IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no: 20341/19

In the matter between:

Minerals Council South Africa Applicant

and

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2019 -03- 26
L. W. MOTAU
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

Minister of Mineral Resources First Respondent

South African Diamond and Precious Metals Regulator Second Respondent

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Dated at Sandton on this the 26th day of March 2019.

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Received on ____ March 2019

For: First Respondent

And to:
South African Diamond and Precious Metals Regulator
SA Diamond Centre
251 Fox Street
Johannesburg

Received on ____ March 2019

For: Second Respondent

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NOTICE OF MOTION

TAKE NOTICE THAT the applicant intends to apply to the above honourable court for an order in the following terms:

1. Reviewing and setting aside the following clauses of the *Broad-based Socio-economic Empowerment Charter for the Mining and Minerals Industry, 2018* (Mining Charter, 2018) published in Government Notice 1002, Government Gazette No. 41934, dated 27 September 2018 (as amended by the Amendment in Government Notice 1421, Government Gazette No. 42130, dated 20 December 2018) ("the 2018 Charter") in terms of sections 6(2)(a)(i), 6(2)(d), 6(2)(e)(i), 6(2)(e)(iii), 6(2)(f)(i), 6(2)(f)(ii) and/or 6(2)(i) of the Promotion of Administrative Justice Act 3 of 2000:

2

1.1. the introductory sentence of clause 2.1 insofar as it provides that "a mining right holder must comply with the following";

1.2. clause 2.1.1.2, 2.1.1.5, 2.1.1.6 and 2.1.6.2, insofar as they apply to the renewal of a mining right;

1.3. clause 2.1.1.4;

1.4. clauses 2.1.3.2 and 2.1.4;

1.5. clauses 2.1.5.2 and 7.2;

1.6. the proviso to clause 2.1.6.1, in clauses 2.1.6.1.1 to 2.1.6.1.4;

1.7. the heading of clause 2.1.6 insofar as it refers to "existing rights";

1.8. the definition of "beneficiation" and clauses 2.1.7.1 (including clauses 2.1.7.1.1 to 2.1.7.1.5) in the following respects:

1.8.1. setting aside the definition of beneficiation and substituting it with the definition of beneficiation in section 1 of the Mineral and Petroleum Resources Development Act, 2002;

1.8.2. setting aside the words "against a BEE Entrepreneur" where they appear in clause 2.1.7.1;

1.8.3. setting aside the words "a maximum of 5 percentage points of a BEE Entrepreneur" where they appear in clause 2.1.7.1.1;

1.8.4. setting aside the whole of clauses 2.1.7.1.2 to 2.1.7.1.5;

1.9. clause 2.2;

1.10. Insofar as the following clauses relate to existing or new licences and permits issued in terms of the Diamonds Act, 1986 and the Precious Metals Act, 2005, clauses 4, 6.2, 7.1, 7.3, 8.7, 8.8, 8.9 and 9.2; and

1.11. clause 9.1.

2. In the alternative to prayer 1, declaring that the clauses mentioned in prayers 1.1 to 1.11 above are inconsistent with the principle of legality enshrined in section 1(c) of the Constitution, 1996 and setting them aside.

3. Directing the first respondent to pay the costs of this application, such costs to include the costs of three counsel.

4. Further and/or alternative relief.

TAKE NOTICE FURTHER that the accompanying affidavit of **TEBELLO LAPHATSOANA CHABANA** and supporting affidavits and documents will be used in support of the application.

TAKE NOTICE ALSO that the first respondent is hereby called upon to show cause why the decisions referred to in prayer 1 above should not be reviewed and set aside.

TAKE NOTICE FURTHER that the first respondent is also hereby called upon to dispatch within fifteen days of receipt of the notice of motion, to the Registrar, the record of proceedings before him resulting in the decisions referred to in prayer 1 above together with such reasons as he is by law required or may desire to give and to notify the applicant's attorney that he has done so.

TAKE NOTICE FURTHER that if the first respondent intends opposing this application, he is required:

(a) within fifteen days after receipt by them of the notice of motion or any amendment thereof, to deliver notice to the applicant's attorney that he intends so to oppose and in such notice to appoint an address within eight kilometres of the office of the registrar of this honourable court at which he will accept notice and service of all process in these proceedings; and

(b) within thirty days after the expiry of the time referred to in rule 53(4) of the Uniform Rules of the High Court, to deliver any affidavits he may desire in answer to the allegations made by the applicant.

TAKE NOTICE FURTHER that if no such notice of intention to oppose the order in terms of this notice of motion be given, the application will be made on 4 September 2019 at 10:00 or as soon thereafter as the matter may be heard.

TAKE NOTICE, FURTHER, THAT the applicant has appointed Norton Rose Fulbright South Africa Inc care of Mothle Jooma Sabdia Inc, at the address set out hereunder at which it will accept notice and service of all process in these proceedings.

Dated at Sandton on this the 26th day of March 2019.

5

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To:
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Pretoria

And to:
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c/o Office of the State Attorney, Pretoria
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Received on ____ March 2019

For: First Respondent

And to:
South African Diamond and Precious Metals Regulator
SA Diamond Centre
251 Fox Street
Johannesburg

Received on ____ March 2019

For: Second Respondent

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I, the undersigned,

TEBELLO LAPHATSOANA CHABANA

hereby say on oath that:

PART 1: INTRODUCTION

DEPONENT

1 I am the Senior Executive: Public Affairs and Transformation of the Minerals Council South Africa, previously known as the Chamber of Mines of South Africa. I took office on 1 July 2016.

2 I am duly authorised to represent the Minerals Council in this application and to depose to this affidavit on its behalf.

3 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 Council's legal advisors.

DEFINITIONS

4 In this affidavit, the following definitions are used:

4.1 the Mineral and Petroleum Resources Development Act, 2002 which was assented to on 3 October 2002 and took effect from 1 May 2004 is the **MPRDA**;

4.2 the Applicant is the **Minerals Council South Africa (the Minerals Council)**;

4.3 the First Respondent is the **Minister** and the Department of Mineral Resources is the **DMR**;

4.4 the Second Respondent is the **Diamond and Precious Metals Regulator**;

4.5 the Charter contemplated by section 100(2)(a) of the MPRDA is **the Charter**;

4.6 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**. A copy of the Original Charter is annexed hereto marked '**FA1**';

4.7 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.** A copy of the 2010 Charter is annexed hereto marked '**FA2**';

4.8 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**. A copy of the 2017 Charter is annexed hereto marked '**FA3**';

4.9 the *Broad-based Socio-economic Empowerment Charter for the Mining and Minerals Industry, 2018* (Mining Charter, 2018) published in

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Government Notice 1002, Government Gazette No. 41934, dated 27 September 2018 (as amended by the Amendment in Government Notice 1421, Government Gazette No. 42130, dated 20 December 2018) is the **2018 Charter**. Copies of the 2018 Charter and the Amendment are annexed hereto marked '**FA4(1)**' and '**FA4(2)**';

4.10 Historically Disadvantaged Persons are **HDPs**;[1]

4.11 where appropriate, the Original Charter, the 2010 Charter, the 2017 Charter and the 2018 Charter will be referred to collectively as the **Charters**;

4.12 the Constitution of the Republic of South Africa, 1996 is the **Constitution**.

THE PARTIES

5 The applicant is the **Minerals Council**, with its principal place of business at 5 Hollard Street, Johannesburg.

5.1 The Minerals Council is a voluntary association with power to sue and be sued in its own name. It is also registered as an employers' organisation in terms of section 96(3) of the *Labour Relations Act, 1995.*

5.2 The members of the Minerals Council comprise mining finance companies and mines operating in the gold, coal, diamond, platinum, lead, iron ore,

[1] The MPRDA defines the term "historically disadvantaged person". 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". The reference to HDPs or HDSAs was impermissibly substituted in the 2017 Charter with "Black Person" and "Black Owned Company". The 2018 Charter employs the terms "Historically Disadvantaged Persons" (as defined in the MPRDA) and "Historically Disadvantaged Persons Owned and Controlled Company" (not defined in the MPRDA).

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rutile, zircon, ilmenite, leucoxene, monazite, magnetite and other associated minerals, antimony and copper mining sectors. The Minerals Council represents mining companies providing about 90% of South Africa's mineral production and employing about 90% of the employees employed in the mining sector. A list of the Minerals Council's members is attached hereto marked '**FA5**'. The members of the Minerals Council affected by this application are those mining companies which are either holders of, or applicants for, mining rights under the MPRDA. In this affidavit, I refer to these affected members of the Minerals Council as **mining companies**.

5.3 In terms of paragraph 2(a) of its constitution, one of the objects and powers of the Minerals Council 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 hereto marked '**FA6**'.

5.4 The Minerals Council 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.

5.5 The Minerals Council also works closely with the various employer organisations in formulating these positions where appropriate.

5.6 The Minerals Council is a signatory to the Original Charter and represents

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the industry in the forums established in order to review performance under the Charters.

5.7 The Minerals Council brings this application on its own behalf and in the interests of its members.

6 The first respondent is the **Minister of Mineral Resources**.

6.1 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.

6.2 Service of this application on the Minister will be effected by service on the State Attorney, Pretoria, in terms of the provisions of Rule 4(9) of the Uniform Rules of Court.

6.3 This application will also be served on the Director-General: Mineral Resources of the Department of Mineral Resources at the address mentioned in paragraph 6.1 above and on the State Attorney, Pretoria with address at 316 Thabo Sehume St, Pretoria CBD, Pretoria, 0001, as required by section 2 of the State Liability Act No 20 of 1957.

7 The second respondent is the **South African Diamond and Precious Metals Regulator**, a juristic person established by section 3 of the Diamonds Act 56 of 1986, with address at SA Diamond Centre, 251 Fox Street, Johannesburg.

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THE BACKGROUND TO AND NATURE AND PURPOSE OF THIS APPLICATION

8 The Minerals Council and its members are fully committed to the transformational objects of the MPRDA and have given concrete and substantial expression to that commitment.

9 They have played an integral role in the reform of South Africa's minerals policies since 1992 and have contributed positively to the reform agenda throughout the process. They have, in particular, made significant progress on all elements of the Original Charter, including meeting and exceeding the ownership target. The Minerals Council's members continued to support and facilitate HDP ownership even in the face of the collapse of mining equities and constrained markets. This created significant momentum in HDP ownership, in the mining sector and beyond. All of this is demonstrated by the fact that, as set out in annexures '**FA7(1)**' and '**FA7(2)**' hereto, as at the end of 2014, meaningful economic empowerment participation achieved by HDSAs had been 38% on average[2] amongst the members of the Minerals Council, with meaningful economic value transfer of more than R159 billion. The Minerals Council submits that annexures FA7(1) and FA7(2) demonstrate its members' commitment to transformation and to the spirit of the Charters. I also refer the court to the Report of 18 March 2015 which was annexed as Appendix 4 to the Minerals Council's submissions to the Minister in August 2018 in respect of the draft 2018 Charter, and a copy of which submissions (with all appendices thereto) is annexed hereto marked

[2] That figure assumes that empowerment levels once achieved are not eroded by the exit by HDPs from their investments.

'**FA7(3)**'.

10 In February 2018, the current Minister, Mr Mantashe, with the support of President Ramaphosa, resumed interactions between the DMR and the Minerals Council aimed at averting litigation about the highly contentious 2017 Mining Charter and at preserving and promoting South Africa's mining industry. The Minerals Council did not proceed with the application for the judicial review of the 2017 Charter, which was set down for 19 February 2018, pending the development of a legally compliant Mining Charter that would effectively secure transformation, growth and competitiveness of the sector.

11 Discussions took place over the weekend of 17 to 18 March 2018 through a Principals Committee. The Principals Committee agreed that two task teams be established, namely the Mining Charter and Transformation Task Team ("MCTTT") and the Growth and Competitiveness Task Team ("GCTT"). The purpose of the task teams was to make proposals on Growth, Competitiveness and Transformation for the mining sector in South Africa, to cross-pollinate ideas and to develop a Mining Charter that addressed both the industry's socio-economic transformation challenges and its growth and competitiveness challenges. The task teams were to recommend and seek acceptance of their proposals from the Principals Committee, which was chaired by Minister Mantashe. The MCTTT met on 14 occasions in total and two of these meetings were combined meetings with the GCTT, where presentations were heard from a handful of law advisory firms, the Department of Trade and Industry ("DTI") and the South African Bureau of Standards ("SABS"). Only two Principals meetings were held and,

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unfortunately, the mid-May Principals Committee meeting which was envisaged to resolve several of the issues that arose during the MCTTT meetings, did not proceed.

12 Discussions and negotiations were also held with other industry stakeholders. In particular, a Mining Charter Summit was held on 7 to 8 July 2018, where over 1000 community members gathered together with social partners to discuss the draft 2018 Charter.

13 The Minerals Council wishes to stress that it remains committed to transformation of the mining sector in South Africa and believes that this should be implemented in accordance with the imperatives of job creation, economic growth, competitiveness and social upliftment and development. The Minerals Council, as one of the key stakeholders in the mining industry, regards a transformed, growing and competitive mining sector as a significant catalyst for South Africa's social and economic development and critical for the realisation of the admirable goals of the National Development Plan.

14 This will, however, only be realised through a minerals policy framework, including the Mining Charter, which conforms to the rule of law and principles of legality, and by administrative action which is lawful, reasonable and procedurally fair and consistent in all respects with provisions of the country's legislation. The rule of law, regulatory certainty and the fair and even-handed administration of laws are of the utmost importance in sustaining the mining industry. This will provide a context conducive to commercially sustainable

operations and capital investment which is not only in the interest of the Minerals Council and its members, but to the economy as a whole.

15 The mining industry is an important component of the South African economy, directly constituting 7.5% of the Gross Domestic Product (GDP), and indirectly promoting substantial economic activity in other sectors of the economy. We set out below the industry's commercial impact on the South African economy, the proportion in which the stakeholders in mining benefit therefrom, and the impact that the 2018 Charter is anticipated to have upon the industry and those employed within it.

15.1 If the direct and indirect multiplier effects of mining are taken into account, the mining sector contributes about 17% to GDP. The sector employed 453 500 people in 2018, which equates to 6.1% of private non-agricultural employment and 4.8% of total non-agricultural employment. A total of R130,5 billion was paid to employees in the same year. Fixed investment from mining totalled R93 billion in 2018, which was 17% of private sector fixed investment and 9.3% of the county's total fixed investment for the year. The industry exported R350 billion worth of output, which accounted for 25% of the country's R1.1 trillion exports. In the 2017/2018 fiscal year the industry paid R7.5 billion in royalties and R 19,4 billion in corporate taxes. The sector also contributed R7,2 billion to skills development, R2 billion to community development and made a significant contribution to health, education and community development initiatives in mining areas.

15.2 As regards the identities of the stakeholders who benefit from mining, and the degree to which they benefit, the position is as follows:

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15.2.1 Employees benefitted 30% in 2011 and 47% in 2018;

15.2.2 Dividends to shareholders were 11% in 2011 and 6% in 2018;

15.2.3 Direct taxes were 11% in 2011 and 12% in 2018;

15.2.4 Employees taxes were 6% in 2011 and 9% in 2018;

15.2.5 Royalties were 3% in 2011 and 3% in 2018;

15.2.6 Community investment was 0% in 2011 and 2% in 2018;

15.2.7 Borrowings were 1% in 2011 and 6% in 2018;

15.2.8 Funds retained/utilised were 6% in 2011 and -14% in 2018;

15.2.9 Funds invested were 32% in 2011 and 29% in 2018.

15.3 The 2018 Charter has and will continue to have a variety of materially adverse effects upon the mining industry, which, as appears from what I say below, is already in decline and under threat.

15.3.1 A country's resource endowment is a necessary but not sufficient condition for a mining sector to exist. The successful economic exploitation of such resources depends on a conducive, stable and predictable policy environment. The challenged clauses of the 2018 Charter are unfortunately not conducive to such an environment and on the contrary have introduced instability and unpredictability into the policy environment. An economically viable mining sector depends on large long-term investment decisions, which require certainty about the policy environment.

This is particularly felt in the willingness of venture capital to invest in the exploration for such mineral resources, the willingness of investors and bankers to invest in the construction of mines, as well as the willingness of the latter to fund the operations of mining companies.

15.3.2 The impact of the Charters on **exploration** (prospecting) in South Africa has been overwhelmingly negative. Although rights have been issued, investment has stagnated. This is reflected in the decline of 65% in exploration spending over the last 8 years, to below R 400 million a year, the further collapse of the weak (positive) relationship between commodity price movements and exploration, as well as the extreme volatility in exploration spending from one year to the next (between -60% and +60%) over the recent past. The result of these adverse trends is that the pipeline of new resources for mine development is not replenished and will lead to the earlier demise of the sector.

15.3.3 The measure of **investor sentiment** to global, local and company news is via the stock exchange. Investors make their decisions based on comparing a potential risk-adjusted return to the cost of the investment. The similarity in the Johannesburg Stock Exchange resources index response to the 2017 and 2018 mining charters is worth noting - each time dropping by more than 2% and losing around R 50 billion of market capitalisation. The remaining uncertainty around the regulatory circumstances regarding mining right renewals has the potential to shock

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investor confidence in the same way. The Johannesburg Resources Index (June 2018) was down 44% on 10 years ago, significantly underperforming peer resource indices in other mining jurisdictions. The recent recovery of the resources index (outperforming the overall Index over the last two years) could easily be reversed if the issue of regulatory uncertainty introduced by the challenged clauses of the 2018 Charter is not resolved. It must also be mentioned that the financing efforts by mining companies in South Africa happen under the cloud of a possible sovereign credit downgrade, which already had the result of raising the long-term cost of capital to equal or higher levels than countries which do not have investment grade ratings.

15.3.4 The confidence of mine owners in future returns on investments is most starkly reflected in their willingness to expand capacity by **investing in fixed capital** (construction of mines, machinery and equipment, transport equipment). Gross fixed investment (net investment plus allowances for depreciation/maintenance) in mining has stagnated at around R 72 billion for almost 10 years, reaching a lowest point in 2016 (R 54 billion) and recovering to R 91 billion in 2018. However, when the numbers are adjusted for inflation, and depreciation allowances removed, net (new) investment has declined by 70% since 2009, with the worst three years being 2016 to 2018.

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15.3.5 Without a recovery in fixed investment in mining, no expansion is possible. Production is already languishing in a band between 10% and 15% below the levels of 2005 and has never recovered since the collapse of the commodity cycle. With ever increasing costs, profitability remains under threat, and employment levels are declining. The sector has lost 7 000 jobs between 2017 and 2018, and 52 000 since 2013.

15.4 The materially increased costs, regulatory uncertainty, and dilution in security of title caused by the challenged clauses of the 2018 Charter will significantly exacerbate the existing decline in investment and employment levels in the mining sector.

15.5 In support of the contents of paragraphs 15.1 to 15.4 above, I refer to the confirmatory affidavit of Mr Henk Langenhoven, the Mineral Council's Chief Economist.

16 In many respects the 2018 Charter addressed the serious deficiencies of the 2017 Charter, and constituted a major improvement on it. However, in spite of extensive public participation (the details of which will have to be included in the record requested in this application in terms of the provisions of Rule 53) and in spite of the majority judgment in *Chamber of Mines v Minister of Mineral Resources & Others* [2018] 2 All SA 391 (GNP) ("*the Chamber of Mines judgment 2018*") , the 2018 Charter unfortunately still proceeds from the basic incorrect premise that it constitutes an instrument of law. It seeks to impose legal obligations, by decree, on mining right holders, to be complied with at all relevant times, in conflict with or in addition to those set out in the

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MPRDA and the regulations or in other legislation, as if the Charter constituted law.

17 The purpose of the present application is accordingly to seek the judicial review and setting aside of certain clauses of the 2018 Charter which was published by the Minister on 27 September 2018 and amended on 20 December 2018. These clauses will collectively be referred to as "**the challenged clauses**".

18 As will appear from what is stated below, most of the challenged clauses suffer from the fundamental defect that their promulgation was beyond the powers of the Minister under section 100(2)(a) of the MPRDA. They are the result of the adoption of the same incorrect philosophy that charters developed in terms of section 100(2) of the MPRDA constitute law; this led to contradictions and conflicts with, and impermissible amplifications to, the MPRDA itself and conflicts with other legislation, such as the Diamonds Act, 1986 and the Precious Metals Act 2005. In including these clauses in the 2018 Charter, the Minister has purported to exercise powers which reside exclusively with Parliament and has, in other words, usurped the role of Parliament. This is not only *ultra vires* and based on an error law; it presents a clear threat to the separation of powers.

19 The majority of the full bench of the Gauteng Division of the High Court (Pretoria) in the *Chamber of Mines judgment 2018* has already ruled on this issue as well as on a number of the other central disputes between the parties. The judgment and order are, however, subject to an application for leave to appeal and the Minerals Council was thus constrained to bring the

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present application, which raises a number of the same issues between the same parties albeit in the context of the 2018 Charter. The specific terms of the 2018 Charter also raised a number of new issues between the parties which also form the subject of this application, as appears from what is set out below.

20 I shall set out the grounds upon which the Minerals Council seeks an order reviewing and setting aside the challenged clauses of the 2018 Charter in more detail below.

PAJA REVIEW OR LEGALITY REVIEW

21 It is necessary at the outset also to deal briefly with the nature of the present review and, in particular, with the question whether it is an administrative law review or a legality review. Notwithstanding the fact that the 2018 Charter constitutes policy and does not constitute law, as set out more fully below, the Minister must, when he considers an application for a mining right in terms of subsection 23(1)(h) of the MPRDA, decide whether the granting of the right will be "*in accordance with the charter contemplated in section 100*". In that context the 2018 Charter will certainly have the capacity to adversely affect the rights of applicants and will 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**).

22 Whether the development and publication of the 2018 Charter constitute administrative action for the purposes of PAJA outside of that context is a more difficult question.

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23 As set out more fully below, the Minerals Council contends that the Charters (including the 2018 Charter) constitute formal expressions of policy. However, because the development and publication thereof take place in terms of, and is mandated by, section 100(2) of the MPRDA, the decision to do so may constitute administrative action. I am advised that PAJA defines administrative action *inter alia* as a decision taken by an organ of state such as the Minister when exercising a public power or performing a public function in terms of any legislation.

24 To the extent that it may be held not to qualify as "administrative action" as defined in PAJA, the 2018 Charter is also constrained by the principle of legality enshrined in section 1(c) of the Constitution. That principle entails that the Minister may exercise no power and perform no function beyond that conferred upon him by law. I am advised that the principle acts as a safety net to give the court some degree of control over action that does not qualify as administrative action under PAJA, but nonetheless involves the exercise of public power. I am further advised that it is accepted by our courts that section 1(c) of the Constitution empowers them to review state action on grounds of excess of power and irrationality.

25 In the case of the review grounds that the Minister exceeded his powers or acted irrationally, it would thus make little practical difference whether the development and publication of the 2018 Charter constitute administrative action or not.

26 Therefore, once it is found that the Minister, in developing and publishing the challenged clauses of the 2018 Charter, exceeded his powers and acted

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outside of the scope of the empowering statute or acted irrationally, those clauses would stand to be reviewed and set aside either on the basis of grounds set out in section 6(2) of PAJA (if it is administrative action) or in terms of the principle of legality, which is founded upon section 1(c) of the Constitution (if it is policy, legislation or a *sui generis* executive act). The Minerals Council relies on both these bases, in the alternative.

27 The Minerals Council has been engaged in ongoing attempts to reach a compromise with the Minister on changes to the 2018 Charter in order to address the Minerals Council's concerns. The Minerals Council has delayed bringing the application in the hope that those discussions would be successful. Given the peremptory 180 day time bar imposed by section 7(1) of PAJA, the Minerals Council was obliged to launch the review proceedings, despite the fact that the discussions are ongoing and may yet bear fruit. In the circumstances this application has been brought without unreasonable delay. Brief details of such attempts are the following:

27.1 **16 October 2018**

Meeting at the DMR offices in Pretoria. Regarding the renewal issue, the Minerals Council stressed that it would be a pity if some members of the Minerals Council took the DMR to court on the issue of renewals as it is key.

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27.2 **16 November 2018**

Meeting at the DMR offices in Pretoria. Regarding the renewal issue, the Minerals Council undertook to provide two senior counsel opinions to the DMR relating to this matter for consideration by the DMR.

27.3 **21 February 2019**

Meeting in Cape Town in the Parliament precinct. At this meeting the 3 legal opinions from senior counsel were shared with the DMR. It was stressed to the Minister, among other things, that the deadline to pursue a review application in terms of PAJA was near 27 March 2019 at which stage the Minerals Council would have to lodge papers if the concerns with the ownership provisions of the Mining Charter were not resolved satisfactorily.

PART 2: THE MINERALS COUNCIL'S GENERAL SUBMISSIONS REGARDING THE INTERPRETATION OF SECTION 100(2) OF THE MPRDA AND THE LEGAL NATURE AND ROLE OF THE CHARTER IN THE CONTEXT OF THE MPRDA

28 Before dealing with the specific instances of excess of power and setting out the review grounds, it is expedient to set out the Minerals Council's main submissions with regard to the proper interpretation of section 100(2), the nature and role of the Charter in the context of the MPRDA, and the nature and ambit of the Minister's powers under section 100(2) of the MPRDA. These submissions underpin the review grounds set out below.

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The statutory context of section 100(2) and its wording

29 The mandate to the Minister in section 100(2) to "develop" a "Charter" does not fall into any recognised juristic niche and it is not immediately clear what the nature and ambit of the Minister's powers under section 100(2) of the MPRDA are, or what the legal nature and role of the Charter mentioned in section 100(2) are.

30 It is trite that section 100(2) stands to be interpreted with due regard to its wording and its context. The interpretation must furthermore be guided by established legal principles pertaining to the rule of law and the doctrine of separation of powers.

31 Section 100(2), as amended, provides that:

> "(a) To ensure the attainment of the Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources."[3]
>
> (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."

32 The objects mentioned in section 100(2) are stated as follows in section 2 of the MPRDA, as amended:

[3] The underlined parts were inserted by *Amendment Act 49 of 2008* with effect from 7 June 2013. This coincided with similar amendments to the objects in sections 2(d) and (e) of the MPRDA.

"The objects of this Act are to – [4]

...

(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 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;

(e) 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;

...

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

33 I am advised that the objects of an Act serve as an aide in the interpretation of the provisions of such Act. In the case of the MPRDA, section 4(1) expressly makes provision therefor by providing that -

> "When interpreting a provision of this Act, any reasonable interpretation which is inconsistent with the objects of this Act must be preferred over any other interpretation which is inconsistent with such objects."

34 The objects of an Act, however, do not operate *in vacuo* and do not impose independent obligations or confer powers in the absence of substantive provisions in the Act. Similarly, the long title and preamble do not impose substantive obligations or confer powers. Once the objects are translated

[4] The underlined parts were inserted by *Amendment Act 49 of 2008* with effect from 7 June 2013.

into, and given concrete form in, substantive provisions by the legislature, effect must be given to these substantive provisions, properly interpreted in view of the objects.

35 In addition, I am advised, once legislation is passed to fulfil a constitutional right,[5] the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.

36 In the case of the MPRDA, a number of the substantive provisions, unusually, make express reference to objects of the Act, such as sections 12(3)(d)[6], 17(1)(f)[7], 17(4)[8], 23(1)(h),[9] 55(1)[10] and item 7(2)(k)[11] in Schedule II of the MPRDA.

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[5] In casu, sections 9, 24 and 25(8) of the Constitution

[6] 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*)."

[7] 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.

[8] 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*)."

[9] 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."

[10] 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."

[11] 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)".

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37 These sections of the MPRDA all require that an assessment be made by the Minister, as part of a specific decision-making process, whether and/or the extent to which, an applicant has given effect to the objects of the MPRDA mentioned in sections 2(c), (d), (e), (f) and/or (i) thereof.

38 Just as the objects in section 2 were incorporated in certain substantive sections (as set out above), they were not incorporated in others. I refer in this regard, by way of example, to-

38.1 reconnaissance permissions, mining permits and retention permits in regard to which there are no empowerment requirements in the MPRDA; and

38.2 sections 18 and 24 dealing with renewals, which similarly have no reference to any of the objects of the MPRDA or the Charter.

39 The objects of the MPRDA are framed in broad and general terms, as objects usually are. In the absence of guidelines, the Minister would thus have a very wide discretion in assessing whether an applicant has given effect to the relevant objects of the Act, to the extent that it would be impossible for applicants to predict what factors would weigh with the Minister and what the outcome of their applications are likely to be. This would be contrary to the rule of law. It is submitted that it is in this context that the legislature enacted section 100(2) of the MPRDA, to guide the exercise of the Minister's discretion under the sections mentioned above.

40 The Charter itself is expressly referred to in very few sections of the MPRDA, to wit:

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40.1 in section 23(1)(h) of the MPRDA, which deals with the granting of a mining right, and provides 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*"; and

40.2 in sections 25(2)(h) and 28(2)(c) of the MPRDA which 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.

41 There are no other provisions in the MPRDA which expressly refer to or require compliance with the Charter as such, and there are no provisions which require constant compliance with the Charter. As stated above, the Charter operates in the MPRDA in the context of specific decision-making processes.

The Charter is a formal policy document which cannot contradict, conflict with or go further than, the MPRDA itself

42 It is submitted that upon a proper contextual interpretation of section 100(2), the Charter is thus intended to guide the Minister's discretion, on the basis of a published document, when he takes decisions under those sections of the MPRDA[12] which require that an assessment be made 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.

[12] Such as 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.

43 At the same time, the Charter is 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.

44 It is accordingly submitted that the Charter constitutes a formal guideline or statement of policy, mandated by section 100(2) of the MPRDA, which must be applied in terms of and in the manner contemplated in the substantive provisions of the MPRDA.

45 A policy, formal or otherwise, is not legislation and remains a guideline. The fact that section 23(1)(h) of the MPRDA requires the Minister to consider, when considering an application for a mining right, whether the grant of the right will be *"in accordance with the Charter contemplated in section 100"* does not transform the Charter into a law. It remains a statement of policy which cannot override, supplement, amend or be in conflict with laws (including subordinate legislation), otherwise the separation between legislature and executive will disappear.

46 The Charter could thus 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 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. That is language indicative of a desire to achieve policy objectives and not of legislation.

SS KC

The Charter is not law

47 The Charter is not subordinate legislation. In previous litigation between the same parties, the Minister's predecessor in office took the view that the transformational objects of the Act (but, incidentally, not the other objects of the Act) as well as the Charter are all legally binding in the sense of being directly legally enforceable and producing obligations which the right holders must at all times meet. "*Non-compliance*" with any aspect thereof at any time was regarded as non-compliance with the MPRDA and was viewed as subject to the sanction in section 47. The current Charter seems to depart from the same erroneous premise.

48 This view, however, does not accord with the content or structure of the MPRDA, the rule of law or the doctrine of separation of powers:

48.1 Firstly, as stated, the objects of the Act only produce obligations which applicants for rights must meet to the extent that such obligations have been incorporated in the substantive provisions of the Act, as they have in, for example sections 12(3)(d), 17(1)(f), 17(4), 23(1)(h), 55(1) and item 7(2)(k) of Schedule II of the MPRDA. Outside of these provisions, the objects of the MPRDA only serve as an aide in the interpretation of the substantive provisions of the MPRDA, as provided in section 4 thereof.

48.2 Secondly, the definition of "this Act" in section 1 of the MPRDA does not and cannot include the Charter, and consequently the contention that the Charter forms part of the Act or that non-compliance with the Charter constitutes non-compliance with the Act is misconceived.

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48.3 Thirdly, there is no indication whatsoever in the wording of section 100(2) that the Charter was intended to be subordinate legislation. If Parliament had intended to empower the Minister to make laws regarding the attainment of the Government's objectives of addressing historic inequality in the mining industry, it could have provided in section 100(2)(a) that the Minister may make regulations in that regard. It did not do so.

49 I emphasize that the Charter, which is intended to assist the Minister in assessing whether an applicant/holder has given effect to these objects does not, and cannot lawfully, operate outside of the structure and provisions of the MPRDA as if it were a stand-alone law of general application which supplements and amends the MPRDA, and even overrides other legislation.

50 A policy, formal or otherwise, is not legislation and remains a guideline. The fact that section 23(1)(h) of the MPRDA requires the Minister to consider, when considering an application for a mining right, whether the grant of the right will be *"in accordance with the Charter contemplated in section 100"* does not transform the Charter into a law. Policy could never be applied so does not render the Charter 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. As stated, section 100(2)(b) indeed requires that the Charter should set out how the objects referred to in those sections *can* be achieved. As stated, that is language indicative of a policy, not of legislation.

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Separation of powers

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

52 The executive authority of the Republic is vested in the President by section 85 of the Constitution who exercises the executive authority, together with other members of the Cabinet (consisting of the Deputy-President and Ministers), by *inter alia* (a) implementing national legislation; (b) developing and implementing national policy; and (e) performing any other executive function provided for in the Constitution or in national legislation.

53 The separation of powers between the legislative, executive and judicial branches of government *inter alia* entails that the branches of government may not usurp one another's powers and that each branch of government must perform its constitutionally allocated function, consistently with the Constitution.

54 I am advised that the doctrine of separation of powers does not preclude Parliament, as the legislative body, from delegating its power to make laws to other bodies, including the executive. However, the Constitution places

certain constraints on the delegation of authority to make law to the executive in view of the doctrine of separation of powers. These include that:

54.1 plenary power to the executive to amend the source of its authority to make law or to amend Acts of Parliament is constitutionally impermissible as it would inevitably subvert the manner and form provisions of the Constitution and allow the executive to confer power upon itself to do as it pleases;

54.2 the constitutionality of a delegation of the power to make subordinate legislation would depend on a range of factors including *inter alia* the nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained or exercisable by the delegator over the delegate, the circumstances prevailing at the time when the delegation is made and when it is expected to be exercised, the identity of the delegate and practical necessities generally.

55 In the case of the MPRDA, there is simply no express or implied indication in the text that it was Parliament's intention to mandate the Minister to legislate to achieve the attainment of the objects identified in section 100(2)(a). In fact, such an interpretation of section 100(2) would render it unconstitutional in view of:

55.1 the wide and unqualified nature and ambit of the purported delegation;

55.2 the subject-matter to which it relates;

55.3 the degree of delegation;

SS YC

55.4 the fact that the discretion of the Minister is in no way structured and guided by the enabling Act;

55.5 the total absence of control and supervision retained or exercisable by Parliament, with the result that Parliament does not continue to exercise its control as a public forum in which issues can be properly debated and decisions democratically made;

55.6 the public importance and constitutional significance of the measures which, because they touch on questions of broad public importance and controversy, require greater scrutiny; and

55.7 the fact that the subject-matter does not necessitate the use of forms of rapid intervention which the slow procedures of Parliament would inhibit.

56 It is accordingly submitted that -

56.1 on a conspectus of all these factors, the statutory framework and the wording of section 100(2), the Charter was not, and could not permissibly have been, intended by the legislature to be subordinate legislation, and was not in fact enacted as subordinate legislation. It was "developed" by the executive under section 100(2) as a formal policy, as contemplated in section 85(2)(b) of the Constitution;

56.2 an unconstitutional interpretation should be avoided and section 100(2) should accordingly not be interpreted as empowering the Minister to legislate. The latter interpretation is supported by the wording and structure of the MPRDA and is in conformity with the constitutional norm of separation of powers.

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57 In any event, even if section 100(2) is held to constitute a proper delegation of legislative powers to the Minister, which remains denied:

57.1 the Minister could still not lawfully amend the source of his authority to make law or amend Acts of Parliament or assume powers which are not conferred by the MPRDA;

57.2 the nature, purpose and permissible scope of the Charter all still fall to be determined by the provisions of MPRDA, which is the empowering legislation.

The role of the charter as contemplated in the MPRDA

58 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. In the case of the grant of mining rights, and conversions of old order mining rights into mining rights, the position is as follows:

58.1 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, as set out in regulation 46.

58.2 Section 23(1) provides that the Minister must grant the mining right *inter alia* if -

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"(h) the granting of such right will further the objects referred to in section 2(d) and (f) and[13] in accordance with the charter contemplated in section 100 and the prescribed social and labour plan".

58.3 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)."[14]

58.4 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.

58.5 The standard mining right document contains a recordal of the empowerment agreement relied upon for the grant of the right and imposes an obligation on the holder to honour the terms of such agreement. Copies of the standard mining right and of the standard converted mining right are annexed hereto marked '**FA8(1),** and **FA8(2)**'. In addition, the social and labour plan is approved if it complies with regulation 46.

58.6 Once granted, the holder is obliged to comply with the provisions of the MPRDA and the terms and conditions of its mining right as contemplated

[13] It is submitted that, in the context, it is clear that the "and" was erroneously retained in the text in this place. Acting Justice Barrie in par 83 of the *Chamber of Mines* judgment found that the subsection can only be read sensibly by omitting the word "and".

[14] 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).*"

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in section 23(6). It also has to comply with the provisions of its approved social and labour plan.

58.7 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.

58.8 If the holder fails to comply with the terms of its right, the Minister is authorised to invoke the provisions of section 47.

59 It is accordingly clear that before granting an application for a "new order" mining right or converting an old order mining right, the Minister (or his delegate) must satisfy himself that the grant of such right 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. The requirements to be met by an applicant in applying for a mining right or lodging an old order mining right for conversion must be those that prevail at the time the application or lodgement is made.

60 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 constitutes administrative action):

60.1 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) and an object of item 2(a) of Schedule II (Transitional Arrangements) to the MPRDA to provide for security of tenure in respect of prospecting and mining operations;

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60.2 the decision-maker is *functus officio* and may not revisit his decision, save on the usual review grounds recognised by our law.

61 Accordingly, a mining right once granted cannot be revoked or cancelled because the holder fails to comply with Charter requirements introduced after the grant of the right. 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 new requirements set out in a Charter as revised from time to time. The majority of the court in the *Chamber of Mines* matter held that the MPRDA empowers the Minister to consider a mining right holder's compliance with the Charter before the right is granted (or refused). After the right is granted, the Minister may only revisit such compliance if it is a condition of the mining right itself that the mining right holder continuously meet specific HDP requirements.

62 As shown below, the first substantive provision in the 2018 Charter, which in clause 2.1 provides that "a mining right holder must comply with the following", is for this very reason beyond the powers of the Minister.

Main propositions

63 The following main propositions follow from the principles set out above, and are dealt with more fully below.

(i) The holder of a mining right does not have a continuing obligation to replenish its HDP shareholding under the MPRDA

SS YC

64 The starting point with regard to the obligations of holders of mining rights must be the provisions of the MPRDA. 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 a continuing obligation upon the successful applicant for a mining right or converted mining right to replenish or restore the targeted HDP ownership level referred to in the Charter where the required percentage falls below this level after the grant of the holder's mining right, failing which such holder may be held as being in contravention of the MPRDA.

65 This interpretation of the MPRDA is not only in line with the language and context of the MPRDA as set out above, but also with the objectives of the MPRDA, including the expansion of opportunities for HDPs to invest in the mining industry, and the promotion of employment in that industry.

66 This view, which has been referred to as "once empowered always empowered", was upheld by the majority in the *Chamber of Mines* matter, and is recognised, partially, in the 2018 Charter. Clause 2.1.1.1 of the 2018 Charter duly recognises that "*An existing mining right holder who has achieved a minimum of 26% BEE shareholding shall be recognised as compliant for the duration of the mining right*". The exclusions to this general recognition in cases of renewal or transfer of existing mining rights, which are set out in clauses 2.1.1.2 and 2.1.1.4 to 2.1.1.6 of the 2018 Charter, however, are beyond the powers of the Minister. The MPRDA simply does not require compliance with the Charter in cases of renewal and transfer of existing mining rights. To the extent that clause 2.1.6 applies to existing rights, its provisions are similarly beyond the powers of the Minister. These

clauses of the 2018 Charter are dealt with in more detail below.

(ii) The Minister's lack of power to cancel mining rights on the basis of non-compliance with new Charter requirements after the date of grant

67 It is furthermore submitted that the Minister is not empowered to cancel a mining right in terms of section 47 in the event of non-compliance with the Charter requirements. This is manifestly impermissible.

68 The Minister cannot by decree elevate the Charter's status to that of legislation and cannot by decree provide in the Charter (in clause 9) that non-compliance therewith shall render the mining company in breach of the MPRDA and subject to the provisions of section 93 read in conjunction with sections 47, 98 and 99 of the Act. Only Parliament, by means of appropriate amendments to the MPRDA, can render a breach of the Charter a breach of the MPRDA.

69 National or provincial Acts and regulations are legislative instruments, whereas documents setting out governmental policy are not. As a matter of sound government, a clear distinction should be maintained between policy documents and legislative instruments.

70 The Minister therefore acted beyond his powers in including clause 9 of the 2018 Charter. This is also dealt with in more detail below.

Main grounds of review of the challenged clauses

71 The main grounds of review of the challenged clauses of the 2018 Charter are thus that they are -

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71.1 unconstitutional in that the Minister lacks the power to publish the Charter in the form of what purports to be a legislative instrument and, to the extent that he sought to do so and usurped the functions of the legislature, he offended against the separation of powers, which is entrenched as part of the rule of law in section 1(c) in the Constitution, so that the challenged clauses fall to be set aside in terms of the principle of legality implicit in the Constitution and/or under section 6(2)(i), 6(2)(f)(i), 6(2)(d) and/or 6(2)(i) of PAJA, and

71.2 unauthorised by section 100(2) of the MPRDA generally and the decision to publish them as part of the 2018 Charter was materially influenced by an error of law so that they accordingly fall to be set aside in terms of the principle of legality implicit in the Constitution and/or under sections 6(2)(i), 6(2)(f)(i), 6(2)(d) and/or 6(2)(i) of PAJA.

PART 3: GROUNDS OF REVIEW IN RESPECT OF CLAUSES UNDER THE OWNERSHIP ELEMENT (clause 2.1 of the 2018 Charter) and DISPOSAL OF BEE SHAREHOLDING IN RESPECT OF EXISTING MINING RIGHTS (clause 2.1.6 of the 2018 Charter)

OWNERSHIP: EXISTING MINING RIGHTS (clause 2.1.1 of the 2018 Charter)

Introduction

72 The 2018 Charter introduces onerous re-empowerment obligations in respect of the renewal and transfer of existing mining rights.

73 The Minerals Council seeks to review and set aside clause 2.1 (introductory sentence, which applies to both existing and new rights holders), clauses

2.1.1.2, 2.1.1.4, 2.1.1.5 and 2.1.1.6 which appear under the ownership element under the heading "Existing Mining Rights" as well as clause 2.1.6, insofar as it purports to apply to existing rights. (The introductory sentence of clause 2.1 and clause 2.1.6 are also dealt with under the heading of new mining rights below.)

74 The main ground of review is that the Minister is as a matter of principle not empowered to impose further or new obligations on the holders of existing mining rights outside of the provisions of the MPRDA and its regulations. The imposition of new charter obligations after the grant or conversion of a mining right in the case of renewals and transfers of existing mining rights (in clauses 2.1.1.2 and 2.1.1.4 to 2.1.1.6) is accordingly unauthorised and the said clauses fall to be reviewed and set aside in terms of the principle of legality and/or sections 6(2)(a)(i) and (f)(i) of PAJA. The provisions mentioned below are also unclear and vague as shown below, and thus also fall foul of the requirements of the rule of law as contemplated in section 1 of the Constitution and section 6(2)(i) of PAJA in this regard.

The imposition of new charter obligations after the grant or conversion of a mining right is beyond the Minister's powers under the MPRDA

75 The 2018 Charter defines the term "*Existing mining right holder*" to mean, "*for purposes of the ownership element*", as "*a holder of a mining right granted prior to the commencement of the Mining Charter, 2018*".

76 In terms of section 1 of the MPRDA, the term "*holder*" is defined as "*in relation to a ... mining right .... the person to whom such right . . . has been granted or such person's successor in title*".

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77 The introductory sentence of clause 2.1 of the 2018 Charter, which applies to both existing rights holders and new rights holders, provides as follows:

> "To give effect to meaningful economic participation;[15] integration into the mainstream economy; and effective ownership of the country's mineral resources by the Historically Disadvantaged Persons, a mining right holder must comply with the following:" [own underlining].

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

79 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:

79.1 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).

79.2 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*".

[15] As defined in the 2018 Charter.

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79.3 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).*"[16]

79.4 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 or conversion of the right and imposes an obligation on the holder to honour the terms of such agreement as appears from the standard mining right document and standard converted mining right document referred to and copies whereof are annexed as annexures FA8(1) and FA8(2) above. In addition, the social and labour plan is approved if it complies with regulation 46.

79.5 Once granted, the holder is obliged to comply with the provisions of the MPRDA and the terms and conditions of its mining right.[17] If an applicant entered into an agreement with an empowerment partner to satisfy the criterion in section 23(1)(h), compliance with such agreement is required

[16] 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)."*

[17] 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.

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as part of the right granted. It also has to comply with the provisions of its approved social and labour plan.

79.6 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.

80 It is thus clear that the legislative scheme is that the Minister must, when granting an application for a mining right, or converting an old order mining right, be satisfied that the grant of such right 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. The requirements to be met by an applicant in applying for or conversion to a mining right are clearly those that prevail at the time the application or lodgement is made.

81 Once the Minister is satisfied that 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 the Minister (or his delegate) has taken a decision to grant a mining right, which is an administrative act, he is *functus officio* and may not revisit his decision.

82 A holder can thus not be required by the Charter, after the decision to grant the right to him has been taken, to comply with additional criteria, 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. In terms of section 4(1) of the MPRDA, "*when interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must*

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be preferred over any other interpretation which is inconsistent with such objects.".

83 An interpretation of section 100(2)(a) which would permit the Minister to impose new obligations upon the holder of a mining right which, if not met, would expose such holder to the loss of such right, would also be inconsistent with the description of a mining right in section 5(1) of the MPRDA as a "limited real right".

84 Accordingly, a mining right once granted on application or conversion cannot be revoked or cancelled on the grounds of a failure to comply with Charter requirements imposed after the grant or conversion 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 on application or conversion to an applicant, the holder will, in order to retain such right, have to meet the new requirements set out in a Charter as revised from time to time. In particular, as set out below, sections 47, 93, 98 and/or 99 of the MPRDA do not grant the Minister such power. These sections are discussed more fully below in the context of clause 9 of the 2018 Charter.

85 It is accordingly submitted that the Minister has no power, after he has granted a mining right, whether on application or conversion, through the Charter, to impose new obligations on holders of existing rights outside of, and over and above, the provisions of the MPRDA and its regulations and

the terms and conditions of their granted or converted mining rights and approved social and labour plans. It is not authorised by the MPRDA.

Order granted in previous litigation (the Chamber of Mines judgment 2018)

86 Prior to commencement of the 2018 Charter, there was a long-existing dispute between the Minister and his functionaries on the one hand, and the Chamber of Mines as it was then known and its members on the other, about whether or not, once a party which has applied 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 for new mining rights 30% HDP ownership), if for one reason or another it fell below that level. This was referred to as the *"once empowered, always empowered"* issue.

87 The Minister and his functionaries took the view under the previous Charters, that a holder of a mining right has a continuing obligation to maintain a 26% HDSA ownership level (now, for new mining rights, 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.

88 As stated above, the Mineral Council's view at the time was that 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 HDPs to the 26% (or now, for new mining rights, 30%) target referred to in the Charters where such percentage falls below this level after the grant of the holder's mining right.

89 In consequence of an application for a review of the Original Charter and the 2010 Charter (under case number 41661/2015), the Chamber (as it was then known) was granted an order in the Chamber of Mines judgment 2018 on 4 April 2018 by Acting Justice Barrie (Justice Mabuse concurring, but Justice Siwendu dissenting) declaring that, upon a proper interpretation of the MPRDA, once the Minister or his delegate is satisfied in terms of section 23(1)(h) or item 7(2)(k) in Schedule II of the MPRDA that the grant or conversion of the mining right applied for in terms of section 22 of the MPRDA or lodged for conversion in terms of item 7 in Schedule II of the MPRDA will further the objects referred to in sections 2(d) and (f) in accordance with the Charter, and has granted or converted the mining right applied for or lodged for conversion, the holder thereof is not thereafter legally obliged to restore the percentage ownership controlled by HDPs or HDSAs to the 26% target referred to in the Original Charter and in the 2010 Charter where such percentage falls below 26%, unless the obligation is specified as an obligation in the terms and conditions stated in the right, as referred to in section 23(6) of the MPRDA. As mentioned, the judgment and order are subject to an application for leave to appeal.

The provisions of the 2018 Charter

90 The 2018 Charter was published on 27 September 2018, some five months after the *Chamber of Mines judgment 2018* on 4 April 2018. The 2018

Charter recognises the principle reflected in the above mentioned order and judgment in clause 2.1.1.1 thereof by providing that "*An existing mining right holder who has achieved a minimum of 26% BEE shareholding shall be recognised as compliant for the duration of the mining right*". To remain "compliant", however, the Implementation Guidelines[18] provide that such holders must submit annual reports on their current BEE shareholding, meaningful economic participation and their shareholders' rights. This is already an erosion of the principle set out in clause 2.1.1.1 of the 2018 Charter.

91 The Minister also did not extend this principle in the 2018 Charter to renewals and transfers of existing mining rights, but instead introduced onerous re-empowerment obligations in such cases:

91.1 clause 2.1.1.2 provides that "*such recognition will not be applicable upon renewal*";

91.2 clause 2.1.1.4 provides that "*The recognition of continuing consequences, in respect of an existing mining right, shall not be transferrable (sic) and shall lapse upon transfer of such mining right or part thereof*";

91.3 clause 2.1.1.5 provides that "*The recognition of continuing consequences shall not apply to an application for a new mining right or renewal of a mining right*"; and

[18] Which were contemplated in GN 1002 *GG* 41934 of 27 September 2018 (a copy whereof is annexure **FA4(1)** above) in terms whereof the 2018 Charter was published, and which were published in GN 1399 *GG* 42122 of 19 December 2018, a copy whereof is annexure **FA9** hereto (Implementation Guidelines).

91.4 clause 2.1.1.6 provides that "*A renewal of an existing mining right shall be subject to Mining Charter requirements applicable at the time that a mining right renewal application is lodged*";

[own underlining].

92 It is submitted that the principle remains that, unless authorised to do so by the MPRDA or unless specified in the terms and conditions stated in the right as referred to in section 23(6) of the MPRDA, the Minister has no power after grant, through the Charter, to impose new obligations on holders of existing rights in the case of renewals and transfers of their existing mining rights.

Renewals of existing mining rights

93 The relevant provisions of the MPRDA with regard to renewals of mining rights are sections 25(1) and section 24.

94 Section 25(1) provides that:

> "In addition to the rights referred to in in section 5, the holder of a mining right has, subject to section 24, the exclusive right to apply for and be granted a renewal of the mining right in respect of the mineral and mining area in question."

95 Section 24 of the MPRDA, under the heading "Application for renewal of mining right", provides as follows:

"(1) Any holder of a mining right who wishes to apply to the Minister for the renewal of a mining right must lodge the application—

> (*a*) at the office of the Regional Manager in whose region the land is situated;
>
> (*b*) in the prescribed manner; and

(*c*) together with the prescribed non-refundable application fee.

(2) An application for renewal of a mining right must—

(*a*) state the reasons and the period for which the renewal is required;

(*b*) be accompanied by a report reflecting the extent of compliance with the conditions of the environmental authorisation;

(*c*) include a detailed mining work programme for the renewal period.

(3) The Minister must grant the renewal of a mining right if the application complies with subsections (1) and (2) and the holder of the mining right has complied with the—

(*a*) terms and conditions of the mining right and is not in contravention of any relevant provision of this Act or any other law;

(*b*) the mining work programme;

(*c*) requirements of the prescribed social and labour plans; and

(*d*) conditions of the environmental authorisation.

(4) A mining right may be renewed for further periods, each of which may not exceed 30 years at a time.

(5) A mining right in respect of which an application for renewal has been lodged shall despite its expiry date remain in force until such time as such application has been granted or refused."

96 A plain reading of section 24 shows that the Minister has no power, by way of the Charter or otherwise, to require compliance with further requirements set out in revised Charters from time to time as a pre-condition for the granting of a renewal. There is little doubt that the onerous re-empowerment requirements in the 2018 Charter in the case of renewals go further than those imposed under section 24 of the MPRDA and afford the Minister greater powers than those set out in the MPRDA when he decides whether or not to grant the renewal of an existing mining right. Further argument in this regard will be presented to the court at the hearing of the matter.

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97 The provisions of clauses 2.1.1.2, 2.1.1.5 and 2.1.1.6 as well as 2.1.6.2, insofar as they purport to oblige an existing holder of a mining right to comply with the new requirements of the 2018 Charter relating to ownership upon renewal of a mining right, are accordingly clearly beyond the powers of the Minister. The non-recognition of renewals is furthermore contrary to the object of security of tenure in section 2(g) of the MPRDA (which includes continuity of tenure by way of renewals) and contradicts section 24(3) which does not include re-empowerment as a jurisdictional fact for compulsory grant of renewal applications. The aforesaid clauses are accordingly not authorised by the provisions of the MPRDA and stand to be reviewed and set aside in terms of section 6(2)(a)(i) and/or 6(2)(f)(i) of PAJA, alternatively in terms of the principle of legality.

Transfers of existing mining rights

98 According to clause 2.1.1.4 of the 2018 Charter, the HDP ownership credentials of the transferor (seller) do not follow the existing mining right upon a transfer to the transferee. Instead, it seems, the transferee must ensure that it complies with the HDP ownership provisions applicable to new rights under the 2018 Charter. It is submitted that clause 2.1.1.4 is unauthorised by the MPRDA.

99 Section 11 of the MPRDA deals with the transferability of mining rights. Sections 11(1) and 11(2) are relevant and provide as follows:

> "(1) A prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the

written consent of the Minister, except in the case of change of controlling interest in listed companies.

(2) The consent referred to in subsection (1) must be granted if the cessionary, transferee, lessee, sublessee, assignee or the person to whom the right will be alienated or disposed of—

(*a*) is capable of carrying out and complying with the obligations and the terms and conditions of the right in question; and

(*b*) satisfies the requirements contemplated in section 17 or 23, as the case may be. ..."

100 Section 11(2)(a) contemplates therefore that the transferee will comply with whatever empowerment obligations have been incorporated into the relevant mining right pursuant to the Charter in force when the mining right was granted.

101 Section 11(2)(b) only requires that the transferee satisfy those provisions of sections 17 and 23 of the MPRDA which relate to the capacity of the holder of a mining right to meet particular criteria. For that reason section 23(1)(a) would not have to be satisfied by the transferee because it relates to the nature of the mineral resource to be mined, not to the nature of the miner. By contrast, section 23(1)(b) would have to be satisfied by a transferee, because it relates to the financial and technical strength of the miner.

102 The requirement relating to empowerment in section 23(1)(h) in its terms relates to the point in time when the right is granted. It provides that "*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*" [own underlining]. As pointed out above, the transferee will, upon the

transfer of the mining right, become obliged to comply with the empowerment agreement which the Minister was satisfied would be in accordance with the relevant Charter when he granted the right. Section 23(1)(h) does not therefore relate to the capacity of the holder to meet the requirements of that section and there would therefore be no need for the transferee to satisfy the Minister that it is able to meet the requirements of that section. Those requirements are met because the empowerment agreement in question was concluded.

103 Importantly, section 11 does not impose obligations upon a transferee which the transferor did not have. The provisions of section 23(1)(h) can therefore not be relied upon as a source of power for the Minister in the Charter to require compliance with the new Charter conditions on transfer of an existing mining right.

104 The Minister is accordingly not empowered by the MPRDA, by way of the Charter, to impose a further and new obligation upon a cessionary or transferee of an existing right again to comply with the ownership requirements for new rights under the 2018 Charter or to impose it as a pre-condition to granting consent for a transfer in terms of section 11 of the MPRDA.

105 The provisions of clause 2.1.1.4 of the 2018 Charter accordingly fall to be reviewed and set aside in terms of the principle of legality and/or sections 6(2)(a)(i) and (f)(i) of PAJA.

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OWNERSHIP: DISPOSAL OF BEE SHAREHOLDING IN RESPECT OF EXISTING MINING RIGHTS (clause 2.1.6 of the 2018 Charter)

106 Clause 2.1.6 of the 2018 Charter refers in its heading not only to *new mining rights* but also to *existing mining rights*. The reference to existing mining rights in the heading appears however to be an error.

107 This appears, in the first instance, from the sequence of the clauses. Clause 2.1.6 appears after the clause dealing with new mining rights (clause 2.1.3) and between other clauses also dealing with new mining rights. This suggests that it was only intended to deal with new mining rights.

108 Secondly, there is no reference to existing rights in the body of clause 2.1.6. The only reference to existing rights appears in the heading.

109 Thirdly and importantly, it is clear from the content of clause 2.1.6 that, if it were applied to existing rights, it would directly conflict with the contents of clause 2.1.1 which deals expressly with existing mining rights. By way of example:

109.1 clause 2.1.1 (existing rights) provides that an existing mining right holder who has achieved a minimum of 26% BEE shareholding shall be recognised as compliant for the duration of the mining right (except in the case of renewals and transfers, as set out above);

109.2 clause 2.1.6 (disposal of BEE shareholding), on the other hand, provides that where BEE shareholding is disposed of, a mining right holder's empowerment credentials shall only be recognised if *inter alia* in terms of

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clause 2.1.6.1.1 it is compliant with the requirements of the 2018 Charter (which is 30%) at the time of the disposal.

110 The Minerals Council accordingly submits that clause 2.1.6 was only intended to apply to new rights. In any event, it stands to be reviewed and set aside for being unauthorised *alternatively* as being impermissibly vague and therefore inconsistent with the principle of legality and/or section 6(2)(i) of PAJA in respect of new and existing rights. I deal with new rights in more detail below.

111 I shall deal with the provisions of clause 2.1.6 in respect of new mining rights below, when dealing with new mining rights.

OWNERSHIP: NEW MINING RIGHTS and DISPOSAL OF BEE SHAREHOLDING IN RESPECT OF NEW MINING RIGHTS (clauses 2.1.3 to 2.1.7 of the 2018 Charter)

Introduction

112 Clauses 2.1.3 to 2.1.7, as read with clause 7.2 and the Scorecard of the 2018 Charter, deal with the following main topics in relation to new mining rights:

112.1 A new minimum of 30% BEE shareholding is prescribed (clause 2.1.3.1 of the 2018 Charter).

112.2 The manner of distribution of the 30% is prescribed (clause 2.1.3.2 as well as clause 2.1.4 in relation to clause 2.1.3.2(ii) of the 2018 Charter).

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112.3 It is prescribed that a minimum of 50% BEE shareholding shall vest within two thirds of the duration of a mining right (clause 2.1.5.1).

112.4 It is further prescribed that the minimum 30% target shall apply for the duration of a mining right (clause 2.1.5.2). See also clause 7.2 of the 2018 Charter which provides that for mining right holders, the ownership element is ring-fenced and that 100% compliance is required at all times, as well as the Scorecard which only provides for a *yes* or *no* in measuring compliance with the ownership element.

112.5 Clause 2.1.6.1, however, seems to recognise consequences of empowerment deals for the duration of the new mining right but only in the limited circumstances set out in clause 2.1.6.1.1 to 2.1.6.1.4, although the obligations mentioned in the previous paragraph are not expressly subjected to clause 2.1.6.1.

113 The Minerals Council seeks a judicial review of the clauses mentioned in subparagraphs 2, 4 and 5 above on the grounds set out below.

Manner of distribution of 30% ownership

114 There is no section in the MPRDA which authorises the Minister to prescribe the specific distribution of shareholding in the case of all companies holding new mining rights, as he seeks to do in clauses 2.1.3.2 and 2.1.4.

115 As stated above, the Charter is intended to guide the Minister's discretion but cannot exclude the exercise of his discretion in this manner. Clauses 2.1.3.2. and 2.1.4 accordingly stand to be reviewed and set aside in terms of the principle of legality and/or sections 6(2)(a)(i) and (f)(i) of PAJA.

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Obligation to retain 30% at all times and the apparent exception to the rule

116 The provisions of the Charter that the minimum 30% target shall apply for the duration of a mining right, as embodied in clauses 2.1.5.2 and 7.2 and the Scorecard, are furthermore challenged by the Minerals Council on the basis of the lack of power of the Minister in terms of section 6(2)(a)(i) and/or 6(2)(f)(i) of PAJA and error of law in section 6(2)(d) of PAJA *alternatively* on the basis of the principle of legality. The Minister is simply not empowered by the MPRDA to decree by way of the 2018 Charter that a holder of a new mining right has a continuing obligation to maintain the minimum HDP ownership level (which has now been increased to 30%), and (when read with clause 9.1) that a failure to be 100% compliant at all times constitutes a contravention of the 2018 Charter and is subject to the provisions of sections 93, 47, 98 and 99 of the MPRDA.

117 Secondly, the provisions of the above mentioned clauses, when read with clause 2.1.6.1 are not clear and fall to be set aside for vagueness. Although it is stated categorically in clauses 2.1.5.2 and 7.2, and is implied in the scorecard, that 30% BEE shareholding (as prescribed) must be maintained at all times, clause 2.1.6.1 apparently detracts from this obligation in that it seems to recognise consequences of empowerment deals (apparently concluded in respect of such new rights) for the duration of the new mining right. Such recognition is, however, limited to the circumstances set out in clause 2.1.6.1.1 to 2.1.6.1.4.

118 Whether this is the correct meaning of the above mentioned clauses is however not clear, because the obligation to maintain 30% is not expressly

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made subject clause 2.1.6.1. The interpretation of clause 2.1.6 is further complicated by the fact that it purports in its heading to apply also to existing rights, as already set out above.

119 Even if that is the correct meaning of the said clauses when read together, the point remains that the Minister does not have the power to decree by way of the 2018 Charter that a holder of a new mining right has a continuing obligation to maintain the minimum HDP ownership of 30% or the power to soften his own *ultra vires* rule with an exception, but only on the basis set out in clauses 2.1.6.1.1 to 2.1.6.1.4.

120 The main issue remains whether or not, once a party which applies for a mining right has satisfied the Minister that the granting of the right will be in accordance with the 2018 Charter, that party is obliged, after the right has been granted (therefore, as mining right holder), to "top up" the 30% HDP ownership target, if for one reason or another it falls below that level, such as where a holder entered into a transaction which achieved a minimum of 30% HDP shareholding, but where the HDP partner/s has/have exited the transaction, or where the contract between the holder and the HDP Partner/s has/have lapsed or was cancelled due to breach, or where the previous HDP Partner/s transferred its/their shares to a person/s other than an HDP Person.

121 As stated above, there is nothing in the language of section 23 which imposes such an obligation upon the successful applicant for a mining right. The MPRDA, in particular, does not oblige the holder to restore the percentage ownership by HDPs to the target (now 30%) referred to in the

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Charter where such percentage falls below this level after the grant of the holder's mining right.

122 As also pointed out above, the majority of the full bench of the Gauteng High Court in Pretoria in the *Chamber of Mines judgment 2018* has already held that there is no such obligation in the MPRDA. It is submitted that it is irrational that the 2018 Charter implements the *"once empowered, always empowered"* principle in relation to existing rights (albeit only to the extent set out in clause 2.1.1) but does not also implement it in respect of new mining rights (except, apparently, in the circumstances set out in clause 2.1.6). (Even an old order mining right converted after 26 September 2018 will also rank as a new mining right governed by clause 2.1.3.) The same principles apply in both cases.

123 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 HDPs to invest in the mining industry, and the promotion of employment in that industry. Indeed, it is irrational for the Minister to decree in the 2018 Charter that 30% shareholding must be maintained at all times save in the limited circumstances set out in clauses 2.1.6.1.1 to 2.1.6.1.4:

123.1 If HDSA shareholders or other economic participants in mining companies were to be subject to "perpetual lock-ins" or, at least, locked in for a third of the duration of the mining right, it would reduce the value of their investment, materially impair the investment opportunities available to non-HDPs and discourage investment by HDPs.

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123.2 If mining companies were not to subject HDP owners to perpetual or lengthy lock-in arrangements and were required to continually replace departing HDP investors (save if all the requirements in the subclauses of clause 2.1.6.1 are met), 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.

124 It is submitted that where a mining right holder has complied with its HDP obligations by meeting the 30% ownership target, it will, where the transaction successfully led to empowerment, have empowered the HDP participants in question even if such participants realise their investments and withdraw, other than in the limited circumstances mentioned in the subclauses of 2.1.6.1. 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 HDP investor with another, save in cases where the requirements of subclauses of 2.1.6.1 are all met, irrationally ignores the empowerment and transformational benefits achieved by the departing HDP 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 and is irrational.

125 It is submitted that the MPRDA does not authorise the imposition of new requirements by way of the Charter after grant or conversion in respect of existing rights (upon renewal or transfer) or in respect of new rights (as qualified or not) and that the manner in which the Minister has sought to do so is not in accordance with the rule of law and is ultra vires, irrational and unreasonable. The clauses mentioned above accordingly stand to be

reviewed on the basis of the principle of legality alternatively section 6(2)(a)(i), 6(2)(e)(i), 6(2)(f)(i), 6(2)(f)(ii)(aa) and (bb), 6(2)(h) and/or 6(2)(i) of PAJA.

OWNERSHIP: BENEFICIATION EQUITY EQUIVALENT AGAINST THE OWNERSHIP TARGET (clause 2.1.7)

126 Both the Original Charter and the 2010 Charter made reference to the continuing consequences of empowerment deals. The 2017 Charter, without expressly referring to "continuing consequences", in paragraph 2.1.1.13 only made provision for off-setting under the ownership element against the value of beneficiation. The 2018 Charter has now, once again, changed the parameters of claiming off-sets under the ownership element against the value of beneficiation. Whilst none of these provisions in any of the Charters is clear, I deal with the topic below on the basis of what seems to be a reasonable interpretation of these sections.

Original Charter

127 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. In addition, provision was made for offsets.

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

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

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- 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."

129 Under the Original Charter a mining company was thus entitled to take into account, for the purposes of meeting the HDSA ownership targets, previous empowerment deals also 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 was explained further in the final bullet point under paragraph 4.7 of the Original Charter, which provided that in order to increase participation and ownership by HDSAs in the mining industry, mining companies agreed:

- "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."

Furthermore, in paragraph 4.8 (Beneficiation), it was provided that:

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

130 It is submitted that these provisions were rational and reasonable. 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.

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2010 Charter

131 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.

- "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]

132 In regard to off-sets themselves, the second bullet point in paragraph 2.1 of the 2010 Charter provided 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."

Furthermore, in paragraph 2.3 (Beneficiation), it was provided that:

> "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". [emphasis added]

133 The 2010 Charter thus materially limited the ability of measured entities to offset, and limited continuing consequences, not only to offsets or credits arising from the value of beneficiation, but also to deals concluded prior to the promulgation of the MPRDA. The limitation of the continuing consequences of empowerment deals to deals concluded prior to the coming into force of the MPRDA was irrational, since it was the MPRDA which created the requirement to enter into such deals. While a number of mining companies entered into empowerment transactions in the knowledge of what

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would be required after the effective date of the MPRDA, there was no rational reason to exclude deals concluded after that date.

2017 Charter

134 The 2017 Charter 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."

Paragraphs 2.1.4(a) to (e) provided that:

(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:

- The Holder must have, since 2004 in addition to section 26 requirements of the MPRDA, invested in Beneficiation;
- The activities that are deemed to be Beneficiation are in line with the baseline contemplated in the definition of Beneficiation in the MPRDA; and
- 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.

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(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.

2018 Charter

135 In the first instance, beneficiation is defined in section 1 of the MPRDA. The Charter, however, adopts a different definition "for purposes of the Mining Charter". This is unauthorised. The Minerals Council submits that this is an exceptional case justifying the court granting an order as contemplated in s8(1)(c)(ii)(aa) of PAJA, substituting the existing definition of "beneficiation" in the 2018 Charter with the definition of "beneficiation" in section 1 of the MPRDA.

136 The beneficiation offset afforded under previous Charters to mining companies that undertake beneficiation is retained to an extent in the 2018 Charter. It is not, however, available to licenses or permits issued under the Diamonds Act, 1986 or the Precious Metals Act, 2005. In addition, the eleven percent offset provided for under the 2010 Charter is reduced (apparently in the case of new rights) to five percent and may only be claimed against a maximum of five percent of the BEE entrepreneur shareholding. To qualify for the offset, the mining right holder must submit a beneficiation equity equivalent plan with the Minister as well as meet the criteria set out in the Guidelines. The Minister must, in turn, consider and approve the plan within 60 days from the date of submission thereof. (See clauses 4.4.3 and 4.4 of the Implementation Guidelines.)

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137 In the case of existing mining rights, clause 2.1.7.1.2 of the 2018 Charter provides that existing holders which claimed the 11 percent offset *prior* to the commencement of the 2018 Charter retain the offset for the duration of the right. It is unclear how such holders would have been able to do so because the 2010 Charter did not provide any mechanism for calculating the percentage offset or for submitting a claim.

138 It is clear that the Minister has in the 2018 Charter sought to extinguish retrospectively the credits/offsets conferred by the Original Charter and even the curtailed ones in the 2010 Charter in respect of the continuing consequences of empowerment transactions.

139 The Mineral Council'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. Massive transactions were designed and implemented on this basis. They would be severely prejudiced if they were retrospectively deprived of these credits/offsets and the benefits of the continuing consequences of empowerment transactions.

140 It is submitted that it is a core principle of the rule of law that persons subject to the regulation should be able to plan their affairs on the basis of existing laws and policies. Retrospective amendments make it impossible to do so and render the law uncertain. It is inconsistent with the principle of legality to retrospectively deprive holders of benefits of the continuing consequences of empowerment transactions conferred by the Original Charter, without making proper provision for transitional measures. In particular, it is unauthorised as

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well as irrational to introduce new requirements with which empowerment transactions have to comply, because they render compliant transactions non-compliant overnight and extinguish substantial benefits conferred by past transactions without any transition.

141 Section 100(2) of the MPRDA does not either expressly or by necessary implication permit the Minister to retrospectively withdraw, in later Charters, compensating advantages conferred in earlier Charters.

142 The Minerals Council will accordingly seek an order reviewing and setting aside the limitation in paragraph 2.1.7.1.2 of the 2018 Charter to recognition of an 11% beneficiation offset on the basis that such limitation is not authorised by section 100(2) of the MPRDA, offends the principle of legality and that it is irrational and arbitrary to retrospectively deprive holders of mining rights of the benefits of the continuing consequences of previous empowerment transactions and of existing levels of offsets (including of beneficiation offsets in excess of 11%), which benefits were conferred by the Original Charter. Accordingly, the Minerals Council seeks the following orders:

142.1 setting aside the words "against a BEE Entrepreneur" where they appear in clause 2.1.7.1;

142.2 setting aside the words "a maximum of 5 percentage points of a BEE Entrepreneur" where they appear in clause 2.1.7.1.1;

142.3 setting aside the whole of clauses 2.1.7.1.2 to 2.1.7.1.5.

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143 A further issue is that there is no rational basis for the limitation of the beneficiation offset to 11% of the 26% ownership target (in relation to existing rights) or to 5% of the 30% ownership target (in relation to new rights). The 11% and 5% are entirely arbitrary and irrational. A mining right holder should be able to offset 100% of its 26% or 30% ownership target through its beneficiation projects. This limitation would lead to unequal treatment between a mining right holder which satisfies the 26% ownership target but has no beneficiation obligations, on the one hand, and a mining right holder which does not meet the 26% ownership target but nevertheless has substantial beneficiation projects to offset against the ownership target. The 2018 Charter furthermore does not give any indication of how the 11% or the 5% is to be calculated. That is to say, a mining right holder will not know, simply by looking at the 2018 Charter, whether it has reached the 11% or 5% target, or indeed what percentage its beneficiation projects have reached *vis-à-vis* the 26% or 30% ownership target. The beneficiation element is accordingly impermissibly vague and does not meet the most basic requirements of the rule of law.

