in terms of market share as measured by attributable units of production. In the 2010 Charter the ability of measured entities to offset in the manner contemplated by the Original Charter was thus materially limited. The second bullet point in paragraph 2.1 of the 2010 Charter provides that:

- “The only offsetting permissible under the ownership element is against the value of beneficiation, as provided for by section 26 of the MPRDA and elaborated in the mineral beneficiation framework.”

59 The continuing consequences principle was further restricted in paragraph 2.1 of the 2010 Charter, which provides at the end thereof that:

- “The continuing consequences of all previous deals concluded prior to the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002 would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production.” [emphasis added]

60 In the 2010 Charter therefore continuing consequences are limited not only to offsets or credits arising from the value of beneficiation, but are limited to deals concluded prior to the promulgation of the MPRDA.

61 The 2017 Charter has limited this further in providing in paragraph 2.1.1.13 thereof that -

“The only offsetting permissible under the ownership element is against the value of Beneficiation as provided for in paragraph 2.1.4 below. Such offsetting shall account for a maximum of 11% against the ownership target where such offsetting has been approved by the Department of Mineral Resources.”

62 It is submitted that the Minister is not entitled, under the guise of exercising the power conferred upon him by section 100(2)(a) of the MPRDA, to extinguish retrospectively the credits/offsets conferred by the Original Charter in respect of the continuing consequences of empowerment transactions. The Chamber’s members relied upon those credits/offsets when entering into empowerment transactions and when entering into further commercial transactions and investing in new and ongoing mining operations. They would be severely prejudiced if these credits/offsets could be retrospectively withdrawn.

63 Furthermore, the DMR cannot retrospectively introduce new requirements with which empowerment transactions have to comply. In particular, they cannot render compliant transactions non-compliant by requiring retrospectively that optional elements of the Charter included in the calculation of ownership should become prescribed elements.

64 The Chamber will accordingly seek an order reviewing and setting aside paragraph 2.1.1.13 of the 2017 Charter on the basis that it is *ultra vires* the powers of the Minister and void, in that it purports retrospectively to



deprive holders of mining rights of the benefits of the continuing consequences of empowerment transactions concluded by them prior to the coming into force of the MPRDA, which benefits were conferred by the Original Charter.

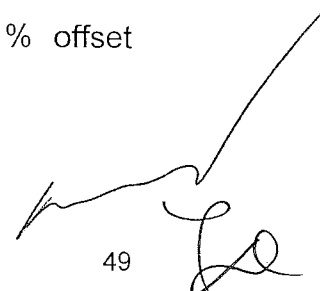
BENEFICIATION

65 Beneficiation is referred to in paragraphs 2.1.1.13 and 2.1.4, i.e. it is no longer a separate element but is now dealt with as part of the ownership element. For the reasons set forth in regard to offsetting generally above, the new requirements in paragraphs 2.1.4(a), (b) and (c) retrospectively deprive holders which have relied on the beneficiation offsets in the Original Charter of their vested rights to do so.

65.1 These new requirements are that the beneficiation must be over and above beneficiation in terms of section 26, limitation to 11%, beneficiation having occurred in 2004, and approval by the DMR.

65.2 Beneficiation is defined as the transformation of a mineral (or a combination of minerals) to a higher value product, which can either be consumed locally or exported. The term is often used interchangeably with mineral "value-addition" or "downstream beneficiation". The 2017 Charter provides, under this element, that a mining right holder may, through its beneficiation projects, offset "a maximum of 11% of Black Persons ownership...".

65.3 It is submitted that there are three difficulties with the 11% offset



proposal.

65.3.1 First, a mining right holder which already meets the 30% ownership target will not have available to it the 11% offset. This would have the effect of discriminating against those mining rights holders who already meet the 30% ownership target.

65.3.2 Second, there is no reason to limit the beneficiation offset to 11% of the 30% ownership target. The 11% is entirely arbitrary and irrational. A mining right holder should be able to offset 100% of its 30% ownership target through its beneficiation projects. This would lead to equal treatment between a mining right holder which satisfies the 30% ownership target but has no beneficiation obligations, on the one hand, and a mining right holder which does not meet the 30% ownership target but nevertheless has substantial beneficiation projects to offset against the ownership target.

65.3.3 Third, the 2017 Charter does not give any indication of how the 11% is to be calculated. That is to say, a mining right holder will not know, simply by looking at the 2017 Charter, whether it has reached the 11%, or indeed what percentage its beneficiation projects have reached *vis-à-vis* the 26% ownership target. The beneficiation element is accordingly vague in the extreme.

65.4 The beneficiation element accordingly falls to be set aside on the basis that it offends against the rule of law, is conducive to unequal treatment

of mining rights holders, and is arbitrary or irrational as contemplated in section 6(2)(i) and 6(2)(f)(ii) of PAJA. Such vague provisions cannot have been authorised by the empowering provision and accordingly also fall to be reviewed under section 6(2)(e)(i) of PAJA.

SALE OF MINING ASSETS

- 66 The term "mining assets" is not defined. It may include the mining right itself. If it does, then paragraph 2.1.3 contradicts, and is *ultra vires*, section 11 of the MPRDA in that the Minister *must* grant consent if the jurisdictional facts in sections 11(2)(a) and (b) are satisfied.
- 67 Paragraph 2.1.3 confers a right of first refusal but contains no mechanism and hence contravenes the rule of law requirements entrenched in section 2(c) of the Constitution read with section 6(2)(i) of PAJA.
- 68 Paragraph 2.1.3 arbitrarily and without compensation deprives existing holders of rights of a component of ownership (the right of disposition) and deprives existing holders of options and of rights of first refusal of their rights, contrary to section 25 of the Constitution read with section 6(2)(i) of PAJA.



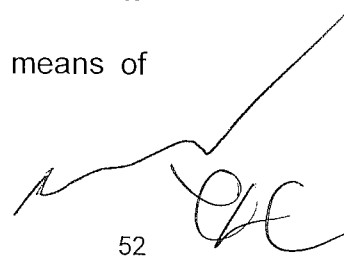
NON-COMPLIANCE WITH THE 2017 CHARTER

69 It is submitted that, even if the Minister were empowered to develop the 2017 Charter (which is not conceded), paragraph 2.12 thereof is *ultra vires*.

70 Paragraph 2.12 provides that mining right holders who have not complied with *inter alia* the ownership element will be regarded as non-compliant with the provisions of the Charter and in breach of the MPRDA and will be dealt with in terms of sections 47, 98 and 99 of the MPRDA.

71 It is submitted, for the reasons set out below, that paragraph 2.12 also falls to be set aside as not being authorised by the MPRDA, as contemplated in section 6(2)(a)(i) of PAJA.

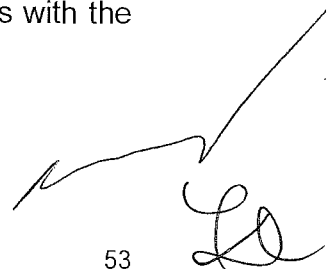
72 The development and publication of the Charters constitute administrative acts by or on behalf of the Minister, purportedly in terms of section 100 of the MPRDA. The Charters do not constitute regulations and do not constitute legislation. Instead they constitute formal guidelines or statements of policy, which are mandated by section 100 of the MPRDA. As stated, they are intended to provide a formal indication, made known to the public, of what the Minister will regard as “furthering” or “giving effect to” the objects referred to in section 2(c), (d), (e), (f) and (i) of the MPRDA as contemplated in *inter alia* section 23(1)(h) and item 7(2)(k) of the MPRDA. A policy, formal or otherwise, is not legislation and remains a guideline. It could never be applied so as to have the force of law or to preclude an applicant for a mining right from adopting other means of



furthering the objects or giving effect to the objects of the Act. Section 100(2)(b) indeed requires that the Original Charter should set out how the objects referred to in those sections can be achieved. In this regard it is important to note that section 100(2)(b) does not require that the contemplated charter prescribe, on an exclusive basis, what must be done in order to achieve the objects of those provisions.

73 It is submitted that the Minister cannot by decree elevate the Charter's status to that of legislation and cannot by decree provide in the Charter that non-compliance therewith shall render the mining company in breach of the MPRDA and subject to the provisions of section 47 read in conjunction with sections 98 and 99 of the Act. Only Parliament, by means of appropriate amendments to the MPRDA, can render a breach of the 2017 Charter a breach of the MPRDA.

74 The Chamber will in this regard seek an order reviewing and setting aside paragraph 2.12 of the 2017 Charter and declaring that a failure by a holder of a mining right or converted mining right to meet the requirements of the Charter(s), and in particular a failure to maintain a 26% HDSA or 30% Black ownership level after the grant of a mining right or converted mining right, does not constitute a contravention of the MPRDA including, in particular, a contravention for the purposes of sections 47(1)(a) or 93(1)(a), and does not constitute an offence for the purposes of section 98(a)(viii). In any event, since the Code (which was published on 30 April 2009) is based on the Original Charter, the 2017 Charter conflicts with the



code as a whole and not only insofar as Chapter 3 is concerned, which conflict is contrary to the rule of law requirement in section 1(c) of the Constitution, an aspect which relates not only to the Diamonds Act and the Precious Metals Act, but generally in regard to the 2017 Charter as a whole.

APPLICATION OF CHARTER TO LICENSEES UNDER THE DIAMONDS ACT, 1986 AND THE PRECIOUS METALS ACT, 2005

75 Section 5(2) of the Diamonds Act provides that

“the Regulator may²⁵—

- (a) when considering an application for any of the licences or permits provided for in this Act, have regard to the broad-based socio-economic empowerment Charter contemplated in section 100 of the Mineral and Petroleum Resources Development Act”.

76 As in the case of the MPRDA, this provision clearly operates at the time of the grant of a licence and means that the Regulator may have regard to the Charter *in deciding whether or not to grant a licence* under the Diamonds Act. This provision does not authorise the Minister in paragraphs 2.8 and 2.8.1 of the 2017 Charter to make the targets and elements of the Charter applicable to licence holders under those Acts in line with the table on pp 23-24 thereof. It also does not authorise the

²⁵ This is to be contrasted with the “shall” in section 5(1) thereof.

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Minister to prescribe ownership targets for licensees in the downstream diamonds and precious metals industry.

- 77 Paragraphs 2.8 and 2.8.1 of the 2017 Charter are simply *ultra vires* and stand to be reviewed and set aside on this basis. Paragraph 2.2 is also *ultra vires*: the Minister has no power to repeal the code of good practice in terms of section 100(2)(a) of the MPRDA.

Part 4: GROUNDS FOR REVIEW OF THE NON-OWNERSHIP ELEMENTS OF THE REVIEWED CHARTER

PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT

- 78 The 2017 Charter imposes certain procurement obligations on a Holder in relation to that Holder's procurement policy. The obligations are meant to apply to "*mining goods*", "*services*", "*processing of samples*", "*verification of local content*", and "*contribution by foreign supplier*". I shall deal with these in turn, starting with procurement of mining goods.

(i) Mining goods

- 79 The 2017 Charter provides that:

"Mining Goods

A Holder must spend a minimum of 70% of total mining goods procurement spend on South African Manufactured Goods. The abovementioned 70% of the total good procurement spend shall be apportioned in the following manner:

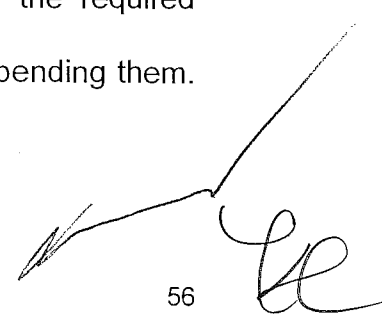
- (a) A minimum of 21% of total goods procurement spend must be set aside for sourcing South African

Manufactured Goods from Black Owned Companies;

- (b) A minimum of 5% of total mining goods procurement spend must be set aside for sourcing South African Manufactured Goods from Black Owned Companies with a minimum of 50%+1 vote female Black Person owned and controlled and/or 50%+1 vote Youth owned and controlled; and
- (c) A minimum of 44% of total mining goods procurement spend must be set aside for sourcing South African Manufactured Goods from BEE Compliant Manufacturing Companies.”

80 The definition of “South African Manufactured Goods” in the 2017 Charter requires a calculation of the value added during assembly and/or manufacturing of the product within South Africa, excluding profit mark-up, intangible value and overheads. It will be impossible for a Holder to know whether or not goods manufactured in South Africa constitute South African Manufactured Goods for the purposes of implementing the requirements of the 2017 Charter under this heading since it will not know the manufacturer’s profit mark-up, the product’s intangible value, the manufacturer’s overheads or what value was added during assembly or manufacturing within South Africa. It is accordingly not possible for a Holder to comply with this requirement and the law does not require the impossible. These provisions must accordingly be struck down under the rule of law principle.

81 The phrase “*must be set aside*” is unclear. It is not clear, for example, whether it is meant that the Holder must actually spend the required percentages or whether it must simply make provision for spending them.



- This is an important point, especially because there is no proof that the manufacturers or companies from which the mining goods must be sourced, have the capacity to provide the relevant mining goods. If, for example, such manufacturers or companies cannot provide the relevant goods to the Holder, then it would make sense to read this sub-element as requiring a Holder simply to set aside the relevant expenditure percentage. Having done so, it would on this interpretation have fulfilled its obligation under the 2017 Charter.
- 82 If, on the other hand, a Holder is required actually to spend the requisite percentages, then merely setting money aside would not be proper fulfilment of the obligation under this sub-element. Further, on this latter interpretation, a Holder would be in breach of the 2017 Charter if, having attempted actually to spend the requisite percentage, it was unable to do so because there is no relevant manufacturer or company to provide the mining goods. This would operate unduly harshly on a Holder.
- 83 At all events, it is not clear which of these two rival meanings this sub-element bears. This, I am advised, is a problem for the principle of the rule of law, according to which laws must be clear and capable of compliance. This sub-element is vague and therefore contrary to section 1(c) of the Constitution.
- 84 It is simply impossible to understand what is meant by the phrase "Black Owned Companies with a minimum of 50%+1 vote female Black Person owned and controlled and/or 50%+1 vote Youth owned and controlled" in

paragraph (b) above. Yet a “minimum of 5% of total mining goods procurement spend must be set aside for sourcing” mining goods from such an ill-defined entity. There is no amount of parsing this element which would make it clearer. Again, a Holder would not know when or when it has not complied with this sub-element. This is fundamentally contrary to the rule of law in section 1(c) of the Constitution.

85 There is another problem with the sub-element, which has been foreshadowed above, namely that there is no evidence that companies currently providing mining goods are Black Owned Companies. If the idea is that such companies must gear themselves up so that they are Black Owned Companies, then that obligation should be imposed on those companies. The 2017 Charter must be capable of compliance by those to whom it applies, and Holders should be assured (as at present they are not) that there will be an ability to procure goods and services from Black Owned Companies. At the moment, there is, as I say, no evidence of that. (In this regard, I challenge the Minister to produce such evidence in his answering affidavit.) I am advised that the Courts have held that if a measure is incapable of implementation, it is on that account alone unconstitutional. That principle is I believe expressed by the legal maxim “*lex non cogit ad impossibilia*”.

86 Another concern is that the 2017 Charter will encourage anti-competitive outcomes. Black Owned Companies can, without unlawful collusion, keep their prices high because they know that there is a legal obligation to

procure certain percentages from them. Those Black Owned Companies will be able to achieve what in our competition law is capable of achievement only by dominant firms: namely, they can without being dominant price excessively (section 8(a) of the Competition Act 89 of 1998). This would be contrary to whole spirit of the Competition Act, namely to protect consumer welfare from, amongst other things, excessive pricing.

87 I am not, in saying this, submitting that this was the wrong policy choice for the Minister to make. I am simply submitting that the Minister is not empowered by the MPRDA to promulgate a 2017 Charter which may effectively lead to an artificial inflation in the prices of mining goods, contrary to the objects of the Competition Act. If that result is to be eventuate, then it should be provided for by primary legislation in Parliament.

88 As was pointed out in the Chamber's submission (a copy of which is annexure "FA10"), presentation, and revised submissions (a copy whereof is annexure FA11 hereto) on the draft 2017 Charter, and in annexure FA2, the 70% capital goods from Black Owned Companies with 60% local requirement is a significant problem for certain commodities (especially those that have to buy very large capital equipment in from off-shore), and the prescriptive nature of these requirements will be a challenge to meet for mining companies.

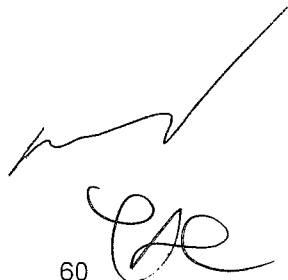
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89 I am advised that the requirement that a Holder must spend a minimum of 70% of "total mining procurement spend" on South African Manufactured Goods is in breach of South Africa's obligations under the General Agreement on Trade and Tariffs (GATT) and the Trade, Development and Cooperation Agreement (TDCA) in that it discriminates against the exports of other member countries. Both agreements constitute international treaties to which South Africa has bound itself. Although those agreements may not have become part of South Africa's domestic law, they reflect this country's international law obligations.

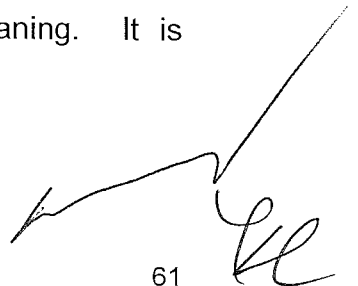
90 It is submitted that the treaties in question give rise to an obligation by the South African government not to undermine its international obligations created thereunder by enacting subordinate legislation or by engaging in administrative action which is irreconcilable with such obligations. To do so would, at the very least, constitute conduct which no reasonable decision-maker would engage in.

91 For all the above reasons, therefore, I am advised and submit that this procurement sub-element is irrational, not capable of implementation and one which no reasonable decision-maker could have reached and is therefore reviewable on the grounds set out in sections 6(2)(e)(i) and (h) of PAJA) and that it is in breach of section 1(c) of the Constitution.

(ii) Services

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- 92 This sub-element requires 80% of "*the total services procurement spend*" to be sourced from Black Owned Companies. There is then a break-down of these percentages to be spent on Black Owned Companies (65%); "*Black Owned Companies with a minimum of 50%+1 vote female Black Person owned and controlled companies*" (10%); and *Black Owned Companies with a minimum of 50%+1 vote Youth owned and controlled companies*" (5%).
- 93 The same objection raised above as to the ability to comply with these targets applies in this case. If there are no or insufficient Black Owned Companies from which to source these services in the relevant percentages, then Holders would not be able to comply with this sub-element. There is as matters stand no evidence (and again I challenge the Minister to produce it) that the companies currently providing such services are black-owned, or that there are any or a sufficient number of Black Owned Companies capable of providing the services in the relevant percentages. I must emphasise that I am not, in saying this, criticising Black Owned Companies, so much as saying that there ought to be the relevant infrastructure to enable compliance with this procurement sub-element.
- 94 Again, the phrases "*Black Owned Companies with a minimum of 50%+1 vote female Black Person owned and controlled companies*" and "*Black Owned Companies with a minimum of 50%+1 vote Youth owned and controlled companies*" are not capable of any clear meaning. It is



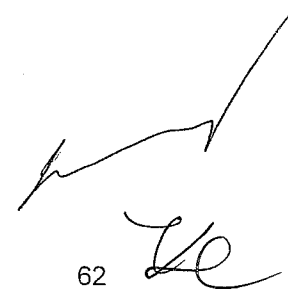
therefore impossible for a Holder, seeking to comply with them, to know how to do.

95 For all the above reasons, this sub-element is *ultra vires* the MPRDA (and therefore contrary to section 6(2)(e)(i) of PAJA), void for vagueness, and contrary to section 1(c) of the Constitution.

(iii) Processing of samples

96 This sub-element requires Holders to “*utilise South African Based Companies for the analysis of 100% of all mineral samples across the mining value chain*”. If a Holder is not to do so, then it must obtain the prior written consent of the Minister.

97 When a similar proposal was previously made by the Minister, the Chamber made submissions to the Minister. In its submissions, the Chamber commented that there is no evidence that local companies have the capacity to conduct an analysis of 100% of a Holder’s mineral samples. The Minister does not seem to have taken this factor into account. There is no evidence that South African Based Companies will be able to conduct an analysis of all the mineral samples produced in the mining industry in South Africa. In ignoring this fact, the Minister failed to take into account relevant considerations in imposing this obligation. As a result, the 2017 Charter should be reviewed under section 6(2)(e)(iii) of PAJA.



98 As regards obtaining the Minister's written permission to use foreign companies for mineral sampling, there is no indication of the factors that the Minister will take into account in exercising that discretion. In the absence of any guidelines as to how such discretion is to be exercised, it is possible that the Minister will exercise it capriciously or arbitrarily. This would be reviewable under section 6(2)(e)(vi) of PAJA. This could of course be remedied by providing for criteria according to which the Minister will exercise his discretion in this regard. Failure to provide for those criteria or guidelines means that the 2017 Charter is in this respect void.

99 There is then the practical point. If a Holder cannot obtain the sampling services of a South African Based Company when it requires them, there is no time limit within which the Minister must give (or refuse) his written permission. The Minister (who is after all a busy person) may not be able timeously to process such requests. Indeed, there are a number of decisions of the Minister which remain outstanding notwithstanding a significant delay. Consequences for the Holder concerned may be enormous. Section 100(2) of the MPRDA does not license the Minister to micro-manage the day-to-day business requirements of Holders. Yet that is what this sub-element permits him to do, with potentially disastrous consequences for the mining industry. Therefore this sub-element is *ultra vires* the MPRDA and accordingly falls to be reviewed under section 6(2)(e)(i) of PAJA.

(iv) Verification of local content

100 It is stated that the responsibility to verify local content lies with the supplier. The MPRDA does however not apply to or bind suppliers. This provision is therefore *ultra vires*, and moreover may render compliance by the Holder impossible if the supplier fails to provide such verification.

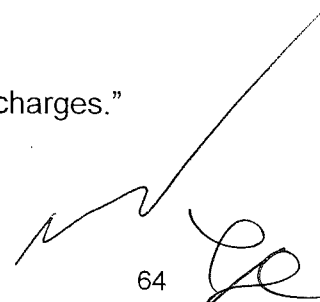
(v) Contribution by Foreign Suppliers

101 This sub-element requires a Foreign Supplier to contribute 1% of its turnover (i.e. whether or not a profit is made) generated from local mining companies towards the Mining Transformation and Development Agency. I am advised that there are a number of difficulties with this.

102 First, the Mining Transformation and Development Agency (an entity yet to be established) will receive funds from the Foreign Supplier levied under this sub-element. It is however quite clear that the funds so received are nothing other than tax, levy, duty or surcharge imposed on goods and services by Foreign Suppliers. In short, this element of the 2017 Charter purports to be a money Bill. The Minister has no power to impose money Bills or to raise revenue. That power is reposed in Parliament. Section 77(1)(b) of the Constitution defines a “money Bill” in *inter alia* the following terms:

“A Bill is a money Bill if it - ...

(b) imposes national taxes, levies, duties or surcharges.”



103 Under section 77(3) of the Constitution, all money Bills must be considered under the procedure set out in section 75 of the Constitution. In short, only Parliament can pass a money Bill, or, in lay terms, impose taxes, levies, duties and surcharges. Yet the Minister has purported, by the device of the 2017 Charter, to do that which is reserved for Parliament. The 2017 Charter is unconstitutional.

104 Second, section 213(1) of the Constitution provides that:

“There is a National Revenue Fund into which all money received by the National Government must be paid, except money reasonably excluded by an Act of Parliament.”

105 The Mining Transformation and Development Agency, which will receive the 1% levy paid to the National Government by Foreign Suppliers, is not established by any Act of Parliament, and is an entity separate and distinct from the National Revenue Fund, which alone under the Constitution can receive revenue. The Mining Transformation and Development Agency, being neither the National Revenue Fund nor provided for by an Act of Parliament, has been given an unconstitutional mandate under the 2017 Charter. It is therefore unconstitutional.

106 Third, the 2017 Charter purports to have extra-territorial application, which is unconstitutional. Suppose a Foreign Supplier obtained revenue (turnover) in South Africa, and expatriated that turnover, there is no mechanism under the 2017 Charter for enforcing the payment of the turnover to the Mining Transformation and Development Agency,

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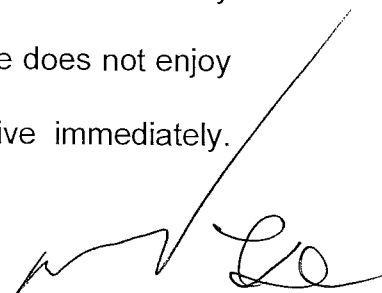
assuming such payment were otherwise lawful. In short, the 2017 Charter is unenforceable *vis-à-vis* a Foreign Supplier with no assets in the Republic. Because the 2017 Charter provides no mechanism for enforcement of this element, the element is incapable of compliance and therefore affronts the rule of law.

107 Fourth, the Minister is not empowered under section 100(2) of the MPRDA to tax Foreign Suppliers to pay levies into the Mining Transformation and Development Agency, whose purpose, powers and functions are yet to be set out and may be contrary to the objects of section 100(2) of the MPRDA.

108 Moreover such contribution by foreign suppliers will simply be passed on to the mining companies themselves, thereby increasing the cost of mining. This is yet again irrational.

109 The definition "Foreign Supplier" refers to "level 4 Dti Codes BEE status" and 25%+1 vote black ownership. These requirements therefore apply cumulatively and are very unlikely to apply to a foreign controlled and registered company. Moreover the reference to level 4 Dti Codes is unclear and indeed meaningless, and foreign companies are not subject to any such codes.

110 Although in terms of paragraphs 2.11(c), (d) and (e) the transitional period for the procurement element targets is three years, the contribution by foreign suppliers is not a procurement target and therefore does not enjoy the 3 year transitional period. It is accordingly effective immediately.



However, the Mining Transformation and Development Agency has yet to be formed, as indeed recognised in paragraph 2.11(a) in relation to paragraphs 2.1.1.3 (b) and 2.1.1.9 relating to ownership, but not in relation to the contribution by foreign suppliers. This element is therefore incapable of having been brought into effect immediately, in similar vein to the absence of schedules or regulations in legislation.

111 For all the above reasons, therefore, I am advised that this sub-element is unconstitutional, *ultra vires* the MPRDA and liable to be set aside on review in terms of sections 6(2)(e)(i) and (iii), (f)(i) and (ii) (aa), (bb), (cc) and (dd).

(vi) Transitional arrangements in relation to procurement

112 Clause 2.11(c) of the 2017 Charter provides for what it calls "*transitional arrangements*" in relation to the procurement element, in the following terms:

"The transitional arrangements period for the procurement element targets is three years. The Holder must within three (3) years from the date of publication of this reviewed Mining Charter of 2017, submit a three (3) year plan indicating progressive implementation of the provisions of this reviewed Mining Charter of 2017 insofar as they relate to procurement."

113 Clause 2.11(e) of the 2017 Charter provides that:

"Compliance with procurement targets within the transitional period shall be as follows:

The first year target is set at 15% of the 70%, second year target is set at 45% of the 70% and the third year target is set at 70%."

114 It would appear from the above clauses, read together, that the procurement targets will become immediately applicable, albeit in a staggered manner. There is however a perplexing puzzle as to how the staggered approach is meant to function. For example, clause 2.11(e) refers to "15% of the 70%", "45% of the 70%", and "70%" (in the third year). And these staggered targets are meant to be "*compliance with procurement targets within the transitional period*". That is to say, on the face of clause 2.11 (e), these targets are meant to be procurements targets across all the procurement sub-elements (mining goods, services, processing of sample, and contribution by Foreign Suppliers).

115 At the same time, it is clear that the reference to "70%" can only be reference to the mining goods sub-element, which alone speaks of "70%". There is therefore confusion as to the exact meaning of the transitional targets. Do they apply only to mining goods, or do they also apply to all other procurement sub-elements? Put shortly, it is not at all clear whether there is a transition period in relation to the procurement sub-elements other than mining goods. The 2017 Charter does not explain this. Laws (and the 2017 Charter purports to be law) must be clear. Those to whom such laws apply must know when, and to what extent (if there is any suggestion of staggered compliance), they are meant to comply. The 2017 Charter is to this extent contrary to section 1(c) of the Constitution.



(vii) Procurement: general

116 There is a general objection which cuts across the procurement targets. As pointed out above, when the Minister first proposed procurement targets, the Chamber made submissions to him, in which it said that the procurement targets were not capable of compliance, in the sense that, with the best will in the world, Holders would not be able to procure goods and services (including sampling services) from Black Owned Companies and local suppliers. There is no evidence (the Minister is challenged to produce it) that the situation has changed since those submissions.

117 The only conclusion to draw from this is that the Minister failed to apply his mind to those submissions. In promulgating the 2017 Charter in its present terms, the Minister therefore failed to take into account relevant considerations, which failure furthermore exhibits a failure to apply the mind. The decision to promulgate the 2017 Charter was therefore unreasonable and irrational (in the legality sense).

118 For all these reasons, I submit that the procurement element falls to be set aside on review, and declared unconstitutional.

EMPLOYMENT EQUITY

119 The 2017 Charter provides for various employment equity targets, at various levels, with which Holders must comply. They are set out in clause 2.3 of the 2017 Charter as follows:

“Board

A minimum of 50% Black Persons with exercisable voting rights, 25% of which must be black Female Persons.

Executive/Top Management

A minimum of 50% Black Persons at the executive directors' level as a percentage of all executive directors, 25% of which must be Female Black Persons.

Senior Management

A minimum of 60% Black Persons in senior management, 30% of which must be female Black Persons.

Middle Management level

A minimum of 75% of Black employees in middle management, 38% of which must be female Black Persons.

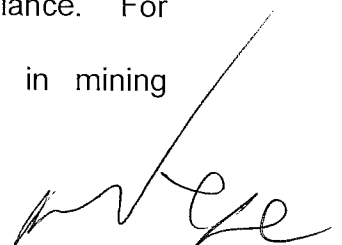
Junior Management level

A minimum of 88% Black employees in junior management, 30% of which must be female Black Persons.

Employees with disabilities

A minimum of 3% employees with disabilities as a percentage of all employees, reflective of national and/or provincial Demographics.”

120 No transitional period is provided in the 2017 Charter for meeting the above employment equity targets. It is not clear whether or not this was simply an oversight. Nevertheless the risk remains that the Minister and his delegates may seek to enforce those targets immediately. It will be apparent, from the stringent nature of these targets, that, as matters stand, and having regard to the need for sustainable continuation of mining in the Republic, these targets are incapable of immediate compliance. For example, it is not possible, without massive disruption in mining



operations, to change 50% of the board of a Holder, or to change 60% of senior management, or to change 75% of middle management or 88% of junior management level. Meeting these targets immediately (i.e. within 12 months), and not over a gradual period allowing for training and up-skilling, will almost certainly lead to a disruption of mining activities in the Republic.

121 In saying this, the Chamber recognises the need for change: it submits, however, that such radical change cannot take place immediately without operational impact on mining in the Republic. Therefore a gradual process by which these targets should be met should have been set out in the 2017 Charter. In failing to set it out, the 2017 Charter has failed to take into account a relevant consideration, namely that, if immediately implemented, the 2017 Charter may in this regard lead to a disruption of mining activities. Therefore the 2017 Charter falls to be reviewed under section 6(2)(e)(iii) of PAJA.

122 Holders are in any event already bound by the Employment Equity Act, which covers much of the ground sought to be covered by the 2017 Charter in this regard. The immediate imposition by the 2017 Charter of unachievable employment equity targets, with the potential result of disruption, is not rationally connected to the purpose for which the 2017 Charter was adopted, the purpose of the empowering provision, and the information before the Minister. Such targets, bearing in mind the disruption they entail, will not, in the words of section 100(2)(a) of the

MPRDA, “allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources”.

123 In the result, the 2017 Charter falls to be reviewed in this regard under sections 6(2)(f)(ii)(aa), (bb) and (cc) of PAJA.

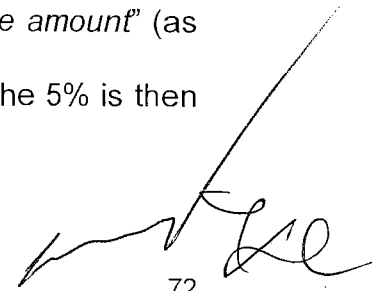
124 Finally, having regard to the fact that Holders are required to comply with the employment equity element immediately, and may with the best will in the world not be able to do so (because personnel with the relevant skills may not be available), it is not proportional to visit upon Holders severe the consequences for non-compliance set out in clause 2.12 of the Charter, which include losing the mining right. On this further basis, then, the 2017 Charter falls to be set aside.

125 Finally, I point out that previously white women were included in the definition of HDSAs but in terms of definition of Black Persons in the 2017 Charter they are excluded which means the current numbers around women will be significantly lower for purposes of meeting this target.

126 Moreover, the targets for Black Women do not take into account the mining industry’s existing employment equity profile or the university skills pipeline.

HUMAN RESOURCE DEVELOPMENT

127 This element requires a Holder to “invest 5% of the Leviable amount” (as defined in another Act) on “essential skills development”. The 5% is then



- further apportioned towards “*essential skill development activities*” (2%); South African Historically Black Academic Institutions (1%); and Mining Transformation and Development Agency (2%). The cost of this is R2,5 billion based on 2017 data annualised. This is a ring-fenced element which in terms of paragraph 2.9 requires 100% compliance at all times.
- 128 The apparent aim of this element is that 5% of a Holder’s Leviable amount should be invested in skills development. I must however point out that the mining industry currently pays a 1% levy towards the National Skills Fund.
- 129 Second, the mining industry is the only industry that is required to invest in community development projects, some of which include expenditure in basic education for the unemployed and *ad hoc* scholarship programmes.
- 130 Therefore to require of the mining industry, in addition to the contribution it is already making, to comply with this element is to treat it differently (that is to say unequally) from other sectors. This alone offends against section 9(1) of the Constitution which provides that “*everyone is equal before the law and has the right to equal protection and benefits of the law*”. A law, such as the element under discussion, which treats persons in various sectors unequally, and without justification, is on that account unconstitutional. If, as appears to be the case, the aim is that Holders should on pain of losing their mining rights solve most of the country’s problems, then that purpose is not mandated by the MPRDA. Only Parliament can impose such a burden upon any industry.

131 In any event, such a law, providing as the element does for Ministerial exemption, should be debated in Parliament and passed by Parliament, having regard to its impact and reach. It is not to be left to the executive. Accordingly, this element offends against the principle of separation of powers enshrined in the Constitution and is on that account reviewable and is to be set aside.

132 The Mining Transformation and Development Agency is, for reasons already advanced, not entitled to receive any funds which in terms of section 213(1) of the Constitution ought properly to be paid to the National Revenue Fund. No Act of Parliament has reasonably excluded payment of moneys into the Mining Transformation and Development Agency. The Minister simply has no power to override the Constitution, as he has here sought to do.

133 Perhaps more importantly, the 5% on Leviable amount is in essence a tax, duty or surcharge. In short, it qualifies as a money Bill. Accordingly, it could only properly be imposed by Parliament, and not by a Minister. On that further basis the element is unconstitutional.

134 Moreover, the Mining Transformation and Development Agency is yet to be formed, yet since in par 2.11(a) in respect of existing mining right holders, there are no transitional provisions which apply to paragraph 2.5(d), paragraph 2.5(d) is effective immediately.

MINE COMMUNITY DEVELOPMENT



- 135 This element requires a Holder to contribute towards Mine Community Development. It does so, however, in terms that are so vague that it is impossible to comply with them. For example, the element provides that a *“Holder’s contribution towards Mine Community Development must be proportionate to size of the investment”*. There is no definition of *“investment”* in the 2017 Charter. A Holder wishing to comply with this element would not be able to do so. This is just one example. The whole element is unclear and therefore incapable of implementation by those to whom it applies. To make matters worse, this is a ring-fenced element which in terms of paragraph 2.9 requires 100% compliance at all times.
- 136 Moreover, the Mining Transformation and Development Agency is yet to be formed, yet since in par 2.11(a) in respect of existing mining right holders, there are no transitional provisions which apply to par 2.5(d), par 2.5(d) is effective immediately.
- 137 Another difficulty with the element is that it seeks to impose obligations that Holders already have under their social and labour plans (SLPs). The major difference is that the element introduces a timetable for meeting SLP targets which may conflict with the provisions of the various SLPs. A Holder would therefore be put in jeopardy if it complies with its SLP but nevertheless fails to comply, within 12 months, with the vaguely expressed provisions of this element. On this further ground, therefore, the element cannot be sustained.



138 SLP's are already regulated by the Mineral and Petroleum Resource Development Regulations (MPRD Regulations) made under s107 of the MPRDA. The three pillars of SLP's, as per the MPRD Regulations, are a human resource development program, local economic development program and downscaling and retrenchment processes (reg 46).

As aspects of the seven components of 2017 Charter are already covered by the MPRD Regulations, the purported regulation of these overlapping aspects in the 2017 Charter is *ultra vires* the MPRD Regulations.

SUSTAINABLE DEVELOPMENT AND GROWTH OF THE MINING AND MINERALS INDUSTRY

139 In terms of section 100(2)(a) of the MPRDA the purpose of the Charter is to "set the framework for targets and timetable for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources and beneficiation of such mining and mineral resources". In terms of section 100(2)(b) the Charter must set out how the objects referred to in sections 2(c),(d),(e),(f) and (i) can be achieved. Sustainable development is dealt with in section 2(h), which is therefore, not one of such objects. Health and Safety is not dealt with in such objects at all because they are dealt with in the Mine Health and Safety Act, 1996. Paragraphs 2.6.1 and 2.6.2 in the 2017 Charter are therefore *ultra vires* section 100(2) and fall to be set aside on that ground.

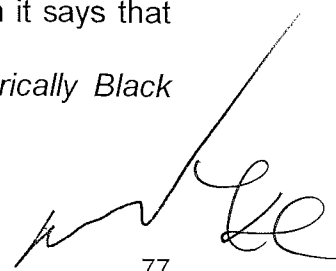
140 Paragraph 2.6.3 deals with research and development. In imposing paragraph 2.6.3 the Minister did not take into account the relevant considerations contained in the Chamber's documents and his decision to publish paragraph 2.6.3 is not rationally connected to the information that was before him in that regard.

141 Because this element constitutes a reiteration, in vague and aspirational terms, of obligations that Holders already bear under other pieces of legislation, it introduces confusion when it imposes implementation targets (12 months) which are not contained in the other legislation. The result is potentially that a Holder will be compliant with primary legislation whilst being in breach of the 2017 Charter. That is a chaotic outcome which is not connected to the purpose for which the Minister's power to publish the 2017 Charter was conferred.

142 The element goes further to provide that a Holder must spend 70% of its research and development budget in South Africa. It is then provided that 50% of this 70% should be "*spent on South African Historically Black Academic Institutions*". There are a number of difficulties with this.

142.1 First, these percentages seem to have plucked out of nowhere. No "costing" was ever done to test their practicability. The Minister is specifically invited to indicate the facts he considered in arriving at these percentages.

142.2 Second, it is not at all clear what the element means when it says that 50% of the 70% "*must be spent on South African Historically Black*



Academic Institutions.” Does it mean that research and development money must be given to those institutions, or that research and development must be conducted at those institutions?

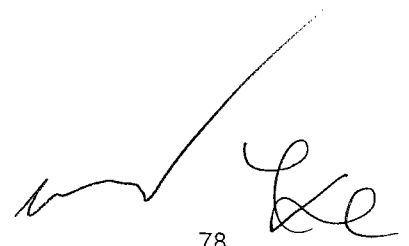
142.3 Third, there is no evidence (and had the Minister consulted properly he would have been informed of this) that these institutions have the capacity to assist in mining research and development within a period of 12 months. They may in due course develop that capacity, but it is absurd to require a Holder, within 12 months, to spend part of its research and development budget on institutions from which that Holder will gain nothing in return.

142.4 That is not research and development but a tax to fund these institutions. But if the aim is that the mining industry should contribute to South African Historically Black Academic Institutions, then that should not be in the guise of research and development, and it should be done by primary money bill legislation, as the Constitution requires.

143 For all the above reasons, I submit that this element should be set aside.

HOUSING AND LIVING CONDITIONS

144 The Chamber supports the values expressed here, but this topic is already regulated by the Housing and Living Condition Standard developed by the Minister under section 100(1)(a) and he has no power to regulate the same topic under section 100(2)(a). The inclusion of these requirements in the 2017 Charter is accordingly ultra vires.

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PARAGRAPHS 2.13 AND 2.14

145 Neither the review nor the repeal of the Original Charter is provided for by section 100(2)(a) of the MPRDA and these paragraphs are accordingly ultra vires the powers of the Minister.

Part 5: REQUIREMENTS FOR INTERIM INTERDICT AND URGENCY**146 *Prima Facie* Right**

146.1 It is submitted, for the reasons set out above, that the Chamber has good prospects of succeeding with an application for the judicial review of the 2017 Charter on the basis of PAJA and/or the Constitution.

146.2 The publication of the 2017 Charter:

146.2.1 was not authorised by section 100(2)(a) of the MPRDA, from which the Minister purports to derive his power;

146.2.2 does not constitute a *bona fide* exercise of power in that it is clear that the Minister could not reasonably have believed that he enjoyed the power to create law in the manner in which he has sought to do;

146.3 The 2017 Charter:

146.3.1 does not constitute, as it purports to, a form of binding legislation;

146.3.2 is inconsistent with the MPRDA;



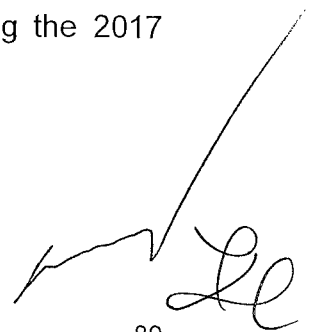
146.3.3 it is not authorised by section 100(2)(a) of the MPRDA.

