

ENVIRONMENTAL

Mining charter 2018 – key elements in the implementation guidelines

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Introduction

- The [Mining Charter](#), 2018 was gazetted on 27 September 2018 (**"the September 2018 Charter"**).
- This note analyses potential high level implications of the Implementation Guidelines (GN 1399 GG 42122 of 19 December 2018) (**"the Implementation Guidelines"**) and the Amendment of the September 2018 Charter (**"the Charter Amendment"**), which amendment was gazetted under GN 1398 GG 42118 of 19 December 2018.
- This note is designed to be read together with the note circulated in October 2018, which the note highlighted the essential provisions contained in the September 2018 Charter, particularly those that were amended subsequent to the publication of the draft Charter published for comment in June 2018 (**"the June 2018 Charter"**).
- Companies wishing to analyse the September 2018 Charter, the Implementation Guidelines and the Amendment of the Mining Charter, 2018 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 a high level overview intended to highlight issues identified by this firm.
- We have considered both review of the Implementation Guidelines conducted by the Minerals Council South Africa (**"the Minerals Council"**) and make reference to certain of the issues raised therein, in this submission. For ease of reference, this note broadly follows the headings contained in the Implementation Guidelines.

General

- The 2018 Mining Charter was promulgated on 27 September 2018 (**"the Mining Charter 2018"**). It was envisaged that the Mining Charter 2018 would be read with the Implementation Guidelines to be gazetted within 2 months from the date of the publication. This ultimately occurred on 19 December 2018 and as stated within the Implementation Guidelines, the Guideline becomes effective as of the publication date.
- "Guidelines" have been described in an administrative law context as quasi-legislation, which have legal effect, but are subject to limitations in that they are fact specific and cannot contradict the document they are intended to inform. They are not meant to preclude the exercise of discretion of decision makers, rather they are intended to assist such decision makers in exercising such discretionary powers.
- In the review of the Implementation Guidelines conducted by the Minerals Council, the Minerals Council expressed the view that while, in certain instances, they do not leave much room for discretion, using peremptory language with respect to the compliance with provisions and sometimes go further than the Mining Charter, 2018 itself, as a whole they do fulfil their role to provide guidance and assisting in the interpretation of the Mining Charter, 2018.
- This note serves to examine the implications of the Mining Charter 2018 read with the Implementation Guidelines.

Ownership

Existing mining rights

- Paragraph 4.1 of the Implementation Guidelines provides that an existing mining right holder shall annually (as outlined in the Mining Charter 2010) report on the items mentioned in 4.1. Table A provides for a current BEE percentage share, which includes units of production that would include historical transactions.
- The first reporting for an existing mining right holder would be by 31 March 2020 for the 2019 year.

Pending applications

- In item 4.2 of the Implementation Guidelines it is stated that a mining right holder must increase its BEE shareholding from the minimum of 26% to 30% as contemplated in the Mining Charter 2018, once off or progressively within the 5-year transitional period. There is a difficulty of interpretation as to what is a pending application, but we assume that the intention of the DMR is that a pending application is an application lodged prior to 27 September 2018.
- It is stated that 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 report annually on its compliance level with the 5-year transitional period in terms of Table A. However, the problematic provision is that after the 5-year transitional period, a mining right holder shall use Tables B, C, D and E relating to new mining rights to annually report on its compliance levels. This seems to indicate that the DMR is of the view that once a pending applicant increases its BEE shareholding from the minimum 26% to 30%, that 30% has to comply with the requirements applicable to a new mining right holder (i.e. the split between the 20% BEE entrepreneur shareholding, the 5% ESOP and the 5% community trust). However, a pending applicant is not obliged to comply with the requirements for a new mining right holder. A pending applicant's 26% shareholding may be made up, for example, by historical transactions and any permutation or combination of shareholding to reach the 26%. Therefore, a pending applicant merely has to top up from that existing shareholding, however it is comprised, up to a shareholding of 30%. There is no obligation on an existing applicant who has 26% empowerment to reconfigure its 30% to comply with the new mining right applicant's requirements under 2.1.3 of the Mining Charter 2018. It is therefore inappropriate for a pending applicant to report in accordance with Tables B, C, D and E rather than Table A.
- It should be noted also that in respect of pending applicants once the mining right is granted, qualifying employees through organised labour and host communities must co sign the annual report on ownership compliance prior to submission to the Department. It is assumed that this obligation only arises after the 5-year transitional period, but, once again, it is believed that this requirement is not appropriate as a pending applicant does not have any obligations to vest a 5% carried interest in qualifying employees and host communities. Therefore, the requirement for qualifying employees and host communities to sign off on the annual report in regard to pending applicants is not appropriate.

