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# Key elements of the Mining Charter, 2018

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## INTRODUCTION

- This note is designed to highlight the essential provisions contained in the Mining Charter, 2018 gazetted on 27 September 2018 **("the September 2018 Charter")**, particularly those which have been amended subsequent to the publication of the draft Charter published for comment in June 2018 **("the June 2018 Charter")**.
- The note also explains potential high level implications for mining companies going forward in relation to the September 2018 Charter and to highlight issues of concern, especially in regard to the inconsistencies in the September 2018 Charter itself and difficulties of interpretation because of vague and confusing terminology and/or nonsensical provisions.
- Companies wishing to analyse the September 2018 Charter in the light of their particular circumstances are advised to take independent advice based on their particular facts and circumstances and should not rely on this note, which is merely an introductory note to highlight issues identified by this firm.
- This note is also not intended to deal with the legality of the September 2018 Charter and the implications of the current litigation between the Chamber of Mines and the Department of Mineral Resources in relation to the "once empowered, always empowered" principle flowing from the Charter released in 2010 **("the 2010 Charter")**. Accordingly, the final outcome of such litigation may have a direct impact on the interpretation and efficacy of the September 2018 Charter.
- We have considered both the draft and final submissions from the Minerals Council South Africa on the Draft Broad Based Socio Economic Empowerment Charter for Mining and Mineral Industry August 2018 **("the Minerals Council Submissions")** and make reference to certain of the issues raised therein, in this submissions.
- For ease of reference, this note broadly follows the headings contained in the September 2018 Charter.

## OWNERSHIP REQUIREMENTS

### Existing Right Holders

- There are two categories of existing right holders that are dealt with under paragraph of the September 2018 Charter, namely:
  - an existing mining right holder who has achieved a minimum of 26% BEE shareholding at the date of publication of the Charter; and
  - an existing mining right holder who at any stage during the existence of a mining right achieved a minimum of 26% BEE shareholding but which shareholding has been reduced as a result of the exit of a BEE partner.
- In respect of both of the above categories existing right holders shall be recognised as compliant for the duration of the mining right.
- The June 2018 Charter recognised a third category of existing rights, namely, an existing right holder who has not achieved a minimum of 26% BEE shareholding. Such shareholder had to supplement the BEE shareholding to a minimum of 30% BEE shareholding within 5 years. In other words, if such a shareholder had say, for example, a 15% BEE shareholding they would have had to acquire a further BEE shareholding of another 15% to take it up to 30% and they had a 5 year period to do so. The September 2018 Charter is silent in regard to this category of persons and therefore the position of such persons is unclear.
- It is must be noted that existing mining rights holders are not subject to any of the requirements set out in paragraph 2.1.3 which only relate to new mining rights. Therefore all of the obligations set out in paragraph 2.1.3 dealing with the makeup of the BEE shareholding, disposal of BEE entrepreneur shareholding, vesting of BEE entrepreneur shareholding, would not apply to an existing mining right holder.

- It is important to note that the “once empowered, always empowered” principle applies only to a limited extent in that it does not cover an application for a renewal of a mining right which constitutes an existing right. Although not specifically stated, it is implied from the September 2018 Charter that upon the application for renewal the new requirements set out in 2.1.3 of the September 2018 Charter would apply, namely the 30% shareholding divided up in the percentages referred to in 2.1.3.
- The “once empowered, always empowered” concept is also limited because of the provisions of 2.1.6, which also deal with existing right holders so that after the September 2018 Charter comes into effect any disposals of BEE shareholding thereafter would have to comply with the requirements of 2.1.6. In other words the “once empowered, always empowered” principle enshrined in 2.1.1 only applies in respect of the period prior to the coming into effect of the September 2018 Charter.