144 The beneficiation element in the 2018 Charter 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 in terms of the principle of legality or as contemplated in section 6(2)(a)(i), 6(2)(e)(i), 6(2)(f)(i), 6(2)(f)(ii)(aa) and (bb), 6(2)(h) and/or 6(2)(i) of PAJA.

145 It is noted that the majority of the full bench of the Gauteng High Court, Pretoria in *the Chamber of Mines judgment 2018* has already granted an order (par 2.5, p 57 of the judgment) declaring that the 2010 Charter did not

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retrospectively deprive holders of mining rights of the benefit of (a) the capacity for offsets as referred to in clauses 4.7 and 4.8 of the Original Charter, or of (b) the continuing consequences of empowerment transactions concluded by them after the coming into force of the MPRDA as referred in clause 4.7 of the Original Charter or of (c) the right to utilise an excess of any set target to offset any shortfall in other operations, as referred to in clause 4.7 of the Original Charter or of (d) the entitlement to offset the value of the level of beneficiation achieved by the holder against its HDP or HDSA ownership commitments, as referred to in clause 4.8 of the Original Charter. As stated, the said judgment and order are, however, subject to an application for leave to appeal.

PART 4: GROUNDS OF REVIEW RELATING TO THE NON-OWNERSHIP ELEMENTS (clauses 2.2 to 2.6 of the 2018 Charter)

GROUNDS OF REVIEW OF PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT ELEMENT (clause 2.2 of the 2018 Charter)

146 The Charter imposes certain procurement obligations on a holder in relation to that holder's procurement policy. The obligations are meant to apply to (i) "*mining goods*", (ii) "*services*", (iii) "*verification of local content*", (iv) "*enterprise and supplier development*", (v) "*research and* development", and (vi) "*processing of samples*". I shall deal with these in turn, starting with procurement of mining goods.

147 At the outset however, the Minerals Council submits that the aim of boosting manufacturing and thus job creation cannot be achieved by the setting of unachievable targets. This element should have been based on scientific

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study. The blunt targets imposed in this element are arbitrary and irrational, because they were not based on proper scientific analysis of economically viable South African manufacturing, with the support of fact-based industrial development initiatives. A decision by a state functionary to impose obligations on persons who face severe sanctions if they fail to comply with such obligations will inevitably be irrational and/or capricious if the functionary is not possessed of credible evidence that there is a reasonable prospect that the obligations in question can be met.

(i) Mining goods

148 The term "South African manufactured goods" is defined in the 2018 Charter to refer to goods with a minimum of 60% local content during the assembly or manufacturing of the product in South Africa, and that the calculation of local content excludes profit mark-up, intangible value such as brand value, and overheads. The definition is unclear in that there are two alternative ways of achieving the target, namely 60% of value added during manufacturing (which is very seldom achieved), and 60% of value added during assembly (which seems to mean only the process of assembling a knock-down kit of a product). Furthermore, the exclusion effectively means that only labour is considered to be "value-add". The Minerals Council submits that targets for value added should have been informed by comprehensive studies that indicate local capabilities and which will probably differ by types of mining such as surface mining, underground coal mining, underground hard rock mining, and so on.

149 The term "Mining Goods" is defined in the 2018 Charter to refer to capital

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goods and consumables used by a right holder or by a contractor on behalf of a right holder. However, contractors would have to apply the applicable codes in terms of the Broad-Based Socio-Economic Empowerment Act, leading to a conflict between the requirements under that Act and under the 2018 Charter.

150 The definition of "Youth" in the 2018 Charter refers, insofar as natural persons are concerned, to young South African citizens between the ages of 18 and to 35 years based on national or provincial demographics. This conflicts with South Africa's National Youth Policy and the National Youth Commission Act and the Youth Development Strategy, which define youth as persons between the ages of 14 and 35 years, resulting in inconsistency.

151 The Charter provides that:

> "2.2.1 **MINING GOODS**
>
> 2.2.1.1 A minimum of 70% of total mining goods procurement spend (excluding discretionary expenditure) must be on South African manufactured goods. The 70% shall be allocated as follows:
>
> 2.2.1.1.1 21% to be spent on South African manufactured goods produced by a Historically Disadvantaged Persons owned and controlled company;
>
> 2.2.1.1.2 5% to be spent South African manufactured goods produced by a women or youth owned and controlled company; and
>
> 2.2.1.1.3 44% to be spent on South African manufactured goods produced by a BEE compliant company."

152 There are, I submit, various difficulties with this sub-element, which I set out

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below.

153 First, the sub-element is premised on the relevant manufacturers being able to provide the mining goods. If they are not and this results in the holder being below levels 6 and 8 of the Mining Charter scorecard, then a holder would be in breach of the Charter if, having attempted to spend the requisite percentage, it was unable to do so because there is no relevant manufacturer to provide the mining goods. This has the potential of operating unduly harshly on a holder.

154 I am advised and respectfully submit that this state of uncertainty as to whether manufacturers are able to provide the mining goods is against the rule of law enshrined in section 1(c) of the Constitution. This sub-element is in addition void for vagueness to the extent that it does not spell out the consequences of non-compliance, assuming the Charter to be law.

155 Second, there is no reason to believe that at the time the Minister decided to impose this obligation he was possessed of credible evidence that companies *currently* providing mining goods meet the empowerment specifications in the sub-element. The Charter must be capable of compliance by those to whom it applies, and holders should be assured (as at present they are not) that they will be able to procure goods and services from specified manufacturers. As far as I am aware, there is no evidence of that. I accordingly call upon the Minister to produce such evidence in his answering affidavit.

156 Third, the definition of "*South African manufactured goods*" is unclear and incapable of practical application. The term is defined thus in the Charter:

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> " **'South African manufactured goods'** refers to goods with a minimum of 60% local content during the assembly or manufacturing of the product in South Africa. The calculation of local content excludes profit mark-up, intangible value such as brand value and overheads[.]"

157 A holder seeking to comply with this sub-element will have to determine, before procuring from a relevant manufacturer, that those goods have a "*minimum of 60% local content during the assembly or manufacturing of the product in South Africa*". In determining this, the holder will have to be satisfied that the "*calculation of local content excludes profit mark-up, intangible value such as brand value and overheads.*"

158 Quite how this complicated determination is to be carried out when a holder is simply seeking to procure mining goods is not explained in the Charter. Clause 2.2.3 (Verification of Local Content) does not assist in this regard. There is no infrastructure that the Charter has set up or requires for this complex determination. There is no corresponding requirement on the manufacturer that it must possess this information at the point of sale. Should (as is possible) the information as to local content be unavailable when a holder seeks to purchase mining goods, there is no clarity whether the holder may not purchase those goods or whether it may purchase them even if it is in potential breach of the Charter.

159 Nor is it clear what components go to making up "*60% local content*" ie whether it is raw material, labour, technology or capital. What if, for example, all the capital is local but the raw materials are foreign? What if the labour and capital are foreign, as might happen? All these are possible in a globalised world. The point I am making is this: the apparently simple phrase "*local content*", as it stands, is not capable of easy determination. It is, in

short, so vague as to be void. There is no reason why this Honourable Court should not require the Minister to make clear what he means in this regard.

160 There is another problem. The determination of "*local content*" is not something that the holder can do. The holder depends on the information from the manufacturer in this regard. It should be enough for the holder to satisfy itself that it is procuring from a qualifying manufacturer. It should then be on the manufacturer, which after all possesses the information as to "*local content*" - assuming it knows what that phrase means - to tell the holder that the mining goods have the requisite local content. Again quite how it will determine this is unclear.

161 There is also no obligation on the qualifying manufacturer to keep records in order to enable a holder to comply with this sub-element. It follows that, absent this infrastructure and absent these obligations on manufacturers, this sub-element is incapable of implementation.

162 I am advised that a measure incapable of implementation is on that basis alone unlawful. Further argument in this regard will be advanced at the hearing of this application.

163 Lastly, I am advised that this element also impacts negatively on South Africa's international trade obligations, as set forth more fully in **Annexure FA10** hereto.

164 For all the above reasons, therefore, I am advised and submit that this procurement sub-element is *ultra vires* the MPRDA and therefore contrary to sections 6(2)(e)(vi) of PAJA and is in any event in breach of section 1(c) of

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the Constitution.

(ii) Services

165 This sub-element provides that:

> "2.2.2 **SERVICES**
>
> 2.2.2.1 A minimum of 80% of the total spend on services (excluding non-discretionary expenditure) must be sourced from South African based company. The 80% shall be allocated as follows—
>
> 2.2.2.1.1 50% must be spent on services supplied by Historically Disadvantaged Persons owned and controlled company;
>
> 2.2.2.1.2 15% must be spent on services supplied by women owned and controlled companies;
>
> 2.2.2.1.3 5% must be spent on services supplied by youth; and
>
> 2.2.2.1.4 10% must be spent on services supplied by BEE compliant company.
>
> 2.2.2.2 The above-mentioned procurement targets must be complied with progressively within a period of five (5) years, as outlined in the transitional arrangements.
>
> 2.2.2.3 A mining right holder must ensure that the terms and conditions offered to women owned and controlled companies, or youth, are not less favourable than those offered to other suppliers.
>
> 2.2.2.4 All procurement expenditure reported must be the actual expenditure incurred by a mining right holder."

166 The Charter defines "services" in the following terms:

> " **'Services"** refers to services contracted by a right holder, or by a contractor on behalf of a right holder, which includes but is not limited to, mining production services, drilling, mineral trading, mineral marketing, legal, shipping, transportation, information technology services, security,

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payroll, finance, medical, consulting, cleaning, insurance and any other services which are supplementary to the mine[.]"

167 I respectfully submit that there are insuperable difficulties with this sub-element. For example, if there are no companies owned or controlled by women or by Historically Disadvantaged Persons from which to source services in the relevant percentages, or if there are no youth providing the services, then holders would not be able to comply with this sub-element. The definition of "services" in the Charter is wide (and I make no criticism of this); I merely wish to point to potential difficulties of compliance.

168 What is clear is that the Minister did not know, before publishing the Charter, whether the targets in this sub-element could be satisfied. For example, the Minister cannot say that the youth can provide the legal, shipping or transportation services. These are examples. The Minister must of course produce the full information he had before him as to implementation and compliance. Only then would this Honourable Court be satisfied that the Minister proceeded upon correct information, or proceeded upon no information at all (thereby undermining the legality of this sub-element) in publishing the Charter.

169 As matters stand, there is no evidence that the companies currently providing such services are qualified in the sense defined in this sub-element (i.e. HDP, women, youth), or that they are capable of providing the services in the relevant percentages. I must emphasise that I am not, in saying this, criticising the relevant service providers. All I am saying is that the Minister ought to have satisfied himself, before publishing the Charter, that the relevant infrastructure exists to enable compliance by the holder with this

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procurement sub-element. It is irrational of the Minister to require compliance with particular obligations where he has not satisfied himself on reasonable grounds that it is possible to do so. There is no indication that the Minister has so satisfied himself. I would of course be happy to be re-assured by the Minister, by reference to facts, that this is the case. Absent that, this sub-element is, I am advised, unlawful. Further argument in this regard will be advanced at the hearing of this application.

170 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) Verification of local content

171 This sub-element provides as follows:

> "2.2.3 **VERIFICATION OF LOCAL CONTENT**
>
> 2.2.3.1 A mining right holder must procure goods in line with a standardised product identification coding system developed by the Department of Trade and Industry.
>
> 2.2.3.2 A mining right holder shall provide proof of local content for mining goods in the form of certification from the South African Bureau of Standards (SABS) or any other entity designated by the Minister."

172 While falling under the same heading, there is no obvious connection between the two clauses. It is not clear why a standardised "product identification coding system" would assist in the verification of local content, nor, to the best of my knowledge, has such a system been developed.

173 I am advised that the South African Bureau of Standards (SABS) is a

statutory body whose functions and objects are set out in sections 4 and 5 of the Standards Act, 2008 (Standards Act). Those objects and functions do not include certifying whether mining goods have "*local content*" for purposes of the Charter. On the contrary, the object of the Standards Act is set out in its preamble as:

> "To provide for the development, promotion and maintenance of standardisation and quality in connection with commodities and the rendering of related conformity assessment services; and for that purpose to provide for the continued existence of the SABS, as the peak national institution; to provide for the establishment of the Board of the SABS; to provide for the repeal of the Standards Act, 1993; to provide for transitional provisions; and to provide for matters connected therewith."

Furthermore, the Minister of Trade and Industry during 2018 dissolved the Board of the SABS and placed it under administration in terms of section 49(2) of the Public Finance Management Act, 1999, as a result of lack of service delivery and failure to perform its mandate, which suggests that the SABS is not in a position to carry out its existing mandates, let alone the additional responsibility set out in paragraph 2.2.3 of the 2018 Charter.[19]

174 I am advised that the rendering of "*conformity assessment services*" under the Standards Act does not empower the SABS to issue certificates of local content under the Charter. This is because section 4(b) of the Standards Act limits conformity assessments to matters related to "*standards*". Section 4(b) of the Standards Act provides that one of the objects of the SABS is to:

> "provide reference materials, conformity assessment services, and related

[19] See http://www.polityorg.za/article/sa-south-africanbureau-of-standards-placed-under-administration-2018-07-06

training services in relation to standards, including a voluntary SABS Mark Scheme proving assurance of product conformity". [Emphasis added]

175 Nor, I am advised, does the Minister have the power to assign functions to the SABS. That power is by section 4(k) reposed in the Minister of Trade and Industry. Nor can the Charter - which, whatever else it might be, is not primary legislation - seek to expand the mandate of the SABS. In short, the SABS has no power to certify whether mining goods have "*local content*" or not.

176 In any event, "*local content*", as understood in the Charter in its definition of "*South African manufactured goods*" (which its exclusions), is something about which only the supplier or manufacturer can have peculiar knowledge. That is why, I submit, it is artificial, impracticable and irrational to impose compliance obligations on a holder. And that is why it is, apart from its illegality, impractical to impose the certification obligation on the SABS.

177 This sub-element is therefore unlawful, incapable of implementation and, I say so with respect, not fully thought through in relation to the existing regulatory regime. It will be found that this difficulty of regulatory mis-alignment characterises large parts of the Charter. This is not so much a problem of over-regulation, as of incoherent policy-making. Further argument in this regard will be advanced at the hearing of this application

(iv) Enterprise and supplier development

In clause 2.2.4.2.2(d) the 2018 Charter provides a minimum period of five years for a contract between a holder and a supplier. The Minerals Council submits that that period is irrationally too long in that it will limit opportunities

for more enterprises to be developed.

(v) Research and development

178 This sub-element provides that:

> **"2.2.5 RESEARCH AND DEVELOPMENT**
>
> 2.2.5.1 A mining right holder must spend a minimum of 70% of its total research and development budget on South African based research and development entities, either in public or private sector."

179 The Minerals Council is in broad agreement with the policy of this sub-element. It is not clear, however, what the sub-element means exactly. Would a holder be in breach of the clause if more than 30% of its total research and development budget were "spent" on a foreign entity, where no South African entity can undertake the research and development, but the fruits thereof were to be applied back in South Africa? On the face of it, the answer is in the affirmative, i.e. that the holder would be in breach.

180 But the result would, I submit, be irrational. On my example, mining in South Africa would gain from the research. But the research may never be carried out in South Africa for lack of resources. To put it differently, a holder would not be able to spend 70% of its research and development budget importing technology which may in the end be applied in South Africa. Yet that would be the result of this sub-element. Often it is necessary to spend a lot of one's research and development budget on licences with a view ultimately to develop one's own expertise or technology. Yet, on the face of it, this sub-element would prevent that. That, I am advised, is not rationally related to the aim of the Charter. It is accordingly unlawful.

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(vi) Processing of samples

181 This sub-element requires holders to "*use South African based facilities or companies for the analysis of 100% of all mineral samples across the mining value chain*" (clause 2.2.6.1). If a holder is not to do so, then it must obtain the prior written permission of the Minister (clause 2.2.6.2).

182 When a similar proposal was previously made by the Minister, the Minerals Council made submissions to the Minister. In its submissions, the Minerals Council 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. In the light of the Minister's failure to respond to the Minerals Council's submission, there is no reason to believe that at the time of his decision to impose this obligation the Minister was possessed of credible 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.

183 Having failed to satisfy himself, before imposing this sub-element, that there is capacity in South Africa to conduct analysis of 100% of samples, the Minister has in the clause 5.11.2.3 of the Charter Implementation Guidelines put the *onus* on a holder to show that there is no such capacity. It is submitted that the Minister cannot, by means of this stratagem, evade his duty to have satisfied himself, on the basis of credible evidence, that the obligations imposed upon mining right holders in clause 5.11 are capable of compliance. It is submitted that it was both capricious and in bad faith for the Minister to adopt this stratagem.

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184 In the circumstances clause 2.2.6 of the 2018 Charter should be reviewed and set aside under sections 6(2)(a), 6(2)(e)(iii), 6(2)(e)(vi), 6(2)(f)(i), 6(2)(f)(ii)(bb) and 6(2)(f)(ii)(cc).

PART 5: GROUNDS OF REVIEW IN REGARD TO THE APPLICATION OF THE MINING CHARTER TO LICENCES GRANTED UNDER THE PRECIOUS METALS ACT, 2005 AND THE DIAMONDS ACT, 1986 (clauses 4, 6.2, 7.1, 7.3, 8.7, 8.8, 8.9 and 9.2 of the 2018 Charter)

185 In the platinum group metals sector, the smelting, refining and marketing activities currently have licenses under the Precious Metals Act, 2005 (Precious Metals Act). Section 6(1)(b) of the Precious Metals Act provides that –

> "(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 (Act No.28 of 2002);".

186 Similarly, section 5(2) of the Diamonds Act, 1986 (Diamonds Act) provides that -

> "(2) The Regulator may[20]—
>
> (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

[20] This is to be contrasted with the "shall" in section 5(1) thereof.

Mineral and Petroleum Resources Development Act".

187 As in the case of the MPRDA, these provisions clearly operate at the time of the grant of a licence and mean that the Regulator must – in the case of the Diamonds Act – or may – in the case of the Precious Metals Act - have regard to the Charter developed in terms of section 100 of the MPRDA *in deciding whether or not to grant a licence* under the Precious Metals Act or under the Diamonds Act.

188 The words "have regard to" are important. They mean, in their context, that the Regulator must pay attention to the Charter and apply it where it is appropriate to do so. When it is not appropriate to do so, the Regulator ought not to apply the Charter. The abovementioned Acts thus confer on the South African Diamond and Precious Metals Regulator ("Regulator") a discretion as to the extent to which the consideration of the requirements of the Mining Charter is appropriate when considering an applications for a particular licence or permit. The Regulator thus has a discretion as to how to apply the mining charter in this context, and is not obliged to refuse the grant of a license, permit or certificate application on the basis of non-compliance with the mining charter.

189 Additionally, the Regulations made in terms of section 95 of the Diamonds Act make provision only for applicants for diamond dealer's licences and diamond beneficiation licences to lodge, together with their applications, a proposed business plan, "inclusive of the broad-based socio-economic empowerment charter developed in terms of section 100 of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002)". No other licence or permit applications under the Diamonds Act have such a

requirement. The Minister does not have the power under the MPRDA, through the 2018 Charter, to determine that the 2018 Charter should apply to all licence and permit applications under the Diamonds Act, contrary to the provisions of the Regulations made in terms of section 95 of the Diamonds Act. Furthermore, the Minister does not have the power to override the discretion conferred on the Regulator to decide whether to apply the 2018 Charter in relation to a licence application under either the Diamonds Act or the Precious Metals Act.

190 Neither section 100(2) nor the above mentioned provisions of the Precious Metals Act or of the Diamonds Act authorise the Minister, as he has sought to do in paragraphs 4, 6.2, 7.1, 7.3, 8.7, 8.9, 8.8 and 9.2 of the 2018 Charter, to impose targets in respect of licence holders or to make the targets and elements of the Charter applicable to licence holders under those Acts, in line with the tables in clause 4 thereof. They also do not authorise the Minister to prescribe ownership targets for licensees in the downstream diamonds and precious metals industry. To do so violates section 5(2) of the Diamonds Act and section 6(1)(b) of the Precious Metals Act, is *ultra vires* the Minister's powers under the MPRDA, and is unlawful and unconstitutional.

191 It is also irrational. Smelting, refining and marketing activities are an integral part of a mine's value chain and are not operated as 'profit centres', with the actual costs of processing recharged directly back to the mines, which carry the individual mining right. The obligation under the Charter to empower is correctly linked back to a mining right level, as that is where value is created, through either empowerment at the holding company level or at an individual

mining operation level, apportioned to the 'mining right'. To make the application of the obligations under the 2018 Charter mandatory on the smelting, refining and marketing activities would only increase the costs of processing which would be recovered from the mines, thereby reducing the revenue of the mining right holder, which is the empowered entity.

192 The indiscriminate application of the 2018 Charter to the downstream diamond industry has been proclaimed in respect of an industry that is in steady decline. It is therefore unlikely that the downstream diamond industry will be capable of surviving the cost of compliance with the requirements proposed in the 2018 Charter.

193 As both the precious metals industry and downstream diamonds industry are, in any event, subject to the Codes of Good Practice issued under the Broad-Based Black Economic Empowerment Act, 2003, the mandatory application of the 2018 Charter to entities in these industries for purposes of furthering transformation in unnecessary. Furthermore, many of the social issues regulated in the 2018 Charter are already catered for by other applicable (and appropriate) legislation. The mandatory application of the 2018 Charter would create unnecessary regulatory confusion across the PGM sector and the downstream diamond industry as to the empowerment statuses of the different parts of the PGM and diamonds value chain.

194 Notwithstanding the above, there is no provision made in the 2018 Charter for the recognition of historical BEE transactions under the Ownership element where the table in clause 4 and clause 4.5.1 require compliance with the Ownership element.

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195 Clause 4 also does not provide transitional periods for the Inclusive Procurement and Employment Equity elements applicable to holders of any licences or permits in terms of the Precious Metals Act and the Diamonds Act.

196 It is submitted that operations which hold licences under the Precious Metals Act and the Diamonds Act, have to adhere to the empowerment obligations in accordance with those Acts respectively, and that the 2018 Charter cannot by decree be made applicable to them as the 2018 Charter has sought to do.

197 Even if it could simply be applied to them, which remains denied, it is irrational that existing mining right holders that require licenses or permits in terms of the Precious Metals Act and Diamonds Act cannot rely on the recognition of historical BEE transactions set out in clause 2.1.1 and similarly qualify for the stated transitional periods in respect of Inclusive Procurement and Employment Equity. It is further submitted that entities which are not holders of rights, permits or permissions in terms of the MPRDA (such as manufacturers of auto catalytic convertors or of jewellery) will find difficulty in applying the 2018 Charter to their activities.

198 Paragraph 8.8 of the 2018 Charter is *ultra vires* because neither the Precious Metals Act nor the Diamonds Act applies the Charter to renewals of licences or permits. The Minister cannot, by means of the 2018 Charter, impose an obligation on applicants for renewals of licences and permits under those Acts where Parliament has not seen fit to do so.

199 Paragraph 9.2 of the 2018 Charter is also *ultra vires* insofar as it attempts to render non-compliance with the Charter a breach of the Diamonds Act and

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the Precious Metals Act. Section 11 of the Precious Metals Act sets out, in exclusive terms, the grounds upon which licences, permits and certificates may be cancelled. Non-compliance with the Charter is not one of them. That Act furthermore does not contain any provision which renders a breach of the Charter a breach of the Act. The term "the Act" is defined in section 1 of the Precious Metals Act to mean "the Precious Metals Act, 2005 (Act 37 of 2005)".The Minister has no power to amend the definition of "the Act" Precious Metals Act by providing, in the 2018 Charter, that a breach of its terms constitutes a breach of that Act.

200 The same considerations apply to the Diamonds Act. The definition of "this Act" in section 1 does not contain any reference to the Charter. In addition, section 37, which deals with the suspension and cancellation of licences, contains no provision referring to the Charter.

201 Insofar as the following clauses relate to existing or new licences and permits issued in terms of the Diamonds Act and the Precious Metals Act, clauses 4, 6.2, 7.1,7.3, 8.7, 8.9, 8.8, as well as clause 9.2 of the 2018 Charter are accordingly not authorised and in any event irrational and stand to be reviewed and set aside in terms of sections 6(2)(a)(i) and/or 6(2)(f)(i) and/or 6(2)(i) of PAJA alternatively on the basis of the principle of legality.

PART 6: GROUNDS OF REVIEW IN REGARD TO NON-COMPLIANCE WITH THE 2018 CHARTER (clause 9 of the 2018 Charter)

202 Clause 9.1 of the 2018 Charter is *ultra vires*. Clause 9.1 provides that a mining right holder who fails to comply with the ownership and mine community development requirements and falls within levels 6 and 8 of the

Scorecard "shall be" in breach of the MPRDA and subject to the provisions of section 93 read in conjunction with section 47, 98 and 99 of the MPRDA.

203 Section 47 of the MPRDA provides the following:

> **"47. Minister's power to suspend or cancel rights, permits or permissions**
>
> (1) Subject to subsections (2), (3) and (4), the Minister may cancel or suspend any reconnaissance permission, prospecting right, mining right, mining permit, retention permit or holders of old order rights or previous owner of works, if the holder or owner thereof—
>
> (a) is conducting any reconnaissance, prospecting or mining operation in contravention of this Act;
>
> (b) breaches any material term or condition of such right, permit or permission;
>
> (c) is contravening any condition in the environmental authorisation;
>
> (d) has submitted inaccurate, false, fraudulent, incorrect or misleading information for the purposes of the application or in connection with any matter required to be submitted under this Act."

204 Section 47 thus makes provision for the cancellation or suspension of rights, permits or permissions in the circumscribed instances mentioned in section 47(1). No reference is made therein to non-compliance with the Charter, nor would one expect to find such a reference. As stated above, if an applicant for a right has entered into an agreement in order to give effect to the objects in section 2(d) and (f), the standard prospecting right or mining right provides as one of its terms that the holder is bound to the empowerment agreement it has concluded. This means that the holder must give effect to the objects of section 2(d) of the MPRDA in the form and manner set out in the concrete

agreements. Section 47 would become applicable if a holder breaches a material term of such right. Absent such a breach, the Minister is not entitled, once an applicant has complied with the granting or conversion criteria in section 23(1), including 23(1)(h), or in item 7(2)(k) in Schedule II of the MPRDA, and a mining right has been granted on application or conversion, to cancel or suspend it in terms of section 47(1) of the MPRDA based on new Charter requirements imposed after the date of grant.

205 Section 93 authorises an authorised official who finds a contravention or suspected contravention of a provision of the Act or of a term of any right, to order the taking of rectifying steps or to suspend the operations concerned. Section 98 renders the contravention or failure to comply with the provisions of the MPRDA listed therein an offence, and section 99 sets the penalties a court may impose in case of conviction of such offences.

206 No power to cancel or suspend is conferred upon the Minister in any of these sections or in section 47 for not complying with the Charter, nor is non-compliance with the Charter listed as an offence in section 98. This is to be expected because, as set out above, the way the MPRDA is structured is that the Minister must be satisfied at the stage of considering whether or not to grant or convert a mining right, that the granting or conversion 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. If, therefore, the Minister is not so satisfied, the right will not be granted. This again serves to confirm that the Minister's idea of the Charter operating as a self-standing piece of legislation in which he can create new obligations and offences and which must at all times be obeyed, is misconceived.

207 I repeat, as set out above, that the Charters do not constitute regulations and do not constitute legislation. In particular, they do not fall within the definition of "this Act" in the MPRDA. 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) in Schedule II 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.

208 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 sections 47, 93, 98 and 99 of the MPRDA.

209 The Minerals Council will accordingly seek an order reviewing and setting aside clause 9.1 of the 2018 Charter as not being authorised by the MPRDA as contemplated in section 6(2)(a)(i) of PAJA *alternatively* on the basis that this excess of power offends the principle of legality.

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210 The Minerals Council will also seek an order 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 30% HDP ownership level after the grant of a 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). It is noted that such an order has already been granted (paragraph 2.3, p 56 of the judgment) by a majority of the full bench of the Gauteng High Court, Pretoria on 4 April 2018 in the *Chamber of Mines judgment 2018* but that such order and judgment are subject to a pending application for leave to appeal.

PART 7: CONCLUSION

211 It is accordingly submitted that the 2018 Charter stands to be judicially reviewed on the basis of PAJA and/or the principle of legality. As set out above, the decision to promulgate the challenged clauses of the 2018 Charter:

211.1 was not authorised by section 100(2)(a) or (b) of the MPRDA, from which the Minister purports to derive his power and/or was taken for a reason not authorised by the said empowering provisisons (sections 6(2)(a)(i) and 6(2)(e)(i) of PAJA);

211.2 was materially influenced by an error of law inasmuch as the Minister believed that he enjoyed the power to create law in the manner in which he has sought to do and in that the challenged clauses do not constitute, as they purport to, a form of binding legislation (section 6(2)(d) of PAJA);

211.3 was inconsistent with the MPRDA or other national legislation (section 6(2)(f)(i) of PAJA);

211.4 was irrational, arbitrary and/or capricious (section 6(2)(e)(vi) of PAJA);

211.5 failed to take into account relevant considerations and information which was before the Minister (section 6(2)(e)(iii) of PAJA);

211.6 was not rationally connected to the purpose of the empowering provision or the information before the Minister (sections 6(2)(f)(ii)(bb) and (cc) of PAJA); and/or

211.7 was otherwise unconstitutional or unlawful as contemplated in section 6(2)(i) of PAJA in that it violates the rule of law in section 1(c) of the Constitution in that the challenged clauses are so confusing and contradictory that those to whom they purport to apply cannot reasonably regulate their affairs in compliance with the 2018 Charter and in that the 2018 Charter contravenes the separation of powers principle.

Confirmatory affidavit

212 I respectfully refer to the confirmatory affidavit by **Mr Henk Langenhoven**, filed herewith.

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 25th day of **MARCH 2019**, 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

Sarah Ashleigh Stodart
Commissioner of Oaths
Practising Attorney
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List of Annexures

Copies of:

FA1	:	The Original Charter
FA2	:	The 2010 Charter
FA3	:	The 2017 Charter
FA4(1)	:	The 2018 Charter
FA4(2)	:	The 2018 Charter Amendment
FA5	:	List of the Minerals Council's members
FA6	:	The Constitution of the Minerals Council
FA7(1)	:	Chamber's statement relating to last-minute MIGDETT meeting on 14 May 2015
FA7(2)	:	Media statement and ancillary documents from the media conference held by the Chamber on 15 May 2015
FA7(3)	:	Minerals Council's submissions to the Minister in August 2018 in respect of the draft 2018 Charter
FA8(1)		Standard Mining Right
FA8(2)	:	Standard Converted Mining Right
FA9	:	Implementation Guidelines published in GN 1399 GG 42122 of 19 December 2018
FA10	:	Note on South Africa's international trade obligations

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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

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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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Notes	Description	5 year target				10 year target
5	Housing and Living Conditions					
	• 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		
	• 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					
	• Has the mining company given HDSA's preferred supplier status?	Yes		No		
	• Has the mining company identified current level of procurement from HDSA companies in terms of capital goods, consumables and services?	Yes		No		
	• 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					
	• 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	Benefication					
	• Has the mining company identified its current level of benefication?	Yes		No		
	• Has the mining company established its base line level of benefication and indicated the extent that this will have to be grown in order to qualify for an offset?	Yes		No		
9	Reporting					
	• 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 beneficiated 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

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

- 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 mineworkers 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;

- 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.

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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.

FINAL 11 10 02

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.

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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).

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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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"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%.

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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/develop-ment 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 save 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 save 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;

- 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.

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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
2	Ownership	Minimum target for effective HDSA ownership	Meaningful economic participation	26%	15%	↑	↑	↑	26%	Y/N
			Full shareholder rights	26%	15%	↑	↑	↑	26%	
3	Housing and living conditions	Conversion and upgrading of hostels to attain the occupancy rate of one person per room	Percentage reduction of occupancy rate towards 2014 target	Occupancy rate of one person per room	Base-line	25%	50%	75%	100%	Y/N
		Conversion and upgrading of hostels into family units	Percentage conversion of hostels into family units	Family units established	Base-line	25%	50%	75%	100%	5%
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%
		Multinational suppliers contribution to the social fund	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%

continued

	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	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					12%
		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%
9	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%

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)

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	Has the company reported the level of compliance with the Charter for the calendar year	Documentary proof of receipt from the department	Annually						Y/N
2	Ownership	Minimum target for effective HDSA ownership	Meaningful economic participation	26%						Y/N
			Full shareholder rights	26%						
3	Housing and living conditions	Conversion and upgrading of hostels to attain the occupancy rate of one person per room	Percentage reduction of occupancy rate towards 2014 target	Occupancy rate of one person per room						Y/N
		Conversion and upgrading of hostels into family units	Percentage conversion of hostels into family units	Family units established						
4	Procurement & Enterprise Development	Procurement spent from BEE entity	Capital goods	40%						5%
			Services	70%						5%
			Consumable goods	50%						2%
		Multinational suppliers contribution to the social fund	Annual spend on procurement from multinational suppliers	0.5% of procurement value						3%

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	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	Implementation of projects will serve to enhance relationships amongst stakeholders leading to communities owing patronage to projects					15%

continued

	ELEMENT	DESCRIPTION	MEASURE	COMPLIANCE TARGET BY 2014	PROGRESS ACHIEVED BY 2010	2011	2012	2013	2014	Weighting
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	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					12%
		Utilisation of South African based research facilities for analysis of samples across the mining value chain	Percentage of samples in South African facilities	100%						5%
9	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%

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)

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	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)	Learnership 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:										Total
		African		Coloured		Indian		White				
		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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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.

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

June 2017

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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

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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 manufacturers 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;

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(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;

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"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;

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"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;

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"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;

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"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.

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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

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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.

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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.

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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.

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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:

- The Holder must have, since 2004, in addition to section 26 requirements of the MPRDA, invested in Beneficiation;
- The activities that are deemed to be Beneficiation are in line with the baseline contemplated in the definition of Beneficiation in the MPRDA; and
- 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.

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(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:

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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.

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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.

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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.

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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.

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A Holder must invest 5% of the Leviable 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.

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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 2.12~~2.9~~ (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

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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

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(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;

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- 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.

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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

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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.

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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:

- 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.

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(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.

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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 %
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.	Percentage of the total annual Leviable amount contributed to essential skills development activities	2%	Y/N (Ring-fenced element)
	Percentage of the total annual Leviable amount contributed to Mining, Transformation and Development Agency.	2%	
HRD expenditure as percentage of total annual Leviable amount (excl. mandatory skills development levy)	Percentage of the total annual Leviable amount contributed to South African Historically Black Academic Institutions	1%	

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MINE COMMUNITY DEVELOPMENT

Element Description	Measure	Compliance Target %	Weighting %
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.	Contribution towards mine community development must be proportionate to the size of the investment		Y/N (Ring-fenced element)

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PROCUREMENT SCORECARD

Element Description	Measure	Compliance Target %	Weighting %
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.	Percentage of the total mining goods procurement spend on South African manufactured goods from 50% + 1 vote Black owned and controlled companies.	21%	5%
	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;	5%	1%
	Percentage of the total goods procurement spend on South African manufactured goods from companies that are at least at level 4 BEE +26% ownership	44%	9%
Services Procurement: A minimum of 80% of the total spend on services must be sourced from South	Percentage of total spend on services from South African based services companies.	65%	5%

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African based companies. The abovementioned 80% of the total services procurement spend shall be apportioned in the following manner.[1]	Percentage of total spend on services from companies with a minimum of 50%+1 vote Black women owned and controlled companies.	10%		2%
	Percentage of total spend on services from companies with a minimum of 50%+1 vote youth owned and controlled companies.	5%		2%
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.	Percentage of samples analysed using South African based facilities	100%		3%
Contribution by Foreign Suppliers Mining companies to submit supplier development plans.	Percentage of annual turnover generated from local mining companies contributed towards the Mining Transformation and Development Agency	1%		3%
Total				**30%**

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EMPLOYMENT EQUITY

Element Description			Compliance Target %	Weighting %
Board:				
Africans	Coloureds	Indians	50%	3%
Black Females as a percentage of all Board representatives			25%	3%
Executive/ Top Management:				
Africans	Coloureds	Indians	50%	3%
Black Females as a percentage of all executive directors.			25%	3%
Senior Management:				
Africans	Coloureds	Indians	60%	4%
Black Females as a percentage of all senior managers.			30%	4%
Middle Management:				
Africans	Coloureds	Indians	75%	3%
Black Females as a percentage of all middle managers.			38%	3%
Junior Management:				
Africans	Coloureds	Indians	88%	1%

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Black Females as a percentage of all junior managers.			44 %	3%	
Employees with disabilities:					
Africans	Coloureds	Indians	3%	2%	
Core and Critical Skills:					
Africans	Coloureds	Indians	60%	3%	
Total				35%	

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SUSTAINABLE DEVELOPMENT

Element Description	Measure	Compliance Target %	Weighting %
Improve the industry's environmental compliance	Complaince 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%

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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%**

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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%	Compliant
Level 2	Level 2	3 Ring fenced Elements + 80 -100%	
Level 3	Level 3	3 Ring fenced Elements + 70-80%	
Level 4	Level 4	3 Ring fenced Elements + 60-70%	

GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

NO. 1002 27 SEPTEMBER 2018

BROAD-BASED SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE MINING AND MINERALS INDUSTRY, 2018.

I, Samson Gwede Mantashe, 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), publish the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 (Mining Charter, 2018) for implementation.

The Mining Charter, 2018 must be read together with the Implementation Guidelines to be gazetted within two months from the date of this publication.

A copy of the Mining Charter, 2018 is attached hereto.

Mr Samson Gwede Mantashe
Minister of Mineral Resources
Date: 26/09/2018

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BROAD-BASED SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE MINING AND MINERALS INDUSTRY, 2018.

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PREAMBLE

The majority of South Africans were systematically marginalised and prevented from ownership of the means of production, and from meaningful participation in the mainstream economy, through colonial rule and exclusionary policies of the apartheid Government. Since its advent, the mining and minerals sector has been the dominant feature of the South African political and socio-economic order. Its continued support and implementation of discriminatory policies and practices brought about inequalities in society broadly, and the mining industry in particular.

To redress these historical inequalities and give effect to Section 9 (equality clause) of the Constitution of the Republic of South Africa, 1996, the democratic Government enacted, amongst others, the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) ("MPRDA").

The primary objective of the MPRDA is to ensure the attainment of Government's objectives, that is, to redress historical socio-economic inequalities, to ensure broad-based economic empowerment and the meaningful participation of Historically Disadvantaged Persons in the mining and minerals industry. Section 100 (2) (a) of the MPRDA empowers the Minister to develop a Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry ("Mining Charter") as a regulatory instrument. Consequently, in 2004 the Minister developed the Mining Charter with specific measurable targets to effect transformation of the industry.

In 2009, the Department conducted a comprehensive assessment of the progress made to transform the mining industry, against the objectives and agreed targets contained in the Mining Charter, 2004. A number of shortcomings in the implementation of the various

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elements of the Mining Charter were identified; namely, Ownership, Procurement, Employment Equity, Beneficiation, Human Resource Development, Mine Community Development, and Housing and Living Conditions. Necessarily, the Mining Charter was amended in 2010 to streamline and expedite the attainment of its objectives. The amended Mining Charter also introduced the Sustainable Development element, which sought to enhance sustainable transformation and growth of the mining industry.

In 2014, a decade after the Mining Charter came into effect, the Department conducted a second assessment. The assessment highlighted the following:

- In some instances, there is a noticeable improvement in the levels of compliance. However, overall transformation of the mining industry remains unacceptably low;
- The spirit of the Mining Charter was not fully embraced, and compliance was generally thought of as means to protect the "social license to operate"; and
- The majority of mining communities continue to live in abject poverty despite the State, being the custodian of the Country's mineral wealth on behalf of the nation.
- The achievement of meaningful participation by Historically Disadvantaged Persons remains limited, owing to the following:
    - ✓ The trickle flow of benefits; which sought to service debt and to provide cash-flow directly to BEE partners, is wholly inadequate; and
    - ✓ As a result of inefficient administration, trusts holding the interest of mine employees and communities constrained the flow of benefits to their intended beneficiaries.

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Against this backdrop, Government initiated another comprehensive review process in 2015. The intention was to strengthen the effectiveness of the Mining Charter as a tool for effecting broad-based and meaningful transformation of the mining and minerals industry.

The review of the Mining Charter recognises that transformation vis-à-vis competitiveness and growth are mutually re-enforcing. Hence the reviewed Mining Charter seeks to remove ambiguities and bring about regulatory certainty by introducing new definitions, terms and targets to harmonise with other legislation. The harmonisation of legislation is intended to ensure meaningful participation of Historically Disadvantaged Persons in accordance with the objects of the MPRDA.

The review further recognises that growth and transformation of the junior mining sector; precious metals sector and the diamond sector, is important for competitiveness of the upstream and downstream minerals sector. In this regard, the Mining Charter, 2018, introduces new provisions applicable to junior miners and amendments to the provisions relating to the precious metals and diamond sectors.

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VISION

To facilitate sustainable transformation, growth and development of the mining 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

This section defines terms and concepts which are used in the Mining Charter.

"**BEE entrepreneur**" refers to a Historically Disadvantaged Person or enterprise that is at least 51% owned by Historically Disadvantaged Persons (excluding host communities and qualifying employees) with at least 51% of exercisable voting rights and 51% of economic interest;

"**BEE shareholding**" refers to shares held by BEE Entrepreneur(s), Host Communities and qualifying employees;

"**BEE compliant company**" means a company with a minimum B-BBEE level 4 status in terms of the Department of Trade and Industry's Broad-Based Black Economic Empowerment Codes of Good Practice, and minimum 25% +1 vote ownership by Historically Disadvantaged Persons;

"**Beneficiation**" for purposes of the Mining Charter, beneficiation means the transformation, value addition or downstream processing of a mineral or mineral product (or a combination of minerals) to a higher value product, over baselines to be determined by the Minister, which can either be consumed locally or exported;

"**Carried interest**" means shares issued to qualifying employees and host communities at no cost to them and free of any encumbrance. The cost for the carried interest shall be recovered by a right holder from development of the asset;

"**Core and critical skills**" refer to science, technology, engineering and mathematical skills across organisational levels, in both production and operations of a mining company;

"**Demographics**" means the numerical characteristics of a national or provincial population (e.g. population size, age, structure, gender, race, etc.);

"**Economic Interest**" means the legal entitlement of BEE shareholders to dividends, capital gains and other economic rights of a shareholder;

"**Effective ownership**" means the meaningful participation of Historically Disadvantaged Persons in:

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(i) the unencumbered net value ownership;

(ii) voting rights attaching to an equity instrument owned by or held for a participant measured using the Flow-Through Principle or Control Principle;

(iii) economic interest representing a return on ownership of the entity similar in nature to a dividend right, measured using the Flow-Through Principle; and

(iv) management control of mining operations;

"**Equity equivalent benefit**" refers to a percentage equivalent to the issued share capital of the mining right holder, at no cost to a trust or similar vehicle set up for the benefit of host communities;

"**Existing mining right holder**" - for purposes of the ownership element; refers to a holder of a mining right granted prior to the commencement of the Mining Charter, 2018;

"**Historically Disadvantaged Persons**" refers to Historically Disadvantaged persons as defined in the MPRDA;

"**Historically Disadvantaged Persons Owned and Controlled Company**" - for the purposes of the Mining Charter, refers to an entity in which Historically Disadvantaged Persons hold at least 51% of exercisable voting rights and economic interest, including the Flow-Through Principle;

"**Historical BEE Transactions**" refers to BEE Transactions concluded prior to the commencement of the Mining Charter, 2018;

"**Host community**" refers to a community within a local or metropolitan municipality adjacent to the mining area, as defined in the MPRDA;

"**Integrated producer**" refers to a mining right holder that beneficiates minerals mined by such a mining right holder as part of its business activities;

"**Leviable amount**" is as defined in the Skills Development Levies Act, 1999 (Act No. 9 of 1999);

"**Local content**" means the value added during assembly or manufacturing of the mining good that is produced in South Africa;

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"Meaningful economic participation" refers to the following key attributes:

(a) Clearly identifiable partners in the form of Historically Disadvantaged Persons, including women; as well as qualifying employees and host communities;

(b) A percentage of unencumbered net value based upon the time graduation factor which has accrued to BEE shareholders;

(c) A percentage of dividends declared, or other monetary distributions or trickle dividends paid to BEE shareholders, subject to the provisions of relevant legislation;

(d) BEE shareholders with vested interest that has vested can leverage equity in proportion to such vested interest over the life of the transaction to reinvest in other mining projects; and

(e) BEE shareholders with full shareholder rights entitling them to full participation at annual general meetings, exercising of voting rights in all aspects, including but not limited to, trading and marketing of the commodity herein affected, and anything incidental thereto regardless of the legal form of the instrument used;

"Mining Charter, 2018" means the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry; developed in terms of section 100 of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002);

"Mining Goods" refers to capital goods and consumables used by a right holder or by a contractor on behalf of a right holder;

"MPRDA" means the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002);

"Net value" refers to the value of equity which accrues to shareholders over time;

"Non-discretionary expenditure" means total procurement budget excluding procurement from rail, utilities (electricity, water, rates and taxes) and fuel;

"Pending applications" refers to applications lodged and accepted prior to the commencement of the Mining Charter, 2018;

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"**Qualifying employees**" for the purposes of the ownership element, refers to employees of a mining company, excluding employees who already hold shares in the same company as a condition of their employment agreement;

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

"**Social and Labour Plan**" refers to the Social and Labour Plan contemplated in section 23 of the MPRDA;

"**South African Based Company**" refers to a company incorporated and registered in terms of the Companies Act (Act 71 of 2008), with operations in the Country and subject to South African laws.

"**South African manufactured goods**" refers to goods with a minimum of 60% local content during the assembly or manufacturing of the product in South Africa. The calculation of local content excludes profit mark-up, intangible value such as brand value and overheads;

"**Women owned and controlled company**" refers to an entity in which South African women hold at least 51% of exercisable voting rights and economic interest; and

"**Youth**" for the purposes of the Mining Charter, refers to:

(a) young South African citizens between the ages of 18 to 35 years based on national or provincial demographics; or (b) a juristic person managed and controlled by a person/s contemplated in paragraph (a) where the persons, collectively or as a group, own and control majority of the issued share capital or members' interest; and are able to control the majority of the members' vote.

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2. ELEMENTS OF THE MINING CHARTER

2.1 OWNERSHIP

To give effect to meaningful economic participation; integration into the mainstream economy; and effective ownership of the country's mineral resources by the Historically Disadvantaged Persons', a mining right holder must comply with the following:

2.1.1 EXISTING MINING RIGHTS

2.1.1.1 An existing mining right holder who has achieved a minimum of 26% BEE shareholding shall be recognised as compliant for the duration of the mining right.

2.1.1.2 An existing mining right holder who, at any stage during the existence of a mining right, achieved a minimum of 26% BEE shareholding, and whose BEE partner/s exited prior to the commencement of the Mining Charter, 2018, shall be recognised as compliant for the duration of a mining right and such recognition will not be applicable upon renewal.

2.1.1.3 The recognition of continuing consequences shall include historical transactions concluded at holding company level, mining right level, on units of production, shares or assets including all historical BEE transactions which formed the basis upon which new order mining rights were granted.

2.1.1.4 The recognition of continuing consequences, in respect of an existing mining right, shall not be transferrable and shall lapse upon transfer of such mining right or part thereof.

2.1.1.5 The recognition of continuing consequences shall not apply to an application for a new mining right or renewal of a mining right.

2.1.1.6 A renewal of an existing mining right shall be subject to Mining Charter requirements applicable at the time that a mining right renewal application is lodged.

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2.1.2 **PENDING APPLICATIONS**

2.1.2.1 A pending application, which was lodged and accepted prior to the commencement of the Mining Charter, 2018, shall be processed in terms of the requirements of the Mining Charter, 2010 with a minimum of 26% BEE shareholding.

2.1.2.2 A mining right holder contemplated in 2.1.2.1 must, within a period of 5 (five) years from the effective date of such mining right, increase BEE shareholding to a minimum of 30%.

2.1.3 **NEW MINING RIGHTS**

2.1.3.1 A new mining right must have a minimum of 30% BEE shareholding, which shall include economic interest plus corresponding percentage of voting rights per mining right or in the mining company which holds a mining right.

2.1.3.2 A minimum of 30% BEE shareholding must be distributed in the following manner:

(i) A minimum of 5% non-transferable carried interest to qualifying employees from the effective date of a mining right;

(ii) A minimum of 5% non-transferrable carried interest or a minimum 5% equity equivalent benefit as defined herein to host communities from the effective date of a mining right;

(iii) A mining right holder shall ensure that any reduction in shareholding of existing shareholders through the issue of new shares, shall not reduce qualifying employees carried interest and host communities' carried interest or equity equivalent benefit.

(iv) A minimum of 20% effective ownership in the form of shares to a BEE Entrepreneur, 5% of which must preferably be for women.

(v) A mining right holder of the minimum 20% shares referred to in subparagraph (iv) shall not be diluted below 51% ownership and control by BEE Entrepreneur.

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2.1.3.3 BEE shareholding may be concluded at holding company level, mining right level, on units of production, shares or assets. However, where BEE shareholding is concluded at any level other than at mining right level, the Flow-Through Principle will apply.

2.1.4 EQUITY EQUIVALENT BENEFIT FOR HOST COMMUNITIES

2.1.4.1 The equity equivalent benefit referred to in paragraph 2.1.3.2 (ii) shall be administered as follows:

2.1.4.1.1 5% equivalent of the issued share capital of the mining right holder, at no cost to a trust or similar vehicle set up for the benefit of host communities;

2.1.4.1.2 The Trust or similar vehicle shall be established and administered in terms of applicable legislation for the duration of the mining right;

2.1.4.1.3 The Trust or similar vehicle shall comprise of representation from host communities (including Community Based Organisations, Traditional Authorities, etc.) and mining companies;

2.1.4.1.4 A mining right holder must, in consultation with relevant municipalities, host communities, traditional authorities and affected stakeholders; identify host community development needs;

2.1.4.1.5 The Trust or similar vehicle shall be responsible for, amongst others, host community development programme, fund distribution and governance of the equity equivalent benefit;

2.1.4.1.6 All administration costs, project management and consultation fees of the Trust or similar vehicle may not exceed 8% of the total budget;

2.1.4.1.7 An approved host community development programme must be published in, at least, two languages commonly used within the host community.

2.1.4.2 A host community development programme approved under this element shall not replace Social and Labour Plan commitments as contemplated in Section 23 of the MPRDA.

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2.1.5 VESTING OF BEE SHAREHOLDING FOR NEW RIGHTS

2.1.5.1 A minimum of 50% BEE shareholding shall vest within two thirds of the duration of a mining right; and

2.1.5.2 The prescribed minimum 30% target shall apply for the duration of a mining right.

2.1.6 DISPOSAL OF BEE SHAREHOLDING IN RESPECT OF EXISTING AND NEW MINING RIGHTS

2.1.6.1 Where a BEE shareholding or part thereof is disposed of below the prescribed minimum shareholding, a mining right holder's empowerment credentials shall be recognised for the duration of the mining right, provided that:

2.1.6.1.1 A mining right holder is compliant with the requirements of the Mining Charter, 2018 at the time of disposal;

2.1.6.1.2 The BEE shareholder must have held the empowerment shares for a minimum period equivalent to a third of the duration of the mining right, and an unencumbered net value must have been realised;

2.1.6.1.3 The recognition of empowerment credentials shall only be applicable to measured effective ownership which has vested to BEE shareholding; and;

2.1.6.1.4 An agreement detailing exit mechanisms and BEE shareholders' remaining financial obligations constituting a contract between the mining right holder and BEE shareholders is submitted to the Department.

2.1.6.2 The recognition of consequences of previous deals shall not be claimed against future mining rights or mining right renewal applications.

2.1.7 BENEFICIATION EQUITY EQUIVALENT AGAINST THE OWNERSHIP TARGET

2.1.7.1 South Africa adopted a strategy on mineral beneficiation to give effect to the National Industrialisation Programme. To this end, this element provides for an equity equivalent mechanism against a BEE Entrepreneur as follows:

2.1.7.1.1 A mining right holder may claim the equity equivalent against a maximum of 5 percentage points of a BEE Entrepreneur shareholding.

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2.1.7.1.2 An existing mining right holder claimed the eleven (11) percentage points beneficiation offset prior to the commencement of Mining Charter, 2018, shall retain the offset for the duration of the mining right.

2.1.7.1.3 Equity Equivalent may only be claimed against a portion of BEE Entrepreneur.

2.1.7.1.4 A mining right holder must submit to the Department a Beneficiation Equity Equivalent Plan for approval, as outlined in the Mining Charter implementation guidelines.

2.1.7.1.5 A mining right holder will be entitled to apply for equity equivalent credits subject to the following:

i. Mineral ore or mineral products supplied to independent South African based beneficiation entities at a discount to the mine gate price;

ii. Portion of an integrated producer's production that is beneficiated;

iii. Mineral ore supplied to BEE Entrepreneur owned beneficiation entities at a discount to the mine gate price;

iv. Monetary investment in South African based mineral beneficiation entities;

v. Any other existing beneficiation related activities undertaken, or monetary investment made since 2004.

2.1.7.2 A mining right holder must submit an annual progress report to the Department, in line with the approved beneficiation equity equivalent plan.

2.2 INCLUSIVE PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT

Procurement of South African manufactured goods and services provide opportunities for expanding economic growth, creating decent jobs and widening market access to the country's goods and services.

A mining right holder is required to promote economic growth through the development or nurturing of small, medium and micro enterprises and suppliers of mining goods and services. In instances where a mining right holder procures goods and services of a contractor to undertake extraction or processing (crushing and concentration) of minerals

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on their behalf, such goods and services will be deemed to have been procured by the mining right holder.

To achieve inclusive procurement, supplier and enterprise development; a mining right holder must identify all goods and services that will be required in its operations and ensure that its procurement policies adhere to the following criteria:

2.2.1 **MINING GOODS**

2.2.1.1 A minimum of 70% of total mining goods procurement spend (excluding non-discretionary expenditure) must be on South African manufactured goods. The 70% shall be allocated as follows:

2.2.1.1.1 21% to be spent on South African manufactured goods produced by a Historically Disadvantaged Persons owned and controlled company;

2.2.1.1.2 5% to be spent on South African manufactured goods produced by a women or youth owned and controlled company; and

2.2.1.1.3 44% to be spent on South African manufactured goods produced by a BEE compliant company.

2.2.2 **SERVICES**

2.2.2.1 A minimum of 80% of the total spend on services (excluding non-discretionary expenditure) must be sourced from South African based company. The 80% shall be allocated as follows:

2.2.2.1.1 50% must be spent on services supplied by Historically Disadvantaged Persons owned and controlled company;

2.2.2.1.2 15% must be spent on services supplied by women owned and controlled companies;

2.2.2.1.3 5% must be spent on services supplied by youth; and

2.2.2.1.4 10% must be spent on services supplied by BEE compliant company.

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2.2.2.2 The above-mentioned procurement targets must be complied with progressively within a period of five (5) years, as outlined in the transitional arrangements.

2.2.2.3 A mining right holder must ensure that the terms and conditions offered to women owned and controlled companies, or youth, are not less favourable than those offered to other suppliers.

2.2.2.4 All procurement expenditure reported must be the actual expenditure incurred by a mining right holder.

2.2.3 VERIFICATION OF LOCAL CONTENT

2.2.3.1 A mining right holder must procure goods in line with a standardised product identification coding system developed by the Department of Trade and Industry.

2.2.3.2 A mining right holder shall provide proof of local content for mining goods in the form of certification from the South African Bureau of Standards (SABS) or any other entity designated by the Minister.

2.2.4 ENTERPRISE AND SUPPLIER DEVELOPMENT

(a) The purpose for implementing supplier and enterprise development is to strengthen local procurement; enhance the ease and cost competitiveness of sourcing mining goods and services and build South Africa's industrial base in critical sectors of production and value addition.

(b) A mining right holder may invest in enterprise and supplier development against which it may offset its procurement element obligations as follows:

2.2.4.1 MINING GOODS

2.2.4.1.1 Up to 30% of the total procurement budget on mining goods (excluding non-discretionary expenditure) may be offset against supplier development.

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2.2.4.1.2 A mining right holder may develop suppliers through Original Equipment Manufacturers (OEMs) as prescribed in the Implementation Guidelines.

2.2.4.2 **SERVICES**

2.2.4.2.1 Up to 10% of the total procurement budget on services (excluding non-discretionary expenditure) may be offset against supplier and enterprise development.

2.2.4.2.2 Percentages referred to in 2.2.4.3.1 and 2.2.4.4.1 must be implemented as follows:

(a) Supplier and Enterprise Development must be invested only in a Historically Disadvantaged Persons owned and controlled company with a turnover of less than R50 million per annum;

(b) Investment on Supplier Development may not be claimed as expenditure on Enterprise Development;

(c) There must be a written agreement between a mining right holder and the recipient Supplier or Enterprise being developed; and

(d) The contract between a mining right holder and the recipient supplier must be for a minimum of 5 years.

2.2.5 **RESEARCH AND DEVELOPMENT**

2.2.5.1 A mining right holder must spend a minimum of 70% of its total research and development budget on South African based research and development entities, either in public or private sector.

2.2.6 **PROCESSING OF SAMPLES**

2.2.6.1 A mining right holder must use South African based facilities or companies for the analysis of 100% of all mineral samples across the mining value chain.

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2.2.6.2 A mining right holder may not conduct sample analysis using foreign-based facilities or companies without the prior written consent of the Minister, as prescribed in the Mining Charter implementation guideline.

2.3 HUMAN RESOURCE DEVELOPMENT

Human Resource Development constitutes an integral part of competitiveness, transformation and sustainable growth. Since the mining industry is knowledge-based, the aim of the Mining Charter, 2018, is to

- produce a skilled, trained and diverse workforce to meet the demands of a modern industry;
- develop skills that enhance productivity of the workforce and improve the employment prospects of Historically Disadvantaged Persons; and
- develop entrepreneurial skills that improve people's livelihoods, and create mining-led local and regional economic diversification.

In this regard, a mining right holder must invest a minimum 5% of leviable amount (excluding the statutory skills development levy) on essential skills development. The minimum 5% must be invested in the following manner:

2.3.1 Invest 5% of the leviable amount on essential skills development activities such as science, technology, engineering, mathematics skills, as well as artisans, internships, learnerships, apprentices, bursaries, literacy and numeracy skills for employees and non-employees (community members), graduate training programmes, research and development of solutions in exploration, mining, processing, technology efficiency (energy and water use in mining), beneficiation as well as environmental conservation and rehabilitation.

2.3.2 Employees contemplated in paragraph 2.3.1 exclude directors and executives.

2.3.3 The skilling and research investment referred to in paragraph 2.3.1 must be apportioned in line with national or provincial demographics.

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2.4 EMPLOYMENT EQUITY

The intention of this tool is to achieve equity in the workplace. Hence the promotion of equal opportunity and fair treatment in employment to eliminate unfair discrimination; the implementation of affirmative action measures to redress disadvantages experienced by designated groups; and ensuring equitable representation in all occupational levels of the workforce.

Consistent with the Employment Equity Act, workplace diversity and equitable representation at all levels are catalysts for social cohesion, transformation and competitiveness. To create a diverse workplace, as well as ensure participation of Historically Disadvantaged Persons at all decision-making positions; and core occupational categories in the mining industry, a mining right holder must achieve a minimum threshold of Historically Disadvantaged Persons that reflects the provincial or national demographics in the following manner;

2.4.1 BOARD

2.4.1.1 A minimum of 50% Historically Disadvantaged Persons with exercisable voting rights, proportionally represented in terms of provincial or national demographics, 20% of which must be women.

2.4.2 EXECUTIVE MANAGEMENT

2.4.2.1 A minimum of 50% Historically Disadvantaged Persons at the executive director level as a percentage of all executive directors proportionally represented in terms of provincial or national demographics, 20% of which must be women.

2.4.3 SENIOR MANAGEMENT

2.4.3.1 A minimum of 60% Historically Disadvantaged Persons in Senior Management proportionally represented in terms of provincial or national demographics, 25% of which must be women.

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2.4.4 **MIDDLE MANAGEMENT**

2.4.4.1 A minimum of 60% of Historically Disadvantaged Persons in Middle Management proportionally represented in terms of provincial or national demographics, 25% of which must be women.

2.4.5 **JUNIOR MANAGEMENT**

2.4.5.1 A minimum of 70% Historically Disadvantaged Persons in Junior Management proportionally represented in terms of provincial or national demographics, 30% of which must be women.

2.4.6 **EMPLOYEES WITH DISABILITIES**

2.4.6.1 A minimum of 1.5% employees with disabilities as a percentage of all employees, reflective of national or provincial demographics.

2.4.7 **CORE AND CRITICAL SKILLS**

2.4.7.1 A mining right holder must ensure that a minimum of 60% Historically Disadvantaged Persons are represented in the mining right holder's core and critical skills by diversifying its existing skills pool. Core and critical skills must include science, technology, engineering and mathematical skills representation across all organisational levels. To achieve this, a mining right holder must:

2.4.7.1.1 Identify and implement its existing skills pool in line with the approved Social and Labour Plan.

2.4.7.1.2 The abovementioned implementation must be reflective of the demographics.

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2.4.8 CAREER PROGRESSION (ALIGNED WITH SOCIAL AND LABOUR PLAN)

2.4.8.1 A mining right holder must develop and implement a career progression plan consistent with the demographics of the country by providing the following:

2.4.8.1.1 Career development matrices of each discipline (inclusive of minimum entry requirements and timeframes);

2.4.8.1.2 Individual development plans for employees;

2.4.8.1.3 An identified talent pool to be fast tracked in line with the needs; and

2.4.8.1.4 A comprehensive plan with targets, timeframes and implementation framework.

2.4.8.2 The above prescribed board and executive management targets must include BEE shareholders; in line with the MPRDA's and Mining Charter, 2018 objectives for Historically Disadvantaged Persons' active participation in the management and control of the mining industry. The targets indicated under this element may change to address employment equity measures.

2.5 MINE COMMUNITY DEVELOPMENT

Mine communities form an integral part of mining development, which requires a balance between mining and mine community's socio-economic development needs. A mining right holder must meaningfully contribute towards Mine Community Development; with a bias towards mine communities both in terms of impact and size, and in keeping with the principles of the social license to operate.

2.5.1 Therefore, a mining right holder must, in consultation with relevant municipalities, mine communities, traditional authorities and affected stakeholders, identify developmental priorities of mine communities. The identified developmental priorities must be contained in the prescribed and approved Social and Labour Plan of a mining right holder.

2.5.2 Mining right holders operating in the same area, may collaborate on identified projects to maximise the socio-economic developmental impact, in line with their approved Social and Labour Plans. Approved Social and Labour Plans must be

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published in English and a dominant language(s) commonly used within the mine community.

2.5.3 For purposes of implementing the Social and Labour Plans and Mine Community Development projects the term "Mine Community" refers to communities where mining takes place, major labour sending areas, adjacent communities within a local municipality, metropolitan municipality or district municipality.

2.5.4 A mining right holder must implement 100% of Social and Labour Plan commitments in any given financial year of the mining right holder. Any amendments/variation of Social and Labour Plan commitments, including the budget, shall be approved in terms of section 102 of the MPRDA and consulted with mine communities.

2.6 HOUSING AND LIVING CONDITIONS

Human dignity and privacy of mine employees remain hallmarks towards enhancing productivity and expediting transformation in the mining industry, in terms of housing and living conditions. In this regard, mining companies must improve the standard of housing and living conditions of mine employees, as stipulated in the Housing and Living Conditions Standard for the Mining and Minerals Industry, developed in terms of Section 100 of the MPRDA. The Standard provides, amongst others, the following principles:

2.6.1 PRINCIPLES OF HOUSING CONDITIONS

- Decent and affordable housing;
- Provision for home ownership;
- Provision for social, physical and economic integration of human settlements; and
- Secure tenure for mine employees in housing institutions.

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2.6.2 PRINCIPLES OF LIVING CONDITIONS

- Proper healthcare services;
- Affordable, equitable and sustainable health system, and
- Balanced nutrition.

A mining right holder shall be required to submit a Housing and Living Conditions Plan to be approved by the Department, after consultation with organised labour and the Department of Human Settlements. The Housing and Living Conditions Standard shall be reviewed to provide clear targets and timelines for the implementation of the aforementioned housing and living conditions principles.

A mining right holder must comply with the Housing and Living Conditions Standard; ensure maintenance of single units, family units and any other arrangement agreed to with employees; pending the finalisation of the Reviewed Housing and Living Conditions Standard.

3. REGIME FOR JUNIOR MINERS

This part applies to a mining right granted after commencement of the Mining Charter, 2018. Its applicability is limited to a mining right holder with a single or multiple mining rights; having a combined annual turnover of less than 150 Million Rands; used to determine the appropriate qualifying criteria as outlined in the table below;

QUALIFYING CRITERIA	EXEMPT FROM THE FOLLOWING ELEMENTS/TARGETS	REQUIRED TO COMPLY WITH THE FOLLOWING ELEMENTS/TARGETS
Annual turn-over of less than 10 Million Rands		Ownership undefined.
	Employment Equity less than 10 employees.	Employment Equity 10 or more employees.
	Inclusive Procurement, Enterprise and Supplier Development.	Human Resource Development.
		Mine Community Development.
An annual turn-over of 10 million Rands to 150 Million Rands.		Ownership undefined.
		Human Resources Development
		Inclusive Procurement.
		Employment Equity at group level.
		Mine Community Development.

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

The Diamonds Act, 1986 and the Precious Metals Act, 2005 provide for the South African Diamond and Precious Metals Regulator (SADPMR) to have regard to the requirements of the Mining Charter, 2018 when considering applications lodged in terms of these Acts.

4.1 APPLICATION AND DEFINITION OF CONCEPTS

4.1.1 For purposes of this part, definitions and Clause 2 shall apply with the necessary changes;

4.1.2 Any reference in definitions and Clause 2 of the Mining Charter, 2018 to:

4.1.2.1 Mine Community Development Element must be construed as reference to Socio Economic Development;

4.1.2.2 Mining goods must be construed as reference to capital goods and consumables;

4.1.2.3 Mining right holder must be construed as reference to a licence or permit issued in terms of the Precious Metals Act and the Diamonds Act;

4.1.3 The targets and elements of the Mining Charter, 2018 shall therefore apply to licences under these Acts in line with the table below.

4.1.4 Recognising the extent of the exemption in terms of the tables below, a permit or licence holder in terms of the Precious Metals Act and the Diamonds Act shall comply with relevant elements and targets as set out in the Mining Charter, 2018.

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4.2 THRESHOLD FOR PRECIOUS METALS JEWELLERS AND PRECIOUS METALS BENEFICIATORS

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.	All Mining Charter Elements and targets.	None.
Small Enterprises.	Estimated max turnover R1 Million to R50 Million.	Socio Economic Development Element.	Ownership: Undefined
		Inclusive Procurement, Supplier and Enterprise Development Element.	Human Resources Development Element.
		Employment Equity Element (in respect of businesses with less than 10 employees).	Employment Equity Element (in respect of businesses with 10 or more employees).
Medium to larger Enterprises.	Greater than R50 million.	None.	All the elements of the Mining Charter.

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4.3 THRESHOLDS FOR DIAMOND BENEFICIATORS

CATEGORY/SIZE OR CLASS	QUALIFYING CRITERIA	EXEMPT FROM THE FOLLOWING TARGETS	REQUIRED TO COMPLY WITH THE FOLLOWING TARGETS
Small Enterprises.	Turnover of less than R50 Million.	Socio Economic Development Element.	Ownership Element: Undefined
			Human Resources Development Element.
		Employment Equity Element (in respect of businesses with less than 10 employees).	Employment Equity Element (in respect of businesses with 10 or more employees).
			Inclusive Procurement, Supplier and Industry Related Enterprise Development Element.
Medium to larger Enterprises.	Turnover greater than R50 million.	None.	All the elements of the Mining Charter.

4.4 THRESHOLDS FOR DIAMOND DEALERS, AND PRECIOUS METALS REFINERS.

CATEGORY/SIZE OR CLASS	QUALIFYING CRITERIA	EXEMPT FROM THE FOLLOWING TARGETS	REQUIRED TO COMPLY WITH THE FOLLOWING TARGETS
All categories, classes and sizes.	None.	None.	All elements of the Charter.

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4.5 APPLICATION OF THE OWNERSHIP, INCLUSIVE PROCUREMENT, ENTERPRISE AND SUPPLIER DEVELOPMENT AND SOCIO-ECONOMIC DEVELOPMENT ELEMENTS

4.5.1 OWNERSHIP

4.5.1.1 In line with the Government policies to encourage beneficiation of the country's mineral resources, the ownership target for the downstream diamonds and precious metals jewellers and diamond beneficiators is a minimum of 26% shareholding for Historically Disadvantaged Persons.

4.5.1.2 The 26% BEE shareholding must be distributed in the following manner:

4.5.1.2.1 A minimum of 10%, of which 5% is a non-transferable carried interest, to qualifying employees from the effective date of a licence or permit.

4.5.1.2.2 A minimum of 16% shares to a BEE entrepreneur.

4.5.1.3 The 30% BEE shareholding by diamond dealers, and precious metals refiners must be distributed as follows:

4.5.1.3.1 A minimum of 10%, of which 5% is a non-transferable carried interest, to qualifying employees from the effective date of a licence or permit.

4.5.1.3.2 A minimum of 20% shares to a BEE entrepreneur.

4.5.1.4 Where a refiner is also a mining right holder and claims the same BEE shareholders as those claimed in terms of the mining right, the flow through principle applies.

4.5.2 SOCIO-ECONOMIC DEVELOPMENT

4.5.2.1 The licence holder must contribute 1% NPAT towards socio-economic development.

4.5.2.2 Projects identified for socio economic development must be published in English and one other language.

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4.5.3 INCLUSIVE PROCUREMENT AND ENTERPRISE DEVELOPMENT

4.5.3.1 Enterprise development for a licence or permit issued in terms of the Diamonds Act or the Precious Metals Act is compulsory and a ring-fenced element.

4.5.3.2 Enterprise development under this section must be industry-related and approved by the South African Diamonds and Precious Metals Regulator.

4.5.3.3 A licence or permit holder required to comply with this element, as per the thresholds provided for above, must submit a five-year plan indicating progressive implementation of the approved enterprise development.

4.5.3.4 A licence or permit holder's performance on enterprise development must be reported, audited and verified annually against the approved five-year plan.

5. REPEAL OF SECTION/PARAGRAPH 3 OF THE CODES OF GOOD PRACTICE FOR THE MINERALS INDUSTRY

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

6. REPORTING (MONITORING AND COMPLIANCE)

6.1 REPORTING BY MINING RIGHT HOLDERS

A mining right holder must report its level of compliance with the Mining Charter, 2018 annually, as provided for by Section 28 (2) (c) of the MPRDA. The Department shall monitor and evaluate implementation, cognisant of the impact of material constraints that may result in the non-achievement of the set target.

