

A GUIDE TO MINING CHARTER III

A synoptic legal analysis of the implications of the third iteration of the Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry published in *Government Gazette* No 40923 on 15 June 2017

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1. Introduction

1.1 On 15 June 2017, the Minister of Mineral Resources ("**Minister**") published the Broad-Based Socio Economic Empowerment Charter for the South African Mining Industry, 2017 ("**Mining Charter III**") in the *Government Gazette*¹ under the auspices of section 100(2)(a) of the Mineral and Petroleum Resources Development Act, 2002 ("**MPRDA**").²

1.2 The purported intention behind Mining Charter III is to address the inadequacies of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry of 2002 ("**original Mining Charter**") and its successor the Amended Broad Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry published, 2010 ("**Mining Charter II**") as well as create defined targets and regulatory certainty.

1.3 When introducing the Mining Charter III, the Honourable Minister of Mineral Resources, Mosebenzi Zwane MP said that Mining Charter III *"is a key instrument for radical change, designed to address many of the inequalities in the mining and minerals sector prior to 2002."*³

1.4 Nature, status and validity of the Mining Charters

1.4.1 South African law draws a distinction between policy that is derived through an empowering provision in legislation ("**policy in the narrow sense**") and policy that is derived in the absence of such legislation ("**policy in the wide sense**"). The original Mining Charter was an example of policy derived from legislation. The original Mining Charter was developed under section 100(2)(b) of the MPRDA.

1.4.2 Policy in the narrow sense may be enforced to the extent that:

1.4.2.1 it does not preclude the exercise of discretion;

1.4.2.2 is compatible with the enabling legislation; and

¹ Published in *Government Gazette* No 40923 on 15 June 2017

² Act 28 of 2002.

³ See *Speech by Mineral Resources Minister MJ Zwane on the occasion of the launch of Mining Charter 2017, 15 June 2017, Pretoria.*

1.4.2.3 is disclosed to persons affected by the decision before the decision is reached.⁴

1.4.3 It appears that where policy is derived from statute, the courts are inclined towards affording such policy legal recognition and enforceability. In order for a policy to be binding, it must derive through an *enabling provision contained in legislation*. It must be borne in mind, however, that although policy derived through enabling legislation may be enforceable, where such policy interferes with statutory or common law rights, it will have no validity as it lacks legal authority.

1.4.4 Section 100(2)(a) of the MPRDA states:

"[t]o ensure the attainment of Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution [of the Republic of South Africa, 1996] 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 timetable 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".

1.4.5 It is trite that the rule of law (which incorporates the principle of legality) includes the principle that administrators are deemed powerless to act upon the interests and concerns of persons without an authorisation or chain of authorisations traceable to the Constitution of the Republic of South Africa, 1996 ("**Constitution**"), from which all South African legislation derives its authority.⁵ If the administrative action is not so authorised it will constitute a ground for judicial review. Section 6(2)(i) of the Promotion of Administrative Justice Act, 2000 ("**PAJA**") states that "*[a] court or tribunal has the power to judicially review an administrative action if ... the administrator who took it ...was not authorised to do so by the empowering provision*".⁶

⁴ L Baxter *et al*, *Administrative law* at page 116.

⁵ F Michelman "*Chapter 11: The Rule of Law, Legality and the Supremacy of the Constitution*", in *Constitutional Law of South Africa* (Second Edition), S Woolman *et al.* (eds), Juta e-publications, 31 December 2010, at para 11.2.

⁶ Under section 1 of PAJA, "*empowering provision*" is defined as "*a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken*".