## Historical Transactions

- Historical transactions are given recognition in paragraphs 2.1.1.3 to 2.1.1.5 of the September 2018 Charter. Thus, where, for example, a company relied on a historical transaction in terms of which an entire asset was disposed of to a Historically Disadvantaged South African entity, recognition would have been given for the ownership element based on units of production. Should such historical transaction still be in place, recognition would therefore be given to it in respect of both categories of existing right holders mentioned in paragraph 2.1 above.
- However, it must be noted that historical transactions are subject to the following caveats, namely:
    - such continuing consequences of historical transactions shall not be transferable and shall lapse upon transfer of the mining right or part thereof;
    - the recognition of continuing consequences shall not apply to an application for a new mining right and renewal of a mining right enjoying such recognition.
- Thus, a mining company that currently relies on historical transactions for the makeup of the 26% BEE shareholding will have to increase the actual shareholding within the company to 30% (in the split referred to in 2.1.3) without relying on the historical BEE transaction in order for it to lodge a new compliant mining right application and will have to do so if it renews an existing mining right which relies wholly or to a certain extent on a historical BEE transaction.
- Furthermore, the continuing consequences in respect of historical BEE transactions shall lapse upon transfer of such mining right or part thereof, as set out in paragraph 2.1.1.4. It is difficult to decipher the meaning of this paragraph. Does it mean that if the holder of a mining right has relied on a historical BEE transaction to satisfy the 26% requirement in relation to that mining right, then upon transfer of such mining right to a third party, the third party cannot rely upon such historical BEE transaction? This would be obvious as the purchaser would have to in any event comply with the September 2018 Charter in order to procure a Section 11 Consent from the Minister to take transfer of the mining right. What may have been intended by paragraph 2.1.1.4 is that if the whole of a mining right has relied on another historical BEE transaction to give it ownership credits for the application for a mining right, if the mining right which is the subject of the historical BEE transaction has been transferred, then the continuing consequences no longer endure for the benefit of the existing holder of a right. If this was the intention, it is not borne out by the wording of paragraph 2.1.1.4 and in any event may be extremely onerous in that the BEE party that is the subject of the historical BEE transaction may have transferred its mining right to another BEE entity.
- It should be noted that in his judgment on the question of once-empowered-always-empowered, Barrie AJ indicated that the 2010 Charter does not retrospectively deprive holders of mining rights of benefits of credit offsets. The continuing consequences of transactions concluded after the MPRDA came into effect and the right to offset credit achieved in one operation against any shortfalls encountered in another operation was recognised. This ability to claim offsets in one operation against another has not been carried forward into the September 2018 Charter, which is contrary to the provisions of the judgment.

## Pending Applications

- It is clear from paragraph 2.1.2 that a pending application is subject to the requirements of the 2010 Charter namely a 26% black person shareholding. What is not clear, is if a pending application can rely on the limited “once empowered, always empowered” principle set out in paragraph 2.1.1.2. Furthermore, it is not clear that such an applicant can rely on the continuing consequences of historical transactions concluded, for example, on units of production and on beneficiation credits.
- It is also equally unclear how section 11 applications will be dealt with, both in the context of pending section 11 applications which have been lodged prior to the coming into operation of the September 2018 Charter and section 11 applications lodged after the coming into operation of the September 2018 Charter.
- The September 2018 Charter is silent in regard to section 11 applications lodged after it has come into operation. The transferee of such mining right would not be an existing right holder for purposes of paragraph 2.1.1, but neither would such transferee be an applicant for a new mining right in terms of paragraph 2.1.3. In other words, would the transferee be governed by the same rules set out in paragraphs 2.1.1.1 and 2.1.1.2 or

would such transferee be governed by the requirement of a 26% shareholding, or would such transferee have to have a 30% shareholding complying with paragraph 2.1.3? This is all extremely unclear.

- In regard to pending section 11 applications the difficulty arises in that it is not a pending application for a mining right but a section 11 application for a transfer of a mining right or a disposal of a controlling interest how these pending applications are going to be dealt with in the context of the wording of paragraph 2.1.2 is difficult to decipher.
- A further problem arises in that paragraph 2.1.2 does not deal with pending renewal applications that have been lodged. It is assumed that such renewal applications will also be pending applications for purpose of 2.1.2 but it is not specifically stated so and this could lead to legal issues going forward and should be clarified in the Implementation Guidelines.