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6.2 REPORTING BY HOLDERS OF LICENCES OR PERMITS ISSUED IN TERMS OF THE DIAMONDS ACT AND THE PRECIOUS METALS ACT

A holder of a licence or permit issued in terms of the Diamonds Act or the Precious Metals Act must annually report its level of compliance with the Mining Charter, 2018 to the South African Diamonds and Precious Metals Regulator. The SADPMR shall monitor and evaluate implementation, cognisant of the impact of material constraints that may result in the non-achievement of the set target.

7. APPLICABILITY OF THE MINING CHARTER

7.1 The Mining Charter, 2018 applies to existing mining rights, pending mining right application, new mining rights, existing licences and permits issued in terms of the Diamonds Act and Precious Metals Act and new licences and permits issued in terms of the Diamonds Act and the Precious Metals Act as provided for herein.

7.2 For Mining right holders, the Ownership and Mine Community Development elements are ring-fenced, requiring 100% compliance at all time.

7.3 For holders of licences or permits issued in terms of the Diamonds Act and the Precious Metals Act, the Ownership and Inclusive Procurement, Supplier and Enterprise Development elements are ring fenced elements requiring 100% compliance at all time.

8. TRANSITIONAL ARRANGEMENTS

A mining right holder must progressively align existing targets from the Mining Charter, 2010 targets within the transitional period, to meet the revised requirements as follows:

8.1 Five (5) years for the inclusive procurement element. A mining right holder must within six (6) months from the date of publication of the Mining Charter, 2018 submit a five-year plan indicating progressive implementation of inclusive procurement targets.

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

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8.2.1 **Mining Goods:** The first-year target is set at 10% of the procurement budget, second year 20% of the procurement budget, 35% of the procurement budget by third year, 50% of the procurement budget by fourth year and 70% of the procurement budget by fifth year.

8.2.2 **Services:** The first-year target is set at 70% of the procurement budget, second year 60% of the procurement budget.

8.2.3 The use of coding system for verification of local content shall be applicable once finalised by the Department of Trade and Industry.

8.3 Five (5) years for the Employment Equity element. A mining right holder must within a period of six (6) months from the date of publication of the Mining Charter, 2018 submit a five-year plan indicating progressive implementation of the provisions of Employment Equity element targets.

8.4 A mining right holder must comply with the Housing and Living Conditions Standard and ensure that it maintains single units, family units and any other arrangements agreed to with employees, pending the finalisation of the Reviewed Housing and Living Conditions Standard.

8.5 At the end of the transition period, a mining right holder must comply with the Mining Charter, 2018 targets as provided for in the respective elements.

8.6 A mining right holder's performance shall be reported, audited and verified annually against each element in respect of implementation for the applicable transitional period.

9. NON-COMPLIANCE

9.1 A mining right holder who has not complied with the ownership element and falls between levels 6 and 8 of the Mining Charter scorecard shall be in breach of the MPRDA and subject to provisions of section 93, read in conjunction with section 47, 98 and 99 of the Act.

9.2 A licence or permit holder who has not complied with the requirements of this Mining Charter shall be in breach of the Diamonds Act and the Precious Metals Act and subject to relevant provisions of the Diamonds Act and the Precious Metals Act.

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10. REVIEW OF THE CHARTER

The Minister may, by notice in the Gazette, review the Mining Charter, 2018.

11. REPEAL OF PREVIOUS MINING CHARTERS

The Broad-Based Socio-Economic Empowerment Charter for the Mining Industry published in 2004, as amended in 2010; and the Broad-Based Socio-Economic empowerment Charter for the Mining and Minerals Industry published in 2017 are hereby repealed.

12. INTERPRETATION OF THE MINING CHARTER

12.1 Any reasonable interpretation, which is consistent with the objects of the Mining Charter, 2018 and the MPRDA, must be preferred over any other interpretation that is inconsistent with such objects; when interpreting a provision of the Mining Charter, 2018.

12.2 The Mining Charter must be read together with the Implementation Guidelines to be gazetted within two months from the date of gazetting of the Mining Charter, 2018.

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13. SCORECARD

Reviewed Mining Charter Scorecard	Weighting %
Ownership	Y/N
Mine Community Development	Y/N
Housing and Living Conditions	Y/N
Employment Equity	30%
Procurement supplier & Enterprise Development	40%
Human Resource Development	30%
Total	100%

OWNERSHIP

New Mining Rights

Element	ELEMENT DESCRIPTION	COMPLIANCE TARGET(%)	MEASURE	WEIGHT (%)
Ownership	Minimum target for representation of Historically Disadvantaged Persons ownership.	30% BEE shareholding	A minimum of 5% non-transferable carried interest to qualifying employees from the effective date of a mining right.	Y/N
			A minimum of 5% equity equivalent benefit as defined herein or 5% carried interest to host communities from the effective date of a mining right.	
			A minimum of 20% effective ownership in the form of shares to Historically Disadvantaged Persons, 5% of which must preferably be for women.	
		Beneficiation Equity Equivalent mechanism in lieu of BEE shareholding	A maximum of 5 percentage points of BEE shareholding.	
	Meaningful and effective Participation		Net Value	
			Voting rights attaching to an equity instrument owned by or held for a participant measured using the Flow through principle or Control Principle	
			Economic interest representing a return on ownership of the entity similar in nature to a dividend right, measured using the Flow Through Principle	

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Existing Mining Rights

ELEMENT	ELEMENT DESCRIPTION	COMPLIANCE TARGET	MEASURE	WEIGHT (%)
Ownership	Minimum target for representation of Historically Disadvantaged Persons.	26%	Meaningful economic participation Full shareholder rights	Y/N

Pending Applications[1]

ELEMENT	ELEMENT DESCRIPTION	COMPLIANCE TARGET	MEASURE	WEIGHT (%)
Ownership	Minimum target for representation of Historically Disadvantaged Persons ownership.	26%	Net value Voting rights attaching to an equity instrument owned by or held for a participant measured using the Flow Through principle or Control Principle Economic interest representing a return on ownership of the entity similar in nature to a dividend right, measured using the Flow Through Principle or Control Principle	Y/N

[1] All pending applications will be required to top-up from 20% to 20% + IDP ownership within the 5 year transitional period provided in terms of Clause 2.1.2.

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INCLUSIVE PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT SCORECARD[2]

Element	ELEMENT DESCRIPTION	COMPLIANCE TARGET(%)	MEASURE	WEIGHT(%)
Inclusive Procurement	Total procurement budget spend on goods and services	Procure 70% locally manufactured mining goods with a 60 % local content	21% of total mining goods procurement budget must be spent on South African manufactured goods produced by Historically Disadvantaged Persons owned and controlled company	5%
			6% of total mining goods procurement budget must be spent on South African manufactured goods produced by women owned and controlled company or youth owned and controlled company; and	5%
			44% of total mining goods procurement budget must be spent on South African manufactured goods produced by BEE compliant company.	5%
		80% Services	50% of the total services budget must be spent on services supplied by Historically Disadvantaged Persons	5%
			15% of total services budget must be spent on services supplied by women owned and controlled companies	5%
			5% of total services budget must be spent on services supplied by the youth owned and controlled companies	5%
			10% of total services budget must be spent on services supplied by a BEE compliant company.	5%
		Research & Development	A minimum of 70% of total research and development budget to be on South African based research and development entities.	2.5%
		Sample Analysis	Utilise South African based facilities or companies for the analysis of 100% of all mineral samples across the mining value chain	2.5%

[2] See transitional arrangements for progressive targets to be met during the transitional period.

EMPLOYMENT EQUITY

Element	ELEMENT DESCRIPTION	COMPLIANCE TARGET (%)					MEASURE	WEIGHT (%)
Employment Equity	BOARD							
		Blacks	Indians	Coloureds	Whites	Foreign Nationals		
	Total no of Directors							
	Total representation						50%	2%
	Female representation						20%	2%
	EXECUTIVE MANAGEMENT							
		Blacks	Indians	Coloureds	Whites	Foreign Nationals		
	Total no of employees							
	Total representation						50%	4%
	Female representation						20%	3%
	SENIOR MANAGEMENT							
		Blacks	Indians	Coloureds	Whites	Foreign Nationals		
	Total no of employees							
	Total representation						60%	3%
	Female representation						25%	3%
	MIDDLE MANAGEMENT							
		Blacks	Indians	Coloureds	Whites	Foreign Nationals		
	Total no of employees							
	Total representation						60%	2%
	Female representation						25%	2%
	JUNIOR MANAGEMENT							
		Blacks	Indians	Coloureds	Whites	Foreign Nationals		
	Total no of employees							
	Total representation						70%	2%
	Female representation						30%	2%

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Element	ELEMENT DESCRIPTION	COMPLIANCE TARGET (%)					MEASURE	WEIGHT (%)
	EMPLOYEES WITH DISABILITIES							
		Blacks	Indians	Coloureds	Whites	Foreign Nationals		
	Total no of employees						1,5%	2%
	Total representation							
	Female representation							
	CORE AND CRITICAL SKILLS							
		Blacks	Indians	Coloureds	Whites	Foreign Nationals		
	Total no of employees						60%	3%

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HUMAN RESOURCE DEVELOPMENT

Element	ELEMENT DESCRIPTION	COMPLIANCE TARGET (%)	MEASURE	WEIGHT (%)
Human Resource Development	HRD expenditure as percentage of total annual leviable amount (excl. mandatory skills development levy).	5% leviable amount	Invest 5% of the leviable amount as defined in the HRD element in proportion to applicable demographics (employees and non-employees).	30%

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MINE COMMUNITY DEVELOPMENT

Element	ELEMENT DESCRIPTION	COMPLIANCE TARGET (%)	MEASURE	WEIGHTING (%)
Mine Community Development	Meaningful contribution towards Mine Community Development will[5] biasness towards mine communities both in terms of impact, in keeping with the principles of the social license to operate.	100% compliant with approved SLP commitments	Publish the SLP in 2 languages (Dominant one in the community & English)	Y/N
			Implement all approved commitments in the SLP	

HOUSING AND LIVING CONDITIONS

Element	ELEMENT DESCRIPTION	COMPLIANCE TARGET (%)	MEASURE	WEIGHTING (%)
Housing and Living Conditions	Improvement the standard of housing and living conditions of mine employees	100% compliant with Housing and Living Conditions Standard commitments	Implement all Housing and Living Conditions commitments in the Standard	Y/N

[5] The gazette is also available free online at www.gpwonline.co.za

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14. ANNEXURE A

This annexure provides an alignment between the DTI BBEEE and DMR scorecard.

[illegible]	[illegible]	[illegible]
Level 1	Ring fenced Element + 100%	Compliant
Level 2	Ring fenced Element+ 80 -100%	
Level 3	Ring fenced Element + 70-80%	
Level 4	Ring fenced Element + 60-70%	
Level 5	Ring fenced Element + 50-60%	
[illegible]	[illegible]	[illegible]

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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF MINERAL RESOURCES

NO. 1421 **20 DECEMBER 2018**

AMENDMENT OF THE BROAD-BASED SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE MINING AND MINERALS INDUSTRY, 2018

I, Samson Gwede Mantashe, Minister of Mineral Resources, hereby amend the Broad Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018, published on the 27 September 2018 under Gazette Notice No. 41934 and shall become effective on the date of publication of this notice.

Mr Samson Gwede Mantashe
Minister: Department of Mineral Resources
Date: 13/12/2018

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AMENDMENT OF THE MINING CHARTER, 2018

The Mining Charter, 2018 is hereby amended as follows:

INCLUSIVE PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT

1. Item 2.2, paragraph 2.2.4.2. sub-paragraph 2.2.4.2.2 on page 20 is substituted for the following paragraph:

2.2.4.2.2 Percentages referred to in 2.2.4.1.1 and 2.2.4.2.1 must be implemented as follows:

REPORTING

2. Item 6 is hereby amended by the insertion of the following paragraph:
First annual reporting on the Mining Charter, 2018 shall be done on or before 31 March 2020.

TRANSITIONAL PERIOD

3. Item 8 is hereby amended by the insertion of the following paragraphs:

8.7 Pending applications for licenses and permits lodged in terms of the Diamonds Act or The Precious Metals Act, with the Regulator prior to the date of publication of the Mining Charter, 2018, must be processed in terms of the Mining Charter, 2010 or requirements prescribed in Clause 3 of the Codes of Good Practice for the Minerals Industry published under Gazette No. 32167 of 29 April 2009, whichever is applicable.

8.8 Holders of licenses or permit issued in terms of the Diamond Act and the Precious Metals Act which are due for renewal within a period of six (6) months from the date of publication of the Mining Charter, 2018 must within a period of twelve (12) months from the date of renewal of the licence or permit comply with the Mining Charter, 2018.

8.9 Existing mining right holders, existing licence and permit holder must implement the Mining Charter, 2018 from the 01 March 2019. Before 1 March 2019, existing right holders and existing licence and permit holders must maintain compliance with the requirements of the Mining Charter, 2010.

NON-COMPLIANCE

4. Item 9 is hereby substituted for the following item:

9.1 A mining right holder who has not complied with the ownership and mine community development elements and falls between levels 6 and 8 of the Mining Charter scorecard shall be in breach of the MPRDA and subject to provisions of section 93, read in conjunction with section 47, 98 and 99 of the Act.

9.2 A licence or permit holder who has not complied with ownership and enterprise development elements shall be in breach of the Diamonds Act or Precious Metals Act and subject to relevant provisions of the Diamonds Act or Precious Metals Act.

ANNEXURE A

5. Annexure A of the Mining Charter, 2018 is hereby substituted for the following:

This annexure provides an alignment between the DTI BBEEE and DMR scorecard.

DTI LEVELS	DMR SCORECARD	Ring Fenced Elements (Percentage Achieved)
Level 1	Ring fenced Elements + 100%	Compliant
Level 2	Ring fenced Elements + 80 -100%	
Level 3	Ring fenced Elements + 70-80%	
Level 4	Ring fenced Elements + 60-70%	
Level 5	Ring fenced Elements + 50-60%	

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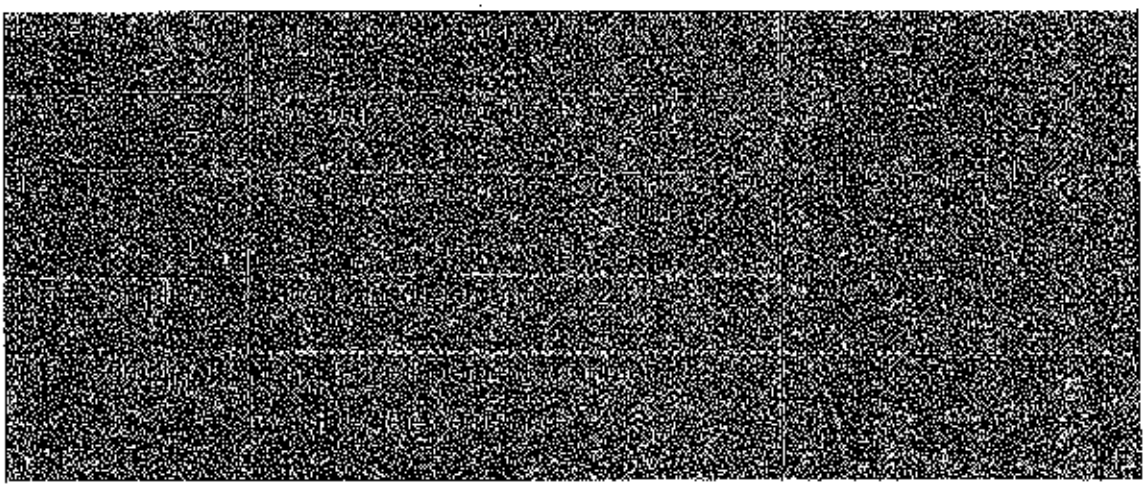

MINERALS COUNCIL
SOUTH AFRICA

MINERALS COUNCIL SOUTH AFRICA: MEMBERSHIP REGISTER

African Rainbow Minerals	Afrimat
ASPASA	Assore
Anglo American Coal South Africa	Anglo American Platinum (Rustenburg)
Anglo American South Africa	AngloGold Ashanti
Atha-Africa Ventures	Aveng Mining
Barplats	Bauba Platinum
Black Mountain Mining	Clay Brick Association of South Africa
Corobrik	Cronimet Mining
De Beers	DRDGOLD
ERG Africa	Exxaro
Fraser Alexander	Glencore Alloys
Glencore Coal	Gold Fields
Harmony	Imerys
Impala Platinum	Ivanhoe Mines
Jindal Africa	Kalagadi Manganese
Kangra Coal	Koornfontein Mine
Kudumane Manganese Resources	Kumba Iron Ore
Kuyasa Mining	Ledjadja Coal
Lonmin	Mbuyelo Group
MC Mining	Msobo Coal
Murray and Roberts Cementation	Mvelo Minerals
New Venture Mining Investment Holdings	Northam Platinum
NV Commodities Trading International	Opal Mining
Orion Minerals	Palabora Mining Company
Pan African Resources	Petra Diamonds
Platinum Group Metals	PPC
Rand Uranium (Sibanye-Stillwater)	Redpath Mining (South Africa) (Pty) Limited
Richards Bay Minerals	Rio Tinto
Royal Bafokeng Platinum	Sasol Mining
Sedibelo Platinum Mines Ltd (SPM)	Sedibeng Iron Ore
Seriti Resources	Sibanye-Stillwater
South Africa Mining Contractors Association	South African Diamond Producers' Organisation
South32 Coal	South32 Manganese
STA Coal Mining Company	Stonewall Resources Ltd
Tharisa Minerals	Trans Hex Group
Tronox Minerals Sands (KZN & Namakwaland)	Tshipi é Ntle Manganese Mining
Tweewaters Fuel - Springlake	United Manganese of Kalahari
Vaalbult Mining Company	Bushveld Vanadium (Vametco)
Village Main Reef	Wesizwe Platinum

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Board: M Mpye (President), A Sangqu (Vice President), N Duncan (Vice President), S Pool (Vice President), A Base, B Berger, B Bynon, W Dunnage, N Fakude, J Gillam, C Gondo, N Holland, MJ Houston, L Kgalle, M Mecondo, S Megani, M Mehlomakulu, Z Mkhabela (Ms), V Modise, T Mokhobotlane, N Mokgosi, L Nkuna, D Nxasana (Ms), B Peterson, N Pienaar, N Pretorius, MP Schmitz, C Smith, PW Steenkamp, M Tibane

CONSTITUTION OF MINERALS COUNCIL SOUTH AFRICA

NAME

1. The name of the Organisation shall be MINERALS COUNCIL SOUTH AFRICA (hereinafter referred to as the "Minerals Council").

STATUS

2. The Minerals Council 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 Minerals Council 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 defense 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 Minerals Council;
f. to establish, or participate in the establishment of pension, gratuity, medical aid or sick funds for the benefit, wholly or partly of the Minerals Council'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 Minerals Council;
h. to invest or lend any moneys of the Minerals Council 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 Minerals Council, 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 Minerals Council;
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 Minerals Council;
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 Minerals Council:

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 Minerals Council; 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 Minerals Council shall lodge with the Chief Executive a written application to the Board of Directors (hereinafter referred to as the **Board**) for admission as such; and, for the purposes of the application, the company concerned shall provide the Board with the company's full name or names and registered address and such further information as the Board may require. The application shall be considered at the next ordinary meeting of the Board or, if the President so directs, at a special meeting of the Board convened for the purpose and the Board 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 Board, shall be considered at that meeting, or at the meeting following, as the President may direct.

   After the meeting of the Board 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 Board. 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 Board's decision be reviewed by the Minerals Council, in general meeting, the application shall be considered at the next annual general meeting of the Minerals Council, or if the Board so decides, at a special general meeting of the Minerals Council 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 Board, on such terms and conditions as the Board may decide, as an honorary member of the Minerals Council.

7. The liability of ordinary members shall be limited to the amount, if any, payable by way of subscription or otherwise to the Minerals Council by such members. Any such liability may be waived in whole or in part by resolution of the Board on behalf of the Minerals Council.

8. The Board may establish two or more classes of ordinary members according to the nature or extent of the business carried on by members of the Minerals Council or according to any other criterion as may be determined by the Board and in such event the Board shall allocate every ordinary member to one or more of such classes. In making such allocation the Board shall be guided, but not bound, by the member's principal business or businesses. The Board 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 Minerals Council, 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

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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 cease 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 Board) shall be given to the Chief Executive of any ordinary member's intention to withdraw from the Minerals Council. Upon expiry of the financial year of the Minerals Council 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 Minerals Council 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 Minerals Council, 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 Minerals Council may be excluded from the Minerals Council by resolution of the Board 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 Minerals Council by resolution of the Board 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 Minerals Council in general meeting.

16. Any member who has been placed in liquidation or is under judicial management, may be excluded from the Minerals Council by resolution of the Board 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 Board, guilty of any practice or proceeding likely to bring discredit upon the Minerals Council, may be excluded from the Minerals Council by resolution of the Board.

18. Any member who has been excluded from the Minerals Council by resolution of the Board, in terms of Articles 14, 15, 16 or 17, shall be notified immediately by the Chief Executive, in writing, of the Board's decision and the ground, with such

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particularity as the Chairperson shall decide, on which such member has been excluded.

19. If a member who has been excluded from the Minerals Council by resolution of the Board, 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 Board be reviewed by the Minerals Council, in general meeting, the matter shall be considered at the next annual general meeting of the Minerals Council or, if the Board so decides, at a special general meeting of the Minerals Council convened for the purpose; and the member concerned shall not be excluded from the Minerals Council 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 Minerals Council, such member shall cease to be a member at the conclusion of the meeting. If such a written request that the Board'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 Minerals Council or from any other obligation to the Minerals Council.

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 Minerals Council, 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 BOARD

22. There shall be a Board of Directors of the Minerals Council which shall consist of such number of persons as may be determined from time to time at a general meeting of the Minerals Council.

23. The directors of the Board shall be elected at each annual general meeting of the Minerals Council by the representatives of ordinary members present and entitled to vote. Each director of the Board shall hold office until the next annual general meeting after such director's election when such director shall retire but be eligible for re- election. Each candidate for election to the Board other than a retiring director 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 Board. Notwithstanding anything to the contrary contained in this Article, the Chief Executive appointed in terms of Article 70 shall ex officio be a director of the Board. Article 29 shall not apply to such ex officio membership.

24. The President shall be the Chairperson of the Board and shall take the chair at all meetings of the Board. If the President is not present at any such meeting the directors present shall elect one of their number to be Chairperson of that meeting.

25. Any director of the Board shall have the power at any time to appoint, by notice in writing to the Chief Executive, any person to act as alternate director in such director's place at any meeting of the Board at which such director shall not be present and to act on such director's behalf for the purpose of signing any resolution contemplated in Article 31. Any alternate director so appointed shall, whilst so acting in the place of a director of the Board, hold office as a director of the Board. The appointment of any alternate director by the President shall not entitle the person so appointed to act as Chairperson at any meeting of the Board and the Chairperson of such meeting shall be elected in accordance with Article 24. If a director who appointed an alternate director ceases to be a director of the Board or gives notice in writing to the Chief Executive of the withdrawal of the appointment of such alternate director, the appointment of such alternate director shall cease.

26. Half of the number of directors of the Board 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 directors of the Board as may be determined from time to time at a general meeting of the Minerals Council shall form a quorum at any meeting of the Board.

27. The Board shall meet as soon as practicable after each annual general meeting of the Minerals Council and thereafter shall meet at least once every three months on such dates and at such times as may be determined by the Board. At least three days' notice in writing of each meeting of the Board or such shorter period of notice as the President or the Board itself may decide shall be given to directors 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 directors to attend the meeting concerned.

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

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

    The Board 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 Board may decide. Such a representative or alternate representative may attend, by invitation, any meeting of the Board and may take part in discussion but may not vote.

28. The Board shall have power to appoint at any time a representative of an ordinary member to fill a casual vacancy in the Board. Any representative so appointed shall hold office as a director of the Board until the next annual general meeting of the Minerals Council when such representative shall retire but shall then be eligible for re- election.

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29. If a director of the Board resigns by giving notice in writing to the Chief Executive of such resignation or if a director of the Board ceases to be a representative of an ordinary member, such director shall cease to hold office as a director of the Board. A director of the Board may be removed from office by the President upon being absent without leave of absence from three consecutive meetings of the Board.

30. At any meeting of the Board a decision shall be taken by a majority of the directors 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 Board 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 directors of the Board 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 Board duly called and constituted. Such resolution may consist of several documents in like form each signed by one or more directors of the Board or may consist of an electronic communication containing the resolution sent to a director's e-mail address and with that director's electronic response of approval having been received by the Minerals Council.

32. The general administration and management of the Minerals Council shall be vested in the Board 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 Minerals Council as may be exercised or done by the Minerals Council.

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 Board shall have power:

a. to enter into such contracts in the name and on behalf of the Minerals Council as it thinks expedient for the purpose of the Minerals Council;
b. to pass by-laws for the regulation of the business of the Minerals Council not inconsistent with the provisions of these Articles or of any law;
c. to appoint at such remuneration and on such terms as the Board may decide and to remove employees or agents of the Minerals Council;
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 Minerals Council;
e. to determine and change at its discretion, the place at which the head office of the Minerals Council shall be situated;
f. to appoint representatives on any bargaining or statutory Board in which the Minerals Council or any member is concerned;
g. to institute, conduct, defend, compound or abandon any proceedings by or against the Minerals Council 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 Minerals Council;
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 Board 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

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i. to delegate any of its functions or powers to any member of the Board or to any principal committee established by the Board, or to any employee of the Minerals Council upon such terms and conditions as the Board may decide.

PRESIDENT AND VICE-PRESIDENTS

33. At each annual general meeting one of the directors of the Board then elected in terms of Article 23 shall be elected President and one representative of an ordinary member (whether or not a director of the Board) shall be elected Vice-President of the Minerals Council 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 directors of the Board). 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 director of the Board who, in the opinion of the Board, is guilty of any practice or proceeding likely to bring discredit upon the Minerals Council, may be removed from office by resolution of the Board. The provisions of Articles 18 and 19 shall apply, mutatis mutandis, for the purpose of an appeal to the Minerals Council in general meeting against the decision of the Board.

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 Board, or, if the Board so decides, at a special general meeting of the Minerals Council convened for the purpose.

CONSTITUTION AND POWERS OF THE BOARD

37. The Board may establish one or more principal committees of the Minerals Council specifically to promote the interests of and to deal with matters concerning any class of members established by the Board in terms of Article 8. Every principal committee shall consist of such number of members as the Board shall determine, who shall be appointed by the Board 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 Board held after the annual general meeting next following the appointment of such member. The Board 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 Board every principal committee appointed by the Board shall be empowered to deal with all matters concerning members of the Minerals Council 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 Minerals Council as may be done by the Minerals Council 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 Board, a principal committee shall have power:

a. to appoint representatives on any bargaining or statutory Board in which any member of the class for which the committee has been established or the Minerals Council 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 Minerals Council 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 Board shall have power to appoint at any time a member of the Board 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 Board 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 Minerals Council.

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 EETINGS

50. The annual general meeting of the Minerals Council shall be held in each calendar year before the first day of December, on such day and at such time and place as the Board 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 Minerals Council and refer to any other matters which the Chairperson considers to be relevant to the occasion and the Board 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 Minerals Council'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 Minerals Council's auditor or auditors thereon, which are to be submitted to the meeting in terms of Article 51.

SPECIAL GENERAL MEETINGS

53. The Board may convene a special general meeting of the Minerals Council, 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 Board 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 Minerals Council 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 Minerals Council.

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 Minerals Council. 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 Board 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 Minerals Council. 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 Board as contemplated in article 26 shall form a quorum at any general meeting of the Minerals Council. 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 Minerals Council 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 Minerals Council in general meeting.

61. If any member has been excluded from the Minerals Council by resolution of the Board 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 Minerals Council 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 Minerals Council.

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 directors of the Board) 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 away 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 Minerals Council;
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 Minerals Council, 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 Minerals Council 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 Minerals Council 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

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members of the Minerals Council 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 Minerals Council, 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 Board, 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 Board 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 Board 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;
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 Minerals Council who shall be appointed by the Board on such terms and conditions as the Board 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 Board or the Chief Executive on giving not less than one month's notice, in writing, of the Board's or the Chief Executive's intention to do so or may be

terminated summarily by the Board on any ground which at common law justifies summary dismissal.

Upon termination by the Board of the appointment of the Chief Executive, the Chief Executive may lodge with the Board, within fourteen days of the date of notification of such termination, a request, in writing, that the decision of the Board be reviewed by the Minerals Council 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 Board 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 Board, 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 Board may decide, a report on the activities of the Minerals Council, 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 Board 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 Board 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 Board. 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 Board 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 Board 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 Minerals Council, 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 Minerals Council or, if the Board so decides, at a special general meeting of the Minerals Council 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

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shall be required to pay, as the case may be. Any decision taken by the Minerals Council, 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 Minerals Council 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 Minerals Council 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 Minerals Council, of all the matters in respect of which such receipts and expenditure take place and of the assets, credits and balances of the Minerals Council.

76. All moneys received by the Minerals Council, from time to time, shall be banked in the name of the Minerals Council, within seven ordinary business days of receipt, with such bank as the Board shall, from time to time, appoint.

77. All cheques and other negotiable instruments drawn in the name of the Minerals Council shall be signed by one or more employees of the Minerals Council duly appointed for the purpose either by the Board or by such employee or employees of the Minerals Council as the Board shall decide.

78. All expenditure incurred by or on behalf of the Minerals Council shall be duly authorized by the Board 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 Minerals Council, 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 Minerals Council shall not be distributed to any person but shall be employed solely for the purpose of investment or for the carrying out of the Minerals Council's objects.

80. The Minerals Council'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 Minerals Council 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 Board. 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 Board 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.

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MINUTES AND RECORDS

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

PROCEEDINGS

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

PROPERTY

84. All movable property belonging to or acquired by the Minerals Council shall vest in the Minerals Council and all immovable property belonging to or acquired by the Minerals Council 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 Minerals Council by such director or directors of the Board or by such employee or employees of the Minerals Council as the Board shall decide; provided that any such instrument which may be signed and executed on behalf of the Minerals Council 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 Minerals Council 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 Minerals Council. 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 Minerals Council 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 Minerals Council shall be indemnified by the Minerals Council 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.

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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 Minerals Council 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 Minerals Council 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.

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 Minerals Council shall be wound up if, at a special general meeting of the Minerals Council 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 Minerals Council 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 Minerals Council, in such manner as deemed fit, liquidate the debts and liabilities of the Minerals Council 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 Minerals Council's funding must be derived from its annual or other long -term members;
b. the Board 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 Minerals Council must comply with any reporting requirements determined by the Commissioner for the South African Revenue Service from time to time; and
d. the Minerals Council 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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CHAMBER OF MINES OF SOUTH AFRICA

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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 Goodface, C Griffith, G Heale, N Holland, MJ Houston, R Magam, N Mbazima, T Mkhwanazi, X Mkhwanazi(Dr), D Matlou, R Moodley, M Motana, SA Nkosi, M O'Hare, D Petersen, S Phiri, N Pleasar, N Pretorius, A Sangqu, MP Schmidt, B Sibiya, PW Steenkamp, S Venkatakrishnan.

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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

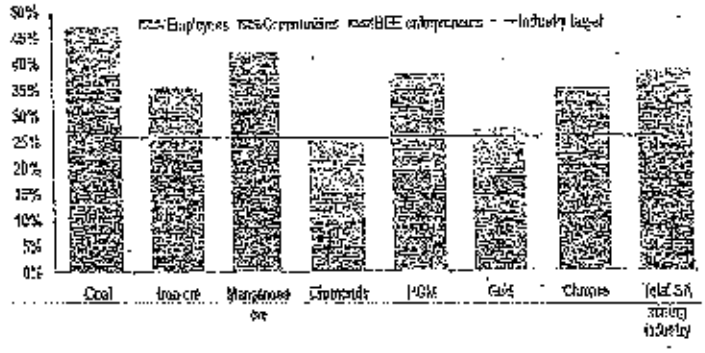
CHAMBER OF MINES CALCULATES BROAD BASED HDSA OWNERSHIP OF 38% and MEANINGFUL ECONOMIC VALUE TRANSFER OF >R159 BN

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 SizweNtsaluhaGobodo (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.

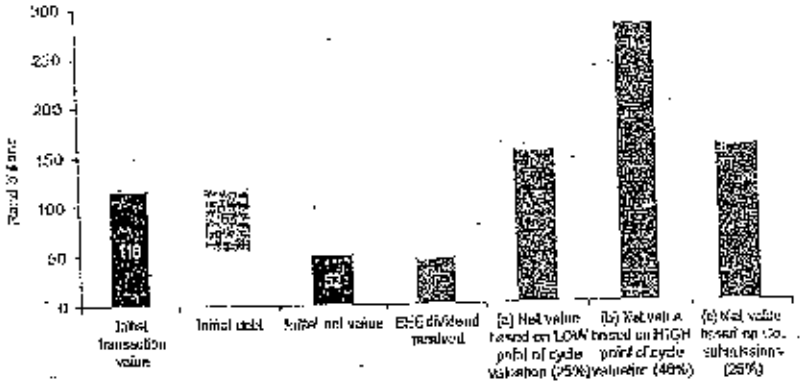
Figure 1: Portion of ownership of mining industry transferred to HDSA controlled entities up to 2014



Source: SNG and Chamber of Mines analysis

- 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.
- BBB 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 8: Estimation of value created (increasing) of economic participation of HDSA

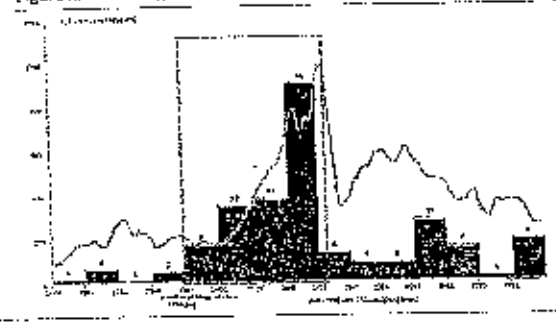


Source: SWIX, JSE and Chamber of Mines; (a) net value = Total net value – value attributable to dividends; (a) and (b) valuation based on 4.0(x) multiple calculation

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:

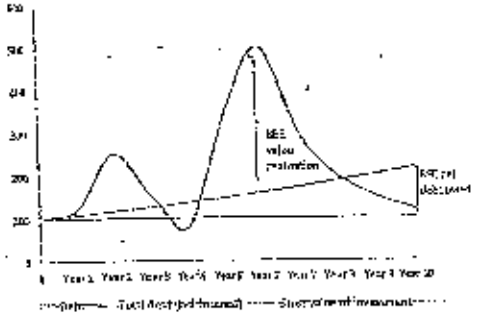
- Market volatility has impacted value creation. Underlying funding structures depended on rising commodity prices to result in value creation for beneficiaries.
- Lock-in provisions have prevented beneficiaries from unlocking value created during the peak of the cycle. Lack of diversification is an 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 9: Mining BEE transactions and Equity performance



Source: JSE and Deutsche online

Figure 2: Illustrative impact of Commodity cycle on value



Source: MM

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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% (26.3% 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 282 078 million representing a return of between 206% 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, 40% 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, 1.0% 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 6.2% 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 193%.
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 114 553 individuals. In terms of volume weighted, the industry has achieved a BEE ownership of 26.8% (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 423% 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 413 512 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 28.0% (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% (23.3% 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 Charter 2014 Progress

Element (Scorecard weighting)	Description	Target	DMR published assessment (i) Comparison to target (ii) % of submissions that has met target		Chamber assessment (i) Comparison to target (ii) % of submissions that has met target		Broad alignment to DMR (Yes/No)
			Unweighted	Weighted[1]	Weighted[2]	Assessment	
Ownership (20%)	Min HDSA ownership % Percentage of companies achieving 26% Percentage of companies with BBBEE, community & SLP	26% 100% Not agreed	(i) 30.9% (ii) 79% (iii) 6.3%	(i) 32.5% (ii) 20% (iii) 2.5%	(i) 26%[3] (ii) 100% (iii) 4.3%	Achieved well	No - significant differences in shareholder interpretation
Housing and living conditions (20%)	Percentage reduction of occupancy rate towards 2014 target	100%	(i) — (ii) 50.8%		(i) – (ii) 73%	Good progress made	No
	Percentage conversion of hostels into family units	100%			(i) — (ii) 50.8%	Work to be done	No
Procurement and enterprise development (15%)	Capital goods (5%) % of companies meeting the target	40%	(i) — (ii) 39.6%	(i) — (ii) 52.1%	(i) 72% (ii) —	Achieved well	Yes (on weighted basis)
	Services (5%) % of companies meeting the target	70%	(i) — (ii) 23.8%	(i) — (ii) 54.9%	(i) 83% (ii) —	Good progress made	Yes (on weighted basis)
	Consumable goods (5%) % of companies meeting the target	80%	(i) — (ii) 5.9%	(i) — (ii) 35.2%	(i) 99% (ii) —	Achieved well	Yes (on weighted basis)
	Assurance spend on petroleum and chemicals (5%) % of companies meeting the target	6.3% of procurement	(i) — (ii) 1.2%	(i) — (ii) 16.9%	(i) — (ii) 15%	Work to be done	Yes (on weighted basis)
Employment equity (10%)	Top Management (Board) (3%)	40%			(i) 93.4%	Achieved well	
	Senior Management (Exco) (2%)	40%			(i) 47.8%	Achieved	
	Middle Management (3%)	40%	*Mining industry exceeded 40% target*		(i) 53.5%	Achieved well	Yes - but DMR still critical of white male dominance at strategic levels of industry
	Junior Management (1%)	40%			(i) 54%	Achieved well	
	Core skills (1%)	40%			(i) 75.5%	Achieved well	
Human resource development (15%)	HRD expenditure as % of total annual payroll % of companies achieving the target	5%	(i) — (ii) 34.1%	(i) — (ii) 55.8%	(i) 5.5% (ii) 100%	Achieved well	No
Mine community development (15%)	Implement approved community projects % of companies meeting target	0% in 2015 Implementation	(i) — (ii) 30%	(i) — (ii) —	(i) 76.8% (ii) —	Work to be done	Yes - timing issues to be addressed
Sustainable development and growth (25%)	Implementation of approved SLP's (12%) % of companies meeting target	100%	(i) — (ii) 44.5%	(i) — (ii) 43.6%	(i) 93.6% (ii) —	Good progress made	No
	Implementation of the hazardous location plan on health and safety (13%) % of companies meeting the target	100%	(i) — (ii) 2.1%	(i) — (ii) 1.6%	(i) 85.2%[3] (ii) —	Achieved well	Yes - DMR views occupational health elements to be improved
	Percentage of beneficiation in SA facilities (2%) % of companies meeting the target	100%	(i) — (ii) 65.5%	(i) — (ii) 36.2%	(i) 84.6% (ii) —	Achieved	Yes

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 where it was not possible to calculate the mineral split)

Note 3: Based on Integrated Current or Prospective Facilities report

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SUBMISSION

ON THE

DRAFT BROAD-BASED SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE MINING AND MINERALS INDUSTRY 2018

AUGUST 2018

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WRITTEN REPRESENTATIONS ON THE DRAFT MINING CHARTER 2018

1 EXECUTIVE SUMMARY

The Minerals Council South Africa ("MCSA") thanks the Honourable Minister of Mineral Resources ("Minister") Gwede Mantashe, for the opportunity to submit written representations on the draft Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry 2018 ("draft 2018 Charter").

MCSA is committed to transformation of the mining sector in South Africa and believes that this should be implemented in accordance with the imperatives of job creation, economic growth, competitiveness and social upliftment and development. MCSA, as one of the key stakeholders in the mining industry, regards a transformed, growing and competitive mining sector as a significant catalyst for South Africa's social and economic development and critical for the realisation of the admirable goals of the National Development Plan. This will only be realised through a minerals policy framework, including the Mining Charter, which provides the required certainty and a context conducive to commercially sustainable operations and capital investment, as well as one that is consistent in all respects with provisions of the country's legislation. MCSA accordingly makes the representations contained in this submission in a spirit of promoting the attainment of national social and economic interests through a thriving mining industry and, thereby, attainment of the noble aspirations and objectives of the Mineral and Petroleum Resources Development Act, 2002 ("MPRDA").

MCSA believes that a continuation of a charter-based approach to transformation is necessary to continue to redress historical legacies and help unite our society and rebuild the country. The transformation and empowerment goals outlined in the Mining Charter should ultimately seek to facilitate the growth and development of the industry. In order to achieve these objectives, the concept of shared benefits for all stakeholders and inclusive growth, as outlined in the National Development Plan, should be a central feature in the final Mining Charter.

MCSA recognises and acknowledges that this draft 2018 Charter is a material advancement on the Reviewed Mining Charter 2017 and the MCSA particularly welcomes the following provisions that will contribute materially towards the realisation of a transformed, growing and competitive mining sector:

- Increase of Historical Disadvantaged South Africans ("HDSA")/Black shareholding from 26% to 30% for new mining rights;
- Recognition of historical transactions;
- Less restrictive beneficiation off-sets or Equity Equivalent provisions;
- Longer transition periods under the Inclusive Procurement element;
- The objectives and targets under the Employment Equity element;
- The 5% leviable amount target under the Human Resource Development element;
- The 70% target for Research and Development to be spent in South Africa;
- A focus on identified developmental needs of communities as opposed to only projects linked to Integrated Development Plans ("IDPs") in the Social and Labour Plans ("SLPs") under the Mine Community Development element;
- The greater transparency relating to the disclosure of approved SLPs and the call for collaboration on projects to maximise socio-economic impact; and
- The objectives under the Housing and Living Conditions element.

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MCSA further acknowledges and welcomes the removal of the following provisions that would have detracted from transformation, growth and competitiveness of the mining sector:

- Mining Transformation & Development Agency ("MTDA") and its appropriation of 40% of the skills funds and 1% of revenue from local sales of multinationals;
- The requirement for 50%+1 black person shareholding for prospecting rights;
- The Sustainable Development element, and its provisions, as this is adequately dealt with in other legislation such as the National Environmental Management Act, the Mine Health and Safety Act, amongst others; and
- Mine Community Development and Human Resource Development being "ring fenced" elements requiring 100% compliance at all times.

Whilst the MCSA acknowledges that the provisions above significantly improve the balance among the objectives of transformation, economic growth and competitiveness, the MCSA highlights the following provisions that it believes will hinder achievement of the underlying objectives of the draft 2018 Charter.

- Free carried interest ("FCI") and the trickle dividend of 1% of Earnings Before Interest Taxes Depreciation and Amortisation ("EBITDA") on new rights.

The introduction of FCI is a policy choice, which MCSA submits should be weighed against the critical need for employment creation that can only be achieved through the stimulation of investment and growth within the sector. The inclusion of the FCI provision will thwart this fundamental objective of the draft 2018 Charter as it will significantly raise investment hurdle rates. The higher the investment hurdle rate the fewer the number of mining projects that will proceed, thereby hindering prospects of job creation. Higher hurdle rates mean that marginal projects will most likely fail to attract the required capital investment. It is critical to note that in South Africa's relatively mature mining industry, most new projects in South Africa are marginal from a commercial investment perspective. A possible solution to the FCI policy issue can be found in several African mining jurisdictions. Many African mining jurisdictions impose some form of FCI rule or legislation, however, these countries do so as part of their total taxation package which they still try to keep competitive. However, consideration should also be given to the fact that, in South Africa's case, the FCI on new rights is being proposed in an environment where the mining sector already faces significant taxation, royalties and other levies. As such, it is of grave concern that the inclusion of the FCI and a trickle dividend to some shareholders will materially dampen investor appetite and will result in lower investment and further job losses in the sector thereby impeding the realisation of the fundamental objectives of the draft 2018 Charter.

The MCSA respectfully proposes a Community and Labour Development Fund ("CLDF") approach, for the benefit of mine employees and communities. Contributions to a CLDF are proposed in lieu of (a portion of) Ownership for qualifying mine employees and mine communities in respect of new mining rights. The proposal envisages that new mining right holders will contribute to a CLDF, with government matching such contributions. In order to achieve these fundamental objectives, all stakeholders in the mining industry (government, labour, business and communities) must be cognisant of the imperative for well-managed investment into mining community development. From historical research conducted, this will only work if government establishes a proper strategy and milestone plan to improve the capacity and capability of local government to ensure delivery of community development in mining areas.

- Top-up to 30% on existing mining rights.

Of primary concern is that this provision undermines and conflicts with the Supreme Court judgment on the recognition of historical transactions ("the Judgment")[1]. The draft 2018 Charter cannot change the conditions of an existing mining right and retrospectively apply new ownership concepts to agreements

[1] *The Chamber of Mines of South Africa v Minister of Mineral Resources & Another* [2018] 2 All SA 391 (GP).

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reached between the Department of Mineral Resources ("DMR") and mining companies over the past 14-years since the MPRDA came into effect, or earlier.

- The empowerment requirements for renewals and conversions on existing mining rights.

An additional concern of the MCSA is that this provision is also in conflict with the MPRDA and the Judgment. In this regard, renewals are dealt with in s24 of the MPRDA in a manner different to new applications in terms of ss22 and 23. The requirements in ss24(1) and (2) for renewals do not include new requirements relating to empowerment. The exclusion of renewals also conflicts with the Judgment, because once a right is granted or converted the holder is not obliged to restore the empowerment percentage. The draft 2018 Charter should not contradict the MPRDA, other legislation, including the Companies Act, 2008, or conflict with the Judgment on the recognition of historical transactions.

- The applicability of the draft 2018 Charter to prospecting right holders.

The MCSA respectfully submits that this provision will inhibit the encouragement of sorely needed prospecting investment and will impact on further job creation within the sector. This would be making investments unattractive, as is already demonstrated in South Africa's dismal greenfields prospecting performance. The applicants for, or holders of, prospecting rights are mainly venture capital funded exploration companies, which have no income stream. Rather, it is preferable that government attempt to reduce red-tape regarding greenfields prospecting to be instrumental in opening the country for a prospecting boom. Only when viable and bankable potential projects are identified, and an application is made for a mining right, should the Mining Charter apply.

- The applicability of the draft 2018 Charter to Junior and Emerging Miners.

The "one size fits all" approach to the draft 2018 Charter and MPRDA is not viable for the various components that make up the mining value chain. It is fully acknowledged that the early stages are entry points for smaller BEE entities and they should not be required to comply with the same Charter requirements that apply to large scale multi-national companies. It is vital that the provisions of the draft 2018 Charter work to stimulate and encourage growth in this sector of the industry and, in order to achieve this objective, the MCSA respectfully requests that Junior and Emerging Miners be afforded exemptions from full compliance with the Charter.

- The local content and verification requirements for mining goods.

The MCSA fully supports and looks forward to collaborating with government, both the DMR and the Department of Trade and Industry ("dti"), in finding solutions for the waning manufacturing sector. Local manufacturing is critical as it will create the much-needed jobs and economic growth for the country, a fundamental objective of the draft 2018 Charter. However, in order to realise these objectives, the targets imposed need to be achievable. Local content and verification must be based on a proper scientific analysis of economically viable South African manufacturing, with the support of fact based industrial development incentives from the dti. Also, the SABS has confirmed that it is currently not capacitated to discharge the verification requirements and is hoping to acquire the necessary capacity to verify local content. As such, MCSA respectfully requests and suggests that the local content requirement and therefore the verification be separated and removed from the draft 2018 Charter until a feasibility study is concluded and more realistic and achievable targets are set. The MCSA also recommends that the SABS and other verification agencies be provided with adequate time to develop the verification skills and capacities required.

- The contribution of 0,5% of annual turnover by foreign suppliers to the Mandela Mining Precinct for research purposes.

This provision is another form of tax, levy, duty or surcharge imposed on goods and services supplied by foreign suppliers. It is respectfully submitted that this provision cannot form part of the draft 2018 Charter but could only be formalised and legitimised through a money bill, which power is vested in the Minister of Finance. It is also worth noting that foreign suppliers are not mining right or permit holders and, as such, are not subject to the provisions of the MPRDA and the Minister's jurisdiction. The MCSA therefore respectfully requests that this provision be removed from the draft 2018 Charter.

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- The splitting of targets and, therefore, funds away from Human Resource Development towards Research and Development.

The MCSA fully supports and promotes the requirement of 5% of leviable amount being contributed by right holders towards investing in their employees and non-employees. Youth unemployment and skills shortages remain huge concerns for not only the mining sector, but the country as a whole. MCSA is of the view that these funds would be better utilised by mining companies in addressing these significant challenges. The splitting of the 5% of leviable amount, where 1.5% would have to be used for R&D purposes is therefore not conducive to addressing these challenges. The dire impact of this provision is that R1.8 – R2.1bn per annum will be taken away from employee skills development, youth and unemployed people's bursaries and scholarships and other skills and training requirements and given to science councils and research entities, which appears counterintuitive to the fundamental objectives of the draft 2018 Charter. The MCSA therefore respectfully recommends that the full 5% of leviable amount be used for the benefit of employees and community members in order to realise the objectives in addressing youth unemployment and skills shortages within its workforces and the surrounding local communities as a whole.

MCSA's Requests

The MCSA acknowledges and appreciates the complex task that the DMR and the Minister has to tackle in its attempt to consult and consolidate mostly asymmetric views expressed by industry stakeholders. Whilst the MCSA recognises that substantial progress has been made in this regard, the MCSA submits that there remain challenges that still need to be addressed in the draft 2018 Charter, not only in terms of certain content, but also the terms of understanding its new definitions, concepts and their implications. It is imperative that this is addressed prior to finalisation and gazetting of the final 2018 Charter to ensure that all stakeholders are cognisant of their respective roles and obligations to ensure that the sector achieves the stimulus required to realise the fundamental objectives of the draft 2018 Charter.

To this end, the MCSA is eager to continue engagements with all social partners in the industry (including labour unions, communities and the DMR) to seek solutions that will benefit all stakeholders within the mining sector. The MCSA is concerned that, in the Mining Charter as currently drafted, certain provisions are unlikely to achieve the intended transformational outcomes, ultimately failing to deliver on the heightened expectations created. The MCSA's key concerns have been highlighted above, relating mainly to the Ownership and Inclusive Procurement elements and the applicability of the Mining Charter for Prospectors and Junior Miners.

The MCSA respects and understands the Minister's imperative to provide much needed certainty in the mining sector by expediting the finalisation of the Mining Charter. However, the pursuit of resolving the regulatory uncertainty and providing the much-needed stimulus in the industry needs to be managed to ensure that the ultimate Mining Charter strikes the balance of promoting job creation, competitiveness, investment, growth, transformation and prosperity; and boldly advances President Ramaphosa's stated intention to attract US$100 billion in foreign investment into South Africa in the next five years. The MCSA is of the view that the current draft 2018 Charter provides a sound basis on which stakeholders can advance these discussions in an attempt to reach a consensus position on provisions that remain contentious.

The MCSA would also like to take this opportunity to reiterate the need to establish a Mining Sector Charter Council ("MSCC") where all stakeholders (organised labour, communities, business & government) can meet regularly in an attempt to recognise and address all stakeholders' challenges and concerns with the ultimate objective of speaking with one voice, recognising that collaboration and commitment to the fundamental objectives of the final Mining Charter will bring about the needed change in the industry. This would allow shared ownership and respective responsibilities in delivering on the Mining Charter. The proposal would be for the MSCC to be tasked with ensuring that progress on transformation in the industry is properly monitored and tracked, and that accurate and reliable information is meaningfully communicated to all stakeholders, including local and global investors and the South African public at large.

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The MCSA also respectfully submits that the mining sector's transformation progress should be independently verified. All other sectors of the economy are independently verified under the dti Revised Codes of Good Practice (CoGP) or Sector Codes.

It goes without saying that neither the MSCC nor the independent verification would replace the vital role of the DMR as the ultimate regulator of the mining sector.

The Mining Charter should align with the dti CoGP where appropriate to drive a more co-ordinated transformation approach with improved consistency across sectors. The CoGP are based on a scorecard, with clear targets, measurement criteria, calculation methodologies and achievable points for all sub elements. This allows for apportionment of points, target setting and progress reporting.

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2 BACKGROUND TO THE DRAFT 2018 CHARTER

In February 2018, Minister Mantashe with the support of President Ramaphosa resumed interactions between the DMR and the MCSA aimed at averting litigation and at preserving and promoting South Africa's mining industry. The court hearing on the Judicial Review of the 2017 Charter which was set down on 19 February 2018 was thus rendered moot pending development of a legally compliant Mining Charter that would effectively secure transformation, growth and competitiveness of the sector.

Discussions between the social partners started on the weekend of 17-18 March 2018 through a Principals Committee. The Principals Committee agreed that two task teams be established, namely the Mining Charter and Transformation Task Team ("MCTTT") and the Growth and Competitiveness Task Team ("GCTT"). The purpose of the task teams was to make proposals on Growth, Competitiveness and Transformation for the mining sector in South Africa, to cross pollinate ideas and develop a Mining Charter that addressed both the industry's socio-economic transformation challenges and its growth and competitiveness challenges. The task teams were to recommend and seek acceptance of their proposals from the Principals Committee, which was chaired by Minister Mantashe. The MCTTT met on 14 occasions in total and two of these meetings were combined meetings with the GCTT where presentations were heard from a handful of law advisory firms, the dti and SABS. Only two Principals meetings were held and regrettably, the mid-May Principals Committee meeting which was envisaged to resolve several of the issues that arose during the MCTTT meetings did not proceed.

The most contentious issues were mainly under the Ownership, Procurement, Enterprise and Supplier Development ("ESD") elements and the applicability of the Mining Charter to Junior and Emerging Miners. The MCSA welcomes the recognition of the need for a balance between transformation objectives and encouraging mineral investment and promoting a vibrant and growing South African mining industry.

The MCSA acknowledges and appreciates the discussions and negotiations held over the past few months with all industry stakeholders, together with the Mining Charter Summit held on 7-8 July 2018 where over 1000 community members gathered together with social partners to discuss the draft 2018 Charter. The MCSA also recognises and values the considerable consultation on the part of DMR.

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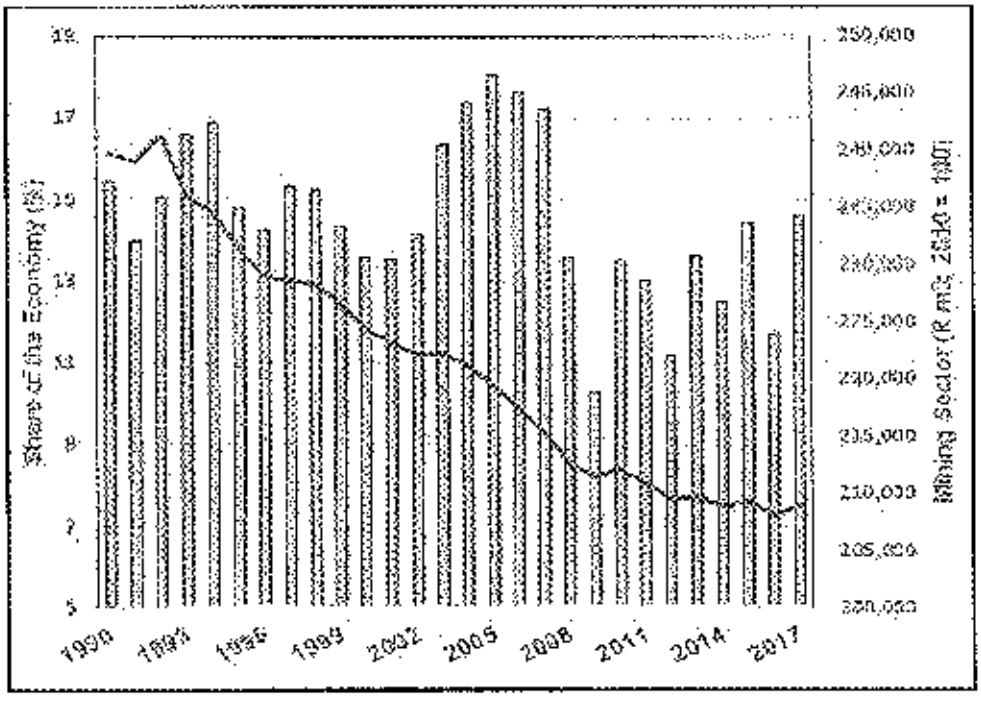
3 CONTRIBUTIONS MADE BY MCSA MEMBERS TO THE SOUTH AFRICAN ECONOMY

The MCSA serves its members and provides strategic support and advisory input with the aim of promoting growth in the mining sector by encouraging investment, economic growth, creating employment in the sector and ancillary service sectors and uplifting and benefitting all stakeholders involved. The MCSA is committed to building a modernised mining industry that contributes positively to social and economic development through a strong and effective compact between business and all other stakeholders in the industry as the basis of mutual, shared success. The MCSA members have committed to a membership compact that places strong emphasis on a commitment to responsible business practice. The MCSA and its members subscribe to modern corporate governance principles and responsible mining and business codes, under which business is a critical partner to strengthen the country's socio-economic ecosystem in cooperation with all stakeholders. An effective Mining Charter should reflect key priorities for business to focus on support of social development without inhibiting business from optimising its contribution to economic growth.

A key role of the MCSA is to facilitate interaction among mining employers and other stakeholders to examine policy issues and engage in robust dialogue on the social and economic implications for South Africa and stakeholders in the mining sector of minerals policy choices. The organisation also acts as a principal advocate for mining in South Africa to government, lobbying and communicating on policies that affect all stakeholders in the mining sector. The MCSA has over 250 members that represent more than 90% of South Africa's mineral production and more than 85% of total employment in the mining sector. The MCSA represents companies that are big and small, which are involved in mining the full spectrum of minerals in South Africa.

The mining industry is an important component of the South African economy, directly constituting 7.3% of the Gross Domestic Product (GDP) as depicted in the chart below, and indirectly prompting substantial economic activity in other sectors of the economy.

Chart: Real mining GDP and mining as a % of GDP



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If the direct and indirect multiplier effects of mining are taken into account, the mining sector helps contribute about 17% of GDP. The sector employed 462 870 people in 2017, which equates to 6.1% of private non-agricultural employment and 4.8% of total non-agricultural employment. A total of R126 billion was paid to employees in the same year. Fixed investment from mining totalled R81 billion in 2017 which was 15% of private sector fixed investment and 9.3% of the county's total fixed investment bill for the year. The industry exported R328 billion worth of output, which accounted for 27% of the country's R1.1 trillion export book. In the 2017/2018 fiscal year the industry paid R7.5 billion in royalties and R 19,4 billion in corporate taxes. The sector also contributed R7,2 billion to skills development, R2 billion to community development and had a significant positive contribution to health, education and community development initiatives in mining areas.

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4 THE ANTICIPATED EFFECT OF THE DRAFT 2018 CHARTER ON MINERAL INVESTMENT IN SOUTH AFRICA AND ON THE SOUTH AFRICAN ECONOMY

The Objective of Security of Tenure

In terms of s2(g) and item 2(a) in schedule II of the MPRDA it is an objective of the MPRDA to provide for security of tenure in respect of prospecting and mining operations. Security of tenure is a fundamental requirement for mineral investment as has been shown in comparative rankings of investor requirements[2]. Mineral security of tenure requires continuity and predictability between the different phases of mine development. Recent studies have found that out of a possible sixty factors influencing investment decisions in the mining industry, security of tenure was ranked second during the exploration phase and first during the mining stage[3]. It also features prominently in various domestic and African best practice publications:

- identified in the National Development Plan 2030 as one of the main interventions required to address the major constraints impeding accelerated growth and development of the mining sector[4];
- recognised as a critical investment consideration in the Africa Mining Vision[5]; and
- identified as an important factor for a "*sound investment and business climate*" under Guiding Principle VI of the Organisation for Economic Co-operation and Development's Guiding Principles for Durable Extractive Contracts[6].

In order to address some of the concerns around security of tenure, a number of African mining jurisdictions have introduced the concept of a stabilisation clause which protects investors against sudden changes in the regulatory regime over the life of a project. In fact, at a media conference presided over by the Minister of Mineral Resources in June this year, Mosa Mabuza, CEO of the Council for Geoscience, was quoted as saying[7]:

> "*Compliant mining companies could rely on security of tenure. In effect, the Mining Charter is offering miners a 30-year stabilisation clause.*
>
> *We need to provide long-term stability. We have looked at best practice elsewhere in the world; Botswana for instance which provides stability for the 25 years of licences given to mining companies.*"

The MCSA respectfully submits that the draft 2018 Charter does not adequately give effect to s2(g) or to item 2(a) and hence will be detrimental to mineral investment in South Africa and, consequently much needed economic upliftment and job creation within the sector. The draft Charter 2018 should respectfully avoid imposing new obligations on existing rights and should contain a stabilisation clause which protects investors against subsequent changes in law (or future mining charters) which seek retrospectively to amend the terms upon which existing rights were granted.

Having said that, the MCSA is fully committed to socio-economic transformation in the mining industry and welcomes the proposed targets (as per the submission below) in all the elements of the Charter,

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[2] Dale et al, South African Mineral and Petroleum Law, LexisNexis, 2005 (loose leaf), pages MPRDA – 119 ff (Service Issue 17) and pages Sch II – 27 to 37 (Service Issue 21).
[3] United Nations Conference on Trade and Development Best Practices in Investment for Development: How to attract and Benefit from FDI in Mining.
[4] *National Development Plan 2030*, p 147.
[5] The Africa Mining Vision was adopted by African Union Heads of State at the February 2009 AU summit following the October 2008 meeting of African Ministers responsible for Mineral Resources Development.
[6] In 2007 the OECD Council at Ministerial level adopted a resolution which led to South Africa's becoming one of five Key Partners to the OECD, along with Brazil, China, India and Indonesia. Key partners contribute to the OECD's work in a sustained and comprehensive manner. A central element of the collaboration is the promotion of direct and active participation of these countries in the work of substantive bodies of the Organisation.
[7] https://www.miningmx.com/news/markets/33250-sa-government-pledges-30-year-stabilisation-clause-mining-licences/

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except for the Ownership element (existing rights). The draft 2018 Charter cannot change the ownership conditions of an existing mining right and retrospectively apply new ownership concepts to agreements reached between the DMR and mining companies over the past 14-years.

The MCSA also respectfully submits that the DMR should have regard to the Tenth Schedule of the Income Tax Act, 1962. This schedule, which incentivises oil and gas exploration, also sets out to create fiscal certainty for companies embarking on oil and gas activities in South Africa.

The Economics of the draft 2018 Charter

FCI and the trickle dividend of 1% of EBITDA as proposed in the draft 2018 Charter will raise investment hurdle rates and materially dampen investor appetite and will result in lower investment and further job losses in South Africa's mining sector, thereby neutralising the commendable objectives of the draft 2018 Charter. The higher the investment hurdle rate the fewer the number of mining projects that may proceed. Higher hurdle rates mean that more marginal projects, which make up most of all projects, are likely not to be pursued. The fact that the FCI represent a dilution of benefits accruing to commercially-funded equity, ***increases both the hurdle rate and risk profile*** of any new project. This underscores the adverse impact of FCI on the potential for new investment.

The MCSA furthermore submits that it is also gravely concerned about the possible destabilising impact of unfulfilled or heightened expectations created around the purported immediate benefits originating from the ownership (and free carry) prescriptions, coupled with the SLP mine community benefits. This is against the reality of the draft 2018 Charter's applicability only to new mining rights.

The MCSA respectfully submits that the proposed 5% FCI for host communities will not resolve community development issues. The FCI comes in addition to the existing skills development contributions (R7 billion), royalty contributions (R7,5 billion), corporate taxes (R19 billion) and SLP contributions (R2 billion) made annually. The MCSA implores government to ensure effective and well capacitated local departments. In 2017, local governments returned R53 billion in unspent funds to the National Treasury. In March 2018, Cooperative Governance and Traditional Affairs Minister Zweli Mkhize, announced that he would be deploying technical capacity experts who would provide support to municipalities in their core functions. This after the Ministry identified that 31% of the country's municipalities were dysfunctional, while 31% were almost dysfunctional. Only 7% of municipalities were well functioning and 31% were reasonably functional[6]. This should not be the case when there are significant capital projects and operational needs that ought to improve the lives of the people of South Africa.

As discussed above, the FCI provision will thwart this fundamental objective of the draft 2018 Charter as it will significantly raise investment hurdle rates thereby impacting negatively on job creation. All stakeholders in the South African mining industry recognise the imperative of attracting substantial new investment to secure growth and thereby continue contributing to national and local economies and social development. Of concern to the MCSA is that shareholders in the sector are getting much less in returns and value compared to employees (remuneration) and government (taxes and royalties). As depicted in the chart below, in 2017 shareholders received 2% as compared to receiving 11% in 2011.

[6] https://mg.co.za/article/2018-03-20-00-municipalities-are-dysfunctional-mkhize

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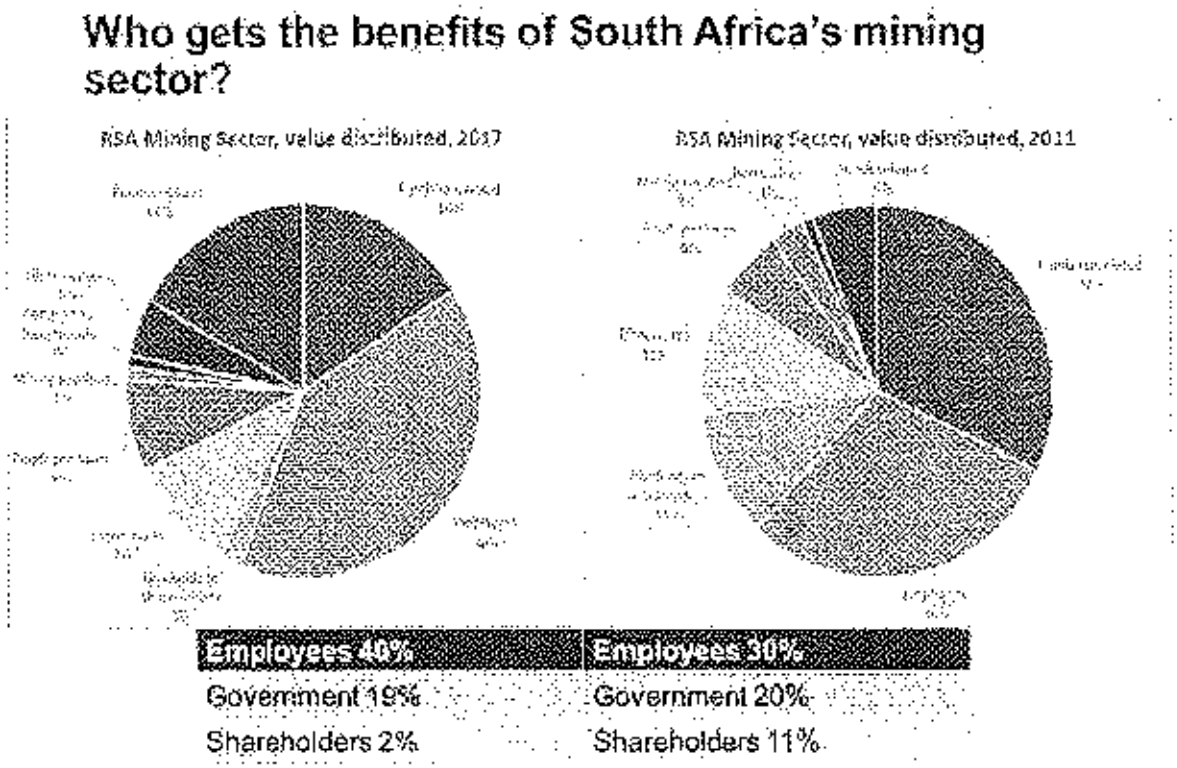
Chart: Percentage of value distributed by the South African Mining Sector



Source: SA Mine 9th edition by PWC

MCSA attaches as **Appendix 1** hereto an exposition of the anticipated effect of the draft 2018 Charter on mineral investment and on the economy.

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5 OVER-ARCHING ISSUES

For the Mining Charter to provide an effective framework to guide transformation in the mining sector, the MCSA considers it essential that its provisions are compatible in all respects with South African legislation and judicial rulings.

5.1 The Mineral and Petroleum Resources Development Amendment Bill B15D – 2013 ("Bill") has not be re-enacted, assented to or put into operation

The Provisions

The Bill impacts upon the draft 2018 Charter in at least the following ways, namely that it proposes to:

- substitute the definition of beneficiation in s1 of the MPRDA;
- substitute the definition of historically disadvantaged person in s1 of the MPRDA;
- substitute the definition of this Act in s1 of the MPRDA so as to include *inter alia* the Charter;
- insert s25(2)(fA) into the MPRDA so as to oblige a mining right holder to comply with the Charter;
- insert s100(3) into the MPRDA to provide that when granting prospecting and mining rights the Minister must impose the provisions of the Charter; and
- insert s100(4) into the MPRDA to provide that the Minister may amend or repeal the Charter.

The Issues

Notwithstanding that the Bill has not yet been re-enacted, assented to or put into operation and may yet be subject to further challenges on constitutionality as set forth for example in MCSA's submissions on the Bill, the draft 2018 Charter relies on the Bill in all the above respects, including on the power to amend and repeal the 2004, 2010 and 2017 Charters and to replace them with the draft 2018 Charter. The MCSA respectively submits that even if the Bill ultimately takes effect, it refers only to amendment and repeal, not to the development of an entirely new Charter. See in this regard also the Judgment to which further reference will be made below.

The Requests

In the light of the above, the MCSA respectfully submits that in order to avoid challenges to the draft 2018 Charter based on the Bill not being in operation, the Minister should defer finalisation of the 2018 Charter until the Bill comes into operation without further constitutional challenge.

5.2 The draft 2018 Charter is a policy document which cannot contradict, conflict with or go further than, the MPRDA itself

The Provisions

The Mining Charter flows from s100(2) of the MPRDA and can therefore not contradict, conflict with or go further than, what is envisaged in s100(2) or in any other provision of the MPRDA. Section 100(2) reads:

"(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 time-table 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.

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The Issues

As also evidenced by the judgment, it is respectfully submitted that the Minister and his Department in their capacity as the Executive of Government have encroached upon the legislative sphere of Government by purporting to use the Charter as a legislative instrument and to regard the Charters as an instrument of law.[8] Notwithstanding that this was held in the judgment, paragraphs 74 ff, not to be the case, the draft 2018 Charter persists in adopting the same incorrect philosophy, leading to contradictions and conflicts with, and amplifications to, the content of the MPRDA itself. Examples of this will be given in Part D below. The Minerals Council remains committed to a mutually agreed Mining Charter as an instrument for achieving transformation.

The Requests

The MCSA respectfully requests that all aspects of the draft 2018 Charter which contradict, conflict with, or go further than, the provisions of the MPRDA itself be deleted.

5.3 The draft 2018 Charter cannot conflict with other legislation

The Provisions

The draft 2018 Charter, as did the 2017 Charter, contains various provisions which contradict the Companies Act, 2008.

The Issues

Numerous provisions of the draft 2018 Charter contravene or conflict with the Companies Act, 2008, as more fully set forth in **Appendix 2** hereto, and as further set forth in Part D below.

The Requests

The MCSA respectfully requests that all the provisions in the draft 2018 Charter which conflict with the Companies Act, 2008, be deleted.

5.4 The draft 2018 Charter conflicts with the Judgment

The Provisions

There are numerous provisions in the draft 2018 Charter which conflict with the Judgment.

The Issues

The Judgment constitutes judicial precedent (*res judicata*) and stands notwithstanding that the Minister has applied for leave to appeal against it.

It is respectfully submitted that the draft 2018 Charter can accordingly not contain provisions which conflict with the Judgment, but yet contain numerous provisions which do conflict with the Judgment. **Appendix 3** hereto is a note on a comparison between the Judgment and the draft 2018 Charter. Examples are set out in Appendix 3 and are discussed further in Part D below.

