

Unpacking the Draft Broad-Based Socio-Economic Empowerment Charter for the Mining and Mineral Industry 2018

An overview of the draft Mining Charter.

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On 15 June 2018, the Minister of Mineral Resources, Gwede Mantashe gazetted the "Draft Broad-Based Socio-Economic Empowerment Charter for the Mining and Mineral Industry, 2018", (draft Mining Charter) for public comment.

The publication of the draft Mining Charter is a culmination of the consultation process between the Department of Mineral Resources (DMR) and the mining industry stakeholders to revise the previous charter that was published in June 2017 by then Minister of Mineral Resources, Mosebenzi Zwane, which charter is the subject of a judicial review application instituted by the Mineral Council of South Africa formally known as the Chamber of Mines of South Africa. Following intervention by President Cyril Ramaphosa, the Mineral Council agreed with the DMR to postpone the court application in order to allow the parties an opportunity to engage with each other and find an amicable solution.

Applicability of the draft Mining Charter

According to the draft Mining Charter it will apply to existing mining rights, pending mining right applications and new mining rights. The draft Mining Charter will also apply to prospecting rights as contemplated in section 17(4) of the Mineral and Petroleum Resources Development Act (MPRDA). It also applies to licences granted under the Precious Metals Act and the Diamonds Act, taking into account the extent of the exemptions provided for in the draft Mining Charter.

Ownership requirements for new mining rights

Under the draft Mining Charter applicants for new mining right must have a minimum of 30% BEE shareholding which must include economic interest plus corresponding percentage of voting rights, per mining right or in the mining company which holds a mining right. The prescribed minimum 30% target will apply for the duration of a mining right.

The 30% BEE shareholding must be distributed in the following manner:

- a minimum of 8% of which 5% is non-transferable free carried interest to qualifying employees within a period of five years from the effective date of a mining right
- a minimum of 8% of which 5% is non-transferable free carried interest to host communities (in the form of a community trust as prescribed) within five years from the effective date of a mining right, and
- a minimum of 14% shares to a BEE entrepreneur.

With regard to the 8% to be held by each of the host communities and qualifying employees respectively, it includes a non-transferrable 5% free-carried interest and 3% financed interest each for the qualifying employees and host communities.

Following the publication of the draft Mining Charter, the Minerals Council released a media statement stipulating that it does not support the free carried interest of 5% allocated to each of the qualifying employees and host communities. The Mineral Council argues that given South Africa's mature mining sector, a 10% total free carried interest on new mining rights will materially undermine investment, by pushing up investment hurdle rates and ensuring that many potentially new projects become unviable.

Furthermore, under the draft Mining Charter the right holder will be required to pay a trickle dividend equal to a minimum of 1% of Earnings Before Interest, Taxes, Depreciation and Amortisation (EBITDA) from the sixth year of a mining right to qualifying employees and host communities respectively, until dividends are declared. The trickle dividend payment will be payable to qualifying employees and host communities at any point within a period of 12 months where dividends are not declared. The trickle dividend to be paid to qualifying employees and host communities is a ring-fenced element and therefore, 100% compliance is required. This is a change from last year's version of the charter, which required mining companies to pay at least 1 percent of annual revenue to Black shareholders. It is not clear from the draft Mining Charter whether the trickle dividend is also payable to BEE entrepreneurs.

With regard to the BEE entrepreneur shareholding, the draft Mining Charter stipulates that such shareholding will vest in the BEE entrepreneur in the following manner, 15% in the first quarter, 50% in the second quarter, 70% in the third quarter and 100% by the end of the last quarter of the duration of a mining right.

The draft Mining Charter proposes that if the BEE entrepreneur sells or disposes of their BEE shareholding, the right holder's empowerment credentials will be recognised for the duration of the mining right, provided that the right holder is compliant with the requirements of the BEE entrepreneur shareholding at the time of disposal, the BEE entrepreneur has held the empowerment shares for a minimum period equivalent to a third of the duration of the mining right and unencumbered net value has been realised and the recognition of empowerment credentials will only be applicable to measured effective ownership which has vested to a BEE entrepreneur.

The BEE entrepreneur will be required to re-invest a minimum of 40% of the proceeds from the disposed equity in the mining industry.

Ownership requirements for existing mining rights and recognition of continuing consequences

With regard to existing mining right holders, the draft Mining Charter provides that an existing right holder who achieved and maintained a minimum of 26% BEE shareholding at the date of publication of the draft Mining Charter, will be recognised as compliant and must within a period of five years from the date of coming into effect of the draft Mining

Charter, supplement BEE shareholding to a minimum of 30%.

Whilst an existing 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 has/have since exited, the BEE transaction shall be recognised as compliant and must within a period of five years from the date of coming into operation of the draft Mining Charter, supplement their BEE shareholding from 26% to a minimum of 30%.