## New Mining Rights

- The most problematic area of the ownership requirements of the September 2018 Charter is set out in paragraph 2.1.3 dealing with new mining right applications.
- A new mining right applicant must have a 30% BEE shareholding distributed in the manner set out in paragraph 2.1.3.2, namely 5% to qualifying employees, 5% to host communities and 20% to BEE entrepreneurs. This does not take into account the frequently encountered scenario where a mining company holds multiple rights and may over time apply for additional rights. By implication, a new BEE transaction would have to be entered into for the new rights.
- The provisions dealing with the interest to qualifying employees and host communities are the most problematic, for the following reasons:
    - it is stated that the 5% which is attributable to qualifying employees and host communities must be a non transferable carried interest. What is meant by this, is extremely unclear. It is not clear what is meant by “carried interest”. In mining law jurisdictions the concept of carry is most often connoted as an equity interest that does not carry with it any obligations to provide funding. It does not necessarily mean that the equity is given to the shareholder without having to pay for that shareholding upfront. However, it seems as if this is not the intention of the DMR and that what they intended was that the qualifying employees and host communities will not have to pay for the 5% at all and it will be a free carry. In this instance they will not have to contribute to any funding, but will be entitled to the full 5% dividend even though they will have not contributed to funding;
    - the further problem arises from the definition of “carried interest” which provides that the cost of the carried interest shall be recovered by a right holder from development of the asset. This is a nonsensical statement. The right holder will be comprised of various shareholders including the 10% free carry shareholder. This effectively means the other 90% shareholders will fund 100% of the mine but only be able to recover 90% of the economic interest. Therefore such shareholders will always carry the 10% carried interest and never recover the costs thereof. How there can therefore be a statement that the right holder will recover the costs from the development of the asset is beyond comprehension; and
    - the donation of a 5% carried interest to host communities and qualifying employees may have severe income tax issues for a mining company and company law issues which are beyond the scope of this note.

## BEE Entrepreneur Shareholding

- In respect of new applications, a minimum of 20% of the shares in the mining company which lodges an application for a mining right, must be held by a BEE entrepreneur. There are provisions dealing with a BEE entrepreneur’s shareholding being disposed of. Paragraph 2.1.6 states that where a BEE entrepreneur’s shareholding is disposed of, the right holders’ empowerment credentials shall be recognised for the duration of the mining right subject to the three provisos that are set out in paragraph 2.1.6. However, what is not clear is what is meant by “a right holder’s empowerment credentials shall be recognised”. How is it recognised? And what is the implication of this statement? If the BEE entrepreneur disposes of its shareholding, the pre. scribed minimum 30% target will be breached if the BEE entrepreneur does not dispose of it to another BEE entrepreneur or to the qualifying employees or host community. However, there is no such restriction on the BEE entrepreneur so therefore the BEE entrepreneur is entitled to dispose of such shareholding to a non BEE shareholder. However, the mining right holder will then be in breach of the prescribed minimum 30% target which has to be maintained for the life of the mining right. Is paragraph 2.1.3.6 an exception to that requirement of a minimum of 30% or not? This is all extremely unclear. In other words, is paragraph 2.1.6 a limited form of “once empowered, always empowered” or not? If it is, it is extremely limited because the recognition of empowerment credentials shall only be applicable to measure effective ownership which is vested to a BEE entrepreneur.
- The definition of “BEE Entrepreneur” creates extreme problems, because it refers to Historically Disadvantaged Persons **(“HDP”)** (which in turn are defined as such in the MPRDA or an enterprise that is least 51% owned by a HDP). This definition does not take account of the fact that the definition of “Historically Disadvantaged Person” in the MPRDA already recognises the concept of juristic entities. This makes the deciphering of the definition almost impossible. It could conceivably then be interpreted to allow for a corporate chain where for example a 51% HDP controlled company in turn has a 51% control of another company which would then qualify as a BEE Entrepreneur, which seems to be beyond the intention of the drafters of the September 2018 Charter.