The Requests

The MCSA accordingly respectfully requests that all provisions of the draft 2018 Charter which conflict with the Judgment be deleted.

[8] See paragraphs 38 ff of MCSA's Heads of Argument in the Judicial Review Application 71147/2017 relating to the 2017 Charter

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6 SPECIFIC ISSUES

6.1 Issues regarding the Preamble

6.1.1 The statement of primary objective is unsubstantiated

The Provisions

In the third paragraph of the Preamble it is stated that the primary objective of the MPRDA is transformation.

The Issues

The MCSA respectfully submits that both in the preamble to, and in s2 of the MPRDA, transformation is but one of various other listed objectives. These include, in the preamble of the MPRDA, the creation of an internationally competitive regulatory regime and in s2(e) the promotion of economic growth and mineral resources development.

The Requests

The MCSA respectfully requests that the third paragraph of the preamble be re-worded to reflect the objectives of transformation and of economic growth and mineral development.

6.1.2 The 2009 and 2014 assessments were based on incorrect premises

The Issues

The 2009 and 2014 assessments presupposed the correctness of the Minister's view that the once empowered principle does not apply. Given the finding of the court in terms of the Judgment, this principle does in fact apply and must be taken into account when conducting such assessments. The research methodology in regard to the non-ownership elements is also questionable, as is alignment with Broad-Based Black Economic Empowerment ("B-BBEE") legislation and codes.

The references in the 2009 and 2014 assessments to shortcomings in the mining industry insofar as the ownership element is concerned are incorrect in that they are based on the Minister's view, which has been held incorrect in the Judgment, that once empowered does not apply. The MCSA has shown in **Appendix 4** that using the same statistics, but applying the once empowered principle, the industry is more than compliant and is not simply compliance-driven.

The last two paragraphs of the preamble refer to alignment with the B-BBEE Act, the dti CoGP, the Employment Equity Act, and other relevant regulatory frameworks. The MCSA respectfully submits that it should be clarified that the draft 2018 Charter is not fully aligned with these instruments. The MCSA refers in this regard to **Appendix 5**. The industry is in favour of alignment where practicable.

In relation to the last paragraph of the preamble in its reference to new definitions, terms and targets, in legal terms the draft 2018 Charter cannot introduce new definitions and terms which differ from those in the MPRDA itself and cannot introduce new targets in contradiction to the declaratory orders in the Judgment.

The Requests

MCSA accordingly, respectfully requests that the Preamble be amended to correct the above misconstructions.

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6.2 Issues relating to the definitions

6.2.1 Definition of BEE Entrepreneur

The Provisions

This definition refers at the end to an organ of State excluding mandated investments.

The Issues

The intention is presumably that an organ of State ranks as a black person. The MCSA respectfully requests that this intention be clarified.

A definition of mandated investments should be provided as in paragraph 2.1.3.4 (b) of the Codes of Good Practice for the Minerals Industry, developed by the Minister in terms of s100(1)(b) of the MPRDA where it is stated that mandated investments include investments or collective investment schemes, investment of pension funds, investments of medical schemes, investment of long-term insurers and investment of banks.

Paragraph 2.1.3.4(c) of the Codes of Good Practice should be carried forward into the above definition, where it is stated that the maximum exclusion is 40%.

The Requests

The MCSA respectfully submits that the above definition be clarified as stated above.

6.2.2 Definition of BEE Shareholding

The Provisions

BEE shareholding *"refers to host community, qualifying employees' and BEE entrepreneurs' shareholding"*. This definition is used in respect of Existing Mining Rights and Pending Applications. However, this definition did not apply to Historical BEE Transactions concluded prior to the commencement of the draft 2018 Charter. HDSA ownership was applied.

The Issues

It is proposed that the definition of HDSA as reflected in the 2010 Mining Charter be made applicable as this is aligned with the basis on which shareholding agreements were concluded. In addition, previous charters refer to HDSA ownership and not BEE shareholding.

The Requests

The MCSA respectfully submits that all reference to BEE shareholding in Section 2.1.1 and 2.1.2 relating to Existing Mining Rights and Pending applications be replaced with HDSA ownership, to correctly reflect the requirements in place at the time these ownership transactions were concluded.

6.2.3 Definition of Beneficiation

The Provisions

"Beneficiation for purposes of the Mining Charter beneficiation means the transformation, value addition or downstream beneficiation of a mineral product (or a combination of minerals) to a higher value product, over baselines to be determined by the Minister, which can either be consumed locally or exported."

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The Issues

The definition of beneficiation is the definition in the Bill and therefore does not accord and hence conflicts with the definition of beneficiation which currently appears in s1 of the MPRDA.

The Requests

The MCSA respectfully suggests that the definition of beneficiation simply refer to beneficiation as defined in s1 of the MPRDA. In terms of s12(1) of the Interpretation Act, 1957, the definition in the MPRDA as it exists from time to time will then apply.

6.2.4 Definition of Black Persons

The Provisions

A definition of black persons appears, which falls to be read with the second paragraph of paragraph 11 (Interpretation) of the draft 2018 Charter which provides that any reference to black persons refers to historically disadvantaged person until such time as the MPRDA has been amended.

The Issues

Again, the definition differs from that in s1 of the MPRDA as to who in terms of s100(2) is intended to benefit from the Charter.

The Requests

The MCSA respectfully suggests that the terms historically disadvantaged person or historically disadvantaged South African as defined in s1 of the MPRDA be used and be stated to bear the meaning as in s1 of the MPRDA. Again, s12(1) of the Interpretation Act, 1957 would apply.

6.2.5 Definitions of Existing Right Holder and of Right Holder

The Provisions

The definition of existing right holder refers to a holder of a mining right granted prior to the coming into operation of the draft 2018 Charter, and the definition of right holder refers to a holder of a mining right granted in terms of the MPRDA.

The Issues

If the second paragraph of paragraph 6 (relating to prospecting rights) is retained, the above definitions should both also refer to prospecting rights.

In both definitions, reference should be made not only to a right granted, but also to a right converted.

The definition of existing right holder should refer additionally to a holder of a right granted after commencement of the draft 2018 Charter pursuant to a pending application.

The Requests

The MCSA respectfully requests that the above definitions be amended as suggested above.

6.2.6 Definition of Pending Applications

The Provisions

The definition refers to applications lodged and accepted prior to coming into operation of the draft 2018 Charter. It is thus assumed to include mining right, prospecting right, renewal, section 11 and section 102 applications.

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The Issues

The MCSA respectfully submits that the definition should not refer to acceptance. Lodgement should be sufficient. Acceptance sometimes occurs significantly after lodgement, notwithstanding that s22(2) provides that acceptance must occur within fourteen days of receipt. More importantly, applications for the renewal of a mining right, in terms of Section 24 of the MPRDA do not require acceptance by the Regional Manager, in so far as it is submitted within the prescribed timeframes. Similarly, applications submitted in terms of Sections 11 and 102 of the MPRDA, are not subject to acceptance by the Regional Manager.

The Requests

The MCSA respectfully requests that the word "submitted" replace "lodged and accepted".

6.2.7 Definition of Trickle Dividend

This definition will be addressed in relation to paragraph 2.1.3 where it is used, including that this definition is unclear in relation to such dividends being "*redeemable*".

6.2.8 Definition of Host Community

The Provisions

Refers to community/ies in the local, district, metropolitan municipality or traditional authority within which the mining area as defined in the MPRDA is located.

The Issues

This has the potential to provide communities far distant from mines the belief that they have the same rights as near neighbours. This ambiguity could cause conflict.

The Requests

The MCSA respectfully submits that the definition be limited to communities within the mining area as defined in the MPRDA and should only include broader communities if no mine community exists within the mining area.

6.3 Issues Relating to objectives in paragraph 1

The Provisions

Paragraph 1 states that the draft 2018 Charter is a regulatory government instrument and sets forth the objectives of the draft 2018 Charter.

The Issues

The draft 2018 Charter cannot declare itself to be a regulatory government instrument. It takes its nature from s100(2) of the MPRDA. Its nature is as set forth in paragraphs 31 ff of the MCSA's Heads of Argument in the Review Application relating to the 2017 Charter where the same issue arose. Moreover, the statement conflicts with paragraphs 79 ff and 94 ff of the Judgment in which it was held that the 2004 and 2010 Charters do not have binding effect and are not enactments having the force of law. Accordingly, paragraph 1 is incorrect. As previously stated, the MCSA accepts the importance of the Mining Charter as an instrument to advance transformation. However, it should be seen as an agreed social compact between stakeholders.

Insofar as the objectives in paragraph 1 are concerned, again the draft 2018 Charter cannot conflict with or amplify the objects as set forth in s100(2)(a) read with the specific objects which are set forth in s100(2)(b).

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The object in paragraph 1(g) is ultra vires s100(2)(b) since it flows from s2(h) of the MPRDA which is not mentioned in s100(2)(b).

The Requests

The MCSA respectfully suggests that paragraph 1 be deleted and be replaced by a cross-reference to the objects in ss100(2)(a) and (b) of the MPRDA.

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7 THE OWNERSHIP ELEMENT

The MCSA members have diligently strived to meet the MPRDA and Mining Charter ownership requirements since the enactment of the MPRDA. The MCSA respectfully submits that most of the members have met and, in some cases, exceeded the 26% BEE ownership requirements at conversion of converted mining rights or the granting of mining rights.

The MCSA welcomes the stipulation in the Charter recognising historical transactions *"concluded on units of production, share assets, including all historic BEE transactions which formed the basis upon which new order mining rights were granted"* at Company or Mining Right level.

The MCSA agrees to the 30% BEE shareholding target for new rights, that includes a portion for employees, communities and BEE entrepreneurs, as a policy choice by government. However, there are a few concerns which we detail below.

7.1 Issues Relating to the Ownership Element pertaining to Existing Mining Rights in paragraph 2.1.1

7.1.1 Applicability of BEE shareholding to existing rights

The Provisions

Paragraphs 2.1.1 and 2.1.2 refers to BEE shareholding.

The Issues
This definition of BEE shareholding did not apply to Historical BEE Transactions concluded prior to the commencement of the Mining Charter, which refers to HDSA ownership.

The Requests

The MCSA respectfully requests that the reference to BEE shareholding be replaced with HDSA ownership provisions, as reflected in the 2010 Mining Charter as this is aligned with the basis on which shareholding agreements were concluded. In addition, previous charters refer to HDSA ownership and not BEE shareholding. Furthermore, HDSA includes white women and recognises ownership transactions concluded to involve white women. The MCSA respectfully submits that these should be recognised for the duration of the mining right.

7.1.2 Ownership structures in relation to existing rights

The Provisions

Paragraphs 2.1.1.1 to 2.1.1.4 in relation to the recognition of empowerment in relation to existing rights.

The issues

The draft 2018 Charter fails to take into account that many South African mining companies are structured and empower themselves in different ways. It presupposes that all historical BEE transactions have been undertaken at the level of the mining right holder and accordingly fails to take group structures into account.

Most of the larger mining operations in South Africa form part of a larger group of companies, and many of these groups have a parent company listed on the Johannesburg Stock Exchange ("JSE") or other international stock exchanges. Most of these groups have structured their empowerment at the parent company level. The purpose of this is to empower the entire group of companies, and to provide a reasonable level of liquidity to their empowerment partners on the expiry of the underlying BEE transactions. This benefits HDSA shareholders, as it allows them to diversify their investment holdings across a number of operations. It also reduces the administrative burden on parties to the transaction.

The draft 2018 Charter accordingly imposes empowerment obligations on "a right holder" but makes no reference to ownership measured in terms of the flow through principle and the modified flow through

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principle, concepts which are recognised under the 2010 Charter10, the Broad-Based Black Economic Empowerment Act, 2003 and the dti CoGP. The failure to recognise this principle in the draft 2018 Charter severely prejudices mining companies that are empowered at a holding company level and not at the right holder level.

The Requests

Paragraph 2.1.1.4 is accordingly too narrow as it only refers to the recognition of "continuing consequences". It should be expanded upon to read as follows:

"*Historical BEE Transactions referred to in paragraphs 2.1.1.1 to 2.1.1.3 (both inclusive) above may have been undertaken at a holding company, group company or mining right level and, where applicable, in accordance with the flow through and modified flow through principles*".

7.1.3 Topping-up - Paragraphs 2.1.1.1 and 2.1.1.2

The Provisions

Paragraphs 2.1.1.1 and 2.1.1.2 provide for existing right holders as compliant but for the obligation to top-up within five years to 30%.

The Issues

The MCSA respectfully submits that the topping-up to 30% conflicts with the Judgment, with what the MCSA thought was the understanding between DMR and MCSA, with the object in s2(g) and item 2(a) in schedule II of security of tenure, and with the principle of non-retrospectivity which is part of the rule of law principle in s1(c) of the Constitution of the Republic of South Africa, 1996.

The MCSA respectfully argues that the provisions of any final Mining Charter cannot change the conditions of an existing mining right. Furthermore, the Minister cannot retrospectively apply new concepts to agreements reached with mining companies over the past 14 years, since inception of the MPRDA, or earlier.

The reference to date of publication should be a reference to date of coming into effect.

The Requests

The MCSA respectfully submits that paragraphs 2.1.1.1 and 2.1.1.2 should be amended by the deletion of the words "*and must within a period of 5 (five) years from the date of coming into effect of the said Mining Charter, supplement BEE shareholding to a minimum of 30%*" in paragraph 2.1.1.1 and "*and must within a period of 5 (five) years from the date of coming into operation of the Mining Charter, 2018, supplement their BEE shareholding from 26% to a minimum of 30%*" in paragraph 2.1.1.2.

7.1.4 Historical Transactions - Paragraph 2.1.1.3

The Provisions

Paragraph 2.1.1.3 deals with continuing consequences of historical transactions.

The Issues

The MCSA respectfully submits that the references to historical transactions and to units of production and share assets are too narrow in that in terms of paragraphs 4.7 and 4.8 of the 2004 Charter there were references to credits/offsets, offsets of excess against shortfall, and offsets against beneficiation. Such offsets would not have occurred by way of transactions. Moreover, the reference to "*share assets*"

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[10] See the definition of "BEE entity" in the 2010 Mining Charter which is defined as "an entity of which a minimum of 26% plus 1 of share capital is directly owned by HDSAs *in accordance with the flow through principles*".

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is not correct and should presumably be a reference to "*shares or assets*", or possibly should not be enumerated at all. In Order 2.5 in the Judgment the court declared that the 2010 Charter did not deprive holders of the benefits of offsets or of all forms of ownership and participation. Therefore, it is arguable that paragraph 2.1.1.3 should simply refer to continuing recognition of the bases upon which rights were granted or converted. The reference to rights granted should be amplified by reference also to rights converted.

The Requests

The MCSA respectfully requests that paragraph 2.1.1.3 should be reworded as suggested above.

7.1.5 New applications and renewals - Paragraph 2.1.1.6

The Provisions

New applications and renewals are excluded from recognition.

The Issues

The exclusion of new applications should be qualified to exclude pending applications from such exclusion.

The exclusion of renewals is in conflict with the MPRDA and with the Judgment. Renewals are dealt with in s24 of the MPRDA in a manner different to new applications in terms of ss22 and 23. The requirements in ss24(1) and (2) for renewals do not include new requirements relating to empowerment. Section 24(3) obliges the Minister to grant renewal if a closed list of requirements is met and which list does not include empowerment. The exclusion of renewals also conflicts with the Judgment in terms whereof once a right is granted or converted the holder is not obliged to restore the empowerment percentage. The exclusion of renewals is therefore ultra vires the MPRDA and would fall to be reviewed and set aside on judicial review.

The Requests

The MCSA respectfully requests that it be made clear that the exclusion of new applications does not include exclusion of pending applications and that the exclusion of renewals be deleted and replaced with wording indicating that recognition endures for the full duration of the prospecting right, mining right including renewals and conversions.

7.1.6 Non-achievement - Paragraph 2.1.1.7

The Provisions

Paragraph 2.1.1.7 provides that a holder who did not achieve 26% will not enjoy any recognition.

The Issues

The all or nothing approach in paragraph 2.1.1.7 is draconian and in any event conflicts with paragraph 2.1.1.8 and should be replaced by a recognition of the level of empowerment which was achieved. Furthermore, the reference to the holder being subjected to the MPRDA corrective processes conflicts with Orders 2.3 and 2.6 of the Judgment and should to be deleted.

The Requests

The MCSA respectfully requests that paragraph 2.1.1.7 be amended as suggested above.

7.1.7 Top-up by under achievers - Paragraph 2.1.1.8

The Provisions

Paragraph 2.1.1.8 provides that a non-compliant holder must top up to 30% within five years.

The Issues

This top-up provision conflicts with the Judgment.

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The Requests

The MCSA respectfully requests the deletion of paragraph 2.1.1.8.

7.1.8 Historical Tailings Dumps

The Provisions

There is no provision dealing with historical tailings dumps.

The Issues

Tailings dumps created pursuant to mining operations conducted prior to 1 May 2004 are not currently subject to the MPRDA[11]. However, if promulgated in its current form, the Amendment Bill will require[12] the holder of a mining right or mining permit (granted under the MPRDA) that owns historic tailings dumps or residue stockpiles which are located within the existing mining area to apply for an amendment of its mining works programme to incorporate such historic tailings dumps and stockpiles into the right; and the owners of any historical tailings dumps or residue stockpiles located outside the mining area have the exclusive right to apply for a mining right or mining permit.

The Requests

The MCSA respectfully requests that the owners of historic tailings dumps and residue stockpiles that have achieved the required 26% BEE ownership requirement as at the date of the promulgation of the final Mining Charter 2018, should not be required to meet any additional or new BEE ownership requirements placed on the owners when lodging applications to the DMR in accordance with subsections (1) or (2) above.

7.2 Issues Relating to Pending Applications in paragraph 2.1.2

7.2.1 Acceptance - paragraph 2.1.2.1

The Provisions

Paragraph 2.1.2.1 provides that a pending application lodged and accepted prior to coming in to operation of the 2018 Charter will be processed and granted in terms of the 2010 Charter with a minimum of 26%.

The Issues

For the reasons above in relation to the definition of pending application, *the words "lodged and accepted"* should be replaced by the word "*submitted*".

The reference to the 2010 Charter needs to be a reference to the 2010 Charter as interpreted in Orders 2.5 and 2.6 of the Judgment.

The wording should also expressly provide that an applicant can rely on the recognition of its historical BEE transactions to comply with the minimum of 26% Black person's shareholding requirement for pending applications.

The Requests

The MCSA respectfully requests that paragraph 2.1.2.1 be amended as suggested above and recognition of historical BEE transactions be allowed in pending applications.

[11] *See De Beers Consolidated Mines Limited v Alaqua Mining Proprietary Limited* (2009) JOL 24602 (O).
[12] Proposed Section 42A of the Amendment Bill.

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7.2.2 Processing and granting - paragraph 2.1.2.1

The Provisions

Paragraph 2.1.2.1 provides that a pending application shall be "*processed and granted*" in terms of the 2010 Charter.

The Issues

The MCSA respectfully submits that paragraph 2.1.2.1 should go further in providing that once such application has been granted, the resultant mining right shall be deemed to be an existing mining right as defined in the 2018 Charter.

The Requests

The MCSA accordingly requests that paragraph 2.1.2.1 be amplified as suggested above.

7.2.3 Top-up -paragraph 2.1.2.2

The Provisions

Paragraph 2.1.2.2 provides for top-up to 30% after five years.

The Issues

Paragraph 2.1.2.2 conflicts with the Judgment.

The Requests

The MCSA respectfully requests the deletion of paragraph 2.1.2.2.

7.3 Issues Relating to New Mining Rights in paragraph 2.1.3

The key areas of contention relating to new rights are the following:

- the 10% free carried interest (5% to employees and 5% to host communities);
- the 1% EBITDA "trickle dividend" from the 6th year of the mining right to employees and host communities (which seemingly also includes Black entrepreneurs);
- the restriction on Black enterprises from diversifying out of the mining industry; and
- the fact that the DMR insists that the above prescripts, among others, will apply to existing rights on renewal.

7.3.1 30% Shareholding - Paragraph 2.1.3.1

The Provisions

Paragraph 2.1.3.1 provides that a new mining right must have a minimum of 30% per mining right or in the company which holds a mining right.

The Issues

The reference to shareholding "*in the mining company which holds a mining right*" is too restrictive in that the shareholding could be held further up the corporate chain of companies and in that this conflicts with the flow through and modified flow through principles in the Code of Good Practice, and would require massive corporate restructuring of the many companies which have availed them of these principles and which will wish to continue to avail themselves of these principles in the future.

The Requests

The MCSA respectfully requests that the reference to the mining company which holds a mining right be amplified to include a company or companies further up the corporate chain of companies. This can

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also be reworded to read similarly to paragraph 2.1.1.4 (following the amended version of this clause as

7.3.2 Distribution and Free Carried Interest - Paragraph 2.1.3.2

The Provisions

Paragraph 2.1.3.2 provides for specified distributions and for carried interests.

The Issues

The MCSA acknowledges the shareholding distribution as proposed of 8% / 8% / 14% as a policy choice, even though the MCTTT had proposed a distribution of 5% / 5% / 20%.

In paragraph 2.1.3.2 (i), the concept of non-transferability by employees would have to be subject to transferability on death or insolvency since upon such events the shares will not cease to exist.

In relation to paragraphs 2.1.3.2(i) and (ii), it should be provided that where the transferable shareholding of employees or host communities is disposed of wholly or partially, the right holder's credentials will be recognised for the duration of the mining right. This is a lacuna in paragraphs 2.1.3.2(i) and (ii) whereas this aspect in relation to BEE entrepreneurs in paragraph 2.1.3.2(iii) is dealt with in paragraph 2.1.3.6.

In paragraph (iii), the reference to "a" BEE entrepreneur should be to one or more BEE entrepreneurs.

Insofar as paragraph 2.1.3.2 (ii) relating to communities is concerned, it should be provided that if there is no host community, the 8% should be distributed pro-rata to qualifying employees and BEE entrepreneurs; and it also needs to be stipulated that the beneficiaries of the community trust are those people who from time to time constitute the host committee. thus taking into account that members of the community may move away or be added to, but perhaps the intention is that this detail will appear in the prescribed regulations.

The Requests

The MCSA respectfully requests amendments as suggested above.

7.3.3 The Removal of Free Carried Interest

The imposition of FCI is a public policy choice, which must be weighed against the critical need to attract investment for growth and employment creation. The major challenge with the proposed provisions is that they will materially undermine investment, by pushing up investment hurdle rates and ensuring that many potentially new projects become unviable. FCI and 1% of EBITDA proposals by the Minister are essentially new taxes on the mining sector, which will undermine investment and the growth and transformation of the sector.

The MCSA is opposed to the concept of FCI in that, FCI also conflicts with the Companies Act, 2008 as more fully set forth in **Appendix 2** hereto, in that it results in inequality of treatment of shareholders.

The FCI comes in addition to the existing skills development contributions (R7 billion), royalty contributions (R7,5 billion), corporate taxes (R19 billion) and SLP contributions (R2 billion made annually by the mining industry. The MCSA implores government to ensure effective and well capacitated local government and for all other stakeholders also to make a positive contribution to community development.

The Alternative to Free Carried Interest

This alternative is proposed as a compromise, where the following items would have to be deleted from the draft 2018 Charter. These are pre-requisite conditions:

1. remove the 10% total free carried interest for qualifying employees and mine communities; and
2. remove the 1% of EBITDA on new rights.

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All stakeholders should appreciate that government, labour and industry all have a role to play in ensuring proper investment into community development.

The MCSA also implores government to establish a proper strategy and milestone plan to improve the capacity and capability of local government to deliver community development in mining areas.

Proposal by the MCSA

Total 30% B-BBEE/HDSA shareholding for new rights:

- 8% Qualifying Employees;
- 8% Mine Communities; and
- 14% BEE Entrepreneurs.

Description of benefits	Qualifying Employees	Mine Communities
Annual New Right Holder's contribution (economic benefits) – in lieu of Ownership – 2% shareholding (each)	New Right Holder to contribute: 1% NPAT annually.	New Right Holder to contribute: 1% NPAT annually.
	State to contribute: 10% of Royalties, or same amount as mining company contribution annually.	State to contribute: 10% of Royalties, or same amount as mining company contribution annually.
Shareholding (economic interest and voting rights)	New Right Holder to facilitate the purchase of 6% shareholding.	New Right Holder to facilitate the purchase of 6% shareholding.
Total Shareholding in New Mining Right	**8%**	**8%**

Proposal for the adoption of a community and labour development fund methodology

The MCSA is respectfully proposing that the South African mining industry adopts a Community and Labour Development Fund (CLDF) approach. The CLDF contributions will be in lieu of Ownership for qualifying mine employees and mine communities and only new right holders will contribute to a CLDF, with a co-matched contribution from government. The MCSA proposes that this CLDF approach would be applied at a local, or regional level (not national), with all the necessary checks and balances and governance in place. It would be governed on the basis of the Trust Property Control Act of 1988. The Trustees in these CLDFs would be an equal number of representatives from organised labour, communities, mining companies and government. The various CLDF Trust structures would be responsible for:

- collection of agreed contributions from industry and government;
- project selection;
- fund distribution;
- monitoring and evaluation; and
- governance and organisation.

Purpose of the Funds in the CLDFs:

The proposal is that the funds that accumulate in the various CLDFs will be used for the purpose of community development and be utilised as a benefit stream to employees. This will be to ensure better community development outcomes and more buy-in from employees into the sector.

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The portion contributed on behalf of mine communities will be used for developmental projects in the mine communities and for Enterprise Development (ED) by the mine community members. This ED will be focused particularly on early stage business development for the youth, the unemployed people and ex-mine workers.

The proposal is that a portion contributed to the fund on behalf of qualifying employees will be split, so that there is a value to be distributed back to employees annually. This annual distribution will be one third (1/3) of the value due to each qualifying employee, and can be used to supplement earnings, pay off existing debts, save or invest. The rest of the annual value two-thirds (2/3) will be invested on behalf of the qualifying employees and will only be accessible at retirement or retrenchment stage, that is for "good leavers". Should the qualifying employee leave the employment of the industry for any other reason, the value of their investment will be forfeited and retained in the fund.

The Requests

The MCSA respectfully requests the deletion of free carried interest and the adoption of the CLDF methodology.

7.3.4 A definition of Free Carried Interest

As a secondary alternative, the MCSA proposes that the following definition of FCI be adopted:

- free carry shares are issued at no cost in the entity that holds the new mining right. Accordingly, the shareholding would be acquired at no cost, free of any encumbrance;
- free carry shareholders would not be required to provide any funding, whether in respect of i.e. the acquisition of an existing right, project development, working capital requirements or operating losses;
- the entity holding the mining right (or its holding company) would be allowed to incur debt as required. Such funding at the entity holding the mining right (or its holding company) can be raised from third parties and / or shareholders willing and able to lend, provided that funding is provided on market related terms which may include appropriate security provisions;
- loan servicing and repayment would front rank distributions/dividends to all shareholders; and
- dividend declarations are at the discretion of the board and are subject to solvency and liquidity tests, as per the provisions of the Companies Act.

The key aspect of the above definition is that even though the free-carry shareholders do not need to fund, the funding can be raised at market related terms from the entity in which the free-carry shareholders have a shareholding in.

The MCSA respectfully submits that the above should come with some assurance from SARS that no donations tax is applicable for the free shares issuance and Treasury must include specific exemptions and at least agree to allow a deduction of the cost of the scheme for the company for tax purposes and a tax credit.

7.3.5 Trickle dividend - Paragraph 2.1.3.3

The Provisions

Paragraph 2.1.3.3 provides for a trickle dividend (as defined) of 1% EBITDA from the sixth year to qualifying employees and host communities.

The Issues

The MCSA considers the concept of a trickle dividend inappropriate for the same reasons as set forth in relation to the free carried interest in paragraph 2.1.3.2.

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Without detraction from the above, in paragraph (a) of the definition of trickle dividend, the MCSA suggests that there is no reason for the employees to elect a structure. In paragraph (b):

- the reference to servicing the funding of the structure needs to be explained since there is no such structure in relation to BEE entrepreneurs; and
- the redemption provision in paragraph (a) should also apply to paragraph (b).

The concept of dividends out of gross (as opposed to nett) earnings is punitive.

The Requests

The MCSA respectfully requests deletion of paragraph 2.1.3.3, failing which it should be amended as suggested above.

7.3.6 Disposal and recognition - Paragraph 2.1.3.6

The Provisions

Paragraph 2.1.3.6 provides for recognition on disposal, subject to provisos.

The Issues

The provisos conflict with the Judgment which provides that on a proper interpretation of the MPRDA itself, the once empowered principle applies, whether to existing rights or to new rights.

Without detraction from the above:

In paragraph 2.1.3.6 (ii) – where it states that the *"unencumbered net value must have been realised"*, this must be replaced with the following wording *"may only dispose of unencumbered shares."*

In paragraph 2.1.3.6 (iii) – where it states that *"shall only be applicable to measured effective ownership which has vested to a BEE entrepreneur"*, this must be replaced with the following wording *"will continue to be recognised for empowerment ownership purposes of the holder."*

The Requests

The MCSA respectfully requests that the provisos either be deleted or paragraphs (ii), and (iii) be amended in the manner suggested above.

7.3.7 Re-investment - Paragraph 2.1.3.7

The Provisions

Paragraph 2.1.3.7 provides that a disposing BEE entrepreneur must reinvest in the mining industry.

The Issues

The MPRDA and hence the draft 2018 Charter cannot bind BEE entrepreneurs, as they are shareholders, so that paragraph 2.1.3.7 will not be enforceable. It is also too constraining to limit the investment portfolio of the BEE entrepreneur, which could potentially amount to a violation of section 9 of the Constitution which prohibits discrimination on the basis of race.

The Requests

The MCSA respectfully requests deletion of paragraph 2.1.3.7.

7.3.8 Black shareholders in management - Paragraph 2.1.3.8

The Provisions

Paragraph 2.1.3.8 provides that management must include black shareholders.

The Issues

Paragraph 2.1.3.8 deals with employment equity and hence is misplaced in paragraph 2.1.3.

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The requirement that management must include shareholders would do no service to either the shareholder or the company in that it would force an employment relationship that may not be suitable for either. Management and shareholding are different and often unrelated concepts.

The Requests

The MCSA respectfully requests deletion of paragraph 2.1.3.8.

7.3.9 Vesting of BEE entrepreneur's shareholding – Paragraph 2.1.3.9

The Provisions

This paragraph details the vesting intervals in relation to BEE entrepreneurs' shareholding.

The Issues

This will result in an additional cost to the right holder given that shares have to vest at set intervals regardless of whether dividends are paid or not, undermining the viability of new mining projects. Vesting periods should depend on circumstances of each project rather than be inflexible.

The Requests

The MCSA respectfully requests deletion of paragraph 2.1.3.9.

7.3.10 30% for duration of right - Last sentence of paragraph 2.1.3

The Provisions

The last sentence provides for 30% to apply for duration of the right.

The Issues

This is contrary to the once empowered principle and hence contrary to the Judgment. Moreover, it is a disincentive to investment. Furthermore, the reference to a mining right should be to a new mining right.

The Requests

The MCSA respectfully requests the deletion of the last sentence of paragraph 2.1.3 and its replacement with a fast sentence indicating that a holder of a new right who has achieved 30% will be recognised as compliant for the duration of the right and will not have to restore.

7.4 Issues Relating to Beneficiation in Paragraph 2.1.4

The Provisions

Paragraph 2.1.4 provides for offsets of beneficiation against BEE ownership requirements.

The Issues

It needs to be specified whether paragraph 2.1.4 applies to existing rights, new rights, or both.

Insofar as paragraph 2.1.4 applies to existing rights it is contrary to the Judgment, which in Order 2.5.4 declared that the 2010 Charter could not retrospectively deprive holders of the benefit of full offset of beneficiation against ownership requirements. That Order will apply equally to paragraph 2.1.4 of the draft 2018 Charter insofar as the limitations in paragraphs 2.1.4(a) to (e) are concerned.

Even insofar as new rights are concerned:

- the limitations of activities in paragraphs 2.1.4(d)(i) to (v) do not accord with the definition of beneficiation as currently contained in the MPRDA or as contemplated in the Bill; and

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- the limitation in paragraph 2.1.4(d)(v) to activities or investments since 2004 is arbitrary.

Furthermore, the following difficulties arise in relation to the 11% off-set provision.

- a holder which already meets the 30% ownership target will not have available to it the 11% offset. This would have the effect of discriminating and prejudicing against those holders which already meet the 30% ownership target or those that already have a minimum of 14% BEE entrepreneurs' shareholding, who also carry out legitimate beneficiation activities that would otherwise qualify for offsets/credits; and
- the draft 2018 Charter does not give any indication of how the 11% is to be calculated. A holder will not know simply by looking at the draft 2018 Charter whether the holder has reached the 11%, or indeed what percentage its beneficiation projects have reached *vis a vis* the 30% ownership target. The beneficiation element is accordingly vague.

The Requests

The MCSA respectfully requests that the applicability or scope of paragraph 2.1.4 be clarified, and that the list of activities be amended to accord with the definition of beneficiation.

The MCSA respectfully submits that additional information will be required from the Minister regarding the 'implementation guidelines', when would these be available and who would develop them?

The MCSA respectfully submits that the requirement to submit an equity equivalents plan to the DMR for approval should also include submitting the plan to the dti for co-approval.

Licences granted under the Precious Metals Act, 2005 and under the Diamonds Act, 1986

7.5 Issues Relating to the Application of the draft 2018 Charter to Licences granted under the Precious Metals Act, 2005 and the Diamonds Act, 1986, in paragraph 3

The Provisions

The abovementioned Acts confer on the South African Diamond and Precious Metals Regulator ('Regulator") a discretion as to the extent to which the consideration of the requirements of the Mining Charter is appropriate when considering applications.

The Issues

In the platinum group metals ("PGM") sector, the smelting, refining and marketing activities currently have licenses under the Precious Metals Act ("PMA"), 2005. Section 6(1)(b) of the Precious Metals Act requires that the Regulator "*have regard to*" the mining charter when assessing an application for a licence or permission in terms of the PMA. This provision therefore confers upon the the Regulator a discretion as to how to apply the mining charter in this context, and does not oblige the Regulator to refuse the grant of a license, permit or certificate application on the basis of non-compliance with the mining charter,

Similarly, section 5(2)(a) of the Diamonds Act, 1986 ("Diamonds Act") requires only that the Regulator may, when considering an application for any licence or permit, have regard to the mining charter vesting in the Regulator a discretion as to whether or not a consideration of the mining charter is appropriate when assessing an application for a particular licence or permit. Additionally, the Regulations made in terms of section 95 of the Diamonds Act make provision only for applicants for diamond dealer's licences and diamond beneficiation licences to lodge, together with their applications, a proposed business plan, "*inclusive of the broad-based socio-economic empowerment charter developed in terms of section 100 of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002)*". No other licence or permit applications under the Diamonds Act have such a requirement.

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The Minister does not have the power, through the draft 2018 Charter, to determine that this should apply to all licence and permit applications under the Diamonds Act contrary to the provisions of the Regulations made in terms of section 95 of the Diamonds Act. Furthermore, the Minister does not have the power to over-ride the discretion conferred on the Regulator to decide whether to apply the the draft 2018 Charter in relation to a licence application under either the Diamonds Act or the PMA. To attempt to do so would be in violation of section 5(2) of the Diamonds Act and section 6(1)(b) of the Precious Metals Act, *ultra vires* the Minister's powers under the MPRDA, and unlawful and unconstitutional.

Smelting, refining and marketing activities are an integral part of a mine's value chain and are **not** operated as 'profit centres', with the actual costs of processing recharged directly back to the mines, which carry the individual mining right. The obligation of the Mining Charter to empower is correctly linked back to a mining right level as that is where value is created, through either empowerment at the holding company level or at an individual mining operation level, apportioned to the 'mining right'. To make the application of the obligations under the draft 2018 Charter mandatory on the smelting, refining and marketing activities would only increase costs of processing which would be recovered from the mines, thereby reducing the revenue of the mining right holder (empowered entity).

The indiscriminate application of the draft 2018 Charter to the downstream diamond industry has been proposed in respect of an industry that has been in steady decline. It is therefore unlikely that the downstream diamond industry will be capable of withstanding the cost of compliance with the requirements proposed in the draft 2018 Charter.

As both the precious metals industry and downstream diamonds industry are, in any event, subject to the Codes of Good Practice issued under the Broad-Based Black Economic Empowerment Act, 2003, the mandatory application of the draft Charter 2018 on these industries for purposes of furthering transformation in unnecessary. Furthermore, many of the social issues proposed to be regulated in the drafted Charter 2018 are already catered for by other applicable (and appropriate) legislation. The mandatory application of the draft 2018 Charter would create unnecessary regulatory confusion across the PGM sector and the downstream diamond industry as to the empowerment statuses of the different parts of the PGM and diamonds value chain.

Notwithstanding the above, there is no provision made in section 3 of the draft 2018 Charter for the recognition of historic BEE transactions under the Ownership element where the table in this paragraph requires compliance with the Ownership element.

Section 3 also does not provide transitional periods for the Inclusive Procurement and Employment Equity elements applicable to holders of any licences or permits in terms of the PMA and the Diamonds Act, 1986.

The table which is part of paragraph 3 contains various references to footnotes but there are no footnotes to that table. MCSA requests that footnotes be included if this section remains. Also, the table still refers to the Sustainable Development and Growth element, but this element has been removed from the draft 2018 Charter and reference to this element should be deleted.

In relation to paragraph 3(b), the reference to "*time-based graduation factor*" is unclear as there is no definition, explanation or clause in the draft 2018 Charter, which "time-based graduation factor".

The Requests

MCSA respectfully requests that operations which hold licences under the PMA and Diamonds Act, should continue to adhere to the empowerment obligations in accordance with the PMA and Diamonds Act respectively, and that the Mining Charter not be applicable to them and this section should be removed in its entirety.

MCSA also respectfully requests that it should be stated clearly that existing mining right holders that require licenses or permits in terms of the PMA and Diamonds Act must be able to rely on the

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recognition of historical BEE transactions and similarly qualify for the stated transitional periods in respect of Ownership, Inclusive Procurement and Employment Equity.

MCSA further submits that entities which are not holders of rights, permits or permissions in terms of the MPRDA (such as manufacturers of auto catalytic convertors or of jewellery) will find difficulty in applying paragraph 3 of the draft 2018 Charter to their activities. MCSA respectfully requests that those entities should comply with the transformational requirements of the PMA.

For these reasons, MCSA respectfully submits that this section should be removed in its entirety, or substantially clarified to ensure certainty.

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8 THE INCLUSIVE PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT (ESD) ELEMENT

The MCSA members fully support and want to collaborate with government (both the DMR and the dti – responsible for industrial policy development) in finding solutions for the waning manufacturing sector. Local manufacturing is critical as it will create the much-needed jobs and economic growth for the country. However, this cannot be achieved by setting unachievable targets. Inclusive Procurement and ESD must be based on a scientific study. The MCSA strongly urges the Minister to review this element.

Spend with B-BBEE suppliers and the development of local manufacturing capabilities is crucial but must be driven separately for greater impact and meaningful transformation. The MCSA proposes separating B-BBEE supplier targets from local manufacturing targets at this stage. B-BBEE Suppliers being, Black Owned, Black Women Owned, Black Youth Owned and B-BBEE compliant suppliers. The mining sector spends billions of Rands on procurement annually and the MCSA supports the focus to have this money spent with B-BBEE suppliers, since this is crucial for meaningful participation in the economy for our people.

A blunt target of 70% of total spend on mining goods manufactured in South Africa will not be achievable and will not achieve the potential of the positive linkages back into the South African economy, rather than when the prescription is based on proper scientific analysis of economically viable SA manufacturing, with the support of fact based industrial development incentives from the dti.

8.1 Issues relating to definitions and applicability of concepts under the Inclusive Procurement element

Definitions need to be clear and well understood. The MCSA suggests the use of dti CoGP definitions to align the mining industry with the rest of the economy.

8.1.1 The definition and applicability of South African manufactured goods

The Provisions

The definition of South African manufactured goods refers to goods with a minimum 60% of the value added during the assembly or manufacturing of the product being created in South Africa, and that the calculation of value added excludes profit mark-up, intangible value, such as brand value, and overheads.

The Issues

The first issue is that the definition is unclear, and it seems as if there are two alternative ways of achieving the 60% target, which differ widely in their practical implementation and potential impact:

- 60% of value added *during manufacturing*, is a tall order (very seldom achieved in manufacturing); and
- 60% of value added *during assembly* of a product seems to mean only the process of assembling a 'complete knock down kit' of a product, as an example.

The second issue is that value added excludes profit mark-up, intangible value such as brand value and overheads. This effectively means that only labour is considered "value add".

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The Requests

Targets for value added in South Africa/local content should 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. The MCSA respectfully submits that the drive to promote the procurement of "South African manufactured goods" should not be managed through the Charter but should rather be supported by the dti through local content programmes and importation tariffs. The MCSA urges the Minister to remove this target from the draft 2018 Charter. Other sectors, such as the construction sector decided to remove the local content provisions from their sector codes until the discussions and proposals on the methodologies and concepts of local content sourcing and verification were finalised with the dti and the construction industry. The mining sector would be able to learn from this sector and apply similar processes of introducing local content targets and verification once the comprehensive local capabilities study is concluded.

8.1.2 The definition and applicability of mining goods

The Provisions

The definition of mining good refers to capital and consumable goods used by the *"mining right holder or by a contractor on behalf of a right holder"*.

The Issues

The definition could be problematic if the contractor on behalf of the right holder applies the dti CoGP or any other sector Codes. In that case, the contractor should be allowed to adhere to the Preferential Procurement element of the dti CoGP or sector Codes and not the Inclusive Procurement requirements of the Charter. This requirement would pose serious challenges to the right holder, if the right holder also has to take account (or ensure) that contractors adhere to the Inclusive Procurement requirements in the Charter.

Where the contractor on behalf of a right holder also applies the Mining Charter, then the definition of mining goods can apply.

The Requests

The MCSA respectfully requests that a distinction as described above be applied to requests that the recommendations made above be applied as suggested above.

8.1.3 The concept of BEE women entrepreneurs

The Provisions

There is no definition of BEE women entrepreneurs. However, the deduction made is that this refers to BEE entrepreneurs as defined, namely, referring to Black enterprises that are at least 51% Black Women Owned (BWO).

The Issues

This 51% BWO requirement is too high a target and may create unintended consequences, such as fronting and misrepresentation. Women empowerment is paramount for the transformation of South Africa; however, the MCSA believes this BWO definition should be aligned to the dti CoGP target of at least 30% instead of 51%.

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The Requests

The MCSA respectfully requests that a definition be added for BEE women entrepreneurs, that refers to Black enterprises that are at least 30% owned by black women in which black women hold at least 30% of exercisable voting rights and 30% of economic interest.

8.1.4 The definition of BEE compliant company

The Provisions

The definition of BEE compliant means a company with a minimum B-BBEE level 4 status in terms of the dti CoGP and a minimum 26% black ownership.

The Issues

The dti CoGP has a minimum 25% +1 vote black ownership requirement and most companies have been structured accordingly. The DMR's requirement of 26% black ownership (instead of the 25% +1 vote), would create huge unjustifiable costs for all companies that have met and are compliant with the dti CoGP or their sector code. These companies would now have to restructure their B-BBEE deals to meet the DMR's requirements, which are over and above their own sector code or dti CoGP. This would also bring regulatory uncertainty on Ownership provisions for other sectors of the economy, such as banking, manufacturing, services, among others, which is undesirable.

The Requests

The MCSA respectfully requests that this definition be amended to align with the dti CoGP and refer to *"minimum 25% +1 vote black ownership."*

8.1.5 The concept of non-discretionary expenditure

The Provisions

There is no definition under the definitions section of the draft 2018 Charter, however, the footnote 2 on the Inclusive Procurement and ESD scorecard refers to the calculation of goods and services spend as not including *"non-discretionary such as spend on buildings, roads, utilities (electricity and water) and land rates."*

The Issues

Procurement spend on buildings and roads should not be included under non-discretionary spend.

The Requests

The MCSA respectfully requests that a definition be included in the definitions section to avoid ambiguity and that it be accurate and correct. Procurement spend on buildings and roads should not be included under non-discretionary spend.

8.1.6 The definition of Youth and the applicability of 51% youth owned and controlled enterprises

The Provisions

The definition of youth refers to young South African citizens between the ages of 18 and 35 years old.

The Issues

South Africa's National Youth Policy, as well as its National Youth Commission Act and its integrated Youth Development Strategy, define youth as 14 to 35 years of age. The draft 2018 Charter has a slightly different age range, which makes for policy inconsistencies.

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51% youth owned and controlled enterprises means that the enterprise requires that 51% of its shareholding/interest be in the hands of youth. The DMR is not clear if this includes youth of all races, as long as they are South African citizens.

Youth is defined by an age range. This means that once a shareholder/s turns 36 years old, they are no longer youth as defined.

Currently, there is no way of ascertaining from a B-BBEE certificate or an affidavit for Exempted Micro Enterprises ("EMEs") and some Qualifying Small Enterprises ("QSEs") what percentage shareholding is held by the youth.

The Requests

The MCSA respectfully requests that the definition for Youth be consistent with other laws as stated above.

It also recommends that if a contract/agreement is concluded with a person/s whilst they are within the Youth age range, that the person/s be considered/deemed *"Youth"* for the entire duration of the contract/agreement.

Lastly, the MCSA respectfully recommends that the Minister consult the dti and have the "Youth" category identifiable on a B-BBEE certificate or affidavit. If that is not resolved, then it recommends that the Minister align with the dti CoGP and apply "designated suppliers" instead of "Youth". Designated suppliers include Youth, people living with disabilities, people living in rural areas and military veteran owned suppliers.

8.2 Issues Relating to Procurement of Mining Goods in paragraph 2.2.1

The Provisions

Paragraph 2.2.1 provides that 70% of total mining goods procurement spend must be on South African manufactured goods. It further states how this 70% target must be apportioned amongst Black entrepreneurs, BEE women entrepreneurs or 51% youth owned and controlled enterprises, and BEE compliant companies. A five-year transition period is provided.

The Issues

There are basically two separate targets being lumped into one under this provision, namely the requirement to purchase mining goods from B-BBEE suppliers (all the categories mentioned earlier) and the requirement to have these mining goods manufactured in South Africa. Spend with B-BBEE suppliers and the development of local manufacturing capabilities are both crucial but must be driven separately for greater impact and meaningful transformation.

The 70% requirement is a significant problem for mining of certain minerals, particularly those which require the buying of very large capital equipment from offshore sources which are the sole source of supply of such equipment. The above requirements are therefore unduly prescriptive and factually challenging. The MCSA respectfully suggests that the Minister should allow the collaboration efforts/study by industry and government to provide sound local manufacturing targets that can be embodied in paragraph 2.2.1.

See **Appendix 6** for the above requirements impact on South Africa's international trade obligations which can be summarised as follows:

The requirements imposed by the draft 2018 Charter in relation to the procurement of goods and services may violate South Africa's international obligations under the General Agreement on Tariffs and Trade ("GATT") and the General Agreement on Trade in Services ("GATS").

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Under the GATT, South Africa is obliged to afford imported products "treatment no less favourable than that accorded to like products of national origin", and thus not to apply any regulatory measures that afford preference or protection to domestic products over imported products. Under the draft Charter, however, right holders will be unable to procure any more than 30 per cent of their mining goods from foreign suppliers, which clearly gives domestic producers a significant advantage over their foreign competitors.

Similarly, under the GATS, South Africa is obliged to accord foreign service providers "treatment no less favourable than domestic suppliers". Under the draft 2018 Charter, however, right holders will be unable to procure any more than 20 per cent of their services from foreign suppliers, who must, in addition, relinquish at least 0.5 per cent of their annual turnover generated from local mining companies.

The imposition of quotas of procurement from domestic suppliers with specific empowerment profiles potentially also violates the GATS' specific prohibitions on measures that limit foreign capital participation in service sectors and measures that restrict or require specific types of legal entities or joint ventures through which a supplier may supply a service.

While a breach of either the GATT or GATS will not directly impact right holders, it could make South Africa vulnerable to challenges by other member states of the World Trade Organisation ("WTO"). If the implementation of the new Mining Charter places South Africa in breach of its obligations under the GATT and GATS, it will either have to negotiate a modification of those obligations or face the risk of a referral to the WTO's Dispute Settlement Body ("DSB").

In the case of the former, South Africa will have to tender necessary *"compensatory adjustments"* for its failure to extend the necessary protection to investors from other member states, which could result in other sectors of the economy being deprived of protections afforded by the GATT and GATS. If the matter is referred to the DSB, some or all of South Africa's rights under the GATT and GATS could be suspended until the dispute is resolved. Predictably, such a suspension will have a detrimental impact on the entire economy and not simply the mining industry.

For all of the above reasons, paragraph 2.2.1 is not based on factual availability and hence is not capable of implementation.

The Requests

The MCSA respectfully requests the separation of B-BBEE supplier requirements from the local content/SA manufacturing requirements, as detailed above. It further proposes that the 70% mining good target remain staggered over a 5-year period as detailed in the draft 2018 Charter, with a split/ apportionment as follows:

Year 5 targets: total 70% Mining goods

- BEE Entrepreneurs (51% BO) – 20%
- BEE women entrepreneurs (30% BWO) – 10%
- 51% Black Youth Owned enterprises OR 51% Black Designated Suppliers – 5%
- BEE Compliant companies – 35%

Also, paragraph 2.2.1 (a) refers to spend with *"Black entrepreneurs"*, whereas it should refer to the defined term *"BEE entrepreneurs"* for consistency.

The MCSA respectfully requests the amelioration of paragraph 2.2.1 so as to indicate that it applies only insofar as the 70% mining goods requirement is available in South Africa.

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The MCSA implores the Minister to insert an Imports Exclusion clause that provides that where the holder can show that output capacity will be detrimentally affected by domestic supply shortages, the holder should be entitled to procure mining goods manufactured outside of South Africa.

8.3 Issues Pertaining to Procurement of Services in paragraph 2.2.2

The Provisions

Paragraph 2.2.2 provides for 80% BEE procurement of services, with specified apportionments of 60% from BEE entrepreneurs, 10% from BEE women entrepreneurs or 51% youth owned enterprises and 10% from BEE compliant companies. A two-year transitional period is provided.

The Issues

The 80% target is apportioned in a manner that over-emphasises the spend with BEE entrepreneurs – 60% of the 80%. This leaves very little for the other B-BBEE supplier categories. The MCSA recommends that the 80% target be apportioned as follows:

- BEE Entrepreneurs (51% BO) – 30%
- BEE women entrepreneurs (30% BWO) – 10%
- 51% Black Youth owned enterprises OR 51% Black Designated Suppliers – 10%
- BEE Compliant companies – 30%

A two-year transition period is not sufficient considering that all the B-BBEE Supplier requirements are new, except for the BEE Compliant companies' requirement. The industry would need more time to identify, develop in most cases and source from these suppliers. The MCSA therefore recommends a five-year transition period similar to that offered for mining goods.

The Requests

The MCSA respectfully requests that the recommendations made above be applied as suggested.

8.4 Issues Relating to Verification of Local Content in paragraph 2.2.3

The Provisions

Paragraph 2.2.3 provides that a holder must provide proof of local content of mining goods in the form of certification from the SABS or any other entity designated by the Minister.

The Issues

The Minister of the dti recently dissolved the board of the SABS and placed it under administration in terms of section 49(2) of the Public Finance Management Act, 1999, as a result of a lack of service delivery and a failure to perform its mandate. This action by the Minister suggests that the SABS is not in a position to carry out its existing mandates, let alone the additional responsibilities set out in the draft 2018 Charter[13].

Certification by the SABS annually of all procurement is not achievable. The SABS has confirmed that it is currently not up to the task and is hoping to acquire the necessary capacity. This prescription dwarfs the annual auditing requirements of all companies in South Africa by the available auditing firms into oblivion. The alternative 'entity designated by the Minister' is not defined.

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[13] See http://www.polity.org.za/article/sa-south-african-bureau-of-standards-placed-under-administration-2018-07-06

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The onus of proof should not lie with the right holder, but rather with the suppliers. Also, the verification of each item would be cumbersome. If one company has over 1million line items, the SABS would need an extensive amount of time to verify that company's line items. To verify the entire industry would require multiple verification agencies. The MCSA recommends that a supplier be verified for and provided with a local manufacturing percentage, instead of each line item being verified for local content.

The Requests

The MCSA respectfully requests that the local content requirement and therefore the verification be separated and removed from the Charter until a feasibility study is concluded and more realistic targets are set. The MCSA also recommends that the SABS and other verification agencies be provided with adequate time to develop the verification skills and capacities required, the industry purchases millions of items and for each one of these to be verified and provided with a local content certificate is noble, but will take time.

8.5 Issues regarding Enterprise and Supplier Development in paragraph 2.2.4

The MCSA supports the general purpose of ESD. However, commitments to develop and support emerging, micro and small enterprises cannot be borne by the mining sector alone. The objective of building the South African industrial base is a national one. The MCSA supports the offset of ESD against the Inclusive Procurement targets as outlined in the draft 2018 Charter. The only concern under this sub-element relates to the minimum duration for a contract between a right holder and the recipient supplier.

The Provisions

Paragraph 2.2.4.3 (d) - requires that a contract between a right holder and the recipient supplier must be a minimum of five (5) years.

The Issues

Five years as a supplier or enterprise development beneficiary is too long. This will limit opportunities for more enterprises to be developed and assisted by the right holder. A developmental programme cannot be longer than three years.

The Requests

The MCSA respectfully requests that the duration of the contract between a right holder and the recipient supplier be for a maximum of three years. The MCSA further recommends that there should be incentives in place to ensure that the enterprise development beneficiaries graduate and become suppliers to the right holder where possible and for the supplier development beneficiaries to be awarded contracts and provide goods and services to the right holder. In this way the ESD programmes developed would meet the objectives and purpose envisaged in the draft 2018 Charter.

Furthermore, the MCSA respectfully requests that a "benefit factor matrix" similar to the one found in the dti CoGP be adopted, stipulating what types of development costs will be recognised and to what extent. This is required to ensure consistency and clarity among all mining companies.

8.6 Issues regarding Research and Development ("R&D") in paragraph 2.2.5

The MCSA's initial submission was that R&D is not a topic that forms part of s100(2) and therefore cannot be dealt with in the Charter and is *ultra vires*. It does not deal with transformation in s100(2)(a) or with any of the objects in s100(2)(b). However, the MCSA agreed to include R&D during the MCTTT negotiations, but now it seems that the draft 2018 Charter brings back a requirement, in a slightly different format, that all social partners proposed to exclude from the Charter.

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The Provisions

Paragraph 2.2.5 provides that a right holder must spend a minimum of 70% of its total R&D budget on South African based research and development entities; and that a minimum of 50% of the 70% be spent on South African Public Academic Institutions or Science Councils.

The Issues

It was agreed during the MCTTT negotiations that 70% of the R&D budget be spent in South Africa and that no target or further prescription would be made regarding the R&D spend. The return of the 50% of 70% prescription is a concern as there is no evidence these South African Public Academic Institutions or Science Councils have the knowledge or expertise to undertake the R&D required by the industry.

The Requests

The MCSA respectfully requests the deletion of the sentence, *"A minimum 50% of the 70% indicated above must be spent at South African Public Academic Institutions or Science Councils."*

8.7 Issues Relating to Processing of Samples in paragraph 2.2.6

The Provisions

Paragraph 2.2.6 provides that a holder must use South African based companies for analysis of 100% of mineral samples and may not use foreign based facilities or companies without Ministerial consent.

The Issues

There is no indication of the factors that the Minister will take into account in exercising his discretion. It should be provided that where there is no sampling capacity in South Africa the right holder may procure foreign sampling services and should be able to prove lack of capacity to the DMR. A further practical difficulty arises in that 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 grant his written permission. The Minister may not be able timeously to process such requests and the consequences for the holder may be significant.

The Requests

The MCSA accordingly respectfully requests that the provisions relating to Ministerial permission be amplified as suggested above.

8.8 Issues Relating to Contribution by Foreign Suppliers in paragraph 2.2.7

The Provisions

Paragraph 2.2.7 provides that a foreign supplier must contribute 0,5% of its annual turnover towards development of suppliers to be directed to the Mandela Mining Precinct for research purposes.

The Issues

The Mandela Mining Precinct is critical to positioning South Africa as a core driver of world class technology and manufacturing capabilities and solutions for the development of the economy. As a Mining Phakisa initiative, it enjoys the support of the MCSA and its members. It deserves to be supported and the MCSA is encouraged that the DMR acknowledges this too. However, this requirement does not fall within the ambit of s100(2)(a) or (b) of the MPRDA and is therefore unauthorised and *ultra vires* and should therefore be deleted.

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This contribution is nothing other than a tax, levy, duty or surcharge imposed on goods and services supplied by foreign suppliers and is not supported. Therefore, this element should be contained in a Money Bill. The draft 2018 Charter is not a Bill let alone a Money Bill. The Minister has no power to make or even introduce Money Bills or to raise revenue. That power is reposed in the Minister of Finance.

The wording "*towards development of suppliers to be directed to the Mandela Mining Precinct for research purposes*" is unclear. For example, the words "*to be directed*" are obscure as to whether they are intended to mean that payments must be made by the foreign supplier to the Mandela Mining Precinct.

Paragraph 2.2.7 of the draft 2018 Charter purports to have extra-territorial application, which it surely may not do. Were a foreign supplier to have expatriated 100% of its annual turnover there would be no mechanism under the draft 2018 Charter for enforcing the payment of the contribution of turnover to the Mandela Mining Precinct. Therefore, the draft 2018 Charter would be unenforceable *viz a vis* a foreign supplier with no assets in South Africa. Paragraph 2.2.7 is therefore incapable of compliance by a holder. Foreign suppliers are not holders and are therefore not subject to the Minister's jurisdiction.

The Requests

The MCSA accordingly respectfully requests that paragraph 2.2.7 be deleted.

8.9 Issues Regarding Submission of Data in paragraph 2.2.8

The Provisions

Paragraph 2.2.8 provides that a right holder must submit data on their annual purchases by using a common product classification system.

The Issues

This is acceptable in principle and in line with one of the recommendations of the draft procurement study funded by dti. However, implementation of such a system would be costly and time consuming. The common product classification system applied would need to be agreed with the industry. There are a few systems which could be considered, namely:

- HS - Harmonized Commodity Description and Coding System;
- SITC - Standard International Trade Classification; and
- UNSPSC - The United Nations Standard Products and Services Code.

The Requests

The MCSA respectfully requests that a system be considered as part of the local content study by the dti mentioned earlier.

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9 THE HUMAN RESOURCE DEVELOPMENT ELEMENT

The MCSA fully supports the requirement of 5% of leviable amount being contributed by right holders towards investing in their employees and non-employees. The mining industry is knowledge based, and the MCSA will continue to play its part in producing a skilled, trained and diverse workforce whilst also developing young people, ex-miners and our communities at large. This is the main reason why the MCSA disagrees with the splitting of the target as prescribed in the draft 2018 Charter, where a portion of this investment is to be spent on R&D. The full 5% of leviable amount must be used for the benefit of employees and community members. Youth unemployment and skills shortages remain huge concerns for the country and these funds would be better utilised by mining companies in addressing these challenges. Programmes such as the Youth Employment Services ("YES") programme that promote job creation for Youth are recognised under the dti CoGP. These types of programmes should also be recognised under the final Mining Charter.

9.1 Issues Relating to Human Resource Development (HRD) in paragraph 2.3

9.1.1 The splitting of the 5% of the leviable amount

The Provisions

Paragraph 2.3 requires a holder to invest 5% of the leviable amount (as defined in the Skills Development Levy Act, 1999) on essential skills development, apportioned as to 3,5% on essential skills development activities and as to 1,5% towards South African public academic institutions, science councils or research entities, and both of which must be apportioned in proportion with national or provincial demographics.

The Issues

The splitting of the 5% of leviable amount, where 1.5% would have to be used for R&D purposes is not supported. This amounts to R1.8 – R2.1bn per annum that will be taken away from employee skills development, youth and unemployed people's bursaries and scholarships and other skills and training requirements and given to science councils and research entities.

The research referred to does not relate to the skills development of employees, but rather to research into finding solutions in exploration, mining, processing, technology efficiency (energy and water use in mining), beneficiation and environmental conservation. R&D is a sub-element of Inclusive Procurement, as important as it is, should not be funded out of employees' skills development funds.

Investments under HRD should be aligned with the objectives and targets set under the Employment Equity element. The EE targets in the draft 2018 Charter are progressive and will require that employees and potential employees (youth, unemployed persons) be provided with skills development opportunities. This R1.8 – R2.1bn investment should therefore not be directed towards R&D.

The Requests

The MCSA accordingly, respectfully requests the deletion of paragraph 2.3 (b) and the amendment of paragraph 2.3 (a) to ensure that the full 5% of the leviable amount is invested in employees and non-employees.

9.1.2 The R&D expenditure must qualify for a tax allowance

The Provisions

Paragraph 2.3 (c) refers to the R&D expenditure which must qualify for an R&D Tax allowance in terms of Income Tax Act, Section 11D.

The Issues

Without detracting from the MCSA's request above that the R & D allocation in paragraph 2.3(a) be deleted, this provision in paragraph 2.3(c) appears as a sweetener; however, it is not. The practicality

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in terms of the time consumed, the amount of paper work and motivations, the discretion applied as well as the lead times in applying for this minor tax allowance is sometimes not worth it. This should not be compulsory.

The Requests

The MCSA respectfully requests the deletion of paragraph 2.3 (c).

9.1.3 Definition of national and provincial demographics

The Provisions

HRD and Employment Equity refer to national or provincial demographics.

The Issues

National or provincial demographics are too vague. One would never know what they are being measured against, because the national or provincial demographics could relate to adult population or all/general population or anything really. The MCSA recommends that the DMR align to the dti CoGP and use national and/or provincial Economically Active Population (EAP) statistics instead.

The Requests

The MCSA respectfully requests the use of national and or provincial EAP statistics, to align with the rest of the economy. EAP includes people from 15 to 64 years of age who are either employed or unemployed and who are seeking employment. The EAP statistics are meant to provide guidance to employers to assist them in determining the resource allocation and subsequent interventions that are needed to achieve an equitable and representative workforce. EAP statistics are also released annually.

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11 THE EMPLOYMENT EQUITY ELEMENT

The MCSA supports workplace diversity and the drive towards equitable representation at all levels of a company to promote social cohesion, transformation and competitiveness of the mining industry. The MCSA members will continue to promote equal opportunities and fair treatment in employment. Women in mining numbers are low across the globe and SA is no different. However, the MCSA will continue to promote employment opportunities for women, especially Black women as they are the least represented in the mining industry. As discussed and presented during the MCTTT, target setting for this element must be based on actual numbers of employees and adapted for corrective and equitable recruitments, training, retentions and promotions. The MCSA appreciates and fully supports the provision that requires companies to prepare and present a five-year plan within six months of the publication of the final Mining Charter.

The MCSA members will endeavour to achieve and, where possible, go beyond compliance as it has done in previous years under this element. The targets are a huge stretch. However, the MCSA members will develop policies and procedures that will assist them to reach their goals.

Illustrated below, are the actual percentages of employees in the industry as against the targets set in the draft 2018 Charter. The last column depicts the expected change in percentages over a five-year period. As can be seen below, the targets set for Black Women in almost all categories are extremely ambitious, and in most cases, they are more than double the actuals (>100% growth).

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Table: Actual 2016 Employment Equity % vs Targets in the draft 2018 Charter.

Employment Equity	Actuals *2016	Targets (Draft 2018)	Expected change %
Black Board members		50%	
Black Women board members		20%	
Black Top Management**	31%	50%	61%
Black Women Top Management**	7%	15%	114%
Black Senior Management	32%	50%	56%
Black Woman Senior Management	7%	15%	114%
Black Middle Management	44%	60%	36%
Black Woman Middle Management	12%	20%	67%
Black Junior Management	65%	70%	8%
Black Women Junior Management	12%	25%	108%
Black employees – Core and Critical skills		60%	
Employees with disabilities		1.5%	

*Commission for Employment Equity report 2016 **Includes Executive Management

The table above represents Black people, not HDSAs as was previously measured under the Mining Charters or as per the MPRDA currently. The MCSA will fully support the use and applicability of Black people instead of HDSAs, in the spirit of progressive transformation when the MPRDA is amended and gazetted under this element and other elements except for existing rights under the Ownership element. In existing rights or pending applications where white women have been involved in Ownership transactions, they should be recognised for the duration of the mining right.

11.1 Issues Relating to Employment Equity in paragraph 2.4

10.1.1 Definition and application of core and critical skills 2.4.7

The Provisions

The definition *"refers to science, technology, engineering and mathematical skills ("STEM") across all organisational levels within both production and operational part of a mining company."*

The Issues

This definition is too narrow, since STEM skills are only a part of core and critical skills required in the mining industry. The definition in the Reviewed Mining Charter 2017 ("RMC17") was more accurate, stating that core and critical skills *"must include technical representation across all organisational levels…"*. This is broader than just STEM.

The Requests

The MCSA respectfully requests that the definition in the draft 2018 Charter be replaced by the one found in the RMC17 as stated above or it be replaced by the one found in the dti CoGP which reads, *"skills that are value adding, cannot be outsourced, within the production/operational of the value chain, as opposed to the supply side, services or downstream operations."*

Again, the MCSA respectfully requests the use of the national and/or provincial EAP targets (as explained earlier) instead of national or provincial demographics.

10.1.2 Board and executive/top management targets including BEE shareholders 2.4

The Provisions

The last paragraph in 2.4 indicates that the board and executive/top management targets must include BEE shareholders

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The Issues

The MCSA understands the principle of inclusion of BEE shareholders in active participation in the management and control of the mining industry, as well as skills transfer, however, there will be no enforceable accountability and obligations on representatives of host communities and BEE entrepreneurs participating in executive/top management levels, relating to corporate governance and confidentiality. Fiduciary duties as officers of the company do not apply to these representatives.

The inclusion of representatives of BEE shareholders who are *"qualifying employees"* on executive/top management will also be impractical as this would mean that these employees would no longer be considered to be *"qualifying employees."* As stated previously, the requirement that management must include shareholders would do no service to either the shareholder or the company in that it would force an employment relationship that may not be suitable for either. Management and shareholding are different and often unrelated concepts.

The Requests

The MCSA respectfully requests that this provision in the last paragraph of 2.4 be deleted.

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12 THE MINE COMMUNITY DEVELOPMENT ELEMENT

The MCSA supports the MCD objectives and strongly believes that mining companies (with the cooperation of key stakeholders such as communities, local and national government) should help facilitate the creation of thriving and sustainable communities (host communities and labour sending areas) where community members are active participants in the development of their communities during the entire mine life cycle, including closure, developed in partnership with other mining companies, government and other business sectors.

The MCSA supports the provisions in the draft 2018 Charter that de-emphasise the link between Integrated IDPs and SLPs, and emphasises a more constructive approach where the mines, municipalities, mine communities, traditional authorities and other affected stakeholders identify developmental priorities for mine communities. It is common cause that mining companies spend a substantial amount, if not the majority of their SLP budgets, on infrastructure related projects that are in municipal IDPs. Yet at the same time, municipalities underspent R53bn as at July 2017 (made up of Capital Expenditure (R15.8b), Operational Expenditure (R38.4b) and Conditional Grants (R4.3b).[14] Mining companies must be allowed more room to focus on projects that are important to communities, such as health, education and, especially, income-generating projects.

The provisions relating to transparency and collaboration are welcomed and fully supported. At the Mining Charter Summit of 7-8 July community members proposed that SLPs should be approved by the DMR within 90 days of submission and that the approved SLPs should be made available to communities and the public within 30 days. The MCSA also supports this.

The MCSA respectfully submits that the proposed wording above for the draft 2018 Charter would also need to be included in the regulations in terms of the MPRDA.

The MCSA's concern relates to target setting for MCD, in which regard the MCSA strongly urges the Minister to reconsider agreeing to a target for this element. The MCSA proposes a target be set at 1% NPAT, this would be in line with the Socio-economic Development ("SED") target of 1% NPAT applicable under the dti CoGP, it is also the target that the industry currently uses for MCD contributions.

12.1 Issues Relating to Mine Community Development in paragraph 2.5

11.1.1 Definition and application of mine community

The Provisions

The third paragraph of paragraph 2.5 provides that for purposes of implementation of Social and Labour Plans and Mine Community Development projects, the term "Mine Community" refers to *"communities where mining takes place, major labour sending areas, adjacent communities within a local municipality, metropolitan municipality and/or district municipality"*.

The Issues

The definition in the draft 2018 Charter is too broad and is not in alignment with the mine communities that benefit from the Local Economic Development ("LED") section of approved SLPs.

The Requests

The MCSA respectfully requests that the latter part of the definition excludes *"adjacent communities within a local municipality, metropolitan municipality and/or district municipality"*, or at the very least excludes *"adjacent communities within a metropolitan municipality and/or district municipality"*.

Furthermore, the MCSA respectfully submits that the second last paragraph of paragraph 2.5 indicates that amendments of SLP commitments must be approved in terms of s102 of the MPRDA. However,

[14] Local Government Revenue & Expenditure July 2016 June 2017

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section 102 of the MPRDA does not refer to amendment of SLPs, that topic being dealt with in MPRDA regulation 44. The MCSA respectfully requests that this be amended accordingly.

13 THE HOUSING AND LIVING CONDITIONS ELEMENT

The MCSA and its members support the objectives of the Housing and Living Conditions elements. Human dignity and privacy of mine employees are paramount to expedite transformation in the sector.

13.1 Issues Relating to Housing and Living Conditions in paragraph 2.6

The Provisions

"Mining companies must improve the standard of housing and living conditions of mine employees as stipulated in the Housing & Living conditions standard"

The Issues

The wording in paragraph 2.6.1 may be interpreted to mean that mining companies are obliged to provide affordable housing.

The Requests

The MCSA respectfully requests that it be clear and understood that in this regard companies would be in compliance with this element if they provide access for their employees to decent and affordable housing through means such as housing allowances, subsidies, etc.

The MCSA notes that the industry has been providing housing allowances and subsidies to employees. In 2017, the average Living Out Allowances for Category 4 (entry level) underground employees in the bargaining unit were R2100 in the Gold sector, R7332 in the Coal sector and R2150 in the Platinum sector.

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14 APPLICABILITY TO THE 2018 CHARTER

14.1 Issues Relating to the Applicability of the 2018 Charter in paragraph 6

13.1.1 Applicability to Prospecting Rights

The Provisions

The second sentence of paragraph 6 provides that the draft 2018 Charter applies also to prospecting rights as contemplated in s17(4) of the MPRDA.

The Issues

On the above wording it seems that the entire draft 2018 Charter would be applicable to prospecting rights. This applicability is undesirable from the perspective of encouragement of prospecting investment in South Africa. The provisions regarding Ownership alone would be to make such investments more unattractive, as is already demonstrated in South Africa's dismal Greenfields prospecting performance. To then include Inclusive Procurement, ESD, EE and all the rest of the Charter elements will have continued dire, if not crippling, consequences for prospecting. The applicants for or holders of prospecting rights are mainly venture capital funded exploration companies, which have no income stream. Rather, government should reduce any red-tape regarding Greenfields prospecting, and really open up the country for a prospecting boom. Only when viable and bankable potential projects are identified, and an application is made for a mining right, should the Mining Charter apply.