146.3.4 violates a number of provisions of the Constitution, including:

- (i) the principle of the rule of law in section 1(c) [in that it is so confusing and contradictory that those whom it purports to apply to cannot reasonably regulate their affairs in compliance with the 2017 Charter and in that the 2017 Charter contravenes the separation of powers principle];
- (ii) the right to equal protection of the law in section 9 [in that shareholders of mining companies are discriminated against unfairly];
- (iii) the right to property in section 25 [in that it requires, without compensation, the expropriation of shareholder rights and arbitrarily deprives them of rights otherwise than in terms of a law of general application];
- (iv) the right to just administrative action guaranteed in in section 33 and protected by PAJA.

146.3.5 Violates the principle of equality of shareholders enshrined in the Companies Act, 2008.

146.4 Pending the outcome of that application, the applicant's members have a clear right to prevent the respondent from implementing the 2017 Charter.

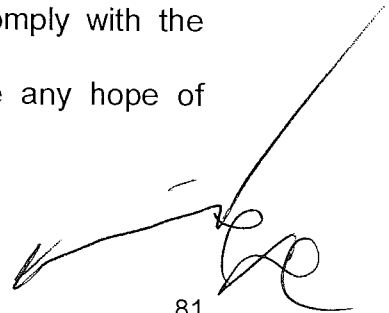
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147 Applicant's Reasonable Apprehension of Harm

148 As I pointed out in my introductory section, the publication of the 2017 Charter resulted in in excess of R50 billion being wiped off the value of shares in listed mining companies operating in South Africa. In annexure FA2 the impact of the 2017 Charter and in particular the consequences of its implementation in the context of a mining industry which is not only contracting and shedding jobs but also already suffering from the burden of uncertain and overly intrusive regulation are explained in detail.

149 The 2017 Charter will apply immediately to applicants for new prospecting and mining rights. In order to comply with the new requirements of the 2017 Charter they will have to attempt to undo the agreements which they reached with their BEE shareholders and partners, and with their investors and enter into new agreements. That will put all such applications on hold for an indefinite period, leading to substantial losses, a loss of reputation amongst investors and chronic uncertainty. As stated above, mining companies with pending applications for rights and renewals, some of which are required urgently for viability or continuity of mines, will now be adjudicated upon based on the new 2017 Charter requirements. This will make those mining houses which were compliant at the date of the application, immediately non-compliant for purposes of the adjudication of such pending application for rights and/or renewals.

150 The 12 month period provided to existing Holders to comply with the revised targets is impossibly short. If they are to have any hope of

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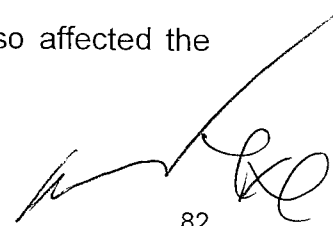
meeting such targets within that period they will have to start immediately re-arranging their affairs at a massive cost in time and resources and with accompanying organisational disruption.

151 As I pointed out above, every commentator – be it economists, ratings agencies, share analysts or mining lawyers – has concluded that the implementation of the 2017 Charter will be massively detrimental to the mining industry.

152 The employment equity provisions of the 2017 Charter are not subject to the transitional provisions and, as pointed out above, although the absence in the transitional provisions of a reference to employment equity may be an error, the risk remains that the targets apply immediately. They will require massive reorganisation and are not immediately achievable. A failure to meet them places Holders' prospecting and mining rights at risk.

153 The 2017 Charter imposes unlawful taxes on Holders. Again, a failure to pay those unlawful taxes will place Holders rights at risk.

154 The apprehension of harm is further exacerbated by the crisis situation the industry faces amidst weakening profitability. The industry has faced significant increases in operating costs (electricity, labour, steel, water etc.) over the past seven years which, when combined with production disruptions cause by inappropriate section 54 stoppages, community protests and strike action, have negatively affected the viability of many mining companies. The industry has also faced volatile commodity prices, and recent declines in some mineral prices which has also affected the



viability of companies. In the period 2012 to 2016 some 70 000 jobs have been lost and large portions of the sector such as platinum mining are making losses or are marginally profitable at current prices..

155 No Alternative Remedy

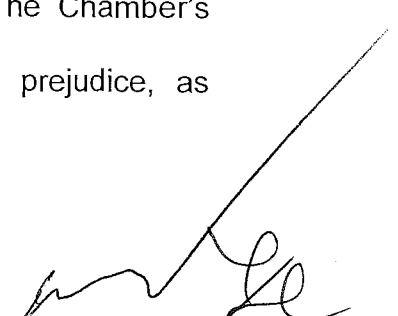
155.1 The Chamber and the mining companies it represents have no remedy other than interdicting the intended implementation of the Reviewed Charter. They cannot wait for the outcome of the review application and then seek to address the damage caused by the commencement of the unlawful 2017 Charter.

155.2 The damage to investor confidence and the impact on the equity value of the mining companies cannot be addressed by a subsequent damages claim. Government will not be held liable for damages in these circumstances and would, in any event, be unable to pay the extent of the losses that will be suffered.

156 Balance of Convenience

156.1 For all the above reasons, I respectfully say that the balance of convenience favours the applicant for the granting of an interim interdict.

156.2 There would be no prejudice to the respondents if a temporary stay is placed on the implementation of the 2017 Charter. The Chamber's members on the other hand would suffer significant prejudice, as demonstrated above.

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157 URGENCY

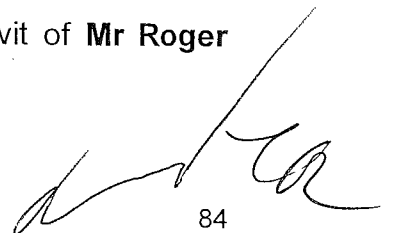
157.1 In dealing with the irreparable harm which the implementation of the 207 Charter will cause the Chamber's members and the mining industry as a whole I have set out the facts which demonstrate that the relief sought in this application is urgently required. Extremely intrusive and damaging provisions of the 2017 Charter are immediately applicable and as long as the 2017 Charter remains implementable mining companies will continue to haemorrhage value and live in an environment of acute regulatory uncertainty, which will encourage disinvestment and lead to further job losses.

158 FURTHER RELIEF

158.1 In the event that the honourable court should grant an interdict suspending the implementation of the Reviewed Charter 2017 pending the institution and finalisation of review proceedings, it is submitted that it is necessary, for the avoidance of doubt, also to suspend the purported repeal thereby (in paragraph 2.14 of the Reviewed Charter 2017) of the 2004 and the 2010 Mining Charters..

159 Confirmatory affidavits

I respectfully refer to the confirmatory affidavit by **Mr Ambrose Vusumuzi Richard Mabena** and the supporting affidavit of **Mr Roger**



Alan Baxter filed evenly herewith, copies of which are annexures "FA12" and "FA13" hereto.

WHEREFORE, the applicant seeks the relief set out in the notice of motion to which this affidavit is annexed.



TEBELLO LAPHATSOANA CHABANA

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at Johannesburg on the 26th day of June 2017, the regulations contained in Government Notice No R1268 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.


COMMISSIONER OF OATHS

Full Names

DESMOND GARY WILLIAMS
155 - 5th Street
Sandown, Sandton, 2196
Commissioner of Oaths
Ex-Officio / Practising Attorney R.S.A

LIST OF ANNEXURES

Copies of:

- FA1: Calculation of loss of R51 billion in value
 FA2: Note prepared by Roger Alan Baxter, the Chief Executive Officer of the applicant, explaining the impact of the 2017 Charter in the context of a contracting South African mining industry
 FA3: Original Charter
 FA4: 2010 Charter
 FA5: 2017 Charter
 FA6: A list of the Chamber's members
 FA7: The Chamber's Constitution
 FA8: Chamber's statement relating to last-minute MIGDETT meeting dated 14 May 2015
 FA9: Media statement from the media conference held by the Chamber on 15 May 2015
 FA10: Chamber's written submission to the Minister of Mineral Resources on the DMR's draft Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining And Minerals Industry, 2016 pursuant to government notice 450 GG 3933 of 15 April 2016
 FA11: Chamber's revised draft submission on DMR Draft Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining Industry

Originals of:

- FA12: Supporting affidavit of Mr Roger Alan Baxter
 FA12.1: Experience and Qualifications of Mr Roger Alan Baxter
 FA13: Confirmatory affidavit of Mr Ambrose Vusumuzi Richard Mabena

CALCULATION OF THE LOSS OF MARKET CAPITALISATION FOR SOUTH AFRICAN LISTED MINING COMPANIES DUE TO THE DMR REVIEWED MINING CHARTER BEING RELEASED

Company	Share Price end 14/6/17		Share price opening 14/6/17		Market Cap opening	Market Cap close	Decline	Issued shares
	130.31	147.26	147.26	303.07				
Age	130.31	147.26	147.26	303.07	60 256 016 347.31	56 597 450 553.39	3 663 565 793.92	409 171 069.00
Amplats	281.31	7.18	7.18	303.07	81 732 612 961.28	75 864 211 350.66	5 868 401 610.62	269 681 886.00
Anglo	163.31	4.89	4.89	171.71	241 327 886 605.40	229 526 952 950.40	11 800 933 655.00	1 405 467 840.00
ARM	73.99	5.17	5.17	78.02	17 063 905 167.22	16 181 701 270.07	882 203 897.15	218 701 193.00
Assore	173.46	10.36	10.36	193.51	27 014 982 396.25	24 216 230 220.00	2 798 752 176.25	139 607 000.00
BHP	189.16	0.98	0.98	191.03	403 473 541 639.43	399 519 500 931.36	3 954 040 708.07	2 112 071 796.00
Coal	0.48	2.04	2.04	0.49	968 236 304.12	948 484 283.52	19 752 020.60	1 976 008 924.00
DRD	4.17	4.79	4.79	4.38	1 889 572 658.74	1 799 062 128.39	90 510 530.35	431 429 767.00
Exxaro	89.34	6.94	6.94	96.00	30 161 299 299.10	28 068 105 127.74	2 093 194 171.36	314 171 761.00
Glencore	46.14	1.11	1.11	46.66	680 701 477 444.88	673 545 691 045.24	7 555 786 399.64	14 589 200 066.00
GoldFields	44.8	4.54	4.54	46.93	38 555 065 235.28	36 804 665 273.60	1 750 399 961.68	821 532 707.00
Harmony	22.8	4	4	23.75	10 448 983 476.25	10 031 024 137.20	417 959 339.05	439 957 199.00
Impala	36.5	2.38	2.38	37.39	27 473 274 735.71	26 813 410 797.00	653 863 938.71	734 778 378.00
Keaton	1.65	2.94	2.94	1.70	497 557 840.00	482 929 639.50	14 628 200.50	292 684 650.00
Kumba	144.54	7.35	7.35	156.01	50 247 497 767.90	46 554 306 681.96	3 693 191 085.94	322 085 974.00
Lonmin	11.17	-0.63	-0.63	11.10	3 135 050 777.39	3 154 801 597.29	(19 750 819.90)	282 435 237.00
Merate	1.19	2.46	2.46	1.22	3 063 050 070.86	2 987 738 055.12	75 352 015.74	2 510 704 248.00
Northam	43.17	2.33	2.33	44.20	22 532 256 498.45	22 007 254 922.04	525 001 576.41	509 781 242.00
Pan African	2.53	3.44	3.44	2.62	5 855 177 577.27	5 653 759 468.61	201 418 108.66	2 234 687 537.00
RBPlat	29	-6.34	-6.34	27.27	5 340 659 662.40	5 679 257 485.00	(338 597 822.60)	195 836 465.00
Sibanye	16.15	3.52	3.52	16.74	15 568 425 644.28	15 020 417 061.60	548 008 582.68	930 056 784.00
South32	25.9	2.78	2.78	26.64	141 668 276 753.24	137 729 898 659.50	3 938 378 093.74	5 317 756 705.00
Tawana	2.5	16.67	16.67	3.00	1 254 103 264.13	1 045 044 250.00	209 059 014.13	418 017 700.00
Tharisa	14.17	6.65	6.65	15.18	3 900 834 345.01	3 641 428 861.07	259 405 483.94	256 981 571.00
TransHex	3.5	1.41	1.41	3.55	376 487 942.49	371 179 462.50	5 308 479.99	105 051 275.00
Wescoal	2.1	4.11	4.11	2.19	793 941 805.30	761 310 797.10	32 631 008.20	362 528 951.00
totals					1 875 300 214 220	1 824 606 817 010	50 653 397 210	

-2.7

% decline



20 June 2017

DMR REVIEWED MINING CHARTER: ECONOMIC IMPACT ON THE STRUGGLING MINING SECTOR

Without Private Sector Investment South Africa’s economy cannot grow (and faces further downgrades)

The private sector accounts for 80% of employment and economic activity in South Africa. One of the key pillars of promoting a higher growth rate (which is desperately needed), is to significantly increase private sector investment. Investment in turn is driven by *confidence*. Investment confidence is driven by stable and competitive policies, smart tape and credible institutions that administer the laws, and on the sound rule of law.

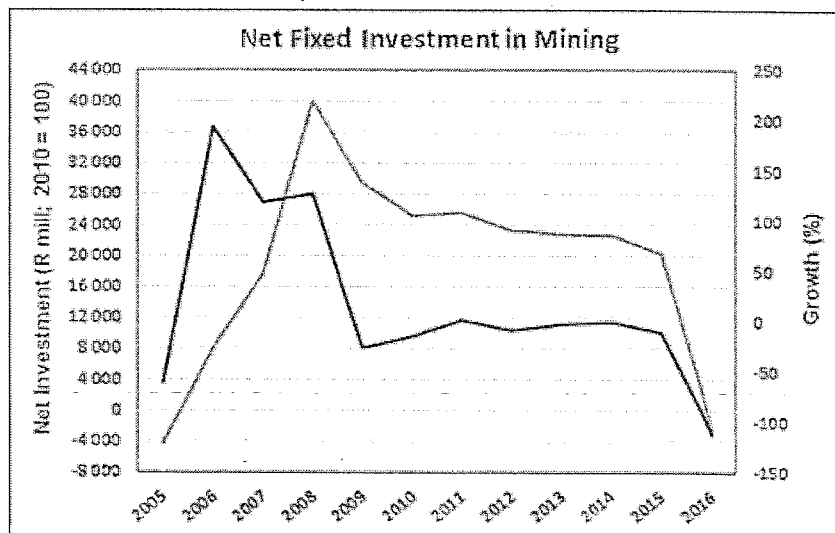
Investment hates uncertainty, draconian policies and institutions that are not trusted to fairly and impartially drive the laws of the land.

South Africa is in a recession. Business and investor confidence are at a very low ebb. The damage caused by the release of a draconian DMR Charter will lead to an exacerbation in the crisis in the mining sector. This will have negative ripple effects throughout the entire economy. It will in all likelihood lead to a further downgrade to the country’s sovereign debt rating – with huge negative implications for all South Africans.

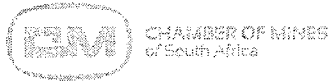
The Mining Sector is in an investment and economic crisis

South Africa’s mining sector is in crisis. The following points are relevant:

- The sector is smaller in real GDP terms in 2016 than it was in 1994.
- In the past 5- years mining GDP shrank by 0.2% per annum, while the rest of the economy grew by 1,6% per annum.
- Investment at the gross and net levels has declined materially in the past two years. The industry is now not even covering depreciation, which means production declines will follow.

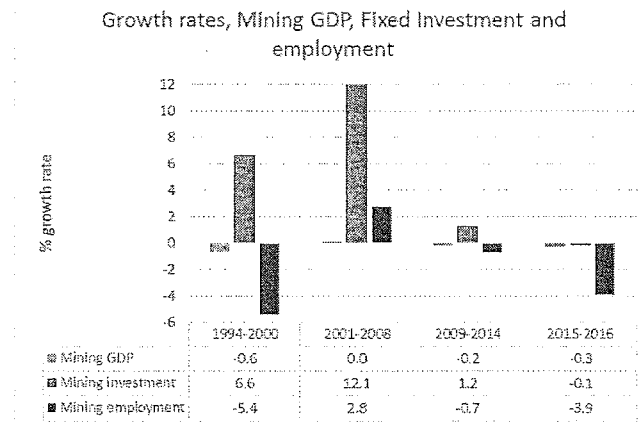


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Source: SARB

- In 2015, the sector made a R31 billion loss and at current prices 60% of the platinum mining sector is loss-making.
- In the period 2012-2016 over 70,000 jobs have been lost in the sector. The sector is currently losing 1,500 jobs per month.

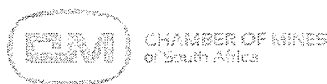


Source: StatsSA and SARB

- The sector has faced a hostile regulator, inappropriate safety stoppages, rapidly escalating costs (Eskom), challenging employment relations, and policy and regulatory uncertainty.
- It has also been in the eye of the storm regarding state capture.
- South Africa is ranked a dismal 74th out of 104 mining jurisdictions in the 2016 Fraser Institute Survey for investment attractiveness in mining.
- South Africa is ranked a very weak 13th out of 18 countries in Africa in the Fraser Institute Survey, behind countries such as the DRC, Ethiopia, Ivory Coast, Burkina Faso and so on.
- The largest contributor to South Africa's poor performance in the Fraser Institute rankings is the uncertainty regarding the interpretation of existing regulations (ranked 90th), uncertainty regarding environmental regulations (ranked 80th), regulatory duplication and inconsistency (ranked 94th), uncertainty on land claims (ranked 94th), workplace disruptions (ranked 101st), and poor security (ranked 93rd).
- Continued uncertainty regarding the finalisation of the MPRDA Amendment Bill and the Mining Charter adds to the policy uncertainty facing the industry. In addition, frustration with the inefficiency of the DMR bureaucracy has resulted in delays to the issuance of new prospecting and mining rights, to the approval of s11 transfers, Social and Labour Plans, etc., with the result that much of the industry's new project investment has been placed on hold.

The unilaterally developed DMR Reviewed Charter is damaging for investment

The DMR's unilaterally developed draconian Charter has spooked the markets and will be negative for investment. It was developed in a flawed process and contains provisions (like the 1% of turnover preference payment to BEE shareholders) that will significantly impact on the viability of many mines and discourage investment in the sector.



CHAMBER OF MINES
of South Africa

For example, in 2016 the total dividends paid by mining to shareholders was R5,9 billion and the 1% turnover requirement is valued at R5,8 billion, meaning existing shareholders would get virtually nothing.

It is clear that no proper economic impact assessment has been done by the DMR on the impact of the different provisions in the DMR's Charter. The economic and investment impact of this draconian charter is as follows:

- Listed mining companies lost R51 billion in terms of their market capitalisation value on 15 June 2017. This will affect the pension funds and investments of millions of South Africans including the government employees whose investment via the PIC lost R2,7 billion on the 15th.
- It is important to stress that the R51 billion lost market capitalisation is off the back of a sector's valuation that was already being negatively impacted by policy and regulatory uncertainty, i.e. this uncertainty was already priced into the share prices.
- Another 50,000 to 100,000 jobs are at risk in the sector, if investment is not made to stem the decline. As mentioned in the section above the mining sectors net fixed investment is already negative (the sector is not even covering depreciation), which given the deleterious impact of the Charter will result in declining production going forward. This will negatively affect investment, production, GDP, employment, export earnings, taxes to the state and undermine all the multiplier effects of mining into the rest of the economy.
- The mining sector's poor economic performance of the past 5 years will worsen and be a drag on the overall growth rate. Through the mining sectors multiplier and induced effects, the rest of the economy will also be weakened. Given the fact that mining generates two jobs in the rest of the economy for every one job created in mining, the DMR's Charters impact in other sectors will be a reduction of employment of between 100,000 to 200,000 jobs.
- This Charter has negatively affected investor sentiment towards the sector. Policy uncertainty means that SA is ranked 13th in Africa in the Fraser Institute Survey in terms of our investment attractiveness. Even the DRC and Ethiopia are ahead of South Africa. This ranking will deteriorate further. Less investment, means falling production, jobs losses, etc.
- This will contribute to the ratings agencies potentially further downgrading the country to total junk status (only Moody's still has the country rated at one notch above junk status), and all citizens will be negatively affected.

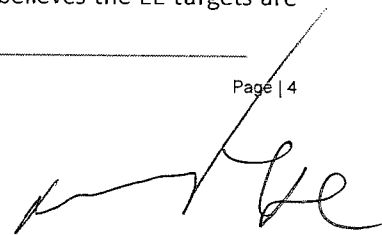
Annexure A: Specific challenges with the Charter

The following are some of the specific issues the Chamber believes are damaging in the DMR Charter:

- The DMR negotiation with the Chamber to try and resolve the ownership element was conducted in bad faith, with new issues added at the 11th hour by the DMR.
- The process that led to the development of the Charter was flawed. The DMR abandoned the traditional tripartite negotiation model and rather just "consulted" stakeholders' developing a wish list of targets. The DMR never brought together all the key stakeholders into a single negotiation to allow all parties to have an overview of all the issues that the DMR was considering.
- The Chamber has had limited access to the DMR's Charter documents. The Chamber only saw the first published draft Reviewed Charter when it was released in April 2016 and only then again on the final publication of the Reviewed Charter on 15 June 2017. At no stage in the intervening period has the Chamber had access to the detail,

and essentially the Chamber could only work off the brief presentation the DMR gave to the Chamber (this presentation was never shared with the Chamber either electronically or in physical format). This illustrates the lack of substantive engagement by the DMR with the Chamber.

- There are a number of substantive issues that appear in the final Charter released on 15 June 2017, that have never been discussed with the Chamber. These will be highlighted in the sections below.
- There is a key difference between being an “interested party” and an “affected party”. While some people may have an interest in trying to access the mining sector as an interested party, the Chamber’s members accounting for 90% of RSA mineral production will be the main party implementing the Charter (and therefore is a materially affected party). The DMR cannot use a view that it consulted 60 parties, because some are really affected and others are just interested.
- On ownership:
 - The Charter does not provide continuing consequences for existing rights or for new rights.
 - The 1% of turnover to the BEE shareholders, which was never discussed with the Chamber, is contrary to the principle of shareholder equality in the Companies Act and is simply unaffordable to the industry. In 2016 the total dividends paid by the mining sector was R6 billion. A 1% of turnover requirement is valued at R5,7 billion, effectively meaning there would be very little left over for the remaining shareholders who own 70% of the company. This is simply not practical and will damage investment in the sector.
 - The 30% ownership target is new.
 - The one year transitional period to top up to 30% is not practical.
 - The 50% +1 ownership requirement on new prospecting rights is a new issue and is contrary to the MPRDA and will simply undermine exploration (and significantly impact new mine/resource development), which is venture capital funded (with venture capital funding scarce in SA). How many exploration or mining companies will invest in a prospecting right if they own a minority of the shares but are expected to provide the majority of the capital and take the majority of the risk. RSA’s Greenfields exploration has already collapsed. We should be encouraging exploration, not inhibiting it.
 - The ring-fencing of allocations of ownership to mineworkers and communities is new and is a one size fits all approach and is too prescriptive.
 - The requirement that all community trusts must be controlled by the MTDA is a new issue that has never been discussed with the industry. What are the governance implications?
 - The requirement not to dilute BEE below 30% limits the ability of South African companies to raise future capital.
 - The requirement that BEE shareholders must achieve a no debt position (i.e. the shares must vest) within 10-years is a new issue, or the amount will need to be written off by the right holder, is effectively an expropriation event which has constitutional implications. Existing shareholders will not tolerate ongoing dilutions in perpetuity.
 - The requirement that the Black shareholder can take 30% of the production for their own transport and sales, is a new issue and has never been discussed with the industry and has significant implications for the mining companies.
 - The requirement that the Black shareholder can only sell to another Black company, will create a two tier share market. This will affect the liquidity of shares traded on the JSE and may have other unintended consequences.
- On employment equity:
 - Even in an optimistic scenario of a 5% annual growth rate in the mining sector (with increasing employment levels) these employment equity targets will be very hard to reach. The Chamber believes the EE targets are not achievable in the next 5-years.



- The specific prescription of targets for black women does not take into account the industry's existing employment equity profile or the university skills pipeline.
- On procurement:
 - The 70% capital goods from Black owned or controlled companies with 60% locally manufactured is a significant problem for certain commodities (especially those that have to buy very large capital equipment in from offshore).
 - The extremely prescriptive nature of the Charter on local procurement will be a challenge to meet for the mining companies.
 - The 1% of foreign supplier turnover to the MTDA is a tax on the industry and will raise the costs of production. The Chamber does not support this tax. A money bill will need to be developed on this matter. This will cost the industry another R433 million per annum based on 2016 intermediate import data.
 - The 3 year transitional period is too short.
- On beneficiation:
 - The 11 percentage point offset against the ownership target has never worked, as there is no clear system of offsets.
 - The requirement that the right holder should have invested in beneficiation since 2004 is heavily skewed towards companies with existing operations
- On preferential sale of South African assets:
 - This was not discussed with the Chamber.
- On HRD:
 - The Chamber does not support the establishment of the MTDA, another brand new bureaucracy. Instead focus should be placed on fixing the existing MQA.
 - The MTDA has no required governance arrangements (the April 2016 draft indicated all stakeholders would be involved) nor does it have a stated remit or purpose. Now the MTDA just reports to the Minister.
 - The Chamber does not support 2 percentage points of the 5% skills development commitment being taken to the MTDA. This will undermine skills development in the mining sector. This is effectively another tax. The cost of this is R2,5 billion based on 2017 data annualised.
- Sustainable Development elements, which were never included in the first draft now account for 35% vs 29% in 2010
 - Shockingly, 3% of the 35% was not agreed and 32% was not consulted on.
 - Worst of all, 19% relate to the inclusion of aspirational health and safety milestones where we were given the explicit assurance that they would not find their way into the Mining Charter.
- Transitional arrangements.
 - There are no transitional arrangements for new right applications (so companies cannot structure community trusts under the MTDA for a year).
 - There is only a one year transitional period for companies to achieve the employment equity targets and the other main elements of the Charter.

Annexure B: Economic Background

The Mining Sector has to cope with three fundamental areas of uncertainty over which it has very little control;

- International commodity prices,
- The Rand exchange rate (mostly relative to the dollar), and



- Domestic cost pressures (other than labour)

International commodity prices (measured in Rand terms) have been extremely volatile since the financial crisis of 2008, varying between +40% and -40%. Prices have been declining since the beginning of 2012 and have only recently regained upward momentum (since the second half of 2016). The rand dollar exchange rate has been equally unstable; the rand has been strengthening against the dollar since the middle of 2010 to the middle of 2016 and therefor neutralized better dollar prices for commodities over most of this period. The domestic cost base of the mining sector (excluding labour) are largely determined by administered prices related to energy and transport and logistics (more than 50%). The costs of intermediate inputs have been rising at double digits (on average) for the last 10 years.

The result has been a sector in decline measured by virtually every indicator (over the last 5 years, annual weighted average rates of change, inflation adjusted numbers);

- Turnover fell by 1% (Statistics SA)
- Value added to the economy by 0,3% (Statistics SA)
- People employed fell by 1,4%, or 70 000 people (Statistics SA)
- Gross Fixed Investment stagnated and Net Fixed Investment turned negative in 2016 (Statistics SA)
- Reported Profits declined by 8% (Statistics SA)

The proposed extra levies/taxes will further erode profitability in a sector loosing 1500 jobs per month at the moment. The Sector is in dire need of investment to keep operations running and investment for expansion and new technologies to exploit ever lower grade ores.

The actual salient data for the Mining and Quarrying Sector is as follows;

	Annual Turnover	Annual Profit/Loss	Dividends Paid	Salaries & Wages	Total Mining Taxes Paid
	R mill	Before Taxes R mill	R mill	R mill	Own
Column	1	2	3	4	5
2 006	238 681	60 561	15 588	49 535	13 149
2 007	277 627	81 223	18 324	58 221	11 450
2 008	336 412	155 673	23 950	69 675	20 454
2 009	349 094	43 958	25 519	75 601	2 529
2 010	388 734	73 555	16 407	86 399	16 090
2 011	442 836	92 067	12 406	97 479	18 541
2 012	469 122	63 261	11 582	109 796	12 358
2 013	519 292	21 163	8 646	120 748	15 781
2 014	538 184	44 401	9 569	127 137	11 759
2 015	537 171	-30 782	7 026	138 311	8 513
2 016	571 301	47 895	5 953	120 065	

Sources	1; Statistics South Africa
	2; Statistics South Africa (Quarterly Financial Surveys)
	3; Statistics South Africa (Quarterly Financial Surveys)
	4; Statistics South Africa & Department of Mineral Resources
	5; Davis Tax Commission & Budget Reviews

The Mining Charter document proposes several new taxes and levies on the sector

- A 1% levy on turnover



- 2 percentage points (40%) of the 5% of salaries and wages committed to skills development by the Sector, also to fund the MTDA.

The 1% Levy on Turnover will amount to the following and erode a hefty percentage of profits before taxes.

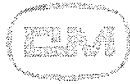
	Annual Turnover R mill	1% of Turnover R mill	Percentage of Profits/Loss %
2006	238 681	2 387	3.94
2007	277 627	2 776	3.42
2008	336 412	3 364	2.16
2009	349 094	3 491	7.94
2010	388 734	3 887	5.28
2011	442 836	4 428	4.81
2012	469 122	4 691	7.42
2013	519 292	5 193	24.54
2014	538 184	5 382	12.12
2015	537 171	5 372	-17.45
2016	571 301	5 713	11.93

The 40% tax on the committed 5% of salaries and wages for skills development and training will have the following impact on funds available for that purpose;

	Salaries & Wages R mill	Theoretical 1% Levy R mill	Estimated Actual 1% MQA Levy * R mill	Estimated 5% Commitment R mill	40% Levy on 5% Commitment R mill
	1	2	3	4	5
2006	49 535	495		2 477	
2007	58 221	582		2 911	
2008	69 675	697		3 484	
2009	75 601	756		3 780	
2010	86 399	864		4 320	
2011	97 479	975		4 874	
2012	109 796	1 098	854	5 490	2 196
2013	120 748	1 207	1 030	6 037	2 415
2014	127 137	1 271	1 075	6 357	2 543
2015	138 311	1 383	1 200	6 916	2 766
2016	120 065	1 201	1 243	6 003	2 401
2017	124 868	1 249	1 228	6 243	2 497

Sources	1; Statistics South Africa
	2; Chamber of Mines estimate
	3; Chamber of Mines estimate calculated from actual 80% Skills Levy to MQA
	4; Chamber of Mines estimate of 5% commitment to Skills and SLP's
	5; Chamber of Mines estimate of 40% (2 percentage points of 5%) to MTDA
Note *	The mining sector can only get access to +/- 50% of column 3 for skills development

The Mining Charter document proposes a new 1% levy on imported inputs (not procured in SA). The estimates of such a levy has been done on two sets of data; mines import intermediary inputs as well as inputs for fixed capital investment. The tables give some estimates of the levy proposed which will in all likelihood be recouped on mining companies and thus increase their cost base. (It is unclear whether the levy will be imposed on imported gross fixed capital goods or net investment goods.)



Intermediary Imports

	Intermediate Imports R mill	1% Levy R mill
2006	20 851.54	208.52
2007	25 005.95	250.06
2008	28 570.00	285.70
2009	27 317.80	273.18
2010	31 707.22	317.07
2011	37 798.96	377.99
2012	38 586.91	385.87
2013	43 955.23	439.55
2014	43 204.45	432.04
2015	43 322.99	433.23

Capital Goods Imports

	Estimated 1% Levy on Gross Fixed Investment R mill	Estimated 1% Levy on Net Fixed Investment R mill
	1	2
2006	73.83	21.66
2007	105.17	57.74
2008	163.15	198.47
2009	181.45	136.13
2010	175.11	107.17
2011	196.59	99.74
2012	227.80	107.41
2013	266.61	146.74
2014	304.37	170.20
2015	321.68	183.70

The added uncertainties cast over the profitability of the sector due to these proposed cost increasing measures and the damage to investors' confidence has had an immediate effect on share prices.

The combined market capitalization of the listed mining companies on the Johannesburg Stock Exchange declined by nearly 3% within the space of one day, from R 1,875 trillion to R 1,825 trillion.

The Public Investment Corporation, through its investment in several mining companies lost R2,685 billion, or 5% in one day. This represents the losses to the pensions of government officials.

The PIC's share of mining companies' equity has dropped from 2,85% before the losses to 2,78% after the first day of trading.

Scorecard for the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (including the Charter)

GNR 1639 OF 13 AUGUST 2004

ARRANGEMENT OF REGULATIONS		<i>Page</i>
Annexure A	Scorecard for the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry	2
	Vision.....	4
	Preamble	4
1.	Scope of Application.....	5
2.	Interpretation.....	5
3.	Objectives.....	6
4.	Undertakings.....	6

Introduction

- The proposed scorecard gives effect to the provisions contained in the Broad Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry.
- The scorecard is designed to facilitate the application of the Charter in terms of the Mineral and Petroleum Resources Development Act requirements for the conversion of all the "old order rights" into new rights within a five-year conversion window period, but recognising the full 10-year period.
- In adjudicating the scorecard the Minister of Minerals and Energy will need to take into account the entire scorecard in decision making.
- The scorecard is intended to reflect the "spirit" of the Broad Based Socio-Economic Empowerment Charter for the Mining Industry.
- Progress by stakeholders in achieving the aims of the Charter as enunciated in the Scorecard can be measured in two ways:
 - The specific targets set in the Charter.
 - The targets set by companies.




ANNEXURE A
SCORECARD FOR THE BROAD BASED SOCIO-ECONOMIC EMPOWERMENT
CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY

Notes	Description	5 year target		10 year target	
1	Human Resource Development				
	• Has the company offered every employee the opportunity to be functionally literate and numerate by the year 2005 and are employees being trained?	Yes	No		
	• Has the company implemented career paths for HDSA employees including skills development plans?	Yes	No		
	• Has the company developed systems through which empowerment groups can be mentored?	Yes	No		
2	Employment Equity				
	• Has the company published its employment equity plan and reported on its annual progress in meeting the plan?	Yes	No		
	• Has the company established a plan to achieve a target for HDSA participation in management of 40% within five years and is implementing the plan?				
	• Has the company identified a talent pool and is it fast tracking it?	Yes	No		
	• Has the company established a plan to achieve the target for woman participation in mining of 10% within the five years and is implementing the plan?				
3	Migrant Labour				
	• Has the company subscribed to government and industry agreements to ensure non-discrimination against foreign migrant labour?	Yes	No		
4	Mine Community and Rural Development				
	• Has the company co-operated in the formulation of integrated development plans and is the company co-operating with the government in the implementation of these plans for communities where mining takes place and for major labour sending areas? Has there been effort on the side of the company to engage the local mine community and major labour sending area communities? (Companies will be required to cite a pattern of consultation, indicate money expenditures and show a plan.)	Yes	No		

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Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry

Notes	Description	5 year target		10 year target
5	Housing and Living Conditions			
	<ul style="list-style-type: none"> For company provided housing has the mine, in consultation with stakeholders established measures for improving the standard of housing, including the upgrading of the hostels, conversion of hostels to family units and promoted home ownership options for mine employees? Companies will be required to indicate what they have done to improve housing and show a plan to progress the issue over time and is implementing the plan? 	Yes	No	
	<ul style="list-style-type: none"> For company provided nutrition has the mine established measures for improving the nutrition of mine employees? Companies will be required to indicate what they have done to improve nutrition and show a plan to progress the issue over time and is implementing the plan? 	Yes	No	
6	Procurement			
	<ul style="list-style-type: none"> Has the mining company given HDSA's preferred supplier status? 	Yes	No	
	<ul style="list-style-type: none"> Has the mining company identified current level of procurement from HDSA companies in terms of capital goods, consumables and services? 	Yes	No	
	<ul style="list-style-type: none"> Has the mining company indicated a commitment to a progression of procurement from HDSA companies over a 3 - 5 year time frame in terms of capital goods, consumables and services and to what extent has the commitment been implemented? 	Yes	No	
7	Ownership & Joint Ventures			
	<ul style="list-style-type: none"> Has the mining company achieved HDSA participation in terms of ownership for equity or attributable units of production of 15 percent in HDSA hands within 5-years and 26 percent on 10-years? 	15%		26%
8	Beneficiation			
	<ul style="list-style-type: none"> Has the mining company identified its current level of beneficiation? 	Yes	No	
	<ul style="list-style-type: none"> Has the mining company established its base line level of beneficiation and indicated the extent that this will have to be grown in order to qualify for an offset? 	Yes	No	
9	Reporting			
	<ul style="list-style-type: none"> Has the company reported on an annual basis its progress towards achieving its commitments in its annual report? 	Yes	No	

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Notes

1. The commitment of the mining companies is to have offered each employee the opportunity to become functionally literate and numerate. The critical test is if a human resource development system has been established and resourced so that people are being trained.
2. The mentoring of empowerment groups refers to that mining company's HDSA employees and HDSA linked partners at the levels of ownership and procurement. It does not preclude mining companies being involved in mentoring programmes outside of its own operations.
3. The aspirational target for HDSA participation in management is a 5-year target. If companies want to convert to licenses within a much shorter time frame, then a phase in approach will be adopted with the companies committing to a 40 percent by the fifth year. The key decision point here is whether the company has established a plan to achieve the target and is implementing the plan.
4. The aspirational target for women participation in mining is a five-year target and the phase in approach will be used. The key decision point here is whether the company has established a plan to achieve the target and is implementing the plan.
5. The commitment of stakeholders to ensure non-discrimination against foreign migrant labour can be approached from the perspective that each company subscribes to industry and government agreements on the matter.
6. In terms of companies establishing measures for improving the standard of housing – the company will be required to indicate what it has done to improve housing and show a plan to progress the issue over time and are implementing the plan.
7. In terms of companies establishing measures for improving the standard of nutrition – the company will be required to indicate what it has done to improve nutrition and show a plan to progress the issue over time and are implementing the plan.
8. In terms of procurement the mining company should commit to an increase of procurement from HDSA companies over the 3-5 year time frame and agree to a monitoring system.
9. The Scorecard represents the 5-year targets and it has been agreed that within 10-years the level of HDSA participation will rise to 26 percent.
10. In terms of beneficiation commitments and the offset option the key issue is to capture the actual beneficiation activities of a company and to convert it to the same unit of measurement of ownership e.g. attributable units of production/or % measure of value as the case may be and offset accordingly. The attributable ounces that are benefited above the base state may be offset against HDSA ownership targets. *Considering that some 59 different minerals are mined in South Africa – the detailed discussions on the base state for each mineral are ongoing.*

BROAD BASED SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH
AFRICAN MINING INDUSTRY

VISION

All the actions and commitments set out below are in the pursuit of a shared vision of a globally competitive mining industry that draws on the human and financial resources of all South Africa's people and offers real benefits to all South Africans. The goal of the empowerment charter is to create an industry that will proudly reflect the promise of a non-racial South Africa.

PREAMBLE

Recognising:

- The history of South Africa, which resulted in blacks, mining communities and women largely being excluded from participating in the mainstream of the economy, and the

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Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry

formal mining industry's stated intention to adopt a proactive strategy of change to foster and encourage black economic empowerment (BEE) and transformation at the tiers of ownership, management, skills development, employment equity, procurement and rural development;

- The imperative of redressing historical and social inequalities as stated by the Constitution of the Republic of South Africa, in *inter alia* section 9 on equality (and unfair discrimination) in the Bill of Rights;
- The policy objective stated in the Mineral and Petroleum Resources Development Act to expand opportunities for historically disadvantaged persons to enter the mining and minerals industry or benefit from the exploitation of the nation's mineral resources;
- The scarcity of relevant skills has been identified as one of the barriers to entry into the mining sector by historically disadvantaged South Africans (HDSA's);
- The slow progress made with employment equity in the mining industry compared to other industries.

Noting that

- It is government's stated policy that whilst playing a facilitating role in the transformation of the ownership profile of the mining industry it will allow the market to play a key role in achieving this end and it is not the government's intention to nationalise the mining industry.
- The key objectives of the Mineral and Petroleum Resources Development Act and that of the Charter will be realised only when South Africa's mining industry succeeds in the international market place where it must seek a large part of its investment and where it overwhelmingly sells its product and when the socio-economic challenges facing the industry are addressed in a significant and meaningful way.
- The transfer of ownership in the industry must take place in a transparent manner and for fair market value.
- That the following laws would also assist socio-economic empowerment:
 - The Preferential Procurement Framework Act (No. 5 of 2000);
 - The Employment Equity Act (No. 55 of 1998);
 - The Competition Act (No. 89 of 1998) (Also ref. To the Amendment Act No. 35 of 1999 and subsequent amendments);
 - The Skills Development Act (No. 97 of 1998).

Therefore

The signatories have developed this Charter to provide a framework for progressing the empowerment of historically disadvantaged South Africans in the Mining and Minerals Industry. The signatories of this Charter acknowledge:

Section 100 (2) (a) of the Mineral and Petroleum Resources Development Act, which states that, to insure the attainment of Government's objectives of redressing historical social and economic inequalities as stated in the Constitution, the Minister of Minerals and Energy must within six months from the date on which this Act takes effect develop a Broad Based Socio-Economic Empowerment (BBSEE) Charter.

1. **Scope of application.**—This Charter applies to the South African mining industry.