- 1.4.6 It is clear that section 100(2)(a) of the MPRDA only empowers the Minister to "*develop a broad based socio-economic empowerment Charter*". It does not grant the Minister the power to alter, vary and/or revise such a Charter. Had the legislature intended to bestow such powers of alteration, variation and/or revision on the Minister, it stands to reason that such powers would have been specifically conferred on the Minister by the MPRDA. Needless to say, not providing the Minister with such power was probably a conscious step in the minds of the legislature to create regulatory certainty.
- 1.4.7 In addition, section 100(2)(a) of the MPRDA requires that the Minister exercise his authority to develop a broad based socio-economic Charter "*within six months from the date on which this Act takes effect*". The MPRDA took effect on 1 May 2004. Mining Charter III was published on 15 June 2017; more than 13 years later. The Minister's amendment of the original Mining Charter, through the publication of Mining Charter II and Mining Charter III is, in our view, beyond the scope of section 100(2)(a), the empowering provision, and thus is *ultra vires*, ie acting beyond his powers.
- 1.5 **Impact of the interdict proceeding's launched by the Chamber of Mines**
- 1.5.1 We understand that the Chamber of Mines ("**CoM**") is in the process of bringing an application to review and set aside the Minister's decision to publish Mining Charter III (the "**Review**"). The CoM has, *in the interim*, brought an urgent application to interdict the Minister, his delegates and officials, the Department of Mineral Resources ("**DMR**"), and its officials from implementing and applying Mining Charter III "*in any way, directly or indirectly*" pending the finalisation of the Review (the "**Interdict**"). The CoM also seeks a declaratory order suspending the repeal of the Scorecard for the original Mining Charter and Mining Charter II (the "**Declarator**").
- 1.5.2 To the extent that any application by the CoM seeks to suspend the implementation of Mining Charter III, this could potentially create uncertainty with respect to applications for new rights under the MPRDA as aspects of Mining Charter III have come into effect immediately, without any grace period, for such applications. It is accordingly important to consider what legal regime will be in place should any interim interdicts be granted.
- 1.5.3 On the assumption that the implementation of Mining Charter III constitutes '*Administrative Action*' for the purposes of the PAJA, such implementation remains extant and effective until set aside by a competent court (even if this

implementation was unlawful). Ordinarily, the setting aside of administrative action is automatically retrospective and, accordingly, the legal position, as it existed prior to the impugned administrative action being taken, should be restored. Consequently, should Mining Charter III be set aside, the original Mining Charter, as amended by the Mining Charter II, may well apply.

1.5.4 Reviews, however, are lengthy processes even if the matter is dealt with on an expedited basis. It is for this reason that clarity in relation to the interim regime which will apply pending the final determination of any review is necessary. Pending any final order reviewing and setting aside Mining Charter III, the CoM has applied for the Interdict and the Declarator on an urgent basis. An urgent interim interdict is sought by way of motion proceedings and will only come into effect once an order is made by the court (ie Mining Charter III would not be interdicted simply by the service of an application) (the "**Order**"). It should also be borne in mind that the Minister may (and likely would) appeal the Order in which the Interdict and Declarator are granted.⁷ 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.

1.5.5 The Declarator sought by the CoM, if granted by the Court, should make it clear that original Mining Charter, as amended by the Mining Charter II, will apply in the interim, pending the finalisation of the Review. The CoM has not, however, prayed that this regime apply retrospectively (ie from 14 June 2017 when the Mining Charter III was published and came into force). Accordingly, it is not clear whether the suspension will apply only after the order is given, or whether it will apply retrospectively from 14 June 2017. On balance, it is our view that the Interdict and the Declarator will only apply from the date of the Order until the finalisation of the Review. This would mean that, in the period between 15 June 2017 and the Order, Mining Charter III may well apply and govern any applications for new rights. This is a result of the wording of the CoM's notice of motion. The situation may have been different had the CoM explicitly prayed for the order to be retrospective in this regard.

⁷ Though interim interdicts are usually not appealable, it may be that this interim interdict has final effect and would thus be appealable. Even where this may not be the case, the Government may well run an argument to this effect to buy time - thus forcing further urgent proceedings for enforcement). Should the Order be appealed, such an appeal would not suspend the effect of the Order by virtue of section 18(2) of the Superior Courts Act, 2013 (provided the Order is interlocutory in nature).

2. Ownership and the beneficiation offset

The Mining Charter III directly impacts ownership and beneficiation offset. In light of this we deal with the pertinent elements below.