The Requests

The MCSA respectfully requests that the Minister should not apply the Ownership requirements of the Mining Charter, or any other elements of the Charter to prospecting rights.

The MCSA respectfully submits that if the Minister makes a request in terms of s17(4), it needs to be clarified whether the provisions of the draft 2018 Charter apply with the necessary changes also to existing prospecting rights, pending prospecting right applications, and or new prospecting rights.

The MCSA also respectfully requests that when mining right applications are made pursuant to the holding of an existing prospecting right (i.e. a prospecting right which exists prior to the coming into operation of the draft 2018 Charter) such applications should be processed and granted in terms of the provisions of the 2010 Mining Charter, and the resultant granted mining right should be stated to be deemed to be an existing mining right as defined in and for purposes of the draft 2018 Charter.

13.1.2 Ring-fencing of ownership element

The Provisions

The third sentence of paragraph 6 provides that the ownership element is ring-fenced which requires 100% compliance at all times.

The Issues

However:

- it is not clear whether this sentence is intended to apply to existing mining rights, to new mining rights, or to both;
- insofar as this sentence is intended to apply to existing mining rights it conflicts with paragraphs 2.1.1.1 and 2.1.1.2 of the draft 2018 Charter and with the Judgment. So that it should be made clear that the second sentence does not apply to existing mining rights; and
- insofar as the second sentence applies to new mining rights, it also conflicts with the Judgment, and in any event is contrary to the object of attraction of mineral investment.

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The Requests

The MCSA respectfully requests the deletion of the third sentence in favour of reliance on the specific ownership provisions where they appear in paragraphs 2.1.1.1, 2.1.1.2, 2.1.1.3, and 2.1.1.4, of the draft 2018 Charter.

13.1.3 Definition of Junior Miners

The Provisions

The fourth sentence of paragraph 6 provides that a Junior Miner, *"may make representations to the Minister regarding the extent to which the Mining Charter elements shall apply"*.

The Issues

The concept of "*Junior Miners*" is not defined and may be misapplied. The MCSA requests that the following definitions be adopted:

"Junior Miners" shall mean Prospectors, Mine Developers, Micro Mine Enterprises, Small Scale Mining Enterprises, Medium Scale Mining Enterprises, as well as Mining Permit holders.

"Prospectors" shall mean applicants for or holders of prospecting rights in terms of MPRDA and which holders and their holding companies do not have revenue which is generated from mining rights.

"Mine Developers" shall mean applicants for or holders of mining rights in the first three years of the relevant mining right calculated from the date of the granting of the right and which holders and their holding companies do not have revenue which is generated from other mining rights which when aggregated, exceed R500 million in the past tax year.

"Micro Mine Enterprises" shall mean applicants for or holders of mining rights or mining permits and which had a total Revenue generated in the past tax year of less than R10 million, which employ a maximum of 150 employees, and which holders and their holding companies do not have revenue generated from other mining rights which when aggregated, exceeds R500 million in the past tax year, and includes any diamond mining enterprises which fall into the following categories:

- Artisanal Diamond Miners - employ a maximum of 20 employees;
- Mid-tier Diamond Miners - employ between 20 and 60 employees; and
- Upper-tier Diamond Miners - employ between 60 and 150 employees.

"Small Scale Mining Enterprises" shall mean applicants for or holders of mining rights or mining permits that had a total revenue in the past tax year of R10 million or more and less than R50 million, which employ between 150 and 250 employees, and which holders and their holding companies do not have revenue generated from other mining rights which when aggregated, exceeds R500 million in the past tax year.

"Medium Scale Mining Enterprises" shall mean applicants for or holders of mining rights that had a total revenue in the past tax year of R50 million or more and less than R500 million, employs between 250 and 500 employees, and which holders and their holding companies do not have revenue generated from other mining rights which when aggregated, exceeds R500 million in the past tax year.

"Mining permit holders" shall mean holders of mining permits in terms of the MPRDA.

"Holding companies" shall mean holding companies as defined in the Companies Act, 2008.

13.1.4 Applicability to Junior Miners

The "one size fits all" approach to the draft 2018 Charter and MPRDA is not viable for the various component parts that make up the mining value chain. At the earlier stages of development smaller companies are extremely vulnerable as they are drawing their capital needed for development from

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borrowed money, and it is only after they reach the production stage that they can realise any revenue. It is fully acknowledged that the early stages are entry points for smaller BEE entities and they should not be required to comply with the same Charter requirements that apply to large scale multi-national companies. For these reasons and to stimulate and encourage growth in this sector of the industry the MCSA recommends that *"Junior Miners"* be afforded exemptions from full compliance with the Charter.

The Requests

The MCSA respectfully requests that the definitions and the applicability of Junior Miners be adopted as suggested above. The table below illustrates the exemptions requested:

Table: Different categories of Junior Miners and the exemptions from the Charter

Emerging Miners	Prospectors (exploration)	Mine Developers (from the Emerging Miner Sector)	Miners			
			Micro Mining Enterprises	Small Scale Mining Enterprises	Medium Scale Mining Enterprises	Large Scale Mining Enterprises
Ownership	Exempt	15% ownership by BEE shareholders	Exempt	5% BEE entrepreneurs 2% Communities - NPAT share 2% Employees – NPAT share	15% BEE entrepreneurs 2% Communities - NPAT share 2% Employees – NPAT share	Full Compliance
Human Resource Development	Exempt	25% requirement for full compliance	Exempt	25% requirement for full compliance	60% requirement for full compliance	Full Compliance
Mine Community Development	Exempt	Exempt except for housing plan accompanying the Mining Right application Compliance with SLP undertakings	Exempt Compliance with SLP undertakings where applicable	30% requirement for full compliance Compliance with SLP undertakings	60% requirement for full compliance Compliance with SLP undertakings	Full Compliance
Procurement, Supplier & Enterprise Development	Exempt	50% requirement for full compliance	Exempt	30% requirement for full compliance	60% requirement for full compliance	Full Compliance
Employment Equity	Exempt	50% requirement for full compliance	Exempt	30% of the requirement for full compliance	60% of the requirement for full compliance	Full Compliance

* Any concession should be limited to Black Entrepreneurs and should allow for an increase in BEE level to full compliance as the operator progresses to mining operations at increased scale

14.2 Non-Compliance with the draft 2018 Charter

13.2.1 Issues Relating to Non-Compliance in paragraph 8

The Provisions

Paragraph 8 purports to provide that a holder who has not complied with the Ownership element and falls between levels 6 and 8 of the draft 2018 Charter scorecard will be regarded as non-compliant and

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in breach of the MPRDA and will be dealt with in terms of s93 read in conjunction with ss47, 98 and 99 of the MPRDA.

The Issues

Paragraph 8 contravenes and conflicts with the Judgment, Orders 2.3 and 2.6 which clearly indicate that failure to meet the requirements of the Charters does not constitute a breach of the MPRDA and hence that ss47, 98 and 99 do not apply to such failure. In that regard the MCSA also notes that the Bill has not yet been re-enacted, assented to, or put into operation, and that in any event the Bill may yet be subject to further constitutional challenges.

The MCSA repeats, as it has set out above, that the draft 2018 Charter does not constitute a regulation and does not constitute legislation, and instead constitutes formal guidelines or statements of policy which are mandated by s100 of the MPRDA. The Minister cannot by decree elevate the status of the draft 2018 Charter to that of legislation and cannot by decree provide in the draft 2018 Charter that non-compliance therewith will render the mining company in breach of the MPRDA and subject to the provisions of ss93, 47,98 and 99 of the MPRDA. The MCSA reiterates that it remains committed to a mutually agreed Mining Charter as an instrument for achieving transformation

All of the above is more fully set out in the Judgment, as also in appendix 3 hereto.

The Requests

The MCSA accordingly, respectfully requests the deletion of paragraph 8.

14.3 SCORECARD: MINING CHARTER REVIEW

The MCSA supports in principle the development of a scorecard and supports the removal of HRD and MCD from ring fenced elements. This scorecard is an improvement from the past scorecards with binary targets and three ring fenced elements. However, the MCSA respectfully recommends a closer alignment with the dti CoGP scorecard and weightings. The MCSA also recommends that the scorecard be aligned to the requests/suggestions made throughout this document.

Although, Inclusive Procurement is a critical element, the over-emphasis of points on this element should be reduced.

15 CONCLUSION

The MCSA wishes to thank the Minister for the opportunity to make representations on the draft 2018 Charter and respectfully requests the opportunity to submit oral representations to the Minister. The MCSA remains committed to working with all industry stakeholders to achieve a Mining Charter that promotes transformation, growth, competitiveness and sustainability of the industry to the benefit of all stakeholders.

Dated at Johannesburg this 22ne day of August 2018.

Roger Baxter

Chief Executive Officer, duly authorised hereto

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16 LIST OF APPENDICES

Copies of:

1 : The Anticipated Effect of the Draft 2018 Charter on Mineral Investment in South Africa and on the Economy.

2 : Exposition on contraventions of the Companies Act, 2008.

3 : Note on comparison between the Judgment and the draft 2018 Charter.

4 : MCSA document showing that using the same statistics, but applying the once empowered principle, the mining industry is more than compliant notwithstanding the DMR's 2009 and 2014 assessments to the contrary.

5 : Document dealing with non-applicability of the B-BBEE Act and dti CoGP to the draft 2018 Charter.

6 : Note on International Trade Agreements.

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APPENDIX 1

THE ANTICIPATED EFFECT OF THE DRAFT 2018 MINING CHARTER ON MINERAL INVESTMENT IN SOUTH AFRICA AND ON THE SOUTH AFRICAN ECONOMY

MINERALS COUNCIL SOUTH AFRICA (MCSA): ECONOMICS DEPARTMENT MINING CHARTER REPORT

The focus of this analysis is on two aspects of the mining charter namely: free carried interest (FCI) and the trickle dividend of 1% of EBITDA (Earnings Before Interest Taxes Depreciation and Amortisation) as proposed in the Draft 2018 Charter. MCSA submits that these requirements will raise investment hurdle rates and materially dampen investor appetite and will result in lower investment and further job losses in South Africa's mining sector. Emphasis is placed on the impact of these requirements on investment.

MCSA is gravely concerned about the possible destabilising impact of unfulfilled or heightened expectations created around the purported immediate benefits originating from the ownership (and free carry) prescriptions, coupled with the Social Labour Plans (SLP) mine community benefits. This against the reality of the Draft 2018 Charter's applicability only to new mining rights.

Moreover, the applicability of the Draft 2018 Charter to prospecting rights will have continued dire if not crippling consequences for Greenfields exploration.

Salient Points

- Investment decisions are made based on comparing a potential risk adjusted return, relative to the cost of the investment. Therefore, it would follow that increased investment costs, decrease the likelihood of new investment. Essentially, the mining company has to take a long-term view of likely revenue streams (which includes predictions on prices), and the risks and costs of the investment. If the risks and costs increase due to additional regulatory requirements, this pushes up the relative investment hurdle rate. For the mining company to justify investment in the project the future revenue streams would have to cover the higher hurdle rate.
- In effect, the higher the investment hurdle rate the less the number of mining projects that may proceed. Higher hurdle rates mean that more marginal projects are simply discarded.
- Investment decisions in mining are similarly global in nature. Mining companies may have several competing projects with one that may be located in South Africa. If the projects are similar in nature, an increase in the investment hurdle rate due to the imposed free carried interest may well prejudice the South African project from obtaining the go-ahead from the investment committee of the mining company.
- It is imperative that when global comparisons are done that projects are compared on a fair like for like basis. Most global mining jurisdictions look at all the regulatory imposts and taxes in a collective fashion, with the emphasis on encouraging investment, but at the same time providing a fair tax return to government and investment return to shareholders.
- The similarity in the stock exchange response to the Reviewed Mining Charter 2017 and the Draft 2018 Charters is worth noting. However, MCSA also acknowledges the impact that recent global trade war fears have had on emerging market equities.
- On a 10-year performance basis the Johannesburg Resources Index (JES RESI) is down 44% in US dollar terms, significantly underperforming peer resource indices in other mining jurisdictions (Australia RESI was down 4% and Toronto RESI was down 5%). This is concerning and indicative of a lack of investor confidence in the South African mining sector.

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- Due to policy and regulatory uncertainty and a poor investment environment construction of new mining projects is down 51% (2011-2017) and net fixed investment (gross investment less depreciation) in mining in South Africa is down 72% from 2008.
- In terms of orders of magnitude, a 10% Free Carried Interest (FCI) of issued share capital equates to between 20% and 30% of a company's annual revenue. The fact that the FCI is incurred as an upfront cost before any value is derived by the company, ***increases both the hurdle rate and risk profile*** of any new project. This underscores the adverse impact of FCI on the potential for new investment.
- MCSA recently completed an exercise which compared the mining legislation in a sample set of 33 mining countries (a mix of African, East and Western states), which found that only 21% of countries include free carried interest ("FCI") in their legislation. The countries that do implement FCI do so as part of their total taxation package which they still try to keep competitive. In South Africa's case the FCI on new rights is being proposed in an environment where the mining sector already faces a significant aggregated burden of taxation, royalties and other regulatory burdens. Effectively, unless the FCI proposal is built into the total tax and incentive package, South Africa's investment attractiveness will continue to decline.
- The trickle dividend will increase the tax liability of mining companies from 15% of total corporate income tax ("CIT") paid to government by the private sector to over 30% of total CIT.
- If domestic mining companies are not attracted to invest in other competitive jurisdictions, the trickle dividend will cost the sector approximately a R1 billion annually.
- Growth in net investment, which has been on a downward trajectory for years now, is set to continue declining; having peaked at R40 billion in 2008 but registered only R17 billion in 2016.
- With a decline in real net investment the sector is projected to lose more jobs because of austere regulatory dynamics. For example, if the trickle dividend had been a requirement in the 2010 Mining Charter, cumulative job losses would have been approximately 79,000 in addition to the 70,000 jobs lost in the past six years.

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1. INVESTMENT INTO MINING - A STOCK EXCHANGE VIEW

A measure of investor sentiment to global, local and company news is via the stock exchange.

The table below depicts the movement of the stock market on the release dates of Reviewed Mining Charter 2017 and Draft 2018 Charter. Coincidentally both were released on the 15th of June in the respective years. The table indicates the movement in the Johannesburg Stock Exchange (JSE) - All Share Index (ALSI) and the JSE Resources Index (RESI). The former includes the broader stock exchange covering all other sectors of the economy, while the latter provides a nuanced view of the resources/mining sector.

Table 1: JSE (All Share Index and Resource Index)

JSE ALL SHARE

	Date	Price	Open	High	Low	%
	Jun 20, 2017	51,100.57	51,626.32	51,642.03	51,150.70	-0.98%
	Jun 19, 2017	51,615.50	51,152.26	51,615.50	51,081.58	1.04%
2017 Charter	Jun 15, 2017	50,831.89	51,343.64	51,343.64	50,749.08	-1.28%
	Jun 14, 2017	51,480.16	51,926.15	51,971.17	51,489.16	-0.76%
	Jun 13, 2017	51,625.07	51,788.26	52,048.57	51,584.09	0.12%
	Jun 12, 2017	51,561.00	51,867.78	52,011.10	51,525.85	-1.75%

	Date	Price	Open	High	Low	%
	Jun 20, 2018	56,587.65	56,728.48	56,868.20	56,728.48	1.15%
	Jun 19, 2018	56,253.21	56,472.65	56,705.71	56,241.15	-1.72%
	Jun 18, 2018	57,256.84	57,860.90	57,860.90	56,885.08	-0.73%
2018 Charter	Jun 15, 2018	57,660.50	58,690.95	58,703.69	57,639.70	-1.43%
	Jun 14, 2018	58,496.67	57,958.73	58,696.07	57,958.73	0.10%
	Jun 13, 2018	58,437.23	58,158.21	58,798.89	58,157.11	0.39%
	Jun 12, 2018	58,207.62	58,274.26	58,465.47	57,987.35	-0.11%

JSE Resource Index

	Date	Price	Open	High	Low	%
	Jun 20, 2017	10,768.38	11,047.89	11,049.32	10,768.27	-2.95%
	Jun 19, 2017	11,042.80	10,825.05	11,065.21	10,780.52	1.97%
2017 Charter	Jun 15, 2017	10,829.05	11,064.82	11,064.82	10,779.51	-2.13%
	Jun 14, 2017	11,064.82	11,206.43	11,316.02	11,064.82	-1.26%
	Jun 13, 2017	11,208.49	11,256.99	11,305.78	11,154.20	-0.45%
	Jun 12, 2017	11,258.99	11,305.17	11,394.20	11,258.09	-0.95%

	Date	Price	Open	High	Low	%
	Jun 20, 2018	15,178.57	14,991.77	15,179.00	14,960.77	1.32%
	Jun 19, 2018	14,983.77	15,159.50	15,282.90	14,955.72	-1.18%
	Jun 18, 2018	15,159.50	15,163.51	15,163.50	14,925.10	0.02%
2018 Charter	Jun 15, 2018	15,130.51	15,497.61	15,566.56	15,130.51	-2.12%
	Jun 14, 2018	15,457.61	15,448.82	15,448.82	15,142.80	-0.07%
	Jun 13, 2018	15,468.42	15,465.42	15,586.76	15,269.94	-0.11%
	Jun 12, 2018	15,485.42	15,572.77	15,714.60	15,272.53	-0.69%

Source: Johannesburg Stock Exchange

MCSA acknowledges the fact that emerging market equities have experienced volatility because of the global trade war fears, fears which were resuscitated around the same time of the Draft 2018 Charter release date. However, the similarity in the order of magnitude of the stock market response to the Reviewed Mining Charter 2017 and Draft 2018 Charter, is worth noting. This is particularly more pronounced on the resource index.

Table 2: JSE Resource index Performance (as at 21 June 2018)

JSE Resource Index	
Period	**% Movement**
Month-to-date	1.90
Quarter-to-date	16.37
Year-to-date	11.24
7 Days	-4.29
14 Days	-4.24
21 Days	1.95
1 Month	-2.30
2 Months	8.41
3 Months	15.96
6 Months	12.05
1 Year	37.08
2 Years	14.51
5 Years	-2.98
5 Years	-6.78
10 Years	-44.20

Source: ShareNet

Due to the immediate nature of responses and movement on the stock exchange, short term data are often very volatile. It is therefore worth measuring the performance in longer dated time periods. Table 2 depicts the performance of the JSE Resource Index along multiple timeframes.

From the date of preparing this report on 21 June 2018, the 7-day performance marks exactly 1 week from the release date of the 2018 mining charter. The 14- day performance is largely influenced and reflective of the strong decline in the 7-day performance of the index.

Of even greater concern is the longer dated performance measured in; 3, 5 and 10 years, which recorded decreases of; -3%, -8.7% and -44%, respectively. This is indicative of declining levels of investment and confidence in the South African resource sector.

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Table 3: Stock Exchange Comparison (as at 21 June 2018)

Stock Exchange Resource Indices			
Measured Period	Johannesburg Stock Exchange (Resource Index)	Australia Stock Exchange (Resources Index)	Toronto Stock Exchange (Resource Index)
	%	%	%
Month-to-date	1,06	0,94	-0,95
Quarter-to-date	16,52	13,63	5,50
Year-to-date	11,74	6,93	2,24
1 Year	37,08	38,29	20,73
3 Years	-2,08	8,51	3,76
5 Years	-8,78	3,61	2,88
10 Years	44,28	4,04	-3,19

Source: ShareNet, S&P

Compared to the resource indices in global stock exchange peers, the South African performance has been extremely poor, this being depicted in table 3.

It cannot be stressed enough that stock exchange performance is a function of investment into or out of a jurisdiction. A negative performance is indicative of declining levels and confidence of investment in an industry. The South African performance as depicted above is undoubtedly a cause for concern and indicates the view investors hold of the South African mining sector.

2. FREE CARRIED INTEREST (FCI) AND INVESTMENT

FCI is typically viewed as forming part of the fiscal regime of a given jurisdiction, which also entails, among other things, corporate income taxes, royalties, value added taxes and customs duties. Therefore, because the FCI is evaluated as part of the overall countries fiscal regime, it has a direct bearing on a mining company's investment decision.

Investment decisions are made based on comparing the potential risk adjusted return, relative to the cost of the investment. Therefore, it would follow that increased investment costs, decrease the likelihood of investment.

The fact that FCI means no cost and no participation in the capital raising process by the recipients of the FCI, automatically increases the cost of facilitation (and funding) for the remainder of the shareholders, who must fund 100% of the issued share capital for only 90% of the benefit. Moreover, the fact that the FCI is an upfront cost incurred before any return is realised, adversely affects the prospect of a company considering investment in that jurisdiction. The risk profile and in turn hurdle rates of a project are increased from the onset of the project.

2.1 Quantifying the Cost of Free Carried Interest

As will be illustrated below, facilitating a free carried interest of 10% is a very costly exercise. FCI can equate to as much as 20% to 30% of a company's annual revenue. Again, it should be borne in mind that the FCI is an upfront cost, before revenues and potential profits are recorded.

Using the 2017 annual financial statements of 3 companies, MCSA illustrates the point above by adopting the following method;

a) Establish the market capitalisation; issued share capital multiplied by the share price at last day of the reporting period for each company.
b) Importantly, MCSA has only included companies listed on the Johannesburg Stock Exchange (JSE), with this being their only listing. This is done so as not to inflate the market capitalisation from an alternate listing and to exclude the potential of cross ownership across stock exchanges.
c) The assumption made by following the approach in point (b), is that because the company is solely listed in South Africa, the mining right holding can be at company level. However, MCSA is also alive to the fact that a mining right can be held at operating/ asset level.
d) FCI is worked out as 10% of the market capitalisation determined in point (a)
e) Revenue: MCSA has used total group revenue, which includes South African and non-South African revenues. Importantly, replicating the same exercise and excluding revenue attributable to non-SA operations would result in more adverse outcomes.

Table 4 below contains the results:

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Table 4: Free Carried Interest Ownership relative to revenue

Company	Company 1	Company 2	Company 3
Number of Shares in Issue 2017	358 706 754	509 781 212	218 702 000
Closing Share Price (FY end)	R152,35	R40,45	R84,00
Market Capitalisation	R54 648 973 972	R20 620 650 025	R18 370 968 000
FCI @ 10%	R5 464 897 397	R2 062 065 003	R1 837 096 800
2017 Revenue	R22 800 000 000	R6 900 000 000	R9 019 000 000
FCI as a % of Revenue	**24,0%**	**29,9%**	**20,4%**

Source: Company Financial Statements and MCSA Estimates

Using company 1 as an example, the company would have to raise as much as R5.4 billion and 'gift' this to the FCI shareholders. This amount would have to be funded (either via shares or debt) and added to the company's obligations. The fact that these funds are not deployed to productive capacity, but rather, are gifted to the FCI recipients makes the FCI a substantial direct and opportunity cost.

To put company 1's FCI obligation into context; the mining sector's total royalty bill for the 2017/2018 fiscal year amounted to R7.5 billion.

As was noted earlier, with the comparison of the JSE to peer stock exchanges around the world it is important to note that the companies have the option to deploy their capital globally, that is, into other mining jurisdictions. The decision on where to deploy capital is made based on comparing the cost and risk of a project, to its potential return.

It must be pointed out that South Africa is a mature mining jurisdiction. Given the fact that Greenfields exploration has virtually collapsed in South Africa, there is a very limited pipeline of new mining projects. The impact of imposing an FCI on new mining rights would be that that potential project pipeline would become even smaller, as previously viable projects are made unviable by the FCI requirement.

The FCI component automatically pushes up the hurdle rate of investing in South Africa. Compared to another jurisdiction without a similar expectation, South Africa would compare poorly, resulting in the capital being invested elsewhere.

It is therefore incumbent on any region to create a conducive environment that will attract capital. Unfortunately, the FCI is contrary to this objective.

Additionally, if it is South Africa's objective to grow the mining sector, then the FCI works against this objective. The FCI will act as a disincentive for companies to raise growth capital, because of the need to maintain the 10% FCI. Companies will have to incur additional costs to re-align the FCI in the larger company and potentially also need to facilitate the transaction for the communities, employees and entrepreneurs.

Therefore, the cost of facilitation would not only be at the onset of a mining right, but also every time the company attempts to raise growth capital. This MCSA concludes is contrary to any growth objective.

2.2 Global Comparison of Free Carried Interest in Mining Legislation

MCSA recently completed an exercise to ascertain the prevalence of FCI in mining jurisdictions. The sample size of 33 countries included a mix of African, East and Western states, across the development spectrum from poor to highly developed.

The result from this exercise was that only 21% (7 out of 33) countries make provision for FCI in their mining legislation.

Important attributes about the sample:

1) All the countries included in the sample are mining jurisdictions.
2) The FCI assessment only relates to the mining legislation of the respective countries. That is, we have looked at FCI as it relates only to the mining industry in these countries and not any other sector of the economy, for example; Private Equity structures in the finance industry.

3) Correction for sample bias;
    a. A sample bias, which is a statistical error, occurs when the results of the survey are skewed in a direction because of a non-randomised sample selection.
    b. To correct for the potential of a sample bias, the sample in this survey has been purposefully diversified. That is, included in the sample are a combination of African, Eastern and Western states, across the development spectrum in terms of their mining sector.
    c. However, to make the sample of countries comparatively relevant to South Africa, 30% of the sample has been allocated to African countries (10 out of 33 countries).
    d. A relevant example in accounting (and curing for the sample bias), is that if only African countries are included in the survey then FCI prevalence increases to 60% (6 out of the 10 countries). If this sample bias is not corrected for, it leads to results that are erroneously attributed to the topic being studied, as opposed to the method of sampling.

From this it can be concluded that FCI contributes negatively in determining a country's competitiveness, and that a significant number of countries are alive to this reality.

Additionally, it can also be concluded that competing for mining investment will only become harder for those jurisdictions with FCI expectations in their legislation, when competing against regions without FCI provisions.

The table below presents the countries assessed in the survey, with the distinction made between the countries that provide for FCI in their mining legislation, and those that do not:

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FREE CARRIED INTEREST COUNTRY SURVEY					
Free Carried Interest			No Free Carried Interest		
African Countries					
Angola	Yes	10%	Botswana	No	0%
Ghana	Yes	10%	Nigeria	No	0%
Mozambique	Yes	5%	Zambia	No	0%
Tanzania	Yes	Negotiated	Namibia	No	0%
Guinea	Yes	15%			
DRC	Yes	10%			
BRICS Member States					
			Brazil	No	0%
			India	No	0%
			Russia	No	0%
Developed Mining Markets					
			Canada	No	0%
			Australia	No	0%
			United Kingdom	No	0%
			United States	No	0%
Other					
Kazakhstan	Yes	Negotiated	Colombia	No	0%
			Finland	No	0%
			Mexico	No	0%
			Thailand	No	0%
			Uzbekistan	No	0%
			Argentina	No	0%
			Dominican Reput	No	0%
			Indonesia	No	0%
			Peru	No	0%
			Sweden	No	0%
			Chile	No	0%
			Ecuador	No	0%
			Greenland	No	0%
			Myanmar	No	0%
			Philippines	No	0%

Source: Minerals Council South Africa, Country Mining Legislation

3. TAX LIABIITY OF THE MINING SECTOR

This section MCSA argues that the mining sector's tax liability is more than its contribution to gross domestic product (GDP).

a) The mining sector's contribution to GDP (real and nominal) has been declining over the years owing to several factors such as deeper mines which have increased input costs, inadequate logistics and transport infrastructure, and regulatory uncertainty. Exploration and construction of new mines have taken a knock, ultimately having a negative effect on investment and jobs. The chart below shows the mining sector's contribution to GDP.

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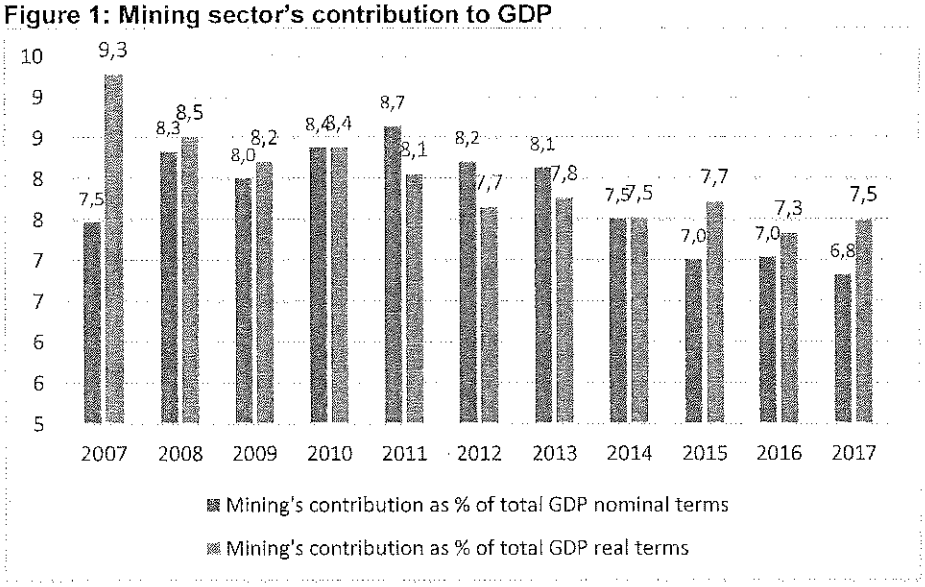
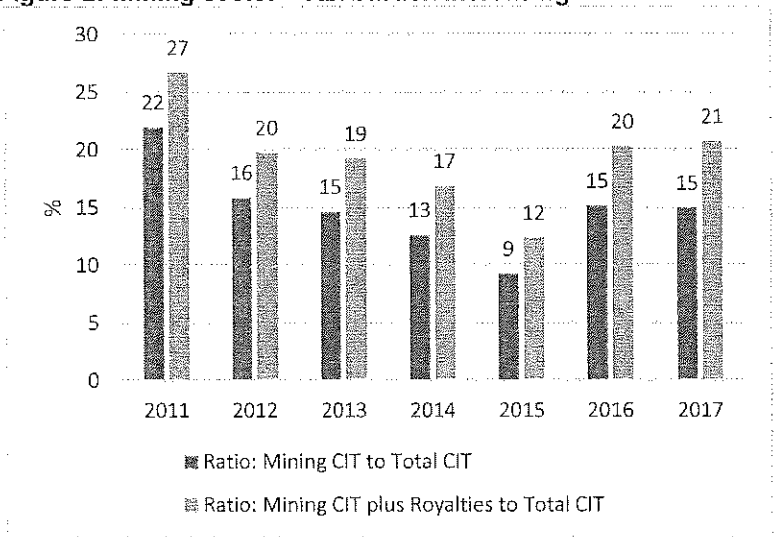
Figure 1: Mining sector's contribution to GDP



Source: Statistics South Africa

b) The mining industry pays a variety of taxes which contribute to the country's development. The figure below shows that on corporate income tax (CIT) alone (as a share of total CIT) the sector has consistently paid more than its contribution to GDP.

Figure 2: Mining sector - Tax burden increasing



If royalties paid by mining companies are added, the amount of taxes paid by the sector escalates significantly. The adjacent chart indicates that the tax burden as a share of total corporate income tax (CIT) rises to 27% in 2011 and 21% in 2017

Source: Statistics South Africa, Price Waterhouse Coopers, MCSA calculations

c) The Draft 2018 Charter proposes a trickle dividend equal to a minimum of 1% of Earnings Before Interest, Taxes, Depreciation and Amortisation (EBITDA). The following chart shows that this will lead to a further escalation of the total share of taxes paid by mining companies in relation to total CIT.

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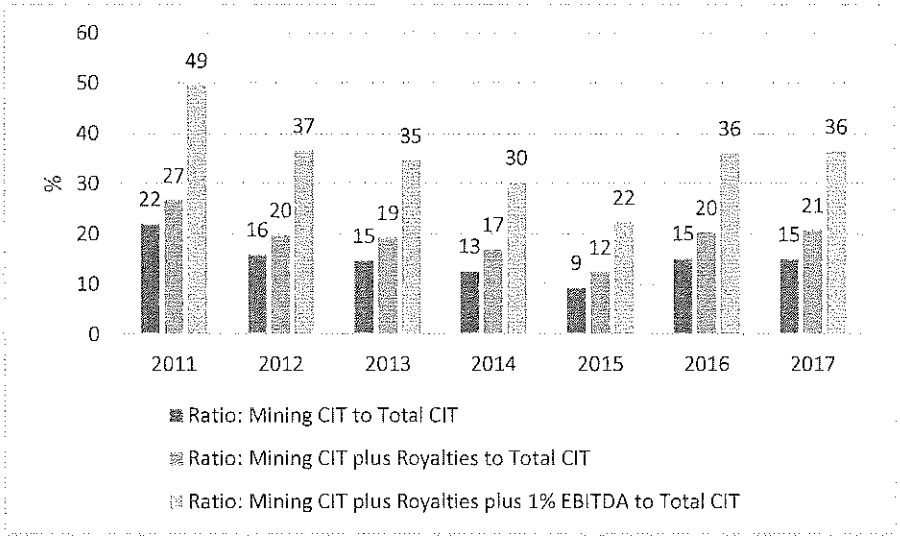
Figure 3: Mining sector: 1% of EBITDA will increase the mining tax burden to >30 % of total CIT



As the chart on the left shows, adding 1% of EBITDA increases the share of taxes mining companies pay, in relation to total CIT, to 36% in 2017.

Including the trickle dividend and royalties: For example, in 2011 the sector's share of CIT would have been 49%.

Source: Statistics South Africa, Price Waterhouse Coopers, MCSA calculations

The table below shows the actual amounts in key taxes paid by mining companies. It also includes the 1% of EBITDA. Had this requirement been included in the Mining Charter 2010 the sector would have paid R480 million as a trickle dividend; R1 billion in 2011; R1.2 billion in 2012; and R950 million in 2017.

Table 4: Key taxes paid by the mining sector (incl. the 1% of EBITDA)

	Key taxes paid by the mining sector....		1% of EBITDA (R mn)	Total taxes paid
	Company tax (R mn)	Royalties (R mn)		
2006	16 364	-		16 364
2007	20 658	-		20 658
2008	32 490	-	840	33 330
2009	10 049	-	850	10 899
2010	17 597	-	480	18 077
2011	26 159	5 612	1 010	32 781
2012	20 468	5 015	1 230	26 713
2013	20 563	6 420	920	27 903
2014	16 062	5 422	910	22 394
2015	11 017	3 708	750	15 475
2016	17 114	5 802	650	23 566
2017	19 326	7 500	950	27 776

Source: Statistic South Africa, Price Waterhouse Coopers and MCSA calculations

4. HOW THE TRICKLE DIVIDEND WILL AFFECT REAL NET FIXED INVESTMENT IN MINING

A more damaging effect of the trickle dividend is on investment. Investment drives jobs – the more investment, the more jobs created. Below MCSA shows the impact of the dividend on net investment in the sector. (The trickle dividend is a tax.) MCSA starts off by showing investment trends in the mining sector.

Real net capital investment in mining shrunk 72% between 2008 and 2017. This effectively means that mining companies are not even covering their depreciation costs. The implication is that the fixed capital stock of mining is not being kept at a steady sate and therefore one expects mining production to continue to decline in the years ahead, unless there is a substantial improvement in investment.

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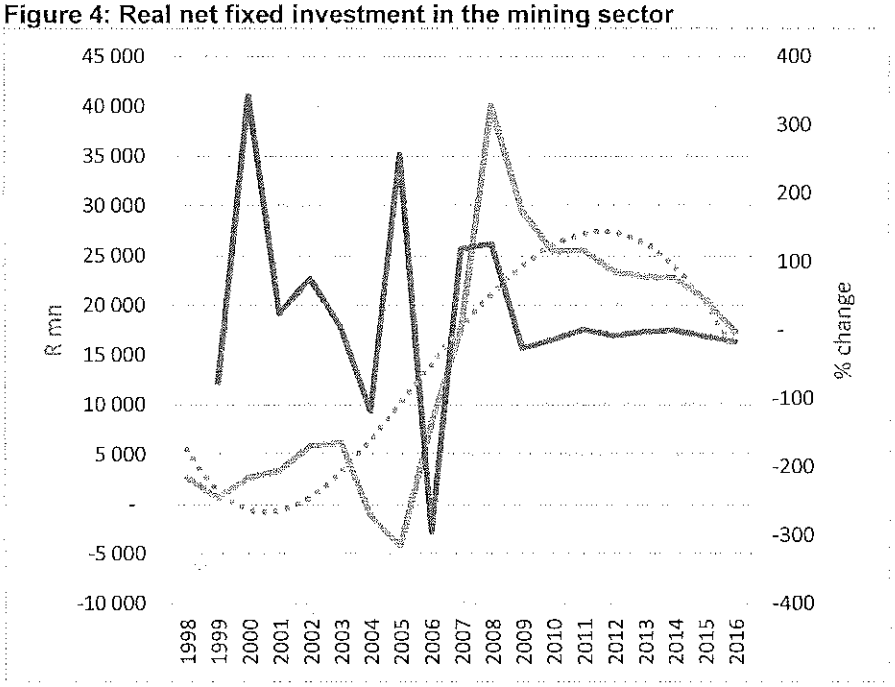
Figure 4: Real net fixed investment in the mining sector



Source: Quantec and MCSA calculations

Real net investment in the mining sector peaked at R40 billion in 2008 when the global financial crisis began. The crisis resulted in the global economy shrinking by 1.7%. Since then the world economy has expanded and in some aspects demand for commodities picked up. The domestic mining industry has remained in the doldrums

by a lack of improvement in the net investment. As a matter of fact, between 2008 and 2016 depreciation of capital stock in the mining sector, on average, grew faster than real net investment at 6.4% and 5.6%, respectively. This means that production has been dependent on mainly existing stock of capital. Investment in new machinery & equipment has predominantly been for replacement – replacing old machinery & equipment.

The components of investment, on a net basis, have also been contracting on average as seen in the chart below.

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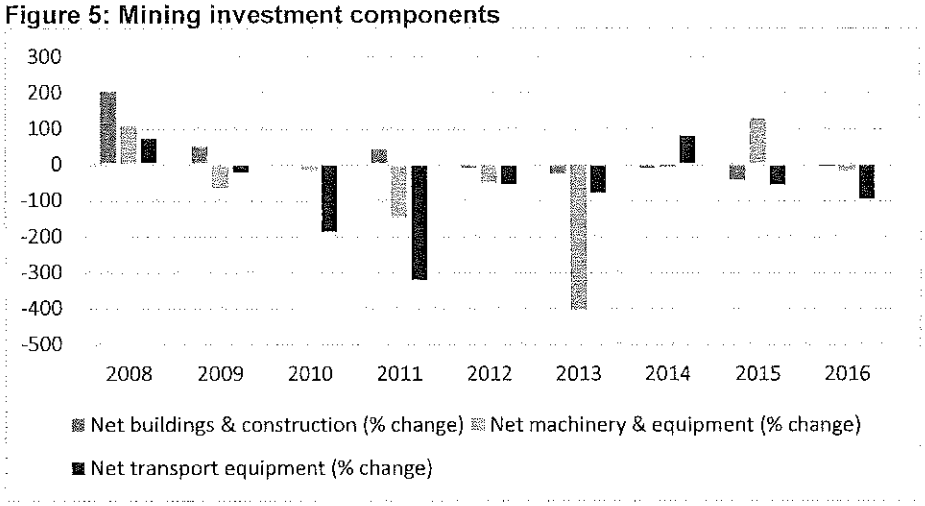
Figure 5: Mining investment components

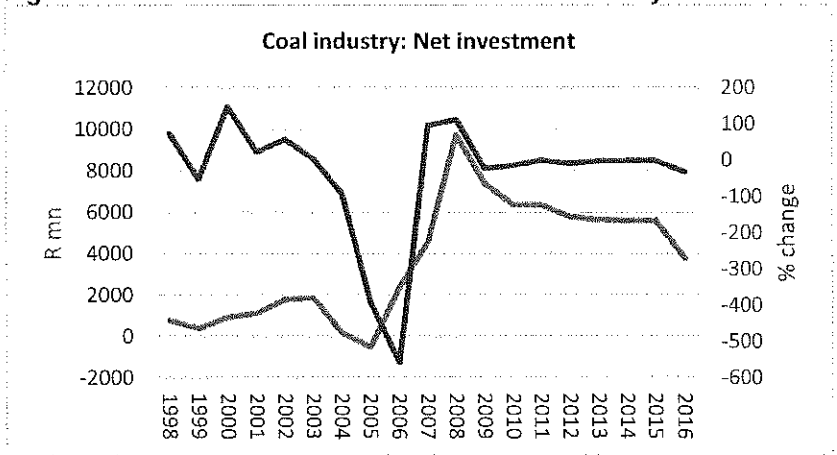


Source: Quantec and MCSA calculations

What can be learnt from the chart above:

- **Net buildings & construction** – this category mainly includes exploration and mine development, and it shows that mine development has been lacklustre, growing in 2008, 2009 and 2011
- **Net machinery & equipment** – this picture is the same. Growth registered only in 2008 and in 2015. Mining companies have not been buying new machinery & equipment because new projects are not forthcoming
- **Net transport equipment** - the story is the same, growth was realised only in 2008 and 2014
- **Even in the coal industry**, net investment is on the decline. The coal industry is peculiar compared to the other big industries in the sector such as gold and platinum in that 70% of production volumes is consumed locally while export prices drive investment. Even then, there should be some investment going in the sector; but this is not happening as **the chart below** shows.

Figure 6: Real fixed net investment in the coal industry



The coal investment graph mirrors that of total mining (net) investment above. The industry, just like the entire sector is on the decline since 2008. This is despite the fact that Eskom has built two massive coal-fired power plants.

Source: Quantec and MCSA calculations

Overall, the story is consistent: Mining companies are not investing in new projects because of policy uncertainty and because of a limited pipeline of investible projects (again due to a lack of proper Greenfields exploration).

4.1 Econometric analysis: The impact of the trickle dividend (1% of EBITDA) on real net investment in the mining sector

Note:

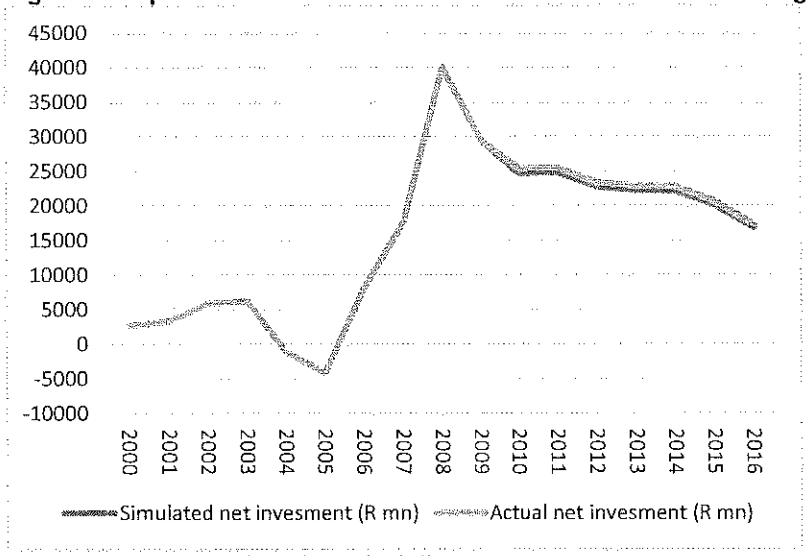
- The trickle dividend is a cost to mining companies and it was modelled as a 1% increase in tax

Findings:

- The trickle dividend will reduce real investment by 0.3% annually

The graph below shows the levels of real net fixed investment (GFCF) in the mining sector had the trickle dividend been introduced in 2010. This is compared with the actual levels of real investment.

Figure 7: Impact of the trickle dividend on net investment in mining



Clearly the trickle dividend would have driven real net investment to even lower levels compared to what was realised. For example, in 2010 real net investment was R25.4 billion. With the compulsory dividend investment would have been R24.6 billion. In 2017 net investment would have registered

Source: Quantec and MCSA calculations

4.2 Econometric analysis: The impact of the trickle dividend (1% of EBITDA) on mining sector employment

Assumption:

- MCSA assumes that the *transmission mechanism* through which jobs are created (and retained) in the mining sector is via higher net growth in real fixed investment. [The expression "higher net growth" refers to growth in net investment that is higher than growth in depreciation or consumption of capital.]

Findings:

- A 1% increase in real net investment in the mining sector generates 0.2% jobs

Table 5: Assumed cumulative number of jobs lost due to the trickle dividends

	Actual Mining Employment	Simulated Mining Employment	Jobs lost on account of the "trickle dividend"
2010	498907	488929	9978
2011	512874	502617	10257
2012	524869	514371	10497
2013	509909	499710	10198
2014	492931	483072	9859
2015	480205	470601	9604
2016	457662	448508	9153
2017	462871	453613	9257
Cumulative no. of jobs lost			78805

Source: DMR and MCSA Calculations

- Had the trickle dividend been introduced in 2010 it would have resulted in the loss of almost 10 000 jobs. Cumulatively this would have resulted in the loss of approximately 79,000 jobs (from 2010 to 2017) – a catastrophic number! This would be in addition to the 70,000 jobs lost between 2012 and 2017. Beyond the statistics, tens of hundreds of families would have lost a bread winner rendering them indigent.

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APPENDIX 2

2018 Charter provisions which conflict with the *Companies Act, 2008*

1 **Notes**

1.1 This analysis is inclusive of potential contraventions of the Companies Act (defined below).

1.2 The identified contraventions all relate to the ownership section of the 2018 Charter (defined below). Paragraph 3(a) and (b) of the 2018 Charter contain ownership elements applicable to licensees under the *Precious Metals Act, 2005* and the *Diamonds Act, 1986*. The issues set out below in relation to mining rights apply equally to these provisions.

1.3 Although the operative sections of the 2018 Charter refer only to mining rights, paragraph 6 of the 2018 Charter provides that it also applies to prospecting rights. While it is unclear how an EBITDA calculation would be performed on a company holding only a prospecting right, the issues set out below in relation to mining rights apply equally to prospecting rights.

2 **Definitions**

2.1 **2018 Charter** means the *Draft Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2018 published in Government Notice 611, Government Gazette No. 41714 dated 15 June 2018*; and

2.2 **Companies Act** means the *Companies Act*, 2008.

3 **Analysis of paragraphs of 2018 Charter which contravene sections of the Companies Act**

3.1 This note identifies those paragraphs of the 2018 Charter which contravene or which, if implemented, will contravene sections of the Companies Act.

3.2 Restriction on transferability of shares

(1) In terms of paragraph 2.1.3.1 of the 2018 Charter, a new mining right must have a minimum of 30% BEE shareholding. Paragraph 2.1.3.2 requires at least 8% of such shareholding must be held by qualifying employees and a second 8% must be held by host communities. Of this 16%, at least 5% must be a "non-transferable free carried interest" to be held by qualifying employees and a second 5% must be a "non-transferable free carried interest" to be held by host communities.

(2) Section 8 of the Companies Act categorises companies as either being state-owned, private, personal liability or public. A company may only be a private company if it prohibits the offering of shares to the public and restricts the transferability of its securities. The definition of "offer to the public" in section 95 of the Companies Act includes an offer to any section of the public. This would include an offer to host communities. As a result, the private company can no longer restrict offerings of its

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shares to the public, as it is required by the 2018 Charter to offer and issue shares to host communities. This would result in the company being re-categorised as a public company, which carries with it higher administrative and compliance thresholds. In addition, the structure of a mandatory community trust holding shares in a mining company may constitute a collective investment scheme, and fall within the regulation of the *Collective Investment Schemes Control Act, 2002*.

3.3 Equality of treatment for shareholders

(1) In terms of section 37(1) of the Companies Act, "all of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class." Section 37(1) confirms the common law principle of the doctrine of equality among shareholders.

(2) Shares that have different rights attaching to them by their nature form separate classes of shares. As a result, by requiring differential dividend rights, the 2018 Charter legislatively requires particular shareholders to hold a different class of shares. While not in contravention of section 37, it does create complexity in shareholding structures, and means that empowerment shareholders are unable in law to hold the same class of shares as ordinary shareholders.

(3) The restriction on the ability of qualifying employees and host communities to dispose of 5% of the shares of the class that they hold as "free carried" shares means that a further additional class would have to be created for the balance of the 8% that qualifying employees and host communities are required to hold. Again, while this does not directly contravene section 37 because these shares would be of a different class, it creates further complexity in shareholding structures.

(4) The result of these provisions is that every single company holding a mining right must have at least three, but in practice more likely at least five different classes of shares. This complexity would be compounded if a company holds more than one mining right, or has operations with more than one host community. It also means that empowerment shareholders are not permitted to hold the same class of shares as ordinary shareholders.

3.4 Pre-emptive rights of existing shareholders

(1) Subject to certain exceptions, section 39 of the Companies Act provides that, if a private company proposes to issue any shares, each shareholder of that company has a right, before any other person who is not a shareholder of the company, to be offered and, within a reasonable time, to subscribe for a percentage of the shares to be issued. In other words, existing shareholders have an effective pre-emptive right over new shares to be issued.

(2) Because of the requirements for the employee and host community shares set out in paragraph 3.2 above, new shares would have to be issued to meet the employee and host community requirements. As a result, paragraph 2.1.3.2 of the 2018 Charter would require companies to issue shares in contravention of section 39, as existing shareholders would not be entitled to participate. This applies only to private companies.

(3) In addition, paragraphs 2.1.1.1, 2.1.1.2 and 2.1.1.8 of the 2018 Charter requires certain additional shares to be issued by companies with existing mining rights. This would contravene section 39, as existing shareholders would not be entitled to participate in the issue of shares. Please note that this applies only to private companies.

(4) This issue is compounded if the 5% non-transferable shareholding is intended to be non-dilutable. This means that any future share issue or capital raising will need to

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account for supplementing this free carry to maintain a 5% shareholding, again contravening section 39.

3.5 Issuing of shares for adequate consideration and financial assistance

(1) In terms of section 40(1) of the Companies Act, "The board of a company may issue authorised shares only: (a) for adequate consideration to the company, as determined by the board; (b) in terms of conversion rights associated with previously issued securities of the company; or (c) as a capitalisation share as contemplated in section 47."

(2) In terms of section 40(2) of the Companies Act, "Before a company issues any particular shares, the board must determine the consideration for which, and the terms on which, those shares will be issued."

(3) In terms of section 44 of the Companies Act, "Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise the company to provide financial assistance by way of a loan, guarantee, the provision of security or otherwise to any person for the purpose of, or in connection with, the subscription of any option, or any securities, issued or to be issued by the company or a related or inter-related company, or for the purchase of any securities of the company or a related or inter-related company, subject to subsections (3) and (4)."

(4) Paragraph 2.1.3.2 of the 2018 Charter requires the issue of "free carried interest" to qualifying employees and host communities, and also requires additional shares to be held by qualifying employees, host communities and BEE entrepreneurs. This paragraph contravenes the Companies Act as it creates a legislative regime which effectively obliges the holder of a new mining right to issue shares to qualifying employees and host communities for no value in relation to the 5% "free carried interest" without regard for what the board considers to be "adequate consideration".

(5) The balance of the shares to be issued to the qualifying employees and host communities, as well as the shares to be issued to the BEE entrepreneurs are not required to be issued for no consideration. However, it is likely that, in light of the legislative requirement, at least a discount will apply to either the subscription price or the purchase price (in the event that the shares are purchased from existing shareholders). To the extent that the relevant BEE shareholders cannot raise third party financing, it is likely that the holder of a new mining right would be required to fund such an acquisition or subscription. This means that the holder would be required to provide financial assistance (as defined in the Companies Act) to qualifying employees, host communities and BEE entrepreneurs to subscribe for or acquire shares. While this would generally be a practical consideration, the 2018 Charter should recognise that financial assistance is a possibility, and the obligation must be subject to the Companies Act requirements.

3.6 Trickle dividends

(1) In terms of section 1 of the Companies Act, distribution means, amongst other matters, a direct or indirect: "transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one or more holders of any of the shares, or to the holder of a beneficial interest in any such shares, of that company or of another company within the same group of companies, whether in the form of a dividend...or otherwise..." As noted in paragraph 3.3 above, this also results in the creation of a separate class of shares.

(2) Section 46 of the Companies Act contemplates the various forms of distributions, and acknowledges that distributions may be made "pursuant to an existing legal obligation of the company..." Notwithstanding, before a distribution may be made, section 46(1) requires the board of the company to apply the solvency liquidity test in order to

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determine whether it reasonably appears that the company would satisfy the solvency and liquidity test immediately after completing the proposed distribution.

(3) Paragraphs 2.1.3.3 and 2.1.3.4 of the 2018 Charter contravene the Companies Act as they each require the holder of a new mining right to declare a dividend, but to do so without complying with section 46.

(4) In addition, the definition of "Trickle dividend" in the 2018 Charter provides that the dividends referred to above are "redeemable by a right holder when ordinary dividends are declared". The meaning of this element of the definition is not clear, although presumably the Minister intended for these payments to be deducted off the ordinary entitlement to receive dividends, once they are declared. As noted in paragraph 3.3 above, this results in the creation of a separate class of share. In addition, the redemption of dividends is not a concept known in South African law.

3.7 Board representation

(1) Section 66 of the Companies Act provides that the board of the Company must comprise, in the case of a private company, at least one director, and in the case of a public company, at least 3 directors. Section 66(4)(a)(i) provides that a company's Memorandum of Incorporation may provide for the direct appointment of one or more directors by any person who is named in or determined in terms of the Memorandum of Incorporation. However, the JSE listings requirements restrict this right, and require that the Memorandum of Incorporation of a listed company does not contain this right for shareholders. Any shareholder may nominate directors, but directors are elected by all shareholders, and no person may have the right to directly appoint directors.

(2) Paragraph 2.1.3.5 of the 2018 Charter requires that host communities and qualifying employees must have representation on the board of a right holder. In the case of listed right holders, this would contravene section 66, read with the JSE listings requirements, as it effectively requires the direct appointment of directors. As noted in paragraph 3.3 above, this also results in the creation of a separate class of share.

(3) The definition of "meaningful economic participation" refers to the BEE shareholders exercising voting rights in relation to all matters, "including but not limited to trading and marketing." These are board functions rather than shareholder functions, and the definition contravenes the Companies Act which in section 66(1) requires that the business of the company must be managed by the board. The words "including but not limited to trading and marketing of the commodity herein affected and anything incidental thereto" should be deleted.

3.8 Restriction on use of capital by BEE entrepreneurs

(1) In terms of paragraph 2.1.3.7 of the 2018 Charter BEE entrepreneurs must "reinvest a minimum of 40%" of any proceeds derived from the disposal of equity held in terms of the 2018 Charter back into the mining industry. It is unclear how this will be required to be structured, but if it is a term attaching to the shares held by BEE entrepreneurs it would result in yet another class of shares being created.

(2) This restriction on the ability of BEE entrepreneurs to use the capital proceeds of a sale of shares may be unconstitutional in that it is an arbitrary deprivation in terms of section 25(1) of the Constitution.

4 Fundamental structural problems identified in the 2018 Charter

4.1 The 2018 Charter fails to recognise the way in which South African mining companies are structured and empower themselves. It assumes that all historical transactions have been done at the level of the mining right or the company that holds the mining right, and disregards group structures. Most of the larger mining operations in South Africa form part of a larger group of

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companies, and many of these groups have a listed parent. Most of these groups have structured their empowerment at the parent level, in order to empower the entire group, and in order to provide a reasonable level of liquidity to empowerment partners at the expiry of the transactions. This is of benefit to the BEE shareholders, as it provides a level of diversity in their investment. It also cuts down on the administrative burden for all parties to the transaction.

4.2 Specifically, paragraph 2.1.1.4 refers to historical transactions that may be at a company or mining right level. As noted above, these transactions were usually done at the level of the holding company. This should be acknowledged and accepted as a historic transaction. Even in unlisted structures, empowerment has traditionally been implemented at a higher level in order to ensure that an entire group is empowered.

4.3 Similarly, paragraph 2.1.1.5 provides that the recognition of historic transactions will not be transferable and lapses in the event of a transfer of the mining right. This provision does not take into account that mining companies often operate in group structures and hold a number of mining rights in the same entity. This issue is compounded by paragraph 2.1.1.6, which provides that the recognition lapses upon the renewal of a right. The result of these paragraphs is that the same company could have different levels of recognition for each mining right that it holds, depending on at what time the mining right was awarded in the life cycle of an empowerment transaction.

4.4 Paragraph 2.1.3.1 seems to imply that empowerment would only be recognised if it is implemented at the level of the actual holder of the rights. As noted above, traditionally empowerment transactions have been done at higher levels in a group structure. Recognising empowerment only at asset level would create a multiplicity of structures, unnecessarily increasing the complexity of already complex group structures. In addition, in a listed environment BEE shareholder may not be able to realise the full value of their investment if they are not entitled to dispose of their shareholding on the open market (i.e. on the exchange where the holding company shares are listed). This paragraph should be amended to also take into account empowerment at a higher level in group structures, utilising the flow-through or modified flow-through principle.

4.5 Paragraphs 2.1.3.3 and 2.1.3.4 require the payment of the trickle dividend to qualifying employees and host communities. Again, this requirement does not take into account the fact that a mining company often holds more than one mining right, and that more than one host community would be involved. The EBITDA calculation is not limited to the mine or the operation to which a particular mining right relates. As a result, it is not clear in what proportion various host communities should participate.

4.6 These provisions should be clarified in relation to a group structure. Alternatively, the 2018 Charter needs to make clear that a particular mining operation needs to be ring fenced in order for a community to benefit from a particular operation. In other words, the 2018 Charter could permit a special class of shares, linking to the performance of a particular mining operation. In this way, host communities would benefit from the operations in their areas. However, this would have the result of complicating all group structures of mining companies in South Africa and may disincentivise diversified miners from cross subsidising their own operations.

5 General suggestions for the improvement of the 2018 Charter

5.1 This section does not repeat the issues raised above in relation to the Companies Act. To the extent that the 2018 Charter contravenes the Companies Act, those provisions should be amended.

5.2 The definition of "Labour sending areas" refers to areas from which a right holder "historically" sourced the majority of its labour. Given the age of certain rights holders, this creates unnecessary complexity, and should be deleted.

5.3 The definition of "Meaningful economic participation" includes reference to BEE shareholders being able to leverage equity in proportion to vested interests over the life of the transaction to

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reinvest in other mining projects. It is unclear how this could apply to the "free carry" portion of the required shareholding, which is non-transferable. This should be clarified.

5.4 The definition of "Trickle dividend" is unclear in relation to such dividends being "redeemable", and the intention should be clarified.

5.5 Paragraph 2.1.1.7 seems to contradict paragraph 2.1.1.8 and should be clarified.

5.6 Paragraph 2.1.3.6(ii) contains a typographical error, in that it refers to the BEE entrepreneur's "partner". Presumably this should refer only to the BEE entrepreneur. In addition, this paragraph provides that, in order for empowerment to be recognised on an ongoing basis, the BEE entrepreneur must have held the shares for a minimum of a third of the duration of the mining right. However, paragraph 2.1.3.9, which deals with vesting of the shareholding of the BEE entrepreneur does not provide for a particular level of vesting after 1/3 of the duration of the mining right. Instead, this paragraph refers to quarters of the duration of the mining right. Because these periods do not align, the calculation of a BEE entrepreneur's unencumbered net value would be artificially skewed. This is exacerbated by the fact that paragraph 2.1.3.9 does not prorate vesting. In other words, and assuming the period of the mining right to be 30 years, the same number of shares would be vested in year 8 as at the end of year 14. This seems inequitable and should be clarified.

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APPENDIX 3

NOTE ON COMPARISON BETWEEN THE ONCE EMPOWERED JUDGMENT & THE 2018 CHARTER

1. In the matter of *The Chamber of Mines of South Africa v Minister of Mineral Resources & Another* [2018] 2 All SA 391 (GP) delivered on 4 April 2018 ("the judgment"), the majority of the court (per Barry AJ, Mabuse J concurring) held that:

   1.1. None of sections of the MPRDA which refer to "the charter contemplated in section 100" provides that that charter "would as such and without further ado have any binding effect". (Para 80);

   1.2. The charter contemplated in section 100 of the MPRDA accordingly finds application and legal significance in an indirect manner only, through the application of other sections of the MPRDA that refer to it. (Para 81);

   1.3. Arising from the conclusion that "the charter contemplated in section 100" only has legal significance (in the context of the granting or conversion of mining rights) through section 23(1)(h) or item 7 in Schedule II, whether an obligation to "top up" the percentage HDP/HDSA participation/ownership level to 26% exists depends

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entirely on whether such obligation arises in terms of the terms and conditions subject to which the Minister granted the mining right in question. (Para 92);

1.4. Accordingly, even if the terms of the Original Charter could have been interpreted to specify an ongoing commitment that a 26% HDP/HDSA participation/ownership level must be achieved and maintained indefinitely (which is not the case), it would not, of itself, have created an obligation in that regard for holders of mining rights enforceable by means of application of section 47 or sections 98 and 99 of the MPRDA (paragraph 93). The "charter contemplated in terms of section 100" of the MPRDA does not provide an avenue for the Minister to impose terms and conditions on holders of mining rights at variance with the terms and conditions that applied in terms of section 23(6) of the Act at the time the mining right was granted (para 94);

1.5. There is no scope for the Minister, by way of regulation, to prescribe further or new terms and conditions applying to a mining right that purport to diminish or limit the rights that accrued to the holder when the mining right was granted, or by regulation to specify or bring about that non-compliance with such new terms and conditions would render the mining right potentially susceptible to suspension or cancellation or the holder thereof to prosecution (paragraph 102);

1.6. Section 9(2) of the Constitution does not itself give the Charter contemplated in section 100 of the MPRDA coercive legal effect. The

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principle of legality, as a subset of the rule of law, dictates that any coercive legal measure taken by the State must be authorised by law. (Para 103);

1.7. Neither section 23 nor section 25 of the Constitution imposes a self-standing obligation on the holder of a mining right to comply with "the charter contemplated in section 100", in whatever incarnation, in circumstances where no such obligation had been imposed in the mining right at the time when the mining right was granted. (Para 105).

2. On the basis of the findings made by the majority of the court[1], the following declaratory orders were made:

2.1. Once the Minister or her/his delegate is satisfied in terms of section 23(1)(h) of the MPRDA that the grant of a mining right applied for in terms of section 22 of the Act will further the objects referred to in section 2(d) and (f) of the Act in accordance with "the charter referred to in section 100", as referred to in section 23(1)(h) of the Act, and has granted the mining right applied for, the holder thereof is not thereafter legally obliged to restore the percentage ownership (however measured) controlled by HDPs or HDSAs to the 26% target referred to in the Original Charter and in the 2010 Charter, where

[1] The majority of the court also held (at para 96) that the Original Charter is "the charter contemplated in section 100" and that the 2010 Charter is not. In paragraph 99 the court went on to hold that the issue by the Minister of the 2010 Charter did not occur in terms of, or in compliance with, the duty imposed on the Minister in terms of section 100(2).

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such percentage falls below 26%, unless such obligation is specified as an obligation in the terms and conditions stated in the right, as referred to in section 23(6) of the MPRDA (Para 109.2.1);

2.2. Once the Minister or his delegate converts an old order mining right in terms of item 7(3) of Schedule II to the MPRDA and the holder of such converted mining right complies with the undertaking provided in terms of item 7(2)(k) of Schedule II, the holder of such converted mining right is not legally obliged to restore the percentage ownership (however measured) controlled by HDPs or HDSAs to the 26% target referred to in the Original Charter and in the 2010 Charter, where thereafter such percentage falls below 26%, unless such obligation is specified as an obligation in the terms and conditions stated in the mining right, as referred to in section 23(6) of the MPRDA (Para 109.2.2);

2.3. A failure by a holder of a mining right or converted mining right to meet the requirements of the Original Charter or of the 2010 Charter does not constitute a breach of a material term or condition of the mining right for the purpose of section 47(1)(a) of the MPRDA and further does not constitute an offence for the purposes of section 98(a)(viii), read with section 99, unless an obligation to meet such a requirement is specified as an obligation in terms and conditions stated in the mining right, as referred to in section 23(6) of the MPRDA (Para 109.2.3);

2.4. Neither the Original Charter nor the 2010 Charter requires the holder

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of a mining right or converted mining right to continue to enter into HDP or HDSA empowerment transactions to address losses in HDP or HDSA participation or ownership once the 26% participation or ownership level as referred to in clauses 4.7 and 4.8 of the Original Charter has been achieved, unless such obligation is specified in the terms and conditions stated in the mining right, as referred to in section 23(6) of the MPRDA (Para 109.2.4);

2.5. Paragraph 2.1 of the 2010 Charter does not retrospectively deprive holders of mining rights or converted mining rights of the benefit of –

2.5.1. the capacity for offsets which would entail credits/offsets to allow for flexibility as referred to in clauses 4.7 and 4.8 of the Original Charter (Para 109.2.5.1);

2.5.2. the continuing consequences of empowerment transactions concluded by them after the coming into force of the MPRDA, as referred to in clause 4.7 of the Original Charter (Para 109.2.5.2);

2.5.3. the right, where a holder has achieved HDP or HDSA participation in excess of any set target in a particular operation, to utilise such excess to offset any shortfall in its other operations, as referred to in clause 4.7 of the Original Charter (Para 109.2.5.3);

2.5.4. the entitlement to offset the value of the level of beneficiation achieved by the holder against its HDP or HDSA ownership

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commitments, as referred to in clause 4.8 of the Original Charter (Para 109.2.5.4); and

2.5.5. all forms of ownership and participation by HDPs and HDSAs as referred to in the Original Charter (Para 109.2.5.5);

2.6. Paragraph 3 of the 2010 Charter does not serve to render holders of mining rights "in breach of the MPRDA and subject to the provisions of section 47 read in conjunction with sections 98 and 99 of the Act", as it expresses itself to do (Para 109.2.6).

3. What was held by the court in relation to the 2010 Charter applies with equal force to the 2017 and 2018 Charters. In relation to the 2018 Charter, those findings and the declaratory orders issued pursuant to them have the following consequences:

3.1. The obligation in paragraph 2.1.1.1 of the 2018 Charter placed upon an existing right holder who has achieved and maintained a minimum of 26% BEE shareholding at the date of publication of the 2018 Mining Charter to increase that shareholding to 30% over a period of 5 years, is unenforceable;

3.2. The obligation placed on an existing right holder in paragraph 2.1.1.2 of the 2018 Charter who has achieved a minimum of 26% BEE shareholding, but whose BEE partner has exited, to supplement its BEE shareholding from 26% to a minimum of 30% is unenforceable;

3.3. The obligation placed on existing right holders in paragraphs 2.1.1.7 and 2.1.1.8 who did not achieve 26% BEE shareholding by the date

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of commencement of the 2018 Charter to supplement their BEE shareholding to a minimum of 30% BEE shareholding, is unenforceable;

3.4. The only obligation on a holder to achieve and/or maintain a particular percentage BEE shareholding arises from the terms and conditions of the mining right granted to such holder;

3.5. The obligation imposed on new mining right holders in paragraph 2.1.31 to have a minimum of 30% BEE shareholding is unenforceable. That is so both because the 2018 Charter is not the "charter contemplated in section 100" of the MPRDA, but also because the obligation to have a particular percentage BEE shareholding can arise only from a term or condition of a mining right;

3.6. The application of the 2018 Charter in paragraph 3 to licensees under the Precious Metals Act, 2005 and the Diamonds Act, 1986 has no force or effect in law. As indicated earlier, that is because the 2018 Charter has no binding effect *per se* and only gives rise to legal consequences insofar as a provision thereof is lawfully incorporated in a mining right issued in terms of the MPRDA or in a right issued under another Act which requires that regard be had to the 2018 Charter;

3.7. A failure in paragraph 8 by a right holder to comply with the ownership element of the 2018 Charter does not constitute a breach of the MPRDA and cannot be dealt with in terms of section 93 read in

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conjunction with sections 47, 98 and 99 of the MPRDA. That is both because of a specific finding to that effect in the judgment and because the 2018 Charter is not the charter contemplated in section 100 of the MPRDA.

4. The Minister has applied for leave to appeal against the judgment to the Supreme Court of Appeal. Section 18(1) of the Superior Courts Act, 2013 provides:

> *"Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal." (Underlining added)*

5. The orders made by the 2018 court were in the form of declarators. Although the position is not entirely clear, the effect of the Minister's application for leave to appeal the 2018 judgment may be to suspend the effect of the declaratory orders *as between MCSA and the Minister.*

6. MCSA submits that the practical consequences of that suspension are however limited. To the extent that the 2018 Charter contains provisions which were declared to be unlawful in the 2018 Judgment, MCSA submits that that judgment also establishes the unlawfulness of the corresponding provisions in the 2018 Charter, despite the fact that as between the Minister and MCSA, the declaratory orders may have been suspended. That is because the 2018 Judgment establishes a precedent. Another court called upon to determine the unlawfulness of the provisions in question will have regard to the 2018 Judgment despite the fact that leave to appeal has been sought.

7. The rule of precedence applies so as to settle the legal issues determined by a court, as opposed to disputes between the parties to the proceedings which led to the judgment.

8. MCSA submits that where a dispute between litigants is determined by the courts in favour of one party or the other, the losing party may not raise that

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dispute again. The issue is said to be *res judicata*. The object of that rule is to prevent re-litigation of a dispute finally determined between the parties to the litigation. The rule applies to both legal and factual questions.

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MINING CHARTER: OWNERSHIP COLLATION

March 2015

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FOR CONSIDERATION BY THE CHAMBER OF MINES
MINING CHARTER OWNERSHIP TASK TEAM

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1. Executive summary

The purpose of this document is to present the findings of the collation process, and to enable the mining industry to have aggregated information to quantify the percentage of the South African mine industry (represented by the members of the Chamber) owned by HDSAs. Although it is a snapshot, the analysis has captured the ownership compliance in relation to asset level mining rights' compliance. This incorporates all BEE transactions where the partner may have exited or the ESOP may have vested. The total results are displayed, weighted across sectors based on volumes (units of production), and value (EBITIDA multiple basis). The results below demonstrate that the industry had met and exceeded the ownership target of 26% HDSA by 2014, despite the significant challenges posed by the 2008 world financial crisis and the current commodity demand weakness.

This document presents collated figures of the South African mining industry HDSA ownership over 12 years to 2014

- HDSA ownership of the South African mining industry over the last 10 years averages 38.2% and 44% based on value and volume weighting respectively. This is significantly above the 26% agreed upon target, demonstrating the industry's commitment to transformation and the spirit of the Mining Charter.

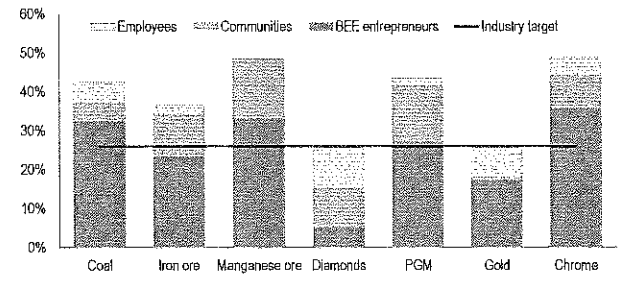
The industry has achieved 38% to 44% HDSA ownership over the 12 year period to December 2014, having exceeded the 26% target, despite challenges posed by the word financial crisis

- The various sectors of the South African mining industry have similarly all met or exceeded the HDSA targets based on volume – PGM at 67%, Gold at 32%, Coal at 47%, Diamonds at 26%, Iron Ore at 23%, Manganese Ore at 42.2% and Chrome at 69%.
- An estimated number of 95 BEE entrepreneurs, community and employee structures have been established over the period, benefiting a total of 7.1 million HDSAs. The majority of the beneficiaries are communities (6.9 million), with more than 200 000 employees benefiting, representing some 41% of the total labour force.
- The industry has to date paid out dividends of R46 813 million to BEE beneficiaries, which is 19.5% of the total 'company' dividends declared over the period.
- The initial total BEE transaction value of R118 billion, grew to a total net value of R161 billion (+193%) based on the company submissions snapshot, or 16% of total industry value. However, based on a through-the-cycle low and high valuation of assets undertaken in this study, the net value ranges represent between R243bn (+340%) and R425bn (+670%) or 25% to 43% of the total industry value.