2. **Interpretation.**—For the purposes of interpretation, the following terms apply:

Broad Based Socio-Economic Empowerment (BBSEE) refers to a social or economic strategy, plan, principle, approach or act, which is aimed at:

- Redressing the results of past or present discrimination based on race, gender or other disability of historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries; and

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- Transforming such industries so as to assist in, provide for, initiate, facilitate or benefit from the:
 - Ownership participation in existing or future mining, prospecting, exploration and beneficiation operations;
 - Participation in or control of management of such operations;
 - Development of management, scientific, engineering or other skills of HDSA's;
 - Involvement of or participation in the procurement chains of operations;
 - Integrated Socio-economic development for host communities, major labour sending areas and areas that due to unintended consequences of mining are becoming ghost towns by mobilising all stakeholder resources.

The term **Historically Disadvantaged South Africans (HDSA)** refers to any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) came into operation.

HDSA Companies are those companies that are owned or controlled by historically disadvantaged South Africans.

Major labour sending areas refer to areas from where a significant number of mine-workers are or have been recruited.

Ghost towns refer to areas whose economies were dependent on mining and therefore could not survive beyond the closure or significant downsizing of mining activities.

Ownership of a business entity can be achieved in a number of ways:

- a majority shareholding position, i.e. 50% + 1 share;
- Joint ventures or partnerships (25% equity plus one share);
- Broad based ownership (such as HDSA dedicated mining unit trusts, or employee share ownership schemes).

3. Objectives.—The objectives of this charter are to:

- Promote equitable access to the nation's mineral resources to all the people of South Africa;
- Substantially and meaningfully expand opportunities for HDSA's including women, to enter the mining and minerals industry and to benefit from the exploitation of the nation's mineral resources;
- Utilise the existing skills base for the empowerment of HDSA's;
- Expand the skills base of HDSA's in order to serve the community;
- Promote employment and advance the social and economic welfare of mining communities and the major labour sending areas; and
- Promote beneficiation of South Africa's mineral commodities.

4. Undertakings.—All stakeholders undertake to create an enabling environment for the empowerment of HDSA's by subscribing to the following:

4.1 Human Resource Development

The South African labour market does not produce enough of the skills required by the mining industry. Stakeholders shall work together in addressing this skills gap in the following manner:

- Through the standing consultative arrangements they will interface with statutory bodies such as the Mines Qualifications Authority (MQA), in the formulation of comprehensive skills development strategies that include a skills audit;
- By interfacing with the education authorities and providing scholarships to promote mining related educational advancement, especially in the fields of mathematics and science at the school level;

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- By undertaking to ensure provision of scholarships and that the number of registered learnerships in the mining industry will rise from the current level of some 1200 learners to not less than 5000 learners by March 2005; and
- Through the MQA shall undertake to provide skills training opportunities to miners during their employment in order to improve their income earning capacity after mine closure.

Government undertakes that:

- In its bi-lateral relations with relevant countries, undertakes to secure training opportunities for HDSA companies' staff, as well as exchange opportunities with mining companies operating outside of South Africa;
- Through the MQA and in collaboration with academic institutions, DME associated institutions, NGO's, and the Gender Commission, shall provide training courses in mining entrepreneur's skills.

Companies undertake:

- To offer every employee the opportunity to become functionally literate and numerate by the year 2005 in consultation with labour;
- To implement career paths to provide opportunities to their HDSA employees to progress in their chosen careers; and
- To develop systems through which empowerment groups can be mentored as a means of capacity building.

4.2 Employment Equity

Companies shall publish their employment equity plans and achievements and subscribe to the following:

- Establish targets for employment equity, particularly in the junior and senior management categories. Companies agree to spell out their plans for employment equity at the management level. The stakeholders aspire to a baseline of 40 percent HDSA participation in management within 5-years;
- South African subsidiaries of multinational companies and South African companies, where possible, will focus their overseas placement and/or training programmes on historically disadvantaged South Africans;
- Identification of a talent pool and fast tracking it. This fast tracking should include high quality operational exposure;
- Ensuring higher levels of inclusiveness and advancement of women. The stakeholders aspire to a baseline of 10 percent of women participation in the mining industry within 5-years; and
- Setting and publishing targets and achievements.

4.3 Migrant Labour

Stakeholders undertake to:

- Ensure non-discrimination against foreign migrant labour.

4.4 Mine Community and Rural Development

Stakeholders, in partnership with all spheres of government, undertake to:

- Co-operate in the formulation of integrated development plans for communities where mining takes place and for major labour-sending areas, with special emphasis on development of infrastructure.

4.5 Housing and Living Conditions

Stakeholders, in consultation with the Mine Health and Safety Council, the Department of Housing and organised labour, undertake to:

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- Establish measures for improving the standard of housing including the upgrading of hostels, conversion of hostels to family units and the promotion of home ownership options for mine employees; and
- Establish measures for improving of nutrition of mine employees.

4.6 Procurement

Procurement can be broken down into three levels, namely: capital goods; services; and consumables.

Stakeholders undertake to give HDSAs a preferred supplier status, where possible, in all three levels of procurement. To this end stakeholders undertake to:

- Identify current levels of procurement from HDSA companies;
- Commit to a progression of procurement from HDSA companies over a 3 to 5-year time frame reflecting the genuine value added by the HDSA provider;
- Encourage existing suppliers to form partnerships with HDSA companies, where no HDSA Company tenders to supply goods or services; and
- Stakeholders commit to help develop HDSA procurement capacity and access Department of Trade and Industry (DTI) assistance programmes to achieve this.

List of suppliers: It is envisaged that information on all HDSA companies wishing to participate in the industry will be collected and published. All participants in the industry will assist the DTI in compiling such a list that will *inter alia* be published by government on the Internet and updated regularly.

4.7 Ownership and Joint Ventures

Government and industry recognise that one of the means of effecting the entry of HDSA's into the mining industry and of allowing HDSA's to benefit from the exploitation of mining and mineral resources is by encouraging greater ownership of mining industry assets by HDSA's. Ownership and participation by HDSA's can be divided into active or passive involvement as follows:

Active involvement:

- HDSA controlled companies (50 per cent plus 1 vote), which includes management control.
- Strategic joint ventures or partnerships (25 per cent plus 1 vote). These would include a Management Agreement that provides for joint management and control and which would also provide for dispute resolution.
- Collective investment, through ESOPS and mining dedicated unit trusts. The majority ownership of these would need to be HDSA based. Such empowerment vehicles would allow the HDSA participants to vote collectively.

Passive involvement:

- Greater than 0 percent and up to 100 percent ownership with no involvement in management, particularly broad based ownership like ESOPs.

In order to measure progress on the broad transformation front the following indicators are important:

- The currency of measure of transformation and ownership could, *inter alia*, be market share as measured by attributable units of South African production controlled by HDSA's.
- That there would be capacity for offsets which would entail credits/offsets to allow for flexibility.

- The continuing consequences of all previous deals would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production.
- Government will consider special incentives to encourage HDSA companies to hold on to newly acquired equity for a reasonable period.

In order to increase participation and ownership by HDSA's in the mining industry, mining companies agree:

- To achieve 26% HDSA ownership of the mining industry assets in 10 years by each mining company; and
- That where a company has achieved HDSA participation in excess of any set target in a particular operation then such excess may be utilised to offset any shortfall in its other operations.

All stakeholders accept that transactions will take place in a transparent manner and for fair market value. Stakeholders agree to meet after 5-years to review the progress and to determine what further steps, if any, need to be made to achieve the 26% target.

4.8 Beneficiation

This Charter will apply to mining companies in respect of their involvement in beneficiation activities, specifically activities beyond mining and processing. These include production of final consumer products.

Mining companies will be able to offset the value of the level of beneficiation achieved by the company against its HDSA ownership commitments.

Mining companies agree to:

- Identify their current levels of beneficiation.
- Indicate to what extent they can grow the baseline level of beneficiation.

4.9 Exploration and Prospecting

Government will support HDSA companies in exploration and prospecting endeavours by, *inter alia*, providing institutional support.

4.10 State Assets

Government will ensure compliance with the provisions of this Charter and be exemplary in the way in which it deals with state assets.

4.11 Licensing

To facilitate the processing of licence conversions there will be a scorecard approach to the different facets of promoting broad based socio-economic empowerment in the mining industry. This scorecard approach would recognise commitments of the stakeholders at the levels of ownership, management, employment equity, human resource development, procurement and beneficiation. These commitments have been spelt out in sections 4.1 to 4.9 above.

The HDSA participation required to achieve conversion within the five year period on a company specific basis will be specified in the score-card, hereto attached as Annexure A.

4.12 Financing Mechanism

The industry agrees to assist HDSA companies in securing finance to fund participation in an amount of R100 billion within the first 5-years. Participants agree that beyond the R100 billion-industry commitment and in pursuance of the 26 per cent target, on a willing seller – willing buyer basis, at fair market value, where the mining companies are not at risk, HDSA participation will be increased.

4.13 Regulatory Framework and Industry Agreement

Government's regulatory framework and industry agreements shall strive to facilitate the objectives of this Charter.

4.14 Consultation, Monitoring, Evaluation and Reporting

It is recognised that the achievement of the objectives set out herein entails an ongoing process.

Companies undertake to report on an annual basis their progress towards achieving their commitments, with these annual reports verified by their external auditors. A review mechanism will be established which again provides flexibility to the company commitments.

Parties hereto agree to participate in annual forums for the following purposes:

- Monitoring progress in the implementation of plans;
- Developing new strategies as needs are identified;
- Ongoing government/industry interaction in respect of these objectives;
- Developing strategies for intervention where hurdles are encountered;
- Exchanging experiences, problems and creative solutions;
- Arriving at joint decisions;
- Reviewing this Charter if required.

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Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry

[GN 838 of 20 September 2010]

[Date of Commencement 13 September 2010]

Preamble

Publication of the amendment of the Broad-Based Socio-Economic Empowerment Charter
for the South African Mining and Minerals Industry
(Government Gazette No. 33573)

The Minister of Minerals and Energy has in terms of section 100 (1) (b) of the Mineral and Petroleum Resources Development Act, 2002, (Act 28 of 2002), developed the Codes of Good practice for the minerals industry as set out below.

TABLE OF CONTENTS

Page

	Preamble	BBEE-1
	Vision	BBEE-2
	Mission	BBEE-2
	Definitions	BBEE-2
1.	Objectives.....	BBEE-4
2.	Elements of the Mining Charter.....	BBEE-4
	2.1. Ownership.....	BBEE-4
	2.2. Procurement and Enterprise Development.....	BBEE-4
	2.3. Beneficiation	BBEE-5
	2.4. Employment Equity.....	BBEE-5
	2.5. Human Resource Development	BBEE-5
	2.6. Mine Community Development	BBEE-6
	2.7. Housing and Living Conditions.....	BBEE-6
	2.8. Sustainable Development and Growth of the Mining Industry	BBEE-6
	2.9. Reporting (Monitoring and Evaluation).....	BBEE-7
3.	Non-compliance.....	BBEE-7
4.	Amendments.....	BBEE-7

Preamble

The systematic marginalisation of the majority of South Africans, facilitated by the exclusionary policies of the apartheid regime, prevented Historically Disadvantaged South Africans (HDSAs) from owning the means of production and from meaningful participation in the mainstream economy. To redress these historic inequalities, and thus give effect to section 9 (equality clause) of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution), the democratic government has enacted, *inter alia*, the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

The objective of the MPRDA is to facilitate meaningful participation of HDSAs in the mining and minerals industry. In particular, section 100 (2) (a) of the MPRDA provides for the development of the Mining Charter as an instrument to effect transformation with specific targets. Embedded in the Mining Charter of 2002 is the provision to review the progress and determine what further steps, if any, need to be made to achieve its objectives.

In line with this provision, the DMR has concluded a comprehensive assessment to ascertain the progress of transformation of industry against the objectives of the Charter in the mining industry. The findings of the assessment identified a number of shortcomings in the manner in which the mining industry has implemented the various elements of the Charter, viz. ownership, procurement, employment equity, beneficiation, human resource development, mine community development, housing and living conditions, all of which have not embraced the spirit of the Charter to the latter. To overcome these inadequacies, amendments are made to the Mining Charter of 2002 in order to streamline and expedite attainment of its objectives. Additionally, the review of the Charter introduces an element of sustainable growth of the mining industry, which seeks to ensure sustainable transformation and growth of the mining industry.

VISION

To facilitate sustainable transformation, growth and development of the mining industry.

MISSION

To give effect to section 100 (2) (a) of the MPRDA and section 9 of the Constitution.

Definitions

“BEE entity” means an entity of which a minimum of 25% + 1 vote of share capital is directly owned by HDSA as measured in accordance with flow through principle;

“Beneficiation” means the transformation of a mineral (or a combination of minerals) to a higher value product, which can either be consumed locally or exported. The term “beneficiation” is often used interchangeably with mineral “value-addition” or “downstream beneficiation”;

“Broad-Based Socio-Economic Empowerment (BBSEE)” means a socio-economic strategy, plan, principle, approach or act, which is aimed at—

- (a) Redressing the results of past or present discrimination based on race, sex and disability of historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries; and
- (b) Transforming such industries so as to assist in, provide for, initiate, facilitate or benefit from the—
 - Ownership participation in existing or future mining, prospecting, exploration and beneficiation operations;
 - Participation in or control of management of such operations;
 - Development of management, scientific, engineering or other skills of HDSA's;
 - Involvement of or participation in the procurement chains of operations;
 - Integrated socio-economic development for mine workers, host communities, major labour sending areas and areas that due to unintended consequences of mining are becoming ghost towns by mobilising all stakeholder resources;

“Calendar year” is defined as the one year period that begins on January 1st and ends on December 31st;

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Broad-Based Socio-Economic Empowerment Charter for the South African Mining

“Community” means a coherent, social group of persons with interest of rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law;

“Demographics” means the numerical characteristics of a population (e.g. population size, age, structure, sex/gender, race, etc.)

“Effective ownership” means the meaningful participation of HDSAs in the ownership, voting rights, economic interest and management control of mining entities;

“EMP” means an approved environmental programme contemplated in section 39 of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002);

“Enterprise development” means monetary and non-monetary support for existing or fostering of new HDSA companies in the mining sector of the economy, with the objective of contributing to their development, sustainability as well as financial and operational independence;

“ESOPs” mean Employees Share Ownership Schemes;

“Historically Disadvantaged South Africans” (“HDSA”) refers to South African citizens, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) came into operation which should be representative of the demographics of the country;

“Labour sending area” areas from which a majority of mineworkers, both historical and current are or have been sourced;

“Level of management” refers to line of demarcation between various managerial positions;

“Life of Mine” means the number of years that a particular mine will be operational;

“Meaningful economic participation” includes, inter alia, the following key attributes—

- BEE transactions shall be concluded with clearly identifiable beneficiaries in the form of BEE entrepreneurs, workers (including ESOPs) and communities;
- Barring any unfavourable market conditions, some of the cash flow should flow to the BEE partner throughout the term of the investment, and for this purpose, stakeholders will engage the financing entities in order to structure the BEE financing in a manner where a percentage of the cash-flow is used to service the funding of the structure, while the remaining amount is paid to the BEE beneficiaries. Accordingly, BEE entities are enabled to leverage equity henceforth in proportion to vested interest over the life of the transaction in order to facilitate sustainable growth of BEE entities;
- BEE shall have full shareholder rights such as being entitled to full participation at annual general meetings and exercising of voting rights, regardless of the legal form of the instruments used;
- Ownership shall vest within the timeframes agreed with the BEE entity, taking into account market conditions;

“Mining Charter” means the broad-based socio-economic empowerment Charter for the South African Mining and Minerals Industry;

“Mine Community” refers to communities where mining takes place and labour sending areas;

“Non-discretionary procurement expenditure” means expenditure that cannot be influenced by a mining company, such as procurement from the public sector and public enterprises;

“Shareholder” shall mean a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached;

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"**Social Fund**" refers to a trust fund that provides financing for investments targeted at meeting the needs of poor and vulnerable communities as informed by commitments made by companies in terms of their social and labour plans;

"**Stakeholder**" refers to a person, group, organisation, or system which affects or can be affected by an organisation's actions which may relate to policies intended to allow the aforementioned to participate in decision making in which all may have a stake;

"**Sustainable development**" means the integration of social, economic and environmental factors into planning, implementation and decision-making to ensure that the mineral and petroleum resources development serves present and future generations.

1. Objectives

The Broad Based Socio-Economic Empowerment Charter for the South African Industry, hereafter referred to as "the Mining Charter", is a Government instrument designed to effect sustainable growth and meaningful transformation of the mining industry. The Mining Charter seeks to achieve the following objectives:

- (a) To promote equitable access to the nation's mineral resources to all the people of South Africa;
- (b) To substantially and meaningfully expand opportunities for HDSA to enter the mining and minerals industry and to benefit from the exploitation of the nation's mineral resources;
- (c) To utilise and expand the existing skills base for the empowerment of HDSA and to serve the community;
- (d) To promote employment and advance the social and economic welfare of mine communities and major labour sending areas;
- (e) To promote beneficiation of South Africa's mineral commodities; and
- (f) Promote sustainable development and growth of the mining industry.

2. Elements of the Mining Charter

2.1 Ownership

Effective ownership is a requisite instrument to effect meaningful integration of HDSA into the mainstream economy. In order to achieve a substantial change in racial and gender disparities prevalent in ownership of mining assets, and thus pave the way for meaningful participation of HDSA for attainment of sustainable growth of the mining industry, stakeholders commit to—

- Achieve a minimum target of 26 percent ownership to enable meaningful economic participation of HDSA by 2014;
- The only offsetting permissible under the ownership element is against the value of beneficiation, as provided for by section 26 of the MPRDA and elaborated in the mineral beneficiation framework.

The continuing consequences of all previous deals concluded prior to the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002 would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production.

2.2 Procurement and Enterprise Development

Local procurement is attributable to competitiveness and transformation, captures economic value, presents opportunities to expand economic growth that allows for creation of decent jobs and widens scope for market access of South African capital goods and services. In order to achieve this, the mining industry must procure from BEE entities in accordance with the following criteria, subject to the provisions of clause 2.9—

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- Procure a minimum of 40% of capital goods from BEE entities by 2014;
- Ensure that multinational suppliers of capital goods annually contribute a minimum of 0.5% of annual income generated from local mining companies towards socio-economic development of local communities into a social development fund from 2010;
- Procure 70% of services and 50% of consumer goods from BEE entities by 2014.

The targets above are exclusive of non-discretionary procurement expenditure.

2.3 Beneficiation

Beneficiation seeks to translate comparative advantage in mineral resources endowment into competitive advantage as fulcrum to enhance industrialisation in line with State developmental priorities. In this regard, mining companies must facilitate local beneficiation of mineral commodities by adhering to the provision of Section 26 of the MPRDA and the mineral beneficiation strategy—

- Mining companies may offset the value of the level of beneficiation achieved by the company against a portion of its HDSA ownership requirements not exceeding 11 percent.

2.4 Employment Equity

Workplace diversity and equitable representation at all levels are catalysts for social cohesion, transformation and competitiveness of the mining industry. In order to create a conducive environment to ensure diversity as well as participation of HDSA at all decision-making positions and core occupational categories in the mining industry, every mining company must achieve a minimum of 40% HDSA demographic representation at—

- Executive Management (Board) level by 2014;
- Senior management (EXCO) level by 2014;
- Core and Critical skills by 2014;
- Middle management level by 2014;
- Junior management level by 2014.

In addition, mining companies must identify and fast-track their existing talent pools to ensure high level operational exposure in terms of career path programmes.

2.5 Human Resource Development

The mining industry is knowledge based and thus hinges on human resource development, constituting an integral part of social transformation at workplace and sustainable growth. To achieve this objective, the mining industry must—

- Invest a percentage of annual payroll (as per relevant legislation) in essential skills development activities reflective of the demographics, but excluding the mandatory skills levy, including support for South African based research and development initiatives intended to develop solutions in exploration, mining, processing, technology efficiency (energy and water use in mining), beneficiation as well as environmental conservation and rehabilitation; as follows—
 - Target for 2010 = 3%;
 - Target for 2011 = 3.5%;
 - Target for 2012 = 4%;
 - Target for 2013 = 4.5%;
 - Target for 2014 = 5%.



2.6 Mine Community Development

Mine communities form an integral part of mining development, there has to be meaningful contribution towards community development, both in terms of size and impact, in keeping with the principles of the social license to operate. Stakeholders must adhere to the following—

- Consistent with international best practices in terms of rules of engagement and guidelines, mining companies must invest in ethnographic community consultative and collaborative processes prior to the implementation/development of mining projects;
- Mining companies must conduct an assessment to determine the developmental needs in collaboration with mining communities and identify projects within the needs analysis for their contribution to community development in line with Integrated Development Plans (IDPs), the cost of which should be proportionate to the size of investment.

2.7 Housing and Living Conditions

Human dignity and privacy for mineworkers are the hallmarks to enhance productivity and expedite transformation in the mining industry in terms of housing and living conditions. In this regard mining companies must implement measures to improve the standards of housing and living conditions for mineworkers as follows—

- Convert or upgrade hostels into family units by 2014;
- Attain the occupancy rate of one person per room by 2014;
- Facilitate home ownership options for all mine employees in consultation with organised labour by 2014.

2.8 Sustainable Development and Growth of the Mining Industry

Mineral resources are non-renewable in nature, forthwith exploitation of such resources must emphasise the importance of balancing concomitant economic benefits with social and environmental needs without compromising future generations, in line with Constitutional provisions for ecological, sustainable development and use of natural resources. To this end, with consideration to clause 2.9, every mining company must implement elements of sustainable development commitments included in the *“Stakeholders’ Declaration on Strategy for the sustainable growth and meaningful transformation of South Africa’s Mining Industry of 30 June 2010 and in compliance with all relevant legislation”*, as follows—

- Improvement of the industry’s environmental management by—
 - Implementing environmental management systems that focus on continuous improvement to review, prevent, mitigate adverse environmental impact;
 - Undertake continuous rehabilitation on land disturbed or occupied by mining operations in accordance with appropriate regulatory commitments;
 - Provide for the safe storage and disposal of residual waste and process residues;

(Editorial Note: Wording as per original *Government Gazette*. It is suggested that the phrase “Provide for the safe storage” is intended to be “Provide for the safe storage”.)

- Design and plan all operations so that adequate resources are available to meet the closure requirements of all operations.
- Improvement of the industry’s health and safety performance by—
 - Implementing a management systems focused on continuous improvement of all aspects of operations that have a significant impact on the health and safety of employees, contractors and communities where mining takes place;

Broad-Based Socio-Economic Empowerment Charter for the South African Mining

- Providing all employees with health and safety training and require employees of contractors to have undergone such training;
- Implement regular health surveillance and risk-based monitoring of employees.
- Stakeholders undertake to enhance the capacity and skills in relevant South African research and development facilities in order to ensure quality, quick turn around, cost effectiveness and integrity of such facilities. To this extent, mining companies are required to utilise South African based facilities for the analysis of samples across the mining value chain.

2.9 Reporting (Monitoring and Evaluation)

Every mining company must report its level of compliance with the Mining Charter annually, as provided for by section 28 (2) (c) of the MPRDA.

The Department shall monitor and evaluate, taking into account the impact of material constraints which may result in not achieving set targets.

3. Non-compliance

Non-compliance with the provisions of the Charter and the MPRDA shall render the mining company in breach of the MPRDA and subject to the provisions of Section 47 read in conjunction with sections 98 and 99 of the Act.

4. Amendments

The Minister of the Department of Mineral Resources may amend the Mining Charter as and when the need arises.



SCORECARD FOR THE BROAD-BASED SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY

ELEMENT	DESCRIPTION	MEASURE	COMPLIANCE TARGET BY 2014	PROGRESS ACHIEVED BY					Weighting
				2010	2011	2012	2013	2014	
1 Reporting	Has the company reported the level of compliance with the Charter for the calendar year	Documentary proof of receipt from the department	Annually	March 2011	March 2012	March 2013	March 2014	March 2015	Y/N
		Meaningful economic participation	26%	15%	15%	26%	26%	26%	
2 Ownership	Minimum target for effective HDSA ownership	Full shareholder rights	26%	15%	15%	26%	26%	26%	Y/N
		Percentage reduction of occupancy rate towards 2014 target	Occupancy rate of one person per room	Base-line	25%	50%	75%	100%	
3 Housing and living conditions	Conversion and upgrading of hostels to attain the occupancy rate of one person per room	Percentage conversion of hostels into family units	Family units established	Base-line	25%	50%	75%	100%	Y/N
		Conversion and upgrading of hostels into family units	Occupancy rate of one person per room	Base-line	25%	50%	75%	100%	
4 Procurement & Enterprise Development	Procurement spent from BEE entity	Capital goods	40%	5%	10%	20%	30%	40%	5%
		Services	70%	30%	40%	50%	60%	70%	5%
		Consumable goods	50%	10%	15%	25%	40%	50%	2%
		Annual spend on procurement from multinational suppliers	0.5% of procurement value	0.50%	0.50%	0.50%	0.50%	0.50%	3%
5 Employment Equity	Diversification of the workplace to reflect the country's demographics to attain competitiveness	Top Management (Board)	40%	20%	25%	30%	35%	40%	3%
		Senior Management (EXCO)	40%	20%	25%	30%	35%	40%	4%
		Middle Management	40%	30%	35%	40%	40%	40%	3%
		Junior Management	40%	40%	40%	40%	40%	40%	1%
		Core Skills	40%	15%	20%	30%	35%	40%	5%

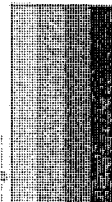
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Broad-Based Socio-Economic Empowerment Charter for the South African Mining

ELEMENT	DESCRIPTION	MEASURE	COMPLIANCE TARGET BY 2014	PROGRESS ACHIEVED BY					Weighting
				2010	2011	2012	2013	2014	
6	Human Resource Development Development of requisite skills, incl. support for South African based research and development initiatives intended to develop solutions in exploration, mining, processing, technology efficiency (energy and water use in mining), beneficiation as well as environmental conservation and rehabilitation	HRD expenditure as percentage of total annual payroll (excl. mandatory skills development levy)	5%	3%	3.5%	4.0%	4.5%	5.0%	25%
7	Mine community development Conduct ethnographic community consultative and collaborative processes to delineate community needs analysis	Implement approved community projects	Up-to-date project implementation	Implementation of projects will serve to enhance relationships amongst stakeholders leading to communities owing patronage to projects					15%
8	Sustainable development & growth Improvement of the industry's environmental management	Implementation of approved EMPs	100%	Annual progress achieved against approved EMPs					12%
		Improvement of the industry's mine health and safety performance	100%	Annual progress achieved against commitments in the tripartite action plan on health and safety					12%
9	Beneficiation Utilisation of South African based research facilities for analysis of samples across the mining value chain	Percentage of samples in South African facilities	100%	establish baseline	25%	50%	75%	100%	5%
		Contribution of a mining company towards beneficiation (this measure is effective from 2012)	Section 26 of the MPRDA (percentage above baseline)	The beneficiation strategy and its modalities of implementation outline the beneficiation requirements per commodity extracted in South Africa					—
TOTAL SCORE									100%

Y/N applies to pillars that are ring-fenced.

Legend



- 0-25% (Gross non-compliance)
- 25-50% (Non-compliance)
- 50-75% (Marginal to acceptable performance)
- 75-100% (Excellent performance)

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SCORECARD FOR THE BROAD-BASED SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY: REPORTING TEMPLATE

ELEMENT	DESCRIPTION	MEASURE	COMPLIANCE TARGET BY 2014	PROGRESS ACHIEVED BY					Weighting	
				2010	2011	2012	2013	2014		
1	Reporting	Documentary proof of receipt from the department	Annually						Y/N	
2	Ownership	Meaningful economic participation	26%						Y/N	
3	Housing and living conditions	Full shareholder rights	26%						Y/N	
		Percentage reduction of occupancy rate towards 2014 target	Occupancy rate of one person per room							
4	Procurement & Enterprise Development	Percentage conversion of hostels into family units	Family units established						5%	
		Capital goods	40%							
		Services	70%							5%
		Consumable goods	50%							2%
		Annual spend on procurement from multinational suppliers	0.5% of procurement value						3%	

continued

Broad-Based Socio-Economic Empowerment Charter for the South African Mining

ELEMENT	DESCRIPTION	MEASURE	COMPLIANCE TARGET BY 2014	PROGRESS ACHIEVED BY					Weighting
				2010	2011	2012	2013	2014	
5 Employment Equity	Diversification of the workplace to reflect the country's demographics to attain competitiveness	Top Management (Board) level	40%						3%
		Senior Management (Exco)	40%						4%
		Middle Management	40%						3%
		Junior Management	40%						1%
		Core Skills	40%						5%
6 Human Resource Development	Development of requisite skills, incl. support for South African based research and development initiatives intended to develop solutions in exploration, mining, processing, technology efficiency (energy and water use in mining), beneficiation as well as environmental conservation and rehabilitation	HRD expenditure as percentage of total annual payroll (excl. mandatory skills development levy)	5%						25%
7 Mine community development	Conduct ethnographic community consultative and collaborative processes to delineate community needs analysis	Implement approved community projects	Up-to-date project implementation						15%

continued

ELEMENT	DESCRIPTION	MEASURE	COMPLIANCE TARGET BY 2014	PROGRESS ACHIEVED BY					Weighting
				2010	2011	2012	2013	2014	
Sustainable development & growth	Improvement of the industry's environmental management	Implementation of approved EMPs	100%	Annual progress achieved against approved EMPs					12%
	Improvement of the industry's mine health and safety performance	Implementation of the tripartite action plan on health and safety	100%	Annual progress achieved against commitments in the tripartite action plan on health and safety					
	Utilisation of South African based research facilities for analysis of samples across the mining value chain	Percentage of samples in South African facilities	100%						
Beneficiation	Contribution of a mining company towards beneficiation (this measure is effective from 2012)	Additional production volume contributory to local value addition beyond the base-line	Section 26 of the MPRDA (percentage above baseline)	The beneficiation strategy and its modalities of implementation outline the beneficiation requirements per commodity extracted in South Africa					—
TOTAL SCORE								100%	

8

9

Y/N applies to pillars that are ring-fenced.

Legend



- 0-25% (Cross non-compliance)
- 25-50% (Non-compliance)
- 50-75% (Marginal to acceptable performance)
- 75-100% (Excellent performance)

Broad-Based Socio-Economic Empowerment Charter for the South African Mining

SCORECARD FOR THE BROAD-BASED SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY
CATEGORY: HUMAN RESOURCE DEVELOPMENT

DESCRIPTION	MEASURES	SPREAD OF MEASURE CATEGORY	REPORTING TEMPLATE									
			YEAR:									
			African		Coloured		Indian		White		Total	
Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	
Development of requisite skills, incl. support for South African based research and development initiatives intended to develop solutions in mining, processing and exploration technology efficiency (energy and water use in mining), beneficiation as well as environmental conservation and rehabilitation.	HRD expenditure as percentage of total annual payroll (excl. mandatory skills development levy)	Learnship and Bursaries (of core and critical skills)										
		Artisans										
		ABET training (level I, II, III, IV and NQF 1)										
		Other training initiatives (school support & post matric programmes)										
		Support for South African based research and development initiatives										

SCORECARD FOR THE BROAD-BASED SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY CATEGORY: EMPLOYMENT EQUITY

DESCRIPTION (ACTION)	MEASURE	REPORTING TEMPLATE										
		YEAR:										
		African		Coloured		Indian		White		Total		
Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	
Diversification of the workplace to reflect the country's demographics to attain competitiveness	Top management (Board level)											
	Senior Management (EXCO)											
	Middle Management											
	Junior Management											
	Core Skills											

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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF MINERAL RESOURCES

NO. 581

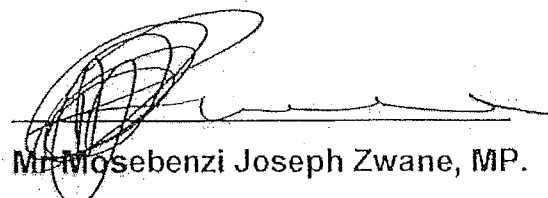
15 JUNE 2017

REVIEWED BROAD BASED BLACK-ECONOMIC EMPOWERMENT
CHARTER FOR THE SOUTH AFRICAN MINING AND MINERALS
INDUSTRY, 2016.

I, Mosebenzi Joseph Zwane, MP, Minister of Mineral Resources, hereby in terms of section 100 (2) of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002), as amended, publish the Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 (Reviewed Mining Charter, 2017) for implementation.

The Reviewed Mining Charter shall come into operation from the date of publication of this notice in the Government Gazette.

A copy of the Reviewed Mining Charter, 2017 is attached hereto.



Mr Mosebenzi Joseph Zwane, MP.

Minister of Mineral Resources.

Date: 15/06/2017.



**BROAD-BASED BLACK SOCIO-ECONOMIC EMPOWERMENT CHARTER
FOR THE SOUTH AFRICAN MINING AND MINERALS INDUSTRY, 2017**

June 2017

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CONTENTS

PREAMBLE i

VISION iv

MISSION iv

DEFINITIONS 1

1. OBJECTIVES OF THE MINING CHARTER 6

2. ELEMENTS OF THE MINING CHARTER 7

 2.1 OWNERSHIP 7

 2.2 PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT 13

 2.3 EMPLOYMENT EQUITY 15

 2.4 HUMAN RESOURCE DEVELOPMENT 17

 2.5 MINE COMMUNITY DEVELOPMENT 18

 2.6 SUSTAINABLE DEVELOPMENT AND GROWTH OF THE MINING AND MINERALS
INDUSTRY 19

 2.7 HOUSING AND LIVING CONDITIONS 21

 2.8 APPLICATION OF THE MINING CHARTER TO LICENCES GRANTED UNDER THE
PRECIOUS METALS ACT, 2005 AND THE DIAMONDS ACT, 1986 22

 2.9 REPORTING (MONITORING AND COMPLIANCE) 25

 2.10 APPLICABILITY OF TARGETS 25

 2.11 TRANSITIONAL ARRANGEMENTS 26

 2.12 NON-COMPLIANCE 27

 2.13 REVIEW OF THE CHARTER 27

 2.14 REPEAL OF PREVIOUS MINING CHARTERS 27

 2.15 INTERPRETATION OF THE MINING CHARTER 27

 2.16 SCORECARD: MINING CHARTER REVIEW 1

PREAMBLE

The systematic marginalization of the majority of South Africans, facilitated by exclusionary policies of the apartheid regime, prevented Black Persons, as defined herein, from owning the means of production and from meaningful participation in the mainstream economy. To redress these historic inequalities, and thus give effect to section 9 (equality clause) of the Constitution of the Republic of South Africa, 1996 (Constitution), the democratic government enacted, *inter alia*, the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) (MPRDA).

The objective of the MPRDA is to ensure the attainment of Government's objectives of redressing historical, socio-economic inequalities and ensuring broad based and meaningful participation of Black Persons in the mining and minerals industry. In particular, section 100 (2) (a) of the MPRDA provides for development of the broad-based black economic empowerment charter for the South African mining and minerals industry as an instrument to effect transformation with specific targets.

In 2009 the Department of Mineral Resources conducted a comprehensive assessment to ascertain the progress of transformation of the mining and minerals industry against the objectives of the Mining Charter of 2002 in the mining and minerals industry. The findings of the assessment identified a number of shortcomings in the manner in which the mining and minerals industry has implemented the various elements of the Mining Charter of 2002, viz. ownership, procurement, employment equity, beneficiation, human resource development, mine community development, and housing and living conditions. To overcome these inadequacies, the Mining Charter of 2002 was

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amended in order to streamline and expedite attainment of its objectives. Further, the sustainable development element, which sought to ensure sustainable transformation and growth of the mining and minerals industry was introduced.

In 2014 a second assessment of the levels of compliance by mining companies with the Mining Charter of 2010 was conducted. This second assessment has revealed the following:

- Although there was a noticeable improvement in levels of compliance, there remains a long way for the mining and minerals industry to be fully transformed.
- Notwithstanding a paucity of companies of all sizes that have fully embraced the spirit of the Mining Charter, companies have adopted extremely varied degrees of performance most of which seem to suggest a compliance-driven mode of implementation, designed only to protect the "social license to operate".
- Whereas the MPRDA has transferred the ownership of the mineral wealth of the country to all the people of South Africa, under the custodianship of the State, a proliferation of communities living in abject poverty continues to be largely characteristic of the surroundings of mining operations.
- Limited progress has been made in embracing the broad-based empowerment ownership in terms of Meaningful Economic Participation of Black Persons. The trickle flow of benefits that ought not only to service any debt funding, but also include cash-flow directly to BEE Partners, is vastly limited. To this end, the interests of mineworkers and communities are typically held in trusts, which constrain the flow of benefits to intended beneficiaries. As a result, the mining and minerals industry has broadly



been faced with increasing tensions with both workers and host communities.

It is against this backdrop that Government initiated another comprehensive review process in 2015 aimed at strengthening the efficacy of the Mining Charter as one of the tools for effecting broad based and meaningful transformation of the mining and minerals industry.

The review process took into account the need to integrate Government policies to remove ambiguities in respect of interpretation and create regulatory certainty. In this regard, the principles of this Mining Charter of 2017 are harmonised with the provisions of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003) and the Codes of Good Practice (Dti Codes), the Employment Equity Act, 1998 (Act No. 55 of 1998) and other relevant regulatory framework.

The Mining Charter of 2017 introduces new definitions, terms and targets to effect the abovementioned harmonisation. The harmonisation of these policies is intended to ensure meaningful participation of Black Persons in accordance with the objects of the MPRDA and the Mining Charter and provide for policy and regulatory certainty sought to invest in the development of the industry.

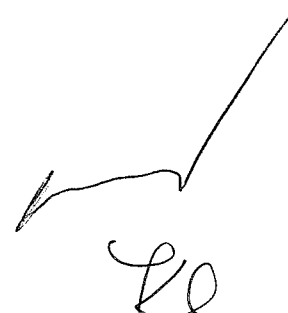
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VISION

To facilitate sustainable transformation, growth and development of the mining and minerals industry.

MISSION

To give effect to section 100 (2) (a) of the MPRDA, section 9 of the Constitution and harmonise Government's transformation policies.

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DEFINITIONS

Government has identified a need to align and integrate the transformation regulatory framework contained in the Mining Charter of 2017 in order to remove ambiguities in respect of interpretation and bring about regulatory certainty. In this regard, this section defines terms and concepts used in this Mining Charter of 2017 so as to provide clarity as to their meaning.

“BBBEE Act” means the Broad-Based Black Economic Empowerment Act 2003 (Act No. 53 of 2003) as amended from time to time;

“Beneficiation” has the meaning ascribed to that term in the MPRDA;

“BEE Compliant Manufacturing Company”, in relation to the procurement element contemplated herein, means a company that manufactures goods and has minimum BEE level 4 of the Dti Codes and minimum 26% black ownership;

“BEE Entrepreneur” means a Black Owned Company or a Black Person who acquires an equity interest in a Holder through a BEE Transaction;

“BEE Partner” means a Black Person that holds equity in a mining company as a result of a BEE Transaction;

“BEE Transaction” means the issue of equity instruments to Black Persons or a group of Black Persons based on the principles of broad-based black economic empowerment the aim of which includes-

- (a) to redress the results of past or present discrimination based on the race of historically disadvantaged persons in the mining and minerals industry; and
- (b) to transform such industries so as to assist in, provide for, initiate or facilitate—
 - (i) the ownership, participation in or the benefiting from existing or future mining, prospecting, exploration or production operations;

- (ii) the participation in or control of management of such operations;
- (iii) the development of management, scientific, engineering or other skills of historically disadvantaged persons;
- (iv) the involvement or participation in the procurement chains of operations;
- (v) the ownership of and participation in the beneficiation of the proceeds of the operations or other upstream or downstream value chains in such industries;
- (vi) the socio-economic development of mine communities; and
- (vii) the socio-economic development of all historically disadvantaged Black South Africans from the proceeds or activities of such operations;

“Black Person” is a generic term which means Africans, Coloureds and Indians-

- (a) Who are citizens of the Republic of South Africa by birth or descent; or
- (b) Who became citizens of the Republic of South Africa by naturalisation:
 - (i) before 27 April 1994; or
 - (ii) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date;
- (c) A juristic person which is managed and controlled by person/s contemplated in paragraph (a) and/or (b) and the person/s collectively or as a group own and control all issued share capital or members' interest, and are able to control the majority of the members' vote;

“Black Owned Company” means a juristic person having shareholding or similar interest that is controlled by a Black Person/s and in which such Black Person/s enjoy/s a right to economic interest that is at least 50% + 1 of the total shareholding;



“**Companies Act**” means the Companies Act, 2008 (Act No. 71 of 2008) as amended from time to time;

“**Core and Critical Skills**” means high level technical skills across all organisational levels within both the production and operational parts of the Holders’ value-chain;

“**Demographics**” means the numerical characteristics of a national and/or provincial population and includes but is not limited to population size, age, structure, sex/gender, race;

“**Dti**” means the Department of Trade and Industry;

“**Economic Interest**” means the entitlement of a BEE Partner to distributions (including but not limited to dividends), capital gains and other economic rights of shareholders;

“**Effective Ownership**” means the meaningful participation of Black Persons in the net value ownership, voting rights, economic interest and/or management control of mining entities;

“**ESOPs**” refers to black employee share ownership plans, a vehicle used to empower employees of a mining company who are Black Persons, excluding employees who already hold shares in the same company as a condition of their employment agreement except where such condition is a Mining Charter requirement;

“**Foreign Supplier**” means a foreign controlled and registered company, supplying the South African mining and minerals industry with mining goods and services, which does not have at least a level 4 Dti Codes BEE status and 25%+ 1 vote black ownership;

“**Historical BEE Transactions**” means those BEE Transactions concluded prior to the coming into operation of the Mining Charter of 2017 that achieved a minimum 26% Black shareholding or more;



“**Holder**” has the same meaning as is ascribed to that term in the MPRDA;

“**Housing and Living Conditions Standards**” means the Housing and Living Conditions Standards for the Mining and Minerals Industry developed in terms of Section 100 (1) (a) of the MPRDA;

“**Labour Sending Areas**” means areas from which a majority of South African mineworkers both historical and current, are or have been sourced;

“**Leviable amount**” has the same meaning as is ascribed to that term in the Skills Development Levies Act, 1999 (Act No. 9 of 1999);

“**Meaningful Economic Participation**” includes, *inter alia*, the following key attributes:

- (a) BEE Transactions shall be concluded with clearly identifiable partners in the form of BEE Entrepreneurs, Mine Communities and workers;
- (b) A percentage of Effective Ownership must accrue to partners who are Black Persons;
- (c) Taking into account the provisions of the Companies Act, some of the distributions by mining companies should flow to the Black Person partners throughout the term of the investment the structure of the BEE Transaction financing should be in a manner where a percentage of the cash-flow is used to service the funding of the structure;
- (d) Accordingly, BEE Partners are enabled to leverage equity henceforth in proportion to vested interest over the life of the BEE Transaction in order to facilitate sustainable growth of Black Person partners;
- (e) BEE Partners shall have full shareholder rights such as being entitled to full participation at annual general meetings, shareholders meetings and exercising of voting rights in all aspects at shareholders meetings;

“**Mine Community**” refers to communities where mining takes place, major Labour Sending Areas, as well as adjacent communities within a local municipality, metropolitan municipality and/or district municipality;

“**Mining Transformation and Development Agency**” refers to an agency to be established by the Minister during the period set out in paragraph 2.11(a);

“**Minister**” means the minister of the Department of Mineral Resources;

“**Mining Charter**” means this broad-based black socio-economic empowerment charter for the South African mining and minerals industry, 2017, developed in terms of section 100 (2) (a) of the MPRDA;

“**Mining Goods**” refers to tangible goods used by the Holder, or by a contractor on behalf of the Holder, for mineral extraction, materials handling, environmental control, mineral processing, drilling, digging, and earthmoving. This also includes aftermarket components and products that are used and/or consumed in daily operations;

“**MPRDA**” means the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) as amended from time to time;

“**the Republic**” means the Republic of South Africa;

“**Services**” refers to work contracted out by the Holder, or by a contractor on behalf of a Holder, which includes but is not limited to, mining production services, drilling, mineral trading, mineral marketing, shipping, transportation, information technology services, security, payroll, finance, medical, cleaning, insurance and any other services which are supplementary or optional to the mine;

“**Scorecard**” means the scorecard set out in paragraph 2.16 below;

“**SLP**” means the social and labour plan contemplated in section 23 of the MPRDA;



“South African Based Company” refers to a company incorporated in the Republic in terms of the Companies Act and which has offices in the Republic;

“South African Historically Black Academic Institutions” means institutions of higher learning which were historically solely for Black Persons;

“South African Manufactured Goods” means goods where at least 60% of the value added during the assembly and/or manufacturing of the product is realised within the borders of the Republic. The calculation of value added for the purposes of this definition excludes profit mark-up, intangible value (such as brand value) and overheads;

“Top Up” means the increasing of shareholding of a Black Person in order to reach the minimum thresholds required by the Mining Charter;

“Youth” for the purposes of this Mining Charter refers to Black Persons between the ages of 18 to 35 years old.