However, an existing right holder who did not achieve a minimum of 26% BEE shareholding by the date of commencement of the draft Mining Charter, shall not enjoy the recognition of continuing consequences and must be subjected to the MPRDA corrective processes immediately. Such an existing right holder will be required within a period of five years from the date of coming into operation of the draft Mining Charter, to supplement their BEE shareholding to a minimum of 30% BEE shareholding. The draft Mining Charter does not specify what is meant by the "MPRDA corrective processes", other than that such existing mining holder will have a period of five years to supplement their BEE Shareholding to the required 30%.

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

The recognition of continuing consequences in respect of existing and historical BEE transactions will not be transferrable and will lapse upon transfer of such mining right or part thereof and will also not apply to an application for a new mining right and renewal of a mining right enjoying such recognition.

Although the draft Mining Charter recognises the so called "once empowered, always empowered" principle, existing mining right holders will still be required to top up their BEE shareholding level to 30% within a period of five years, regardless of whether or not they met and/or maintained the 26% BEE shareholding required under the 2004 and 2010 charters. The "once empowered, always empowered" principle was the subject of High Court (Gauteng Division, Pretoria) ruling in April 2018, whereby the court found that the 2004 and 2010 mining charters did not require mining companies to maintain their BEE shareholding throughout the duration of the mining right if the BEE shareholders disposed of their shareholding. The DMR petitioned the Supreme Court of Appeal (SCA) for leave to appeal the judgment. In the previous version of the mining charter, mining companies had a year to comply with the 30% Black ownership requirement. The draft Mining Charter gives mining companies up to five years to comply.

The Mineral Council does not support the topping up of BEE shareholding by existing right holders to 30% within five years. It argues that the top up prejudices existing right holders that secured their rights on the basis of the 2004 and 2010 charters and that despite a High Court declaratory order judgment and an agreement with the DMR, the issue of recognising the continuing consequences of previous BEE deals on existing rights, including for renewals, has not been properly captured in the draft Mining Charter.

Pending applications

Regarding pending applications, the draft Mining Charter provides that a pending application lodged and accepted prior to the coming into operation of the draft Mining Charter will be processed and granted in terms of the requirements of the 2010 Mining Charter with a minimum of 26% Black Person's shareholding. Such a mining right holder will be required within a period of 5 years from the effective date of such mining right to supplement their BEE shareholding to a minimum of 30%. Therefore applications already with the DMR will be processed in line with the 2010 charter, which requires 26% BEE ownership and the mining companies will have five years in which to top up to 30%.

Equity-beneficiation offset

Under the draft Mining Charter, a right holder will be able to off-set up to 11% of the ownership element through beneficiation activities. However, the off-set may only be claimed against a portion of BEE entrepreneur shareholding. In order to be able to claim an off-set the right holder must undertake the following activities, which include (i) mineral ore or mineral products supplied to independent local 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 Black owned beneficiation entities at a discount to the mine gate price, (iv) investments in locally based mineral beneficiation entities, and (v) any other existent beneficiation related activities undertaken or investment made since 2004.

Relief for junior miners

The draft Mining Charter provides some relief for junior miners. In respect of junior miners, a right holder may make representations to the Minister regarding the extent to which the draft Mining Charter elements shall apply.

Employment equity and procurement targets

Other requirements in the draft Mining Charter include a requirement that boards, executive management and senior management must comprise a minimum 50% Black Persons, with 20% of which, at board level must be Black women, 15% of which at executive management and senior management, must be Black women. For middle-level management, the target is set at a minimum 60%, and 20% of which must be Black women and for junior-level management, the target is set at a minimum 70% and 25% of which must be black women and . All these positions must include members of the BEE structures.

A right holder will also be required to ensure that a minimum of 60% Black Persons are represented in the right holder's core and critical skills by diversifying its existing pools. The term "Core and critical skills" "refers to science, technology, engineering and mathematical skills across organisational levels within both production and operational part of a mining company".

Moreover, a minimum of 70% of total mining goods procurement spend must be on South African manufactured goods and a minimum of 80% of the total spend on services (excluding non-discretionary expenditure) must be sourced from South African companies.

Consequences for non-compliance

A right holder who has not complied with the ownership element and falls between levels 6 and 8 of the Mining Charter score-card will be regarded as non-compliant with the provisions of the draft 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.

Conclusion

The public has 30 days from the date of publication of the draft Mining Charter to submit their comments on the draft Mining Charter. The DMR is planning a mining summit for early July 2018 to discuss the draft Mining Charter with the industry and social partners.

It remains to be seen whether the draft Mining Charter will balance the need for meaningful transformation in the mining sector with the need to ensure that mining is productive and profitable and increases investment, employment and sustainability, as well as being fair to investors and affected local communities.

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