Economic value transfer and ownership participation was received by a minimum of 46 BEE companies, 6.9 million community members and 200 thousand employees

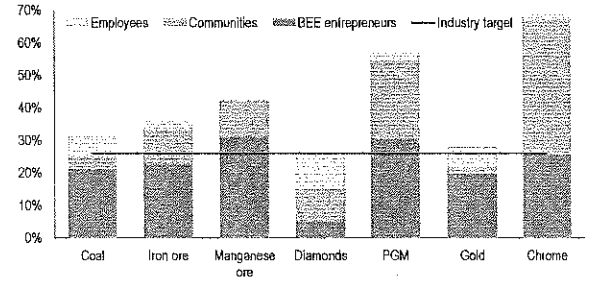
- Because the potential for value creation was dependent on a number of external factors (key being the performance of the underlying asset and the funding structure used to facilitate the transactions), this has resulted in varying levels of success for BEE transactions.
- From the data analysed, it is evident that the industry provided a significant amount of facilitation to ensure the sustainability of BEE transactions. As discussed above, a wide range of facilitation options have been applied to create sustainable and particularly fundable BEE transactions within the industry over the past 15 years.

Figure 1: HDSA ownership by Value (EBITDA)



Source: SNG and Chamber of Mines analysis

Figure 2: HDSA ownership by volume (Sales and revenue)



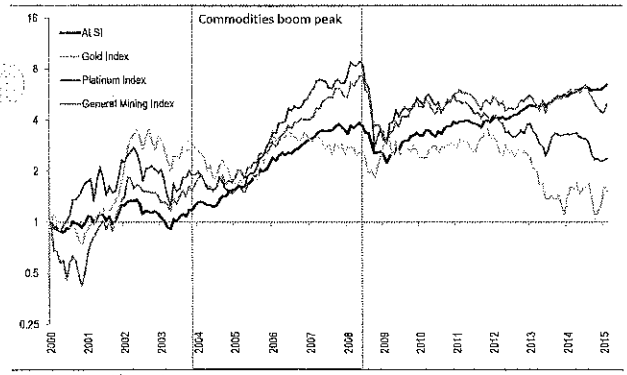
Source: SNG and Chamber of Mines analysis

Transactions and net value

Through the last 10 years, the mining industry has experienced volatility, which is presenting challenges and results in varying levels of success in the implementation of the HDSA ownership transfer. It has varying impact on the overall economic value transferred to HDSAs from the mining industry. The changing dividend levels and funding constraints are two key challenging areas. Companies have been creative and facilitated transactions in an attempt to counteract some of these challenges. This was done to ensure that not just the letter but also the spirit of the Mining Charter targets are delivered. To highlight this, the figures below demonstrate the varying performance of the mining sectors relative to the JSE compared to the HDSA transactions. As can be seen, a significant portion of transactions were concluded during boom time. Yet, over the last 12 years, R205 billion worth of transactions in today's terms have been concluded.

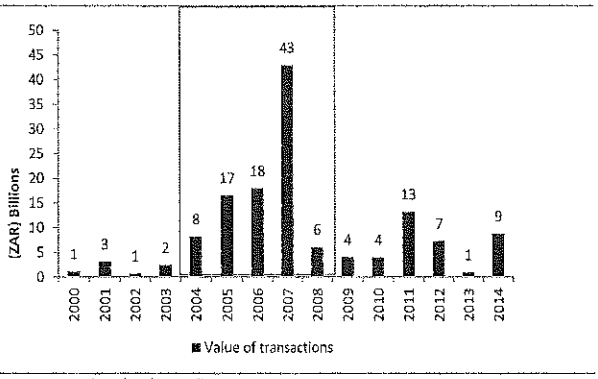
R205 bn worth of mining BEE transactions has occurred over the period, a significant portion concluded prior to the world financial crisis in 2008/2009

Figure 3: Equity indices performance (rebased 2000)



Source: I-Net Bridge and Momentum Investment Managers

Figure 4: BEE transactions by value (R billion)



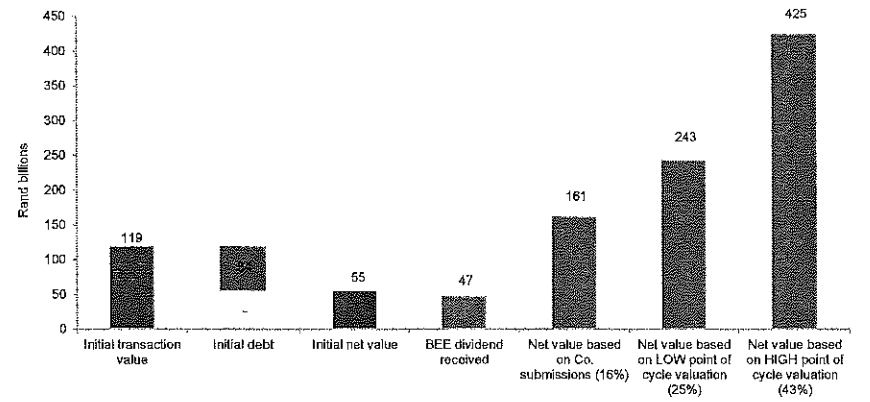
Source: RMB and Deal Makers Online

Significant value has been created based on our estimates over the last 12-year period. There are three current BEE net values indicated in the graph below, which in summary highlights three alternate methods in considering the net valuation:

a. Based on a low cycle valuation methodology applied consistently to all sectors (representing 25% of the total average mining industry value). On this basis, net value has increased to R242 bn or 340%.
b. Based on a high cycle valuation methodology applied consistently to all sectors (representing 43% of the total average mining industry value). On this basis, net value has increased to R424 bn or 670%.
c. Based on companies' estimations as submitted to the DMR (representing 16% of total average industry value). On this basis, net value has increased to R161 bn or 193%.

Based on a range of methods of calculating net value created for HDSA recipients, value transfer including dividends ranges from R161 bn (+193%) to R424 bn (+670%)

Figure 5: Representation of economic value created over the period (including dividends)



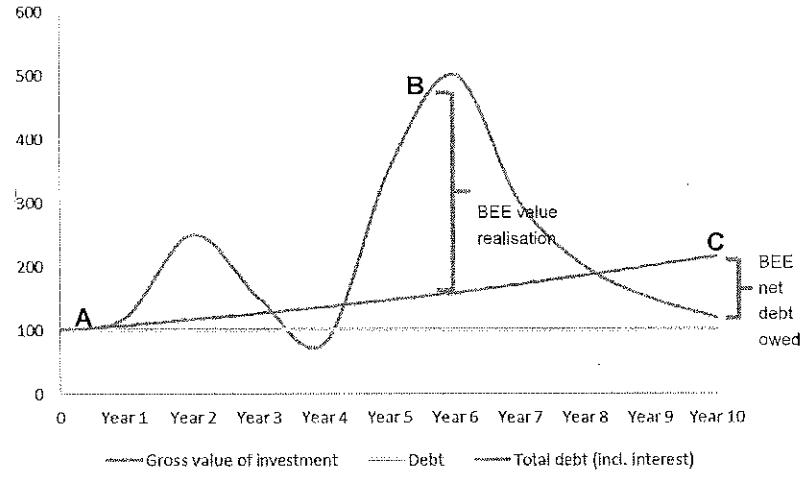
Source: SNG, RMB and Chamber of Mines analysis

Funding structures, cycle timing and facilitation

Most BEE transactions were put in place with the intention of creating value for the beneficiaries. However, in reality, the potential for value creation was dependent on a number of factors, key being the performance of the underlying as well as the funding structure used to facilitate the transactions. Value creation was therefore a function of volatility in commodity prices and other qualitative factors, which drive the performance on the JSE and the return to shareholders. In addition, underlying debt and the timing of the transaction were also critical factors impacting value creation.

Based on a range of methods of calculating net value created for HDSA recipients, value transfer including dividends ranges from R161 bn (+193%) to R424 bn (+670%)

Figure 6: Illustrative impact of when transaction matures



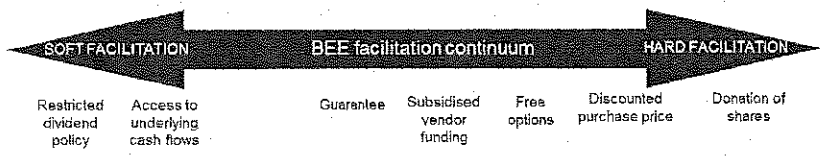
Source: RMB

From a market perspective, creating sustainable value for BEEE transactions in a volatile market has been one of the key challenges. BEE transactions could therefore have dramatically different outcomes depending on the point at which they mature in the commodity cycle. Transactions, which were concluded during the boom cycle of 2004 to 2007, are likely to have high debt numbers and depressed valuations (e.g. the platinum sector) with the result that value-creating potential will be minimal, taking into account current valuations. However, transactions, which unwound at the height of the commodities boom (e.g. iron ore), would have seen significant value transferred to employees.

Funding of BEE transactions in a sustainable manner, with limited equity coming from BEE parties, was also a challenge. Innovative forms of financing, supported by vendor companies were necessary to ensure that transactions were implemented. Facilitation had multiple forms, but all were designed to overcome the challenge of raising third party debt finance for a full value purchase price of shares. In the transactions completed in the Resources sector, facilitation ranged from soft to hard facilitation. This has been in the form of vendor financing, guarantees, discounts, donation of shares, etc.

The data analysed showed a significant amount of BEE facilitation, including hard and soft facilitation – this has been critical to counter the challenges faced as a result of volatile markets

Figure 7: BEE facilitation continuum



Source: Chamber of Mines analysis

From the data analysed, it is evident that the industry provided a significant amount of facilitation to ensure the sustainability of BEE transactions. As discussed above, a wide range of facilitation options have been applied to create sustainable and particularly fundable BEE transactions within the industry over the past 15 years. Due to the extreme cycles the industry has experienced, facilitation/funding models have often had to be adjusted during the terms of a transaction to improve the probability of transactions creating value for the beneficiaries. Due to the Mining Charter maturing and getting assessed during particularly depressed times in the commodity cycle, with many companies facing significant margin/cash flow pressures, a range of transactions (through no fault of either the vendor or BEE buyer) have shown to have particularly challenging economics.

Summarised HDSA ownership collation results

The South African Mining Industry	The industry has achieved a BEE ownership of 38.2% (25.2% BEE entrepreneurs, 9.2% communities and 3.8% ESOPs) based on value. The ownership structure has benefited 63% BEE entrepreneurs, 23% communities and 13% ESOPs, and an estimated 7 125 611 individuals. In terms of volumes, the industry has achieved a BEE ownership of 44.0% (31.3% BEE entrepreneurs, 8.2% communities and 4.5% ESOPs). The ownership has benefited 65% BEE entrepreneurs, 25% communities and 10% ESOPs. The industry has a total net value of between R 161 499 million and R 424 628 million representing a change of between 193% and 670%. In addition, all the sectors have met or exceeded the 26% minimum requirement.
PGM	The PGM sector has achieved a BEE ownership of 45.9% (29.5% BEE entrepreneurs, 14.5% communities and 1.9% ESOPs) based on value. The ownership structure has benefited 62% BEE entrepreneurs, 33% communities and 5% ESOPs, and an estimated 2 774 493 individuals. In terms of volumes, the industry has achieved a BEE ownership of 64.7% (40.9% BEE entrepreneurs, 24.2% communities and 1.9% ESOPs). The ownership structure has benefited 54% BEE entrepreneurs, 43% communities and 3% ESOPs. The PGM sector has a total net value of between R 46 817 million and R 140 075 million representing a change of between 114% and 539%.
Gold	The Gold sector has achieved a BEE ownership of 27.5% (18.9% BEE entrepreneurs, 0.9% communities and 7.7% ESOPs) based on value. The ownership structure has benefited 67% BEE entrepreneurs, 3% communities and 30% ESOPs, and an estimated 135 109 individuals. In terms of volumes, the industry has achieved a BEE ownership of 31.5% (23.3% BEE entrepreneurs, 2.0% communities and 6.2% ESOPs). The ownership structure has benefited 71% BEE entrepreneurs, 7% communities and 22% ESOPs. The Gold sector has a net value of between R 7 182 million and R 56 579 million representing a change of between -31% and 441%.
Coal	The Coal sector has achieved a BEE ownership of 45.1% (35.0% BEE entrepreneurs, 5.0% communities and 5.1% ESOPs) based on value. The ownership structure has benefited 76% BEE entrepreneurs, 12% communities and 12% ESOPs, and an estimated 1 753 087 individuals. In terms of volumes, the industry has achieved a BEE ownership of 47.2% (37.2% BEE entrepreneurs, 4.1% communities and 6.0% ESOPs). The ownership structure has benefited 68% BEE entrepreneurs, 13% communities and 19% ESOPs. The Coal sector has a net value of between R30 476 million and R 60 845 million representing a change of between 267% and 633%.
Diamonds	The Diamond sector has achieved a BEE ownership of 26.0% (5% BEE entrepreneurs, 10.4% communities and 10.6% ESOPs) based on value. The ownership structure has benefited 19% BEE entrepreneurs, 40% communities and 41% ESOPs, and an estimated 114 653 individuals. In terms of volumes, 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 86 million and R 4 229 million representing a change of between -94% and 205%.
Iron ore	The Iron Ore sector has achieved a BEE ownership of 36.7% (23.2% BEE entrepreneurs, 11.2% communities and 2.4% ESOPs) 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 volumes, 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 113 543 million representing a change of between 433% and 1 037%.
Manganese ore	The Manganese Ore sector has achieved a BEE ownership of 48.5% (33.3% BEE entrepreneurs, 15.3% communities and 0.0% ESOPs) based on value. The ownership structure has benefited 69% BEE entrepreneurs, 31% communities and 0% ESOPs, and an estimated 411 512 individuals. In terms of volumes, 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 6 402 million representing a change of between -100% and 100%.
Chrome	The Chrome sector has achieved a BEE ownership of 48.9% (35.8% BEE entrepreneurs, 8.4% communities and 4.7% ESOPs) based on value. The ownership structure has benefited 73% BEE entrepreneurs, 17% communities and 10% ESOPs, and an estimated 454 594 individuals. In terms of volumes, the industry has achieved a BEE ownership of 68.5% (25.6% BEE entrepreneurs, 41.5% communities and 1.4% ESOPs). The ownership structure has benefited 37% BEE entrepreneurs, 61% communities and 2% ESOPs. The Chrome sector has a net value of between R 5 611 million and R 42 954 million representing a change of between 78% and 1 263%.

2. Background

The mining industry is currently undergoing a regulatory compliance review to assess the level of transformation and economic value creation for HDSAs as required in terms of the Mining Charter. The Department of Minerals (DMR) results of this compliance review process are expected to be released end March 2015. The DMR is leading the Mining Industry Growth, Development and Employment Task Team (MIDGETT) process, which is a tri-partite structure between business, labour and government. Its purpose is to address strategic issues facing the industry – the Mining Charter is one of its areas of focus. With the review undertaken by the Department of Mineral Resources (DMR) the CoM undertook an exercise in collation of individual company information relating to the ownership element of the Mining Charter. The aim of the exercise is to produce aggregated information on empowerment (HDSA ownership) in the SA mining industry and demonstrate the significant economic value that has been transferred to HDSAs since 2000 as a result of the mining industry's extensive empowerment drive.

The purpose of this collation process is to enable the mining industry to have aggregated information to quantify the percentage of the South African mining industry (represented by the members of the Chamber) owned by HDSAs. The focus of this engagement was between the Chamber, DMR and other stakeholders in the MIGDETT engagements, which include labour unions. It may further form the basis of the industry's communication with media and investors. The result seeks to address the issues the DMR has requested companies to report on, while capturing the additional information industry believes has been omitted in the DMR process.

Challenges regarding measurement of HDSA ownership

Although there is clarity in terms of the Mining Charter around the level of HDSA ownership required at 26%, there are divergent views in the industry on how this should be calculated.

- General agreement exists in terms of the principle that ownership should be measured at the time when the transaction (or empowerment) occurred. This is view is held across companies in the industry and the DMR seems to subscribe to this. In terms of ongoing evaluation of this target, it is less clear how this will or should be measured.
- There are marked differences in how companies measure empowerment. This could either be done in terms of volume of production or value of assets. These two different approaches invariably lead to different results. This is of particularly significance as the current measurement of the ownership target will influence future measurements post-2014.
- Quantifying the credits attributed to continuing consequences in the measurement of the ownership target remains a challenge. Recognition for continuing consequences appears to be mainly at the discretion of the DMR.

Debate around continuing consequences

The mining industry has been unwavering in its position that continuing consequences for past transactions should be recognised in the measurement of its performance against the 26% ownership target. This was clear in the 2002 Mining Charter which stated: *"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". However, the 2010 revision to the Charter, brought a new twist with the proviso that it would only apply to transactions before the promulgation of the MPRDA (2004).

Industry remained unwavering through those discussions, asserting that the continuing consequences remain in place post-2004. However, is appears that this amendment was imposed on the industry by the DMR from the amendment made in 2010.

3. Ownership collation – aggregated results

Approach and methodology

The following approach and methodology has been applied in the compilation exercise:

Information collection

The information relating to the ownership element has been sourced in three primary methods:

- Interviews/meetings with the company specialists on ownership and BEE transactions;
- Documents provided by the companies; and
- Ownership templates submitted to the DMR.

Asset level collation

Given the complexities of crossholdings of assets by different companies, it was necessary to ensure there was no double-counting of empowerment across the industry. As such, an asset level analysis was undertaken at an operational level. Distinction between assets/operations occurs where different empowerment structures apply. Ownership of an asset is then divided between different corporate and BEE shareholders.

As part of this process, consideration is given for equity participation of BEE shareholders. In addition, BEE participation is specified based on the four categories as considered by the DMR – BEE entrepreneurs, employees, communities and other broad-based groups (including woman).

This is in line with the DMR template submissions, which are linked back to mining rights at an asset level mainly.

Dual aggregation approach

Information has been collated based on volumes (units of production) and value.

- For the volume aggregation process, the level empowerment for each asset is weighted based on the volumes in its sector. The sectors are then aggregated based on the mineral sales value in the sectors.
- For the value aggregation process, EBITDA multiple valuation methodology is used, by applying a high and low range multiple to the 2014 EBITDA for the asset. In the case, for listed assets, market capitalisation at 2014 is used.

Shareholding

- To reduce the risk of double-counting, we have recorded the transactions at an asset level as far as practicable.
- Where the BEE partner is Black controlled, we have included the shareholding as an effective 100% BEE shareholder.
- Where the entity itself is Black controlled, we have included the shareholding at its effective percentage (i.e. flow through).
- Where the BEE partner is not Black controlled, we have included the shareholding at an effective percentage (i.e. flow through).

Treatment of past transactions (continuing consequences)

The industry has remained unwavering in its recognition of past transactions where the BEE partner has exited in its empowerment credentials. For entities where the mining assets have not been re-empowered we have included them in the current shareholding as the Members have in their submission to the DMR.

There are two categories of exited past transactions (continuing consequences), which has been treated differently in this collation process:

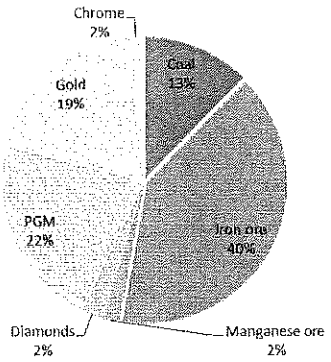
- **Category 1 - Re-empowered; Multiple owners**: Where the asset is currently re-empowered we have included the past transactions as a continuing consequence, to prevent double counting in the collation process. This is in the instance where an asset has a history of multiple BEE transactions, and an existing empowerment partner remains present. It is also applied to cases where the assets has had multiple owners over the last 14 years. Where the BEE partner has exited the transaction (past transactions) we have obtained the value in reference to the price at the exit date and have applied the effects of the time value of money at an average CPIX rate of 6%. In the analysis that follows, we indicate this category separately.
- **Category 2 - Same owner; historic empowerment**: For past transactions where the BEE partner has exited from the transactions, industry maintains that compliance has been met in terms of mining right being granted. This is where the asset has not been re-empowered, nor exchanged ownership and double counting is not a consideration. As such, we have included those empowerment credentials in the current section of the ownership calculation. In the analysis that follows, this is included in the current calculation.

It is important to note that all of the Mining industry's empowerment credentials is ultimately at risk, should exited past transactions be disallowed. It means that perpetually mining companies need to have up for sale 26% of their business. This while BEE partners are able to enter and exit, benefiting from economic value in perpetuity. The need for HDSA participants to realize value from their ownership, implies that each transaction at some stage will have an HDSA partner who has exited and therefore would put ownership credentials at risk. Lock-ins for BEE partners are a solution but within the next 3 years, the majority of those expire for industry.

South African mining industry sector weightings

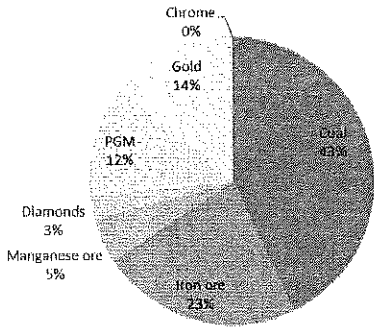
Given the extensive scale and variety of mining operations forming part of the South African mining industry, this analysis focuses on the largest assets across the largest sectors. The collation is based on seven key sectors – PGMs, Gold, Iron Ore, Coal, Manganese Ore, Diamonds and Chrome. Assets included in the analysis represent the majority of the sector by volume and value. The results therefore would not represent the entire South African mining industry but would account for the majority of companies represented by the Chamber. It does, however, provide for the majority of South African mining operations, and is, in our opinion, a fair proxy for the South African mining industry, on the basis of the 80/20 principle. The key weighting differences are due to margin differences across the sectors as at 2014. The figures below demonstrate the relative sector weightings applied, based on value and volume:

Figure 8: Sector weighting by value (EBITDA)



Source: SNG and Chamber of Mines analysis

Figure 9: Sector weighting by volume (sales and revenue)

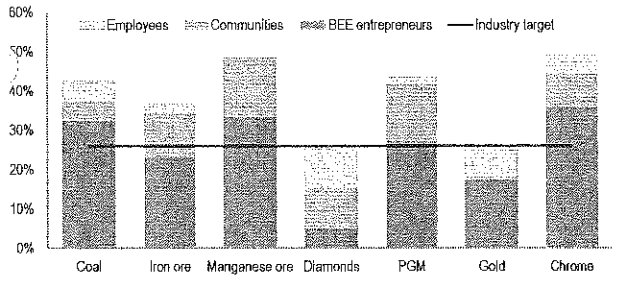


Source: SNG and Chamber of Mines analysis

Results of mining industry HDSA ownership collation

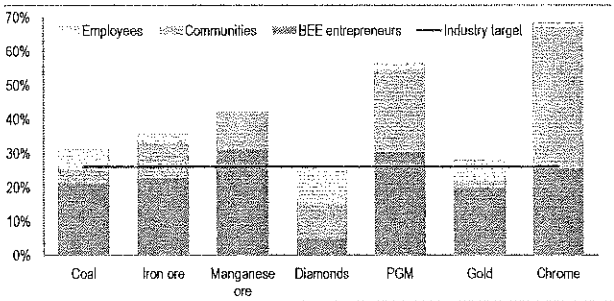
The industry has achieved a BEE ownership level of 38.2% (25.2% BEE entrepreneurs, 9.2% communities and 3.8% ESOPs) based on value of the assets. The ownership structure has benefited 63% BEE entrepreneurs, 23% communities and 13% ESOPs, and an estimated 7 million individuals. In terms of volumes, the industry has achieved BEE ownership level of 44.0% (31.3% BEE entrepreneurs, 8.2% communities and 4.5% ESOPs). The ownership has benefited 65% BEE entrepreneurs, 25% communities and 10% ESOPs. The industry has created net value of between R 161 499 million and R 424 628 million representing a change of between 193% and 670%. In addition, most of the sectors have not only met but also exceeded the 26% minimum compliance requirement. See Appendix page 45 for sector details.

Figure 10: HDSA ownership by Value (EBITDA)



Source: SNG and Chamber of Mines analysis

Figure 11: HDSA ownership by volume (Sales and revenue)



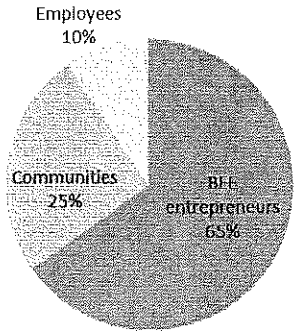
Source: SNG and Chamber of Mines analysis

Figure 12: Total HDSA overall contribution

	Total HDSA	BEE entrepreneurs	Communities	ESOPs	Other broad-based schemes
By value (%)					
Current	37.2	24.2	9.2	3.8	37.2
Continuing consequences	1.1	1.1	0.0	0.0	1.1
Total	*38.2*	*25.2*	*9.2*	*3.8*	*38.2*
By volume (%)					
Current	*35.3*	22.6	*8.2*	*4.5*	*35.3*
Continuing consequences	8.7	8.7	0.0	0.0	8.7
Total	*44.0*	*31.3*	*8.2*	*4.5*	*44.0*
Participants					
No of structures	95.0	46.0	31.0	18.0	95.0
No of individuals	7 125 611	46.0	6 915 449	210 116	7 125 611

Source: SNG and Chamber of Mines analysis

Figure 13: Total HDSA component contribution



Source: SNG and Chamber of Mines analysis

Mining industry dividends distributed to HDSA participants

The industry has to date paid out dividends of R46 813 million to BEE parties, which amounts to 19.5% of the total dividends declared and paid by the industry over the period. Of the dividends paid to the BEE beneficiaries, R10 935 million was used to service the debt on the transactions with the balance having been paid in the form of trickle dividends to the BEE parties. In our analysis, we noted instances where as part of the lock-in provisions, the BEE parties receive guaranteed payments in lieu to cover costs for purposes of maintaining the BEE structures. These payments are paid out despite the performance of the companies.

In other structures, we have noted instances where the entity uses 100% of its dividends to service the debt. However, the BEE beneficiary would retain a portion of their dividend, thus ensuring that the duration of the debt is reduced. The analysis did not take into account the net cash realised over the period as a result of the exiting of HDSA participants.

Figure 14: Total HDSA dividends

	Dividends			
	Overall Dividends declared (RM')	Dividends to BEE beneficiaries (RM')	Dividends to payoff BEE loan (RM')	Dividends to BEE %
Coal	30 372	11 708	4 840	39%
Iron ore	93 613	20 810	2 686	22%
Manganese ore	2 866	493	234	17%
Diamonds	9 035	2 278	2 176	25%
PGM	93 141	9 319	999	10%
Gold	1 966	341	-	17%
Chrome	8 758	1 864	-	21%
Total industry	**239 752**	**46 813**	**10 935**	**19.5%**

Source: SNG and Chamber of Mines analysis

Transactions and net values

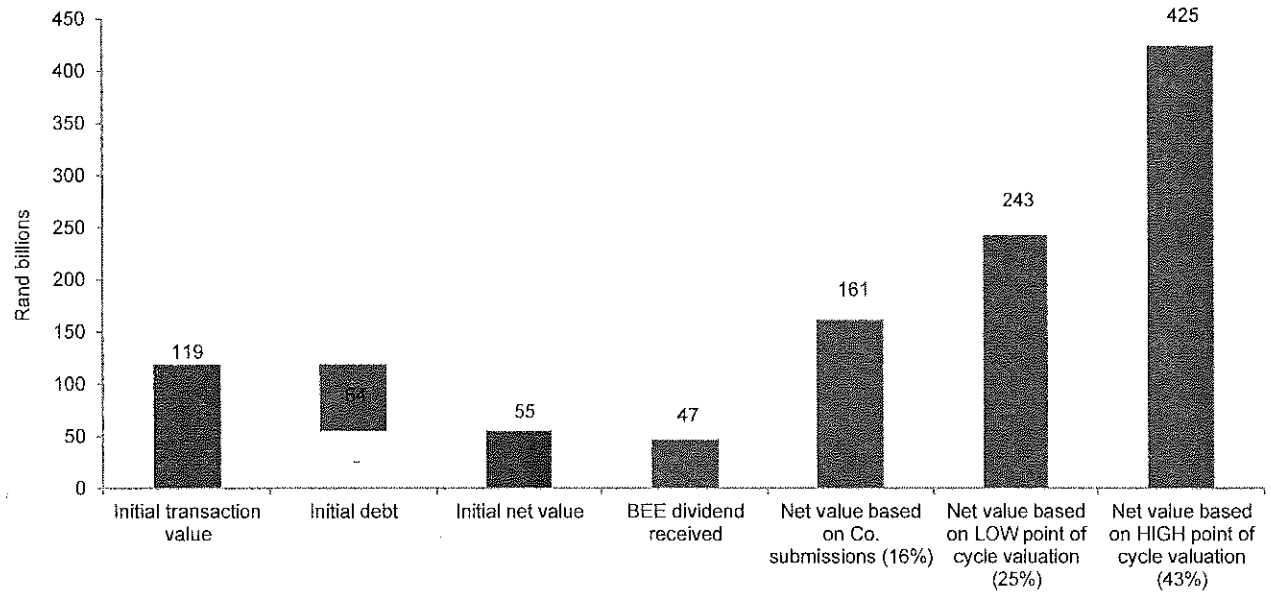
In the DMR template submission, various BEE transaction and value information was requested. Based on the company submissions, we have collated this information as the companies have provided it. In the table below, the columns indicated with an '*' are the DMR requested information. The other columns, specifically the net value column, are analysis applied to submitted data.

Companies have applied varying assumptions in terms of current value, or elected to not disclose it. A high and low net value was used to estimate the range of value creation based on differing assumptions.

There are three current net values indicated in the graph and tables:

a. Based on a low cycle valuation methodology applied consistently to all sectors (represents 25% of the total average mining industry value).
b. Based on a high cycle valuation methodology applied consistently to all sectors (representing 43% of the total average mining industry value).
c. Based on companies' estimations as submitted to the DMR (representing 16% of total average industry value).

Figure 15: Representation of economic value created over the period



Source: SNG, and Chamber of Mines analysis

The value of initial transactions amount to R118 billion, which represents approximately 85% of total industry transactions concluded for the period. From the initial transaction value, debt is subtracted in calculating a net value. We caution that certain companies may have elected not to disclose the debt amounts, and these figures should be considered on that basis.

Based on the actual transaction values over the last 15 years, the initial net value was R 55 181 million which amount represented the initial equity value at inception of the transaction which would have been created as a result of entry discounts and other factors. As at 31 December 2014 the total net value created was between R 161 499 million and R 424 628 million representing a change of between 193% (almost a two times increase in value) and 670% (almost a seven times increase in value). The value creation is a function of volatility in production

prices and other qualitative factors, which drives the performance on the JSE and the return to shareholders. The value creation is further impacted by debt in terms of the structuring and the timing of the transaction.

Figure 16: Initial and current values

	Initial values			Current values						
Sector	Initial BEE Transaction Value ('Rm)*	Initial loan value (BEE) ('Rm)*	Initial BEE net value ('Rm)	(a) Current transaction value (BEE) ('Rm) Low	(b) Current transaction value (BEE) ('Rm) High	(c) Current transaction value (BEE) Companies ('Rm)*	Current loan balance (BEE) ('Rm)*	(a) Current net value (BEE) ('Rm) Low	(b) Current net value (BEE) ('Rm) High	(c) Current net value (BEE) Companies ('Rm)
Coal	27 423	19 126	8 297	40 492	70 861	57 153	16 884	23 608	53 977	40 269
Iron ore	13 823	3 833	9 990	48 788	97 575	37 253	2 157	46 631	95 419	35 096
Manganese ore	3 850	3 850	-	6 142	12 285	5 447	6 142	0	6 143	(695)
Diamonds	5 094	3 709	1 385	4 143	8 287	6 026	4 160	(16)	4 127	1 866
PGM	48 063	26 159	21 904	100 757	146 555	53 297	14 799	85 957	131 756	38 497
Gold	14 255	3 802	10 452	32 201	56 352	6 955	114	32 087	56 238	6 841
Chrome,	6 425	3 272	3 153	22 435	44 871	7 527	3 780	18 655	41 090	3 747
Total SA mining industry	118 934	63 752	55 181	254 959	436 786	173 658	48 037	206 922	388 749	125 621

Source: SNG and Chamber of Mines analysis

We have included the aggregate value of dividends as discussed in the previous section to derive the total value created over the period in the table below, which indicates the value increase range of 193% to 670%.

Figure 17: Dividends and total values

	Dividends			Total values								
Sector	Value of overall dividends declared by the company ('RM)*	Value of dividends paid to BEE beneficiaries ('Rm)*	Value of dividends paid to service the BEE loan ('Rm)*	(a) Total BEE value Low	(a) Change in net value Low	(a) Change in net value % Low	(b) Total BEE value High	(b) Change in net value High	(b) Change in net value % High	(c) Total BEE value Companies	(c) Change in net value Companies	(c) Change in net value % Companies
Coal	30 372	11 708	4 840	30 476	22 179	267%	60 845	52 548	633%	47 136	38 840	468%
Iron ore	93 613	20 810	2 686	64 755	54 765	548%	113 543	103 553	1037%	53 220	43 230	433%
Manganese ore	2 866	493	234	260	260	100%	6 402	6 402	100%	(436)	(436)	100%
Diamonds	9 035	2 278	2 176	86	(1 299)	-94%	4 229	2 844	205%	1 968	583	42%
PGM	93 141	9 319	999	94 277	72 373	330%	140 075	118 171	539%	46 817	24 913	114%
Gold	1 966	341	-	32 428	21 976	210%	56 579	46 127	441%	7 182	(3 271)	-31%
Chrome	8 758	1 864	-	20 519	17 366	551%	42 954	39 801	1263%	5 611	2 458	78%
Total SA mining industry	239 752	46 813	10 935	242 800	187 619	340%	424 628	369 446	670%	161 499	106 318	193%

Source: SN, RMB and Chamber of Mines analysis

Comparison to other sectors

Comparison with other sectors would make a good start to benchmark how the mining industry has performed. The financial services sector is one sector that is one of the sectors that has reached a critical milestone where its performance it terms of its industry charter will be assessed. The sector generally been celebrated as having created meaningful value transfer for its beneficiaries.

The Financial Services Sector Charter required direct BEE of 10% (as opposed to the Mining Charter's 26%). Although the transaction size was small, these transactions included exposure to international operations as opposed to mining companies who empowered only South African based assets.

The financial services sector delivered value to beneficiaries of approximately R60 billion. This value was created by companies with an aggregate market capitalisation of approximately R1 trillion. Value created translates to approximately 6% empowerment on the basis of the current market capitalization. Relatively speaking, one can conclude that on the basis of capitalisation (note that capitalisation of mining companies is likely understated because of our valuation approach), the mining industry has fared better in absolute terms as value a maximum of c.R425 billion has been created as opposed to approximately R60 billion (approximately R153 billion if grossed up for 26%) delivered by the Financial Services companies included in our study.

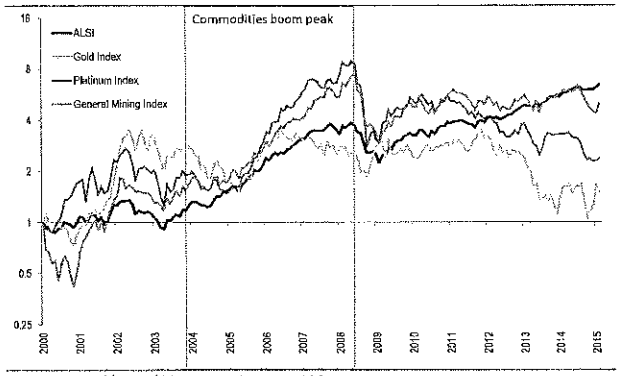
4. Funding structures and cycle timing

Overview of the performance of the market and mining sector since 2000

From 2000 to 2015, we have seen a period of exceptional high volatility for the Resources sector globally. The overall period's price and valuation moves were heavily influenced by China's exceptional growth rates and intense capital investment cycle. In the years until 2008, this major global demand driver was a strong underpin for commodity prices, which, however, were pushed to unrealistic levels on the back of low interest rates, low inflation rates and loose monetary policy in some of the world's major developed economies. Towards the latter part of the price peak cycle, significant investment flows into commodity funds further pushed commodity prices to unsustainable levels.

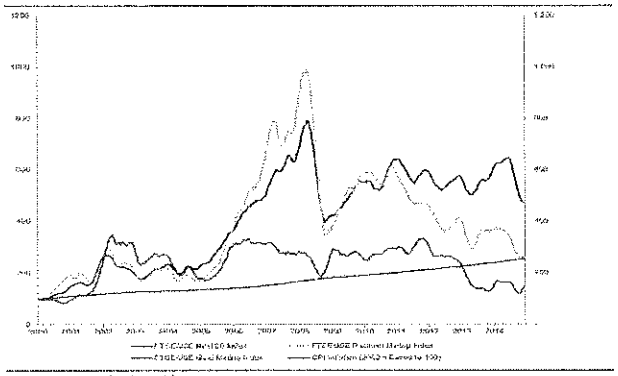
This period unfortunately also created a significant misallocation of capital within the global resources industry, in the form of excessive organic growth based on unrealistic long-term assumptions, overpriced mergers and acquisitions, and heavy project capital over-runs. Furthermore, costs in the industry started rising dramatically, partially as a result of relative scarcity of skills, equipment, etc., as well as opportunistic supplier pricing and increased host country expectations. Following the 2008 correction, the industry has paid a heavy price in the following years in the form of impairments that are now well in excess of US$100 billion globally.

Figure 18: Mining equity indices performance vs ALSI (rebased in 2000)



Source: I-Net Bridge and Momentum Investment Managers

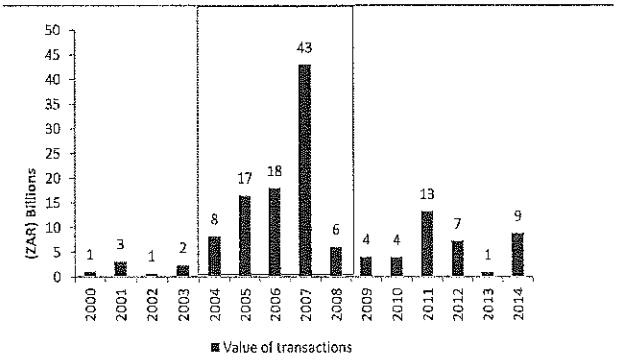
Figure 19: Mining equity performance vs Inflation



Source: RMB and I-Net Bridge

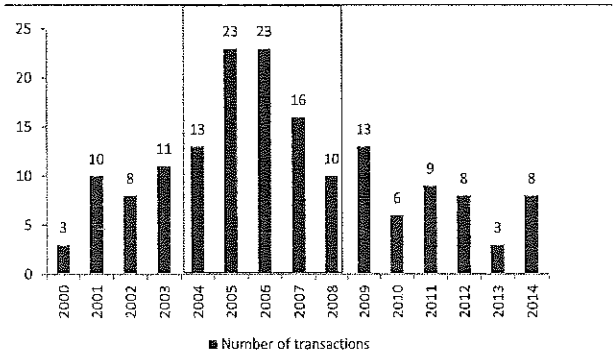
The consequence of the above was that the full global resources boom and bust cycle was replicated in South Africa over the 2004-2014 Charter implementation period. As a result, the outcomes for a wide range of industry efforts in achieving Charter compliance has, depending on timing, resulted in radically different outcomes from a net value perspective. This has made measurement of such outcomes at a specific point in time, depending on cycle level and momentum, challenging to say the least.

Figure 20: BEE transactions by value (R billions)



Source: RMB and Deal Makers Online

Figure 21: BEE Transactions by volume (no. of transactions)



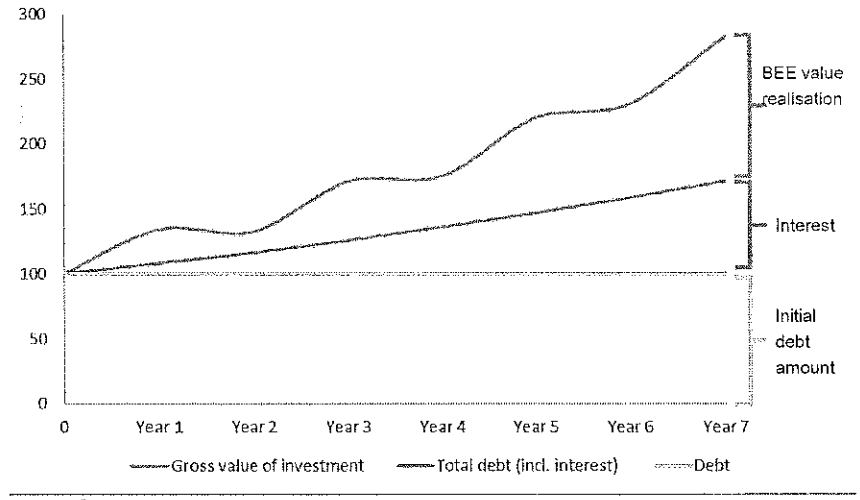
Source: RMB and Deal Makers Online

From inception, industry's key concern has been the economic impact of facilitating the transfer of the required equity ownership to BEE groups, given these groups lack of capital. This remains a fundamental macro issue for BEE as there is clearly insufficient capital to fund the transfer of 26% of the economy as a whole to BEE parties. To achieve the empowerment objectives, companies therefore generally chose the route of selling shareholding interests to BEE compliant entities instead of transferring shares without value.

BEE value realisation in a simplified world and a modestly volatile industry

In a simplified world, and assuming a modestly volatile but growing industry, putting together a BEE transaction with a reasonably certain value realisation upon vesting seems relatively straightforward. Net value realisation will largely depend on the growth in value of the investment outstripping the compound interest rate on the debt over the period.

Figure 22: Simplified BEE value realisation



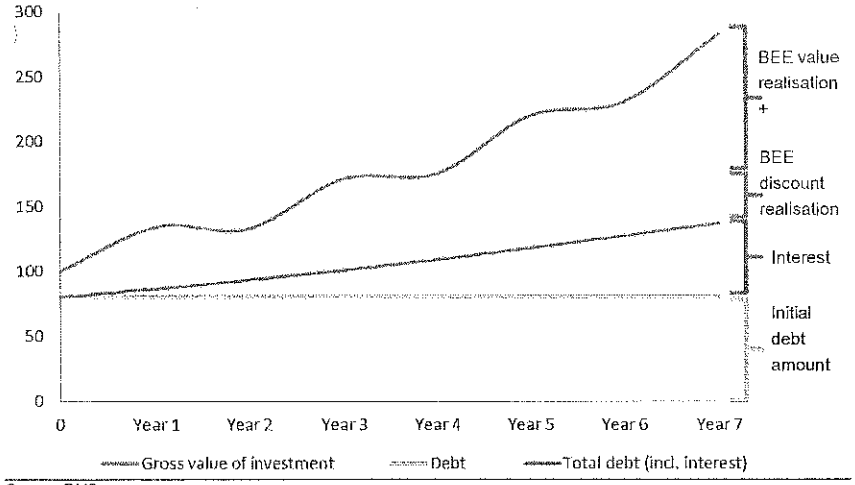
Source: RMB

In the simplified diagram above, it is illustrated how a typical transaction commencing in Year 0, and assuming no servicing of debt nor interest over the period, and ignoring dividend payments by the company, would realise value in Year 7, assuming the underlying company's performance over the period would be

in excess of the compound interest of the debt over the period. In the above example, if the company would show a compound growth rate of 16% per annum vs interest charged on the debt at an assumed 8%, the BEE party's net value realised after settlement of debt and interest would be some 112 (with essentially no upfront equity provided by the BEE party).

If the company above furthermore introduces some form of facilitation, in the example below through the form of an upfront discount offered of, say 20%, potential returns for the BEE party could be further enhanced. This offers the benefit of a lower upfront debt amount, and a lower compound interest amount as a result at the time of value realisation. Again assuming no servicing of debt, interest nor dividend payments, and similar compound growth rates as the earlier example, this results in a BEE value realised of some 146, or a 30% enhancement over the earlier example.

Figure 24: Simplified BEE value realisation with upfront discount

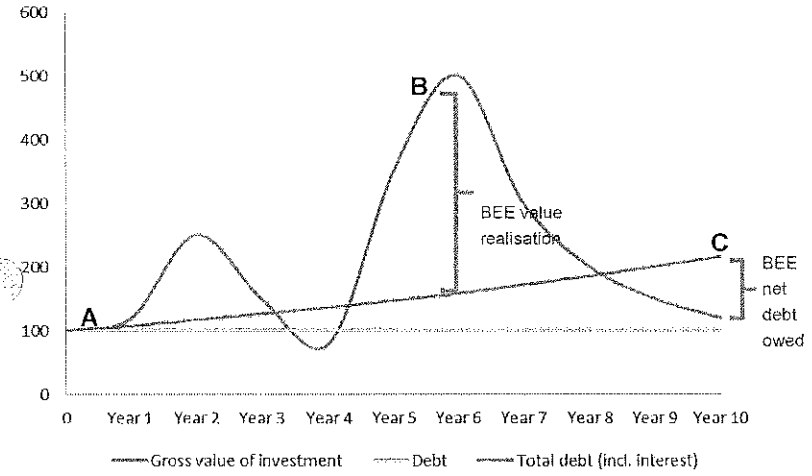


Source: RMB

Structuring around BEE value realisation in volatile industry

The above examples provide an ideal picture – unfortunately, creating sustainable BEE transactions within a very volatile industry (both from a cash flow and value perspective) is far more challenging. The graphs below use two examples to illustrates this:

Figure 23: Illustrative impact of when transaction matures



Source: RMB

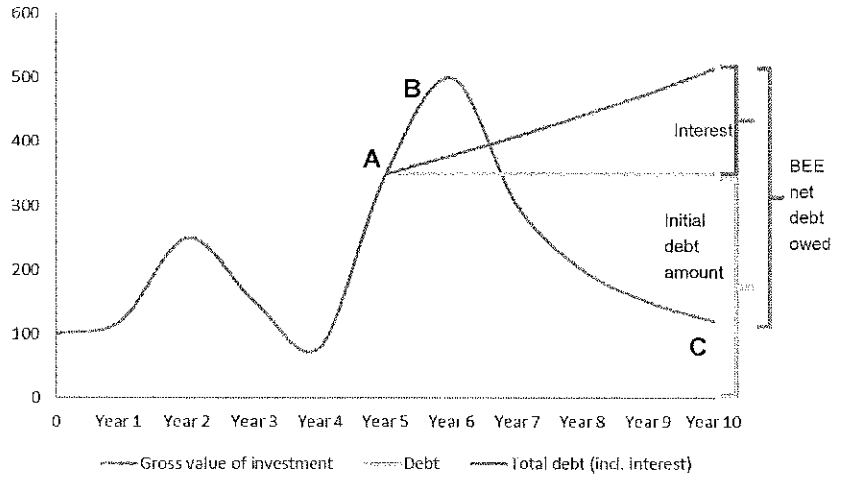
As indicated above, the pay-out profile of a transaction that is concluded in point A will have a different pay-out depending on which point it unwinds (point B or C in Figure 25). A transaction that matures at point B in the commodity cycle, e.g., the Kumba Envision I employee scheme, which was implemented at low iron ore price levels and matured at the highest point of the iron ore price performance, resulted in an outperforming transaction in terms of the value transferred to employees. This was due to the compounded growth in value being far greater than the funding rate at which the facilitated funding rolled up.

In contrast, a transaction that matures at point C, e.g. Aquarius Platinum's transaction where the transaction accumulated great value up until point B but all that value was lost when the transaction matured at point C, wherein the underlying performance of the company and the greater PGM industry was hindered due to the commodity price bust.

The above graphs illustrate how similar transactions could have different outcomes depending on the point at which the transactions matured in the commodity cycle.

A potentially far worse outcome can be created when transactions have been completed at significantly higher valuations during the boom period. This is illustrated below, where transaction A has now been concluded at a significantly richer price. As a result, the debt quantum raised had to be significantly higher, with resultant higher interest servicing costs. Although some value was created at point B, often as a result of either funding restraints or lock-in provisions, no exit was possible at this point. As a result of the cycle correction, such transactions have resulted in significantly under-water valuations for the BEE parties involved at point C. Should the commodities cycle still be depressed at maturity, they offer no likelihood of value realisation at this point.

Figure 24: Illustrative impact of when transaction matures



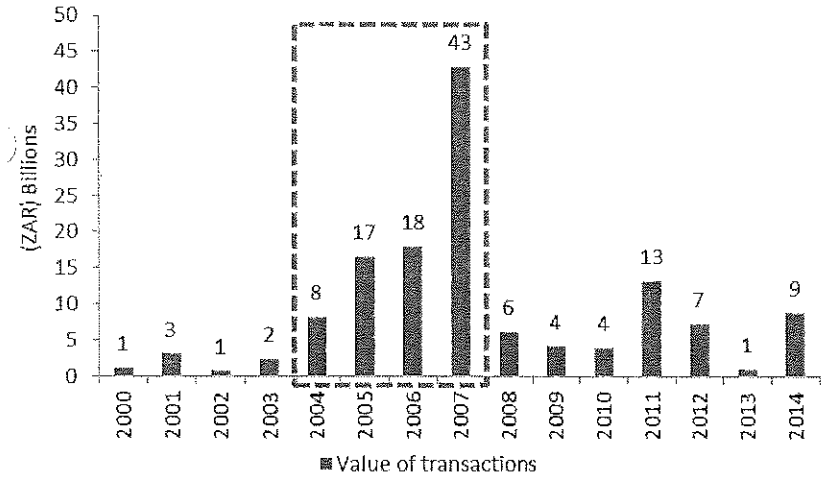
Source: RMB

Impact of BEE transaction timing 2000-2015

As shown in the preceding section, in a volatile industry, success or failure of BEE value creation is strongly dependent on point in the cycle when the transaction is initiated.

As illustrated in Figure 27, a large number of BEE transactions where concluded during the commodities boom cycle between 2004 and 2008. Transactions concluded during this period include, *inter alia*, Anglo Coal, Exxaro, Implats, Lonmin, and Richards Bay Minerals. This is the period during which most of the BEE transactions in the PGM sector were concluded as well.

Figure 25: Value of BEE transactions – SA mining industry 2000-2014



Source: Dealmakers Online

Given the associated facilitation cost involved in setting up a BEE structure, it is largely during the boom cycle that many companies, generally, find it affordable to implement BEE transactions. Not only were these transactions dependent on the underlying financing structure but also the continued performance of the market.

Given the lock-in provisions that are usually associated with most BEE transactions, most of the transactions matured or are maturing in a far more subdued pricing environment. Whilst some of the BEE parties saw some wealth during the peak points in the commodities cycle, most of this value was destroyed when the cycle turned. Many BEE transactions were, however, subject to lock-in restrictions, constraining value realisation at a more appropriate time in the cycle.

Whilst there has been a lot of value created for BEE participants post the introduction of the Mining Charter, it is worth noting that BEE transactions, which were concluded prior to the promulgation of the legislation, largely resulted in sustainable black operated companies.

Funding structures conundrum – BEE transaction implementation impact

From a financier's perspective, matching the correct risk/reward profile was often challenging. In BEE transactions, financiers typically only had recourse against the shares that were being funded for recovery of the loan. Financiers were therefore exposed to share price decreases, which could result in losses if insufficient value existed to settle the loan. These risks were the same as if the financier owned the shares himself, although the return was limited to a fixed interest rate, while if the shares had been bought outright, the downside risk would have been balanced by full exposure to the upside of the share.

To overcome this challenge, financiers required a 'cover level', i.e. a value buffer able to absorb initial losses arising from share price decreases before loan losses occurred. Only with these cover levels or buffers did a fixed return begin to compensate the financier for the risk inherent in share cover lending.

The obvious source of these buffers was equity introduced into a funding structure by the prospective BEE party. Typically, this would have needed to account for c.66% to 75% of the purchase price to allow the financier a share cover (defined as value of shares divided by outstanding debt) of between 3 and 4 times. In light of the objectives of BEE, the prospective BEE parties typically did not have access to such funds.

The lack of capital resulted in the design of innovative funding solutions to provide capital resources to finance BEE transactions, which almost exclusively required the empowering company to bridge the gap described above, in what is typically referred to as 'facilitation'.

Facilitation had multiple forms, but all were designed to overcome the challenge of raising third party debt finance for a full value purchase price of shares. In the transactions completed in the Resources sector, facilitation took the form of one or more of the following:

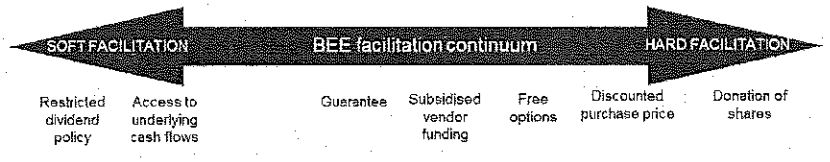
- *Upfront discount on BEE shares*
  If shares were sold to BEE parties at below market value, the discount equated to an equity injection into the funding structure. This provided a buffer to third party financiers up to the amount of the discount. For example, if shares worth R100 were sold for R90, the market price could decrease by R10 before risking loss to the financier.
- *Issue of free shares to guarantee a minimum amount of vesting*
  Free shares had the obvious benefit of not requiring external funding. In addition, they allowed BEE parties to borrow funds using them as collateral and to acquire further shares (possibly at a discount), thereby increasing the

overall level of BEE ownership. Third party funding in these instances was possible as the free shares acted as an equity issuance into the BEE structure providing a buffer for financiers.

- *Vendor financing*
  As described above, commercial financiers would not be able to provide all the required funding without facilitation, as the resulting risk/reward profile would typically not have been commercial. In many instances, companies chose to provide funding to the BEE parties for the full purchase price on favourable terms. Notwithstanding the funding challenges described above, companies provided facilitation by accepting the skewed risk/reward profile resulting from receiving a subsidised debt return in exchange assuming the full downside equity risk. The structures typically resulted in a 'free-option' profile granted to BEE beneficiaries by the companies in that all the upside over a certain debt return accrued to the BEE parties and the companies bore the full downside risk.
- *Guarantee in respect of BEE funding*
  In many transactions, third party funding for the acquisition of BEE shares was provided with full recourse to the company through a payment guarantee. Such a guarantee served to overcome the share cover limitations discussed above by giving financiers access to the company's balance sheet should the value of the BEE shares be insufficient to settle the loans. As for vendor loans, the facilitation took the form of assuming full downside risk while foregoing any equity return on the BEE shares. Variations of this facilitation included the provision of put options to financiers over the BEE shares, which allowed the financiers to sell the share back to the company at a pre-agreed minimum price, which would typically have been set at the price required to fully settle the debt.
- *Cash flow underpin*
  Another challenge faced by third party financiers in BEE transactions was the ability of BEE parties to service interest on the loans. In the Mining sector, dividend payments have tended to be volatile given the many variables mining companies are faced with. To mitigate this risk, many companies provided certainty to financiers by guaranteeing a minimum fixed cash flow profile to the BEE parties allowing them to service their loans. These cash flow underpins took the form of preferred ordinary dividends or dividend-for-interest swaps on BEE shares. These structures ensured that even if other ordinary shareholders were not receiving dividends, or were receiving lower dividends, cash flows to BEE parties continued.

The various forms of facilitation all provided different levels of support, and were often used in combination. The chart below plots these facilitation forms on a facilitation continuum, which ranges from 'soft facilitation' to 'hard facilitation'.

Figure 26: BEE facilitation continuum



Source: Chamber of Mines analysis

Generally, the facilitation norm for most BEE transactions averaged between 25% and 30% of transaction value. Therefore using the value of BEE transactions

concluded in the Mining sector (i.e. c.R138 billion), the estimated minimum facilitation value provided by industry could be between R35 billion and R40 billion. Although this facilitation level would not necessarily translate into value transferred, this shows the level of commitment the industry had in putting in place what they considered to be robust BEE funding structures at the time.

Cumulative facilitation provided by industry

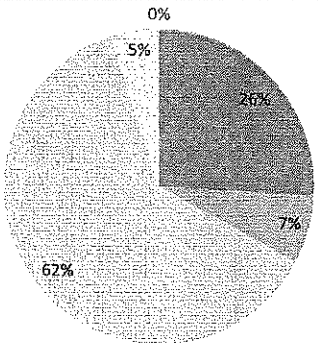
As discussed above, a wide range of facilitation options have been applied to create sustainable and particularly fundable BEE transactions within the industry over the past 15 years. Due to the extreme cycles the industry has experienced, facilitation/funding models have often had to be adjusted during the terms of a transaction.

In the graph below, we show an overview of the industry facilitation forms provided by industry over the period. It should be noted, however, that:

- The data used for this analysis was extracted from the company's detailed presentations on their BEE transactions.
- Due to the diverse nature of facilitation, it is impossible to sum the different forms of facilitation. Therefore, no cumulative number is provided.
- This does not provide a comprehensive picture, as either (1) certain forms of facilitation have been considered confidential (either as a result of funding structures or discounts provided), and (2) not all forms of facilitation can be easily captured/calculated, particularly when involving option value.

Figure 29 indicates that the main form of facilitation provided by mining companies was in the form of vendor facilitation followed by an entry discount.

Figure 27: Funding facilitation



Source: RMB analysis

5. Sector analysis

PGM

Ownership results

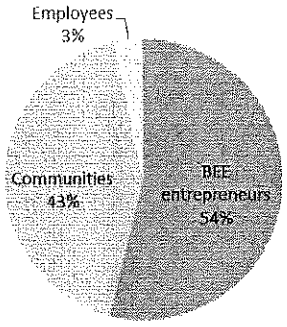
The PGM sector has achieved BEE ownership of 45.9% (29.5% BEE entrepreneurs, 14.5% communities and 1.9% ESOPs) based on value. The ownership structure has benefited 62% BEE entrepreneurs, 33% communities and 5% ESOPs, and an estimated 2 774 493 individuals. In terms of volumes, the industry has achieved a BEE ownership of 64.7% (40.9% BEE entrepreneurs, 24.2% communities and 1.9% ESOPs). The ownership structure has benefited 54% BEE entrepreneurs, 43% communities and 3% ESOPs. The PGM sector has a total net value of between R 46 817 million and R 140 075 million representing a change of between 114% and 539%.

Figure 28: PGM HDSA overall contribution

	Total HDSA	BEE entrepreneurs	Communities	ESOPs	Other broad-based schemes
By value (%)					
Current	43.7	27.2	14.5	1.9	0.0
Continuing consequences	2.3	2.3	0.0	0.0	0.0
Total	***45.9***	***29.5***	***14.5***	***1.9***	***0.0***
By volume (%)					
Current	56.6	30.5	24.2	1.9	0.0
Continuing consequences	10.4	10.4	0.0	0.0	0.0
Total	***67.0***	***40.9***	***24.2***	***1.9***	***0.0***
Participants					
No of structures	26.0	11.0	4.0	11.0	
No of individuals	2 774 493	11.0	2 669 482	105 000	

Source: SNG and Chamber of Mines analysis

Figure 29: PGM HDSA component contribution



Source: SNG and Chamber of Mines analysis

Figure 30: PGM assets forming part of the BEE calculations

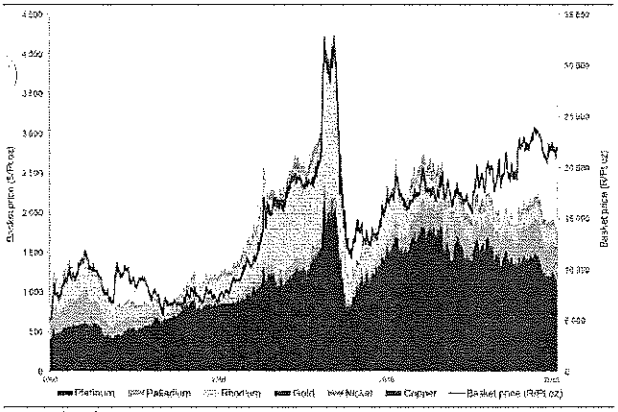
Asset	Volume % contribution to sector	Mining companies
Atlatsa, Rustenburg, Amandelbult, Mogolakwena, Twickenham, Western Limbs ops, DerBrochen	36.7	Anglo Platinum, Atlatsa
Union Mine	4.2	Anglo Platinum
Modikwa	5.1	Anglo Platinum, African Rainbow Minerals
Mototolo	5.4	Anglo Platinum, Glencore
Impala Lease, Two Rivers, Marula, Leeuwkop	16.0	Impala Platinum
East Plats, West Plats	13.7	Lonmin Platinum
Kroondal	4.6	Aquarius Platinum, Anglo American Platinum
Boschkoppie, Styldrift	5.7	Royal Bafokeng Holdings, Anglo Platinum
Zondereinde,Booysendal	8.6	Northam Platinum

Source: Company reports, SNG, Chamber of Mines

Market dynamics

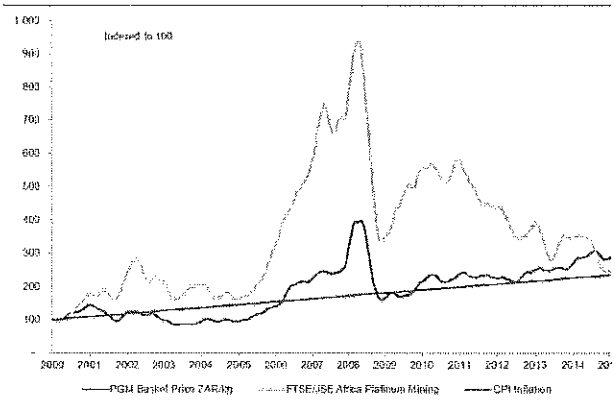
The key revenue drivers for the PGM industry are platinum, palladium, rhodium and gold prices (4E metals), representing in general some 85-90% of the income for the bulk of the industry. The PGM industry experienced a rapid rise in profitability in the late-1990s and early-2000s, followed by the unsustainable 2005-2008 price rally, particularly driven by spiking platinum and rhodium prices. Over this period, a wide range of new players entered the industry, and significant capital was spent in opening up new ore bodies and expanding the industry production base. Unfortunately, the combination of a 'normalisation' in prices, more subdued demand, together with a sharply higher cost base for the industry, has resulted in an industry where currently few companies are remaining cash flow positive. This has already resulted in a range of closures (i.e. Platinum Australia, Blue Ridge, Everest, Marikana), as well as general capital curtailment.

Figure 31: PGM basket price – $/Pt oz and R/oz



Source: Bloomberg, RMB

Figure 32: PGM performance on JSE



Source: Bloomberg, RMB

The aggressive price rally over the period until 2008 was replicated on the JSE, with the PGM sector strongly outperforming over the period 2005-2008 in particular. Unfortunately, as shown above, the net performance over the 2000-2015 has barely matched CPI over the period. As a result of the very volatile industry dynamics over the 2004-2014, many companies have experienced challenges in creating sustainable equity transactions for a range of reasons:

- Unrealistic long-term price expectations during the boom period, over which a range of BEE deals were concluded, locking-in asset transactions at relatively rich valuations.
- Excessive unit cost inflation across the industry in the boom times, which has been shown to be sticky, even in a much more modest price environment, suppressing margins.
- The collapse in rhodium prices has put significant stress on (rhodium rich) lower grade UG2 transactions/companies.
- Significant curtailment of dividends in the industry, as a result of sharply reduced margins, large stay-in-business capital requirements at the older and deeper orebodies, as well as significant business interruptions (strikes, Section 54s, power curtailments).
- Loss of support from foreign shareholders due to industry's increasingly tougher challenges, worsened by South Africa's deteriorating reputation as a mining investment destination over the period. This has resulted in a serious deflation of market capitalisation across the sector, threatening a wide range of BEE transactions.

Gold

Ownership results

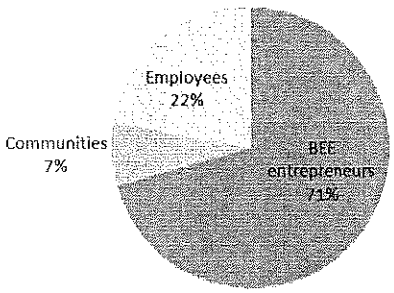
The Gold sector has achieved a BEE ownership of 27.5% (18.9% BEE entrepreneurs, 0.9% communities and 7.7% ESOPs) based on value. The ownership structure has benefited 67% BEE entrepreneurs, 3% communities and 30% ESOPs, and an estimated 135 109 individuals. In terms of volumes, the industry has achieved a BEE ownership of 31.5% (23.3% BEE entrepreneurs, 2.0% communities and 6.2% ESOPs). The ownership structure has benefited 71% BEE entrepreneurs, 7% communities and 22% ESOPs. The Gold sector has a net value of between R 7 182 million and R 56 579 million representing a change of between -31% and 441%.

Figure 33: Gold HDSA overall contribution

	Total HDSA	BEE entrepreneurs	Communities	ESOPs	Other broad-based schemes
By value (%)					
Current	26.0	17.4	0.9	7.7	0.0
Continuing consequences	1.4	1.4	0.0	0.0	0.0
Total	***27.5***	***18.9***	***0.9***	***7.7***	***0.0***
By volume (%)					
Current	28.0	19.8	2.0	6.2	0.0
Continuing consequences	3.5	3.5	0.0	0.0	0.0
Total	***31.5***	***23.3***	***2.0***	***6.2***	***0.0***
Participants					
No of structures	13.0	9.0	2.0	2.0	
No of individuals	135 109	9.0	60 000	75 100	

Source: SNG and Chamber of Mines analysis

Figure 34: Gold HDSA component contribution



Source: SNG and Chamber of Mines analysis

Figure 35: Gold assets forming part of the BEE calculations

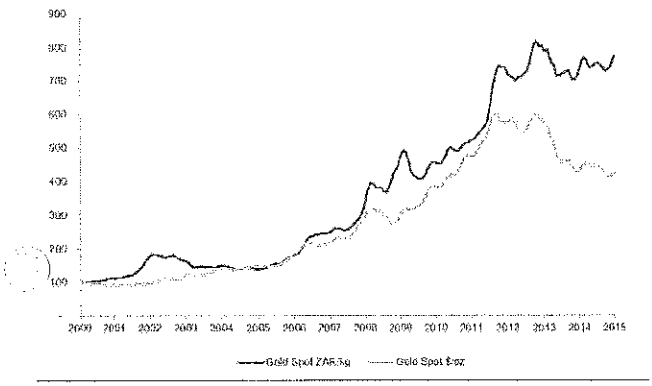
Asset	Volume % contribution to sector	Mining companies
AngloGold Ashanti SA operations	24.9	AngloGold Ashanti
Sibanye Gold	30.7	Goldfields, Sibanye Gold
South Deep	7.0	Goldfields
Harmony Gold SA operations	37.4	Harmony Gold

Source: Company reports, SNG, Chamber of Mines

Market dynamics

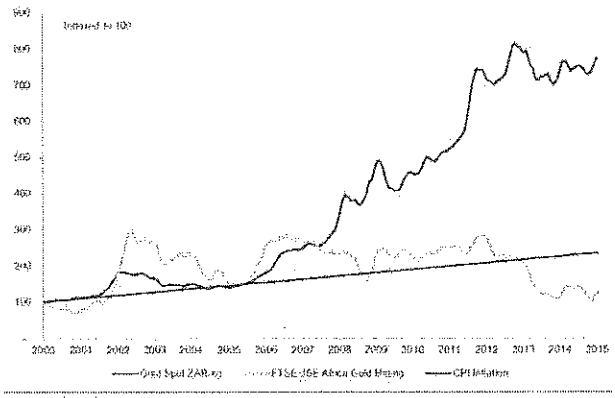
Gold prices rose from sub-300 US$/oz prices at around 2000, peaking at around 1900 US$/oz in September 2011. The Rand/kg price has risen nearly eight-fold over the period. As can be seen below, the South African gold industry has battled to materially translate this into shareholder value.

Figure 36: Gold price – US$/oz and Rand/kg



Source: Bloomberg, RMB

Figure 37: Performance on JSE



Source: Bloomberg, RMB

The South African listed gold companies reflect a mix of South African and international gold assets. Over the period, the contribution of the mature South African production base has been consistently shrinking, while several of the companies have seen significant organic and acquisitive growth in their offshore portfolios. Creating sustainable BEE transactions within a mature and essentially shrinking production base has created particular challenges. The industry's history of rising real costs, flat to declining productivity, lower grades, sharply rising input costs (particularly power) has made it increasingly reliant on a rising Rand/kg gold price in order for it to achieve margins/dividend paying capacity. Unfortunately, despite a near eight-fold increase in the Rand/kg price over the period, the valuations of the gold companies have failed to beat CPI over the same period. This has put significant challenges on the industry in creating sustainable transactions. Also, the relative volatile performance of the industry has seen it particularly plagued by 'hit and run' transactions, posing particularly important questions around the 'once empowered always empowered debate'.

Coal

Ownership results

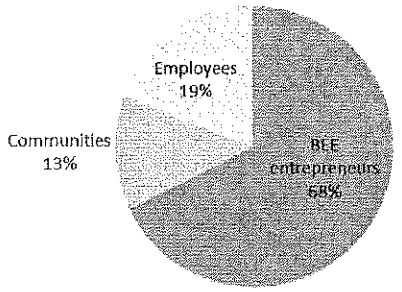
The Coal sector has achieved a BEE ownership of 45.1% (35.0% BEE entrepreneurs, 5.0% communities and 5.1% ESOPs) based on value. The ownership structure has benefited 76% BEE entrepreneurs, 12% communities and 12% ESOPs, and an estimated 1 753 087 individuals. In terms of volumes, the industry has achieved a BEE ownership of 47.2% (37.2% BEE entrepreneurs, 4.1% communities and 6.0% ESOPs). The ownership structure has benefited 68% BEE entrepreneurs, 13% communities and 19% ESOPs. The Coal sector has a net value of between R30 476 million and R 60 845 million representing a change of between 267% and 633%.