1. OBJECTIVES OF THE MINING CHARTER

This Mining Charter, is a government instrument designed to achieve mutually symbiotic sustainable growth and broad based and meaningful transformation of the mining and minerals industry. The Mining Charter seeks to achieve the following objectives:

- (a) Recognition of the internationally accepted right of the State to exercise sovereignty over all the mineral resources within the Republic;
- (b) Deracialising of ownership of the mining and minerals industry by redressing the imbalances of the past injustices;
- (c) Substantially and meaningfully expanding opportunities for Black Persons to enter the mining and minerals industry and to benefit from the exploitation of the State's mineral resources;

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- (d) Utilising and expanding the existing skills base for the empowerment of Black Persons;
- (e) Advancing employment and diversifying the workforce in order to achieve competitiveness and productivity of the mining and minerals industry;
- (f) Enhancement of the social and economic welfare of Mine Communities and major Labour Sending Areas in order to achieve social cohesion;
- (g) Promotion of sustainable development and growth of the mining and minerals industry;
- (h) Catalysing growth and development of the local mining inputs sector by leveraging the procurement spend of the mining and minerals industry; and
- (i) Promoting Beneficiation of South Africa's mineral commodities by South African Based Companies.

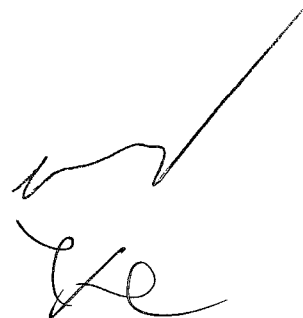
2. ELEMENTS OF THE MINING CHARTER

2.1 OWNERSHIP

In order to give effect to Meaningful Economic Participation and the integration of Black Persons into the mainstream economy; and ensure Black Persons' effective ownership of the State's mineral resources, a Holder must comply with the following:

2.1.1 NEW PROSPECTING AND MINING RIGHTS HOLDERS

- 2.1.1.1 A Holder of a new prospecting right must have a minimum of 50% + 1 Black Person shareholding which shareholding shall include voting rights, per prospecting right or in the company which holds the right.
- 2.1.1.2 A Holder of a new mining right must have a minimum of 30% Black Person shareholding which shall include economic interest plus a corresponding percentage of voting rights, per right or in the mining company which holds the right.

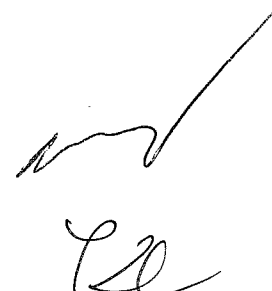


- 2.1.1.3 The 30% Black Person shareholding must be distributed in the following manner:
- (a) a minimum of 8% of the total issued shares of the Holder shall be issued to ESOPs (or any similar employee scheme structure);
 - (b) a minimum of 8% of the total issued shares of the Holder shall be issued to Mine Communities (in the form of a community trust); and
 - (c) a minimum of 14% of the total issued shares of the Holder shall be issued to BEE Entrepreneurs.
- 2.1.1.4 To the extent that any Black Person holds shares within one of the categories set out in paragraph 2.1.1.3 above, such Black Person shall ensure that in the event of transferring the shares, the party to whom the shares are transferred must fall within the same category as the transferring Black Person as set out paragraph 2.1.1.3 above. Such that the Black Person shareholding distribution set out in paragraph 2.1.1.3 above shall always be maintained by the Holder.
- 2.1.1.5 The Holder shall ensure that any reduction of shareholding of existing shareholders through the issue of new shares, shall not reduce the Black Person shareholding distribution as set out in the paragraph 2.1.1.3 above.
- 2.1.1.6 The portion of the 30% Black Person equity shareholding referred to in paragraph 2.1.1.3 which has not yet vested shall vest in no more than 10 years and by no less than 3% annually of the total issued share capital of the Holder, proportionate to the respective non-vested shareholding of the employees, Mine Communities and BEE Entrepreneurs. Such vesting shall be paid for from the proceeds of dividends received by the Black Person shareholders, provided that if the total dividends received by any of the Black Person shareholders is not sufficient to discharge the amount required for full vesting, the



balance owing in respect thereof, shall be written off by the Holder or vendor of the shares to the Black Person as the case may be.

- 2.1.1.7 Subject only to the solvency and liquidity requirements as set out in the Companies Act, a Holder of a new mining right must pay a minimum 1% of its annual turnover in any given financial year to the Black Person shareholders, prior to and over and above any distributions to the shareholders of the Holder.
- 2.1.1.8 Subject to the provisions of paragraph 2.1.1.4, the BEE Entrepreneurs shall be allowed to dilute a maximum of 49% shareholding in the Holder, provided that 100% of the proceeds from the dilution are used by the BEE Entrepreneurs to develop another asset.
- 2.1.1.9 The shareholding of the Mine Community must be held in a trust created and managed by the Mining Transformation and Development Agency, from a date to be published by the Minister.
- 2.1.1.10 The Mining Transformation and Development Agency shall report to the Minister. on an annual basis.
- 2.1.1.11 The 30% Black Person shareholding must be held in an entity/ies or by person/s which is/are separate from the right Holder.
- 2.1.1.12 The Black Person shareholders shall directly and actively control their share of equity interest in the empowering company, including the transportation as well as trading and marketing of the proportionate share of the production.
- 2.1.1.13 The only offsetting permissible under the ownership element is against the value of Beneficiation as provided for in paragraph 2.1.4 below. Such offsetting shall account for a maximum of 11% against the ownership target where such offsetting has been approved by the Department of Mineral Resources.



2.1.2 EXISTING PROSPECTING AND MINING RIGHTS HOLDERS

- 2.1.2.1 A Historical BEE Transaction shall be recognised for the reporting period ending on the date on which this Mining Charter is published in the *Government Gazette*.
- 2.1.2.2 The provisions of paragraph 2.1.2.1 shall apply to an existing Holder whose BEE Partner/s has exited the BEE Historical Transaction; or the contract between the Holder and the BEE Partner/s has lapsed; or the previous BEE Partner/s transferred its shares to a person/s other than a Black Person.
- 2.1.2.3 A Holder who claims the recognition of Historical BEE Transactions is required to Top Up its Black Person shareholding from the existing level to a minimum of 30% Black Person shareholding, at the Holder level within the twelve (12) months transitional period. Such Top Up need not be in proportion to the shareholding distribution set out in paragraph 2.1.1.3 above.
- 2.1.2.4 An existing Holder, who after the coming into operation of the Mining Charter of 2017, has maintained a minimum of 26% Black Person shareholding shall be required to Top Up its Black Person shareholding to a minimum of 30% within the twelve (12) months transitional period. Such Top Up need not be in proportion to the shareholding distribution set out in paragraph 2.1.1.3 above.
- 2.1.2.5 An existing Holder who has acquired and maintained more than 30% Black Person shareholding shall be allowed to maintain its existing structure until such time as the BEE Partner/s exits or upon renewal of such right.
- 2.1.2.6 The required Top Up stipulated in paragraphs 2.1.2.3 and 2.1.2.4 shall be effected by a reduction of the remaining shareholders who are not Black Persons in proportion to their respective shareholding in the company.



- 2.1.2.7 The Black Person shareholding Top Up referred to in 2.1.2.3 and 2.1.2.4 shall be given proportionally to the Holder's existing BEE Partner/s. To the extent that BEE Partner/s has exited the BEE Historical Transaction; or the contract between the Holder and the BEE Partners has lapsed; or the BEE Partners have transferred the shares to a person other than a Black Person, then the Top Up shall be to a BEE Entrepreneur.
- 2.1.2.8 A Holder referred to in 2.1.2.3 to 2.1.2.5 must, within the transitional period of twelve (12) months, ensure that its BEE Partners directly and actively control their share of equity interest in the Holder, including the transportation as well as trading and marketing of the proportionate share of the production.
- 2.1.2.9 The recognition of Historical BEE Transactions shall include the recognition of historical deals concluded on units of production, share asset deals (including deals where the BEE Partner/s have sold their shareholding) and all Historical BEE Transactions deals which formed the basis upon which new order mining rights were granted.
- 2.1.2.10 The Historical BEE Transactions referred to above may be at company level, asset level or cover all operations.
- 2.1.2.11 The recognition of Historical BEE Transactions shall not apply to transactions which did not achieve a minimum of 26% empowerment by the date on which this Mining Charter is published in the *Government Gazette*.
- 2.1.2.12 After the date of publication of this Mining Charter in the *Government Gazette* the recognition of Historical BEE Transactions shall not apply to applications for a new mining right or prospecting right or applications for the renewal of such rights, or to applications in terms of section 11 of the MPRDA affected by such recognition.



2.1.3 Sale of South African Mining Assets

In order to ensure effective and meaningful participation of Black Persons in the mining and minerals industry, a Holder who sells its mining assets must give Black Owned Company/s a preferential an option to purchase.

2.1.4 MINERAL BENEFICIATION

In order to give effect to government policies and contribute to the Republic's national developmental imperatives relating to Beneficiation of the Republic's mineral resources:

- (a) A Holder may offset a maximum of 11% of Black Persons ownership by financially investing in and contributing to Beneficiation over and above the provisions of Section 26 of the MPRDA.
- (b) The offsetting referred to in paragraph 2.1.4 (a) shall not exceed 11% irrespective of the formulae, methods and/or mechanisms identified.
- (c) A Holder claiming an offset pursuant to Beneficiation must meet the following criteria:
 - o The Holder must have, since 2004, in addition to section 26 requirements of the MPRDA, invested in Beneficiation;
 - o The activities that are deemed to be Beneficiation are in line with the baseline contemplated in the definition of Beneficiation in the MPRDA; and
 - o The Department of Mineral Resources must approve the proposed activities to ensure that such activities are in line with Beneficiation policies published by it from time to time.



- (d) Offsetting shall not apply to any Beneficiation project which existed post 2004 but which has since ceased to exist and or has been terminated.
- (e) Offsetting may only be claimed where the Holder's contribution to Beneficiation is still ongoing.

The processes and mechanisms that shall determine the offset of each mineral value chain, shall be provided for by the Minister, by way of *Government Gazette*, as envisioned in section 26 (2) of the MPRDA.

2.2 PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT

Leveraging maximum benefit from the Republic's mineral resources will require strengthening linkages between the mining and minerals industry and the broader economy. This element seeks to strengthen these linkages through procurement of South African Manufactured Goods and sourcing of Services from South African Based Companies. Procurement of South African Manufactured Goods and Services presents opportunities to expand economic growth that allows for the creation of decent jobs and widens the scope for market access of South African Manufactured Goods and Services. A Holder must identify what goods and services are available within the community where its mining operation takes place and, where feasible, give preference to suppliers within that community.

To achieve this, a Holder must identify all goods and services that will be required in its operations and must ensure that its procurement policies adhere to the following criteria:



Mining Goods

A Holder must spend a minimum of 70% of total mining goods procurement spend on South African Manufactured Goods. The abovementioned 70% of the total goods procurement spend shall be apportioned in the following manner:

- (a) A minimum of 21% of total mining goods procurement spend must be set aside for sourcing South African Manufactured Goods from Black Owned Companies;
- (b) A minimum of 5% of total mining goods procurement spend must be set aside for sourcing South African Manufactured Goods from Black Owned Companies with a minimum of 50%+1 vote female Black Person owned and controlled and/or 50% +1 vote Youth owned and controlled; and
- (c) A minimum of 44% of total mining goods procurement spend must be set aside for sourcing South African Manufactured Goods from BEE Compliant Manufacturing Companies.

Services

A minimum of 80% of the total spend on services must be sourced from South African Based Companies. The abovementioned 80% of the total services procurement spend shall be apportioned in the following manner:

- (a) A minimum of 65% of the total spend on services must be sourced from Black Owned Companies;
- (b) A minimum of 10% of the total spend on services must be sourced from Black Owned Companies with a minimum of 50%+1 vote female Black Person owned and controlled companies; and
- (c) A minimum of 5% of the total spend on services must be sourced from Black Owned Companies with a minimum of 50%+1 vote Youth owned and controlled companies.



Processing of samples

- (a) A Holder must utilise South African Based Companies for the analysis of 100% of all mineral samples across the mining value chain, except in cases where samples are analysed for the purpose of verification of the accuracy of local laboratories.
- (b) A Holder may not conduct sample analysis using foreign based facilities and/or companies without the prior written consent of the Minister.

Verification of local content


- (a) A Holder shall, when submitting the annual Mining Charter report contemplated in paragraph 2.9 to the Department of Mineral Resources, provide proof of local content for goods and services in the form of certification from the South African Bureau of Standards (SABS).
- (b) The responsibility to verify local content lies with the supplier of goods and/or services.

Contribution by Foreign Suppliers

A Foreign Supplier must contribute a minimum of 1% of its annual turnover generated from local mining company/ies towards the Mining Transformation and Development Agency.

2.3 EMPLOYMENT EQUITY

The purpose of the Employment Equity Act, 1998, (Act No. 55 of 1998) (EE Act) is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce.



Consistent with the EE Act, workplace diversity and equitable representation at all levels are catalysts for social cohesion, transformation and competitiveness within the mining and minerals industry. In order to create a conducive environment to ensure diversity as well as participation of Black Persons at all decision-making positions and core occupational categories in the mining and minerals industry, a Holder must employ a minimum threshold of Black Persons which is reflective of the Demographics of the country as follows:

Board

A minimum of 50% Black Persons with exercisable voting rights, 25% of which must be female Black Persons.

Executive/Top Management

A minimum of 50% Black Persons at the executive directors' level as a percentage of all executive directors, 25% of which must be female Black Persons.

Senior Management

A minimum of 60% Black Persons in senior management, 30% of which must be female Black Persons.

Middle Management level

A minimum of 75% of Black Persons in middle management, 38% of which must be female Black Persons.

Junior Management level

A minimum of 88% Black employees in junior management, 44% of which must be female Black Persons.

Employees with disabilities

A minimum of 3% employees with disabilities as a percentage of all employees, reflective of national and/or provincial Demographics.

Core and Critical skills

A Holder must ensure that a minimum of 60% Black Persons are represented in the Holder's Core and Critical Skills by diversifying its existing pools. Core and Critical Skills must include technical representation across all organisational levels. To achieve this, the Holder must identify and implement its existing pools in line with the approved SLP and such implementation must be reflective of the Demographics of the Republic.

Career progression (aligned with SLP)

A Holder must develop and implement a career progression plan consistent with the Demographics of the Republic by:

- (a) Developing career development matrices of each discipline (inclusive of minimum entry requirements and timeframes);
- (b) Developing individual development plans for employees;
- (c) Identifying a talent pool to be fast tracked in line with the needs; and
- (d) Providing a comprehensive plan with targets, timeframes and how the plan will be implemented.

The targets indicated under this element may change in order to address employment equity measures.

2.4 HUMAN RESOURCE DEVELOPMENT

The mining and minerals industry is knowledge based and thus hinges on human resource development which constitutes an integral part of social transformation in the workplace as well as sustainable growth. The objective is to improve the employment prospects of Black Persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education.



A Holder must invest 5% of the Leviaible amount on essential skills development. To achieve this objective, a Holder must invest the 5% in the following manner:

- (a) 2% on essential skills development activities such as artisanal training, bursaries, literacy and numeracy skills for employees and non-employees (community members);
- (b) The skilling referred to in paragraph (a) must be a representative of national and/or provincial demographics and must be biased towards low level employees;
- (c) 1% towards South African Historically Black Academic Institutions for research and development initiatives intended to develop solutions in exploration, mining, processing, technology efficiency (energy and water use in mining), Beneficiation as well as environmental conservation and rehabilitation. A Holder may make representations to the Minister for exemption from the 1% referred to in this paragraph (c) if the Holder has partnered and supported a State owned entity in respect of mining related research and development; and
- (d) 2% towards the Mining Transformation and Development Agency.

2.5 MINE COMMUNITY DEVELOPMENT

Mine Communities form an integral part of mining development, which requires a balance between mining and the Mine Community's socio-economic development. A Holder must meaningfully contribute towards the development of the Mine Community (with a bias towards communities where mining takes place) both in terms of impact, and also in keeping with the principles of the social license to operate.

Mine Community development projects referred to above must include infrastructure projects, income generating projects and enterprise development.



District, metropolitan, and local municipalities as constitutionally, mandated institutions for community development, have a responsibility to develop integrated development plans (IDP's) in consultation with all relevant stakeholders in a transparent and inclusive manner in terms of applicable legislation. A Holder must contribute towards Mine Community development by identifying priority project/s as per the approved IDP.

- (a) In this regard a Holder's contribution towards Mine Community development must be proportionate to the size of the investment.
- (b) A Holder must meaningfully contribute towards Mine Community development in terms of its approved SLP which is to be published in English and other languages commonly used within the Mine Community.
- (c) All project management and consultation fees incurred during the execution of Mine Community development projects shall be capped at 8% of the total budget.
- (d) Holders may collaborate on projects where more than one right Holder operates in the same area informed by their SLPs, which are aligned to the district, metropolitan and local municipality's IDP's for maximum socio- economic developmental impact.

2.6 SUSTAINABLE DEVELOPMENT AND GROWTH OF THE MINING AND MINERALS INDUSTRY

Mineral resources are non-renewable in nature. Accordingly, exploitation of such resources must emphasise the importance of balancing concomitant economic benefits with social and environmental needs without compromising future generations, in line with the provisions of the Constitution for ecologically sustainable development and use of natural resources. To this end, in consideration of clause 2.122.9 (reporting), a Holder must implement elements of sustainable development commitments included in the "Stakeholders' Declaration on Strategy for the sustainable growth and meaningful transformation of South



Africa's Mining Industry" of 30th June 2010, and in compliance with all relevant legislation, as follows:

2.6.1 Improvement of the industry's environmental management

In order to preserve and improve the environment, a Holder must comply with and implement environmental management systems that focus on continuous improvement to review, prevent and mitigate adverse environmental impacts in line with the environmental management plan approved in terms of the National Environmental Management Act 1998 (Act 107 of 1998) and its Regulations.

2.6.2 Improvement of the industry's health and safety performance

The stakeholders within the mining and minerals industry have committed themselves to the goal of zero harm. The key driver to achieve zero harm will be the implementation of the 2016 Occupational Health and Safety Summit Milestones and taking into consideration the following:

- (a) Implementing a management system focused on continuous improvement of all aspects of operations that have a significant impact on the health and safety of employees and communities where mining takes place;
- (b) Providing all employees with health and safety training; and
- (c) Implementing regular health surveillance and risk-based monitoring of employees.

The Holder must comply with the following milestones:

- (a) Elimination of occupational lung diseases in accordance with agreed timelines and taking into account occupational exposure limits;
- (b) Elimination of noise-induced hearing loss in accordance with agreed timelines and taking into account occupational exposure limits;
- (c) Prevention and management of tuberculosis and HIV/AIDS in accordance with agreed timelines;
- (d) Elimination of fatalities and injuries in accordance with agreed timelines; and



- (e) Implementing the approved Culture Transformation Framework pillars aimed at significantly improving the culture towards health and safety across the mining sector, in accordance with agreed timelines.

A Holder must further put in place a management system focused on continuous improvement of all aspects of operations that have a significant impact on the health and safety of employees, contractors and communities where mining takes place. A Holder must continue providing all employees with health and safety training and require employees of contractors to have undergone such training.

2.6.3 Research and Development Spend

- (a) Where a Holder intends to undertake research and development, the Holder must spend at least 70% of their research and development budget in the Republic.
- (b) 50% of the 70% indicated above must be spent on South African Historically Black Academic Institutions.

2.7 HOUSING AND LIVING CONDITIONS

Human dignity and privacy for mineworkers are still the hallmarks to enhance productivity and expedite transformation in the mining and minerals industry in terms of housing and living conditions. In this regard Holders must improve the standards of housing and living conditions for mine workers as stipulated in the Housing and Living Conditions Standards. The Housing and Living Conditions Standards provide for, amongst others, the following principles:

2.7.1 Principles of Housing Conditions

- Decent standards of housing;
- Centrality of home ownership;



- Provision for social, physical and economic integrated human settlements;
- Measures to address housing demand;
- Involvement of employees in the housing administrative system; and
- Secure tenure for the employees in housing institutions.

2.7.2 Principles of Working Conditions

- Proper health care services;
- Affordable, equitable and sustainable health system; and
- Proper nutrition requirements and standards.

A Holder shall further be required to submit a housing and living conditions plan which must be approved by the Department of Mineral Resources after consultation with the Department of Housing and organised labour and the Department of Human Settlement.

2.8 APPLICATION OF THE MINING CHARTER TO LICENCES GRANTED UNDER THE PRECIOUS METALS ACT, 2005 AND THE DIAMONDS ACT, 1986.

The Diamonds Act 1986 (Act 56 of 1986) and the Precious Metals Act 2005 (Act 37 of 2005) make provision for the South African Diamond and Precious Metals Regulator (as defined therein) to have regard to the requirements of this Mining Charter of 2017 when considering applications lodged in terms of those acts.



The targets and elements of the Mining Charter shall therefore apply to licenses under those Acts in line with the table below:

CATEGORY/SIZE OR CLASS	QUALIFYING CRITERIA	EXEMPT FROM THE FOLLOWING TARGETS	REQUIRED TO COMPLY WITH THE FOLLOWING TARGETS
Exempted Micro Enterprises (including students)	Estimated max turnover less than R1 Million.	Ownership	Sustainable Development and growth of the minerals industry.
		Human Resource Development	
		Procurement	
		Employment Equity	
		Mine Community Development	
Qualifying Small and Micro Enterprises (QSME's)	Estimated max turnover R1 Million to R3.8 Million.	Ownership	Employment Equity
		Mine Community Development	Human Resource Development
			Procurement and supplier and enterprise development.
			Sustainable Development and growth of the minerals industry.
			Ownership

Medium and Large Entities	Estimated max turnover greater than R3.8 million.	Mine Community Development	Employment Equity ²
			Human Resource Development ³
			Procurement and supplier and enterprise development
			Sustainable Development and growth of the minerals industry.

ELEMENTS OF THE MINING CHARTER APPLICABLE TO LICENSEES UNDER THE PRECIOUS METALS ACT, 2005 AND THE DIAMONDS ACT, 1986 AS AMENDED

2.8.1 OWNERSHIP

(a) In line with Government policies to encourage Beneficiation of the Republic's mineral resources, offsetting shall be permissible under the ownership element against the value of Beneficiation up to a maximum of 11% against the ownership target. As such the ownership target for the downstream diamonds and precious metals industry is a minimum of 19% in the hands of Black Persons per licensee to enable meaningful economic participation of Black Persons.

(b) The Black Person shareholding indicated above shall comprise of BEE Entrepreneurs and workers and must be 40% ownership of net value based upon the time based graduation factor.

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(c) Taking into account the extent of the exemption in terms of the above table, a permit or license holder in terms of the Precious Metals Act and the Diamonds Act is required to comply with all the relevant elements and targets as set out in this Mining Charter of 2017.

2.8.2 REPEAL OF PARAGRAPH 3 OF THE CODES OF GOOD PRACTICE FOR THE MINERALS INDUSTRY

Paragraph 3 of the *Codes of Good Practice for the Minerals Industry* published in *Government Gazette* No. 32167 of 29 April 2009 is hereby repealed.

2.9 REPORTING (MONITORING AND COMPLIANCE)

A Holder must report its level of compliance with this Mining Charter of 2017 annually, as provided for by Section 28 (2) (c) of the MPRDA. The Department shall monitor and evaluate the Holder's implementation of this Mining Charter of 2017, taking into account the impact of material constraints which may result in not achieving the set target.

The ownership, Mine Community development and human resources development elements are ring fenced and require 100% compliance at all times.

2.10 APPLICABILITY OF TARGETS

All targets stipulated in this Mining Charter of 2017 shall be applicable throughout the duration of a mining right (including prospecting and other exploration rights), unless a specific element specifies otherwise.

2.11 TRANSITIONAL ARRANGEMENTS

The following provisions shall only apply to existing Holders:

- (a) An existing mining right holder has a maximum of twelve (12) months to comply with the revised targets of this Mining Charter of 2017 from the date of publication of this Mining Charter of 2017. Save that the twelve (12) month period in relation to paragraph 2.1.1.3 (b) as read with paragraph 2.1.1.9, shall commence upon a date to be published by the Minister.
- (b) The Holder must align existing targets cumulatively from the Mining Charter of 2014 targets within the transitional period referred to above to meet the revised targets in line with the attached Scorecard.
- (c) The transitional arrangements period for the procurement element targets is three years. The Holder must within three (3) years from the date of publication of this reviewed Mining Charter of 2017, submit a three (3) year plan indicating progressive implementation of the provisions of this reviewed Mining Charter of 2017 insofar as they relate to procurement.
- (d) The transition period for the procurement target may upon request by the Holder be extended by a further two (2) years to allow the Holder sufficient time to develop the 50%+1 vote Black Owned Company suppliers in accordance with the procurement targets.
- (e) Compliance with procurement targets within the transitional period shall be as follows:
 - o The first year target is set at 15% of the 70%, second year target is set at 45% of the 70% and the third year target is set at 70%.
- (f) A Holder must comply with the Housing and Living Conditions Standards and ensure that it maintains single sex units and family units and any other agreement which has been reached with workers pending the finalisation of the Reviewed Housing and Living Conditions Standards.



(g) The Holder's performance shall be reported and audited against each element in respect of implementation for the applicable transitional period.

2.12 NON-COMPLIANCE

A Holder who has not complied with the ownership, Mine Community development and human resource development elements and falls between level 5 and 8 of the Scorecard will be regarded as non-compliant with the provisions of the Mining Charter and in breach of the MPRDA and will be dealt with in terms of section 93 read in conjunction with section 47, 98 and 99 of the MPRDA.

2.13 REVIEW OF THE CHARTER

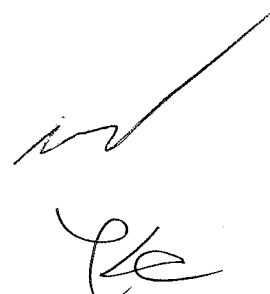
The Minister may, by notice in the *Government Gazette* review this Mining Charter.

2.14 REPEAL OF PREVIOUS MINING CHARTERS

This Charter repeals the 2004 and the 2010 Mining Charters.

2.15 INTERPRETATION OF THE MINING CHARTER

The Mining Charter shall be read and interpreted in conjunction with MPRDA and the BBBEE Act where words are not defined and a meaning thereof has been ascribed in the aforementioned legislation.



2.16 SCORECARD: MINING CHARTER REVIEW

Reviewed Mining Charter Scorecard	Weighting %
Ownership	Y/N
Human Resource Development	Y/N
Mine Community Development	Y/N
Procurement supplier & Enterprise Development	30%
Employment Equity	35%
Sustainable Development and growth	35%
Total	100%

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OWNERSHIP

Element Description	Measure	Compliance Target %	Weighting %
Minimum target for representation of Black people ownership.	ESOP's	30% BBBEE Ownership	Y/N (Ring-fenced element)
	BEE Entrepreneurs		
	Mine Community		

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HUMAN RESOURCE DEVELOPMENT

Element Description	Measure	Compliance Target %	Weighting %
<p>Development of requisite core and critical skills, literacy and numeracy and South African Historically Black Academic Institutions in respect of human resources development initiatives intended to develop solutions in exploration, mining, processing, technology efficiency, beneficiation as well as environmental conservation.</p> <p>HRD expenditure as percentage of total annual Leviable amount (excl. mandatory skills development levy)</p>	<p>Percentage of the total annual Leviable amount contributed to essential skills development activities</p>	<p>2%</p>	<p>Y/N (Ring-fenced element)</p>
	<p>Percentage of the total annual Leviable amount contributed to Mining, Transformation and Development Agency.</p>	<p>2%</p>	
	<p>Percentage of the total annual Leviable amount contributed to South African Historically Black Academic Institutions</p>	<p>1%</p>	

MINE COMMUNITY DEVELOPMENT

Element Description	Measure	Compliance Target %	Weighting %
<p>Implement locally approved community projects, which are aligned to the district, metropolitan and local municipality's IDPs of revenue projection for two and half years, applicable to a SLP's for five (5) years cycle.</p>	<p>Contribution towards mine community development must be proportionate to the size of the investment</p>		<p>Y/N (Ring-fenced element)</p>

PROCUREMENT SCORECARD

Element Description	Measure	Compliance Target %	Weighting %
<p>Goods Procurement: A minimum of 70% of the total mining goods procurement spend must be spent on South African manufactured goods must be sourced from a BEE compliant manufacturing companies. Calculation of goods and services spend does not include spend on buildings, roads, utilities (electricity and water) and land rates.</p>	<p>Percentage of the total mining goods procurement spend on South African manufactured goods from 50% + 1 vote Black owned and controlled companies.</p>	<p>21%</p>	<p>5%</p>
	<p>Percentage of the total goods procurement spend on South African manufactured goods from companies with a minimum of 50%+1 vote Black women owned and controlled and/or 50% +1 vote youth ownership;</p>	<p>5%</p>	<p>1%</p>
<p>Services Procurement: A minimum of 80% of the total spend on services must be sourced from South</p>	<p>Percentage of the total goods procurement spend on South African manufactured goods from companies that are at least at level 4 BEE +26% ownership</p>	<p>44%</p>	<p>9%</p>
	<p>Percentage of total spend on services from South African based services companies.</p>	<p>65%</p>	<p>5%</p>

<p>African based companies. The abovementioned 80% of the total services procurement spend shall be apportioned in the following manner.¹</p>	<p>Percentage of total spend on services from companies with a minimum of 50%+1 vote Black women owned and controlled companies.</p>	<p>10%</p>	<p>2%</p>
<p>Percentage of samples analyses using South African based facilities: Utilise South African based facilities for the analysis of mineral samples across the mining value chain except in cases where samples are analysed for the purpose of verification of the accuracy of local laboratories.</p>	<p>Percentage of total spend on services from companies with a minimum of 50%+1 vote youth owned and controlled companies.</p>	<p>5%</p>	<p>2%</p>
<p>Contribution by Foreign Suppliers Mining companies to submit supplier development plans.</p>	<p>Percentage of samples analysed using South African based facilities</p>	<p>100%</p>	<p>3%</p>
<p>Total</p>	<p>Percentage of annual turnover generated from local mining companies contributed towards the Mining Transformation and Development Agency</p>	<p>1%</p>	<p>3%</p>
<p>Total</p>			<p>30%</p>

EMPLOYMENT EQUITY

Element Description		Compliance Target %	Weighting %
Board:			
Africans	Coloureds	Indians	3%
Black Females as a percentage of all Board representatives			
Executive/ Top Management			
Africans	Coloureds	Indians	3%
Black Females as a percentage of all executive directors.			
Senior Management:			
Africans	Coloureds	Indians	4%
Black Females as a percentage of all senior managers.			
Middle Management:			
Africans	Coloureds	Indians	3%
Black Females as a percentage of all middle managers.			
Junior Management:			
Africans	Coloureds	Indians	1%

7

Black Females as a percentage of all junior managers.		44 %	3%
Employees with disabilities:			
Africans	Coloureds	Indians	2%
Core and Critical Skills:			
Africans	Coloureds	Indians	3%
Total		35%	

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SUSTAINABLE DEVELOPMENT

Element Description	Measure	Compliance Target %	Weighting %
Improve the industry's environmental compliance	Compliance with the approved Environmental Management Plans	100%	10%
A minimum of 70% of the right holder's research and development budget must be spent in South Africa	Percentage of research and development budget spent in South Africa	70%	3%
	Percentage of the research budget spent locally and spent on South African Historically Black Academic Institutions.	50%	2%
Total			15%

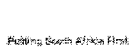
Element Description	Measure	Compliance Target %	Weighting %
	(a) Percentage of all exposure measurement results for respirable crystalline silica below the milestone	95%	1%
	(b) Percentage of all exposure measurement results for platinum dust respirable particulate below the milestone	95%	1%
	(c) Percentage of all exposure measurement results for coal dust respirable particulate below the milestone level	95%	1%
	(d) Tuberculosis incidence rate by 2024	Below National TB incident rate	2%

Elimination of Occupational Diseases	(e) Percentage of employees offered HIV Counselling and Testing (HCT) annually	100%	2%
	(f) Percentage of all eligible employees linked to an Anti-Retroviral Treatment (ART) programme	100%	2%
Elimination of Occupational fatalities and injuries	(a) Percentage annual reduction of fatalities	20%	7%
	(b) Percentage annual reduction of injuries	20%	3%
Culture Transformation Framework	(a) Culture Transformation Framework pillars aiming to significantly improve the culture towards Health and Safety across the mining sector, in accordance with agreed timelines	6 Pillars implemented	1%
	Total		20%

Annexure A

This annexure provides an alignment between the Dti BBEEE and DMR scorecard

Dti LEVELS	DMR LEVELS	DMR SCORECARD	3 Ring Fenced Elements + percentage weighting
Level 1	Level 1	3 Ring fenced Elements + 100%	
Level 2	Level 2	3 Ring fenced Elements + 80 -100%	
Level 3	Level 3	3 Ring fenced Elements + 70-80%	Compliant
Level 4	Level 4	3 Ring fenced Elements + 60-70%	
Ring fenced Elements 50-60% Ring fenced Elements 40-50% Ring fenced Elements 30-40% Ring fenced Elements 20-30% Ring fenced Elements 10-20% Ring fenced Elements 0-10% All Ring fenced Elements for the selected element score			



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IN THE NEWS

CAREER GUIDE

INITIATIVES

CONTACT

CHAMBER MISSION

THE CHAMBER COUNCIL

CHAMBER MANAGEMENT

OUR WORK

HISTORY

CHAMBER MEMBERS

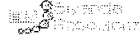
COMSA MEMBERS

These are mining companies in South Africa that identify themselves and members of the Chamber of Mines of South Africa.

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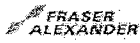
GLENCORE



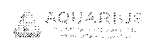
SHANDUKA



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Palabora Mining Company Limited



Putting South Africa First



HOME

ABOUT THE CHAMBER

INDUSTRY

MEDIA

CONTACT

MISSION
COUNCIL
MANAGEMENT
OUR WORK
HISTORY
CHAMBER MEMBERS

MINERALS IN SA
GOLD
COAL
PLATINUM

MEDIA RELEASES
PUBLICATIONS
FACTS AND FIGURES
IN THE MEDIA
PHOTO GALLERY

FACEBOOK
TWITTER
EMAIL

IN THE NEWS

CANCER GUARD

INITIATIVES

NEWSLETTER
SIGN UP

HEALTH SERVICES
SAFETY &
SUSTAINABILITY
THE LEARNING HUB
STAKEHOLDER FORUM

WEBMAB

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CONSTITUTION OF CHAMBER OF MINES OF SOUTH AFRICA

Name

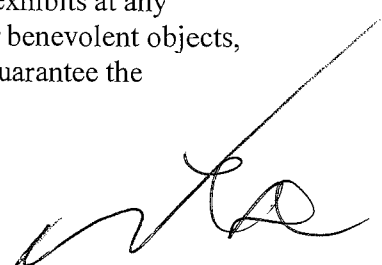
1. The name of the Organisation shall be CHAMBER OF MINES OF SOUTH AFRICA (hereinafter referred to as the "Chamber").

Status

2. The Chamber shall be a body corporate with perpetual succession capable of entering into contractual and other relations and of suing and being sued in its own name and shall be an association not for gain.

Objects and powers

3. The objects and powers of the Chamber shall be:
 - a. to advance, promote and protect the mining and other interests of its members; to consider, discuss and make recommendations on matters connected therewith or incidental thereto; to collect, circulate and publish information, and to investigate and conduct research into matters concerning its members, their interests or activities; to represent its members and to act on their behalf or as their agent in matters affecting their common interests; and to assist technically, financially or otherwise in the prosecution or defence of actions involving questions the decision whereof is likely to affect the common interests of its members;
 - b. to regulate relations between its members and their employees; to represent its members and act on their behalf in matters connected with the regulation of such relations; to negotiate and conclude, on behalf of its members, agreements with any or all of their employees, or with any association, associations, trade union or trade unions representing any or all of such employees, relating to wages or other conditions of employment; to represent its members and act on their behalf in industrial disputes in which they or any of them are concerned and in all matters arising under or in connection with industrial legislation affecting them;
 - c. to petition or make representations or submit evidence to the President, Parliament, any Premier of a Province, any Provincial Legislature, any Municipality, any other legislative or administrative body or any commission on matters concerning its members, their interests or activities and to promote or oppose legislative measures affecting them;
 - d. to form, or participate in the formation of, and to support, or grant subsidies to associations, institutions, companies, committees and other organizations or bodies associated or connected with the mining industry or calculated to benefit the industry, gratuity funds, provident and pension funds, and medical aid and sick benefit funds for the benefit, wholly or partly, of persons employed in the mining industry; to provide scholarships and endowments; to provide facilities for the training in first aid, rescue operations and safety, of persons employed in the mining industry; to establish and maintain a mining exhibit or exhibits at any exhibition or public show; to subscribe money for charitable or benevolent objects, for exhibitions or for public, general or useful objects; and to guarantee the



- payment of the liabilities or the fulfilment of the contracts or undertakings of any person, company, association or institution;
- e. to examine and report upon applications for patents or other monopolies which affect or may affect the interests of its members; to promote or oppose such applications and to acquire, hold and dispose of any patents or other monopolies for the purposes of the Chamber;
 - f. to establish, or participate in the establishment of pension, gratuity, medical aid or sick funds for the benefit, wholly or partly of the Chamber's employees and to contribute to any such fund;
 - g. to acquire and hold, to improve, sell, lend, let, hire, mortgage, donate, dispose of or deal in any other way with any property, movable or immovable, for the purposes of the Chamber;
 - h. to invest or lend any moneys of the Chamber with or without security and on such terms and conditions as may be decided from time to time and to realize or vary any such investment or loan;
 - i. to borrow or raise moneys for the purposes of the Chamber, whether by means of debenture bonds, mortgages or otherwise howsoever and to pledge as security for the repayment of such moneys all or any of the property or assets of the Chamber;
 - j. to open and operate a banking account and to make, draw, accept, endorse, discount, execute, issue or otherwise dispose of bills of exchange, promissory notes, bills of lading and other negotiable or transferable instruments or securities;
 - k. to employ or appoint and remunerate attorneys, advisers, agents and other persons for the purposes of the Chamber;
 - l. to establish and maintain a library and museum embracing collections of books and articles of interest to its members;
 - m. to act as secretaries or managers of associations, institutions, funds, companies, committees and other organizations or bodies associated or connected with the mining industry and to charge fees for so acting; and
 - n. generally to do all such other things as are necessary, conducive or incidental to the attainment of the above objects.