- A further confusing statement is made in 2.1.3.2(iv) of the September 2018 Charter. It states as follows:

> *"2.1.3.2(v) A mining right holder of the minimum 20% shares referred to in sub paragraph (iv) shall not be diluted below 51% ownership and control by BEE Entrepreneurs." This is a meaningless statement as it is not clear what is meant by a "mining right holder of the minimum 20% shares". It is assumed that it should have stated that "the BEE Entrepreneur that holds the minimum 20% shares referred to sub-paragraph (iv) shall not be diluted below 51% ownership and control by HDPs.".*

### Beneficiation

- Beneficiation credits are given in paragraph 2.1.4 for an equity equivalent mechanism in lieu of BEE entrepreneur shareholding up to a maximum of 5%.
- There are certain criteria that are set out. It is provided that certain activities undertaken by the holder will entitle the right holder to apply for equity equivalent credit. It is assumed that there is no reason that the right holder has to undertake all of the activities set out in paragraph 2.1.7.1.5.
- Existing right holders that claim up to 11% beneficiation credit shall be entitled to retain that credit but once again only for the duration of the mining right. It is not clear what applies on renewal because the duration of a mining right could also be deemed to include periods of renewal.

### Prospecting Rights and Junior Miners

- There is nothing stated in the September 2018 Charter relating to prospecting rights whatsoever. There would therefore seem to be no empowerment requirements notwithstanding that Section 17(4) of the MPRDA still gives the Minister the discretion to require empowerment requirements in the circumstances set out in that section.
- Furthermore it should be noted that the current holder of a prospecting right when applying for a mining right in future will have to comply with the ownership requirements set out in 2.1.3 dealing with new mining right applications at the time of application.
- There are provisions dealing with Junior Miners which are mining right holders within single or multiple mining rights having a combined annual turnover of less than R150 000 000. There are distinctions between those that have turnover of less than R10 000 000 and those that have turnover of between R10 000 000 and R150 000 000. In respect of both the ownership requirements are not defined.

## PROCUREMENT OF MINING GOODS IN PARAGRAPH 2.2.1

### June 2018 Charter

Paragraph 2.2.1 provided for 70% BEE procurement of mining goods, with specified apportionments among black entrepreneurs (21%), BEE women entrepreneurs (5%) /youth (51%) and BEE compliant companies (44%). A 5 year transition period is provided for.

### September 2018 Charter

- Paragraph 2.2.1 remains the same as the June 2018 Charter, save for the following minor amendments:
    - "non-discretionary expenditure" is defined as total procurement budget excluding procurement from rail, utilities and fuel;
    - "BEE woman entrepreneurs", previously undefined in the June 2018 Charter is now 'woman owned and controlled companies' defined as an entity in which South African woman hold at least 51% of the exercisable voting rights and economic interest;
    - as mentioned above, there is no longer reference to Black entrepreneurs as this has been substituted by reference to HDP owned and controlled companies. This is defined as a company with a minimum B-BBEE level of 4 status in terms of the DTI B-BBEE codes of good practice, and a minimum of 25% plus 1 vote ownership by a HDP; and
    - the above amendments apply ***mutatis mutandis*** to all the provisions in the September 2018 Charter, unless otherwise indicated.
- A deeming provision has been added so that in instances where a mining right holder procures goods and services of a contractor to undertake extraction or processing (crushing and concentration) of minerals on their behalf, such goods and services will be deemed to have been procured by the mining right holder.