Figure 38: Coal HDSA overall contribution

	Total HDSA	BEE entrepreneurs	Communities	ESOPs	Other broad-based schemes
By value (%)					
Current	42.6	32.5	5.0	5.1	0.0
Continuing consequences	2.5	2.5	0.0	0.0	0.0
Total	***45.1***	***35.0***	***5.0***	***5.1***	***0.0***
By volume (%)					
Current	31.1	21.1	4.1	6.0	0.0
Continuing consequences	16.1	16.1	0.0	0.0	0.0
Total	***47.2***	***37.2***	***4.1***	***6.0***	***0.0***
Participants					
No of structures	24.0	13.0	6.0	5.0	
No of individuals	1 753 087	13.0	1 745 551	7 523	

Source: SNG and Chamber of Mines analysis

Figure 39: Coal HDSA component contribution



Source: SNG and Chamber of Mines analysis

Figure 40: Coal assets forming part of the BEE calculations

Asset	Volume % contribution to sector	Mining companies
AngloCoal SA operations (excl Inyosi and Mafube)	23.2	Anglo American Coal
Mafube	1.6	Anglo American Coal, Exxaro Resources
Inyosi (Kriel, Zibulo)	5.6	Anglo American Coal
BECSA	14.0	BHP Billiton
Glencore PCB	5.5	Glencore, African Rainbow Minerals
Glencore GGV	3.5	Glencore, African Rainbow Minerals
Shanduka Coal	2.5	Glencore, Shanduka Resources
Optimum, Koornfontein	5.3	Glencore, Shanduka Resources
Umcebo Mining	3.4	Glencore, Shanduka Resources
Exxaro Coal	17.5	Exxaro Resources
Sasol Coal	18.2	Sasol Mining

Source: Company reports, SNG, Chamber of Mines

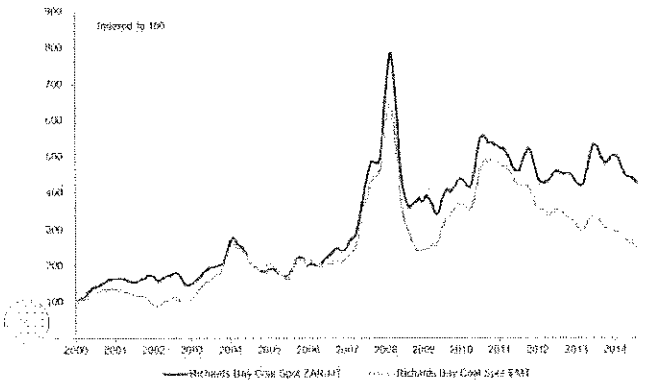
Market dynamics

The South African coal industry is largely a thermal coal industry, with very limited amounts of metallurgical and anthracite coal being produced.

A large proportion of the lower quality domestic coal produced in South Africa is produced into long-term contracts for power generation or fuel conversion. Of the approximately 75 mtpa export coal, the bulk is transported via Richards Bay Coal Terminal (RBCT). As a result of a major shift in demand over the years from Europe to Asia, as well as increasing challenges by South African mines to produce a 6 000 CV (RB1) product, an increasing percentage of lower quality South African coal is exported through RBCT. The price graph below reflects prices achieved for RB1 spec coal. Similar to most commodities over the period, export thermal coal prices

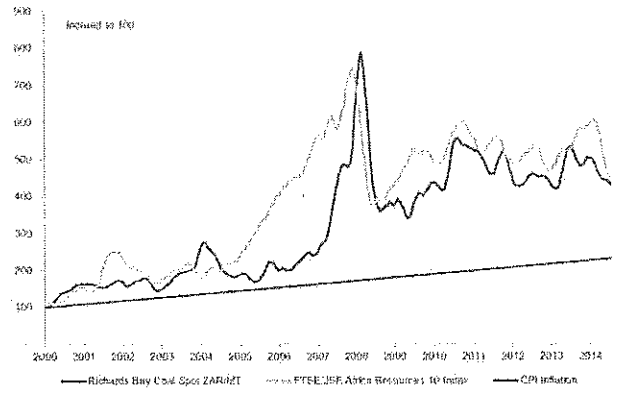
spiked to unprecedented and unsustainable levels during 2008, creating unrealistic expectations around the long-term profitability and value of the industry. Prices for domestic coal are difficult to represent in graph form, as domestic production has a far wider specification range, while much is tied into long-term contracts.

Figure 41: RBCT FOB prices – US$/MT & ZAR/MT



Source: Bloomberg, RMB

Figure 42: Performance on JSE



Source: Bloomberg, RMB

Although briefly represented by the listing of Optimum Coal, over the time period, the JSE has lacked a consistent mix of representative and sizeable coal companies. The index reflected is therefore a broader mix of diversified companies, the performance of which has been skewed by for example strong contributions from iron ore. For example, although coal forms a large part of Exxaro's portfolio, its share price performance over the period has largely tracked Kumba, as a result of Exxaro's highly profitable exposure to 20% of the Sishen mine.

Over the period, a wide variety of BEE deals has occurred, resulting in a significant transfer of ownership in the sector. Although from a volume perspective, the bulk of these would be represented by Eskom coal mines, for example the Eyesizwe/Exxaro transactions, these were essential cornerstones for transformation, as due to their lower risk profiles were easier to fund for buyers with limited equity. However, subsequently, and particularly as a result of transformative transactions like Optimum Coal, ARM Coal and Shanduka, as well as the Quatro schemes, significant BEE exposure to RBCT export capacity has also been achieved.

Diamonds

Ownership results

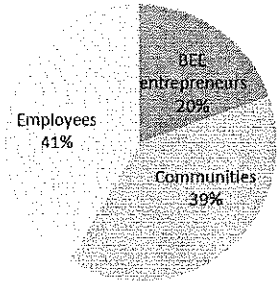
The Diamond sector has achieved a BEE ownership of 26.0% (5% BEE entrepreneurs, 10.4% communities and 10.6% ESOPs) based on value. The ownership structure has benefited 19% BEE entrepreneurs, 40% communities and 41% ESOPs, and an estimated 114 653 individuals. In terms of volumes, the industry has achieved 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 86 million and R 4 229 million representing a change of between -94% and 205%.

Figure 43: Diamonds HDSA overall contribution

	Total HDSA	BEE entrepreneurs	Communities	ESOPs	Other broad-based schemes
By value (%)					
Current	26.0	5.0	10.4	10.6	
Continuing consequences	0.0	0.0	0.0	0.0	0.0
Total	***26.0***	***5.0***	***10.4***	***10.6***	***0.0***
By volume (%)					
Current	26.0	5.1	10.2	10.7	0.0
Continuing consequences	0.0	0.0	0.0	0.0	0.0
Total	***26.0***	***5.1***	***10.2***	***10.7***	***0.0***
Participants					
No of structures	10.0	4.0	2.0	4.0	
No of individuals	114 653	4.0	99 679	14 970	

Source: SNG and Chamber of Mines analysis

Figure 44: Diamonds HDSA component contribution



Source: SNG and Chamber of Mines analysis

Figure 45: Diamonds assets forming part of the BEE calculations

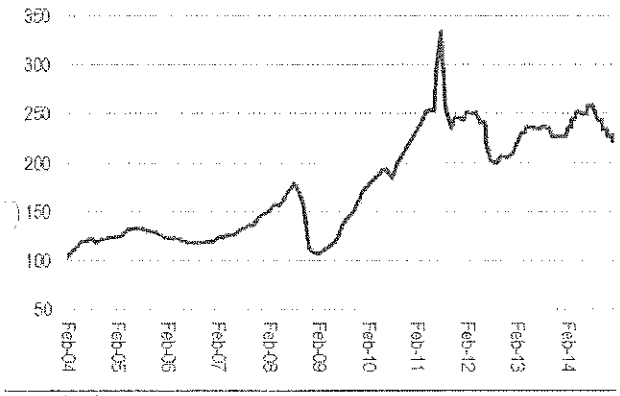
Asset	Volume % contribution to sector	Mining companies
DeBeers Consolidated Mines	71.3	Anglo American DeBeers
Finsch	28.7	Petra

urce: Company reports, SNG, Chamber of Mines

Market dynamics

South Africa's diamond production is dominated by Kimberlite open-cast and underground mines, and to a lesser extent, dump retreatment operations. A much smaller volume (although much higher value per carat) of diamonds is produced from a variety of smaller scale, low grade, alluvial operations. Over the period, diamond prices, apart from a short and sharp correction post-GFC, have been relatively robust.

Figure 46: Diamond price index



Source: Bloomberg, CoM

Like coal, the JSE has a rather unrepresentative Diamond sector, following the de-listing of De Beers, and the listing of Petra Diamonds in London. The remainder of the junior Diamond sector is not really representative of the overall diamond industry in South Africa.

Over the period, the South African diamond sector has gone through major restructuring. Not only was De Beers de-listed, a series of major older mines were sold by De Beers to Petra Diamonds. This in time resulted in a rejuvenation of these mines, and has significantly extended the scale and life of mine of large scale diamond mining in South Africa. As a result, the major BEE deals in the sector have also been dominated by De Beers and Petra Diamonds.

Iron ore

Ownership results

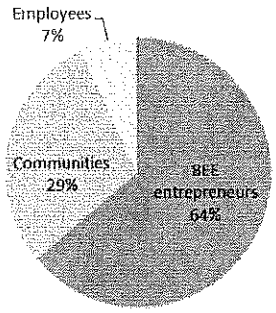
The Iron Ore sector has achieved a BEE ownership of 36.7% (23.2% BEE entrepreneurs, 11.2% communities and 2.4% ESOPs) based on value. The ownership structure has benefited 63% BEE entrepreneurs, 31% communities and 6% ESOPs, and an estimated 1 482 163 individuals. In terms of volumes, the industry has 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 113 543 million representing a change of between 433% and 1037%.

Figure 47: Iron ore HDSA overall contribution

	Total HDSA	BEE entrepreneurs	Communities	ESOPs	Other broad-based schemes
By value (%)					
Current	36.7	23.2	11.2	2.4	0.0
Continuing consequences	0.0	0.0	0.0	0.0	0.0
Total	***36.7***	***23.2***	***11.2***	***2.4***	***0.0***
By volume (%)					
Current	35.7	22.9	10.3	2.5	
Continuing consequences	0.0	0.0	0.0	0.0	0.0
Total	***35.7***	***22.9***	***10.3***	***2.5***	***0.0***
Participants					
No of structures	10.0	4.0	4.0	2.0	
No of individuals	1 482 163	4.0	1 474 636	7 523	

Source: SNG and Chamber of Mines analysis

Figure 48: Iron ore HDSA component contribution



Source: SNG and Chamber of Mines analysis

Figure 49: Iron ore assets forming part of the BEE calculations

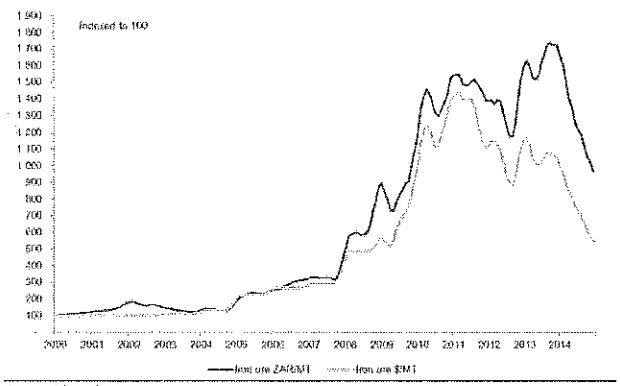
Asset	Volume % contribution to sector	Mining companies
Sishen, Kolomela, Thabazimbi	75.5	Anglo American Kumba Iron Ore
Assmang (Khumani and Beeshoek)	24.5	African Rainbow Minerals, Assore

Source: Company reports, SNG, Chamber of Mines

Market dynamics

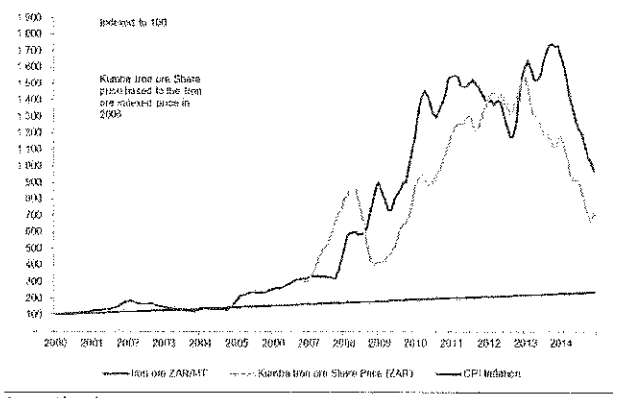
Of all the bulk commodities, iron ore prices have probably seen the most spectacular Bull Run. On the back of the rapid expansion of Chinese steel demand, iron ore prices have been pushed to unprecedented levels. South Africa, although benefitting significantly from the Bull Run, missed out on maximising the opportunity due to rail infrastructure constraints. Unfortunately, the significant capital the extensive bull run has attracted to the industry, has created a very large capacity growth momentum at a time that Chinese steel output growth is stalling. The rapid correction in prices over the past six months has stalled Africa's ambitious iron ore prospects, as the three major global producers intend to grow its share of low cost production to the detriment of the higher cost producers.

Figure 50: Iron ore prices – US$/MT & ZAR/MT



Source: Bloomberg, RMB

Figure 51: Performance on JSE



Source: Bloomberg, RMB

In the graph above, we have used Kumba as the purest proxy for stocks exposed to the iron ore cycle. As result of fortuitous cycle timing, both Kumba (and Exxaro) have seen exceptional BEE benefits from the spectacular run in iron ore prices. It has, however, created unrealistic expectations among government, unions and the public, on both the profitability of the industry in general, and its ability for a 'repeat performance'.

Manganese ore

Ownership results

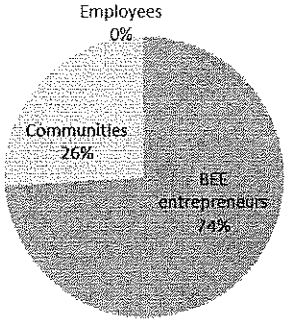
The Manganese Ore sector has achieved a BEE ownership of 48.5% (33.3% BEE Entrepreneurs, 15.3% Communities and 0.0% ESOPs) based on value. The ownership structure has benefited 69% BEE entrepreneurs, 31% communities and 0% ESOPs, and an estimated 411 512 individuals. In terms of volumes, the industry 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 6 402 million representing a change of between -100% and 100%.

Figure 52: Manganese ore HDSA overall contribution

	Total HDSA	BEE entrepreneurs	Communities	ESOPs	Other broad-based schemes
By value (%)					
Current	48.5	33.3	15.3	0.0	0.0
Continuing consequences	0.0	0.0	0.0	0.0	0.0
Total	***48.5***	***33.3***	***15.3***	***0.0***	***0.0***
By volume (%)					
Current	42.2	31.2	11.0	0.0	
Continuing consequences	0.0	0.0	0.0	0.0	0.0
Total	***42.2***	***31.2***	***11.0***	***0.0***	***0.0***
Participants					
No of structures	4.0	2.0	2.0	0.0	
No of individuals	411 512	2.0	411 510	0.0	

Source: SNG and Chamber of Mines analysis

Figure 53: Manganese ore HDSA component contribution



Source: SNG and Chamber of Mines analysis

Figure 54: Manganese ore assets forming part of the BEE calculations

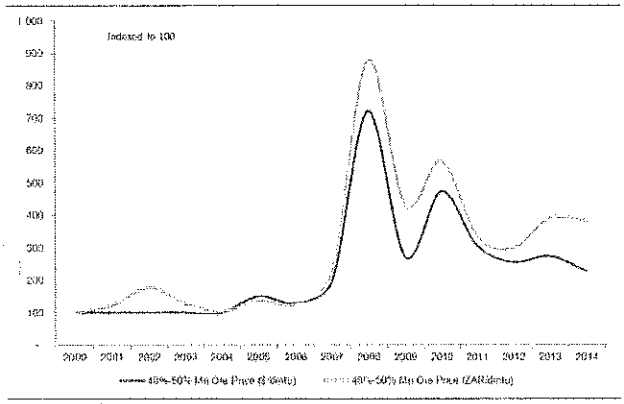
Asset	Volume % contribution to sector	Mining companies
Assmang (Blackrock)	43.8	African Rainbow Minerals, Assore
Samancor	56.2	BHP Billiton, Anglo American

Source: Company reports, SNG, Chamber of Mines

Market dynamics

As an essential ingredient for the steel industry, manganese has similarly benefitted from the rapid growth of the Chinese steel industry over the period. The industry in South Africa has experienced a period of exceptional profitability, achieving unprecedented price levels. It also attracted significant new capital to the industry, resulting in a wide range of new (and empowered) entrants to the industry.

Figure 55: Manganese ore prices



Source: Bloomberg, RMB

The JSE does not offer any 'pure play' manganese exposures. Although both Assore and ARM hold significant investments in manganese assets, their share price performance has been dominated more by iron ore price performance. Apart from the impressive bull run over the period, a key feature of the industry was the re-distribution of mineral rights to a broad range of new industry participants. As a result of the manganese bull run, many of the new entrants managed to either sell portions of their assets at handsome valuations, or managed to more easily attract capital to start their new ventures. A range of new, particularly open-cast, empowered and successful manganese producers have therefore emerged. Like iron ore, due to rail constraints, the industry failed to maximise benefits from the manganese boom during peak pricing. Also, there is an increasing fear of overcapacity developing in the industry, which, together with Transnet finally starting to deliver, could suppress prices for longer, putting increasing pressure on some of the new empowered players in the industry.

Chrome

Ownership results

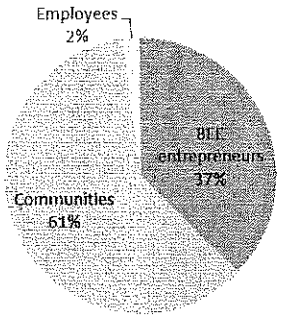
The Chrome sector has achieved a BEE ownership of 48.9% (35.8% BEE entrepreneurs, 8.4% communities and 4.7% ESOPs) based on value. The ownership structure has benefited 73% BEE entrepreneurs, 17% communities and 10% ESOPs and an estimated 454 594 individuals. In terms of volumes, the industry has achieved a BEE ownership of 68.5% (25.6% BEE entrepreneurs, 41.5% communities and 1.4% ESOPs). The ownership structure has benefited 37% BEE entrepreneurs, 61% communities and 2% ESOPs. The Chrome sector has a net value of between R 5 611 million and R 42 954 million representing a change of between 78% and 1263%.

Figure 56: PGM HDSA overall contribution

	Total HDSA	BEE entrepreneurs	Communities	ESOPs	Other broad-based schemes
By value (%)					
Current	48.9	35.8	8.4	4.7	
Continuing consequences	0.0	0.0	0.0	0.0	0.0
Total	48.9	35.8	8.4	4.7	*0.0*
By volume (%)					
Current	68.5	25.6	41.5	1.4	0.0
Continuing consequences	0.0	0.0	0.0	0.0	0.0
Total	68.5	25.6	41.5	1.4	*0.0*
Participants					
No of structures	8.0	3.0	4.0	1.0	
No of individuals	454 594	3.0	454 591	0.0	

Source: SNG and Chamber of Mines analysis

Figure 57: PGM HDSA component contribution



Source: SNG and Chamber of Mines analysis

Figure 58: Chrome assets forming part of the BEE calculations

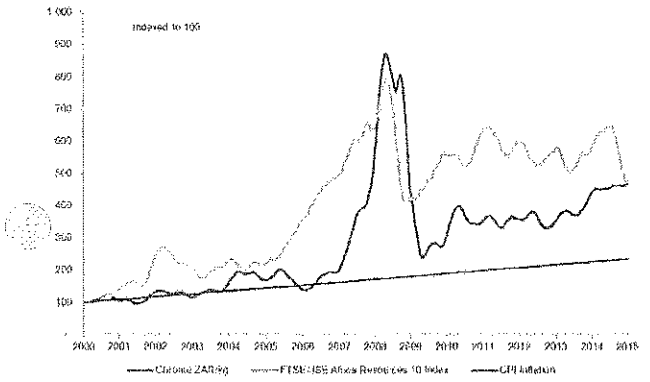
Asset	Volume % contribution to sector	Mining Companies
Assmang Chrome	37.8	African Rainbow Minerals, Assore
Merafe JV	12.8	Glencore, Merafe Resources
Kroondal Mine, Rietvlei Mine, Waterval Mine, Wonderkop Smelter, Bakwena	49.4	Glencore

Source: Company reports, SNG, Chamber of Mines

Market dynamics

The chrome industry has historically been notorious for its cyclical, and often marginal, pricing. Although it certainly benefitted from the commodities boom, it has seen a significant correction to its 'old' pricing structure, which has been further pressurised over the last few years due to significant volumes of chrome from UG2 reprocessing appearing on the market. This has been forecast to continue to grow rapidly, and has put significant strain on the South African chrome market outlook.

Figure 59: Chrome prices and performance on JSE



Source: Bloomberg, RMB

Like some of the other commodities discussed earlier, South Africa's Chrome sector is poorly represented on the JSE. Although Merafe is a passive shareholder in the very large Xstrata chrome operations, due to its illiquidity, it represents a poor proxy for the fortunes of the chrome industry.

Funding of BEE transactions in the industry has posed significant challenges. The chrome industry is especially price volatile, and often marginal, making the structuring of commercial or vendor debt packages challenging.

6. Appendices

Sources of information

1. Audited Annual Financial Statements 2014 for listed entities
2. Integrated Reports 2014 for listed entities
3. Mining operation reviews 2014
4. Members websites
5. Ownership submission to DMR by the Members
6. Discussions with shareholders, directors and key personnel of the Members
7. Dealmakers online
8. CAP IQ
9. Bloomberg
10. Inet Bridge
11. Chamber of mines of South Africa

Evolution of BEE

The initial wave of BEE transactions took place outside of any formal regulatory framework and was largely driven by the business community. These transactions were almost entirely focused on equity transfer based on ownership and financing structures, which eventually proved to be unsustainable. Consequently, most of the BEE transactions from this period eventually collapsed or were subsumed into later transactions. It became clear to government that the desired breadth and depth of empowerment would not be achieved without some degree of regulation. This gave rise to an entire regulatory framework being created to govern BEE with specific industry charters for those industries which were identified as particular areas of focus, including the mining industry.

Fundamentally, BEE has become an explicit policy intervention to ensure the equitable participation of black South Africans in the economic activities of the country from an income-sharing and decision-making perspective. The intention, therefore, is entirely appropriate; the means to achieving it, however, remains controversial and predominantly focused on one key element of BEE – notably the transfer of corporate shareholding to black-owned entities.

BEE has been a focus of government for some time but with shifts in emphasis and policy priorities. The Following periods generally characterise the metamorphoses of BEE:

- **First wave** of BEE ownership, which was largely private sector driven and dissipated after the 1998 Asian crisis.
- The **second wave** from 2000 to 2008, when it became evident that the hiatus was passing and that government would become more interventionist in its approach towards black ownership in the corporate sector. The period is characterised by transformation charters, BEE legislation, and ultimately the introduction of the Department of Trade and Industry (DTI) Codes of Good Practice (Codes) in 2005.
- The **third wave** post-2008, a period marked by the collapse of the Global Economy, introduction of the Mining Industry Growth, Development and Employment Task Team (MIDGETT), the release of the new Mining Charter, and growing uncertainty over security of tenure of mineral rights.
- **Emerging trend** – the next wave of BEE will likely be driven by the government's strategic agenda, which involves the creation of black industrialists. Although not defined, the intention seems to be to create a class of black entrepreneurs who not only control businesses but also have operational control. The government will increasingly use its procurement spend policies (especially through state-owned enterprises) to facilitate the achievement of this strategic objective.

The table below outlines the Mining BEE evolution:

Pre MRPDA promulgation & Mining Charter (1994 – 2003)	Post MRPDA promulgation & Mining Charter (2004– 2014)
|1994 First democratic elections.Nelson Mandela elected President (ANC).	|2004 SA's third democratic elections. MPRDA brought into force on 1 May 2004.
|1995 SA Springboks win the Rugby World Cup in South Africa.	|2005 Promulgation of the Precious Metals Act.
|1996 Truth and Reconciliation Commission was chaired by Archbishop Desmond Tutu.	|2006 DME Minister Buyelwa Sonjica (appointed by President Thabo Mbeki).
|1997 New Constitution implemented, replacing interim constitution.	|2007 B-BBEE Codes of Good Practice.
|1998 White Paper on Minerals and Mining policy.	|2008 Promulgation of the Royalty Bill. MIGDETT established. World financial crisis.
|1999 Dept of Minerals and Energy (DME) Minister Pumzile Mlambo-Ngucka (appointed by President Nelson Mandela). SA's second democratic elections, with ANC retaining majority.	|2009 SA's fourth democratic elections. DMR Minister Susan Shabangu (appointed by President Kgalema Motlanthe). Creation of two separate ministries: Resources (DMR) and Energy. Initial Mining Charter ownership target of 15%.
|2000 Release of the draft Minerals Development Bill.	|2010 SA hosts successful FIFA World Cup. Revision of the Mining Charter.
|2001 Bull market for commodities commences, led by China.	|2011 Calls for nationalisation of mines.
|2002 Passing of the MRPDA by Parliament. Leaking of a draft of the Mining Charter (R52bn reduction in market capitalisation of JSE-listed mining companies). Mining Charter signed on 11 October.	|2012 ANC SIMS* document released. Tragic Marikana strike resulting in deadly violence.
|2003 Promulgation of the Broad-Based Black Economic Empowerment Act.	|2013 B-BBEE Amendment Act passed by Parliament (brought into force in 2014).
	|2014 Record lows for commodity prices. SA's fifth democratic elections. DMR Minister Advocate Ngoako Ramatlhodi (appointed by President Jacob Zuma). Final Mining Charter ownership target of 26%. MRPDA Amendment Bill approved in parliament. MIGDETT revived.

*Source: Chamber of Mines; *SIMS: State intervention in the minerals sector*

Mining charter scorecard (per DMR website, revised 2010)

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

	ELEMENT	DESCRIPTION	MEASURE	COMPLIANCE TARGET BY 2014	PROGRESS ACHIEVED BY 2010	2011	2012	2013	2014	Weighting
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
2	Ownership	Minimum target for effective HDSA ownership	Meaningful economic participation	26%	15%	→			26%	Y/N
			Full shareholder rights	26%	15%	→			26%	
3	Housing and living conditions	Conversion and upgrading of hostels to attain the occupancy rate of one person per room	Percentage reduction of occupancy rate towards 2014 target	Occupancy rate of one person per room	Base-line	25%	50%	75%	100%	Y/N
		Conversion and upgrading of hostels into family units	Percentage conversion of hostels into family units	Family units established	Base-line	25%	50%	75%	100%	
4	Procurement & Enterprise Development	Procurement spent from BEE entity	Capital goods	45%	5%	15%	25%	35%	45%	5%
			Services	70%	50%	40%	50%	60%	70%	5%
			Consumable goods	50%	10%	15%	25%	40%	50%	2%
		Multinational suppliers contribution to the social fund	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%
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	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 owning 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	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.					12%
		Utilisation of South African based research facilities for analysis of samples across the mining value	Percentage of samples in South African facilities	100%	establish baseline	25%	50%	75%	100%	5%
9	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%

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)
75-120% (Exceeded performance)

DTI ownership element of the BEE Codes of good practice

Category	Ownership indicator	Weighting points	Compliance Target
2.1	Voting rights:		
	2.1.1 Exercisable Voting Rights in the Enterprise in the hands of black people	3	25%+1 vote
	2.1.2 Exercisable Voting Rights in the Enterprise in the hands of black women	2	10%
2.2	Economic interest:		
	2.2.1 Economic interest of black people in the Enterprise	4	25%
	2.2.2 Economic interest of black women in the Enterprise	2	10%
	2.2.3 Economic interest of the following black natural people in the Enterprise:	1	2.5%
	2.2.3.1 black designated groups; 2.2.3.2 black Participants in Employee Ownership Schemes; 2.2.3.3 black beneficiaries of Broad based Ownership Schemes; or 2.2.3.4 black Participants in Co-operatives		
2.3	Realisation points:		
	2.3.1 Ownership fulfilment	1	Refer to paragraph 10.1
	2.3.2 Net Value	7	Refer to Annexe C paragraph 4
2.4	Bonus points:		
	2.4.1 Involvement in the ownership of the Enterprise of black new entrants:	2	10%
	2.4.2 Involvement in the ownership of the Enterprise of black Participants:	1	10%
	2.4.2.1 in Employee Ownership Schemes; 2.4.2.2 of Broad-Based Ownership Schemes; or 2.4.2.3 Co-operatives.		

Sector summary of Collation calculation

Value (R million)	Total Value	BEE	BEE entrepreneurs	AL: Communities	AL: Employees	Past transactions
Coal	123 525	55 677	40 117	6 197	6 291	3 071
Iron ore	398 314	146 363	92 305	44 667	9 392	-
Manganese ore	18 987	9 214	6 318	2 896	-	-
Diamonds	23 904	6 215	1 200	2 478	2 537	-
PGM	214 327	98 413	58 330	31 144	4 107	4 832
Gold	189 089	51 916	32 991	1 611	14 648	2 666
Chrome	22 087	10 810	7 902	1 861	1 048	-
Total SA mining industry	990 233	378 607	239 161	90 854	38 023	

% Value	Industry split Values	BEE %	BEE entrepreneurs	Communities	Employees	Past transactions
Coal	12.5%	45.1%	32.48%	5.02%	5.09%	2.49%
Iron ore	40.2%	36.7%	23.2%	11.2%	2.4%	0.0%
Manganese ore	1.9%	48.5%	33.3%	15.3%	0.0%	0.0%
Diamonds	2.4%	26.0%	5.0%	10.4%	10.6%	0.0%
PGM	21.6%	45.9%	27.2%	14.5%	1.9%	2.3%
Gold	19.1%	27.5%	17.4%	0.9%	7.7%	1.4%
Chrome	2.2%	48.9%	35.8%	8.4%	4.7%	0.0%
Total SA mining industry	100.0%	38.2%	24.2%	9.2%	3.8%	1.1%
Industry targeget		26%				

Volume (Value of production)	Total Volume	BEE	BEE entrepreneurs	Communities	Employees	Past transactions
Coal	118 149.21	55 819	24 927.17	4 829.06	7 032.46	19 031
Iron ore	63 584.64	22 720	14 555.40	6 570.73	1 594.35	-
Manganese ore	13 956.20	5 891	4 359.13	1 531.95	-	-
Diamonds	7 095	1 845	361.79	723.36	759.55	-
PGM	34 288.90	22 964	10 463.78	8 294.82	654.34	3 551
Gold	39 295.05	12 367.91	7 761.50	796.40	2 433.32	1 377
Chrome	15.89	11	4.06	6.60	0.22	-
Total SA mining industry	276 385	121 618				

% Values	Industry split Volumes	BEE %	BEE entrepreneurs	Communities	Employees	Past transactions
Coal	42.7%	47.2%	21.1%	4.1%	6.0%	16.1%
Iron ore	23.0%	35.7%	22.9%	10.3%	2.5%	0.0%
Manganese ore	5.0%	42.2%	31.2%	11.0%	0.0%	0.0%
Diamonds	2.6%	26.0%	5.1%	10.2%	10.7%	0.0%
PGM	12.4%	67.0%	30.5%	24.2%	1.9%	10.4%
Gold	14.2%	31.5%	19.8%	2.0%	6.2%	3.5%
Chrome	0.0%	68.5%	25.6%	41.5%	1.4%	0.0%
Total SA mining industry	100.0%	44.0%	22.6%	8.2%	4.5%	8.7%

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APPENDIX 5

THE NON-APPLICABILITY OF B-BBEE ACT AND dti CODES TO THE DRAFT 2018 CHARTER

1 **Broad-Based Black Economic Empowerment**

1.1 Section 2: objectives of the BEE Act

(1) In terms of section 2 of the BEE Act, the "*objectives of the BEE Act are to facilitate broad-based black economic empowerment by:*

(a) *promoting economic transformation in order to enable meaningful participation of black people in the economy;*

(b) *achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises;*

(c) *increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training;*

(d) *increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training;*

(e) *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;*

(f) *empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills;*

(g) *promoting access to finance for black start-ups, small, medium and micro enterprises, co-operatives and black entrepreneurs, including those in the informal business sector; and*

(h) *increasing effective economic participation and black owned and managed enterprises, including small, medium and micro enterprises and co-operatives and enhancing their access to financial and non-financial support.*"

(2) The objects of the BEE Act are to promote transformation and empowerment and not to set hard targets or quotas which entities must meet. Neither the BEE Act nor the BEE Codes have any specific quotas with which an entity is legally obliged to comply.

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1.2 Section 3: interpretation of the BEE Act

(1) In terms of section 3(2) of the BEE Act, in "*the event of any conflict between this Act and any other law in force immediately prior to the date of commencement of the Broad-Based Black Economic Empowerment Amendment Act, 2013, this Act prevails if the conflict specifically relates to a matter dealt with in this Act.*"

(2) Section 3(2) of the BEE Act does not prohibit industries from developing their own principles to achieve Black ownership but, rather, records that the BEE Act and BEE Codes will prevail to the extent that there is a conflict between the principles set out in another law to achieve transformation and a matter specifically catered for in the BEE Act and BEE Codes.

(3) In terms of section 9(1) of the BEE Act, in "*order to promote the purposes of the Act, the Minister may by notice in the Gazette issue codes of good practice on black economic empowerment that may include...*". The BEE Codes (and the principles contained therein) should, therefore, be read with the BEE Act and so a conflict between any other law and the BEE Codes will also be governed by section 3(2).

1.3 Section 9: codes of good practice

(1) In terms of section 9(1) of the BEE Act (Weighting and measurement), in "*order to promote the purposes of the Act, the Minister may by notice in the Gazette issue codes of good practice on black economic empowerment that may include:*

(a) *the further interpretation and definition of broad-based black economic empowerment and the interpretation and definition of different categories of black empowerment entities;*

(b) *qualification criteria for preferential purposes for procurement and other economic activities;*

(c) *indicators to measure broad-based black economic empowerment;*

(d) *the weighting to be attached to broad-based black economic empowerment indicators referred to in section 9(1)(c);*

(e) *guidelines for stakeholders in the relevant sectors of the economy to draw up transformation charters and codes of good practice for their sector; and*

(f) *any other matter necessary to achieve the objectives of this Act.*"

(2) The BEE Codes do not set any quotas but create overarching focus areas (i.e. the elements of the BEE scorecard) and the criteria against which BEE initiatives in such focus areas are measured. The focus areas or elements are:

(a) ownership;

(b) management control;

(c) enterprise development, supplier development and preferential procurement;

(d) skills development; and

(e) socio-economic development.

(3) Obligation on DMR

(a) The DMR has no obligations in relation to the creation of Sector Codes.

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(b) In accordance with section 9(1)(e) of the BEE Act, the BEE Codes contain processes and procedures to issue Sector Codes. To the extent that mining companies wish to be assessed, for commercial reasons, against mining Sector Codes, those Sector Codes should be issued by the dti in terms of section 9(1) of the BEE Act read with the BEE Codes in consultation with the relevant industry. The issuing of generic BEE Codes or Sector Codes constitutes compliance with section 9 of the BEE Act. The failure by the dti, in consultation with the relevant sector, to issue such Sector Codes will merely result in the generic BEE Codes applying to that sector.

(4) Obligation on mining companies

(a) No entity (including a mining company) is obligated to be measured against the BEE Codes or any relevant Sector Codes and, in doing so, be awarded a BEE score.

(b) An entity (including a mining company) which is issued with a BEE score under the BEE Codes or Sector Codes will use that score for commercial purposes. The score issued under the BEE Codes or Sector Codes and the BEE Act and the BEE Codes themselves do not relate to the maintenance of a right / licence.

1.4 Section 10: status of codes of good practice

(1) Setting qualification criteria

(a) In terms of section 10(1) of the BEE Act, "*every organ of state and public entity must apply any relevant code of good practice issued in terms of this Act in:*

(i) *determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law;*

(ii) *developing and implementing a preferential procurement policy;*

(iii) *determining qualification criteria for the sale of state-owned enterprises;*

(iv) *developing criteria for entering into partnerships with the private sector; and*

(v) *determining criteria for the awarding of incentives, grants and investment schemes in support of broad-based black economic empowerment.*"

(b) Section 10:

(i) specifically refers to the setting of qualification criteria for the issuing of licences but does not contemplate the setting on-going qualification criteria for the maintenance of the licences;

(ii) does not require a public entity to:

(A) set qualification criteria for the issuing of licence but, rather, to apply the BEE Codes when determining any such qualification criteria;

(B) issue sector specific BEE Codes;

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(C) pertinent to the mining industry, align a Mining Charter with the measurement principles of the BEE Codes but, rather, to apply the BEE Codes when setting any qualification criteria; or

(D) create measurement criteria to determine an entity's BEE score.

(2) Obligation on DMR

(a) In applying the BEE Codes when determining the transformation qualification criteria for the issuing of prospecting rights and mining rights contained in the draft 2018 Charter, the DMR should apply the elements of the BEE scorecard and set qualification criteria based on the overarching focus areas / elements of the BEE Codes as well as other areas pertinent to mining in order to promote transformation, being the objective of the BEE Act.

(b) The DMR should set qualification criteria in the draft 2018 Charter which align with the principles and overarching focus areas / elements of the BEE Codes as well as other areas pertinent to mining. The application of the BEE Codes in determining qualification criteria for the issuing of a licence constitutes compliance with section 10(1) of the BEE Act.

(c) The DMR should not set criteria in the draft 2018 Charter to measure a mining company to be used to award it a BEE score for use on a day-to-day and commercial basis. The issuing of BEE Codes or, in consultation with the relevant industry, Sector Codes by the dti constitutes compliance with section 9 of the BEE Act.

(3) Obligation on mining companies

Mining companies are required to comply with the qualification criteria lawfully set by the DMR in the draft 2018 Charter in order to be issued with and maintain a prospecting right or mining right.

(4) Exemption

(a) In terms of section 10(2) of the BEE Act, "*the Minister may, after consultation with the relevant organ of state or public entity, exempt the organ of state or public entity from a requirement contained in [section 10(1)] or allow a deviation therefrom if particular objectively verifiable facts or circumstances applicable to the organ of state or public entity necessitate an exemption or deviation.*"

(b) On 30 October 2015, the dti issued such an exemption to the mining industry (**Exemption**). In terms of the Exemption, the "*Department of Mineral Resources will be exempted from applying the provisions of section 10 (1) of the Broad Based Black Economic Empowerment Act, 2003 to the upstream petroleum and mining industries administered in terms of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA). This is a short-term measure, and will be for a period of 12 months, pending the finalisation of alignment between the MPRDA and the B-BBEE Act and the dti Codes, as well as a review of the Mining Charter.*"

(c) The Exemption was unnecessary and a misconstruction of section 10(1).

(i) The decision by the mining industry not to issue mining Sector Codes (in terms of the BEE Act) to be used to measure and score a mining company for BEE purposes does not result in a conflict with the BEE Act, including but not limited to section 10(1).

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(ii) The DMR has no obligation in relation to the issuing of Sector Codes or principles for measuring BEE initiatives.

(iii) The decision by the dti not to issue mining sector BEE Codes (in terms of the BEE Act) will, instead, result in mining companies being assessed against the generic BEE Codes to determine their BEE score and contributor status.

(d) To the extent that any mining Sector Codes were to be issued by the dti under the BEE Act, those Sector Codes must be aligned with the BEE Codes pursuant to section 9 and not pursuant to section 10(1).

(e) An exemption from the requirements of section 10(1) of the BEE Act in the context of the DMR and the issuing of mining rights is that the DMR would not need to apply any relevant code of good practice issued in terms of the BEE Act when determining qualification criteria for the issuing of prospecting rights or mining rights.

(5) Other departments could set qualification criteria for the issuance and maintenance of other rights / licences required by mining companies. This would not impact on the mining right or the MPRDA but mining companies would be required to comply with those criteria in order to be issued with a separate licence. For example:

(a) a mining company is required to renew or be issued with or renew a water use licence under the *National Water Act*, 1998;

(b) in complying with section 10(1) of the BEE Act, the Minister of Water Affairs and Forestry sets the qualification criteria under the National Water Act to be issued with or renew a water use licence as, amongst other matters, 29% Black ownership; and

(c) the mining company would be able to retain its mining right but would not meet the requirements to be issued with a water licence.

1.5 Section 12 (transformation charters)

(1) In terms of section 12 of the BEE Act, the Minister of Trade and Industry *"must publish in the Gazette for general information and promote a transformation charter for a particular sector of the economy, if the Minister is satisfied that the charter:*

(a) *has been developed by major stakeholders in that sector; and*

(b) *advances the objectives of this Act."*

(2) None of the BEE Codes, any Sector Codes, or the draft 2018 Charter are transformation charters for the purposes of section 12 of the BEE Act.

1.6 Conclusion

(1) The issuing of the draft 2018 Charter with specific qualification criteria, including that mining companies maintain a particular Black ownership (that is lower than the ownership required to be issued with a right) on an on-going basis, will not result in a conflict with the BEE Act or the BEE Codes. It does also not harmonise the draft 2018 Charter with the BEE Codes as they serve two distinct purposes

(2) The lapsing of the Exemption or failure to issue a further Exemption:

(a) will not result in the draft 2018 Charter falling away; but

(b) will result in mining companies:

(i) continuing to be assessed for compliance with their prospecting right and mining rights in terms of the MPRDA and the conditions to their right; and

(ii) being assessed against the generic BEE Codes if they wish to be awarded a BEE score for commercial reasons.

(3) In addition, the introduction of the draft 2018 Charter will continue to result in mining companies:

(a) continuing to be assessed for compliance with their prospecting right and mining rights in terms of the MPRDA and the conditions to their right; and

(b) being assessed against the generic BEE Codes if they wish to be awarded a BEE score for commercial reasons.

MINERALS COUNCIL
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APPENDIX 6

Draft 2018 Charter's contravention of international trade agreements

The 2018 Charter is unconstitutional as being inconsistent with South Africa's international trade obligations for the following further reasons.

(1) Section 233 of the Constitution requires that:

(a) when interpreting any legislation, the courts must prefer any reasonable interpretation which is consistent with international law over any alternative interpretation which is inconsistent with international law,

(b) international law is a basis for determining the legality of subordinate legislation,

therefore, the legality and constitutionality of the 2018 Charter are to be tested by reference to South Africa's international law obligations. To this extent, therefore, the treaties are enforceable in South Africa.

(2) The state's obligation in section 7(2) of the Constitution to protect and fulfil the Bill of Rights requires the executive in initiating legislation, and Parliament when enacting legislation, to give effect to the obligations of the state in terms of section 7(2) to promote and fulfil the rights in the Bill of Rights. This includes a duty to consider international law and the obligations undertaken by South Africa under international law; and that the state, having bound itself under international law, must take reasonable measures to implement international law where such is required to protect and fulfil the Bill of Rights.

(3) The consequences of the above are that international law obligations restrain the exercise of executive power that is inconsistent with them; and that such obligations may give rise to a duty on the state to take reasonable measures to give effect to such obligations. The 2018 Charter violates South Africa's trade obligations as detailed below, since the only manner in which the Minister would be able to exercise his powers would be to violate international law since the exercise of such powers would result in a quantitative restriction on exports of minerals.

(4) South Africa is a member of the World Trade Organisation (WTO) which provides international measures in regard to export restrictions for member countries by way of *inter alia*:

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(a) the General Agreement on Tariffs and Trade, 1994 (GATT), Article XI: 1 of which limits the ability to impose export restrictions.[1]

(b) the WTO Agreement on Subsidies and Countervailings Measures, Article 3 in Part II of which outlaws the requirement to use domestic over imported goods, if the downstream beneficiation would mean that imported goods were likely to be less favoured.[2]

(c) The WTO Agreement on Trade-Related Investment Measures, Article 2(2) read with the Annex to which provide an illustrative list of Trade-Related Investment Measures (TRIMs) inconsistent with Article XI of the above GATT, 1994.[3]

(5) South Africa and the European Union entered into an Agreement on Trade, Development and Co-Operation, 1999 which came into force in 2004, Article 19 of which prohibits quantitative restrictions on exports.[4] In terms of Article I of GATT, 1994,[5] the provisions of the European Union reservation are also applicable to other non-EU WTO Members.

(6) South Africa is also a party to the Southern African Development Community Trade Protocol, 1996 which in Article 6 prohibits trade barriers.[6] Article 8 also prohibits quantitative restrictions on exports.

(7) South Africa and the European Union entered into an Economic Partnership Agreement, 2016, Article 39 of which read with GATT, 1994, prohibits quantitative export restrictions.

(8) Also of relevance are the abovementioned BITs since they normally contain a "*fair and equitable treatment*" clause which prohibits subjecting investors or investments to unjustified, unreasonable or discriminatory measures.[7] This has been held in international arbitration cases to encompass transparency and non-discrimination in regulatory processes;[8] full protection and security for foreign investments;[9] acting in

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[1] Article XI: 1 provides: "*No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.*".

[2] Article 3 provides: "*Part II: Prohibited Subsidies Article 3: Prohibition 3.1 except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited: (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I; (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods. 3.2 a Member shall neither grant nor maintain subsidies referred to in paragraph 1.*".

[3] The annex in Para 2(c) refers to: "*2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict: . . . (c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.*".

[4] Article 9 provides: "*1. Quantitative restrictions on imports or exports and measures having equivalent effect on trade between South Africa and the Community shall be abolished on the entry into force of this Agreement. 2. No new quantitative restrictions on imports or exports or measures having equivalent effect shall be introduced in trade between the Community and South Africa. 3. No new customs duties or imports or exports or charges having equivalent effect shall be introduced, nor shall those already applied be increased, in the trade between the Community and South Africa from the date of entry into force of this Agreement.*".

[5] Article I: 1 provides: "*1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.*".

[6] Article 6 provides: "*NON-TARIFF BARRIERS Except as provided for in this Protocol Member State shall, in relation to intra-SADC trade: (a) adopt policies and implement measures to eliminate all existing forms of NTBs. (b) Refrain from imposing any new NTBs.*".

[7] See Article 2.3 of the Italy/RSA BIT and Article 3(1) of the Belgo-Luxembourg/RSA BIT and the *Foresti* arbitration (supra).

[8] *Metalclad Corp v United Mexican States, ICSID (NAFTA)* Case ARB (AF) 97/1.

[9] *Ronald S. Lauder v the Czech Republic*, UNCITRAL Final Award of 3 September 2001.

good faith and in a non-arbitrary manner towards foreign investors;[10] not undermining the legitimate expectations taken into account by foreign investors in making their investments.[11] The fact that South Africa has not renewed or has terminated its BITs does not stop the BITs remaining in force in regard to existing investments made during the currency of the BIT.

(9) Also relevant to this is that the 2018 Charter would cause some producers to have to breach their long-term export contracts.

(10) From the above it follows that the 2018 Charter violates South Africa's abovementioned international trade agreements. The 2018 Charter requires in paragraph 2.2.1 that 70% a minimum of 70% of total mining goods procurement spend must be on South African manufactured goods. This requirement is in breach of Article XI (1) the GATT and Trade, Development and Co-operation Agreement (TDCA), both treaties to which South Africa is a signatory. The internal exceptions contained in Article XI (2) of GATT do not apply so as to save the procurement provisions in the 2018 Charter. Therefore, the prohibition on restrictions in Article XI (1) of GATT apply.

(11) Similarly, Article 19[12] of the TDCA (an agreement with the European Community to which South Africa is a party) applies.

(12) Our Courts have made it clear that international law is an obligatory guide to the interpretation of domestic legislation and serves as a basis for determining the legality of subordinate instruments. In *Progress Office Machines CC v South African Revenue Services and Others* 2008 (2) SA 13 (SCA) the Court said the following in relation to anti-dumping duties imposed by the relevant Minister:

> "*Not only is a court bound to "prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law" but subordinate legislation such as the notice by the Minister of Finance imposing the anti-dumping duty must be reasonable. Dugard submits that a court may "insist on compliance with a state's international obligations as a requisite for the validity of subordinate legislation". The duration of the anti-dumping duty imposed beyond the period allowed by the Anti-Dumping Agreement would not only be a breach of the Republic's international obligations and an unreasonable interpretation of the notice but also unreasonable and to that extent invalid.*" [Internal footnotes omitted, and emphasis added]

(13) The reasoning of the majority in *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) is consistent with - indeed gives effect to - what was said in *Progress Office Machines* quoted above. It is therefore plain that the Minister may not, in the 2018 Charter, provide for targets which are inconsistent with South Africa's international treaty obligations, in this case GATT and TDCA.

(14) In conclusion therefore:

(a) the 2018 Charter entails quantitative restrictions on exports;

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[10] *Occidental Exploration and Production Company v Republic of Ecuador* (London Court of International Arbitration, Administered Case UN 3467), 1 July 2004.

[11] *Tecmed SA v United Mexican States*, ICSID Case ARB (AF) /00/2, 29 May 2003.

[12] Article 19 provides that "*1. Quantitative restrictions on imports or exports and measures having equivalent effect on trade between South Africa and the Community shall be abolished on the entry into force of this Agreement.*
2. No new quantitative restrictions on imports or exports or measures having equivalent effect shall be introduced in trade between the Community and South Africa.
3. No new customs duties on imports or exports or charges having equivalent effect shall be introduced, nor shall those already applied be increased, in the trade between the Community and South Africa from the date of entry into force of this Agreement."

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(b) such export restrictions breach South Africa's international law obligations;

(c) South Africa's international law obligations are of constitutional relevance in that:

(i) the legality and constitutionality of the 2018 Charter are to be tested by reference to South Africa's international law obligations and in this way the international treaties are directly enforceable;

(ii) they must be considered for the purpose of interpreting legislation; and

(iii) international law obligations discipline the exercise of powers granted under primary legislation to make subordinate legislation, as well as executive conduct generally.

2. No new quantitative restrictions on imports or exports or measures having equivalent effect shall be introduced in trade between the Community and South Africa.
3. No new customs duties on imports or exports or charges having equivalent effect shall be introduced, nor shall those already applied be increased, in the trade between the Community and South Africa from the date of entry into force of this Agreement."

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DME 386

DEPARTMENT: MINERALS AND ENERGY

REPUBLIC OF SOUTH AFRICA

MINING RIGHT

Granted in terms of section 23(1) of the Mineral and Petroleum Resources Development Act, 2002
(Act No. 28 of 2002)

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Received Time 2. Nov. 8:51

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Protocol No----/2005

LET IT HEREBY BE MADE KNOWN:

THAT on this DAY day of MONTH in the year YEAR, before me, SURNAME AND INITIALS a Notary Public, duly sworn and admitted, residing and practising at PLACE, in the NAME OF REGION Province of South Africa, and in the presence of the subscribing competent witnesses, personally came and appeared:

NAME AND SURNAME, Regional Manager, NAME OF REGION Region of the Department of Minerals and Energy, and as such in his / her capacity as the duly authorised representative of:

THE MINISTER OF MINERALS AND ENERGY

The said Regional Manager, being duly authorised thereto under and by virtue of a Power of Attorney granted by the DIRECTOR-GENERAL OR DEPUTY DIRECTOR-GENERAL: MINERAL REGULATION of the Department of Minerals and Energy on the DAY day of MONTH in the year YEAR in terms of the powers delegated by the Minister on the 12th day of May 2004 in terms of section 103 (1) of the Act,

SS

AND

(REPRESENTATIVE'S SURNAME AND INITIALS) in his/her personal capacity or as the company's (POSITION OF REPRESENTATIVE) or as a Close Corporations Member, and as such, the duly authorised representative of (COMPANY NAME),Identification/ Registration number:

(Hereinafter together with his/her/ its successors in title and assigns referred to as" the Holder", he or she, the said representative, being duly authorised thereto under and by virtue of a Power of Attorney/ Resolution of directors or members of the Holder, signed or passed at **PLACE** on the **DAY** day of **MONTH** in the year **YEAR** which Power of Attorney or a certified copy of a resolution has this day been exhibited to me, the Notary, and remain filed of record in my protocol with the minutes hereof;

AND THE MINISTER AND HOLDER DECLARED THAT:

WHEREAS The State is the custodian of the Nation's mineral and petroleum resources in terms of section 3 of the Act.

AND WHEREAS The Holder has applied for a mining right in terms of section 22 of the Act,

AND WHEREAS The **DIRECTOR-GENERAL OR DEPUTY DIRECTOR-GENERAL: MINERAL REGULATION** of the Department of Minerals and Energy has by virtue of powers delegated to him, granted to the Holder, a mining right in terms of section 23(1) of the Act.

NOW THEREFORE THE MINISTER GRANTS A MINING RIGHT SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:

SS

Definitions

In this mining right, the following words and expressions shall have the meanings assigned to them:

'***Act***' means the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002) and includes the Regulations, guidelines, circulars, directives and orders made in terms of that Act;

'***Effective date***' means DAY day of MONTH in the year YEAR (being the date on which the environmental management programme is approved in terms of section 39(4) of the Act);

'***Environmental Management Programme***' is as defined in the Act and includes any other Environmental Management Programme approved in terms of the previous mining legislation;

'***Financial year***' means a complete financial year of the Holder which, at the time of the granting of this mining right, commences on DAY day of MONTH in the year YEAR; and ends on DAY day of MONTH in the year YEAR;

'***Holder***' is as defined in the Act, and specifically in relation to this right, it means NAME OF HOLDER, Registration No/Identification No ;

'***Mineral***' is as defined in the Act, and specifically in relation to this right means MINERAL/S APPLIED FOR;

'***Mining Area***' is as defined in the Act and includes any additional area of environmental liability as may be reflected on the Environmental Management Programme relating to this right;

'***Mining operations***' is as defined in the Act;

'***Mining right***' is as defined in the Act and includes all the Annexures to it, agreements and inclusions by reference;

'***Mining Work Programme***' is as defined in the Act and as reflected in the attached Annexure to this mining right;

'***Minister***' means the Minister of Minerals and Energy and includes the successors in title, the assignee or any person duly authorised to act in the Minister's place and stead;

'**Regional *Manager***' is as defined in the Act and specifically in relation to this right means the Regional Manager for the NAME OF REGION Region of the Department of Minerals and Energy; and

'***Social and Labour Plan***', is as contemplated in regulation 36of the Regulations to the Act and is as reflected in the attached Annexure to this mining right.

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1. **Description of the Mining Area**

The Mining Area shall comprise the following:

Certain: **FARM NAME, PORTION AND FARM NO**

Situated: **AREA** Magisterial/Administrative District of **NAME OF DISTRICT**

Measuring: hectares in extent.

(In the case of various farms being involved, a list can be attached and referred to as Annexure);

Which Mining Area is described in detail on the attached Diagram/sketch plan marked Annexure .

2. **Granting of Mining Right**

Without detracting from the provisions of sections 5 and 25 of the Act, the Minister grants to the Holder the sole and exclusive right to mine, and recover the mineral/s in, on and under the mining area for the Holder's own benefit and account, and to deal with, remove and sell or otherwise dispose of the mineral/s, subject to the terms and conditions of this mining right, the provisions of the Act and any other relevant law in force for the duration of this right.

3. **Commencement, Duration and Renewal**

3.1. This mining right shall commence on **DAY MONTH YEAR** and, unless cancelled or suspended in terms of this clause 13 of this right and or section 47 of the Act, will continue to be in force for a period of **DURATION** years ending on **DAY MONTH YEAR**.

3.2. The Holder must commence with the mining operations within a year from the date on which the mining right becomes effective in terms of section 23 (5) of the Act, or any later date as may, upon a written request by the Holder, be authorised in writing by the Minister in terms of the Act, failing which this right will automatically lapse.

3.3. Any application for renewal must be submitted to the Regional Manger not later than 60 working days prior to the date of expiry of this right.

4. **Amendments, Variation and Abandonment**

4.1. The terms of this right (including by extension of the area covered by it or by the addition of minerals or a share or shares or seams, mineralized bodies, or strata, which are not at the time the subject thereof) may not be amended or varied without the written consent of the Minister.

4.2. The Holder shall be entitled to abandon or relinquish the right or the area covered by the right entirely or in part, in which case the applicant must apply for a closure certificate in terms of section 43 (3) of the Act

4.3 With effect from the date the Holder has abandoned or relinquished a portion or portions of the mining area, and after issuing of a closure certificate, the Minister is entitled to grant any prospecting rights or mining rights or any right or permit referred to in the Act in, on, or under the portion/s, so abandoned or relinquished, to any person/s.

4.4 Upon abandonment or relinquishment of the mining area or any portion thereof, the Holder will furnish the Regional Manager with all prospecting and /or mining results and/or information, as well as its general evaluation of the geological, geophysical and borehole data in respect of such abandoned area in so far as it applies to the mineral or any other mineral/s obtained in respect of this right.

5. Payment of Royalties

5.1. The Holder shall as contemplated in section 25 (2) (g) pay to the State throughout the duration of this mining right any levy, fees, royalty or consideration payable in terms of any Act or Amendment to an Act of Parliament implemented.

6. Payment of Interest

If mining fees, any fees, any levy, royalties or consideration referred to in clause 5 are not paid punctually, the Holder shall be in mora and shall pay interest thereon at the rate prescribed in terms of section 80 of the Public Finance Management Act, 1999(Act 1 of 1999) reckoned from the date on which payment is due and payable, to the date of actual payment.

7. Restrictions and Obligations Imposed on the Holder

7.1 The Holder is entitled to the rights referred to in section 5(2), (3) and section 25 of the Act, and such other rights as may be contained in this mining right or such other right as may be granted to, acquired by or conferred upon the Holder by any other applicable law.

7.2 Mining operations in the mining area must be conducted in accordance with the Mining Work Programme and any amendment to such Mining Work Programme and an approved Environmental Management Plan.

7.3 The Holder shall not trespass or enter into any homestead, house or its curtilage nor interfere with or prejudice the interests of the occupiers and/or owners of the surface of the Mining Area except to the extent to which such interference or prejudice is necessary for the purposes of enabling the Holder to properly exercise the Holder's rights under this mining right.

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8. **Conditions on disposal of Minerals and/ or Products Derived from Mining**

It is a condition of the granting of this mining right that the Holder shall dispose of all minerals and/ or products derived from the exploitation of the mineral at competitive market prices which shall mean in all cases, non-discriminatory prices or non-export parity prices. If the minerals are sold to any entity, which is an affiliate or non-affiliated agent or subsidiary of the Holder, or is directly or indirectly controlled by the Holder, such purchaser must unconditionally undertake in writing to dispose of the minerals and any products produced from the minerals, at competitive market prices.

9. **Mortgage, Cession, Transfer, Alienation**

9.1 This mining right, a shareholding, an equity, an interest or participation in the right or joint venture, or a controlling interest in a company, close corporation or joint venture, may not be encumbered, ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of a change of controlling interest in listed companies.

9.2 Any transfer, encumbrance, cession, letting, sub-letting, assignment, alienation or disposal of this right or any interest therein or any share or any interest in the Holder, without the consent of the Minister referred to in section 11(1) is of no force, no effect and is invalid.

10. **Protection of Boreholes, Shafts, Edits and Openings.**

All boreholes, shafts, edits, excavations, and openings sunk or made, by the Holder during the currency of this mining right shall be sealed, closed, fenced, made safe by the Holder in accordance with the approved Environmental Management Programme, the Mine Health and Safety Act, 1996 or any other applicable laws and Regulations.

11. **Holder's liability for Compensation for Loss or Damage**

11.1. Subject to section 43 of the Act, the Holder shall, during the tenure of this right while carrying out the mining operations under this right, take all such necessary and reasonable steps to adequately safeguard and protect the environment, the mining area and any person/s using or entitled to use the surface of the mining area from any possible damage or injury associated with any activities on the mining area.

SS

11.2. Should the holder fail to take reasonable steps referred to above, and to the extent that there is legal liability, the holder shall compensate such person or persons for any damage or losses, including but not limited to damage to the surface, to any crops or improvements, which such person or persons may suffer as a result of, arising from or in connection with the exercise of his/her rights under this mining right or of any act or omission in connection therewith.

12. Inspection of Mining Area

The Minister and/or any person duly authorised thereto in writing by the Minister shall be entitled to inspect the mining area, the Holder's mining operations and the execution of the approved Environmental Management Programme on the Mining Area as provided for in the Act, and any instruction conveyed in writing by the Minister to the Holder requiring the proper performance by the Holder of the Holder's obligations under this mining right shall be put into effect by the Holder in terms of the Act.

13. Cancellation or Suspension

13.1 Subject to section 47 of the Act, this mining right may be cancelled or suspended if the Holder:

13.1.1 Submitted incorrect and or misleading information for the purposes of the application for this right;

13.1.2 Submits inaccurate, incorrect and or misleading information or during the duration of the right;

13.1.3 Fails to honour or carry out any agreement, arrangement, or undertaking, including the undertaking made by the Holder in terms of the Broad Based Socio Economic Empowerment Charter and Social and Labour plan, on which the Minister relied for the granting of this right;

13.1.4 Breaches any material term and condition of this mining right;

13.1.5 Conducts mining operations in contravention of the provisions of the Act;

13.1.6 Contravenes the requirement of the approved Environmental Management Programme; or

13.1.7 Contravenes any provisions of this Act in any other manner.

13.2 Before the Minister cancels or suspends this right, the Minister shall:

13.2.1 Give written notice to the Holder indicating the intention to suspend or cancel this right;

13.2.2 Give reason/s why the Minister is considering the suspension or cancellation of this right;

13.2.3 Give the Holder 30 days to show cause why the right should not be suspended or cancelled;

13.2.4 Notify, the mortgagee [if any], of the intention to suspend or cancel this right; and

13.2.5 Direct the Holder, where it is possible to remedy any contravention, breach or failure, to comply or to take such specified measures to remedy any contravention, breach or failure to comply.

13.3 If the Holder does not take the measures as specified by the Minister to remedy a contravention, breach or failure, the Minister may cancel or suspend this right after considering representations made by the Holder in terms of clause 13.2.3.

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14. **Records and Returns**

14.1. The Holder shall maintain all such books, plans and records in regard to mining on the Mining Area as may be required by the Act and shall furnish to the office of the Regional Manager such reports and documents as may be relevant under this agreement.

14.2. The Holder shall furnish to the Regional Manager all such monthly returns contemplated in section 28 (2) A of the Act not later than the 15th day of the month following the month in respect of which it was reported.

14.3 The Holder shall furthermore at the end of each year following commencement of this mining right, inform the Regional Manager in writing of any new developments and of the future mining activities planned in connection with the exploitation/mining of the minerals on the Mining Area.

15. **Minister's liability for Compensation**

The Minister shall not at any time be liable or responsible for the payment of compensation of whatever nature to the Holder, the Holder's successors-in-title or assignee, or any person whomsoever as a result of the granting of this right.

16. **Compliance with the Laws of the Republic**

The granting of this Right, does not exempt the Holder and its successors in title and/or assigns from complying with the relevant provisions of the Mine Health and Safety Act, (Act No.29 of 1996) and any other law in force in the Republic of South Africa.

17. **Provisions relating to section 2(d) and (f) of the Act**

In the furthering of the objects of this Act, the Holder is bound by the provisions of an agreement or arrangement dated **DAY MONTH YEAR** entered into between the Holder/ empowering partner and **NAME OF EMPOWERMENT PARTNER** (the empowerment partner) which agreement or arrangement was considered by the Department for purposes of compliance with the requirements of the Act and or Broad Based Economic Empowerment Charter developed in terms of the Act and such agreement shall form part of this right.

18. **Social and Labour Plan**

The holder must annually, not later than three months before the end of its financial year, submit detailed implementation plan to give effect to Regulation 46(e)(iii)(iv)(v) and (vi) in line with the Social and Labour Plan.

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19. Severability

Notwithstanding anything to the contrary, any provision of this mining right which is contrary to any provision of the Act or which is otherwise ultra vires, null and void, voidable, or unenforceable, shall be severable from the rest of this right, such rest thus being and remaining of full force, effect and enforceable.

20. Domicilia citandi et executandi

20.1. The parties hereto choose the following addresses as their *domicilia citandi et executandi* and for all purposes arising from this mining right, in particular for the purposes of serving of any notice in terms of this mining right, and any notice properly addressed to the under mentioned postal addresses of the parties shall be deemed to have been received by the addressee within 14 days if given in writing and posted by prepaid registered post addressed to the addressee at the relevant postal address:

20.1.1. In the case of the ***Minister***:

Physical Address	Postal Address
Code Tel Fax	

20.1.2. In the case of the ***Holder***:

Physical Address	Postal Address
Code Tel Fax	

20.2. Notwithstanding anything to the contrary herein contained, a written notice or communication actually received by a party at any place other than the chosen *domicilia citandi et executandi* shall constitute adequate notice or communication to the party notwithstanding that it was not sent to or delivered at such party's chosen *domicilium citandi et executandi*.

SS

20.3 Either party shall be entitled from time to time to change the *domicilia citandi et executandi* or postal address furnished above after giving at least 14 days prior written notice of such change to the other party, failing which the above mentioned addresses will remain in force.

20.4. Any written notice or communication contemplated in this clause which is forwarded by one party to the other by registered post will be presumed to have been received by the addressee on the fourteenth day following the date of posting from an address within the Republic of South Africa to the addressee at the postal address of the addressee for the time being as determined in accordance with the provisions of this clause.

21. Costs

The Holder shall pay all costs and charges incurred in connection with the negotiation, preparation, execution and registration of this mining right.

Thus done and signed at **PLACE** on the **DAY** day of **MONTH** in the year **YEAR** in the presence of the undersigned witnesses:

AS WITNESS:

_____

_____

For and on behalf of the **Minister**

AS WITNESS:

_____

_____

For and on behalf of the **Holder**

_____

Notary Public

DME 388

DEPARTMENT: MINERALS AND ENERGY

REPUBLIC OF SOUTH AFRICA

CONVERTED MINING RIGHT

Converted in terms of Item 7 of Schedule II of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002)

Received Time 2. Nov. 8:51

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SS

Protocol No-----/2005

LET IT HEREBY BE MADE KNOWN:

THAT on this **DAY** day of **MONTH** in the year **YEAR**, before me, **SURNAME AND INITIALS** a Notary Public, duly sworn and admitted, residing and practising at **PLACE**, in the **NAME OF REGION** Province of South Africa, and in the presence of the subscribing competent witnesses, personally came and appeared:

NAME AND SURNAME, Regional Manager, **NAME OF REGION** Region of the Department of Minerals and Energy, and as such in his / her capacity as the duly authorised representative of:

THE MINISTER OF MINERALS AND ENERGY

The said Regional Manager, being duly authorised thereto under and by virtue of a Power of Attorney granted by the **DIRECTOR-GENERAL OR DEPUTY DIRECTOR-GENERAL: MINERAL REGULATION** of the Department of Minerals and Energy on the **DAY** day of **MONTH** in the year **YEAR** in terms of the powers delegated by the Minister on the 12th day of May 2004 in terms of section 103 (1) of the Act,

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AND

(REPRESENTATIVE'S SURNAME AND INITIALS) in his/her personal capacity or as the company's (POSITION OF REPRESENTATIVE) or as a Close Corporations Member, and as such, the duly authorised representative of (COMPANY NAME),Identification/Registration number:

(Hereinafter together with his/her/ its successors in title and assigns referred to as" the Holder", he or she, the said representative, being duly authorised thereto under and by virtue of a Power of Attorney/ Resolution of directors or members of the Holder, signed or passed at **PLACE** on the **DAY** day of **MONTH** in the year **YEAR** which Power of Attorney or a certified copy of a resolution has this day been exhibited to me, the Notary, and remain filed of record in my protocol with the minutes hereof.

AND THE MINISTER AND HOLDER DECLARED THAT:

WHEREAS The State is the custodian of the Nation's mineral and petroleum resources in terms of section 3 of the Act.

AND WHEREAS The Holder has applied for conversion of an old order mining right in terms of Item 7 of the schedule to the Act,

AND WHEREAS The **DIRECTOR-GENERAL OR DEPUTY DIRECTOR-GENERAL: MINERAL REGULATION** of the Department of Minerals and Energy has by virtue of powers delegated to him, converted the Holder's old order, mining right in terms of Item 7 of the Schedule to the Act.

NOW THEREFORE THE MINISTER CONVERTS THE HOLDER'S OLD ORDER MINING RIGHT SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:

55

Definitions

In this mining right, the following words and expressions shall have the following meanings:

'***Act***' means the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002) and includes the Regulations, guidelines, circulars, directives and orders made in terms of that Act;

'***Effective date***' means DAY day of **MONTH** in the year **YEAR** (being the date on which the environmental management programme is approved in terms of section 39(4) of the Act);

'***Environmental Management Programme***' is as defined in the Act and includes any other Environmental Management Programme approved in terms of the previous mining legislation;

'***Financial year***' means a complete financial year of the Holder which, at the time of the granting of this mining right, commences on **DAY** day of **MONTH** in the year **YEAR**; and ends on **DAY** day of **MONTH** in the year YEAR;

'***Holder***' is as defined in the Act, and specifically in relation to this right, it means **NAME OF HOLDER**, Registration No/Identification No ;

'***Mineral***' is as defined in the Act, and specifically in relation to this right means **MINERAL/S APPLIED FOR**;

'***Mining Area***' is as defined in the Act and includes any additional area of environmental liability as may be reflected on the Environmental Management Programme relating to this right;

'***Mining operations***' is as defined in the Act;

'***Mining right***' is as defined in the Act and includes all the Annexures to it, agreements and inclusions by reference;

'***Mining Work Programme***' is as defined in the Act and as reflected in the attached **Annexure** to this mining right;

'***Minister***' means the Minister of Minerals and Energy and includes the successors in title, the assignee or any person duly authorised to act in the Minister's place and stead;

'**Old order mining right**' is as defined in the Schedule to the Act.

'**Regional *Manager***' is as defined in the Act and specifically in relation to this right means the Regional Manager for the **NAME OF REGION** Region of the Department of Minerals and Energy;

'***Social and Labour Plan***', is as contemplated in regulation 36 of the Regulations to the Act and is as reflected in the attached **Annexure** to this mining right; and

1. **Description of the Mining Area**

The Mining Area shall comprise the following:

Certain: **FARM NAME, PORTION AND FARM NO**

Situated: **AREA** Magisterial/Administrative District of **NAME OF DISTRICT**

Measuring: hectares in extent.

(In the case of various farms being involved, a list can be attached and referred to as Annexure);

Which Mining Area is described in detail on the attached Diagram/sketch plan marked **Annexure** .

2. **Conversion of Old Order Mining Right**

Without detracting from the provisions of Item 7 of the schedule to the Act, sections 5 and 25 of the Act, the Minister converts the holder's old order right and grants to the Holder the sole and exclusive right to mine, and recover the mineral/s in, on and under the mining area for the Holder's own benefit and account, and to deal with, remove and sell or otherwise dispose of the mineral/s, subject to the terms and conditions of this mining right, the provisions of the Act and any other relevant law in force for the duration of this right.

3. **Commencement, Duration and Renewal**

3.1. This mining right shall commence on **DAY MONTH YEAR** and, unless cancelled or suspended in terms of clause 13 of this right and or section 47 of the Act, will continue to be in force for a period of **DURATION** years ending on **DAY MONTH YEAR.**

3.2. The Holder must continue to conduct mining operations failing which this right will automatically lapse.

3.3. Any application for renewal must be submitted to the Regional Manger not later than 60 working days prior to the date of expiry of this right.

4. **Amendments, Variation and Abandonment**

4.1. The terms of this right (including by extension of the area covered by it or by the addition of minerals or a share or shares or seams, mineralized bodies, or strata, which are not at the time the subject thereof) may not be amended or varied without the written consent of the Minister.

4.2. The Holder shall be entitled to abandon or relinquish the right or the area covered by the right entirely or in part, in which case the applicant must apply for a closure certificate in terms of section 43 (3) of the Act.

4.3 With effect from the date the Holder has abandoned or relinquished a portion or portions of the mining area, and after issuing of a closure certificate, the Minister is entitled to grant any prospecting rights or mining rights or any right or permit referred to in the Act in, on, or under the portion/s, so abandoned or relinquished, to any person/s.

4.4 Upon abandonment or relinquishment of the mining area or any portion thereof, the Holder will furnish the Regional Manager with all prospecting and /or mining results and/or information, as well as its general evaluation of the geological, geophysical and borehole data in respect of such abandoned area in so far as it applies to the mineral or any other mineral/s obtained in respect of this right.

5. Payment of Royalties

5.1. The Holder shall as contemplated in section 25 (2) (g) pay to the State throughout the duration of this mining right any levy, fees, royalty or consideration payable in terms of any Act or Amendment to an Act of Parliament implemented.