Membership

4. The following may be admitted as ordinary members of the Chamber:
 - a. any company registered in South Africa in accordance with the prevailing South African legislation and engaged in the Republic of South Africa in the business of mining;
 - b. any company registered in South Africa in accordance with the prevailing South African legislation and engaged in the Republic of South Africa in the business of promoting or financing mining ventures or in the business of providing administrative, secretarial, technical or other services to companies engaged in the business of mining;
 - c. any company registered in South Africa in accordance with the prevailing South African legislation and engaged in the Republic of South Africa in the business of extracting any mineral (as defined in the prevailing South African legislation regulating the extraction of minerals) from any tailings, slimes, waste rock or other residues produced in the course of mining if such company is provided with



- administrative, secretarial, technical or other services by a member of the Chamber; and
- d. any association whose members include a significant number of companies contemplated in paragraph (a), (b) or (c) of this Article 4.

For the purposes of this Article "mining" means the operation of any mine as defined in the prevailing South African legislation regulating the extraction of minerals.

5. Any company desirous of becoming an ordinary member of the Chamber shall lodge with the Chief Executive a written application to the Council for admission as such; and, for the purposes of the application, the company concerned shall provide the Council with the company's full name or names and registered address and such further information as the Council may require. The application shall be considered at the next ordinary meeting of the Council or, if the President so directs, at a special meeting of the Council convened for the purpose and the Council shall then decide whether or not the applicant shall be admitted and the terms and conditions upon which it shall be admitted which shall not be subject to review in terms of this Article; provided that such an application, if received less than fourteen days before the next ordinary meeting of the Council, shall be considered at that meeting, or at the meeting following, as the President may direct.

After the meeting of the Council at which such an application is considered, the applicant shall be notified, in writing, by the Chief Executive whether or not the applicant has been admitted and of the terms and conditions imposed by the Council. If within thirty days of the date of a notification from the Chief Executive that an application for admission as an ordinary member has been refused, the applicant lodges with the Chief Executive a request, in writing, that the Council's decision be reviewed by the Chamber, in general meeting, the application shall be considered at the next annual general meeting of the Chamber, or if the Council so decides, at a special general meeting of the Chamber convened for the purpose; and if the meeting then decides to admit the applicant by a two-thirds majority of the representatives present and entitled to vote, the applicant shall be admitted to ordinary membership, but not otherwise.

6. Any person may be elected by the Council, on such terms and conditions as the Council may decide, as an honorary member of the Chamber.
7. The liability of ordinary members shall be limited to the amount, if any, payable by way of subscription or otherwise to the Chamber by such members. Any such liability may be waived in whole or in part by resolution of the Council on behalf of the Chamber.
8. The Council may establish two or more classes of ordinary members according to the nature or extent of the business carried on by members of the Chamber or according to any other criterion as may be determined by the Council and in such event the Council shall allocate every ordinary member to one or more of such classes. In making such allocation the Council shall be guided, but not bound, by the member's principal business or businesses. The Council may at any time re-allocate an ordinary member to any class or classes.

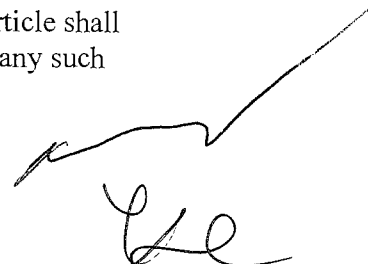


Appointment of representatives

9. Within fourteen days of admission to membership of the Chamber, each ordinary member shall appoint a representative, by notice, in writing, lodged with the Chief Executive. Such notice shall contain the full names, occupation and address of the representative concerned.
10. An ordinary member may, at any time, appoint an alternate representative, by notice, in writing, lodged with the Chief Executive. Such notice shall contain the full names, occupation and address of the alternate representative concerned.
11. An ordinary member may withdraw the appointment of a representative or alternate representative, by notice in writing, lodged with the Chief Executive and, in the case of the withdrawal of the appointment of an alternate representative, may then or at any time thereafter appoint, in the manner prescribed by Article 10, another in such alternate representative's place. If the appointment of a representative is so withdrawn or if a representative ceases for any other reason, to be such, the ordinary member concerned shall appoint, within fourteen days thereafter and in the manner prescribed by Article 8, another in such representative's place.
12. The representative or alternate representative of an ordinary member shall cease to be such:
 - a. if such representative or alternate representative resigns;
 - b. if the member who appointed such representative or alternate representative withdraws the relevant appointment; or
 - c. if the member who appointed such representative or alternate representative ceases to be a member.

General provisions applicable to members

13. Six months' notice in writing (or such lesser period of notice as may be allowed by resolution of the Council) shall be given to the Chief Executive of any ordinary member's intention to withdraw from the Chamber. Upon expiry of the financial year of the Chamber in which the period of such notice expires, the member concerned shall cease to be a member.
14. Any ordinary member who ceases to be eligible, in terms of Article 4, for ordinary membership, shall withdraw from the Chamber within three months of ceasing to be eligible for membership. One month's notice, in writing, shall be given to the Chief Executive of such member's intention so to withdraw from the Chamber, and, upon the expiry of the notice, the member concerned shall cease to be a member. Any member who, having ceased to be eligible for ordinary membership, does not so withdraw from the Chamber may be excluded from the Chamber by resolution of the Council and shall thereupon cease to be a member.
15. Any member who, having been given notice, in writing, by the Chief Executive of the amount of any subscription due by such member and of the date on which such subscription is payable, fails to pay the amount concerned within six months of that date, may be excluded from the Chamber by resolution of the Council and shall thereupon cease to be a member; provided that the provisions of this Article shall not apply to any ordinary member who has failed to pay the amount of any such

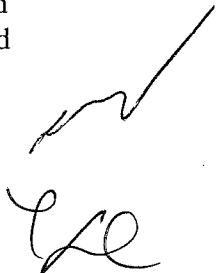


subscription by reason of the fact that a request, lodged in terms of Article 72, that the basis on which such subscription has been calculated or the amount of such subscription, be reviewed, has not yet been considered and disposed of by the Chamber in general meeting.

16. Any member who has been placed in liquidation or is under judicial management, may be excluded from the Chamber by resolution of the Council and shall thereupon cease to be a member.
17. Any member who has infringed the provisions of these Articles or of any by-laws passed in terms of Article 32, or being, in the opinion of the Council, guilty of any practice or proceeding likely to bring discredit upon the Chamber, may be excluded from the Chamber by resolution of the Council.
18. Any member who has been excluded from the Chamber by resolution of the Council, in terms of Articles 14, 15, 16 or 17, shall be notified immediately by the Chief Executive, in writing, of the Council's decision and the ground, with such particularity as the Chairperson shall decide, on which such member has been excluded.
19. If a member who has been excluded from the Chamber by resolution of the Council, in terms of Article 17 lodges, with the Chief Executive, within fourteen days of the date of the notification referred to in Article 18, a request, in writing, that the decision of the Council be reviewed by the Chamber, in general meeting, the matter shall be considered at the next annual general meeting of the Chamber or, if the Council so decides, at a special general meeting of the Chamber convened for the purpose; and the member concerned shall not be excluded from the Chamber if the meeting then decides accordingly by a majority of not less than two-thirds of the representatives present and entitled to vote. Unless it is so decided that the member concerned shall not be excluded from the Chamber, such member shall cease to be a member at the conclusion of the meeting. If such a written request that the Council's decision to exclude a member, in terms of Article 17, be so reviewed, is not received by the Chief Executive within fourteen days of the date of the notification referred to in Article 18, the member concerned shall thereupon cease to be a member.
20. Cessation of membership in terms of these Articles shall not release the member concerned from liability for any subscription or other amount due by the member to the Chamber or from any other obligation to the Chamber.

Register of members

21. There shall be kept a register of members in which there shall be recorded:
 - a. the full name or names and the address of each member and a statement whether the member is an ordinary member or an honorary member;
 - b. the full names of the representative and alternate representative, if any, of each ordinary member; and
 - c. the date on which each member is admitted to membership of the Chamber, the class or classes to which each ordinary member has been allocated or re-allocated in terms of Article 8 together with the date of such allocation or re-allocation, and the date on which any member ceases to be a member and the reason therefor.



Constitution and powers of the Council

22. There shall be a Council of the Chamber which shall consist of such number of persons as may be determined from time to time at a general meeting of the Chamber.
23. The members of the Council shall be elected at each annual general meeting of the Chamber by the representatives of ordinary members present and entitled to vote. Each member of the Council shall hold office until the next annual general meeting after such member's election when such member shall retire but be eligible for re-election. Each candidate for election to the Council other than a retiring member shall be nominated by the representative of an ordinary member and such nomination shall be lodged with the Chief Executive at least fourteen days prior to the date on which the election is to take place. The representatives of ordinary members shall be the only persons eligible for election to the Council. Notwithstanding anything to the contrary contained in this Article, the Chief Executive appointed in terms of Article 70 shall ex officio be a member of the Council. Article 29 shall not apply to such ex officio membership.
24. The President shall be the Chairperson of the Council and shall take the chair at all meetings of the Council. If the President is not present at any such meeting the members present shall elect one of their number to be Chairperson of that meeting.
25. Any member of the Council shall have the power at any time to appoint, by notice in writing to the Chief Executive, any person to act as alternate member in such member's place at any meeting of the Council at which such member shall not be present and to act on such member's behalf for the purpose of signing any resolution contemplated in Article 31. Any alternate member so appointed shall, whilst so acting in the place of a member of the Council, hold office as a member of the Council. The appointment of any alternate member by the President shall not entitle the person so appointed to act as Chairperson at any meeting of the Council and the Chairperson of such meeting shall be elected in accordance with Article 24. If a member who appointed an alternate member ceases to be a member of the Council or gives notice in writing to the Chief Executive of the withdrawal of the appointment of such alternate member, the appointment of such alternate member shall cease.
26. Half of the number of members of the Council from time to time (and if half the number equals a fraction, it must be rounded up to the next round number) plus one, or such other number of members of the Council as may be determined from time to time at a general meeting of the Chamber shall form a quorum at any meeting of the Council.
27. The Council shall meet as soon as practicable after each annual general meeting of the Chamber and thereafter shall meet at least once every three months on such dates and at such times as may be determined by the Council. At least three days' notice in writing of each meeting of the Council or such shorter period of notice as the President or the Council itself may decide shall be given to members thereof by the Chief Executive provided that such shorter period of notice, if given, shall not be



less than is reasonably necessary to permit the members to attend the meeting concerned.

The President may convene a meeting of the Council at any time and the Chief Executive shall convene a meeting of the Council if requested in writing to do so by at least five members thereof. The Council may act notwithstanding any vacancy or vacancies in its number, but if and so long as the number of continuing members of the Council is reduced below the number fixed as the quorum, such continuing members of the Council may act for the purpose of increasing the number of members to that number, but for no other purpose.

Notwithstanding Articles 22 and 23, the Council may at any time and from time to time in its discretion, appoint any representative of an ordinary member as an additional member of the Council. Each member so appointed to the Council shall hold office until the next annual general meeting after such member's appointment when such member shall retire but be eligible for re-election or re-appointment.

The Council may at any time co-opt the services of the representative or the alternate representative of any ordinary member to such extent and for such purposes as the Council may decide. Such a representative or alternate representative may attend, by invitation, any meeting of the Council and may take part in discussion, but may not vote.

28. The Council shall have power to appoint at any time a representative of an ordinary member to fill a casual vacancy in the Council. Any representative so appointed shall hold office as a member of the Council until the next annual general meeting of the Chamber when such representative shall retire but shall then be eligible for re-election.
29. If a member of the Council resigns by giving notice in writing to the Chief Executive of such resignation or if a member of the Council ceases to be a representative of an ordinary member, such member shall cease to hold office as a member of the Council. A member of the Council may be removed from office by the President upon being absent without leave of absence from three consecutive meetings of the Council.
30. At any meeting of the Council a decision shall be taken by a majority of the members present voting by a show of hands. The Chairperson shall have a deliberative vote but no casting vote. The conduct of a meeting of the Council shall be the responsibility of the Chairperson who, subject to the provisions of these Articles, shall determine the procedure to be followed at the meeting.
31. A resolution in writing signed by members of the Council and being not fewer in number than are sufficient to form a quorum shall be as valid as if it had been passed at a meeting of the Council duly called and constituted. Such resolution may consist of several documents in like form each signed by one or more members of the Council or may consist of an electronic communication containing the resolution sent to a member's e-mail address and with that member's electronic response of approval having been received by the Chamber.

A handwritten signature in black ink, consisting of a stylized, cursive script that appears to be the initials 'LQ' or similar, with a long horizontal stroke extending to the left.

32. The general administration and management of the Chamber shall be vested in the Council which in addition to the powers expressly conferred upon it by these Articles may exercise all such powers and do all such acts and things in the name of and on behalf of the Chamber as may be exercised or done by the Chamber.

Without prejudice to its general powers or to the powers, acts and things which by these Articles it may exercise or is required to do, the Council shall have power:

- a. to enter into such contracts in the name and on behalf of the Chamber as it thinks expedient for the purpose of the Chamber;
- b. to pass by-laws for the regulation of the business of the Chamber not inconsistent with the provisions of these Articles or of any law;
- c. to appoint at such remuneration and on such terms as the Council may decide and to remove employees or agents of the Chamber;
- d. to acquire and hold, to improve, sell, rent, let, hire, mortgage, donate, dispose of or deal with in any other way, any property, movable or immovable for the purposes of the Chamber;
- e. to determine and change at its discretion, the place at which the head office of the Chamber shall be situated;
- f. to appoint representatives on any bargaining or statutory council in which the Chamber or any member is concerned;
- g. to institute, conduct, defend, compound or abandon any proceedings by or against the Chamber in any court of law or before any arbitrator, wage board or other body constituted according to law and, without prejudice to any other provision contained herein, to recover by legal proceedings or otherwise any amount due to the Chamber;
- h. to appoint sub-committees to act in an advisory and/or specialist capacity and any other standing committees, ad-hoc committees or ad-hoc working parties which the Council in its discretion deems necessary, and to regulate the number of such committees or working parties, the nature of the business to be conducted by each of them and their composition, to establish procedural rules and guidelines to be followed by them, and for the purposes of any such appointment, to authorize the co-option of the services of any person; and
- i. to delegate any of its functions or powers to any member of the Council or to any principal committee established by the Council, or to any employee of the Chamber upon such terms and conditions as the Council may decide.

President and vice-presidents

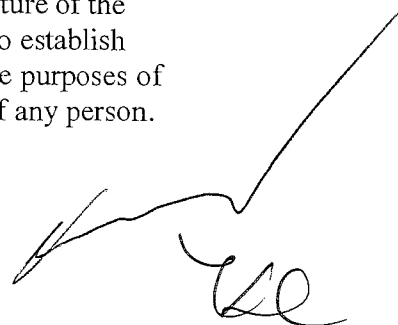
33. At each annual general meeting one of the members of the Council then elected in terms of Article 23 shall be elected President and one representative of an ordinary member (whether or not a member of the Council) shall be elected Vice-President of the Chamber by the representatives of ordinary members present at the meeting and entitled to vote. Such representatives of ordinary members may, in addition, elect one or more than one Vice-President from the representatives of ordinary members (whether or not members of the Council). The President and any Vice-President so elected shall hold office until the next annual general meeting when they shall retire, but shall be eligible for re-election.



34. If the President or any Vice-President resigns from that office or ceases to be a representative of an ordinary member, such President or Vice-President shall cease to hold office as such.
35. Any President, Vice-President or member of the Council who, in the opinion of the Council, is guilty of any practice or proceeding likely to bring discredit upon the Chamber, may be removed from office by resolution of the Council. The provisions of Articles 18 and 19 shall apply, mutatis mutandis, for the purpose of an appeal to the Chamber in general meeting against the decision of the Council.
36. If the office of the President or a Vice-President becomes vacant for any reason such vacancy shall be filled for the unexpired term of the current period of office by the Council, or, if the Council so decides, at a special general meeting of the Chamber convened for the purpose.

Constitution and powers of the Council

37. The Council may establish one or more principal committees of the Chamber specifically to promote the interests of and to deal with matters concerning any class of members established by the Council in terms of Article 8. Every principal committee shall consist of such number of members as the Council shall determine, who shall be appointed by the Council from the representatives of members of the class for which the principal committee has been established. Each member of a principal committee shall hold office until the first meeting of the Council held after the annual general meeting next following the appointment of such member. The Council shall appoint a member of each principal committee as Chairperson and shall fix a quorum for each such committee. If the Chairperson of a principal committee is not present at a meeting of the committee, the members present shall elect one of their number to be Chairperson of that meeting.
38. Subject to the direction and control of the Council every principal committee appointed by the Council shall be empowered to deal with all matters concerning members of the Chamber of the class in respect of which the committee was appointed and with all matters arising within the mining industry which affect their interests and to that end may exercise all such powers and do all such acts and things in the name and on behalf of the Chamber as may be done by the Chamber by virtue of paragraphs (a), (b), (c), (d), (e) and (n) of Article 3; and, without prejudice to such general powers and such further powers that may be delegated to it by the Council, a principal committee shall have power:
 - a. to appoint representatives on any bargaining or statutory council in which any member of the class for which the committee has been established or the Chamber acting on behalf of any or all of such members, is concerned; and
 - b. to appoint sub-committees to act in an advisory and/or specialist capacity, and any other standing committees, ad-hoc committees, or ad-hoc working parties which such principal committee may in its discretion deem necessary, and to regulate the number of such committees or working parties, the nature of the business to be conducted by each of them and their composition, to establish procedural rules and guidelines to be followed by them, and for the purposes of any such appointment, to authorize the co-option of the services of any person.

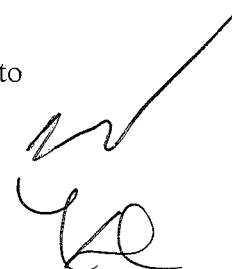


Transitional provisions

39. (Deleted)

General provisions applicable to committees

40. Every principal committee shall each meet at least once every three months on such dates and at such times as shall be decided by the committee concerned. All matters on which a decision has to be taken at any meeting of any such committee (including the election of Chairperson where necessary) shall be decided by the majority of members present voting by a show of hands.
41. The Chairperson of a meeting of a principal committee shall have a deliberative vote but not a casting vote.
42. Subject to the provisions of Article 44 any principal committee of the Chamber may make such regulations as it thinks appropriate as to the summoning and holding of its meetings and the transaction of business thereat; provided that the Chairperson of such committee may convene a special meeting of such committee at any time. No business may be transacted at any meeting of any such committee unless a quorum is present. Each such committee may also at any time co-opt the services of the representative or the alternate representative of any ordinary member to such extent and for such purposes as the committee concerned may decide. Such a representative or alternate representative may attend by invitation any meeting of the committee by which such representative or alternate representative was co-opted and may take part in discussion but may not vote.
43. Any member of any principal committee shall have the power at any time to appoint, by notice in writing to the Chief Executive, any person to act as alternate member in such member's place at any meeting of the committee concerned at which such member shall not be present and to act on such member's behalf for the purpose of signing any resolution contemplated in Article 47. Any alternate member so appointed shall, whilst so acting in the place of a member of any principal committee, hold office as a member of the committee concerned. The appointment of any alternate member by the Chairperson of any principal committee shall not entitle the person so appointed to act as Chairperson at any meeting of the committee concerned and the Chairperson of such meeting shall be elected in accordance with Article 37. If a member who appointed an alternate member ceases to be a member of the committee concerned or gives notice in writing to the Chief Executive of the withdrawal of the appointment of such alternate member, the appointment of such alternate member shall cease.
44. At least three days' notice in writing of each meeting of a principal committee or such shorter period of notice as the Chairperson of the committee concerned, or the committee itself shall decide, shall be given to the members thereof by the Chief Executive, provided that such shorter period of notice, if given, shall not be less than is reasonably necessary to permit the members to attend the meeting concerned.
45. The Council shall have power to appoint at any time a member of the Council or a representative of an ordinary member in the appropriate class, as the case may be, to



fill a casual vacancy in a principal committee or as an additional member of a principal committee. Any person so appointed shall hold office as a member of the committee concerned until the first meeting of the Council held after the annual general meeting next following such person's appointment.

46. The Chairperson of any meeting of a principal committee shall be responsible for the conduct of the meeting and shall, subject to the provisions of these Articles, determine the procedure to be followed at the meeting.
47. A resolution in writing signed by members of a principal committee and being not fewer in number than are sufficient to form a quorum shall be as valid as if it had been passed at a meeting of the committee concerned duly called and constituted. Such resolution may consist of several documents in like form each signed by one or more members of the committee concerned or may consist of an electronic communication containing the resolution sent to a member's e-mail address and with that member's electronic response of approval having been received by the Chamber.
48. A member of a principal committee shall be entitled to resign at any time from membership of the committee concerned upon written notice to the Chief Executive.
49. A member of a principal committee shall cease to hold office as a member of the committee concerned:
 - a. upon resignation;
 - b. upon ceasing to hold the qualification necessary in terms of these Articles for appointment to the committee concerned; or
 - c. upon being absent without leave of absence duly granted by the relevant committee concerned from three consecutive meetings of the committee concerned.

Annual general meetings

50. The annual general meeting of the Chamber shall be held in each calendar year before the first day of December, on such day and at such time and place as the Council shall decide. The Chief Executive shall give at least thirty days' notice, in writing, of such meeting to each member.
51. At each annual general meeting the Chairperson shall review the activities of the Chamber and refer to any other matters which the Chairperson considers to be relevant to the occasion and the Council shall submit an audited statement of income and expenditure for the past financial year, an audited balance sheet as at the date to which such statement is made up, and the report of the Chamber's auditors thereon.
52. At least fourteen days before the date for which each annual general meeting is originally called, the Chief Executive shall send to each member true copies of the audited statement of income and expenditure, the audited balance sheet and the report of the Chamber's auditor or auditors thereon, which are to be submitted to the meeting in terms of Article 51.

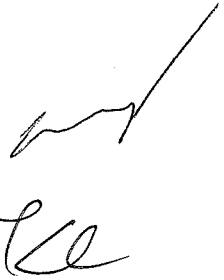


Special general meetings

53. The Council may convene a special general meeting of the Chamber, at any time, for the consideration of special business and shall do so within thirty days of the date on which a request, in writing, by the representatives of at least seven ordinary members, that a special general meeting be convened, is lodged with the Chief Executive. Subject to the provisions of Articles 89 and 90, the Chief Executive shall give to each member at least seven days' notice, in writing, of each special general meeting or such shorter period of notice as the Council may decide; provided such shorter period of notice, if given, shall not be less than is reasonably necessary to permit the representatives of members to attend the meeting concerned.

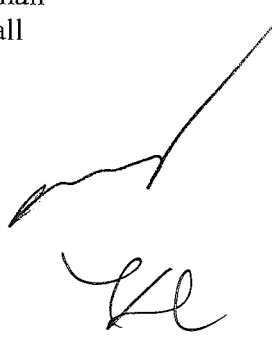
General provisions applicable to general meetings

54. Each ordinary member shall be represented at general meetings of the Chamber by the representative of such member or, in the absence of such representative, by the alternate representative of such member, duly appointed in terms of these Articles.
55. An honorary member may be present, in person, at general meetings of the Chamber.
56. The representative or, in the absence of such representative, the alternate representative of any ordinary member, and any honorary member shall be entitled to take part in the discussions at all general meetings of the Chamber. If the representative of an ordinary member is present at any general meeting, the alternate representative of that member may also be present and may take part in the discussions, but shall not vote at the meeting on behalf of the member concerned. An alternate representative of an ordinary member, while acting in the place of the representative of that member, shall exercise all the duties, powers and functions of such representative.
57. Any person who has been invited by the Council to be present and take part in the discussion at any general meeting, may do so, but shall have no right of voting.
58. The President shall take the Chair at all general meetings of the Chamber. If the President is not present at any general meeting, the representatives of ordinary members present and entitled to vote shall elect one or other of the Vice-Presidents to be Chairperson of that meeting. If neither the President nor a Vice-President is present at a general meeting, the representatives of ordinary members present and entitled to vote shall elect one of their number to be Chairperson of the meeting. The Chairperson of a general meeting shall be responsible for the conduct of the meeting.
59. The representatives of such number of ordinary members as is equal to the quorum requirement for meetings of the Council as contemplated in article 26 shall form a quorum at any general meeting of the Chamber. If a quorum is not present ten minutes after the time for which any such meeting is called, the meeting shall stand adjourned until the same day in the next week at the same time and place, or if such day is a public holiday, until the day following, and the representatives then present shall constitute a quorum and may transact the business for which the meeting was originally called.



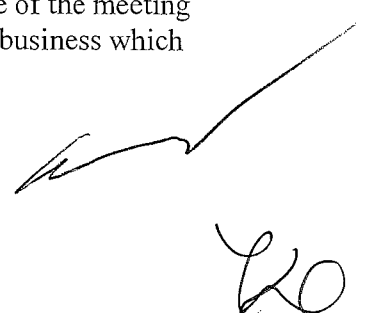
60. If any ordinary member, having been given notice, in writing, by the Chief Executive of the amount of any subscription due by such member and the date on which such subscription is payable, has failed to pay the amount concerned within six months of that date and the subscription is still outstanding on the date for which any general meeting of the Chamber is originally called, the representative of that member shall not be entitled to be present at or take part in the proceedings of the meeting or any adjournment thereof nor to vote thereat; provided that the provisions of this Article shall not apply to any representative of any ordinary member who has failed to pay the amount of any such subscription by reason of the fact that a request, lodged in terms of Article 72, that the basis on which such subscription has been calculated or the amount of such subscription be reviewed, has not yet been considered and disposed of by the Chamber in general meeting.
61. If any member has been excluded from the Chamber by resolution of the Council in terms of Articles 14, 15, 16 or 17, neither the member concerned nor any representative of that member shall be entitled to be present at or to take part in the proceedings of any general meeting of the Chamber or any adjournment thereof or, in the case of an ordinary member, to vote thereat, except for the purposes of the review of such member's exclusion in terms of Article 19. 62. The representative or, in the absence of such representative, the alternate representative of each ordinary member present at a general meeting shall be entitled on a show of hands, to one vote on behalf of the member concerned. On a ballot other than a ballot on a lock-out referred to in Article 67, the representative or, in the absence of such representative, the alternate representative of each ordinary member present at a general meeting shall be entitled, on behalf of the member concerned, to one vote in respect of each one hundred rand (R100) or part thereof paid by such member by way of subscription in respect of the immediately preceding financial year, provided that such representative or, in the absence of such representative, such alternate representative shall be entitled to at least one vote.
62. An honorary member shall not be entitled to vote any general meeting of the Chamber.
63. All matters on which a decision has to be taken at any general meeting (including the election of Chairperson, where necessary, the election of the President and the Vice-Presidents, and the election of members of the Council) shall be decided on a show of hands, unless a ballot is required to be taken by virtue of this or any other Article, and, unless a ballot is so required to be taken, a declaration by the Chairperson that a resolution has or has not been carried, on a show of hands, shall be final.

At any general meeting, the Chairperson or the representatives of seven ordinary members present and entitled to vote may demand a ballot on any matter, on which a decision has to be taken either before or on a declaration of the result of a show of hands, except on the matter of the election of a Chairperson or of the appointment of scrutineers or of the adjournment of the meeting. If a ballot is so demanded, it shall be taken at once or at such other time during the meeting as the Chairperson shall decide.



A ballot which is required to be taken by virtue of this or any other Article, shall be conducted in accordance with and shall be governed by the following provisions:

- a. two scrutineers shall be appointed by the Chairperson to supervise the taking of the ballot at the meeting;
 - b. the representative of each ordinary member present at the meeting shall be given, in the presence of the scrutineers, one ballot paper which such representative shall thereupon complete, fold and deposit in a container provided for the purpose;
 - c. a ballot paper shall not be endorsed or marked in any way apart from any endorsement required to show the number of votes to which a representative is entitled and the mark or marks required to be made by a representative in recording such representative's vote or votes. Papers bearing any other endorsements or marks shall be regarded as spoiled and shall not be counted;
 - d. on completion of the taking of the ballot the result of the voting thereat shall be ascertained by the scrutineers and communicated to the Chairperson, by whom the outcome of the ballot shall be declared to the meeting;
 - e. in computing the majority on a ballot, regard shall be had to the number of votes to which the representative of each ordinary member present at the meeting is entitled;
 - f. for the purposes of ascertaining the representatives who are entitled to vote, on a ballot, at any general meeting and the votes to which they are or any of them is entitled, the scrutineers shall have a right of access to the register of members and to the books of account and other records of the Chamber;
 - g. for the purposes of enabling the scrutineers to ascertain the result of the voting at any ballot and to communicate such result to the Chairperson, the Chairperson may adjourn the meeting and shall fix a place, date and time for such adjourned meeting, in which case the outcome of the ballot shall be declared at such adjourned meeting;
 - h. the result of a ballot shall be deemed to be the decision of the meeting at which the ballot was required to be taken on the matter concerned;
 - i. a demand for a ballot shall not prevent the continuance of the meeting for the transaction of any business, other than the matter on which the ballot was demanded;
 - j. the decision of the Chairperson on any matter arising in connection with the taking of a ballot shall be final.
64. At the instance and on the direction of the Chairperson of any general meeting of the Chamber, any question which, in the opinion of the Chairperson, directly affects one class of ordinary members shall be dealt with, at the meeting, by the representatives present of the ordinary members within the class affected and entitled to vote and, for such purpose, the Chairperson shall confine the proceedings on the question concerned at the meeting to the representatives of that class; and all the provisions of these Articles shall apply, mutatis mutandis, for the purpose of ascertaining the decision of such class on that question.
65. Members wishing to bring business before the Chamber at any annual general meeting shall lodge notice in writing, with the Chief Executive of intention to move the discussion of such business, at least fourteen days before the date of the meeting at which such business is proposed to be brought forward. The only business which

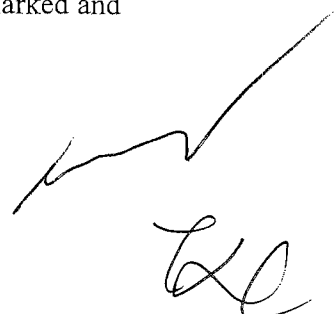


shall be dealt with at a special general meeting shall be the business for the consideration of which the meeting was convened.

66. The Chairperson of a general meeting, may, with the consent of the meeting, adjourn the same from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

Ballots on lock-outs

67. A ballot shall be taken on a proposal by any ordinary member that the Chamber should call a lock-out as defined in the Labour Relations Act, No. 66 of 1995, or any law in substitution thereof. Such ballot shall be a ballot of those ordinary members of the Chamber in respect of whom it is intended to call the lock-out. Should the President, or in the absence of the President, one of the Vice-Presidents, decide that the proposal shall be considered at a general meeting of the Chamber, the ballot thereon shall be conducted in accordance with the provisions of Article 63; provided that the representative or, in the absence of such representative, the alternate representative of each such ordinary member present and entitled to vote shall have only one vote and the proposal shall be deemed to have been carried if a majority of all the members concerned have voted in favour of it.
68. In the event that it is decided that a proposal referred to in Article 67 should not be considered at a general meeting, the following procedure shall apply:
- a. the Chief Executive shall forthwith submit the proposal to the Council, which shall determine which members or class or classes of members are directly affected by the proposal. Voting in the ballot shall be confined to such members or class or classes of members;
 - b. after the Council has determined who shall participate in the ballot the Chief Executive shall give written notice of the ballot to the members concerned in good standing;
 - c. such notice shall be given at least three days before the ballot is to be conducted or within such shorter period as the Council may decide; provided that such shorter period of notice shall not be less than is reasonably necessary to permit the members concerned to vote in the ballot. The notice shall specify the date, place and time for voting in the ballot;
 - d. a ballot paper shall be sent with each notice and each ordinary member concerned shall have one vote;
 - e. before voting in the ballot commences, the Chief Executive shall appoint two scrutineers to supervise the taking of the ballot and to ascertain the result thereof;
 - f. a ballot paper shall not be marked in any way apart from the mark or marks required to be made by a member in recording its vote. Papers bearing any other marks shall be regarded as spoiled and shall not be counted;
 - g. voting shall take place by a representative of a member, such representative's alternate or another person authorized by the member depositing the marked and folded ballot paper in a container provided for this purpose;

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- h. upon the expiry of the time fixed for voting in the ballot the scrutineers shall ascertain the result thereof and inform the Chief Executive who shall make it known to all ordinary members;
 - i. the proposal shall be deemed to have been carried if the majority of all the members concerned have voted in favour of it.
69. Notwithstanding anything to the contrary contained in these Articles, a member shall not be disciplined or have its membership terminated for failure or refusal to participate in a lock-out if:
- a. no ballot was held about the lock-out; or
 - b. a ballot was held but a majority of the members who voted did not vote in favour of the lock-out.

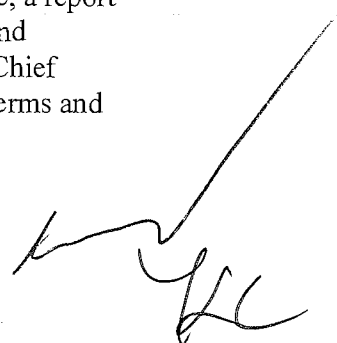
Chief executive

70. There shall be a Chief Executive of the Chamber who shall be appointed by the Council on such terms and conditions as the Council shall decide; provided that such appointment shall at all times be subject to the condition that it may be terminated at any time by the Council or the Chief Executive on giving not less than one month's notice, in writing, of the Council's or the Chief Executive's intention to do so or may be terminated summarily by the Council on any ground which at common law justifies summary dismissal.

Upon termination by the Council of the appointment of the Chief Executive, the Chief Executive may lodge with the Council, within fourteen days of the date of notification of such termination, a request, in writing, that the decision of the Council be reviewed by the Chamber in general meeting at a special general meeting convened for that purpose and the appointment of the Chief Executive shall not be terminated if the meeting then decides accordingly. Unless it is so decided that the appointment of the Chief Executive shall not be terminated, the appointment of the Chief Executive shall be terminated at the conclusion of the meeting. If a written request to review the termination of the Chief Executive's appointment is not received by the Council within fourteen days of the date of the notification of such termination, the appointment of the Chief Executive shall thereupon be terminated.

Subject to the direction and control of the Council, it shall be the duty of the Chief Executive:

- a. to keep or cause to be kept the register of members for which provision is made in Article 21;
- b. to keep or cause to be kept the records and accounts for which provision is made in Article 75;
- c. to keep or cause to be kept the minutes and records for which provision is made in Article 82;
- d. to compile annually or at such other interval as the Council may decide, a report on the activities of the Chamber, for the information of its members; and
- e. to perform such other duties and functions as may be entrusted to the Chief Executive by these Articles or by the Council in accordance with the terms and conditions of the Chief Executive's appointment.

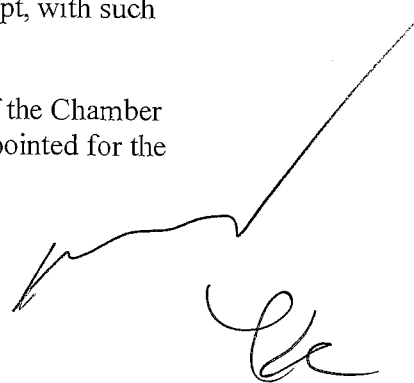


Subscriptions

71. The aggregate subscriptions payable for each financial year by each class of members established in terms of Article 8 shall be determined by the Council from time to time. Such aggregate subscriptions shall be allocated amongst the members of each particular class by the principal committee established in terms of Article 37 to deal with matters concerning each class or in the absence of such a committee, by the Council. The subscriptions payable by ordinary members in respect of each financial year shall be paid in advance or in arrear at such time or times or in such amount or amounts as the Council in its discretion may decide. An ordinary member admitted after the commencement of a financial year shall pay as a subscription for such year such amount, not exceeding the subscription that would have been payable by such member for the whole year, as the Council may decide.
72. Within thirty days of the date of any notice, in writing, from the Chief Executive giving the amount of any subscription due by any ordinary member and the date on which such subscription is payable, the ordinary member concerned may lodge with the Chief Executive a request, in writing, that the basis on which such subscription has been calculated and/or the amount of such subscription be reviewed by the Chamber, in general meeting. Such a request, if lodged within the period prescribed by this Article but not otherwise, shall be considered at the next annual general meeting of the Chamber or, if the Council so decides, at a special general meeting of the Chamber convened for the purpose; and the meeting shall then either confirm or determine anew the basis on which the subscription concerned shall be fixed and/or the amount of the subscription which the ordinary member concerned shall be required to pay, as the case may be. Any decision taken by the Chamber, in general meeting, in terms of this Article, shall be final in respect of the subscription which is the subject of such decision.
73. No subscription shall be payable by honorary members.

Financial year, funds and accounts

74. The financial year of the Chamber shall be the period from 1 January to 31 December.
75. A record shall be kept of the subscriptions, if any, due by each member of the Chamber and the periods to which such subscriptions relate as also the subscriptions paid by each such member and the periods to which such payments relate. Proper accounts shall be kept of all moneys received and expended by the Chamber, of all the matters in respect of which such receipts and expenditure take place and of the assets, credits and balances of the Chamber.
76. All moneys received by the Chamber, from time to time, shall be banked in the name of the Chamber, within seven ordinary business days of receipt, with such bank as the Council shall, from time to time, appoint.
77. All cheques and other negotiable instruments drawn in the name of the Chamber shall be signed by one or more employees of the Chamber duly appointed for the

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purpose either by the Council or by such employee or employees of the Chamber as the Council shall decide.

78. All expenditure incurred by or on behalf of the Chamber shall be duly authorized by the Council or a principal committee as the case may be, acting in terms of the powers conferred upon such committee by these Articles, or by the Chief Executive or such other employee of the Chamber, acting in terms of such authority as shall have been conferred upon the Chief Executive or such other employee by any of such committees.
79. Any profits or gains which may accrue to the Chamber shall not be distributed to any person, but shall be employed solely for the purpose of investment or for the carrying out of the Chamber's objects.
80. The Chamber's accounts shall be audited annually and reported upon by the auditor or auditors appointed in terms of Article 81.

Auditors

81. An auditor or auditors shall be appointed to the Chamber at each annual general meeting, when the remuneration for the past year's audit shall also be fixed; provided that, if so authorized by resolution of the meeting, such remuneration may be fixed by the Council. The auditor or auditors appointed at each annual general meeting shall hold office until the next annual general meeting, when such auditor or auditors shall retire, but shall be eligible for re-appointment. Casual vacancies in the office of auditor shall be filled by the Council and any person so appointed shall hold office until the next annual general meeting, when such person shall retire, but shall be eligible for re-appointment.

Minutes and records

82. Minutes shall be kept of proceedings of general meetings of the Chamber and of the meetings of the Council and the principal committees of the Chamber, as also records of the correspondence and transactions of the Chamber.

Proceedings

83. All legal or other proceedings by or against the Chamber shall be instituted, conducted or defended in its name.

Property

84. All movable property belonging to or acquired by the Chamber shall vest in the Chamber and all immovable property belonging to or acquired by the Chamber shall be registered in its name.

Signature of documents

85. All powers of attorney, bonds, deeds and other similar instruments shall be signed and executed on behalf of the Chamber by such member or members of the Council

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or by such employee or employees of the Chamber as the Council shall decide; provided that any such instrument which may be signed and executed on behalf of the Chamber by a principal committee in pursuance of the powers conferred in terms of these Articles on any such principal committee may be signed and executed by such member or members of the principal committee concerned and by such employee or employees of the Chamber as the principal committee concerned shall decide.

Notices

86. Any notice, written notification or document required by these Articles to be given or sent to any member shall be deemed to have been given or sent if it has been delivered, by hand, at such member's registered address, has been sent through the post addressed to such member at the member's registered address or has been electronically sent to such member's e-mail address and written (including electronic) proof of receipt has been provided to the Chamber. The date on which any such notice, written notification or document is so delivered, is so posted or is so electronically sent shall be deemed to be the date on which it was given or sent.
87. The notice convening any general meeting of the Chamber shall state the date, time and place of the meeting and the general nature of the business to be transacted; provided that, in the case of a notice convening a special general meeting at which any amendment or alteration of or any addition to these Articles is to be considered, the notice shall be accompanied by a copy of the proposed amendment, alteration or addition.

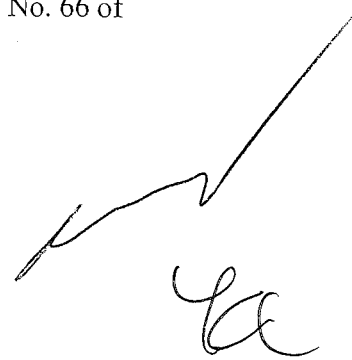
Indemnity

88. The office-bearers and employees of the Chamber shall be indemnified by the Chamber against all costs, losses and expenses they may incur or become liable to by reason of any contract entered into or act or deed done by them in their capacity as such or in any way in the discharge of their duties.

Alteration of articles

89. These Articles shall not be amended, altered or added to except by resolution of a majority of not less than two-thirds of the representatives of ordinary members present and entitled to vote at a special general meeting of the Chamber called for that purpose, of which at least fourteen days' notice, in writing, has been given by the Chief Executive to each member.

Upon any such alteration, amendment or addition being made in terms of this Article, the same shall be deemed to be incorporated in and form part of these Articles, in the same manner in all respects as though originally inserted herein, and shall be binding upon all members of the Chamber without any further act of assent thereto, subject, however, to the provisions of the Labour Relations Act, No. 66 of 1995, or any law in substitution thereof.


