

New draft Mining Charter sets new potentially controversial targets for BEE ownership - but past deals recognised and stability clauses proposed

“Following the recently launched draft Mining Charter, a stability clause has also been proposed and this is exactly what our country needs right now, to allay investor fears and encourage much-needed investment in a struggling sector,” says Bert Lopes, Natural Resources Head at audit firm, BDO.

The new ownership clauses are controversial but free carry clauses are common in many developing countries. The question that remains to be answered is whether this will affect the economic viability of marginal projects.

The new draft Mining Charter was released by the Department of Mineral Resources on Friday 15th June. Its highlights are:

- a new shareholding target for Black Economic Empowerment (BEE) shareholdings of 30% for new mineral rights applications
- an increase on the former 26% BEE shareholding requirement. This new requirement does not apply immediately to existing holders of mineral rights, but the 30% level must be achieved by them within a period of five years for existing owners.

Of the new 30% requirement, 16% must be allocated as follows:

- 8% each must be given to communities and employees respectively.
- In addition, of the 8%, 5% must be free carry, meaning that there will be a minimum free carry shareholding of 10% for new applications.

Another interesting aspect of the new draft was the announcement of the intention to introduce stability clauses into the minerals regulatory environment.

Mosa Mabuza, former Deputy-Director of Licensing in the Department of Mineral Resources (DMR), said at a press conference presided over by Mineral Resources Minister, Gwede Mantashe, that compliant mining companies could rely on security of tenure. In effect, the Mining Charter is offering miners a 30-year stabilisation clause.

“If there are any changes in law - and the South African government must be allowed to do this - the terms and conditions of the mining license will be applied for the tenure of the right,” said Mosa Mabuza, CEO of the Council for Geoscience.

Stability clauses are favoured by foreign investors because they guarantee that the term and the conditions attaching to the mineral right they sign up for will not be changed unilaterally. There is some precedent for this in fiscal legislation already in section 13 and 14 of the Mineral and Petroleum Royalty Resources Act where a mineral right holder can apply for fiscal stability in respect of the rate of royalty he has to pay on the value of his minerals extracted.

In addition, there are fiscal stability clauses in the Income Tax Act relating to Oil and Gas projects as set out in paragraph 8 of the 11th Schedule whereby the Minister of Finance may enter into a binding agreement with any oil and gas company in respect of an oil and gas right held by that company, and that agreement so entered into must guarantee that the provisions of this Schedule (as at the date on which the agreement was concluded) apply in respect of that right as long as the right is held by the oil and gas company.