New mining rights



Figure 2: Ownership Obligations for New Right Applications, Mining Charter 2018.

A new mining right holder has to use Tables B, C, D and E to report on compliance. Table B deals with the qualifying employees carried interest, Table C deals with the host communities carried interest, Table D deals with the BEE entrepreneur shareholding and Table E deals with disposals of BEE shareholding. It is noticeable in Table B that there is reference to dividends being paid to qualifying employees.

Mineral beneficiation

The maximum of 5% offsetting for beneficiation contemplated in Mining Charter 2018 is given context in accordance with item 4.4 of the Implementation Guidelines. A beneficiation equity equivalent plan has to be submitted to the Minister for approval within 60 days from date of submission. The requirements of the beneficiation equity equivalent plan is set out in item 4.4.1. The valuation of the entity must be done every 5 years to ensure the value of the equity equivalent offset is still correct. It is further clear that the mining right holder can choose any of the activities specified in the Mining Charter 2018 as qualifying for beneficiation offsets as set out in item 2.1.7 of Mining Charter 2018. An example of how to calculate the equity equivalent is set out in item 4.4.4 of the Implementation Guidelines and the reporting template Table G.

Lacunae in implementation guidelines

It was hoped that the Implementation Guidelines would give more clarity in regard to the following issues but to no avail, namely:

- the pending application section gives no recognition to pending Section 11 applications and pending applications for renewal and what the status thereof is in terms of the Mining Charter as read with the Implementation Guidelines;
- no recognition is given to applications that have been lodged as at 27 September 2018 but not accepted;
- no provisions have been inserted to deal with an existing right holder who has never achieved a minimum of 26% BEE shareholding and the position of such holder is unclear in terms of Mining Charter 2018 as read with the Implementation Guidelines; and
- no recognition is given to the concept of applying an offset credit achieved in one operation against any shortfalls encountered in another operation, which lack of recognition is contrary to the recent judgment in *The Chamber of Mines vs Minister of Mineral Resources* handed down in September 2018.

Procurement, supplier, and enterprise development



Figure 3: Procurement Obligations, Mining Charter 2018.

General

- This section of the Implementation Guidelines is intended to give the right holder a more detailed explanation of how compliance with the procurement element of the Mining Charter, 2018 is to be achieved.
- It contains explanations followed by examples of how weighted scores for key sub-elements are to be calculated. A detailed analysis of these formulas is beyond the ambit of this note.
- It also includes a set of reporting templates that the right holder must populate and submit to the Department of Mineral Resources.

Calculation of local content

- Item 5.2 provides the formula for determining how local content is calculated.
- Mining goods whose percentage local value add is 60% or greater will be considered South African Manufactured goods.
- Mining goods whose percentage local value add is below 60% will be deemed not to be manufactured locally and thus the right holder will be unable to claim any points under this sub-element.
- All calculations for compliance with the targets of the procurement element shall exclude non-discretionary spend, which includes spend on buildings, roads, utilities (electricity and water), land rates and fuel.

Procurement of mining goods

- Item 5.5 provides the formula for determining how the total mining goods procurement spend shall be apportioned.
- The mining goods procurement reporting template is found at Table “H”.
- Examples for calculating points achieved for the inclusive procurement of mining goods is found at Item 5.13.1.
- The mining goods scorecard is found at Table “N”.