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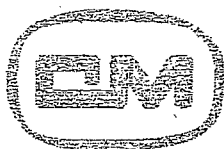
Winding up

90. Subject to the provisions of the Labour Relations Act, No. 66 of 1995, or any law in substitution thereof and any order of the Labour Court, the Chamber shall be wound up if, at a special general meeting of the Chamber of which at least thirty days' notice, in writing, has been given by the Chief Executive to each member and at which voting has taken place by ballot, a resolution to wind up the Chamber has been passed by a majority of two-thirds of the representatives of ordinary members present and entitled to vote. Upon the passing of such a resolution, the liquidator or liquidators shall, subject to any order of the Labour Court, realize the assets of the Chamber, in such manner as deemed fit, liquidate the debts and liabilities of the Chamber and distribute any surplus assets to --
- a. another entity approved by the Commissioner for the South African Revenue Service in terms of section 30B of the Income Tax Act;
 - b. a public benefit organisation approved in terms of section 30 of the Income Tax Act;
 - c. an institution, board or body which is exempt from tax under section 10(1)(cA)(i) of the Income Tax Act; or
 - d. the government of the Republic of South Africa in the national, provincial or local sphere.

Compliance with Income Tax Act

91. In compliance with section 30B(2)(b) of the Income Tax Act, Act No. 58 of 1962, -
- a. substantially the whole of the Chamber's funding must be derived from its annual or other long term members;
 - b. the Council must submit any amendment of this constitution to the Commissioner for the South African Revenue Service within 30 days of such amendment having been approved by the Registrar of Labour Relations, as contemplated in the Labour Relations Act, Act No. 66 of 1995;
 - c. the Chamber must comply with any reporting requirements determined by the Commissioner for the South African Revenue Service from time to time; and
 - d. the Chamber may not knowingly become a party to, or knowingly permit itself to be used as part of, an impermissible avoidance arrangement as contemplated in Part IIA of Chapter III, or a transaction, operation or scheme contemplated in section 103(5), of the Income Tax Act.



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FOR IMMEDIATE RELEASE
TO ALL MEDIA

14 MAY 2015

MEDIA STATEMENT

The Chamber of Mines and its members are fully committed to the growth and transformation of the South African mining industry. Despite turbulent global conditions, the South African mining industry (specifically Chamber members), has made significant progress on all elements of the Mining Charter – including meeting and exceeding the ownership target. The Chamber and its members are committed to building the mining industry and helping to achieve the strategic objectives of the National Development Plan.

The MIGDETT Principals were called at late notice to a meeting at the DMR in Pretoria on 14 May 2015, to consider, inter alia, the DMR's Mining Charter audit process, the viability challenges facing large parts of the mining sector and the relevant potential job losses and the Project Phakisa process.

At the last MIGDETT meeting held on 31 March 2015, the Minister announced that the parties had agreed to jointly approach the courts for a declaratory order to clear up differences of interpretation on the ownership element of the Mining Charter. In the interim the parties also agreed not to release the DMR's ownership data pending the outcome of the declaratory order process. The Chamber itself committed not to release its ownership data, compiled by independent credible external companies, to remain faithful to the agreed declaratory order process. The legal teams of both the DMR and Chamber have been meeting to progress the declaratory order process.

At the urgent MIGDETT Principals meeting on 14 May 2015 the DMR and stakeholders has insisted on releasing the findings of their DMR Mining Charter report, including the ownership section. This is contrary to the agreement reached in the last MIGDETT meeting on the non-release of ownership data. The results presented by the DMR show both simple and employment weighted averages. The DMR has emphasized Mining Charter definitional interpretations, such as the meaningful economic participation of historically disadvantaged South Africans,

COUNCIL OF THE CHAMBER: M Teke (President), Ms KT Kweyama (Vice President), G Briggs (Vice President), A Bam, M Cutifani, P Dunne, J Evans, N Froneman, T Goodlace, C Griffith, G Heale, N Holland, MJ Houston, B Magara, N Mbazima, T Mkhwanazi, X Mkhwanazi(Dr), D Matlou, R Moodley, M Mothoa, SA Nkosi, M O'Hare, B Petersen, S Phiri, N Pienaar, N Pretorius, A Sangqu, MP Schmidt, B Sibiya, PW Steenkamp, S Venkatakrishnan.

which undermine the measurement of the progress made. The Chamber and its members do not agree with this DMR interpretation, which suggests that only 20% (on a weighted basis) of mining right holders have met the definition in terms of meaningful economic participation.

Nevertheless, on the basis of the DMR releasing its report – we have no option but to make sure that the correct facts, based on our interpretation are on the table. Based on independently completed research covering 85% of the value of the mining sector, (work completed by Rand Merchant Bank, and audit firm SizweGobodoNtsaluba with the Chamber), the mining sector has achieved a weighted ownership target of 38.5%, which significantly exceeds the 26% targeted level and demonstrated meaningful economic participation by HDSAs.

We note the differences in the DMR report which seeks to cast the industry as not having met its obligations. The DMR states that 90% of the companies achieved the 26% target on an employment weighted basis with an average of 32.5% HDSA ownership. However, the DMR in its own interpretation of meaningful economic participation is now of the view that mining companies have to not only do narrow based empowerment transactions, but have to also include community and employee ownership schemes, which they say on a weighted basis that only 20% of the transactions comply. The Chamber does not share this interpretation and is firmly of the view that 100% of Chamber members have achieved the 26% ownership target. These interpretational differences is the reason why a declaratory order process is necessary (and was agreed between the stakeholders) in order to provide certainty on the matter. This in addition to the continuing consequences limitation.

On the challenges facing the mining sector the stakeholders briefly discussed the viability risks facing the gold, platinum and coal sectors, and the potential job losses in these sectors. The stakeholders discussed the matter and agreed that all legal processes should be followed by companies. The Chamber did not agree to any MIGDETT task team regarding job losses. The Chamber urges all stakeholders to play their role in managing the viability crisis, to reduce cost pressures and to manage the viability challenges the sector is facing.

The Chamber states unequivocally that it is unhappy with the rushed MIGDETT process on the DMR's Mining Charter Progress report. The Chamber has not been given the opportunity to properly interrogate the DMR's Progress Report and has not even been given a copy of the report. The MIGDETT process has been rushed and does not adequately cover the key principles of fairness, transparency and effective stakeholder engagement, which are the traditional hallmarks of the MIGDETT



process. What the Chamber has seen is a truncated presentation – and this was also not shared with the Chamber in electronic or hard copy format

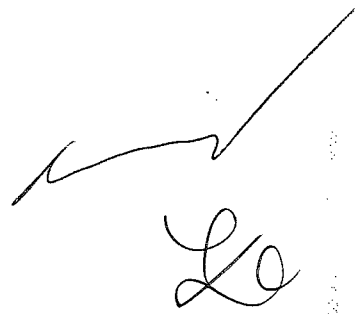
It is important to highlight that the Chamber will continue to engage government on all issues that are inhibiting the growth and transformation of the mining sector. However, for the government to be shifting the goal posts mid-stream and for stakeholders to continue to incorrectly accuse the industry of non-compliance is both damaging to trust and investment in the mining sector.

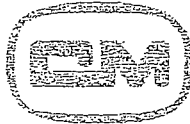
The Chamber will be holding a media conference at 11h00, Johannesburg Country Club, Auckland Park on 15 May 2015.

ENDS

Issued by: The Chamber of Mines of South Africa

For enquiries contact Zingaphi Matanzima on 082 766 3940

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CHAMBER OF MINES OF SOUTH AFRICA

Putting South Africa First



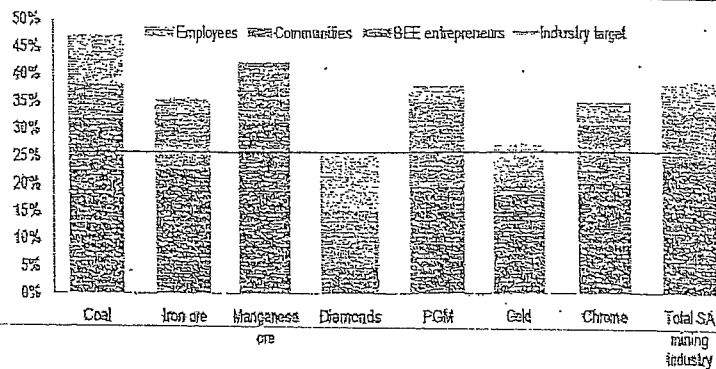
CHAMBER OF MINES CALCULATES BROAD BASED HDSA OWNERSHIP OF 38% and MEANINGFUL ECONOMIC VALUE TRANSFER OF >R159 BN

The Chamber of Mines (Chamber) and its members, release findings of a comprehensive report which demonstrates the meaningful economic participation of HDSAs in the South African mining industry as per the ownership element of the Mining Charter. It is an aggregation of company information based on DMR submissions as at 31 December 2014. Given the significance of this milestone which sets the 26% HDSA ownership target, the Chamber has engaged the services of industry experts SizweNtsalubaGobodo (SNG) auditing firm and Rand Merchant Bank (RMB) corporate finance. The analysis represents the majority of the Chamber membership and also captures a significant portion of the South African mining industry (80% – 90% based on BEE transactions, value and volumes).

Although it is a calculation at end 2014, the analysis has captured the ownership compliance in relation to asset level mining rights' compliance over the last 12 years. The results below demonstrate that the industry has met and exceeded the ownership target of 26% HDSA by 2014 and has transferred significant value to HDSAs despite the significant challenges posed by the 2008 World Financial Crisis and the subsequent bear market for commodities. In addition, meaningful economic participation of HDSAs has occurred with a broad based identifiable beneficiaries and cash flowing to HDSA beneficiaries. This demonstrates the industry's commitment to transformation and the spirit of the Mining Charter. The highlights are:

- Since the commencement of the process of transformation in the mining industry, meaningful economic empowerment participation by HDSA has been 38% on average, based on the Chamber of Mines collation. This is above the Mining Charter 26% HDSA ownership target by 2014.
- The various sectors of the South African mining industry have similarly all met or exceeded the HDSA ownership targets – PGM at 38.0%, Gold at 27.3%, Coal at 47.2%, Diamonds at 26.0%, Iron Ore at 35.7%, Manganese Ore at 42.2% and Chrome at 35.1%.
- The composition of identifiable HDSA beneficiaries in the industry that has benefited through ownership, both directly and indirectly, is 63% BEE entrepreneurs (46 BEE companies), 22% communities (6.9 million HDSAs) and 15% employees (210 thousand HDSAs).
- The DMR's interpretation of the Charter is that the definition of meaningful economic participation has to include all three beneficiary categories to be compliant (this interpretation is not shared by the Chamber). Based on the company information we have received, we found that the proportion of companies that have all three categories present, i.e. BEE entrepreneurs, communities and ESOPs in their HDSA empowerment structures represent a minimum of 41% of the SA Mining Industry.

Figure 1: Portion of ownership of mining industry transferred to HDSA controlled entities up to 2014

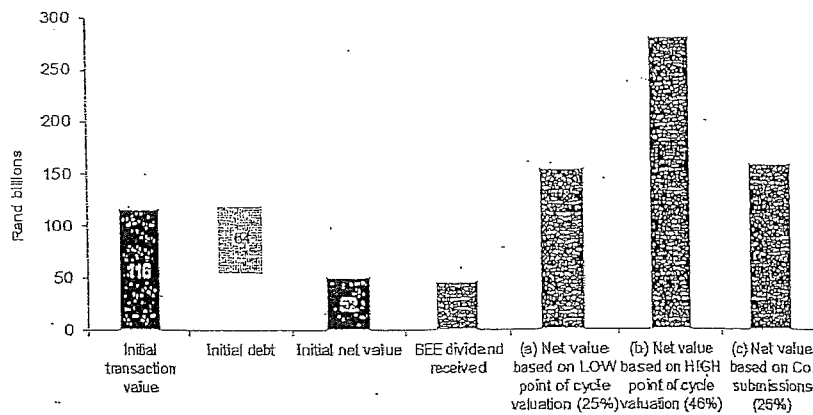


Source: SNG and Chamber of Mines analysis

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- ❑ Over the 12 year period, dividends of a minimum of R47 billion were paid to HDSA beneficiaries, representing 19.6% of the total 'company' dividends paid over the period. This is in line with the staged HDSA ownership target from 15% by 2009 to 26% by 2014 and fairly represents the average over the period. It also does not take into account profit from asset sales over the period and should be considered against a background where many shareholders during the period did not receive dividends.
- ❑ BEE transactions with an initial value of R116 billion were implemented over the period. These transactions created net value of around R159 billion (+207%) over the same period. The net value (after deducting debt from the asset values) created for HDSA controlled entities represented 26% of the value (EBITDA multiple basis) of the entire industry at December 2014.
- ❑ However, based on a through-the-cycle low and high valuation of assets, the net value created represents between R155bn (+200%) and R282bn (+444%) or 25% to 46% of the entire industry value (EBITDA multiple basis), respectively.

Figure 3: Estimation of value created (meaningful economic participation of HDSA)

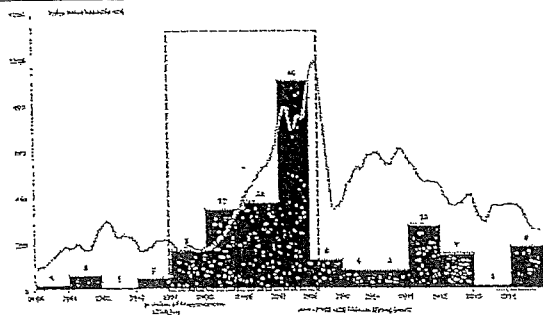


Source: SNG, RMB and Chamber of Mines analysis (Net value = Total asset value - debt outstanding + dividends; (a) and (b) valuation based on EBITDA multiple calculations)

These results have been achieved by the industry, despite the fact that measurement is occurring at a low point in the commodities cycle. Key lessons learnt include:

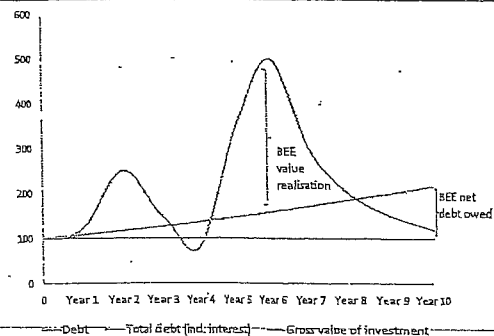
- ❑ Market volatility has impacted value creation. Underlying funding structures depended on rising commodity prices to result in value creation for beneficiaries.
- ❑ Lock-in provisions have prevented beneficiaries from unlocking value created during the peak of the cycle. Lack of diversification is an inherent risk in BEE transactions.
- ❑ Facilitation important in ensuring sustainable transaction e.g. vendor funding, free shares, minimum guaranteed cash flows. Implementing BEE transactions at the height of the commodities cycle resulted in unsustainable high debt levels.

Figure 1: Mining BEE transactions and Equity performance



Source: RMB and Dealmakers online

Figure 2: Illustrative impact of Commodity cycle on value



Source: RMB

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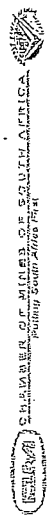
Summarised HDSA ownership results

The South African Mining Industry	The industry has achieved BEE ownership of 37.7% (22.8% BEE entrepreneurs, 10.8% communities and 4.2% ESOPs) weighted based on value of the assets. The ownership structure has benefited 60% BEE entrepreneurs, 29% communities and 11% ESOPs, and an estimated 7 million individuals. In terms of volumes weighting (Production and revenue), the industry has achieved BEE ownership level of 38.8% (24.3% BEE entrepreneurs, 9.1% communities and 5.4% ESOPs). The ownership has benefited 63% BEE entrepreneurs, 22% communities and 15% ESOPs. The industry has created net value of between R 155 320 million and R 282 018 million representing a return of between 200% and 444%. In addition, most of the sectors have not only met but also exceeded the 26% minimum compliance requirement.
PGM	The PGM sector has achieved BEE ownership of 39.5% (19.5% BEE entrepreneurs, 18.0% communities and 2.0% ESOPs) weighted based on value. The ownership structure has benefited 49% BEE entrepreneurs, 46% communities and 5% ESOPs, and an estimated 2 774 493 individuals. In terms of volumes weighted, the industry has achieved a BEE ownership of 38.0% (19.8% BEE entrepreneurs, 15.5% communities and 2.6% ESOPs). The ownership structure has benefited 52% BEE entrepreneurs, 41% communities and 7% ESOPs. The PGM sector has a total net value of between R 43 442 million and R 65 987 million representing a change of between 109% and 212%.
Gold	The Gold sector has achieved BEE ownership of 28.8% (18.6% BEE entrepreneurs, 0.9% communities and 9.2% ESOPs) weighted based on value. The ownership structure has benefited 65% BEE entrepreneurs, 3% communities and 32% ESOPs, and an estimated 135 109 individuals. In terms of volumes weighted, the industry has achieved a BEE ownership of 27.3% (18.3% BEE entrepreneurs, 1.6% communities and 7.5% ESOPs). The ownership structure has benefited 67% BEE entrepreneurs, 6% communities and 27% ESOPs. The Gold sector has a net value of between R 7 182 million and R 32 267 million representing a change of between -31% and 209%.
Coal	The Coal sector has achieved BEE ownership of 43.9% (32.0% BEE entrepreneurs, 5.3% communities and 6.3% ESOPs) weighted based on value. The ownership structure has benefited 74% BEE entrepreneurs, 12% communities and 14% ESOPs, and an estimated 1 753 087 individuals. In terms of volumes weighted, the industry has achieved a BEE ownership of 47.2% (32.0% BEE entrepreneurs, 6.2% communities and 9.0% ESOPs). The ownership structure has benefited 68% BEE entrepreneurs, 13% communities and 19% ESOPs. The Coal sector has a net value of between R24 000 million and R 49 512 million representing a change of between 189% and 497%.
Diamonds	The Diamond sector has achieved BEE ownership of 26.0% (4.4% BEE entrepreneurs, 11.6% communities and 10.0% ESOPs) weighted based on value. The ownership structure has benefited 17% BEE entrepreneurs, 45% communities and 38% ESOPs, and an estimated 114 653 individuals. In terms of volume weighted, the industry has achieved a BEE ownership of 26.0% (5.1% BEE entrepreneurs, 10.2% communities and 10.7% ESOPs). The ownership structure has benefited 20% BEE entrepreneurs, 39% communities and 41% ESOPs. The Diamond sector has a net value of between R 616 million and R 5 290 million representing a change of between -56% and 282%.
Iron ore	The Iron Ore sector has achieved BEE ownership of 38.2% (24.0% BEE entrepreneurs, 12.0% communities and 2.2% ESOPs) weighted based on value. The ownership structure has benefited 63% BEE entrepreneurs, 31% communities and 6% ESOPs, and an estimated 1 482 163 individuals. In terms of volume weighted, the industry has achieved a BEE ownership of 35.7% (22.9% BEE entrepreneurs, 10.3% communities and 2.5% ESOPs). The ownership structure has benefited 64% BEE entrepreneurs, 29% communities and 7% ESOPs. The Iron Ore sector has a net value of between R 53 220 million and R 115 330 million representing a change of between 433% and 1054%.
Manganese ore	The Manganese Ore sector has achieved BEE ownership of 50.1% (33.3% BEE Entrepreneurs, 16.3% Communities and 0.0% ESOPs) weighted based on value. The ownership structure has benefited 67% BEE entrepreneurs, 33% communities and 0% ESOPs, and an estimated 411 512 individuals. In terms of volume weighted, the industry has achieved a BEE ownership of 42.2% (31.2% BEE entrepreneurs, 11.0% communities and 0.0% ESOPs). The ownership structure has benefited 74% BEE entrepreneurs, 26% communities and 0% ESOPs. The Manganese Ore sector has a net value of between R -436 million and R 8 389 million representing a change of between -100% and 100%.
Chrome	The Chrome sector has achieved BEE ownership of 28.1% (15.9% BEE entrepreneurs, 7.0% communities and 5.2% ESOPs) weighted based on value. The ownership structure has benefited 57% BEE entrepreneurs, 25% communities and 18% ESOPs and an estimated 454 594 individuals. In terms of volume weighted, the industry has achieved a BEE ownership of 35.1% (20.3% BEE entrepreneurs, 10.6% communities and 4.2% ESOPs). The ownership structure has benefited 58% BEE entrepreneurs, 30% communities and 12% ESOPs. The Chrome sector has a net value of between R 1 824 million and R 5 242 million representing a change of between 204% and 774%.

Chamber of Mines of South Africa Assessment of Mining Companies

Element (Scorecard weighting) Description	DMR published assessment		Chamber assessment		Broad alignment with DMR (Yes/No)
	Target	Unweighted (i) % of submissions that has met target (ii) % of submissions that has not target	Comparison to target (i) Comparison to target (ii) % of submissions that has met target (iii) % of submissions that has not target	Assessment	
Ownership (Y/N)					
Min HDSA ownership %	26%	(i) 30.6%	(i) 32.5%	Achieved well	No - significant differences in occupational interpretation
Percentage of companies achieving 26%	100%	(ii) 79%	(ii) 90%		
Percentage of companies with BEE, community & ESOP (not agreed)		(iii) 6.3%	(iii) 20%		
Housing and living conditions (Y/N)	Percentage reduction of occupancy rate towards 2014 target			Good progress made	No
	100%	(i) ---	(i) 73%		
	Percentage conversion of hostels into family units	100%	(ii) 55%	Work to be done	No
			(ii) 63.4%		
Procurement and enterprise development (15%)					
Caplini goods (5%)	40%	(i) ---	(i) 72%	Achieved well	Yes (on weighted data)
% of companies meeting the target		(ii) 39.6%	(ii) 82.1%		
Services (5%)	70%	(i) ---	(i) 63%	Good progress made	Yes (on weighted data)
% of companies meeting the target		(ii) 33.2%	(ii) ---		
Consumable goods (2%)	50%	(i) ---	(i) 72%	Achieved well	Yes (on weighted data)
% of companies meeting the target		(ii) 60%	(ii) 85.2%		
Annual spend on procurement from MNCs (3%)	0.5% of procurement	(i) ---	(i) ---	Work to be done	Yes (on weighted data)
% of companies meeting the target		(ii) 3.3%	(ii) 14.9%		
Employment equity (16%)	Top Management (Board) (3%)	40%	(i) 50.4%	Achieved well	
	Senior Management (Execo) (4%)	40%	(i) 41.9%	Achieved	
	Middle Management (3%)	40%	(i) 50.9%	Achieved well	Yes - but DMR still critical of while makes dominating at strategic levels of industry
	Junior Management (1%)	40%	(i) 54%	Achieved well	
	Core skills (5%)	40%	(i) 73.5%	Achieved well	
Human resource development (25%)	HRD expenditure as % of total annual payroll	5%	(i) 5.5%	Achieved well	No
% of companies achieving the target		(ii) 38.1%	(ii) 56.9%		
Mine community development (15%)	Implement approved community projects	Up to date	(i) ---	Work to be done	Yes - limiting issues to be addressed
% of companies meeting target		Implementation (ii) 3.6%	(ii) ---		
Sustainable development and growth (20%)	Implementation of approved BMPs (12%)	100%	(i) 90.6%	Good progress made	No
% of companies meeting target		(ii) 44.5%	(ii) ---		
Implementation of the tripartite action plan on health and safety (12%)	100%	(i) ---	(i) 85.2%	Achieved well	No - DMR wants occupational health elements to be improved
% of companies meeting the target		(ii) 2.8%	(ii) 1.6%		
Percentage of samples in SA facilities (5%)	100%	(i) ---	(i) 84.6%	Achieved	Yes
% of companies meeting the target		(ii) 65.5%	(ii) 84.2%		

Source: Chamber of Mines, Department of Mineral Resources
 Note 1: Weighting based on DMR employment figures
 Note 2: Weighting based on Chamber employment figures, except for ownership which is based on volumes and mineral sales
 Note 3: Based on Independent Chamber Ownership Coalition report



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CHAMBER OF MINES OF SOUTH AFRICA

WRITTEN SUBMISSION TO THE MINISTER OF MINERAL RESOURCES ON THE DMR'S DRAFT REVIEWED
BROAD BASED BLACK-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING AND
MINERALS INDUSTRY, 2016 PURSUANT TO GOVERNMENT NOTICE 450 GG 3933 OF 15 APRIL 2016

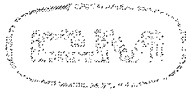


TABLE OF CONTENTS

	PAGE NUMBER
EXECUTIVE SUMMARY	2
I. INTRODUCTION	7
II. BACKGROUND	8
III. MINING INDUSTRY CONTEXT	9
IV. THE REVIEWED BROAD BASED BLACK-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING AND MINERALS INDUSTRY, 2016	12
V. SUMMARY OF MAJOR ISSUES WHICH ARE OF CONCERN TO THE CHAMBER	13
VI. FOUNDING PRINCIPLES	14
VII. PREAMBLE	18
VIII. PART A	20
1. OBJECTIVES OF THE MINING CHARTER	
2. MINING CHARTER ELEMENTS	
2.1 Ownership	21
2.2 Procurement, Enterprise and Supplier Development	29
2.3 Beneficiation	31
2.4 Employment Equity	32
2.5 Human Resource Development	33
2.6 Mine Community Development	35
2.7 Housing and Living Conditions	38
IX. PART B: Proposal: Key Measurement Principles and Reporting Requirement	40
2.8 Application of the Mining Charter for Permits/Licenses Granted Under The Precious Metals Act, 2005, And the Diamond Act, 1986 as Amended	
X. CONCLUSION	43
ANNEXURES Proposed Scorecard	44



EXECUTIVE SUMMARY

The Chamber of Mines of South Africa (the Chamber) welcomes the opportunity granted by the Minister of Mineral Resources to make written submissions on the DMR Reviewed Mining Charter.

It must be stated that the approach taken to gazette the Reviewed Mining Charter, in which interested and affected parties were given 30 days in which to submit written representations; without appropriate and meaningful participation by stakeholders, is of considerable concern to the Chamber and its members. The Chamber is concerned that the approach chosen by the Minister to review the Mining Charter will not allow for sufficient time for all stakeholders to participate meaningfully in a process that will lead to a Final Mining Charter that will have the full support of all the key stakeholders.

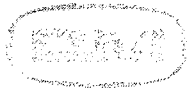
Whilst every opportunity has been taken to document a considered Chamber response and recommendations on the Reviewed Mining Charter; the limited time frame within which to submit this response has compromised our ability to put forward empirical evidence to support all our positions. Having said that, the Chamber positions are based on our internal analysis of industry performance, legal counsel opinion, the current market conditions and our members' view of what an aligned Mining Charter should entail in order to promote our shared objectives of a transformed, inclusive and prosperous mining industry.

The Chamber members which represent approximately 90% of South Africa's mineral production, have highlighted the following as fundamental concerns and founding principles which need to be taken into consideration in the development of a Revised Mining Charter:

1. Mining Charter Alignment Process

The Chamber's submission will show that whilst the Reviewed Charter aims to align the Mining Charter to the Codes in order to create consistency of regulation, it has in fact created further potential confusion and uncertainty especially with regard to the following:

The Mining Charter was developed by the DMR Minister in terms of s100(2)(a) of the MPRDA; therefore:

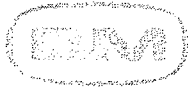


- (a) The Mining Charter is not a code of good practice issued or gazetted by the Minister of Trade and Industry in terms of s9 of the BBBEE Act. It was in fact developed by the DMR Minister in terms of s100(2)(a) of the MPRDA and gazetted as such.
- (b) The Mining Charter is not a code of good practice issued or gazetted by the Minister of Trade and Industry in terms of s9 of the BBBEE Act. The issuing of any sector specific Codes (Sector Codes) for the mining industry should be a task undertaken by the DTI in consultation with the mining sector.
- (c) The confusion created by the Reviewed Mining Charter as to whether it can be used for revoking issued mining rights as well as whether the final assessment results of a mining rights holder by the DMR can be used for general commercial purposes.
- (d) Should the DTI not issue such Sector Codes for the mining industry, mining companies will be governed by the generic Codes for the purposes of determining their BEE score. The issuing of generic Codes or Sector Codes constitutes compliance with section 9 of the BBBEE Act.
- (e) The adoption of the definitions from the B-BBEE Act and Codes without first making the necessary amendments on the MPRDA to eradicate mal-alignment between the Mining Charter and the MPRDA, thus making the Mining Charter ultra-vires.

The Chamber respectfully submits that the process which has been adopted creates confusion, in that it is not possible to develop a Reviewed Charter which is based on concepts contained in the BBBEE Act and Codes, without first procuring an amendment by Parliament to the MPRDA, for example to adopt the definitions from the BBBEE Act and Codes. And that is indeed the solution which the Chamber very respectfully suggests, namely that the present process relating to the development of a Reviewed Charter be terminated, and be replaced by the development of a further MPRDA Amendment Bill which gives effect to the present objectives, and in which the Reviewed Charter will appear as a schedule (Schedule III) to the MPRDA itself, and in which other provisions of the MPRDA (such as definitions) will be amended or replaced in such a way that the Reviewed Charter which appears in such schedule will be harmonised with such other provisions of the MPRDA itself.

2. The Chamber's court application in case 41661/2015

The outcome of the Declaratory Order court application will have major implications on the Reviewed Mining Charter as a whole. It therefore would have been prudent if the court case



would have been concluded prior to the conclusion of the Mining Charter alignment process. There is no provision in the MPRDA for amendments to or review of the Mining Charter or for development of a new Charter in substitution of the Original Charter and hence both the 2010 Charter and the reviewed Charter are ultra vires the MPRDA itself. The Chamber is of the view that the above problem needs to be resolved by amendments to the MPRDA itself and not the Charter.

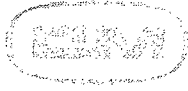
Furthermore, it is the Chamber's view that the requirement to unbundle and restructure existing transactions is tantamount to retrospective regulation where mining rights have already been granted based on those transactions. The Chamber is also gravely concerned that such unbundling will benefit the deal makers and banks more than the intended Black beneficiaries. Finally the Chamber raises concerns about the prescriptive nature of the ownership element as proposed in the Reviewed Mining Charter. Such prescriptions will regress the progress made to date and further make the South Mining industry to be uncompetitive. Limiting ownership structures to individual mining rights will further disadvantage the Black beneficiaries as they will not have access to more diversified portfolios of mine ownership, and may be limited to only one which compromises the construct of black industrialists.

3. Legal

The Chamber is gravely concerned that the MPRDA does not grant the Minister any powers to review the Mining Charter as it is purported to be done under s100 2 (a). This submission will make relevant references to show that the MPRDA and the B-BBEE Act and its Codes are different and have two different purposes that should not be confused through the Mining Charter.

4. Definitions

The Reviewed Charter imports definitions from the BBEE Act which is out of alignment with the definitions in the MPRDA that may create interpretation challenges.



5. Compliance Mechanism

The Chamber is concerned that the DMR does not provide clarity on when the Mining Charter can be used for purposes of granting mining rights as well as when it can be used for commercial purposes in the economy. The Reviewed Mining Charter creates confusion by introducing BEE Codes assessment ratings for compliance purposes when the mining charter score card itself is not properly aligned to that of the Codes. For purposes of the Mining Charter it would be ideal to clearly state how the regulator will apply the provisions of the MPRDA when some or all of the elements of the ring-fenced elements are not met. For purposes of the Mining Charter it would be ideal to clearly state how the regulator will apply the provisions of the MPRDA when some or all of the elements of the ring-fenced elements are not met.

6. Scorecard

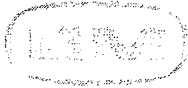
The Chamber is concerned that the Reviewed Charter does not adopt the flexibility of the scorecard contained in the DTI Codes. The DMR scorecard is less flexible.

In Conclusion

The above fundamental concerns and founding principles are not exhaustive and will be further expounded in the attached submission document.

The Chamber welcomes the DMR's intention to align government policies and create regulatory certainty. On reading the requirements for alignment to the Generic DTI Codes the Chamber notes that the DMR has not followed these requirements. This leaves a question on whether the process chosen by the DMR will lead to the credibility of the Reviewed Charter and its acceptance in the economy as a whole being questioned. The Chamber and its members are looking forward to a Reviewed Mining Charter that will be acceptable to other economic sectors in a manner that will not require mining companies to be rated under the DTI Codes once they have been rated by the DMR. The Chamber would like to reiterate that it supports an aligned Mining Charter that will remain regulated under the MPRDA as stated in Section 100 (2) (a) of the MPRDA.

The Chamber is a strategic partner in the country's transformation objectives and as such believes that beyond compliance, ongoing engagements with stakeholders such as the DMR, organised labour and communities are necessary for collective efforts to contribute to an inclusive industry and to meet the country's development agenda.



Transformation therefore is not only a regulatory requirement, but we believe it is a business imperative. For this reason the Chamber is of the view that all stakeholders who are directly affected by the Mining Charter and the manner in which it needs to be implemented need to actively participate and agree in the development of the content of the Revised Mining Charter and the design of how it will be measured.

As a representative body of major and emerging mining companies in South Africa the Chamber takes the opportunity to make submissions to the DMR in response to the recently published Mining Charter.

The Chamber's further comments contained in our submission, which are necessarily driven by the content of the Reviewed Charter, are in the light of the above founding principles, subject to and without detracting from the above founding principles and what the Chamber has said in relation thereto above, so that the Chamber's further comments below fall at all times to be read in the context of such founding principles.



CHAMBER OF MINES OF SOUTH AFRICA

WRITTEN SUBMISSION TO THE MINISTER OF MINERAL RESOURCES ON THE DRAFT REVIEWED BROAD BASED BLACK-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING AND MINERALS INDUSTRY, 2016 PURSUANT TO GOVERNMENT NOTICE 450 GG 39933 OF 15 APRIL 2016

I. INTRODUCTION

The Chamber of Mines of South Africa (the Chamber) thanks the Minister of Mineral Resources (the DMR Minister) for the invitation to comment on the above Draft Reviewed Mining Charter (the Mining Charter), and hopes that he will find its comments to be constructive. It also thanks the DMR Minister and the Department of Mineral Resources (the DMR) for having given effect to some of the suggestions to provide policy certainty as recommended by the Chamber.

In these comments, reference to the Mining Charter means, collectively, the Original Mining Charter, 2004, the Mining Charter, 2010 as well as the Reviewed Charter (or, as the context may require, each of the above charters).

The Chamber believes that the Mining Charter is a stakeholder agreed instrument that is used to drive transformation in the mining sector. For this reason the Chamber believes that all stakeholders who are directly affected by the Mining Charter and the manner in which it needs to be implemented need actively to participate in and agree to the development of the content of the Mining Charter and the design of how it will be measured or how its scorecard will be developed.



II. BACKGROUND

The Chamber is a voluntary employer organisation that represents major and emerging mining companies. The membership of the Chamber is structured as follows:

- 4 Associations namely; Aggregates, Sands Producers Association of Southern Africa (ASPASA), South African Diamond Producers Organisation (SADPO), Association of Shaft Sinkers and SA Mining Contractors, Clay brick Association of South Africa (CASA)
- 30 Emerging Mining Companies
- 38 Major Mining companies

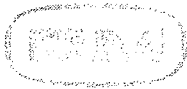
The 72 members of the Chamber represent more than 90% of Mineral production in South Africa. The South African mining industry contributes 7.7 % of Gross Domestic Product (GDP), 25% of merchandise exports and approximately 12% of the Johannesburg Stock Exchange (JES) market capitalisation.¹ The 72 members of the Chamber currently comply with the Mining Charter and will be materially affected by the changes proposed in the Mining Charter.

The Chamber is a strategic partner in the country's transformation objectives and as such believes that beyond compliance, ongoing engagements with stakeholders such as the Department of Mineral Resources (DMR), organised labour and communities are a necessary panacea for collective efforts to contribute to an inclusive industry and to meet the country's economic growth and the development agenda.

Transformation therefore is not only a regulatory requirement, but we believe it is a business imperative. For this reason the Chamber is of the view that all stakeholders who are directly affected by the Mining Charter and the manner in which it needs to be implemented need to actively participate and agree in the development of the content of the Mining Charter and the design of how it will be measured.

As a representative body of major and emerging mining companies in South Africa the Chamber takes the opportunity to make this submission to the DMR in response to the recently published DMR Reviewed Mining Charter.

¹ Chamber of Mines estimates: Stats SA 2014



III. MINING INDUSTRY CONTEXT

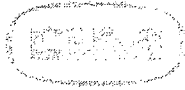
The Chamber and its members remain committed to transformation and growth in the mining sector and significant progress has been made to ensure that the objectives of transformation are met and that the targets set in the Mining Charter are achieved. Any amendments to the Mining Charter will need to consider the real impact of the Mining Charter since its inception in 2004.

1. Mine Community Development

The Chamber and its members can attest to the significant milestones that have been achieved in the transformation journey whilst recognizing that more work still needs to be done. The Anglo American Group of Companies (Anglo Platinum, Anglo Coal, De Beers and Kumba Iron Ore), Impala Platinum, Royal Bafokeng Platinum, AngloGold Ashanti, South32, Sibanye Gold, Exxaro and others have successfully converted or eradicated hostels and established single room and or family units to improve the living conditions and dignity of their employees. The Mining Industry prides itself in building basic education infrastructure like schools and crèches and health facilities in mine host communities in collaboration with relevant government departments. Those companies that draw a significant number of its employees from labour sending areas have made significant contributions towards infrastructure development, health and basic education facilities in their respective labour sending areas.

2. Human Resource Development

The mining industry has contributed considerably towards the education and training of its employees. Progress has been made in Adult Education and Training where literacy levels have improved from over 60% illiteracy in 2002 to below 30% in 2014. In 2016, there are more qualified black artisans than there were in 2002. The industry has invested significantly in skills development and evidence of this investment can be demonstrated by the approximately 10,000 bursaries offered to deserving black students at various institutions of higher learning in the past 12 years; apart from those issued by the Mines Qualification Authority (MQA). The industry has spent an average of R3 billion to R5 billion per annum in various education and training programmes for its employees and communities including bursaries over the past 12 years.



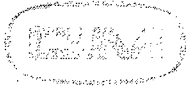
3. Ownership

According to the DMR's own numbers, 90% of mining right holders on a weighted basis had achieved the 26% BEE ownership target. The DMR's average ownership level was 34% versus the 26% target. Approximately R159 billion of value to HDSAs has been transferred in the form of ownership since the inception of the Mining Charter.

4. Difficult Economic Conditions

The mining industry has in the past five years gone through challenging economic conditions. The decline in commodity prices, rising costs and falling productivity, has resulted in a sustained decline in the industry's viability. Additionally, reduced investment in capital expenditure and in exploration and new mining projects, has had the unintended negative consequence of large scale restructuring. In 2014, the industry made a R10 billion loss (after taxes and dividends) and this escalated to a R37 billion loss in 2015; the only loss-making sector of the entire economy. Approximately 59 000 people have lost their jobs in the mining industry (in the period January 2012-December 2015) and a further ±30 000 are currently faced with the threat of retrenchment. The DMR and its other tripartite partners including the Chamber are currently engaged in exploring possible measures of reducing the negative impact of large scale retrenchment through the Jobs declaration which is proving difficult to implement. At the same time the industry has to restructure to survive. Collaborative partnership is key.

Given these conditions in the mining sector, it is not clear as if the DMR has done a thorough regulatory impact assessment of the implications and possible consequences of introducing the Reviewed Charter in its current format. Some stakeholders do not appear fully to comprehend the socio-economic impact of this Reviewed Charter. Perhaps an independent agent or institution needs to be commissioned to conduct a full and thorough Regulatory Impact Assessment (looking at all aspects of the Reviewed Charter) before a decision is made on how best to make changes or add new things or targets to the Mining Charter.

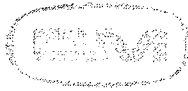


5. Transformation

Whilst the industry is in support of the country's transformation agenda, it is our considered view that the current Charter as published does not do enough to ensure the growth of a competitive mining industry through promoting regulatory certainty.

The subject of Transformation has to be broader than compliance targets. If our members are to accept the Mining Charter as currently presented, not only would the industry regress in terms of current contributions, but the industry would have missed a key opportunity to re-imagine a Mining Charter that is realistic, forward looking and can contribute to the establishment of black industrialists that will benefit the industry as well as meet the state's objectives of an inclusive and growing economy.

The comments and recommendations that will follow in this submission will be made with the foregoing context in mind.

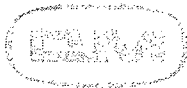


IV. THE REVIEWED BROAD BASED BLACK-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING AND MINERALS INDUSTRY, 2016

The Minister of Trade and Industry released General Notice 1047 GG 39350 of 30 October 2015 to exempt the DMR from applying the requirements contained in section 10(1) of the Broad-Based Black Economic Empowerment Act 53 of 2003 ("BBBEE Act"). In effect, this was done to allow the DMR sufficient time to align the Mining Charter developed by the DMR Minister in terms of the Mineral and Petroleum Resources Developments Act, 2002 ("MPRDA") to the BBBEE Act and the BBBEE Codes of Good Practice ("Codes").

On 15 April 2016, the DMR released its own version of the Reviewed Charter for the South African Mining and Minerals Industry; 2016 for public comment. Interested and affected parties have 30 days in which to submit written representations on the Draft Reviewed Mining Charter.

It is of grave concern to the Chamber that the DMR chose to gazette the Reviewed Charter without meaningful stakeholder engagement or participation. It is our view that this approach may compromise the process. The Chamber further believes that a Charter that is concluded within 30 days without full participation and engagement of all key stakeholders will not result in an inclusive Mining Charter that has the full support of all its stakeholders and buy-in by the economy at large.



V. SUMMARY OF MAJOR ISSUES WHICH ARE OF CONCERN TO THE CHAMBER

The following are overarching provisions that have not been addressed in the Reviewed Charter:

-In regard to alignment with the Codes, the Reviewed Charter does not provide for any weighting points.

