

The 2018 Mining Charter

by the natural resources department

On 27 September 2018, the South African Minister of Mineral Resources, Gwede Mantashe (the “**Minister**”), published the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2018 (the “**2018 Mining Charter**”). It is indicated that “implementation guidelines” are to be published in the near future. What follows is a summary of a few of the salient features of the 2018 Mining Charter.

Ownership

The “once empowered, always empowered” principle has been accepted but still in a qualified fashion, which will unfortunately lead to further litigation and legal uncertainty. Existing mining right holders who achieved a minimum of 26% broad-based black economic empowerment (“**B-BBEE**”) shareholding will be recognised as compliant for the duration of the mining right, implying but without stating expressly that such recognition will lapse upon the expiry of the mining right, suggesting that such a holder will need to re-empower upon renewal. This is unfortunate and renders the 2018 Mining Charter susceptible to legal challenge. The Minister has removed the requirement in the draft 2018 Mining Charter for such holders to “top-up” B-BBEE shareholding to 30% within a period of five years.

Existing mining right holders whose B-BBEE partners exited prior to the commencement of the 2018 Mining Charter will be recognised as compliant for the duration of the mining right and such recognition will not be applicable upon renewal. The requirement to re-empower upon renewal is likely to be challenged on the basis that it is not contemplated in the renewal requirements prescribed in the Mineral and Petroleum Resources Development Act, 2002 (“**MPRDA**”).

The recognition of continuing consequences of all historical B-BBEE transactions, which formed the basis upon which “new order mining rights” (it is not clear whether converted mining rights have been excluded by omission or design) were granted, will not be transferable and will not apply to:

- an application for a new mining right (which will oblige mining companies to undertake a potential onerous and impractical corporate re-structuring to comply with the “new mining rights” requirements of the 2018 Mining Charter regardless of what their current empowerment status or structure is. An existing holder with, for example, a 20% B-BBEE entrepreneur shareholder will need to incorporate a new company to hold the new mining right and this subsidiary will need to be empowered in accordance with 30% B-BBEE requirement distributed in accordance with the prescribed share percentage distribution of 5% (ESOP)/ 5% (community trust) / 20% (B-BBEE entrepreneur) which would also ignore the fact the 2018 Mining Charter recognises the flow-through principle; or
- renewal of a mining right (which as stated above is unfortunate).

A pending application **lodged and accepted prior** to the commencement of the 2018 Mining Charter will be processed in terms of the 2010 Mining Charter (ie, 26% B-BBEE shareholding), subject to the mining right holder increasing B-BBEE shareholding to 30% within a period of five

years from the effective date of the mining right.

A new mining right must have a minimum of 30% B-BBEE shareholding distributed in the following manner:

- a minimum of 5% non-transferable carried interest to qualifying employees;
- a minimum of 5% non-transferable carried interest or “equity equivalent benefit” to host communities; and
- a minimum of 20% effective ownership in the form of shares to a B-BBEE entrepreneur, 5% of which must preferably be for women.

The previous draft version of the 2018 Mining Charter required a share percentage distribution of 8% (ESOP)/ 8% (community trust) / 14% (B-BBEE entrepreneur).

The nebulous concept of a “carried interest” is defined to mean shares issued at no cost and free of any encumbrance. But the definition also states that “the cost for such shares must be recovered” by the right holder “from the development of the asset”. The 2018 Mining Charter also prohibits any dilution the shares issued to employees and communities. The concept of a “free carried interest” contained in the previous draft 2018 Mining Charter was considered to be inimical to investment, contrary to certain provisions of the MPRDA, conflicting with the Companies Act, 2008, in that it results in inequality of treatment of shareholders and a constitutionally impermissible deprivation of property and an expropriation of property without compensation.

The “equity equivalent” to host communities is a monetary donation to be administered as an amount equivalent to the value of 5% of the issued share capital in the mining right holder at no cost to a trust or similar vehicle set up for the benefit of host communities. The trust or similar vehicle will be responsible for developing and implementing a host community development programme which is to be approved under this element and does not replace social and labour plan commitments of the mining right holder. The 2018 Mining Charter also prohibits dilution of the equity equivalent benefit.

The prescribed minimum 30% target must apply for the duration of the new mining right. The holder will therefore have to maintain the target for the duration of the new mining right, unless there is a disposal by the B-BBEE entrepreneur of unencumbered net value shares which have been held for a third of the duration of the relevant new mining right. The 2018 Mining Charter therefore encourages a “lock-up” and requires B-BBEE entrepreneurs to value long-term investment.