Procurement of services

- Where services are procured by the mining right holder, the procurement will be allocated to one of the budget categories identified in the services sub-element.
- Item 5.6 provides the formula for determining how the total mining services procurement spend shall be apportioned.
- The services procurement reporting template is found at Table “I”.
- Examples for calculating points achieved for the inclusive procurement of mining services is found at Item 5.13.2.

- The services scorecard is found at Table “O”.

Verification of local content

- Verification of local content shall be carried out by the SABS. 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, has not been addressed.
- If the mining right holder pays for the cost of verification of a supplier, it is considered to be developing and can be interpreted to be part of supplier development costs.
- During the first two years of the transitional period, verification certificates from the SABS will not be required.

Contractors and inclusive procurement

- Where a mining right holder uses a contractor to undertake extraction and/or processing (crushing and concentration) of minerals on their behalf, any goods and services used by the contractor will be deemed to have been used by the right holder.
- The mining right holder will therefore be expected to report on the procurement element using procurement spend data from their contractor.

Enterprise and supplier development

- Where a mining right holder does supplier development, it will be allowed to offset the amount spend to offset some of their obligation under the procurement element.
- The limitations placed on the allocation of the percentages remains as allocated in the Mining Charter, 2018 are repeated in Item 5.8.4 – 5.8.8 of the Implementation Guidelines, with the inclusion of the following:
 - the right holder cannot use the same enterprise or supplier development spend to offset against procurement obligations for mining goods and services [There is no provision in the Mining Charter, 2018, which corresponds to this item. This provision goes further than merely a guideline for interpretation]; and
 - activities undertaken under enterprise development and supplier development must be quantifiable in monetary value.
- The criteria to recognise supplier and enterprise development initiatives are set out in Item 5.8.3.
- The enterprise and supplier development reporting template is found at Table “J”.
- An example of how enterprise and supplier development can be used to augment procurement scores for mining goods and services is found at Item 5.4.1.
- Mining goods and services weighted scores adjusted by enterprise and supplier development is found at Table “P”.

Supplier development through original equipment manufacturers

- A right holder will be allowed to do supplier development through Original Equipment Manufacturers (OEM) in the following manner:
 - the right holder and OEM will identify imported components to be locally manufactured;
 - the components identified can be those already used in mining goods supplied by the OEM to the right holder or to be used in mining goods supplied by the OEM to the right holder within five years; and
 - the right holder can then claim offset points for (quantifiable investments) monies invested by them in supplier development programme.
- Supplier development through OEM reporting template is found at Table “K”.

Research and development

- The guidelines merely re-emphasises the requirement to report annually on its research and development expenditure on South African based research and development entities. No further guidance is given.
- Research and development reporting template is found at Table “L”.

Processing of samples

- It was hoped that the Implementation Guidelines would address the uncertainty regarding the processing of samples in the Mining Charter, 2018 by providing set timelines from processing of permissions and that where there is no sampling capacity in South Africa, they would require the Minister to grant permission to procure foreign sampling services.
- The Implementation Guidelines now make provision for a process of requesting and obtaining prior written consent from the Minister, where a mining right holder needs to use foreign based facilities or companies.
- The request must contain certain specified information including proof that the three largest mineral sampling laboratories in South Africa are incapable of carrying out the type of analyses required. The type of proof is not specified.
- Item 5.11.3 appears to be incomplete as it provides that the Minister shall acknowledge receipt of the application within 14 days and then states that the Minister shall grant such consent if the mining right holder has “(add wording)”. This is clearly an error and creates uncertainty as to when the Minister is obliged to grant consent.
- Item 5.11.4 also appears to contain a drafting error but the intention seems to be that the Minister will have 30 days from the date of submission of the application within which to decide whether or not he will grant the requested consent.
- The written consent will be valid for a period of 12 calendar months.

Human resource development



Figure 4: Human Resource Development, Mining Charter 2018.