-The Chamber recommends that reference to other Acts such as the Companies Act, the Small Business Act etc. especially with regards to definitions, be referenced to specific sections in those Acts to allow for consistency in understanding.

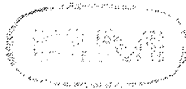
-In respect of the preamble, the last paragraph on page 8 of the Reviewed Charter seems to be defining the net value principle. If this is the case, the Chamber does not agree to the principle of net value being included.

-The Reviewed Charter will result in the need to restructure implemented transactions (some new, others recently re-financed) in terms of paragraph 2.11 (transitional arrangements), i.e. existing mining right holders have a maximum of three (3) years to align to the provisions of the Reviewed Charter.

-The DMR cannot retrospectively legislate. Mining rights approved by the DMR should not have to be redone

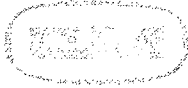
-The implications of the requirement to align do not appear to have been carefully considered by the DMR, since this is going to perpetuate the theme of the ultimate beneficiaries of B-BBEE continuing to be the deal makers and funders of these transactions rather than true empowerment for the beneficiaries. The implications of the unbundling process and reorganizing BEE deals will result in a decrease in net Present Value of Mining Projects with less value to be unlocked by historically disadvantaged South Africans. Furthermore, the beneficiaries would not have access to more diversified portfolios of mine ownership, and may be limited to only one. We are aware that a company can apply to the Minister for permission to construct a consolidated transaction, however, the permission is not fait accompli.

-There is lack of clarity as to whether "ring-fenced" elements are to be interpreted as Priority elements as per the Codes



The following are major issues which are of concern to the Chamber and which are mentioned here in alphabetical order and therefore not necessarily in order of importance, but which will be addressed at the appropriate places in the Charter element-by-element commentary.

- Annual Turnover
- BEE Compliant Company
- BEE Entity
- BEE Entrepreneur
- Beneficiation
- Black owned/controlled entity
- Codes
- Continuing Consequences
- Calendar Year
- Effective Ownership
- Locally Manufactured Goods
- Meaningful Economic Participation
- Ministerial Skills Development Trust
- Ring fenced Elements
- Small Business Development
- Social Development Trust
- Special Purpose Vehicles



VI. FOUNDING PRINCIPLES

The Chamber submits that the following founding principles apply to the Reviewed Charter and to the Chamber's comments on it.

1. Separation of Powers between the Legislature and the Executive

To the extent that the 2010 Charter and the Reviewed Charter purport to clothe the Minister with powers not flowing from or contained in the MPRDA, both charters offend the separation of powers doctrine.

2. The issues identified by the Chamber in the Chamber's court application in case 41661/2015

The issues identified by the Chamber in the declaratory order application in relation to the Original Charter, 2004 and to the 2010 Charter are applicable also to the Reviewed Charter. These issues are more fully set out in paragraph 2.1 below.

3. The Amendment or Review of the Charter

There is no provision in the MPRDA for amendments to or review of the Mining Charter or for development of a new Charter in substitution of the Original Charter and hence both the 2010 Charter and the reviewed Charter are ultra vires the MPRDA itself.

The Chamber is of the view that the above problem falls to be resolved by amendments to the MPRDA itself and not the Charter.

4. The relationship of the MPRDA and the Mining Charter on the one hand, and the BBBEE Act and Codes on the other.

• Reference is made in the last two paragraphs of the Preamble to the Reviewed Charter, of alignment between the MPRDA and Mining Charter on the one hand, and the BBBEE Act and Codes on the other. The Chamber submits that those paragraphs disclose fundamental misconceptions in regard to these issues.

(i) The Mining Charter was developed by the DMR Minister in terms of s100(2)(a) of the MPRDA.

(a) The Mining Charter is not a code of good practice issued or gazetted by the Minister of Trade and Industry in terms of s9 of the BBBEE Act. It was in fact developed by the DMR Minister in terms of s100(2)(a) of the MPRDA and gazetted as such.



(b) The Mining Charter is also not a transformation Charter for the mining and minerals sector of the economy which was developed by major stakeholders in that sector and gazetted by the Minister of Trade and Industry in terms of s12 of the BBBEE Act. Again, it was in fact developed by the DMR Minister in terms of s100(2)(a) of the MPRDA and gazetted as such.

(c) The need to align the Mining Charter with the BBBEE Act comes from the perceived conflict between the two. There is no such conflict in law.

(ii) The above will apply equally to the Reviewed Charter, i.e. it will neither be a code of good practice or a transformation Charter as envisaged in ss9 and 12 of the BBBEE Act but rather will be a reviewed Charter developed by the DMR Minister albeit acting ultra vires his powers in terms of s100(2)(a) of the MPRDA, in so far as s10(1)(a) which intends to elevate the Codes to the level of parliamentary legislation is constitutionally sound.

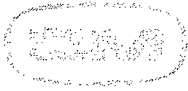
(iii) The above also reveals that the purposes of the MPRDA and the Mining Charter on the one hand, and the BBBEE Act and Codes on the other, are entirely different. In all other aspects, the BBBEE Act and Codes are simply measuring devices and do not impose any requirement of compliance. The MPRDA, on the other hand, is a specific legislative instrument designed inter alia to lead to meaningful participation of historically disadvantaged persons in the mining and minerals industries.

(iv) The issuing of any sector specific Codes (Sector Codes) for the mining industry should be a task undertaken by the DTI in consultation with the mining sector. Should the DTI not issue such Sector Codes for the mining industry, mining companies will be governed by the generic Codes for the purposes of determining their BEE score. The issuing of generic Codes or Sector Codes constitutes compliance with section 9 of the BBBEE Act.

(vii) To the extent that a minimum BEE level is a qualification criterion, the:

(a) qualification criterion in the Mining Charter could be achieving the minimum BEE level. The mining company either achieves that BEE level or not; but

(b) the determination of the BEE level will be conducted in terms of the Codes or any Sector Codes. The Mining Charter should not contain a scorecard against which a mining company is awarded a BEE score.



- The Reviewed Charter imports definitions from the BBBEE Act which importation is not competent since the Reviewed Charter is ostensibly founded in the MPRDA and must carry forward the definitions which are contained in the MPRDA.

If Government wishes to achieve "alignment" of all legislative instruments dealing with empowerment, the correct place to do so is to amend the various pieces of legislation themselves and not the Mining Charter.

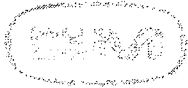
- The result of the above is not alignment but rather conflation, which gives rise to confusion and uncertainty.

- In the light of the above, what the Reviewed Charter achieves is not alignment but conflation, i.e. a confusion of the purpose of and concepts in the MPRDA and Mining Charter on the one hand, and of and in the BBBEE Act and Codes on the other, and gives rise to greater uncertainty than ever.

- The Chamber very respectfully submits that the process which has been adopted creates confusion, in that it is not possible to develop a Reviewed Charter which is based on concepts contained in the BBBEE Act and Codes, without first procuring an amendment by Parliament to the MPRDA, for example to adopt the definitions from the BBBEE Act and Codes. And that is indeed the solution which the Chamber very respectfully suggests, namely that the present process relating to the development of a Reviewed Charter be terminated, and be replaced by the development of a further MPRDA Amendment Bill which gives effect to the present objectives, and in which the Reviewed Charter will appear as a schedule (Schedule III) to the MPRDA itself, and in which other provisions of the MPRDA (such as definitions) will be amended or replaced in such a way that the Reviewed Charter which appears in such schedule will be harmonised with such other provisions of the MPRDA itself.

5. The Chamber's further comments below

The Chamber's further comments below, which are necessarily driven by the content of the Reviewed Charter, are in the light of the above founding principles, subject to and without detracting from the above founding principles and what the Chamber has said in relation thereto above, so that the Chamber's further comments below fall at all times to be read in the context of such founding principles.



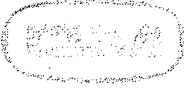
VII. PREAMBLE

In its Preamble the Reviewed Charter states that “the review process takes into account the need to align and integrate Government policies to remove the ambiguities in respect of interpretation and create regulatory certainty. In this regard the reviewed Mining Charter is aligned to the provisions of the Broad-Based Black Economic Empowerment (Act 2003 (Act No. 53 and the Codes of Good Practice (DTI Codes).”

The Chamber welcomes the DMR’s intention to align government policies and create regulatory certainty. On reading the requirements for alignment to the Generic DTI Codes the Chamber notes that the DMR has not followed these requirements. This leaves a question on whether the process chosen by the DMR will finally lead to the credibility of the Reviewed Charter and its acceptance in the economy as a whole being questioned. The Chamber and its members are looking forward to a Reviewed Mining Charter that will be acceptable to other economic sectors in a manner that will not require mining companies to be rated under the DTI Codes once they have been rated by the DMR. The Chamber would like to reiterate that it supports an aligned Mining Charter that will remain regulated under the MPRDA as stated in Section 100 (2) (a) of the MPRDA. The definition of a “BEE compliant company” as described in the Reviewed Charter refers to the DTI Codes as they relate to the procurement element only. Does this mean that the mining companies must comply with the DTI Codes only in relation to the “Procurement, Supplier and Enterprise Development.”?

One of the main purposes of the Mining Charter is to acquire mining rights to mine in South Africa, not to revoke mining rights after the holder has been assessed under the Reviewed Charter. The DMR needs to provide clarity on when the Mining Charter can be used for purposes of granting mining rights as well as when it can be used for commercial purposes in the economy. It is not sufficient to state that, “Mining right holders who have not complied with the ownership, housing and living conditions and human resources development elements as well as those who fall between level 6 and 8 of the Mining Charter scorecard will be regarded as non-compliant with the provisions of the Charter and the MPRDA shall render the mining right holder in breach of the MPRDA and subject to sanctions in the Act.”

For purposes of the Mining Charter it would be ideal to clearly state how the regulator will apply the provisions of the MPRDA when some or all of the elements of the ring-fenced elements are not met. In this way the regulator creates certainty on how non-compliant mining right holders will be treated by law.



VISION

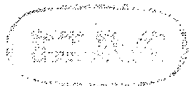
The Chamber is satisfied with the Vision of Mining Charter.

MISSION

The Chamber is satisfied with the Mission statement of the Mining Charter.

DEFINITIONS

Specific requests for clarity on definitions will be captured in the element-by-element commentary which follows. As mentioned above however, since the Mining Charter has its source and origin in the MPRDA, the definitions must accord with those in the MPRDA, and if definitions are to be changed, they must be changed in the MPRDA itself first so as to avoid mis-alignment between the MPRDA and the Mining Charter.



VIII. PART A

1. OBJECTIVES OF THE MINING CHARTER

It is necessary to obtain clarity as to whether the Mining Charter's objectives are limited to the granting of mining rights by the DMR specifically, as the scorecard in the Mining Charter is not aligned to the B-BEE Codes. The B-BEE Codes allow for proportional weightings with appropriate points allocated to each of the scorecard areas. Is the DMR expecting companies to produce generic codes certifications for other procurement processes with the private sector and other government agencies and departments? As set out above, the Chamber's view is that the MPRDA / Mining Charter and the BBBEE Act / Codes play separate and distinct roles.

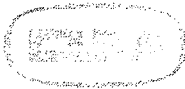
2. ELEMENTS OF THE MINING CHARTER

The Chamber welcomes the exclusion of the following 2 pillars:

- Health and Safety
- Environment and Sustainable Development

The Chamber believes that the Mine Health and Safety Act, 1996 and the initiatives that are in place to improve Health and Safety in the mining industry through the Mine Health and Safety Council have made significant strides to improve Health and Safety in the industry.

In terms of the Environment and Sustainable Development Pillar, the Chamber is of the view that there are sufficient mechanisms in place in terms of regulations made in terms of the MPRDA and in terms of the National Environmental Management Act, 1998 to measure and report on the companies' performance on approved EMPs/ Environmental Authorisations and any other environmental regulatory requirements. Consequently, there is no need for additional mechanisms through the Mining Charter. Such additional mechanisms would in effect create duplication of the auditing and reporting requirements that are already catered for in the current legislation.



2.1 OWNERSHIP

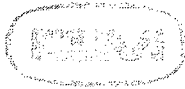
This is classified as a “ring-fenced” element. The threshold of 26% Black ownership has been retained. The Chamber proposes that the term “priority element” be utilised as per the BEE Codes.

The Preamble of the Mining Charter states the intent to “align the Mining Charter to the provisions of the Broad-Based Black Economic Empowerment Act, 2003 and the Codes of Good Practice (DTI Codes).” However, there is very limited evidence of alignment of the ownership element in the Mining Charter. The following are concerns which relate to the alignment of the Ownership Element to the Codes:

- The scorecard does not mention any weighting points related to Ownership and uses “YES/NO” which will not assist in calculating the final weighting points that will lead to calculating the different levels of compliance.
- Inconsistent definitions .e.g. BEE Compliant company, effective ownership,
- The Charter has adopted the BEE Black definition, however, the ownership scorecard still refers to HDSA ownership.
- The issue of Continuing Consequences is yet to be settled in the courts. In the amended Codes, the loss of shareholding mirrors the same number of years that the BEE shareholder was in existence. The Chamber and its members would prefer that the consequences of previous transactions should be retained in perpetuity.

The alignment requirements as stipulated in the Mining Charter are retrospective and prescriptive and this is not the requirement in the Codes. The DTI Codes do not prescribe how entities should arrive at the 26% Black Ownership. The Mining Charter is proposing that of this 26% no less than 5 % of shares should be in the form of ESOPS which under the Mining Charter, comprises of entrepreneurs, community and workers, respectively; the interests of which should be held in a Registered Trust. A maximum of 11% can be offset against Beneficiation. An unintended commercial consequence of this prescription is the lock-in of the empowerment shares for the life of mine which members of the Chamber do not agree with.

The inclusion of a Special Purpose Vehicle to drive ESOPs is a concern as, especially the requirement to incorporate a registered Memorandum of Incorporation (MOI). The intention for introducing such conditions for Ownership and participation at Board level are understood. However, they introduce



the concept of a significant minority block that tends to stifle decision making at Board level. This is also against Company law and JSE Regulations and the Companies Act, 2008. Companies should have the flexibility to engage their employees on an appropriate empowerment model which can include a profit share mechanism.

These stringent prescriptive conditions will also create negative conditions for investment in the mining industry.

As mentioned above, the Mining Charter will result in the unbundling of some existing transactions (some new, others recently re-financed) in terms of S2.11 (transitional arrangements), i.e. existing mining right holders have a maximum of three (3) years to align with the provisions of the charter. The Chamber is concerned as to whether implications of the requirement to restructure past and existing transactions have been considered by the DMR. The implications of the unbundling process and reorganizing BEE deals will result in increased transactions costs, with financial institutions being the main beneficiaries and no impact on the intended black beneficiaries. Furthermore, the beneficiaries will not have access to more diversified portfolios of mine ownership, and may be limited to only one. A company can apply to the Minister for permission to construct a consolidated transaction however the permission is not a *fait accompli*.

There is also a concern that this will open the doors for bankers and deal makers, at the expense of the black beneficiaries.

Furthermore the inclusion of the 11% Beneficiation as an offset, whilst welcome, requires further guidelines on how it will be measured and incentivised if companies already have a 26% Black ownership. A proper mechanism to recognise beneficiation credits should be developed.

Alignment to the Codes has not been achieved in respect of the ownership provisions as the following critical facets of the Codes have not been addressed:

- a) Sale of Assets provisions,
- b) Continuing consequences provisions
- c) Exclusion of South African Mandated Investments from the value of the equity
- d) The Exclusion of Foreign operations from the value of the equity
- e) The consideration of equity equivalency participation for foreign multinationals



f) Application of the Modified Flow Through Principle

All the above are currently viewed as allowable enhancements to the measurement of equity held in the hands of black people. However, the Mining Charter makes reference to compliance with its ownership provision as the absolute attainment of 26% direct equity in the hands of black people (split between individuals, ESOPS and CBOS equally). The Mining Charter does not make provisions for the indirect provisions catered for in the Codes.

2.1.1. Effective Ownership

The term needs to be adequately defined and clarified to limit room for speculation and confusion within the mining industry.

Does this mean the following can be applied?

- 40% exclusion of mandated investments, government entities,
- Apply modified flow through principle?
- Continuing Consequences and a whole host of principles applied in the Codes of Good Practice (the Codes)?

Foreign generated revenue/profits from foreign territories can also be excluded.

In the Mining Charter, a mine would find itself with different ownership structures as the new requirement is that each ownership be done "per mining right"

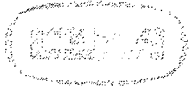
For consolidation purposes and simplicity, it would make more sense to consolidate ownership at Group level (approval by the Minister is required for this). This will be beneficial, not only for the mines but shareholders. It is such consolidation at Group level that gives an opportunity for black shareholders to have interest in other diversified mines either than just one mining right.

Should there be a retrospective review and unbundling of all past deals, which we do not support; who would bear the cost of such an exercise?

2.1.2 Definitions

There is a need to set clear definitions for the following terms on the Ownership Element:

BEE Compliant Company



- The Codes do not contain a concept of “BEE Compliant Company” or compliance with the Codes.
- An entity is measured under the Codes and achieves a BEE rating of Level 1 to Level 8 or a rating of Non-Compliant.
- In the Chamber’s view, the definition of BEE Compliant should either be:
 - (i) an entity that achieves at least a Level 8 BEE contributor status under the Codes; or
 - (ii) an entity that qualifies as an empowering supplier under the Codes.

BEE Supplier

The concept of “BEE supplier” must be defined. It is not clear what is intended by this term and whether it is a reference to BEE level or particular Black ownership.

Codes

If it is intended to cross-reference the Codes, the Mining Charter should specifically define the Codes.

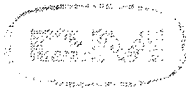
Meaningful economic participation

The Codes measure the level of Black participation in the ownership of an entity using various methodologies. Ownership relates to the economic interest (dividends) and voting rights attaching to the shares. A Black shareholder owning 1% of a company is an owner notwithstanding that 1% may not be a material or meaningful percentage ownership. There is no requirement in the BBBEE Act or the Codes for a specific level of Black ownership which constitutes “meaningful economic participation”.

In terms of section 2 of the BBBEE Act, the objectives of the BBBEE Act include:

- (i) “promoting economic transformation in order to enable meaningful participation of Black people in the economy; and
- (ii) promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity”.

In the Chamber’s view, the Mining Charter should move away from the concept of “meaningful economic participation” and refer to companies being required to have a specific level of Black ownership.



2.1.3 Beneficiation

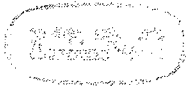
The scorecard says it is discretionary:

- What is the definition of discretionary?
- What is the percentage?
- What is beneficiation? (Sale of asset?)
- Is there a formula and threshold?
- What is the definition of refining?

The beneficiation offset only benefits those who have not achieved the 26% target and this is unfair to those companies that have invested in beneficiation in various forms and, if they already have achieved the 26% black ownership target. A workable formula to allow for beneficiation offsets should be developed.

2.1.4 Suggestions on the Ownership Element

- Ownership Target: The Chamber of Mines supports the target of 26% Black Ownership and further wishes to propose the following:
- Application of the Modified Flow Through principle for all prospective applications for calculating:
 - o Voting Rights
 - o Economic Interest
- Composition and Treatment of Black Partners: The principle of including ESOPs, Communities and Black Entrepreneurs in the BEE structure is accepted. However, Mining Right holders should be allowed to choose vehicles that will work best in their particular structures.
- There is a need for a wider definition of ESOPS as well as a definition of black entrepreneur.
- Understand that ESOPs and all black shareholders are not only entitled to cash-flows through dividend payment, but rather capital appreciation of their shares. If there is no dividend paid out (losses), what happens to the beneficiaries? They are still shareholders. The dividend



policy of a company should prevail and the DMR can check if the company has deviated from its dividend policy.

- The Chamber would like to see the introduction of debt (treatment thereof) for shareholders that do not have the funds. The Mining Charter does not cover this and its modalities.
- The concept of profit share as part of a model for ownership should be considered

The Chamber will be proposing an aligned scorecard for the Ownership element.

The key positions which the Chamber raised in its court application which are relevant to this topic are the following:

- By virtue of the MPRDA, once the Minister has granted or converted a mining right, the holder is not legally obliged to restore the percentage ownership by historically disadvantaged persons (“HDP”) to the 26% requirement in the Original Charter or in the 2010 Charter, and neither Charters requires a holder to enter into further empowerment transactions to address losses in HDP ownership once 26% has been achieved. This also applies in respect of the Reviewed Charter.
- A failure by a holder of a mining right or converted mining right to meet the requirements of the Original Charter and the 2010 Charter and a failure to maintain a 26% HDP ownership level do not constitute contraventions of the MPRDA, and paragraph 3 (which provides for this) of the 2010 Charter is accordingly ultra vires. This also applies in respect of paragraph 2.12 of the Reviewed Charter.
- Any provision in the 2010 Charter which retrospectively deprives holders of mining rights or converted mining rights of:
 - the capacity for offsets to allow for flexibility
 - the recognition of the continuing consequences of all empowerment transactions irrespective of when concluded
 - the right to offset excess empowerment in a particular operation against shortfall in other operations
 - the right to offset the full value of beneficiation against HDP ownership commitments
 - the use of all forms of ownership and participation by HDPs not only those in the definition of “meaningful economic empowerment”, including therefore the requirement to choose HDPs (and not

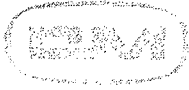


compulsorily to include entrepreneurs, workers and/or communities), is ultra vires the MPRDA and void.

This applies equally to the Reviewed Charter insofar as existing rights are concerned in that it would retrospectively increase the empowerment requirements and thus interfere with existing mining rights which had been granted on the basis of the requirements as they existed on date of grant or conversion having been met.

Summary of Issues on Ownership

- **Empowerment ownership principles and measurement**
- Any structure is permissible (avoids micro-management and over-regulation):
 - no requirements for special purpose vehicles
 - no requirements for entrepreneurs, workers or communities
 - no requirements for trusts.
- All good faith transactions whenever concluded and in whatever form, are recognised on an ongoing basis.
- No requirement (whether for existing or new rights) to restore ownership percentage.
- Offset (without limitation) of beneficiation (formula required).
- Offset of excess in one operation against shortfall in other operations.
- No warehousing requirement.
- The measure could be attributable units of production.
- **Existing mining rights**
- Holders of existing rights which on grant or conversion met the 26% requirements are deemed to continue to hold the greater of such 26% and the actual percentage held.
- Holders may attribute the level of ownership percentage across all existing mining rights to each individual mining right.
- By the third anniversary of the commencement date of the Reviewed Charter, holders of mining rights must apply in terms of s102 of the MPRDA for consent to an amendment of the existing mining right to delete the existing clause 17 and annex an Empowerment Ownership Plan which records the deemed ownership level in paragraph 2.1 above, the structure of recognised transactions, and a summary of key terms thereof, which the Minister will approve



within 6 months for execution and registration of a Notarial Deed of Amendment/Variation within a further 30 days.

- **Pending applications for mining rights**

Pending applications for mining rights will be dealt with under the provisions prior to the Reviewed Charter save that paragraph 22 above will apply.

- **New mining rights**

New mining rights:

- must achieve 26%
- will not be subject to any top-up requirements
- must have attached an Empowerment Ownership Plan.

- **Prospecting rights**

There will be no empowerment requirements for prospecting rights.

- **Disposals and consolidations**

- An acquirer is deemed to have attained the ownership percentage which is deemed to be held by the disposer.
- An application for consolidation in terms of s102 of the MPRDA must be accompanied by a consolidated Empowerment Ownership Plan embodying the deemed ownership percentage for each right which is being consolidated.

- **Acknowledgment letters**

The Minister will from time to time issue to each holder acknowledgment letters acknowledging the holder's empowerment credentials, the empowerment percentage of the holder, and the consequences of previous deals.



2.2 PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT

The Mining Charter needs to clarify what is meant by a “BEE compliant enterprise” or a “BEE compliant company” or “small business development”. The Codes of Good Practice do not refer to a “BEE compliant enterprise or company” but rather rates companies according to their levels of compliance to the codes or whether it is a Large Enterprise or an Empowering Supplier or a Qualifying Small Enterprise or an Exempt Micro Enterprise.

The Mining Charter has increased the target under Capital Goods by 20 percentage points, 20 percentage points for consumables and 10 percentage points for services. In addition, the targets also introduced local manufacturing for capital goods and consumables. In alignment with the BBEE codes, the differentiation between capital goods, consumables and services should be removed. If it is retained, clear definitions of these categories need to be provided.

2.2.1 Suggestions on the Procurement Element

This is a priority element in terms of the B-BBEE Codes and the Chamber proposes that this should be retained as a priority element within the Mining Charter.

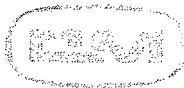
The BBEE Codes measure the denominator against which procurement targets are weighted in terms of the Total Measured Procurement Spend (TMPS). The Charter only makes reference to actual spend. This could affect companies negatively as specific non-procurement items and items procured from foreign domiciles may be included in the value of actual spend which may disadvantage mining right holders if they were to be measured against B-BBEE Codes.

Localisation of competitive supply is fully supported. Targets for local content should, however, be informed by comprehensive studies that indicate local capabilities and will probably differ by types of mining e.g. surface mining, underground coal, underground hard-rock, etc.

BEE compliant companies need to be defined more specifically e.g. Level 4 compliant company according to the B-BBEE Codes.

Targets for small business development should be removed since they interfere with supplier development.

This element now includes criteria previously under the Sustainable Development element of the 2010 Mining Charter of 100% samples analysed at local facilities. This will be problematic for companies as



the DMR has not assessed and confirmed whether there already exists enough processing capacity by local black owned research organisations to meet this requirement. Singling this out as a service is not supported.

The onus should be on suppliers and not with mining right holders to verify local content with the SA Bureau of Standards (SABS).

The existing multi-national supplier levy has been a failure. Mining companies do not have the legal right to collect such funds. All that the levy does is increase the cost of doing business for the mining companies.

Members do not support the Multinational supplier contribution since this contradicts efforts to localise competitive supply. To give effect to this goal a completely different approach than what is included in the Mining Charter will be required. It will probably take about one year to develop a 5-10 year strategy with the requisite targets, incentives, etc. It is proposed that an enabling clause be included in the Mining Charter that will give mining right holders the opportunity to be exempted from this element of the Mining Charter as it stands once a Mining Strategic Sourcing and Supplier Development strategy is developed in consultation with the Dti.

The Chamber will be making proposals on the revised aligned scorecard for this element.



2.3 BENEFICIATION

Beneficiation is defined as the transformation of a mineral (or a combination of minerals) to a higher value product, which can either be consumed locally or exported. The term is often used interchangeably with mineral "value-addition" or "downstream beneficiation".

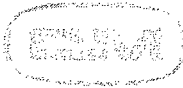
This element is misplaced as a stand-alone and it is our considered view that this in effect should form part of the criteria under the Ownership element.

Beneficiation is one way of promoting Industrialisation in South Africa and further strengthening the linkages between mining and manufacturing especially black industrialisation. The scorecard is very silent on how the beneficiation initiatives by mining companies will be recognised as this is the means of strengthening the linkages between mining and manufacturing.

2.3.1 Suggestions on the Beneficiation Element

It is necessary for the avoidance of confusion for the Mining Charter to set out clearly the measurement principles to be applied for beneficiation. The Mining Charter allows for the off-setting of the value/percentage achieved through beneficiation against the ownership scorecard, at a maximum of 11%. As mentioned under paragraph 2.1 above, the Chamber submits that the limitation to 11% in the 2010 Charter and now in the Reviewed Charter is ultra vires and that there should be no such limitation.

A proposal will be presented on how beneficiation should be treated to benefit those who are involved in beneficiation initiatives who have achieved the 26% Ownership target, whilst at the same being used as an offset of up to 100% of the 26% reserved for Black people for those mining right holders who have not achieved the required 26% ownership target.



2.4 EMPLOYMENT EQUITY

The Chamber and its members remain committed to workplace diversity and equitable representation at all levels to promote social cohesion, transformation and competitiveness of the mining industry. The Mining Charter proposes employment equity targets that are set out in the DTI Codes without any modification. Achieving such targets at core occupational categories remains a challenge and therefore special consideration needs to be given for the mining sector to set stretch targets that are realistic to the conditions of the mining sector.

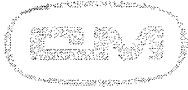
Whilst the industry has met and in some cases exceeded the targets in the current Mining Charter there are limitations in this area; in particular the promotion of black females in middle, senior management and executive positions. Much of the focus has been on programmes targeted towards meeting the target of 10% women participation (inclusive of white females) for Women in Mining projects. It would assist the industry to utilise provincial EAP targets as per the Employment Equity Act with progressive targets over 5 years. These targets should be more realistic in line with industry workplace profiles and aligned to EAP statistics as reported by the Commission on Employment Equity annually. It would be useful to propose an EAP formula to be used by the mining industry. An important initiative will be the streamlining of Skills Development interventions to ensure a sufficient talent pool for career-pathing.

2.4.1 Suggestions on the Employment Equity Element

The following are recommendations to be considered under this element:

- Mining Charter targets to align with the Employment Equity Act five year planning cycle it is proposed that progressive targets be set.
- Accidents affect all employees working at core operations irrespective of their race. South Africa has a serious issue of disabled person's unemployment. For this reason targets for people with disabilities should be inclusive of all races and the mining industry is committed to ensuring that it plays its part in the absorption of those classified as disabled- The target should therefore be 2% of all employees working on surface.
- Clarification is required on the consequences of not meeting the targets and weighting points within the element.

The Chamber will be making proposals on a scorecard for The Employment Equity element.



2.5 HUMAN RESOURCE DEVELOPMENT

The Chamber supports the categorisation of this pillar as a ring-fenced (priority) element.

The Mining industry is currently experiencing significant economic challenges that have a negative impact on the industry. Protracted low commodity prices, poor commodity demand from international markets, including above inflation labour cost increases have affected employment conditions in the mining industry. These conditions have led to many companies resorting to right sizing and reducing their staff complements. As a “knowledge based industry”, mining companies remain committed to training their employees for career growth as well as providing them with skills that will enable them to attain employment outside of mining.

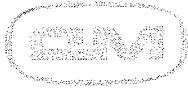
The Mining Charter proposes a target of 5% annual payroll; 5% of this needs to be invested in South African Academic institutions, research organisations, Research and Development initiatives and with a further 15% contribution (of the 5% payroll) towards a Ministerial Skills Development Fund. We do not support the establishment of a Ministerial Skills Fund as it is a duplication of the 1% levy currently being paid towards the National Skills Fund.

The mining industry contribution to the skills levy is equal to approximately R1.14bn per annum and the MQA alone received at least R915m in the 2014-2015 Financial year. More than R200m is allocated to the National Skills Fund from the mining sector alone and the latter funds are dedicated towards the training of the unemployed. Research Institutions like Mintek stand to double dip into these funds as they can claim from the proposed Ministerial Trust Fund as well as the 5% mentioned above that is reserved for research institutions.

Of concern is whether the Minister would not be contravening the National Treasury regulations by imposing his own skills levy from the mining industry?

It must further be noted that the Mining Industry is the only industry that is required to invest in community development projects, some of which include expenditure in basic education for the unemployed, and ad hoc scholarship programmes.

The prescriptive manner in which these funds have to be used as well as prescriptive allocations will reduce the training spend on employees who need to be developed for career progression or training in alternative skills in this environment where many are faced with the real threat of retrenchment.



2.5.1 Suggestions on the Human Resource Development Element

The Chamber proposes that this element be titled Skills Development to reflect the investment on employees as well as community members to better align with the B-BBEE Codes.

In the spirit of alignment with the B-BBEE Codes, consideration will need to be made for the following key measurement principles in respect of Human Resource Development (HRD):

a) SETA regulations

Approval of Work Place Skills Plans, Annual Training Reports to track training programmes provided by mining companies

b) We recommend the usage of an industry learning programme matrix to determine the value applicable to training programmes, i.e. are internal training programmes weighted equally to external programmes? Are the administration costs of programmes (internal) weighted equally to programmes offered by SAQA/QCTO accredited learning institutions? What is deemed legitimate training expenditure?²

c) Legitimate Expenditure: will employees be required to pay back funds expended should they not successfully complete a learning programme?

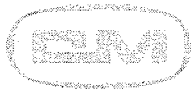
d) Treatment of mandatory sectoral training- the codes do not recognise this as legitimate training expenditure

e) It is unclear how the Mining Charter will treat the expenditure on non-employee individuals? The Codes allow for 6% of expenditure to be expended on unemployed black people.

The Chamber does not support the 15% Ministerial Skills Fund.

We will make submissions on a proposed scorecard for this element.

² A proposed list of courses which will form part of the Learning Programme Matrix will be presented to the DMR



2.6 MINE COMMUNITY DEVELOPMENT (MCD)

The MPRDA Preamble articulates that the state is the custodian of the country's mineral resources, the benefits of which should accrue to all the people who live in it.

In principle, labour sending areas are not limited to areas within the borders of South Africa. Does this imply that the activities carried out by the mining sector to redress the economic imbalances of the past regime will be applied to the SADC countries?

The BEE Codes specifically refer to redressing the economic imbalances affecting only South African Citizens disadvantaged by the Apartheid legislation.

This definition of Labour Sending Areas is also difficult to interpret as people move around in the country, buy houses, start families and live in different areas than where they originally come from. The definition is open for different interpretations and causes confusion.

2.6.1 Suggestions on the Mine Community Development element

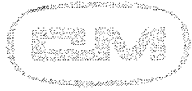
The DMR needs to clarify the term "labour sending areas".

It is suggested that MCD be measured in the same manner as **Socio-Economic Development (SED)** in the B-BBEE Codes as follows:

If a project is implemented, the mine should prove that at least 75% of the beneficiaries are Black as defined. This is possible because a company is supposed to conduct ethnographic assessment through community consultative and collaborative processes to delineate community needs. On that basis 100% of the costs will be taken into account in scoring the mine, taking into account the SED Benefit Factor Matrix.

However, in instances where the black beneficiaries are less than 75%, then expenditure will be recognised on a pro-rata basis. Reference can be made to Annexure 500 (A) of the BEE Codes to assist with the calculation.

Of significant concern under this element is the target setting of 1% Annual Turnover towards a Ministerial Social Development Trust Fund, which is not endorsed by the Chamber. This type of ad



valorem tax is extremely regressive, undermines marginal or loss-making mines and is not supported. Is this similar to the Multi-national Suppliers Contribution towards a Social Fund whose contribution was set a target of 1% Net Profit after Tax (NPAT) and previously included under the Procurement element?

The Chamber does not support the target of 1% Annual Turnover and instead proposes 2% of NPAT towards SED.

It is important to note that non-monetary contributions are not considered under this element. The Chamber further proposes enhanced recognition of technical and capacity building programmes as part of this element as they facilitate municipalities' ability to deliver more effective services. Furthermore, we propose that collaborative endeavours (with other companies, government departments, development finance institutions etc.) also be given enhanced recognition as recognised in the Codes.

The following is proposed as criteria under this element:

- Approved mine and community rural development projects with an annual contribution of 2% NPAT

The following principles will be applied:

- Enhanced Recognition (Multiplier of 1.2) for Collaboration Projects (Government, DFIs etc.)
- All benefits that accrue to contractors and small businesses will be counted under Enterprise Development provided the beneficiary qualifies as per the requirements of B-BBEE.
- Only initiatives that benefit the community, NPOs, NGOs, and Co-Ops will be claimed under SED, 100% of the spend (monetary or non-monetary) will be recognised the moment the black beneficiaries base (BBB %) reach at 75%. If the BBB% is less than 75%, then the spend will be pro-rated.

Measuring MCD projects in terms of money spent is not adequate as it does not demonstrate the real contribution of mining at community level. There should be enough points allocated for both actual spending and also completion of projects. The total points allocated for this element should be commensurate with the amount of money spent on the projects needed to reach compliance stage

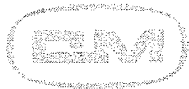


and effort by the mines. The aim is to come up with a formula for testing compliance that will adequately measure the progress in improving the legacy issues in the mine communities.

To avoid confusion, there must be a unified agreed definition for the measurement of compliance. Perhaps the mining industry can learn from the BEE Codes. The real intention should be to measure with the aim of demonstrating the contribution of the mining industry towards community development.

It is imperative that there be specific guidelines set on the DMR approval of MCD projects to guard against protracted approvals which unfairly prejudice companies.

A proposed scorecard will be presented for this element.



2.7 HOUSING AND LIVING CONDITIONS

The Mining Charter has indicated the following as targets under this element:

- a) Maintain the occupancy rate of one person per unit and maintain family units
- b) Contribute towards home ownership options for interested mine employees in consultation with organised labour

The Mining Charter classifies this element as a “ring-fenced” element necessitating 100% compliance for life of mine. The Chamber submits that this should not be a Priority element and should be removed as a Mining Charter target after the three year transitional period. The significance of this element can be reflected through a higher weighting.

2.7.1 Suggestions on the Housing and Living Conditions Element

We support the Mining Charter proposal of integrated development as per the Department of Human Settlements Policies and relevant frameworks (Presidential Package, 2009 Revised Housing Standards etc.). In terms of company contributions towards home ownership, each company be allowed self determination to develop an appropriate housing policy which could include housing subsidies, usage of rental stocks etc.

The stipulation that companies should partner with finance institutions to provide guarantees for home ownership on behalf of employees is not supported.

The Chamber would like to propose a complete phasing out of housing allowance as it has created negative unintended consequences. A significant number of employees who receive this allowance still opt to stay in informal structures.

Definitions should be clarified (Family unit, Home, Hostel, Single room). There is a need for a clear definition of “conversion” to family units. Old hostels, although “converted” to family units, still have shared ablution and the structures of the buildings do not allow for structural changes to add ablution to units.

The following is proposed as criteria under this element:

- a) Provision of adequate and decent housing
- b) Percentage reduction of occupancy rate (progressive targets)
- c) Percentage conversion of hostels into single occupancy and or family units



d) Facilitation of Home Ownership

The Facilitation of Home Ownership options include:

- a) The mine must have an ownership scheme in place including rental, rent to own ; housing policy, proof of implementation of the scheme and housing register will be required as proof
- b) Is there a process to make the scheme affordable? (E.g. indebtedness program, financial training programs)
- c) Proof of a consultative process with internal and external stakeholders (employees, municipalities, traditional leaders, organised labour) – minutes, memos, signed attendance registers

The facilitation of Home Ownership should include rental, rent to own or home ownership in the domicile preferred by the employee.

Proposals will be made regarding a revised scorecard for this element.



IX. PART B: Proposal: Key Measurement Principles and Reporting Requirements

2.8 APPLICATION OF THE MINING CHARTER FOR PERMITS/LICENSES GRANTED UNDER THE PRECIOUS METALS ACT, 2005, AND THE DIAMOND ACT, 1986 AS AMENDED

- As stated in general terms in paragraph 2.8:

.1 in terms of s6(1)(b) of the Precious Metals Act, 2005:

“(1) *In considering an application for any licence, permit or certificate the Regulator –*

...

(b) *must have regard to the requirements of the broad-based socio-economic empowerment Charter developed in terms of section 100 of the Mineral and Petroleum Resources Development Act, 2002 . . .”;*

.2 in terms of s5(2)(a) of the Diamonds Act, 1986:

“(2) *The Regulator may:*

(a) *when considering an application for any of the licences or permits provided for in this Act, have regard to the broad-based socio-economic empowerment Charter contemplated in section 100 of the Mineral and Petroleum Resources Development Act”.*

The above provision in the Precious Metals Act is peremptory (“*must*”) whereas the above provision in the Diamonds Act is only directory (“*may*”).

3 Other than to state that entities which are not holders of rights, permits or permissions in terms of the MPRDA (such as manufacturers of autocatalytic converters and of jewellery) may find difficulty in applying the provisions of the Mining Charter to their activities, the Chamber believes these companies should comply with the DTI Codes.



2.9 REPORTING (MONITORING AND COMPLIANCE)

Section 28 of the MPRDA makes provision for reporting. However, the Chamber is of the view that this pillar is not necessary as an element in the proposed Mining Charter but that the DMR should rather provide guidelines on how reporting should be complied with. We propose that such Guidelines should be developed for independent monitoring and verification. The Chamber accordingly requests that paragraph 2.9 of the Reviewed Charter be deleted.

2.10 APPLICABILITY OF TARGETS

The review of targets should be subject to a stakeholder engagement processes which should consider economic conditions, beneficiary dictates and broader policy shifts as proposed in relation to paragraph 2.13.

The Chamber recommends that the Ownership element be reserved until Judgement is reached on the Chamber's Declaratory Order, but in the meanwhile submits that as stated in relation to paragraph 2.1 above, holders be deemed to hold the greater of 26% or their actual empowerment percentage, and that they not be required to restore any loss of such level.

The Chamber further proposes that there be sub-minimums (40%) on Priority Elements which we recommend to be: Ownership, Procurement, Enterprise and Supplier Development and Skills Development.

2.11 TRANSITIONAL ARRANGEMENTS

The transitional arrangements which allow for a maximum of 3 years to comply with the revised targets are noted but are, as stated in relation to paragraph 2.1 above, not applicable insofar as ownership is concerned. This contradicts the gazetted Notice from the DTI on the development of Sector Codes which states:

3.1.11 No transitional period shall be provided for the implementation of a Sector Code



We therefore propose that for each element there be progressive targets, cumulatively from the Mining Charter Targets of 2014. The Chamber further submits that there be a transitional arrangement that allows for a period of 5 years to enable a legitimate industry alignment process.