### Challenges

- There remains a general lack of guidance in relation to how a right holder is to comply with the prescribed criteria in instances where it is not possible to do so, for example, where required products are not created or manufactured in South Africa at all or where the required services are only offered by a Foreign Supplier.
- In terms of the 2010 Charter, stakeholders are, in far broader terms, required to undertake to give HDPs a preferred supplier status, where possible. The September 2018 Charter does not use words such as "where possible", framing the requirements in prescriptive language, with no provision made for circumstances where compliance is impossible.
- Targets for local content should be informed by comprehensive studies that indicate local capabilities and will probably differ by types of mining, for example surface mining, underground coal mining and underground hard rock mining.
- It is hoped that the imminent Implementation Guidelines will provide clarity on the aspects around 'impossibility in procurement of goods'.
- In addition:
    - as outlined in the transitional arrangements the procurement targets must be progressively complied with, within a period of five years. Progressive implementation means that compliance with the targets must be staggered, i.e in year one the target is 10% of the budget, year three 35%, until at year five, 70% is achieved. The holder is required to submit a plan to the DMR, which describes how it will meet these targets, within six months of the coming into effect of the September 2018 Charter (March 2019);
    - it is unclear what sanction shall exist if compliance is not met within the prescribed 5 year period. At the end of the transition period, a right holder must maintain compliance with the September 2018 Charter targets for the duration of a mining right. Paragraph 9 of the September 2018 Charter deals expressly with non-compliance with the ownership element. There is no such equivalent section that deals expressly with non-compliance of other sections of the September 2018 Charter; and
    - it would seem that where there is non-compliance with procurement criteria, paragraph 6 allows for the impact of material constraints (which may result in non-achievement of the set target) to be taken into account. It is not clear how the department will proceed in the event of noncompliance, even if it can be proved that such non-compliance was as a consequence of material constraints. However, despite the uncertainty of its application, the existence of this provision suggests that unlike with ownership provisions the department will consider the circumstances which may impact on non-compliance by a right holder with its procurement obligations.

## PROCUREMENT OF SERVICES IN PARAGRAPH 2.2.2

### June 2018 Charter

Paragraph 2.2.2 provides for 80% BEE procurement of services, with specified apportionments of BEE entrepreneurs (60%), BEE women entrepreneurs (10%) /youth (51%) and BEE compliant companies (10%).

### September 2018 Charter

- Paragraph 2.2.2, remains the same as the June 2018 Charter, save for the term 'non-discretionary expenditure' which has now been defined and adjustments to the qualifying apportionments.
- The amendments are as follows:
    - the June 2018 Charter required 60% of the services supplied, to be allocated to BEE entrepreneurs, which is now a 50% allocation to HDP owned and controlled companies;
    - woman owned and controlled companies are now allocated 15% of the services spend, which was 10% under the June 2018 Charter;
    - youth owned and controlled companies are allocated 5% (instead of an option to choose between a 10% allocation towards BEE Woman Entrepreneurs OR youth owned and controlled companies as under the June 2018 Charter);
- the 10% allocated for BEE compliant companies and the two year progressive transitional period (70% in the first year and 80% in the second year) prescribed in the June 2018 Charter, remains the same.
- The deeming provision applicable to mining goods applies equally to services.

### Challenges

- The comments raised above in regard to mining goods and the ability to comply with the relevant targets also applies to procurement of services.

- If there are no BEE entities or insufficient capacity from which to source these services in the relevant percentages, then holders would not be able to comply with paragraph 2.2.2.
- There is no evidence that there are BEE entities capable of providing the services in the relevant apportionment percentages to all mining right holders.

## VERIFICATION OF LOCAL CONTENT IN PARAGRAPH 2.2.3

### June 2018 Charter

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.

### September 2018 Charter

- The same provisions apply.
- In addition, it is requires that a mining rights holder must procure goods in line with a standardised product identification coding system developed by the Department of Trade and Industry ("DTI").

### Challenges

We note and support the Minerals Council Submissions that the DTI recently dissolved the board of the SABS and placed it under administration. We similarly echo the concern raised that the SABS is unable to fulfil its current mandate, let alone the additional responsibilities set out in the draft 2018 Charter.

## ENTERPRISE AND SUPPLIER DEVELOPMENT IN PARAGRAPH 2.2.4

### June 2018 Charter

Paragraph 2.2.4 provides for off-sets of investment in enterprise and supplier development against procurement obligations.