- The guideline provides insight for right holders on how best to report on the required 5% investment on human resource development in the September 2018 Charter, by standardising the templates required for reporting.
- The templates identified as Table Q and Table R inter alia require holders to outline the quantum of contribution, the nature of skills development programme and provide a verifiable list of beneficiaries according to their categorisation.
- To the extent that the provincial demographics outweigh the national demographics, the guideline recommends the use of the provincial demographics as the threshold for apportionment of contributions.
- In addition, the guideline recommends that the rights holder include a table showing the calculation of the leviable amount. What the leviable amount is, is defined in Section 3 of the Skills Development Levies Act no. 9 of 1999. This is defined as “the total amount of remuneration, paid or payable, or deemed to be paid or payable, by an employer to its employees during any month, as determined in accordance with the provisions of the Fourth Schedule to the Income Tax Act for the purposes of determining the employer’s liability for any employees’ tax in terms of that Schedule, whether or not such employer is liable to deduct or withhold such employees’ tax”. The leviable amount in the Skills Development Levies Act is set in the Act as being equal to 1% of the employee’s monthly salary after 2001. Simply stated, the skills development levy is a tax paid by an employer in addition to the employees monthly cost.
- As such, the 5% payable by employers as part of the human resource development contribution in the September 2018 Charter, is equal to 5% of the leviable amount (as defined) under the Skills Development Levies Act, which is currently calculated as 1%. Consequently, an employer must, in terms of September 2018 Charter, pay the value of 5% of its current leviable amount (1%), it already pays under the Skills Development Levies Act, towards human resource development.

Employment equity



Figure 5: Employment Equity, Mining Charter 2018.

- The guideline requires employers to submit a 5 year Employment Equity Plan for approval by the Regulator. Considering the transitional arrangements in the September 2018 Charter, a rights holder is required to submit this plan within 6 months from date of enactment of the September 2018 Charter, which is 27 March 2019.
- The guideline further outlines the suggested contents of the Employment Equity Plan, which structure is proposed to assist holders and the Regulator to measure the progressive realisation of rights holders with the September 2018 Charter obligations. It is uncertain who the ‘Regulator’ is as referenced in the guideline, however it is assumed that it is the DMR.

- In addition to the recommended contents, the rights holder is required to represent its employment equity statistics and income differential in a tabular format, which template is found in the guidelines as Table T and Table U.

Mine community development



Figure 6: Mine Community Development, Mining Charter 2018.

Mine community development plan

- As required by the September 2018 Charter, a rights holder must implement 100% of its mine community development commitments as approved in its Social and Labour Plan (SLP), which plan is reviewable every 5 years.
- The guidelines provide a template, identified as Table S, which sets out the required structure for reporting SLP commitments. The table requires rights holders to inter alia disclose the names of approved projects, the duration of those projects, the projects reviewed timelines, capped fees and project execution details.
- The guideline then instructs rights holders to take specific actions in terms of the SLP, namely publish the approved SLP within 30 days of approval, ensure that collaboration occurs on the approved SLP projects by means of inclusiveness and transparency. When review of the SLP is required, the guideline mandates rights holders to ensure that such process is meaningful and done in consultation with inter alia affected communities, the municipality and tribal authorities.
- As observed in the Minerals Council Circular, the contents of the SLP are governed by Regulation 40 and 46 of the MPRDA Regulations. The guideline essentially adds to the requirements of the Regulations by including Table S as part of the contents of the SLP.

Housing and living conditions

- The September 2018 Charter reiterates the requirement for holders of rights to ensure that the standard of housing and living conditions of mine employees is compliant with the Housing and Living Conditions Standard developed in terms of Section 100.
- The guideline reiterates the requirement that holders of rights are required to submit a Housing and Living Conditions Plan after consultation with organised labour and the Department of Human Settlement and recommends that such living arrangements includes single units, family units and any other agreement with the workers, which arrangement must be reported using the template in the guideline, Table W.



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