We recommend that the sentence *"In terms of this Mining Charter performance shall be reported and audited against each element in respect of implementation for the applicable year of the report."* be removed as it is a duplication of Mining Charter paragraph 2.9: Reporting (Monitoring and Compliance).

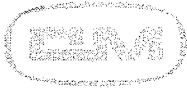
2.12 NON-COMPLIANCE

For the reasons above, the Chamber submits that paragraph 2.12 should be deleted because the matter of non-compliance falls to be addressed by the MPRDA itself and not by the Mining Charter.

2.13 REVIEW OF THE CHARTER

For the reasons above, the Chamber submits that paragraph 2.13 should be deleted since this aspect needs to be governed by the MPRDA itself and not by the Mining Charter. However, insofar as paragraph 2.13 is nevertheless to be retained, and in the spirit of the Stakeholder Declaration (2010), the Chamber would recommend the following addition:

Review of the Mining Charter be subject of a consultative multi stakeholder process through the auspices of MIGDETT, the frequency of which to be determined by unanimous decision.



X. CONCLUSION

The Chamber reiterates its gratitude to the Minister for having afforded to the Chamber the opportunity of commenting on the Mining Charter, and extends an invitation to him for Chamber representatives to meet with the Minister's representatives in order to engage in constructive discussions on these comments and to assist in any way which the Minister might find desirable towards expeditious and beneficial finalisation of the Mining Charter alignment process.

CHAMBER OF MINES OF SOUTH AFRICA



ANNEX 1: CATEGORISATION OF ENTITIES

Entity	Criteria	Turnover Threshold	BBBEE Code Threshold	Element
Exempt Micro-Enterprise (EME) Emerging Miners	Mining Permit Holder, Prospecting Right Start-Up	<R50 million	<R10 million	1 element Skills Development (HRD)
Qualifying Small Enterprise (QSE) Junior Miners	+R500mil capitalisation	>R50 million <R300 million	R10 million < R50 million	2 Priority elements (Ownership, HRD) and choice of 1 Procurement and or Mine Community Development
Generic Enterprise (GE) Major Miners		>R300 million	> R50 million	All Priority elements (Ownership and Beneficiation, Skills Development and Procurement, Enterprise and Supplier Development) and all other elements in the proposed scorecard.

ANNEX 2: PROPOSED REVISED MINING CHARTER SCORECARD

Pillar (Element)	Weighting	Code Series Reference
Ownership and Beneficiation [Priority]	25	100
Management Control (Employment Equity)	19	200
Skills Development (Human Resource Development) [Priority]	25	300
Procurement, Enterprise and Supplier Development [Priority]	40	400
Socio-Economic Development (Mine Community Development)	15	500
Housing and Living Conditions	12	600
Total Points	136 points	

ANNEX 2.1: OWNERSHIP

Ownership and Beneficiation	Weighting Points	Industry Target	DMMR Target
Meaningful Economic Participation			
BEE Entrepreneurs	10	26%	26%
Employees			
Community Interest			
Full Shareholder Rights			
BEE Entrepreneurs	15	26%	26%
Employees			
Community Interest			
Bonus Points : Regional beneficiation into the African region	3		11%
Bonus Points : Invest in a refinery	2	N/A	
Total Points (excluding Bonus points)	25		N/A

NB: Measurement of ownership to include the recognition of asset sale transactions that benefits or benefited transformation.

For Multinational companies, the basis of measurement be only the South African assets i.e. exclude the foreign asset base.

Recognition of continued consequences provision.

Incorporation of the flow through principles





ANNEX 2.2: PREFERENTIAL PROCUREMENT, ENTERPRISE AND SUPPLIER DEVELOPMENT

Preferential Procurement Enterprise and Supplier Development	Weighting	Industry Target
Preferential Procurement		
Spend from all Empowering Suppliers	5	70%
Spend from Empowering Supplier QSEs	2	10%
Spend from EMEs	2	10%
Spend from 51% Black Owned Empowering Suppliers	8	35%
Spend from 30% Black Woman Owned Empowering Suppliers	4	10%
Spend with 51% Black owned Sample Processors or Local Suppliers	4	2%
Bonus Points: Spend from 51% Black Owned Empowering Suppliers who are designated Groups	2	2%
Bonus Points: Spend from 51% Black Owned Black Industrialists	1	2%
Bonus Points :Spend with 51% black owned suppliers of Core services within the Mining Industry	1	5%
Supplier Development		
Annual value of all Supplier Development Contributions made by the measured entity as a percentage of the target	10	2% of NPAT
Enterprise Development		
Annual value of all Enterprise Development Contributions made by the measured entity as a percentage of the target	5	1% of NPAT
Bonus Points: graduation of one or more ED beneficiaries to SD level	1	Y/N
Bonus Points: creating one or more jobs directly as a result of ESD initiatives by the measured entity	1	Y/N
Total Points (excluding Bonus Points)	40	

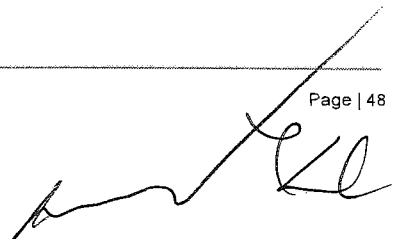


ANNEX 2.3: BENEFICIATION (PROPOSAL TO BE DEVELOPED SUBJECT TO DETERMINATION OF GUIDELINES AND DEFINITIONS)

ANNEX 2.4: Management Control (Employment Equity)

Criteria	Weighting	Industry Target	DMR Target
Board participation:			
Exercisable voting rights of black board members as a percentage of all board members	2	40%	50%
Exercisable voting rights of black female board members as a percentage of all board members	1	15%	N/A
Black Executive directors as a percentage of all executive directors	1	40%	N/A
Black female Executive Directors as a percentage of all Executive Directors	0.5	25%	N/A
Other Executive Management:			
Black Executive Management as a percentage of all Executive Directors	2	60%	60%
Black female Executive Management as a percentage of all Executive directors	1	30%	30%

Criteria	Weighting	Industry Target	DMR Target
Senior Management			
Black employees in Senior Management as a percentage of all Senior Management	2	35%	60%
Black female employees in Senior Management as a percentage of all Senior Management	1	20%	30%
Middle Management			
Black employees in Middle Management as a percentage of all middle management	2	40%	75%
Black female employees in Middle Management as a percentage of all Middle Management	1	20%	30%
Junior Management			
Black employees in Junior Management as a percentage of all Junior management	1	70%	88%
Black female employees in Junior Management as a percentage of all Junior Management	0.5	30%	30%
Employees with disabilities			
Black employees with disabilities as a percentage of all employees non-operational (support services)	2	2%(inclusive)	2%
Core and Critical Skills	2	40%	40%
Total Points	19		N/A





ANNEX 2.5: SKILLS DEVELOPMENT (HUMAN RESOURCE DEVELOPMENT)

Criteria	Weighting	Industry Target	DMR Target
Skills Development			
Skills Development Expenditure on Learning Programmes specified in the learning programme matrix for black people as a % of Leviable Amount	10	5%	5%
Skills Development Expenditure on Learning Programmes specified in the Learning programme Matrix for black employees with disabilities as a % of Leviable Amount	2	0.25%	N/A
Learnerships, Apprenticeships & Internships	4	1.5%	N/A
Number of black people participating in Learnerships, Apprenticeships & Internships as a % of total employees	5	1.5%	N/A
Number of black unemployed people participating in training specified in the learning programme matrix as a % of number of employees	2	2%	N/A
Support for Academic institutions and R&D	2	2%	N/A
Bonus Points	5	100%	N/A
Number of black people absorbed into the industry			
Total (excluding Bonus Points)	25		



ANNEX 2.6: SOCIO-ECONOMIC DEVELOPMENT (MINE COMMUNITY DEVELOPMENT)

Criteria	Weighting	Industry Target	DMR Target
Approved mine and community rural development projects	15	2% NPAT	1% Annual Turnover
Bonus Points	5		N/A
Implementation of additional projects (due to demand from communities/municipality)	1	0% < 5% target	N/A
	2	5% < 10% target	
	3	10% < 15% target	
	4	15% < 20% target	
	5	20% < 25% target	
Total Points (excluding Bonus Points)	15		N/A

NB:

- Enhanced Recognition (Multiplier of 1.2) for Collaboration Projects (Government, DFIs etc.)
- All benefits that accrue to contractors and small businesses will be counted under ED provided the beneficiary qualifies as per the requirements of B-BBEE.
- Only initiatives that benefit the community, NPOs, NGOs, and Co-Ops will be claimed under SED 100% of the expenditure (monetary or non-monetary) will be recognised the moment the black beneficiary base (BBB %) reaches 75%. If the BBB% is less than 75%, the expenditure will be pro-rated.



ANNEX 2.7: HOUSING AND LIVING CONDITIONS

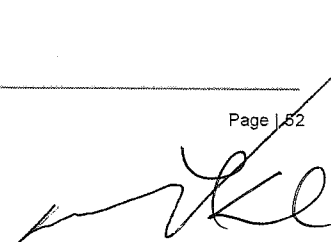
Criteria	Weighting	Target	DMR Target
Provision of adequate and decent housing	2	100%	100%
Percentage reduction of occupancy rate towards 2014 targets	2	100%	100%
Percentage conversion of hostels into family units	2	100%	100%
Facilitation of Home Ownership	6	100%	100%
<ul style="list-style-type: none"> The mine must have an ownership scheme in place, housing policy, proof of implementation of the scheme and housing register will be required as proof 	(2)	100%	
<ul style="list-style-type: none"> Is there a process to make the scheme affordable? (E.g. indebtedness program, financial training programs) 	(2)	100%	
<ul style="list-style-type: none"> Proof of a consultative process with internal and external stakeholders (employees, municipalities, traditional leaders, organised labour) – minutes, memos, signed attendance registers with stakeholder 	(2)	100%	
Total Points	12		

ANNEX 3: LEARNING PROGRAMME MATRIX

Category	Item	Description
A	Bursaries	<ul style="list-style-type: none"> • Institutional instruction • Institutions • Degree, diploma, or certificate
B	Internships	<ul style="list-style-type: none"> • Mixed mode delivery • Institutions and workplace • Degree, diploma or certificate
C	Learnerships	<ul style="list-style-type: none"> • Structured learning • Workplace • Registration and licensing
D	Learnerships or Apprenticeships	<ul style="list-style-type: none"> • Institutional instruction and experiential learning • Institutional and workplace • Professional qualification
E	Work integrated learning	<ul style="list-style-type: none"> • Structured, supervised experiential learning • Workplace, institutional as well as ABET
F	Informal Training	<ul style="list-style-type: none"> • Structured information • Institutions, conferences and meetings • Professional development
G	Informal Training	<ul style="list-style-type: none"> • Informal training • Workplace • Understanding job/work content

ANNEX 3 a): LEARNING PROGRAMME MATRIX TARGETS

Training Expenditure	Recognised
Category A-E	100%
Category F&G	15% of total skills exp.
Mandatory Training (e.g. Health and Safety)	0%
International Training	100% (meets SAQA requirements)
Incidental Costs (Accommodation, travel, catering)	15% total skills expenditure





CHAMBER OF MINES
of South Africa

REVISED DRAFT SUBMISSION ON DMR DRAFT REVIEWED
BROAD BASED BLACK-ECONOMIC EMPOWERMENT
CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY

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Presentation Outline



CHAMBER OF MINES
of South Africa

Background
Proposed Scorecard
Reviewed Draft Mining Charter
Ownership
Procurement, Enterprise and Supplier Development
Beneficiation
Employment Equity
Human Resource Development
Mine Community Development
Housing and Living Conditions
Key Measurement Principles and Reporting Requirements

Background

- As a representative body of major and emerging mining companies in South Africa the Chamber takes the opportunity to make this revised submission to the DMR in response to the DMR engagement of 8 July 2016
- Our understanding of the country's transformation imperative is informed by the following:
 - The Constitution of the Republic of South Africa, 1996 (Act No.108 of 1996)
 - MPRDA Act 2002 (Act No. 28 of 2002)
 - B-BBEE Act 2013 (Act No. 53 of 2003)
 - The National Industrial Policy Framework (NIPF)
 - The National Development Plan (NDP)
 - Recognition of the role that industry needs to play to redress systemic inequalities and to meaningfully contribute towards the promotion of an inclusive industry and economy
- Our understanding of the alignment process is informed by the following:
 - B-BBEE Act 2013 (Act No. 53 of 2003)
 - Government Notice 1047 OF 2015
 - The use of a common scorecard by different stakeholders provides a basic framework against which to benchmark BEE process in different enterprises and sectors.
 - B-BBEE Sector Charter, gazetted in terms of **Section 12** of the B-BBEE Act
(Source: BEE Strategy)

Proposed Classification of Entities



Entity	Chamber Proposal Threshold	BEE Codes Threshold	National Small Business/Amendment Act (26 of 2003)	Element
Exempted Micro Enterprise (EME) Emerging Miners	< R50 million	< R10 million	R0.20 million (Micro) R4 million (Very Small)	1 Priority element (Skills Development)
Qualifying Small Enterprise (QSE) Junior Miners	R50 million-<R300 million	R10 million <R50 million	R10 million (Small)	2 Priority elements (Ownership & Skills Development) plus 1 non-priority element
Generic Enterprise (GE) Majors	> R300 million	> R50 million		ALL

NB:

- The National Small Business Amendment Act (26 of 2003) defines business according to five categories established by the original act, namely, standard industrial sector and subsector classification, size of class, equivalent of paid employees, turnover and asset value – excluding fixed property.
- We propose that the classification of entities by turnover threshold as proposed be incorporated as part of the measurement principles in the Revised Mining Charter
- We propose that Sand and Quarries be classified as EME's

Proposed Scorecard



REPUBLIC OF SOUTH AFRICA
DEPARTMENT OF MINES
REPUBLIC OF SOUTH AFRICA



Category	Weighting
Reporting	Y/N
Ownership	Y/N
Housing and Living Conditions	Y/N
Mining Community Development	15%
Sustainable Development and Growth (i.e. Enviro, Health & Safety, R&D etc.)	29%
Procurement & Enterprise Development	15%
Employment Equity	16%
Human Resource Development	25%
Beneficiation	0%
Total	100%

Category	Weighting
Ownership	25
Socio-Economic Development	5
Enterprise and Supplier Development	40
Management Control	15
Skills Development	20
Total	100

Category	Weighting
Ownership	Y/N
Housing and Living Conditions	Y/N
Human Resource Development	Y/N
Mine Community Development	30%
Procurement & Enterprise Development	40%
Employment Equity	30%
Beneficiation	0%
Total	100%

Category	Weighting
Ownership & Beneficiation	25
Skills Development	25
Housing and Living Conditions	6
Socio-Economic Development	15
Procurement & Enterprise Development	40
Management Control	19
Total	130

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Proposed Scorecard



DEPARTMENT OF MINES
AND METALLURGY

Pillar (Element)	Weighting	Total including Bonus Points
Ownership and Beneficiation [Priority]	25 (5)	30
Management Control (Employment Equity)	19 (0)	19
Skills Development (Human Resource Development) [Priority]	25 (5)	30
Procurement, Enterprise and Supplier Development [Priority]	40 (6)	46
Socio-Economic Development (Mine Community Development)	15 (5)	20
Housing and Living Conditions [Priority]	6 (6)	12
Total Points	130 points	157

NB:

- This is a proposed scorecard. Further engagements to be held to agree an industry scorecard and guidelines for measurement.
- Values in brackets indicate bonus points

Procurement Enterprise & Supplier Development

- Policy instruments to achieve broad based economic empowerment have not yielded desired outcomes-job creation:
 - Investment costs to set up manufacturing for capital goods not commercially sustainable
 - Limited volume of large body mining equipment in SA
 - Limited competitive advantage of old manufacturing plants abroad vs. a new plant
 - High current level of maintenance activities to save costs, thereby reducing volume of units
 - Fluctuating exchange rate which will compromise investment decisions
 - High import content of even locally based OEM's

However...

"In order to grow our economy, more enterprises are needed to produce value-added goods and services, to attract investment, to employ more of our people in productive activities" *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment*

- Procurement, Enterprise and Supplier Development can be a catalyst for growth
 - Consumables and parts of the mining equipment can be produced economically in SA
 - SA industry has the expertise, funding support and baseline off take
 - The vision must be for a South African parts and consumables Hub for Africa and for operations of OEM locally and internationally (The Mining and Innovation Hub initiative is as an example)
 - Our expertise developed for local produced consumables and services can be exported

(Source: *Johan Streuderst*)

Proposed Procurement Scorecard



Preferential Procurement Enterprise and Supplier Development	Weighting	Industry Target
Preferential Procurement		
Spend from all Empowering Suppliers	5	70%
Spend from Empowering Supplier QSEs	2	10%
Spend from EMEs	2	10%
Spend from 51% Black Owned Empowering Suppliers	8	35%
Spend from 30% Black Woman Owned Empowering Suppliers	4	10%
Spend with 51% Black owned Sample Processors or Local Suppliers	4	2%
Bonus Points: Spend from 51% Black Owned Empowering Suppliers who are designated Groups	2	2%
Bonus Points: Spend from 51% Black Owned Black Industrialists	1	2%
Bonus Points :Spend with 51% black owned suppliers of Core services within the Mining Industry	1	5%
Supplier Development		
Annual value of all Supplier Development Contributions made by the measured entity as a percentage of the target	10	2% of NPAT
Enterprise Development		
Annual value of all Enterprise Development Contributions made by the measured entity as a percentage of the target	5	1% of NPAT
Bonus Points: graduation of one or more ED beneficiaries to SD level	1	Y/N
Bonus Points: creating one or more jobs directly as a result of ESD initiatives by the measured entity	1	Y/N
Total Points (excluding Bonus Points)	40	

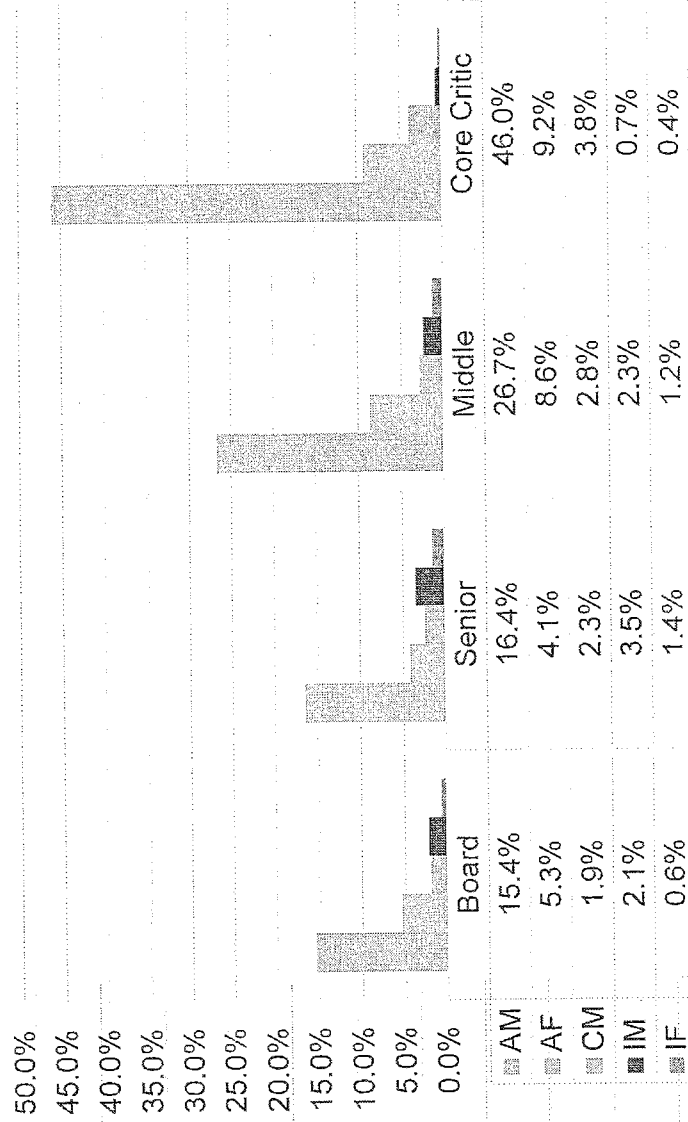
NB

- Include incentives that promote partnering and collaboration
 - Clear definition of what is expected from focused supplier development approaches as it relates to, inter alia, technical skills development of black businesses, mine entry requirements and quality
- The BEE Codes measure the denominator against which procurement targets are weighted in terms of the Total Measured Procurement Spend (TMPS) and the Reviewed Mining Charter is silent on the calculation. The Charter only makes reference to actual spend

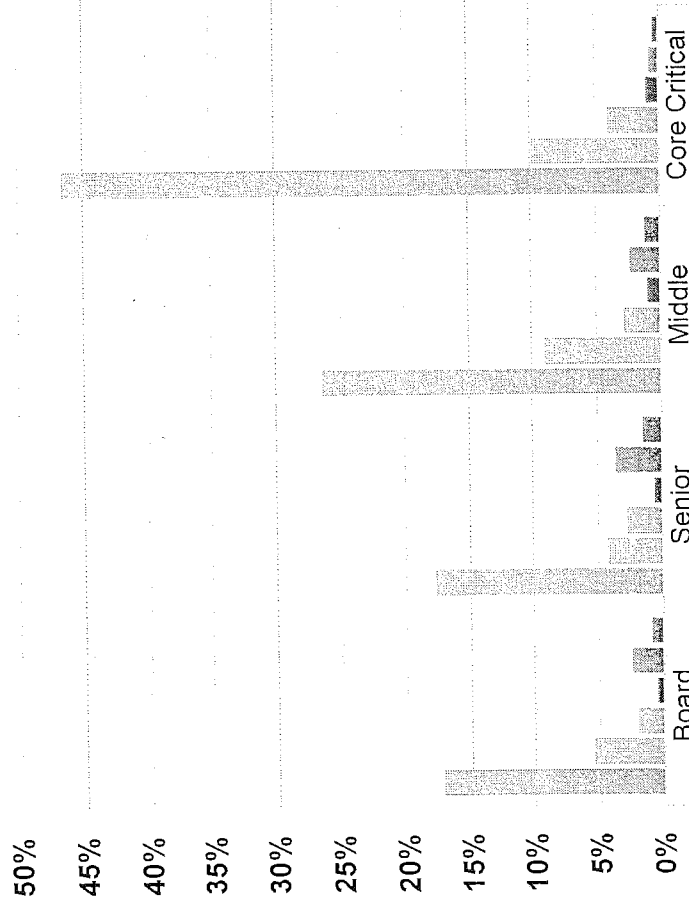
Employment Equity



CEE Report Mining Workforce 2014



CEE Report Mining Workforce 2015

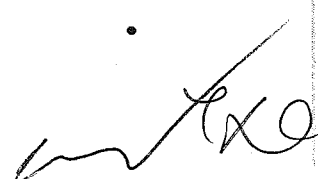


Population Group	Male	Female	Total
African	42.1%	35.3%	77.4%
Coloured	5.4%	4.6%	10%
Indian	1.7%	1.0%	2.7%
White	5.6%	4.3%	9.9%
Total	54.8%	45.2%	100%

National EAP Race and Gender (Stats SA 3rd Quarter 2015)

Employment Equity

- The Chamber and its members remain committed to workplace diversity and equitable representation at all levels to promote social cohesion, transformation and competitiveness of the mining industry
- The Mining Charter proposes employment equity targets that are set out in the DTI Codes without any modification which is problematic as previous Mining Charter targets were inclusive of white females (HDSA)
- We propose targets that are in line with industry workplace profiles and aligned to **regional EAP** statistics as reported by the Commission on Employment Equity annually
- Mining Charter targets to align with the Employment Equity Act five year planning cycle as it is proposed that progressive targets be set. These targets have to reflect:
 - Workplace profiles
 - Existing Talent Pool (internal plus external pipeline)
- According to the 16th Commission on Employment Equity Report (2015/2016) the mining industry had a workforce of **435,639 of which 8610 (1.97%) were reported as disabled**. This is an increase from 0.9% reported in 2014. The Employment Equity Act does not prescribe a target for Black disabled persons.
- Targets for people with disabilities should be inclusive of all races and the mining industry is committed to ensuring that it plays its part in the absorption of those classified as disabled; to address the absorption and employment of people with disabilities as the EE Act. The target should therefore be 2% of all employees. Companies to determine appropriate placements that will limit health and safety risks



Revised Employment Equity Scorecard



DEPARTMENT OF MINES
REPUBLIC OF SOUTH AFRICA

Criteria	Weighting	Industry Target	DMR Target
Board participation:			
Exercisable voting rights of black board members as a percentage of all board members	2	40%	50%
Exercisable voting rights of black female board members as a percentage of all board members	1	15%	N/A
Black Executive directors as a percentage of all executive directors	1	40%	N/A
Black female Executive Directors as a percentage of all Executive Directors	0.5	15%	N/A
Other Executive Management:			
Black Executive Management as a percentage of all Executive Directors	2	55%	60%
Black female Executive Management as a percentage of all Executive directors	1	15%	30%

Revised Employment Equity Scorecard



Criteria	Weighting	Chamber Submission	DMR Target
Senior Management			
Black employees in Senior Management as a percentage of all Senior Management	2	50% (40%)	60%
Black female employees in Senior Management as a percentage of all Senior Management	1	20% (15%)	30%
Middle Management			
Black employees in Middle Management as a percentage of all middle management	2	60%	75%
Black female employees in Middle Management as a percentage of all Middle Management	1	20% (15%)	30%
Junior Management			
Black employees in Junior Management as a percentage of all Junior management	1	70%	88%
Black female employees in Junior Management as a percentage of all Junior Management	0.5	30%	30%
Employees with disabilities			
Black employees with disabilities as a percentage of all employees non-operational (support services)	2	2% (inclusive)	2% Black
Core and Critical Skills	2	40%	40%
Total Points	19		N/A

NB: Items in red denote original submission

Human Resource Development (Skills Development)

- The Chamber supports the categorisation of this pillar as a ring-fenced (priority) element
- Protracted low commodity prices, poor commodity demand from international markets, including above inflation labour cost increases have affected employment conditions in the mining industry
- These conditions have led to many companies resorting to right sizing and reducing their staff complements.
- As a “knowledge based industry”, mining companies remain committed to training their employees for career growth as well as providing them with skills that will enable them to attain employment outside of mining.
- The Chamber proposes that this element be titled Skills Development to reflect the investment on employees as well as community members to better align with the B-BBEE Codes
- We recommend the usage of an industry learning programme matrix to determine the value applicable to training programmes, i.e. are internal training programmes weighted equally to external programme
- **It is unclear how the Mining Charter will treat the expenditure on non-employee individuals? The Codes allow for 6% of expenditure to be expended on unemployed black people**
- **The Chamber does not support the 15% (Of 5% annual payroll) contribution towards a Ministerial Skills Fund.**

Learning Programme Matrix



A	Bursaries	<ul style="list-style-type: none"> • Institutional instruction • Institutions • Degree, diploma, or certificate
B	Internships	<ul style="list-style-type: none"> • Mixed mode delivery • Institutions and workplace • Degree, diploma or certificate
C	Learnerships	<ul style="list-style-type: none"> • Structured learning • Workplace • Registration and licensing
D	Learnerships or Apprenticeships	<ul style="list-style-type: none"> • Institutional instruction and experiential learning • Institutional and workplace • Professional qualification
E	Work integrated learning	<ul style="list-style-type: none"> • Structured, supervised experiential learning • Workplace, institutional as well as ABET
F	Informal Training	<ul style="list-style-type: none"> • Structured information • Institutions, conferences and meetings • Professional development
G	Informal Training	<ul style="list-style-type: none"> • Informal training • Workplace • Understanding job/work content

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Proposed Skills Development Scorecard



CHANGING MINES
AT THE HEART OF THE NATION

Criteria	Weighting	Industry Target	DMR Target
Skills Development			
Skills Development Expenditure on Learning Programmes specified in the learning programme matrix for black people as a % of Leivable Amount	10	5%	5%
Skills Development Expenditure on Learning Programmes specified in the Learning programme Matrix for black employees with disabilities as a % of Leivable Amount	2	0.25%	N/A
Learnerships, Apprenticeships & Internships	4	1.5%	N/A
Number of black people participating in Learnerships, Apprenticeships & Internships as a % of total employees	5	1.5%	N/A
Number of black unemployed people participating in training specified in the learning programme matrix as a % of number of employees	2	2%	N/A
Support for Academic institutions and R&D	2	2%	N/A
Bonus Points			
Number of black people absorbed into the industry	5	100%	N/A
Total (excluding Bonus Points)	25		

Mine Community Development (MCD)



- The MPRDA Preamble articulates that the state is the custodian of the country's mineral resources, the benefits of which should accrue to all the people who live in it
- Clarity is required on the definition of Labour Sending Areas is difficult to interpret
- Provide guidelines for the application and accrual of credits for impact within the African region
- The target setting of **1% Annual Turnover** towards local development is not endorsed by the Chamber
- Turnover based targets will be prejudicial to marginal mines and will increase costs for mining companies, (based on PWC 2015 and 2014 data, R3.3bn and R3.2bn respectively)
- According to research conducted by KPMG, the global average (top 100 companies) for social investment is 2.5% NPAT; of which the mining industry globally contributes on average 1.82%*
- We propose a maximum contribution of 2% NPAT towards Socio Economic Development
- It is important to note that non-monetary contributions are not considered under this element. The Chamber further proposes **enhanced recognition of technical and capacity building programmes** as part of this element as they facilitate municipalities' ability to deliver more effective services
- Furthermore, we propose that collaborative endeavours (with other companies, government departments, development finance institutions etc.) also be given enhanced recognition
- The real intention should be to measure with the aim of demonstrating the **contribution of and impact** that the mining industry has made towards **community development**; there must be a unified agreed definition for the measurement of compliance
- The Charter is silent on the alignment of the social and labour plans (SLP) to the mine and community development requirements. We propose that there should be a direct linkage between MCD contributions and the SLP.
- It is imperative that there be specific guidelines set on the DMR approval of MCD projects to guard against protracted approvals which unfairly prejudice companies

Source: KPMG International, Sustainable Insight: Unlocking the Value of Social Investment, May 2014

Proposed Mine Community Development Scorecard



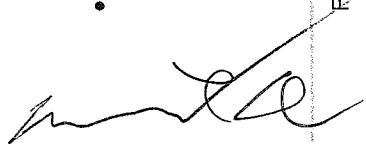
Criteria	Weighting	Industry Target	DMR Target
Approved mine and community rural development projects	15	2% NPAT	1% Annual Turnover
Bonus Points	5		N/A
Implementation of additional projects (due to demand from communities/municipality)	1	0% < 5% target	N/A
	2	5% < 10% target	
	3	10% < 15% target	
	4	15% < 20% target	
	5	20% < 25% target	
Total Points (excluding Bonus Points)	15		N/A

NB:

- Enhanced Recognition (Multiplier of 1.2) for Collaboration Projects (Government, NGOs, DFIs etc.)
- All benefits that accrue to contractors and small businesses will be counted under ED provided the beneficiary qualifies as per the requirements of B-BBEE.
- Only initiatives that benefit the community, NPOs, NGOs, and Co-Ops will be claimed under SED 100% of the expenditure (monetary or non-monetary) will be recognized the moment the black beneficiary base (BBB %) reaches 75%. If the BBB% is less than 75%, the expenditure will be pro-rated.

Housing and Living Conditions

- The Chamber acknowledges that mining companies should assist and contribute to enabling employees who wish to own their own homes, to do so. However, the form and shape of this assistance should be determined by the particular circumstances prevailing in the different mining areas.
- The target set should take cognizance of the various factors that impact on housing delivery in the mining areas. These factors include the following:-
 - **Land Issues:** the challenges regarding access to land and the availability of land in municipal areas.
 - **Infrastructure and services:** the absence of and provision of bulk service infrastructure pose constraints in some areas.
 - **Access to finance:** this relates to, amongst others problems associated with the challenge of over-indebtedness, credit records, and the implementation of the Finance Linked Individual Subsidy Scheme (FLISP) etc.
- A one-size-fits –all approach that does not take account of the circumstances and challenges prevailing in the different mining areas, and the measures that some of the mining companies may have to implement in order to pave the way for housing, is problematic.
- Mining companies tailor their housing strategies, policies and programmes to respond to the specific circumstances and challenges prevailing in the different areas.



Housing and Living Conditions

- Although the Chamber initially submitted that this should not be a Priority element, *the industry recognises the impetus to redress historical imbalances and the need to contribute towards improved living conditions for existing and future mine operations*
- We therefore amend our earlier submission and support the classification of this element as a Priority (ring-fenced) element provided the DMR develops a quantitative measurement formula
- The stipulation that companies should partner with finance institutions to provide **guarantees** for home ownership on behalf of employees is not supported and we request the DMR to provide guidance and a clear definition of what “**guarantee**” entails
 - How will the DMR determine fairness in terms of amount of contribution?
- Support the Mining Charter proposal of integrated development as per the Department of Human Settlements Policies and relevant frameworks and further **propose that the 2009 Revised Housing Standards be updated**
- The following is the proposed as **criteria** under this element:
 - **Provision of adequate and decent housing**
 - Bonus Points
 - Contribution towards home ownership options for interested mine employees in consultation with organised labour

Proposed Housing Scorecard



Criteria	Weighting	Chamber	DMR Target
Provision of adequate and decent housing (one person per unit and family units)	6	100%	100%
Bonus Points			
Contribution towards home ownership options for interested mine employees in consultation with organised labour and the Department of Human Settlements	6	100%	100%
<ul style="list-style-type: none"> The mine must have an ownership scheme in place, housing policy, proof of implementation of the scheme (housing register will be required as proof Process and policies to make the scheme affordable (E.g. indebtedness program, financial training programs) Proof of a consultative process with internal and external stakeholders (employees, municipalities, traditional leaders, organized labour) – minutes, memos, signed attendance registers with stakeholder 	(2) (2) (2)	100% 100% 100%	
Total Points	6		

NB:

- In terms of contributions towards Home Ownership, companies to have the wherewithal to determine a suitable policy for this contribution based on needs of employees. This may include subsidies towards rental accommodation and home ownership in the domicile of the employees' choosing
- Further engagements are required on this element

Key Measurement Principles and Reporting Requirements



CHAMBER OF MINES
SOUTH AFRICA

- Entities which are not holders of rights, permits or permissions in terms of the MPRDA (such as manufacturers of autocatalytic converters and of jewellery) may find difficulty in applying the provisions of the Mining Charter to their activities, the Chamber believes these companies should comply with the DTI Codes
- We propose that Guidelines should be developed for independent monitoring and verification
- The review of targets should be subject to a stakeholder engagement processes which should consider economic conditions, beneficiary dictates and broader policy shifts as proposed
- The usage of Y/N as a basis of measurement should be removed on all elements
- The Chamber recommends that the Ownership element be reserved until Judgement has been given in the Chamber's Declaratory Order, but in the meanwhile submits that holders be deemed to hold the greater of 26% or their actual empowerment percentage, and that they not be required to restore any loss of such level
- The Chamber further proposes that there be sub-minimums (50%) on Priority Elements [with the exception of Housing and Living Conditions which should have a target of 100%]

The Chamber remains committed to the country's transformation objectives...



CHAMBER OF MINES
SOUTH AFRICA

- The Chamber welcomes the DMR's intention to align government policies and create regulatory certainty
- Transformation not only a regulatory requirement, but a business imperative and therefore appeal for a considered and inclusive approach to the development of an effective transformation instrument
- The Chamber is of the view that continued discussions are necessary with all stakeholders who are directly affected by the Mining Charter and the manner in which it is implemented.

CHAMBER OF MINES OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no:

In the matter between:

THE CHAMBER OF MINES OF SOUTH AFRICA

Applicant

and

MINISTER OF MINERAL RESOURCES

Respondent

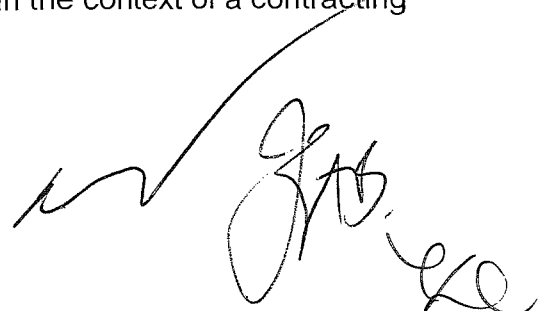
SUPPORTING AFFIDAVIT

I, the undersigned,

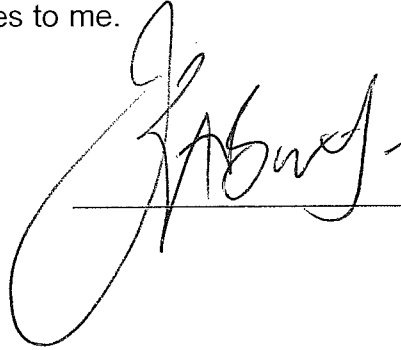
ROGER ALAN BAXTER

hereby say on oath that:

- 1 I am the Chief Executive Office of the Applicant.
- 2 The facts in this affidavit are true and correct and, unless otherwise stated or the contrary appears from the context, are within my personal knowledge.
- 3 My experience and qualifications appear from annexure "FA12.1".
- 4 On 20 June 2017 I drafted an economic impact assessment note (**Note**), annexure FA2, which explains the impact of the 2017 Charter in the context of a contracting South African mining industry.



- 5 I have personal knowledge of the circumstances and the outcomes explained in the Note and I confirm the contents thereof.
- 6 I have also read the founding affidavit of Tebello Laphatsoana Chabana and confirm its correctness insofar as it relates to me.




Roger Alan Baxter

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at Johannesburg on the 26th day of June 2017, the regulations contained in Government Notice No R1268 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

DESMOND GARY WILLIAMS
155 - 5th Street
Sandown, Sandton, 2196
Commissioner of Oaths
Ex-Officio / Practising Attorney R.S.A



Experience

- **Chief Executive Officer**

Company Name: Chamber of Mines of South Africa

Dates Employed: May 2015 – Present

Employment Duration: 2 yrs 2 mos

CEO position is the overarching leadership role in the organisation involving ongoing engagement with the Chamber Office Bearers and Council, leading the strategic planning process (development, adoption, execution, monitoring and evaluation) leading the Chamber team, ensuring ongoing improvement in the operational effectiveness and efficiency of the Chamber, engaging key stakeholders on key strategic issues, and getting the mining industry back on the front foot for meaningful growth and transformation.

- **Chief Operating Officer**

Company Name: Chamber of Mines of South Africa

Dates Employed: Jan 2013 – Apr 2015

Employment Duration 2 yrs 4 mos

Location: Chamber of Mines of South Africa

Responsible for running strategy process (development, mandating, implementation, feedback), management oversight over key departments, senior negotiator with government and other stakeholders on key policy and operational issues.

- **Senior Executive - Strategy and Economics**

Company Name: Chamber of Mines of South Africa

Dates Employed: Jul 2012 – Sep 2013

Employment Duration 1 yr 3 mos

Location: Johannesburg

Handwritten signature and initials, possibly 'JAS. KC' with a checkmark below.

Strategic planning and implementation, running the economic team, front line negotiator on key policies,

- **Rio Tinto Alcan**

VP Industry Analysis

Company Name: Rio Tinto Alcan

Dates Employed: Dec 2011 – Jul 2012

Employment Duration 8 mos

Location: Montreal

Headed up the Industry Analysis team for Rio Tinto Alcan, presented to management team and leadership group on the economics of the industry with projections on future demand and prices, ran a small five person team.

- **Chief Economist**

Company Name: Chamber of Mines of South Africa

Dates Employed: Jan 2000 – Sep 2011

Employment Duration 11 yrs 9 mos

Education

- **University of Natal**

Degree Name: Post graduate economics degree

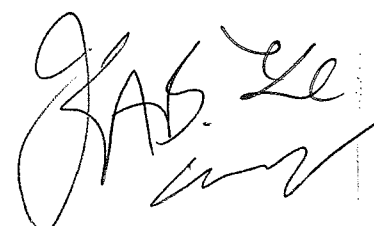
Field Of Study: International economics, business economics and advanced corporate strategy

Dates attended: 1985 – 1990

Activities and Societies: 2nd XV rugby, coached res rugby, etc.

- **Peterhouse**

Dates attended or expected graduation 1979 – 1984



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no:

In the matter between:

THE CHAMBER OF MINES OF SOUTH AFRICA

Applicant

and

MINISTER OF MINERAL RESOURCES

Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned,

AMBROSE VUSUMUZI RICHARD MABENA

hereby say on oath that:

- 1 Prior to my retirement on 30 June 2016, I was Senior Executive: Transformation and Stakeholder Relations of the Applicant.
- 2 The facts in this affidavit are true and correct and, unless otherwise stated or the contrary appears from the context, are within my personal knowledge.
- 3 I have read the founding affidavit of Tebello Laphatsoana Chabana and confirm its correctness insofar as it relates to me.

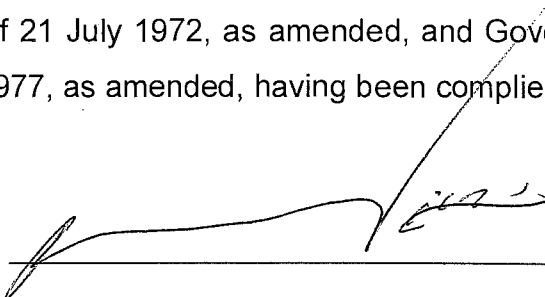
AMBROSE VUSUMUZI RICHARD MABENA





Ambrose Vusumuzi Richard Mabena

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at Johannesburg on the 26th day of June 2017, the regulations contained in Government Notice No R1268 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



Commissioner of Oaths

DESMOND GARY WILLIAM
155 - 5th Street
Sandown, Sandton, 2196
Commissioner of Oaths
Ex-Officio / Practising Attorney R.S.A