5.2. If the Holder of this mining right paid royalties to the state; the Holder shall continue to pay the relevant royalties applicable to such old order mining right until such time a relevant Act of parliament is implemented.

6. Payment of Interest

If mining fees, any fees, any levy, royalties or consideration referred to in clause 5 are not paid punctually, the Holder shall be in mora and shall pay interest thereon at the rate prescribed in terms of section 80 of the Public Finance Management Act, 1999(Act 1 of 1999) reckoned from the date on which payment is due and payable, to the date of actual payment.

7. Restrictions and Obligations Imposed on the Holder

7.1 The Holder is entitled to the rights referred to in section 5(2), (3) and section 25 of the Act, and such other rights as may be contained in this mining right or such other right as may be granted to, acquired by or conferred upon the Holder by any other applicable law.

7.2 Mining operations in the mining area must be conducted in accordance with the Mining Work Programme and any amendment to such Mining Work Programme and an approved Environmental Management Plan.

7.3 The Holder shall not trespass or enter into any homestead, house or its curtilage nor interfere with or prejudice the interests of the occupiers and/or owners of the surface of the Mining Area except to the extent to which such interference or prejudice is necessary for the purposes of enabling the Holder to properly exercise the Holder's rights under this mining right.

8. Conditions on disposal of Minerals and/ or Products Derived from Mining

It is a condition of the conversion of this old order mining right that the Holder shall dispose of all minerals and/ or products derived from the exploitation of the mineral at competitive market prices which shall mean in all cases, non-discriminatory prices or non-export parity prices. If the minerals are sold to any entity, which is an affiliate or non-affiliated agent or subsidiary of the Holder, or is directly or indirectly controlled by the Holder, such purchaser must unconditionally undertake in writing to dispose of the minerals and any products produced from the minerals, at competitive market prices.

9. Mortgage, Cession, Transfer, and Alienation

9.1 This mining right, a shareholding, an equity, an interest or participation in the right or joint venture, or a controlling interest in a company, close corporation or joint venture, may not be encumbered, ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of a change of controlling interest in listed companies.

9.2 Any transfer, encumbrance, cession, letting, sub-letting, assignment, alienation or disposal of this right or any interest therein or any share or any interest in the Holder, without the consent of the Minister referred to in section 11(1) is of no force, no effect and is invalid.

10. Protection of Boreholes, Shafts, Adits and Openings.

All boreholes, shafts, Adits, excavations, and openings sunk or made, by the Holder during the currency of this mining right shall be sealed, closed, fenced, made safe by the Holder in accordance with the approved Environmental Management Programme, the Mine Health and Safety Act, 1996 or any other applicable laws and Regulations.

11. Holder's Liability for Compensation for Loss or Damage

11.1. Subject to section 43 of the Act, the Holder shall, during the tenure of this right while carrying out the mining operations under this right, take all such necessary and reasonable steps to adequately safeguard and protect the environment, the mining area and any person/s using or entitled to use the surface of the mining area from any possible damage or injury associated with any activities on the mining area.

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11.2. Should holder fail to take reasonable steps referred to above, and to the extent that there is legal liability, the holder shall compensate such person or persons for any damage or losses, including but not limited to damage to the surface, to any crops or improvements, which such person or persons may suffer as a result of, arising from or in connection with the exercise of his/her rights under this mining right or of any act or omission in connection therewith.

12. **Inspection of Mining Area**

The Minister and/or any person duly authorised thereto in writing by the Minister shall be entitled to inspect the mining area, the Holder's mining operations and the execution of the approved Environmental Management Programme on the Mining Area as provided for in the Act, and any instruction conveyed in writing by the Minister to the Holder requiring the proper performance by the Holder of the Holder's obligations under this mining right shall be put into effect by the Holder in terms of the Act.

13. **Cancellation or Suspension**

13.1 Subject to section 47 of the Act, this mining right may be cancelled or suspended if the Holder:

13.1.1 Submitted incorrect and or misleading information for the purposes of the application for the conversion of the relevant old order right;

13.1.2 Submits inaccurate, incorrect and or misleading information or during the duration of the right;

13.1.3 Falls to honour or carry out any agreement, arrangement, or undertaking, including the undertaking made by the Holder in terms of the Broad Based Socio Economic Empowerment Charter and Social and Labour plan, on which the Minister relied for the conversion of this right;

13.1.4 Breaches any material term and condition of this mining right;

13.1.5 Conducts mining operations in contravention of the provisions of the Act;

13.1.6 Contravenes the requirement of the approved Environmental Management Programme; or

13.1.7 Contravenes any provisions of this Act in any other manner.

13.2 Before the Minister cancels or suspends this right, the Minister shall;

13.2.1 Give written notice to the Holder indicating the intention to suspend or cancel this right;

13.2.2 Give reason/s why the Minister is considering the suspension or cancellation of this right;

13.2.3 Give the Holder 30 days to show cause why the right should not be suspended or cancelled;

13.2.4 Notify, the mortgagee [if any], of the intention to suspend or cancel this right; and

13.2.5 Direct the Holder, where it is possible to remedy any contravention, breach or failure, to comply or to take such specified measures to remedy any contravention, breach or failure to comply.

13.3 If the Holder does not take the measures as specified by the Minister to remedy a contravention, breach or failure, the Minister may cancel or suspend this right after considering representations made by the Holder in terms of clause 13.2.3.

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14. Records and Returns

14.1. The Holder shall maintain all such books, plans and records in regard to mining on the Mining Area as may be required by the Act and shall furnish to the office of the Regional Manager such reports and documents as may be relevant under this agreement.

14.2. The Holder shall furnish to the Regional Manager all such monthly returns contemplated in section 28 (2) A of the Act not later than the 15th day of the month following the month in respect of which it was reported.

14.3 The Holder shall furthermore at the end of each year following commencement of this mining right, inform the Regional Manager in writing of any new developments and of the future mining activities planned in connection with the exploitation/mining of the minerals on the Mining Area.

15. Minister's liability for Payment of Compensation

The Minister shall not at any time be liable or responsible for the payment of compensation of whatever nature to the Holder, the Holder's successors-in-title or assignee, or any person whomsoever as a result of the conversion of this right.

16. Compliance with the Laws of the Republic of South Africa

The conversion of this Right, does not exempt the Holder and its successors in title and/or assigns from complying with the relevant provisions of the Mine Health and Safety Act, (Act No.29 of 1996) and any other law in force in the Republic of South Africa.

17. Provisions relating to section 2(d) and (f) of the Act

In the furthering of the objects of this Act, the Holder is bound by the provisions of an agreement or arrangement dated **DAY MONTH YEAR** entered into between the Holder/ empowering partner and **NAME OF EMPOWERMENT PARTNER** (the empowerment partner) which agreement or arrangement was considered by the Department for purposes of compliance with the requirements of the Act and or Broad Based Economic Empowerment Charter developed in terms of the Act and such agreement shall form part of this right.

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18. Social and Labour Plan

The holder must annually, not later than three months before the end of its financial year, submit a detailed implementation plan to give effect to Regulation 46(e)(iii)(iv)(v) and (vi) in line with the Social and Labour Plan.

19. Severability

Notwithstanding anything to the contrary, any provision of this mining right which is contrary to any provision of the Act or which is otherwise ultra vires, null and void, voidable, or unenforceable, shall be severable from the rest of this right, such rest thus being and remaining of full force, effect and enforceable.

20. Domicilia citandi et executandi

20.1. The parties hereto choose the following addresses as their *domicilia citandi et executandi* and for all purposes arising from this mining right, in particular for the purposes of serving of any notice in terms of this mining right, and any notice properly addressed to the under mentioned postal addresses of the parties shall be deemed to have been received by the addressee within 14 days if given in writing and posted by prepaid registered post addressed to the addressee at the relevant postal address:

20.1.1. In the case of the ***Minister***:

Physical Address Code Tel Fax	Postal Address

20.1.2. In the case of the ***Holder***:

Physical Address Code Tel Fax	Postal Address

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20.2. Notwithstanding anything to the contrary herein contained, a written notice or communication actually received by a party at any place other than the chosen *domicilia citandi et executandi* shall constitute adequate notice or communication to the party notwithstanding that it was not sent to or delivered at such party's chosen *domicilium citandi et executandi*.

20.3 Either party shall be entitled from time to time to change the *domicilia citandi et executandi* or postal address furnished above after giving at least 14 days prior written notice of such change to the other party, failing which the above mentioned addresses will remain in force.

20.4. Any written notice or communication contemplated in this clause which is forwarded by one party to the other by registered post will be presumed to have been received by the addressee on the fourteenth day following the date of posting from an address within the Republic of South Africa to the addressee at the postal address of the addressee for the time being as determined in accordance with the provisions of this clause.

21. Costs

The Holder shall pay all costs and charges incurred in connection with the negotiation, preparation, execution and registration of this mining right.

Thus done and signed at PLACE on the DAY day of MONTH in the year YEAR in the presence of the undersigned witnesses:

AS WITNESS:

_____

_____

For and on behalf of the **Minister**

AS WITNESS:

_____

_____

For and on behalf of the **Holder**

_____

Notary Public

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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF MINERAL RESOURCES

NO. 1399 **19 DECEMBER 2018**

IMPLEMENTATION GUIDELINES FOR THE BROAD-BASED SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE MINING AND MINERALS INDUSTRY, 2018 (herein referred as the Implementation guidelines for Mining Charter, 2018)

I, Samson Gwede Mantashe, Minister of Mineral Resources, hereby publish the Implementation Guidelines for the Broad Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018.

The Implementation Guidelines for the Mining Charter, 2018 attached to this notice must be read with the Mining Charter, 2018, published under Gazette Notice No. 41934 and shall become effective on the date of publication of this notice.

Mr Samson Gwede Mantashe
Minister: Department of Mineral Resources
Date: 13/12/2018

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mineral resources

Department:
Mineral Resources
REPUBLIC OF SOUTH AFRICA

IMPLEMENTATION GUIDELINES FOR THE BROAD-BASED BLACK SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH AFRICAN MINING AND MINERALS INDUSTRY, 2018.

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1. INTRODUCTION

The Mining Charter, 2018 derives from the Mineral and Petroleum Resources Development Act, 2002, (Act No. 28 of 2002) (MPRDA). The MPRDA's primary objective is to provide for transformation of the mining and minerals industry for the benefit of all South Africans. Section 100(2) (a) and (b) of the MPRDA mandates the Minister of Mineral Resources to develop the Mining Charter to ensure transformation within the mining and minerals industry.

The Mining Charter was gazetted on 27th September 2018 and requires the mining industry to implement the following elements: Ownership, Mineral Beneficiation, Procurement, supplier and enterprise development, Human Resources Development, Mine Community Development. Employment Equity, Principles for Housing and Living Conditions Standard, a regime for junior miners and licenses and permits granted in terms of the Precious Metals Act, 2005 and the Diamonds Act, 1986.

The requirements as enunciated in the above elements are aimed at promoting employment and advancement of the social and economic welfare of all South Africans whilst ensuring economic growth, socio-economic development and competitiveness of the mining industry. To this effect the Department deemed it appropriate to provide clear guidelines for the provision of certainty on the spirit and letter of the Mining Charter, 2018.

2. PURPOSE OF THE IMPLEMENTATION GUIDELINES

The purpose of these guidelines is to outline processes, procedures, forms and templates to facilitate compliance with the requirements of the Mining Charter, 2018. The Mining Charter 2018 must be read together with these guidelines the Score Card and reporting templates by mining right holders in terms of the MPRDA as well as licenses and permit holders in terms of the Precious Metals Act, 2005 and the Diamonds Act 1986.

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3. ABBREVIATIONS

ABREVIATION	DESCRIPTION
ESOP	Employee Share Ownership Plan/Scheme.
HRD	Human Resources Development.
MPRDA	Mineral and Petroleum Resources Development Act.
Mining Charter, 2018	Broad Based Black Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018.
R&D	Research and Development.
SABS	South African Bureau of Standards.
Standard	Housing and Living Conditions Standard.
HDP	Historically Disadvantaged Persons.
BBBEE	Broad Based Black Economic Empowerment.

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4. OWNERSHIP ELEMENT

4.1. Existing mining rights

An existing mining right holder shall annually (as outlined in the Mining Charter, 2010) report the following:

(a) Current BEE percentage share with supporting documents in the form of share certificates, shareholders agreement, memorandum of incorporation, Board resolutions, minutes (Extracts signed off by Company Secretary), signed attendance registers, audited financial statements and exit agreements where the BEE shareholder has exited.

(b) Maximum BEE target reached.

(c) Meaningful economic participation and full shareholder rights refer to ***Table (A).***

Table (A)

CURRENT BEE PERCENTAGE SHARE[1]	
MAXIMUM TARGET REACHED	
FINANCING METHOD	
INITIAL LOAN AMOUNT/AGREEMENT	
CURRENT LOAN AMOUNT	
DIVIDENDS DECLARED	
DIVIDEND PAID	
VOTING RIGHTS	
RECORD OF MEANINGFUL ECONOMIC PARTICIPATION	

[1] Including units of production.

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4.2 Pending applications

A mining right holder must increase its BEE shareholding from the minimum 26% to 30% as contemplated in the Mining Charter, 2018 once off or progressively within the 5 years transitional period. The modalities for the once off or progressive increase shall be incorporated in the terms and conditions of the mining right granted pursuant to a pending application. A mining right holder shall use ***Table A*** to report annually on its compliance level within the 5 years transitional period. After the 5 years transitional period a mining right holder shall use the ***Tables B, C, D and E*** relating to new mining rights to annually report on its compliance level.

Qualifying employees through organised labour and host communities must co-sign the annual report on ownership compliance prior to submission to the Department.

4.3 New mining rights

4.3.1 ESOPS for Qualifying Employees.

A mining right holder shall use ***Table B*** to annually report its level of compliance with the requirements on carried interest for qualifying employees.

Table (B)

ATTACH ESOP CONTRACT/AGREEMENT	
COPY OF TRUST DEED WITH AN UP TO DATE LIST OF BENEFICIARIES	
VALUE IN RANDS (5%)	
COST RECOVERY MECHANISM (PROVIDE DETAILS)	
DIVIDENDS DECLARED	

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DIVIDEND PAID TO QUALIFYING EMPLOYEES								
QUALIFYING EMPLOYEE DETAILS								
TOTAL NUMBER AND NAMES OF QUALIFYING EMPLOYEES	GENDER		RACE				NATIONALITY	
	MALE	FEMALE	A	W	I	C	RSA	OTHER (Specify)

4.3.2 Trust or any other appropriate vehicle for Host Communities.

As part of the annual reporting requirements for carried interest for host communities or the equity equivalent benefit, a mining right holder must submit the following documents to the Department and use ***Table C***;

(a) Copy of the Host community Trust Deed/other appropriate vehicle founding document;

(b) Host Community Development Programme;

(c) Implementation and Progress Report

(d) A Consultation Report with host communities and related parties.

Table (C)

TYPE OF BENEFIT (SHARES OR EQUITY EQUIVALENT)	
VALUE IN RANDS (5%)	
COST RECOVERY MECHANISM (provide details)	
DIVIDENDS DECLARED	
DIVIDEND PAID TO HOST COMMUNITY TRUST OR APPROPRIATE VEHICLE	
BENEFITING HOST COMMUNITY(IES)	
APPROVED PROJECT DESCRIPTION	
DURATION (PROJECT START DATE & END DATE)	
WORK DONE TO DATE AGAINST PLANNED PROJECTS (Attach supporting documents)	
TOTAL BUDGET AMOUNT FOR THE YEAR	
TOTAL AMOUNT SPENT FOR THE YEAR	
CAPPED PROJECT MANAGEMENT & CONSULTANCY FEES	

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4.3.3 BEE Entrepreneur shareholding

A mining right holder shall account for its level of compliance with the minimum BEE entrepreneur shareholding requirements and report annually in terms of section 28 of the MPRDA, and the Mining Charter, 2018 read with the Score Card.

A mining right holder shall provide originally certified copies of supporting documents in the form of:

(a) Share certificates:
(b) Identity document:
(c) Shareholders agreement:
(d) Board resolutions, minutes, signed attendance registers and audited financial statements;
(e) Memorandum of incorporation; and
(f) Exit agreements where the BEE shareholder has exited.

To comply with the broad based and meaningful participation requirement of the Mining Charter, 2018, a mining right holder shall use ***Table D*** to annually report on its level of compliance.

Table (D)

PERCENTAGE SHAREHOLDING	
PERCENTAGE OF WOMEN PARTICIPATION (5%)	
VALUE OF SHARES IN RANDS (20%)	
COPY OF LOAN AGREEMENT	
INITIAL LOAN AMOUNT	
LOAN REPAYMENT TERM	

DIVIDENDS DECLARED	
DIVIDEND PAID	
CURRENT LOAN AMOUNT	
VOTING RIGHTS	
RECORD OF MEANINGFUL ECONOMIC PARTICIPATION	
FOR THE EQUITY EQUIVALENT OPTION PROVIDE AN INDEPENDANT VALUATION REPORT	
QUALIFYING EMPLOYEES, COMMUNITIES AND ORGANISED LABOUR CO-SIGN ANNUAL REPORT	

4.3.4 Disposal of BEE shareholding

A mining right holder shall report on disposal of shares and exit by BEE shareholders by using ***Table E.***

Table (E)

COMPLIANCE WITH MINING CHARTER REQUIREMENTS	PERIOD FOR WHICH BEE SHARES WERE HELD	DURATION OF THE MINING RIGHT	NET VALUE REALISED	EXIT AGREEMENT

4.4 MINERAL BENEFICIATION (Equity Equivalent).

The maximum 5% offsetting contemplated in the Mining Charter, 2018 shall be implemented considering the provisions below.

4.4.1 Beneficiation Equity Equivalent Plan

The mining right holder's equity equivalent plan must contain the following information:

(a) Business name
(b) Business address
(c) Executive Summary of the programme
(d) Total value of company
(e) Valuation of the entity conducted by an independent third party and signed off by the right holder. This must be done every five years to ensure the value of the equity equivalent offset is still correct.
(f) How the 5% equity equivalent will be spread over the duration of the right with time adjusted values.

4.4.2 Approval of the Plan

A mining right holder shall submit the Plan for approval by the Minister. The Minister shall consider and approve the Plan within 60 days from the date of submission.

4.4.3 Qualification Criteria

(a) A mining right holder can choose any of the activities specified in the Mining Charter, 2018.
(b) The right holder must demonstrate that the planned equity equivalent activity/ies have long term viability
(c) The right holder must demonstrate that the combined monetary value of the activities undertaken for equity equivalence is equal to the percentage equity they are offsetting against.
(d) Activities against which beneficiation equity equivalent may be claimed can be undertaken over the duration of a mining right.

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(e) The right holder can claim equity equivalence as long as the beneficiation projects being supported are existent

4.4.4 Example of Calculation of Equity Equivalent

(a) If the ownership equity of a mining right holder's company or asset is valued at R 100000, the mining right holder will be eligible to claim maximum beneficiation equity equivalent credits equal to R 5,000.

(b) Contribution to the total beneficiation equity equivalent credits is calculated using the formula below:

$$A = B + C \quad \text{.....formula i)}$$

Where A is the total monetary value of the beneficiation equity equivalent

B is the monetary value of activities undertaken before the commencement of the Mining Charter, 2018.

C is the monetary value of all planned activities against beneficiation equity equivalent credits. Contribution of the monetary value of these activities will not be capped.

(c) **Table F** contains an example of a list of activities against which a mining right holder may claim ownership.

(d) Activity no.1: a mining right holder has invested in beneficiation plants before commencement of the Mining Charter, 2018 whose time adjusted value is R 400. Using the formula i), contribution of this investment to **B** is R 400.

(e) Activity no. 2: a mining right holder plans to beneficiate ore worth R 100 per year over a ten year period. The total contribution of this activity to **C** will therefore be R 1000.

(f) Activity 3: a mining right holder plans to sell some of its mineral ore or mineral products to independent Historically Disadvantaged Persons owned beneficiation entities at a discount to mine gate price. The discount amounts to R360 per year and plans to sell at the same time-adjusted total discount over a ten year period. This sums up to R 3600 which is the contribution of this activity to **C**.

***Table (F)*:** Monetary value of activities against which beneficiation equity equivalent is claimed:

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Activity No.	Beneficiation Activities	Initial Investment	Over 10 years
1	Beneficiation plants worth (pre-Mining Charter 2018)	R 400	N/A
	B	R 400	N/A
2	Portion of a mining right holder's production, that the mining right holder beneficiates as part of its operating activities.	R100/ year	R1000
3	Supplies mineral ore to Historically Disadvantaged Persons owned beneficiation entities at a discount to the mine gate price.	R360/year	R3,600
	C (i.e. R1000 + R3,600)		R4,600
	A = B + C (i.e. R400 + 4,600)	R 5,000	

4.4.5 Beneficiation Equity Equivalent Reporting Template

A mining right holder who claim the beneficiation equity equivalence, must submit information of their compliance to the department using ***Table G.***

Table (G)

Equity Equivalent Project or Activity	Budgeted Amount for the year	Actual amount spent

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5 PROCUREMENT, SUPPLIER AND ENTEPRISE DEVELOPMENT.

This section is intended to give the right holder detailed explanation of how to comply with the procurement requirements stipulated in the procurement element of the 2018 Mining Charter. This is to ensure that the activities undertaken by the mining right holder are in line with the intent of the DMR. To this end, this section contains explanations then followed by a detailed example of how the weighted scores for key sub-elements will be calculated. Also included in this section of the guidelines will be a set of reporting templates that the right holder must populate and submit to the DMR.

5.1 Sub – Sections

This section of the guidelines consists of the following subsections:

i. Calculation of local content
ii. Exclusions
iii. Local Content Verification
iv. Mining Goods
v. Services
vi. Contractors and Inclusive Procurement
vii. Enterprise and Supplier Development
viii. Supplier Development through Original Equipment Manufacturers
ix. Research and Development
x. Processing of Samples
xi. Procurement Reporting Templates
xii. Example for calculating points achieved for the Inclusive Procurement Element

5.2 Calculation of local content

5.2.1 Percentage local value add for a mining goods (i.e. capital good, component or consumable) will be calculated using the formula below

$$A = \frac{(B-C)}{B} \times 100\% \quad \text{...formula 1)}$$

Where, for the purposes of formula 1:

A is the percentage local value add

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B is the sales price of the capital good, component or consumable in Rands **(excluding profit mark-up, intangible value such as brand value and indirect overheads)**.

C is the value of the imported inputs/components used in the assembly or manufacturing of the capital good, component or consumable

5.2.2 The Rand value of sales price of the capital good, component or consumable (T) will exclude:

5.2.2.1 Profit Mark-up

5.2.2.2 Intangible value such as brand value and;

5.2.2.3 Indirect Overheads

5.2.3 Overhead costs that are a major cost driver for producing the mining good **such as electricity in a foundry can be included in the calculation of the sales price as they are direct overhead costs. These costs must be apportioned accordingly per product produced.**

5.2.4 Mining goods whose percentage local value add is 60% or greater will be considered South African manufactured goods.

5.2.5 Mining goods whose percentage local value add is below 60%, the mining goods will be deemed not to be manufactured locally and thus the right holder will be unable to claim any points under this sub-element.

5.3 Exclusions

5.3.1 All calculations for compliance with the targets of the procurement element shall exclude non-discretionary spend which includes include spend on buildings, roads, utilities (electricity and water) land rates and fuel.

5.4 Local Content Verification

5.4.1 Local content verification shall be carried out by the South African Bureau of Standards

5.4.2 Either the mining right holder or the supplier will pay for the cost of verification

5.4.3 Where a mining right holder pays for the verification of a supplier it is developing, the cost of verification can be interpreted to be part of the supplier development costs

5.4.4 **During the first two years of the transitional period, verification certificates from SABS will not be required.**

5.5 Mining Goods

5.5.1 A minimum of 70% of the total spend on mining goods must be sourced from South African based companies. The above mentioned 70% of the total mining goods procurement spend shall be apportioned in the following manner:

Budget Categories for Mining Goods

5.5.2 50% + 1 Historically Disadvantaged Persons (HDP) owned and controlled companies (21%)

5.5.3 50% + 1 women owned and controlled companies and/or 50% + 1 youth owned and controlled companies (5%)

5.5.4 BBBEE compliant companies with a minimum of 25% + 1 HDP ownership and at level 4 of the BBBEE codes (44%)

5.5.5 For the purposes of facilitating development and growth of youth owned suppliers, right holders will be allowed to claim points for procuring from youth owned entities for the duration of the procurement contract.

5.5.6 The percentage procurement for each budget (spend) category will be calculated using the formula below:

$$A = \frac{B}{C} \times 100\% \qquad \text{....formula 2)}$$

Where, for the purposes of formula 2:

A is the percentage of the total mining goods procurement spend that is spent on a budget category

B is the amount spent, in Rands (ZAR), procuring goods from a budget category

C is the total procurement budget for mining goods.

5.5.7 The weighted score for each of the budget categories of the procurement element will be determined using the formula below:

$$\frac{A}{B} \times C \text{.....formula 3)}$$

Where, for the purposes of formula 3:

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A is the percentage of the total mining goods procurement budget that is spent on a budget category.

B is the minimum percentage that must be procured from a budget category.

C is the maximum percentage weighting for a budget category in the score card.

5.5.8 Where targets have been exceeded for a budget category, the maximum percentage weighting will be given as the weighted score. There will be no bonus points for exceeding the target.

5.6 Services

5.6.1 Where services are procured by the mining right holder, the procurement will be allocated to one of the three budget categories identified in the services sub-element. These budget categories are:

Budget Categories for Services

5.6.2 50% + 1 Historically Disadvantaged Persons owned and controlled companies (50%)

5.6.3 50% + 1 women owned and controlled companies (15%)

5.6.4 50% + 1 youth owned and controlled companies (5%)

5.6.5 BBBEE compliant companies with a minimum of 25% + 1 HDP ownership and level 4 (10%)

5.6.6 For the purposes of facilitating development and growth of youth owned suppliers, right holders will be allowed to claim points for procuring from youth owned entities for the duration of the procurement contract.

5.6.7 The percentage procurement for each budget category will be calculated using the formula below:

$$A = \frac{B}{C} \times 100\% \quad \text{....formula 2)}$$

Where, for formula 2:

A is the percentage of the services procurement spend that is spent on a budget category

B is the amount spent, in Rands (ZAR), procuring services from a budget category

C is the total procurement budget for services

5.6.8 The weighted score for each of the budget categories of the procurement element will be determined using the formula below:

$$\frac{A}{B} \times C \text{.....formula 3)}$$

Where, for formula 3:

A is the percentage of the total services procurement budget that is spent on a budget category.

B is the minimum percentage that must be procured from a budget category.

C is the maximum percentage weighting for a budget category in the score card.

5.6.9 Where targets have been exceeded for a budget category, the maximum percentage weighting will be given as the weighted score. There will be no bonus points for exceeding the target.

5.7 Contractors and inclusive procurement

5.7.1 Where a mining right holder uses a contractor to undertake extraction and/or processing (crushing and concentration) of minerals on their behalf, any mining goods and services used by the contractor will be deemed to have been used by the right holder.

5.7.2 The mining right holder will therefore be expected to report on the procurement element using procurement spend data from their contractor

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5.8 Enterprise and supplier development

5.8.1 Where a mining right holder does supplier development, it will be allowed to offset the amount spent to offset some of their obligation under the procurement element

5.8.2 Right holders will be able to offset up to:

5.8.2.1 30% of their procurement obligation for mining goods.

5.8.2.2 10% of their procurement obligation for services.

5.8.3 The criteria to recognise supplier and enterprise development initiatives

5.8.3.1 Supplier and Enterprise Development can only be done for 50% + 1 vote or more Historically Disadvantaged Persons owned and controlled companies;

5.8.3.2 These 50% + 1 vote or more Historically Disadvantaged Persons owned and controlled companies must have a turnover of less than R50 million per annum;

5.8.4 Money spend on Supplier Development may not be claimed as money spend on Enterprise Development (i.e. If a right holder spends R 100 on supplier development, that R 100 cannot be again claimed as enterprise development);

5.8.5 Activities undertaken under enterprise development and supplier development must be quantifiable in a monetary value;

5.8.6 There must be a formal written agreement between the right holder and the recipient of Supplier or Enterprise Development;

5.8.7 The contract between the right holder and the supplier must be a minimum of 5 years.

5.8.8 The right holder cannot use the same enterprise or supplier development spend to offset against procurement obligations for mining goods and services.

5.9 Supplier Development through Original Equipment Manufacturers

5.9.1 The right holder is allowed to do supplier development through its Original Equipment Manufacturer (OEM) suppliers.

5.9.2 Supplier development done through OEMs will only be recognised if it is done on Historically Disadvantaged Persons owned and controlled companies, women owned and controlled companies, youth owned and controlled

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companies or BBBEE compliant companies with a minimum of 25% + 1 Black ownership and at level 4 of the BBBEE codes.

5.9.3 The right holder will be allowed to do supplier development through Original Equipment Manufacturers (OEM) in the following manner:

5.9.3.1 The right holder and OEM will identify imported components[2] to be locally manufactured.

5.9.3.2 The components identified can be those already used in mining goods supplied by the OEM to the right holder or to be used in a mining good to be supplied to the right holder within five years

5.9.3.3 The right holder can then claim offset points for (quantifiable investments) monies invested by them in the supplier development programme

5.9.4 Where an OEM is doing supplier development as part of its equity equivalent programme, the right holder cannot claim the amount spent on that particular supplier development project as supplier development points for the Charter.

5.10 Research and Development.

5.10.1 A mining right holder shall account and report annually on its R&D expenditure on South African based research and development entities (public or private) as required by the Mining Charter, 2018

5.11 Processing of samples

5.11.1 Where a mining right holder needs to use foreign based facilities or companies, the mining right holder must obtain the prior written consent of the Minister.

5.11.2 This request to use foreign based facilities or companies must contain the following information:

5.11.2.1 Name of right holder and associated right number from where the samples originate

5.11.2.2 The type of analysis to be done on the samples

[2] Component also refers to compounds in chemical formulations

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5.11.2.3 Proof that the three largest mineral sampling laboratories in the country, all mineral related science councils and academic institutions are incapable of carrying out the type of analysis

5.11.2.4 The country and institution where the analysis will be undertaken

5.11.2.5 The amount paid for the analysis

5.11.2.6 The amount of material to be sent out for analysis

5.11.2.7 The number of times samples will be exported

5.11.3 The Minister shall acknowledge receipt of the application within 14 days and grant such consent if the mining right holder has(add wording);

5.11.4 The Minister (must make a decision within 30 days) may grant the prior written consent within 30 days from the date of submission of the application.

5.11.5 The written consent will be valid for a period of 12 calendar months.

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5.12 Inclusive Procurement Reporting Templates

This subsection contains reporting templates that mining right holders will use ***Tables H, I, J, K, L and M*** to submit inclusive procurement compliance information to the Department.

Table (H): Mining Goods procurement reporting template

Company	Ownership(columns for classification and percentages)			BBBEE Level	Standardised Product ID[3]	Goods Procured[4]	Amount Spent (R)	Contract Duration	
	HDP[5]	Women	Youth					Start Date	End Date

[3] Recording of standardised product ID to be applicable once the standardised product identification coding system is developed
[4] If multiple goods are procured from a single entity, the right holder must record the different items in different rows (e.g. if a right holder procures grease and bolts from the same company, then these products need to be recorded in two rows instead of a single row)
[5] Historically Disadvantaged Persons

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Table (I): Services procurement reporting template

Company	Ownership			BBBEE Level	Services Procured[6]	Amount Spent (R)	Contract Duration	
	HDP	Women	Youth				Start Date	End Date

[6] If multiple goods are procured from a single entity, the right holder must record the different items in different rows (e.g. if a right holder procures accounting and security services from the same company, then these services need to be recorded in two rows instead of a single row)

Table (J): Enterprise and Supplier development reporting template

Company	Ownership			BBBEE Level	Development Type[7]	Development Activity[8]	Amount Spent on Development Activity (R)	Development Duration	
	HDP	Women	Youth					Start Date	End Date

[7] Under Development type right holder to capture whether it is supplier development or enterprise development

[8] Different development activities are undertaken for the same entity they must be recorded in different rows (e.g. if a right holder undertakes bookkeeping and quality control as development activities for one company these must be captured in different rows)

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Table (K): Supplier development through Original Equipment Manufacturers reporting template

Company	Ownership			BBBEE Level	Standardised Product ID[9]	Good to be supplied	Development Activity[10]	Amount Spent on Development Activity (R)	Development Duration	
	HDP	Women	Youth						Start Date	End Date

[9] Recording of standardised product ID to be applicable once the standardised product identification coding system is developed

[10] Different development activities are undertaken for the same entity they must be recorded in different rows (e.g. if a right holder undertakes bookkeeping and quality control as development activities for one company these must be captured in different rows)

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Table (L): Research and Development reporting template

Entity	Research and Development Undertaken[11]	Amount Spent (R)
Total Research and Development Spent[12] (R)		

Table (M): Sample processed in South African or foreign based facilities/companies reporting template

Entity	Location of Entity	Analysis undertaken[13]	Amount Spent (R)

[11] If more than R&D activity is carried out by a single entity, these need to be recorded in different rows
[12] This is the total amount spent for the year on research by the mining right holder which includes R&D undertaken outside South Africa
[13] If a right holder employs one entity to undertake more than one type of sample analysis then these need to be recorded in different rows

5.13 Example for calculating points achieved for the Inclusive Procurement Element

5.13.1 Mining Goods sub-element

For a mining goods procurement budget of R 100 million, the portion of the budget that has to be spent on South African manufactured goods is 70% of the budget which is R 70 million (i.e. 70% x R 100million = R 70 million).

For each of the budget category the target amounts that have to be spent on each budget category are:

- 21% of the R 100million has to be procured from Historically Disadvantaged Persons owned and controlled entities which will be R 21million (i.e. 21% x R 100 million = R 21million).
- 5% of the R 100million has to be procured from women owned entities and/or youth owned entities which will be R 5million (i.e. 5% x R100 million = R 5million).
- 44% of the R 100million has to be procured from BBBEE compliant companies with a minimum of 26% (25%+1) HDP ownership and level 4 which will be R 44million (i.e. 44% x R 100million = R 44million).

At the end of each calendar year, the amount spent in each budget category will be determined and used to determine the score for each budget category.

To determine the scores for each budget category formula 2 is used in the following manner:

- For Historically Disadvantaged Persons owned and controlled entities, if R 5million is spent by the end of the calendar year:

$$A = \frac{R\,5million}{(R100\,million)} \times 100\% = 5\%$$

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- For this budget category the compliance target is 21% of the total mining goods procurement and the maximum percentage weighting for the budget category in the score card which is **5%** which gives a percentage weighting of $\frac{5\%}{21\%} \times 5\% = 1.19\%$, which means the pro-rated weighted score of the budget category in this example will be **1.19%**.

- For women owned and controlled and/or youth owned and controlled entities, if R 10million is spent by the end of the calendar year:

$$A = \frac{R\ 10million}{(R100\ million)} \times 100\% = 10\%$$

- For this budget category, the compliance target is 5% and the maximum percentage weighting for the budget category in the score card which is **5%** which gives a percentage weighting of $\frac{10\%}{5\%} \times 5\% = 10\%$, which means that the right holder spent is higher than the target budget spend amount of R 5million. The weighted score will however not be 10% as it is above the maximum allocated weighting percentage of 5% therefore the weighted score captured will be **5%**.

- For BBBEE compliant companies with a minimum of (25%+1 HDP) 26% Black ownership and level 4, if R 10million is spent by the end of the calendar year:

$$A = \frac{R\ 10million}{(R100\ million)} \times 100\% = 10\%$$

- For this budget category, the compliance target is 44% and the maximum percentage weighting for the budget category in the score card which is 5% which gives a percentage weighting of $\frac{10\%}{44\%} \times 5\% = 1.14\%$, which means the pro-rated weighted score of the budget category in this example will be 1.14%.

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Table (N): Mining Goods Scorecard

Element	Measure	Compliance Target	Weighting	Weighted Score
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 utilities (electricity and water), fuels, lubricants and land rates	Percentage of the total mining goods procurement spend on South African Manufactured goods from 50% + 1 vote Historically Disadvantaged Persons owned and controlled companies.	21%	5%	1.19%
	Percentage of the total goods procurement spend on South African manufactured goods from companies with a minimum of 50 % +1 vote women owned and controlled and /or 50% + 1 vote youth ownership;	5%	5%	5%
	Percentage of the total goods procurement spend on South African manufactured goods from companies that are at least at level 4 BEE +25%+1 HDP ownership	44%	5%	1.14%

5.13.2 **Example for calculating points achieved for the Services sub-element**

For a services procurement budget of R 100 million, the portion of the budget that has to be spent on services from South African based companies is 80% of the budget which is R 80 million (i.e. 80% x R 100million = R 80 million)

For each of the budget category the target amounts that have to be spent on each budget category are:

- 50% of the R 100million has to be procured from Historically Disadvantaged Persons owned and controlled entities which will be R 50million (i.e. 50% x R 100 million = R 65million).

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- 15% of the R 100million has to be procured from black women owned entities which will be R 15million (i.e. 15% x R100 million = R 15million)
- 5% of the R 100million has to be procured from youth owned entities which will be R 5million (i.e. 5% x R100 million = R 5million).
- 10% of the R 100million has to be procured from BBBEE compliant companies with a minimum of 25% +1 HDP ownership and level 4 which will be R 10million (i.e. 10% x R 100million = R 10million).
- At the end of **each calendar year**, the amount spent in each budget category will be determined and used to determine the score for each budget category.

To determine the scores for each budget category formula 2 is used in the following manner:

- For Historically Disadvantaged Persons owned and controlled entities, if R 5million is spent by the end of the **calendar year**:

$$A = \frac{R\ 5million}{(R100\ million)} \times 100\% = 5\%$$

- For this budget category, the compliance target is 50% and the maximum percentage weighting for the budget category in the score card which is **5%** which gives a percentage weighting of $\frac{5\%}{50\%} \times 5\% = 0.5\%$, which means the pro-rated weighted score of the budget category in this example will be 0.5%.

- For women owned and controlled entities, if R 5million is spent by the end of the **calendar year**:

$$A = \frac{R\ 5million}{(R100\ million)} \times 100\% = 5\%$$

- For this budget category, the compliance target is 15% and the maximum percentage weighting for the budget category in the score card which is **5%** which gives a percentage weighting of $\frac{10\%}{15\%} \times 5\% = 3.33\%$, which means the pro-rated weighted score of the budget category in this example will be 3.33%.

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- For youth owned and controlled entities, if R 5million is spent by the end of the **calendar year**:

$$A = \frac{R\ 5million}{(R100\ million)} \times 100\% \ = 5\%$$

For this budget category, the compliance target is 5% and the maximum percentage weighting is **5%** which gives a percentage weighting of $\frac{5\%}{5\%} \times 5\% = 5\%$, which means that the weighted score is 5%.

- For BBBEE compliant companies with a minimum of 26% Black ownership and level 4, if R 10million is spent by the end of the **calendar year**:

$$A = \frac{R\ 10million}{(R100\ million)} \times 100\% \ = 10\%$$

- For this budget category, the compliance target is **10%** and the maximum percentage weighting for the budget category in the score card which is **5%** which gives a percentage weighting of $\frac{10\%}{10\%} \times 5\% = 5\%$, which means the weighted score of the budget category in this example will be 5%.

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Table (O): Services Scorecard

Element	Measure	Compliance Target	Weighting	Weighted Score
A minimum of 80% of the total spend on services must be sourced from South African based companies.	Percentage of the total services procurement spend on South African based companies that are 50% + 1 vote HDP owned and controlled companies.	65%	5%	0.5%
	Percentage of the total services procurement spend on South African based companies with a minimum of 50 % +1 vote Black women owned and controlled	15%	5%	3.33%
	Percentage of the total services procurement spend on South African based companies with a minimum of 50% + 1 vote youth ownership;	5%	5%	5%
	Percentage of the of the total services procurement spend on South African based companies that are at least at level 4 BEE +25%+1 HDP ownership	10%	5%	5%

5.4.1 Example how the Enterprise and Supplier Development sub-element can be used to augment Procurement scores for Mining Goods and Services

If a right holder has spent R 10 million on supplier development and R 5million on enterprise development then it can claim points in the following manner:

- Using budget amounts used in the examples for total mining goods and total services where they were R100 million each.
- For mining goods, the right holder will be able to use the full R 10 million spent on supplier development because it is below R30 million offset limit (i.e. 30% x R100 million). In this case, if the right holder opts to augment their score for procurement spend on 50% +1 (HDP)black owned companies, the R 5 million spent on 50% + 1 black owned companies will

therefore be augmented by R 10 million spent on supplier development thus the weighted score will be:

$$A = \frac{(R\ 5million + R10million)}{R100million} \times 100\% = 15\%$$

- For this budget category, the compliance target is 21% and the maximum percentage weighting for the budget category in the score card which is **5%** which gives a percentage weighting of $\frac{15\%}{21\%} \times 5\% = 3.57\%$, which means the pro-rated weighted score of the budget category in this example will increase to 3.57% from 1.19%.

- For services, the right holder will be able to use the R 5 million spent on enterprise development. These monies will then be used to make up for the shortfall in procurement of services from companies that are 50% + 1 vote Historically Disadvantaged Persons owned and controlled where only R 5 million was spent. The R 5 million will therefore be augmented by the R5 million spent on supplier development thus the services calculation for procurement spend on 50% + 1 vote Historically Disadvantaged Persons owned and controlled will be amended to be:

$$A = \frac{(R\ 5million + R5million)}{R100million} \times 100\% = 10\%$$

- For this budget category, the compliance target is 50% and the maximum percentage weighting for the budget category in the score card which is **5%** which gives a percentage weighting of $\frac{10\%}{50\%} \times 5\% = 1\%$, which means the pro-rated weighted score of the budget category in this example will increase from 0.5% to 1%.

Table (P): Mining Goods and Services weighted scores adjusted by Enterprise and Supplier Development

Element	Measure	Compliance Target	Weighting	Weighted Score
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 utilities (electricity and water), fuels, lubricants and land rates.	Percentage of the total mining goods procurement spend on South African Manufactured goods from 50% + 1 vote Historically Disadvantaged Persons owned and controlled companies.	21%	5%	3.57%
	Percentage of the total goods procurement spend on South African manufactured goods from companies with a minimum of 50 % +1 vote women owned and controlled and /or 50% + 1 vote youth ownership;	5%	5%	1%
	Percentage of the total goods procurement spend on South African manufactured goods from companies that are at least at level 4 BEE +26% ownership	44%	5%	1.14%
A minimum of 80% of the total spend on services must be sourced from South African based companies.	Percentage of the total services procurement spend on South African based companies that are 50% + 1 vote Historically Disadvantaged Persons owned and controlled companies.	65%	5%	1.5%
	Percentage of the total services procurement spend on South African based companies with a minimum of 50 % +1 vote Black women owned and controlled	15%	5%	0.67%
	Percentage of the total services procurement spend on South African based companies with a minimum of 50% + 1 vote youth ownership;	5%	5%	2%
	Percentage of the of the total services procurement spend on South African based companies that are at least at level 4 BEE +25%+1 HDP ownership	10%	5%	2%

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6. HUMAN RESOURCES DEVELOPMENT.

To implement the 5% investment on essential skills development activities, graduate training programmes and research and development initiatives a mining right holder must use the templates in ***Table Q*** employees, ***Table R*** non-employees to outline the following:

(a) The quantum of contribution, the nature of skills development programme, graduate training programmes and research and development initiatives conducted and the tenure of such programme;

(b) Provide a verifiable list of beneficiaries and categorisation of such beneficiaries (whether it's mine employees or community members, levels of employment, name, race, gender and demography);

(c) Where provincial demographics materially outweigh national demographics in respect of a mining right, a right holder should use provincial demographics; and

(d) A mining right holder must include a table showing calculation of the leviable amount.

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6.1 ***Table (Q):*** Human Resource Development reporting template (Employees)

NAME OF BENEFICIARY	ID NO/PASSPORT	RACE	GENDER	LEVEL OF EMPLOYMENT	TYPE OF PROGRAMME	DURATION OF PROGRAMME	COMMENCEMENT DATE	INSTITUTION	ACTUAL EXPENDITURE (R)	EXPECTED OUTCOME
TOTAL ACTUALEXPENDITURE (R)										

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6.2 ***Table (R):*** Human Resource Development reporting template (Non-Employees)

NAME OF BENEFICIARY	ID NO	RACE	GENDER	CONTACT DETAILS (CELLPHONE, PHYISICAL & POSTAL ADR)	TYPE OF PROGRAMME	DURATION OF PROGRAMME	COMMENCEMENT DATE	INSTITUTION	ACTUAL EXPENDITURE (R)	EXPECTED OUTCOME
TOTAL ACTUALEXPENDITURE (R)										

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7. MINE COMMUNITY DEVELOPMENT

A mining right holder must implement 100% of Mine Community Development commitments as per approved Social and Labour Plan (SLP). An approved SLP shall be subject to five years periodic review.

A mining right holder must use the template in ***Table S*** to account for the extent of compliance with SLP commitments by providing full description of approved SLP projects, duration of such projects, percentage of work done to date, project review timeline, the total budgeted amount and reflect the capped project management and consultancy fees. A mining right holder shall further provide project execution details including the identification of communities developed, actual amount spent, details of project managers and consultants and provide annual reports to the Department.

7.1 Publication: The Mining Charter, 2018 requires a mining right holder to publish the approved SLP in English and a dominant language(s) commonly used within the mine community. The responsibility to publish this information as outlined herein rests with the mining right holder.

A consulted and approved SLP must be published within 30 days of approval using the following avenues:

(a) Company website/s, local newspaper/s;
(b) Hard copies of the approved SLP to be placed in local libraries, municipal offices, traditional authority offices, company/mine offices; and
(c) Announcements may be made, where feasible, in local radio stations and relevant news outlets about the availability and content of the approved SLP.

7.2 Collaboration: collaboration on approved SLP projects must be transparent, inclusive and based on consultation with all stakeholders. Amendment of an approved SLP pursuant to the collaboration shall be done in terms of Regulation 44 of the MPRDA.

7.3 Review of SLP: a mining right holder shall review the approved SLP every five years for the duration of a mining right. The review process may be initiated from the fourth year of the SLP and shall be done in consultation with affected mine communities, adjacent communities, labour sending areas, local or district municipality

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and tribal authorities. The consultations must be meaningful and may take the form of meetings and workshops with the mine communities and related structures.

7.4 Table (S)

APPROVED PROJECT DESCRIPTION		
DURATION (PROJECT START DATE & END DATE)		
WORK DONE TO DATE AGAINST PLANNED PROJECTS		
PROJECT REVIEW TIMELINE		
TOTAL BUDGET AMOUNT FOR THE YEAR		
TOTAL AMOUNT SPENT FOR THE YEAR		
CAPPED PROJECT MANAGEMENT & CONSULTANCY FEES		
MINE COMMUNITY/IESDEVELOPED	ADJACENT COMMUNITY/IES DEVELOPED	LABOUR SENDING AREA/S DEVELOPED

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NAME	MUNICIPALITY	AMOUNT SPENT	NAME	MUNICIPALITY	AMOUNT SPENT	NAME	MUNICIPALITY	AMOUNT SPENT

8. EMPLOYMENT EQUITY.

A mining right holder shall submit a five year Employment Equity Plan for approval by the Regulator. The Employment Equity Plan shall contain modalities for progressive realisation of Mining Charter, 2018 employment equity targets and contain the following details:

(a) Organisational Structure (hierarchical);
(b) Job roles;
(c) Salary scales;
(d) Race and gender profiles;
(e) Current target;
(f) Progressive target achievement indicator; and
(g) Declaration and Approval by the Board of Directors or equivalent governance structure of the licence or permit holder.

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(h) Indicate whether all management levels as prescribed in the Mining Charter are applicable.

A mining right holder must comply with the employment equity targets in respect of representation of Historically Disadvantaged Persons in Board, Executive Management, Senior Management, Middle management, Junior Management and People with Disabilities by using the template in ***Table T.***

The information required in ***Table T.*** must be provided in numerical form and the categories/levels of employment must be broken down to finest details (include salary bands and grading) in line with ***Tables U*** on income differential.

8.1 Table. (T)

Category	African		Coloured		Indian		White		Foreign Nationals		Demographics	Total employees
	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female		
(Board)												
Executive Management												

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Senior Management				
Middle Management				
Junior Management				
People with Disabilities				
Core and Critical Skills *(reflective of workforce demographics)*:				

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8.2 INCOME DIFFERENTIALS STATEMENT

Please use the table below to indicate the number of employees, including people with disabilities, and their remuneration in each occupational level in terms of race and gender.

Table (U)

Occupational levels		MALE				FEMALE				FOREIGN NATIONALS		Total
		A	C	I	W	A	C	I	W	M	F	
Board	Number of workers											
	Remuneration											
Executive Management	Number of workers											
	Remuneration											
Senior Management	Number of workers											
	Remuneration											
Middle Management	Number of workers											
	Remuneration											
Junior Management	Number of workers											
	Remuneration											
Employees With Disabilities	Number of workers											
	Remuneration											
TOTAL PERMANENT	Number of workers											
	Remuneration											
Temporary employees	Number of workers											

	Remuneration											
TOTAL	Number of workers											
	Remuneration											

To implement the Mining Charter, 2018 requirement regarding career progression of employees' a mining right holder must use the template in ***Table V*** as follows:

8.3 Table (V)

Training programme within career progression path	Occupation	Position starting from	Current training intervention	Target position working towards	Year 1-5
					No of identified employees

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8.5 EMPLOYMENT EQUITY SCORING FOR JUNIOR MINERS PRECIOUS METALS JEWELLERS, PRECIOUS METALS BENEFICIATORS, DIAMOND BENEFICIATORS, DIAMOND DEALERS AND PRECIOUS METALS REFINERS

1. It is recognised that some junior miners (referred to in Item 3 of the Mining Charter), precious metals jewellers, precious metals beneficiators, diamond beneficiators, diamond dealers and precious metals refiners might not have all the identified management levels under the Employment Equity Element of the Charter due to the size of the operation.
2. For those junior miners (referred to in Item 3 of the Mining Charter), precious metals jewellers, precious metals beneficiators, diamond beneficiators, diamond dealers and precious metals refiners that do not have all the management levels identified in the Mining Charter the following steps must be used for scoring:
   - 2.1 The junior miner, precious metals jewellers, precious metals beneficiators, diamond beneficiators, diamond dealers and precious metals refiners must identify all the management levels relevant to them and submit same with the employment equity plan.
   - 2.2 The weightings of the employment categories identified as relevant must be added together.
   - 2.3 The weighting of each of the relevant employment categories must be divided by the value obtained in step 2 to obtain relative weightings of the relevant employment categories.
   - 2.4 The junior miner, license or permit holder will then do the scoring for each of the relevant employment categories but instead of multiplying with the weightings in the scorecard, they will multiply the scores with the relative weightings obtained in step 3.
   - 2.5 The weighted scores calculated in the previous step are then added together.
   - 2.6 The percent obtained in step 5 is then multiplied by the weighting percentage of Employment Equity in the Scorecard (page 36 to 44 of the

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Gazetted Mining Charter) to obtain the total weighted score achieved under the Employment Equity Element.

3. Example of Calculating Weighted Score where the junior miner, precious metals jewellers, precious metals beneficiators, diamond beneficiators, diamond dealers and precious metals refiner does not have all the management levels. In this example, the junior miner, precious metals jeweller, precious metals beneficiator, diamond beneficiator, diamond dealer and precious metals refiner only has senior management and junior management as management levels.

3.1 The relevant employment categories for the junior miner, precious metals jewellers, precious metals beneficiators, diamond beneficiators, diamond dealers and precious metals refiner will be senior management and junior management.

3.2 The weightings of these two elements in the scorecard are:

3.2.1 Senior management: 4% for HDP representation and 3% for Female representation

3.2.2 Junior management: 2% for HDP representation and 2% for Female representation

3.2.3 The sum of these weightings is 4% + 3% + 2% + 2% = 11%

3.3 Each of the weightings is divided by the 11% obtained in the step above to obtain relative weightings:

3.3.1 Senior Management – HDP representation (4%÷11%) x 100% = 36.36%

3.3.2 Senior Management – Female representation (3%÷11%) x 100% = 27.27%

3.3.3 Junior Management – HDP representation (2%÷11%) x 100% = 18.18%

3.3.4 Junior Management – Female representation (2%÷11%) x 100% = 18.18%

3.4 If the junior miner, precious metals jewellers, precious metals beneficiators, diamond beneficiators, diamond dealers and precious metals refiners scores:

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3.4.1 Senior Management – 60% on HDP representation, the weighted score will be 60% x 36.36% = 21.82%

3.4.2 Senior Management – 30% on Female representation, the weighted score will be 30% x 27.27% = 8.18%

3.4.3 Junior Management – 80% on HDP representation, the weighted score will be 80% x 18.18% = 14.54%

3.4.4 Junior Management – 70% on Female representation, the weighted score will be 70% x 18.18% = 12.73%

3.5 Adding together the scores we get:
21.82% + 8.18% + 14.54% + 12.73% = 57.27%

3.6 This is multiplied by the total weighted score of the Employment Equity Element from the Scorecard 30% to get a weighted score of:
57.27% x 30% = 17.18%

9. HOUSING AND LIVING CONDITIONS STANDARDS

A mining right holder shall ensure maintenance of single units, family units and any other arrangement agreed to with workers by using the template in ***Table W.***

- A mining right holder shall provide an originally certified copy of the housing and living conditions agreement which is not part of the collective agreement.

9.1 *Table (W)*

NUMBER OF EMPLOYEES ACCOMODATED IN SINGLE UNITS	NUMBER OF EMPLOYEES ACCOMODATED IN FAMILY UNITS	NUMBER OF EMPLOYEES RECEIVING RENTAL SUBSIDY	NUMBER OF EMPLOYEES RECEIVING HOME	NUMBER OF EMPLOYEES RECEIVING LIVING OUT	TOTAL NUMBER OF EMPLOYEES

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			OWNERSHIP SUBSIDY	ALLOWANCE	

10. APPLICATION OF THE MINING CHARTER, 2018 TO LICENSES AND PERMITS GRANTED AND ISSUED IN TERMS OF THE DIAMONDS ACT AND THE PRECIOUS METALS ACT.

These guidelines apply to Chapter 4 of the Mining Charter, 2018 which deals with licenses and permits granted in terms of the Diamonds Act, 1986 and the Precious Metals Act, 2005.

10.1 OWNERSHIP ELEMENT

Undefined ownership refers to attainment of the minimum prescribed BEE shareholding distributed to qualifying employees and BEE Entrepreneurs without following percentages prescribed in the Mining Charter, 2018.

10.1.1. Existing Licenses and Permits

An existing permit or licence holder shall use the template in ***Table A*** to report annually on compliance with the Mining Charter, 2010 requirements.

10.1.2 Pending Licence and permit applications

A holder of a permit or license issued pursuant to a pending application shall use the template in ***Table A*** to report annually on compliance with the Mining Charter, 2010 requirements.

A holder of a Diamond Dealers licence or a Refining licence must increase its BEE shareholding from the minimum 26% to 30% as contemplated in the Mining Charter, 2018

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once off or progressively within the twelve (12) months transitional period. The modalities for the once off or progressive increase shall be incorporated in the terms and conditions of the Diamond Dealers licence or a Refining licence pursuant to a pending application.

After the twelve (12) months transitional period a permit or license issued pursuant to a pending application shall use the template in ***Table B*** to report annually on compliance with the Mining Charter, 2018 requirements.

10.1.3 New licences and permits

A License or permit holder must comply with all elements of the Mining Charter, 2018 taking into account the exemptions and transitional arrangements.

Qualifying employees

A holder of a licence or permit shall use the template in ***Table B*** to report annually on compliance with the Mining Charter, 2018 requirements in respect of qualifying employees.

BEE Entrepreneurs

A holder of a licence or permit shall use the template in ***Table D*** to report annually on compliance with the Mining Charter, 2018 requirements in respect of BEE entrepreneurs.

Disposal of BEE shareholding

A License or permit holder shall report on disposal of shares and exit by BEE shareholders by using ***Table E***.

10.1.4 Mineral beneficiation offset

The mineral beneficiation offset is not applicable to licences or permits issued in terms of the Diamonds Act and the Precious Metals Act.

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10.2 INCLUSIVE PROCUREMENT AND ENTERPRISE DEVELOPMENT

The approved 5 year plan for industry related enterprise development must include, amongst others, the following:

(a) Prospective entrepreneurs to be developed.
(b) Originally certified copies of identity documents of prospective entrepreneurs or founding documents in the case of a juristic person.
(c) Area of development for prospective entrepreneurs with clear timelines.
(d) Breakdown of monetary, time and related contribution towards development of prospective entrepreneurs over the 5 years period.
(e) Facilitation of funding to obtain permit and licenses by prospective entrepreneurs.
(f) Indication of expected outcomes.

A license or permit holder shall use the template in ***Table H, I,J,K,L and M*** to report annually on compliance with the Mining Charter, 2018 requirements in respect of the Inclusive Procurement, supplier and Enterprise development.

10.3 HUMAN RESOURCES DEVELOPMENT

A license or permit holder shall use the template in ***Table Q and Table R*** to report annually on compliance with the Mining Charter, 2018 requirements in respect of the 5% leviable amount.

Reporting in terms of this element must be consistent with the career progression contemplated in ***Table V*** of these Guidelines.

10.4 EMPLOYMENT EQUITY

A license or permit holder shall submit a five year Employment Equity Plan for approval by the Regulator. The Employment Equity Plan shall contain modalities for progressive realisation of Mining Charter, 2018 employment equity targets and contain the following details:

(a) Organisational Structure (hierarchical);

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(b) Job roles;

(c) Salary scales;

(d) Race and gender profiles;

(e) Current target;

(f) Progressive target achievement indicator; and

(g) Declaration and Approval by the Board of Directors or equivalent governance structure of the licence or permit holder.

(h) Indicate whether all management levels as prescribed in the Mining Charter are applicable.

A license or permit holder shall use the template in ***Table T and Table U*** to report annually on compliance with the Mining Charter, 2018 requirements in respect of the employment equity requirements and the Approved Employment Equity Plan.

10.5 SOCIO ECONOMIC DEVELOPMENT GUIDELINE

A licence or permit holder must use ***Table X*** to report the extent of compliance with Socio-economic development commitments by providing full description of approved Socio-economic development projects, duration of such projects, percentage of work done to date, project review timeline, the total budgeted amount and reflect the capped project management and consultancy fees. A licence or permit holder shall further provide project execution details including the identification of communities developed, actual amount spent, details of project managers and consultants and provide annual reports to the Department.

Collaboration: collaboration on approved projects must be transparent, inclusive and based on consultation with all stakeholders. Amendment of the approved project shall be done through the SADPMR.

Review of projects: A precious metals refiner whose licence has been issued for a period of more than five (5) years shall review its contribution to socio-economic development every five years for the duration of the refiners licence.

14.3.1 *Table (X)*

APPROVED PROJECT DESCRIPTION					
DURATION (PROJECT START DATE & END DATE)					
WORK DONE TO DATE AGAINST PLANNED PROJECTS					
PROJECT REVIEW TIMELINE					
TOTAL BUDGET AMOUNT FOR THE YEAR					
TOTAL AMOUNT SPENT FOR THE YEAR					
CAPPED PROJECT MANAGEMENT & CONSULTANCY FEES					
COMMUNITY/IESDEVELOPED			ADJACENT COMMUNITY/IES DEVELOPED		
IAME	MUNICIPALITY	AMOUNT SPENT	NAME	MUNICIPALITY	AMOUNT SPENT

11. REGIME FOR JUNIOR MINERS

Undefined ownership refers to attainment of the minimum 30% BEE shareholding distributed to all BEE shareholders without following percentages prescribed in the Mining Charter, 2018.

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12. REVIEW OF MINING CHARTER GUIDELINES

The Minister may, by notice in the Gazette, review the Mining Charter Implementation Guidelines.

13. LIST OF TABLES

TABLE	DESCRIPTION
1. TABLE (A)	Existing mining rights annual reporting template.
2. TABLE (B)	ESOPS annual reporting template for qualifying employees.
3. TABLE (C)	Host Communities equity equivalent benefit annual reporting template.
4. TABLE (D)	BEE Entrepreneurs annual reporting template.
5. TABLE (E)	Annual reporting template for disposal BEE shareholding.
6. TABLE (F)	Mineral beneficiation equity equivalent annual reporting template.
7. TABLE (G)	Monetary value annual reporting template for the beneficiation equity equivalent.
8. TABLE (H)	Mining goods procurement annual reporting template.
9. TABLE (I)	Services procurement annual reporting template.
10. TABLE (J)	Enterprise & Supplier Development annual reporting template.
11. TABLE (K)	Supplier development & OEM's annual reporting template.

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12. TABLE (L)	R&D annual reporting template.
13. TABLE (M)	Sample analysis annual reporting template.
14. TABLE (N)	Mining Goods Scorecard.
15. TABLE (O)	Services Scorecard.
16. TABLE (P)	Enterprise and Supplier development offset reporting template.
17. TABLE (Q)	HRD annual reporting template (Employees).
18. TABLE (R)	HRD annual reporting template (Non-Employees).
19. TABLE (S)	Mine Community Development (SLP) annual reporting template.
20. TABLE (T)	Employment Equity annual reporting template.
21. TABLE (U)	Income differential annual reporting template.
22. TABLE (V)	Core and Critical skills annual reporting template.
23. TABLE (W)	Housing and Living Conditions annual reporting template.
24. TABLE (X)	Socio-economic development reporting template.

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2018 Mining Charter's contravention of international trade agreements

The 2018 Charter is unconstitutional as being inconsistent with South Africa's international trade obligations for the following further reasons.

(1) Section 233 of the Constitution requires that:

(a) when interpreting any legislation the courts must prefer any reasonable interpretation which is consistent with international law over any alternative interpretation which is inconsistent with international law,

(b) international law is a basis for determining the legality of subordinate legislation,

therefore the legality and constitutionality of the 2018 Charter are to be tested by reference to South Africa's international law obligations. To this extent, therefore, the treaties are enforceable in South Africa.

(2) The state's obligation in section 7(2) of the Constitution to protect and fulfil the Bill of Rights requires the executive in initiating legislation, and Parliament when enacting legislation, to give effect to the obligations of the state in terms of section 7(2) to promote and fulfil the rights in the Bill of Rights. This includes a duty to consider international law and the obligations undertaken by South Africa under international law; and that the state, having bound itself under international law, must take reasonable measures to implement international law where such is required to protect and fulfil the Bill of Rights.

(3) The consequences of the above are that international law obligations restrain the exercise of executive power that is inconsistent with them; and that such obligations may give rise to a duty on the state to take reasonable measures to give effect to such obligations. The 2018 Charter violates South Africa's trade obligations as detailed below, since the only manner in which the Minister would be able to exercise his powers would be to violate international law since the exercise of such powers would result in a quantitative restriction on exports of minerals.

(4) South Africa is a member of the World Trade Organisation (WTO) which provides international measures in regard to export restrictions for member countries by way of *inter alia*:

(a) the General Agreement on Tariffs and Trade, 1994 (GATT), Article XI: 1 of which limits the ability to impose export restrictions.[1]

(b) the WTO Agreement on Subsidies and Countervailings Measures, Article 3 in Part II of which outlaws the requirement to use domestic over imported goods, if the downstream beneficiation would mean that imported goods were likely to be less favoured.[2]

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[1] Article XI: 1 provides: "*No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.*".

[2] Article 3 provides: "*Part II: Prohibited Subsidies Article 3: Prohibition 3.1 except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited: (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I; (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods. 3.2 a Member shall neither grant nor maintain subsidies referred to in paragraph 1.*".

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(c) The WTO Agreement on Trade-Related Investment Measures, Article 2(2) read with the Annex to which provide an illustrative list of Trade-Related Investment Measures (TRIMs) inconsistent with Article XI of the above GATT, 1994.[3]

(5) South Africa and the European Union entered into an Agreement on Trade, Development and Co-Operation, 1999 which came into force in 2004, Article 19 of which prohibits quantitative restrictions on exports.[4] In terms of Article I of GATT, 1994,[5] the provisions of the European Union reservation are also applicable to other non-EU WTO Members.

(6) South Africa is also a party to the Southern African Development Community Trade Protocol, 1996 which in Article 6 prohibits trade barriers.[6] Article 8 also prohibits quantitative restrictions on exports.

(7) South Africa and the European Union entered into an Economic Partnership Agreement, 2016, Article 39 of which read with GATT, 1994, prohibits quantitative export restrictions.

(8) Also of relevance are the Bi-Lateral Investment Treaties (BITs) which were entered into between South Africa and numerous other countries since they normally contain a "*fair and equitable treatment*" clause which prohibits subjecting investors or investments to unjustified, unreasonable or discriminatory measures.[7] This has been held in international arbitration cases to encompass transparency and non-discrimination in regulatory processes;[8] full protection and security for foreign investments;[9] acting in good faith and in a non-arbitrary manner towards foreign investors;[10] not undermining the legitimate expectations taken into account by foreign investors in making their investments.[11] The fact that South Africa has not renewed or has terminated its BITs does not stop the BITs remaining in force in regard to existing investments made during the currency of the BIT.

(9) Also relevant to this is that the 2018 Charter would cause some producers to have to breach their long-term export contracts.

(10) From the above it follows that the 2018 Charter violates South Africa's abovementioned international trade agreements.The 2018 Charter requires in paragraph 2.2.1 that 70% a minimum of 70% of total mining goods procurement spend must be on South African manufactured goods. This requirement is in breach of Article XI(1) the GATT and Trade, Development and Co-operation Agreement (TDCA), both treaties to which South Africa is a signatory. The internal exceptions contained in Article XI(2) of GATT do not apply so as to save the procurement provisions in the 2018 Charter. Therefore the prohibition on restrictions in Article XI(1) of GATT apply.

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[3] The annex in Para 2(c) refers to: "2. *TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict: . . . (c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.*".

[4] Article 9 provides: "*1. Quantitative restrictions on imports or exports and measures having equivalent effect on trade between South Africa and the Community shall be abolished on the entry into force of this Agreement. 2. No new quantitative restrictions on imports or exports or measures having equivalent effect shall be introduced in trade between the Community and South Africa. 3. No new customs duties or imports or exports or charges having equivalent effect shall be introduced, nor shall those already applied be increased, in the trade between the Community and South Africa from the date of entry into force of this Agreement.*".

[5] Article I: 1 provides: "*1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.*".

[6] Article 6 provides: "*NON-TARIFF BARRIERS Except as provided for in this Protocol Member State shall, in relation to intra-SADC trade: (a) adopt policies and implement measures to eliminate all existing forms of NTBs. (b) Refrain from imposing any new NTBs.*".

[7] See for example Article 2.3 of the Italy/RSA BIT and Article 3(1) of the Belgo-Luxembourg/RSA BIT and Foresti ICSID ARB (AF) 07/1, 3 August 2010.

[8] *Metalclad Corp v United Mexican States, ICSID (NAFTA)* Case ARB (AF) 97/1.

[9] *Ronald S. Lauder v the Czech Republic*, UNCITRAL Final Award of 3 September 2001.

[10] *Occidental Exploration and Production Company v Republic of Ecuador* (London Court of International Arbitration, Administered Case UN 3467), 1 July 2004.

[11] *Tecmed SA v United Mexican States*, ICSID Case ARB (AF) /00/2, 29 May 2003.

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(11) Similarly, Article 19[12] of the TDCA (an agreement with the European Community to which South Africa is a party) applies.

(12) Our Courts have made it clear that international law is an obligatory guide to the interpretation of domestic legislation and serves as a basis for determining the legality of subordinate instruments. In *Progress Office Machines CC v South African Revenue Services and Others* 2008 (2) SA 13 (SCA) the Court said the following in relation to anti-dumping duties imposed by the relevant Minister:

> "*Not only is a court bound to "prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law" but subordinate legislation such as the notice by the Minister of Finance imposing the anti-dumping duty must be reasonable. Dugard submits that a court may "insist on compliance with a state's international obligations as a requisite for the validity of subordinate legislation". The duration of the anti-dumping duty imposed beyond the period allowed by the Anti-Dumping Agreement would not only be a breach of the Republic's international obligations and an unreasonable interpretation of the notice but also unreasonable and to that extent invalid.*" [Internal footnotes omitted and emphasis added]

(13) The reasoning of the majority in *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) is consistent with - indeed gives effect to - what was said in *Progress Office Machines* quoted above. It is therefore plain that the Minister may not, in the 2018 Charter, provide for targets which are inconsistent with South Africa's international treaty obligations, in this case GATT and TDCA.

(14) In conclusion therefore:

(a) the 2018 Charter entails quantitative restrictions on exports;

(b) such export restrictions breach South Africa's international law obligations;

(c) South Africa's international law obligations are of constitutional relevance in that:

(i) the legality and constitutionality of the 2018 Charter are to be tested by reference to South Africa's international law obligations and in this way the international treaties are directly enforceable;

(ii) they must be considered for the purpose of interpreting legislation; and

(iii) international law obligations discipline the exercise of powers granted under primary legislation to make subordinate legislation, as well as executive conduct generally.

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[12] Article 19 provides that "*1. Quantitative restrictions on imports or exports and measures having equivalent effect on trade between South Africa and the Community shall be abolished on the entry into force of this Agreement.*
2. No new quantitative restrictions on imports or exports or measures having equivalent effect shall be introduced in trade between the Community and South Africa.
3. No new customs duties on imports or exports or charges having equivalent effect shall be introduced, nor shall those already applied be increased, in the trade between the Community and South Africa from the date of entry into force of this Agreement."

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no: 20341/19

In the matter between:

Minerals Council South Africa Applicant

and

Minister of Mineral Resources First Respondent

South African Diamond and Precious Metals Regulator Second Respondent

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CONFIRMATORY AFFIDAVIT

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2019 -03- 26
L. W. MOTAU
REGISTRAR VAN DIE HOË HOF VAN SUID-AFRIKA, GAUTENG AFDELING, PRETORIA

I, the undersigned,

HENDRIK PETRUS LANGENHOVEN

hereby say on oath that:

1 I am the Chief Economist at the South African Minerals Council South Africa.

2 I hold a Bachelor of Arts degree majoring in Political Science, African Studies and Economics, a Bachelor of Arts Honours degree in Political Science, and a Master's degree in Economics, all from Stellenbosch University.

3 My experience covers more than 30 years of applied economic research in the public and private sector and my involvement in economic research covers many areas. I have been involved in studies on budgeting, fiscal planning and privatisation for the South African National Treasury. I also formed part of a team that designed and built

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the first Social Accounting Matrices for South Africa, a tool that is widely used in research on the impact of income distribution changes on spending patterns in the economy and economic impact studies.

4 I previously for 5 years held the position of chief economist in the steel and engineering sector and regularly wrote about and commented on the state of the sector.

5 I actively participate in various forums such as the National Economic Development and Labour Council, Business Unity South Africa and the South African Reserve Bank economic roundtable discussions, amongst others. I am also a commissioner of the International Trade Advisory Commission. My research has been widely published in numerous economic journals, the popular press and technical journals. I also regularly comment on the economy through opinion pieces and in radio and television interviews.

6 I have read the Founding Affidavit of Tebello Laphatsoana Chabana and confirm its correctness insofar as it relates to me.

HENDRIK PETRUS LANGENHOVEN

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 25th day of **MARCH 2019**, 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.

Sarah Ashleigh Stodart
Commissioner of Oaths
Practising Attorney
Republic of South Africa
4th Floor, The Forum
2 Maude Street, Sandowns

COMMISSIONER OF OATHS