While the Minister has removed the requirement in the draft 2018 Mining Charter that a B-BBEE entrepreneur would have to reinvest a minimum of 40% of the proceeds from disposed equity back into the mining industry, it still seeks to regulate the decisions of a B-BBEE entrepreneur by confusingly stating that “a mining right holder of the minimum 20% shares ... shall not be diluted below 51% ownership and control by BEE Entrepreneur”. Such a requirement, albeit useful for a mining right holder since it seeks to prohibit a flow-through dilution, will be unenforceable against the B-BBEE entrepreneur. There is also a new requirement for an agreement to be concluded between the shareholders providing for exit mechanisms for the BEE Entrepreneur and arrangements for the settlement of the B-BBEE entrepreneur’s remaining financial obligations. The 2018 Mining Charter requires this agreement to be submitted to the Department of Mineral Resources (“DMR”). It is not clear whether this agreement has to be lodged prior to the granting of a new mining right in order for the DMR to include compliance with this agreement as a term of the new mining right. The 2018 Mining Charter seeks to vest a new power in the hands of the DMR to regulate the disposal of B-BBEE related shareholding, a power currently not afforded to it in the MPRDA.

The 2018 Mining Charter also requires 50% of the B-BBEE shareholding to vest within two thirds of the duration of the right. This will result in an additional cost to the right holder given that shares have to vest at set intervals undermining the viability of new mining projects.

The Minister has removed the requirement in the draft 2018 Mining Charter to pay 1% of Earnings Before Interest, Taxes, Depreciation and Amortisation (“EBITDA”) to communities and employees as a trickle dividend.

Mindful that the 2018 Mining Charter requires the ownership of qualifying employees and B-BBEE entrepreneurs to be in the form of shares in the group, it is interesting that it permits “BEE

shareholding... on units of production or assets". This may be an indulgence for mining companies that would like to donate waste rock dumps to communities for them to extract value from processing the dumps.

Usefully, the 2018 Mining Charter recognises that mining projects are often owned in group structures in order to raise finance and therefore permits the application of the flow-through principle, except that for existing empowered (or partly empowered) mining right holders who apply for new mining right, it does not appear (either by omission or design) that the flow-through principle applies.

Procurement and employment equity

The procurement and employment equity targets as against the original Mining Charter, 2010 Mining Charter and 2017 Mining Charter are set out in the tables available here.

Overall, employment equity targets have remained largely the same but the most significant changes relate to female representation in respect of which there have been increases to accommodate for the fact that white females can now seemingly contribute to those targets.

While the Draft 2018 Mining Charter contained no transitional arrangement period for compliance with the employment equity targets, a period of five years is now provided for to align with the employment equity targets and a five-year plan indicating progressive implementation of the provisions of the employment equity targets must be submitted to the DMR within six months of the publication of the 2018 Mining Charter.

The procurement targets for mining goods remains the same as those in the Draft 2018 Mining Charter. The procurement targets for mining services also remains the same as those in the Draft 2018 Mining Charter, with a slight adjustment made only to the proportion of services to be supplied by women-owned and controlled companies and youth. The concern therefore remains that the requirement to purchase mining goods from B-BBEE suppliers and the requirement to have these mining goods manufactured in South Africa. In respect of the latter, the 70% requirement is also unrealistic for mining of certain minerals, particularly those that require the buying of very large capital equipment from offshore sources which are the sole source of supply of such equipment.

The offset against 10% of the procurement budget on services available to mining right holders by investing in enterprise and supplier development of services remains the same. The offset against the procurement budget on mining goods has been increased from 10% in the draft 2018 Mining Charter to 30%. The transitional arrangement period for compliance with the procurement targets remains five years as provided for in the draft 2018 Mining Charter.

Junior miners

While the draft 2018 Mining Charter provided for junior miners to make representations to the Minister regarding the extent to which the Mining Charter elements will apply to them, the 2018 Mining Charter now provides that for mining rights granted after commencement of the 2018 Mining Charter junior miners with an annual turn-over of less than ZAR10-million will be exempt from complying with the empowerment equity requirements when there are less than 10 employees and are exempt from complying with the inclusive procurement, enterprise and supplier development requirements. Junior miners with an annual turnover of more than ZAR10-million but less than ZAR150-million must comply with employment equity at group level and the inclusive procurement requirements. For all junior miners with an annual turnover of less than ZAR150-million, the 30% ownership requirement is "undefined" (we assume this to mean that there is no prescribed class and proportion of B-BBEE shareholders to make up the 30%).

Application to holders of licences under the Precious Metals Act and the Diamonds Act

While the Precious Metals Act, 2005 and the Diamonds Act, 1986 currently require the South African Diamond and Precious Metals Regulator to have regard to the requirements of the 2018 Mining Charter, the 2018 Mining Charter provides for the specific application of certain of the elements of the 2018 Mining Charter with variations and exemptions depending on the size of the licence holder. Enterprises with a turnover less than ZAR1-million are exempt from the 2018 Mining Charter in its entirety. Enterprises with a turnover of more than ZAR50-million must comply with the 2018 Mining Charter in its entirety.

Legal status of the 2018 Mining Charter

While the definition of “Mining Charter, 2018” refers to the 2018 Mining Charter as being “developed in terms of section 100 of the MPRDA”, section 100 of the MPRDA does not provide for the development of a further charter by the Minister. For this reason, the 2018 Mining Charter is susceptible to judicial review if challenged on the basis that the Minister lacks authority in terms of the MPRDA for the Minister to develop such a Charter.

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