### September 2018 Charter

- The total procurement budget on mining goods offsets has been adjusted. The June 2018 charter allowed 5% of the total procurement budget on mining goods to be offset, the September 2018 Charter now allows 30% (excluding non-discretionary expenditure). This is a welcome offset and may assist with the challenges identified under Mining Goods;
- The offset for services remains 10%. Save for the referencing errors in paragraph 2.2.4.2.2, the limitations placed on the allocation of the percentages remains as allocated in the June 2018 Charter, namely:
    - Supplier and enterprise development must be invested in HDP owned and controlled companies with a turnover of less than 50 million;
    - Investment on supplier development may not be claimed as expenditure on enterprise development;
    - There must be a written agreement between the holder and the recipient of supplier and enterprise being developed;
    - The contract between the holder and the recipient must be for a minimum of 5 years.

### Positive New Development

A positive new development is that the inclusion of an offset that may, under certain circumstances be available to the mining right holder in relation to enterprise and supplier development targets.

## RESEARCH AND DEVELOPMENT IN PARAGRAPH 2.2.5

### June 2018 Charter

Paragraph 2.2.5 provides that a right holder must spend a minimum of 70% of its total research and development budget on South African based research and development entities. 50% of the 70% budget must be spent at South African Public Academic Institutions or Science Councils.

### September 2018 Charter

The provisions remain the same, however the requirement that a minimum of 50% of the 70% budget must be spent at South African Public Academic Institutions or Science Councils has been removed.

### Challenge

As observed in the Minerals Council Submissions, this topic is not one which in terms of s100(2) of the MPRDA can be dealt with in the September 2018 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).

### Positive Development

The removal of the reference to South African Institutions or Science Councils is a positive development as there is no evidence that South African Institutions or Councils have the knowledge or expertise to provide the necessary Research and Development.

## PROCESSING OF SAMPLES IN PARAGRAPH 2.2.6

### June 2018 Charter

- Paragraph 2.2.6 provides that a holder must use South African based companies for analysis of 100% of mineral samples except in cases where samples are analysed for calibration of local laboratories.
- A holder may not use foreign based facilities or companies without Ministerial consent.

### September 2018 Charter

The provisions remain the same, however the exception in respect of cases where samples are analysed for calibration of local laboratories has been removed.

### Challenges

- As observed in the Minerals Council Submissions, the requirement in regard to processing of samples by South African based companies does not fall within the ambit of ss100(2)(a) or (b) of the MPRDA and is therefore unauthorised and ***ultra vires***.
- Without detraction from the above, there is no evidence that local companies have the capacity to conduct an analysis of 100% of all mineral samples produced in the mining industry in South Africa. Moreover, there is no process with regards to obtaining the Minister's permission in the event that his permission needs to be sought.
- Once published, it is hoped that the September 2018 Charter Implementation Guideline will provided set timelines from processing of permissions and that where there is no sampling capacity in South Africa, it will require the Minister to grant permission to procure foreign sampling services.

## CONTRIBUTION BY FOREIGN SUPPLIERS IN PARAGRAPH 2.2.7

### June 2018 Charter

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.

### September 2018 Charter

This provision has been removed, which is a positive development as the provision was fraught with difficulties.

## SUBMISSION OF DATA IN PARAGRAPH 2.2.8

### June 2018 Charter

Paragraph 2.2.8 provided that a right holder must submit data on its annual purchases as prescribed in the Implementation Guidelines, using common product classification system to the Department.

### September 2018 Charter

This provision has been removed.

## HUMAN RESOURCE DEVELOPMENT IN PARAGRAPH 2.3

### June 2018 Charter

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.

### September 2018 Charter

- Paragraph 2.3 requires a holder to invest 5% of the leviable amount on essential skills development, apportioned as to the full 5% on essential skills development activities in proportion with national or provincial demographics.
- The 1,5% apportionment towards South African public academic institutions, science councils or research entities has been removed.
- An additional provision excluding the application of paragraph 2.3.1 to directors and executives has been added.

### Challenges

As observed in the Minerals Council Submissions, the research referred to does not relate to the skills development of employees, but rather to research into finding of solutions in exploration, mining processing and technology




**Chris Stevens**

Head of Mining & Resources

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**Kathleen Louw**

Director

View Profile


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