2.1 Definitional issues

- 2.1.1 A juristic "*Black Person*" is defined as juristic person who is managed and controlled by [natural born or naturalised South African citizens] 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. This definition would suggest that the DMR seeks to apply only the "*flow-through*" principle⁸ as opposed to the "*modified flow-through principle*"⁹ henceforth;
- 2.1.2 The term "*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 III requirement. This would suggest that ESOPs are to fully benefit Black Persons and not a "*majority of black persons*" as has been previously applied. Needless to say, virtually all ESOPs which are currently in place will need to be restructured in order to comply with the requirements flowing from this definition;

⁸ The BEE Codes define the flow-through principle in the following manner: "*as a general principle, when measuring the rights of ownership of any category of black people in a Measured Enterprise, only rights held by natural persons are relevant. If the rights of ownership of black people pass through a juristic person, then the rights of ownership of black people in that juristic person are measurable. This principle applies across every tier of ownership in a multi-tiered chain of ownership until that chain ends with a black person holding rights of ownership.*" The BEE Codes provide further that the application of the flow through principle requires the multiplication of the percentage of HDSAs' rights of ownership in the juristic persons through which those rights pass, by the percentage of ownership that such an entity holds in the juristic person being measured. In other words, the principle contemplates that when measuring HDSA ownership in a chain of ownership, the extent of HDSA ownership is calculated by multiplying different HDSA ownership interests at various levels of ownership. For example, if HDSAs own 40 per cent of Company A, which owns 40 per cent of Company B, which in turn, owns 80 per cent of Company C, the application of the flow-through principle will result in Company B being 16 per cent HDSA owned (40 per cent of 40 per cent) and Company C being 12,8 per cent HDSA owned (80 per cent of 16 per cent)

⁹ The modified flow through principle, according to the BEE Codes, applies to any "BEE owned company" and/or any "BEE controlled company". This principle states that, where in a chain of ownership, HDSAs have a flow through level of participation in excess of 50 per cent, then only once in that chain of ownership may such HDSA ownership be treated as if it were 100 per cent HDSA owned. Thus, for example, if Company A is 51 per cent HDSA owned and if it, in turn, owns 40 per cent of Company B, which, in turn, owns 80 per cent of Company C, the application of the modified flow through principle allows Company A to be treated as 100 per cent HDSA owned. Thus Company B would be 40 per cent HDSA owned (100 per cent of 40 per cent) and Company C would be 32 per cent HDSA owned (80 per cent of 40 per cent). It should be noted that the modified flow through principle only applies when calculating the Exercisable Voting Rights or Economic Interest of HDSAs, which impact on the measured entities ownership rating

2.1.3 The term "*meaningful economic participation*" has been amended and now includes, *inter alia*, the following key attributes:

- BEE Transactions shall be concluded with clearly identifiable partners in the form of BEE Entrepreneurs, Mine Communities and workers;
- A percentage of Effective Ownership must accrue to partners who are Black Persons;
- 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;
- 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;
- 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;

It is apparent that the parameters around market conditions have been removed from the definition of the *meaningful economic participation* thereby making all payments to Black Person shareholders compulsory.

2.1.4 The Mining Charter III creates distinguishable ownership regimes for "*new*" and "*existing*" rights issued under the MPRDA. While the terms "*new right*" and "*existing right*" are not specifically defined, a "*new right*", by implication, must refer to a prospecting or mining right which is granted on or after 15 June 2017, the date on which Mining Charter III took effect and would, by implication, include applications for rights submitted and pending prior to this date.

2.2 New mining rights

2.2.1 In relation to a new mining right, "*Black Person[s]*"¹⁰ must hold minimum of 30 per cent in the Holder¹¹.

2.2.2 Such "*Black Person*" shareholding/ownership must comply with what we have termed the "*mandated structure*" regime which requires a shareholding composed of the following shareholders:

2.2.2.1 an ESOP¹² which must hold a minimum of 8 per cent of the issued shares of the Holder of the new mining right;

2.2.2.2 a Community Trust which must hold 8 per cent of the issued shares of the Holder or a new mining right. The shares issued to a community must be held in a "*Community Trust*":

2.2.2.2.1 we would assume that a Community Trust, which is undefined, refers to an *inter vivos* trust established for the benefit a community as contemplated in Annex 100(D) of the Department of Trade and Industry's ("**DTI's**") Generic Codes of Good Practice on Broad Based Black Economic Empowerment, 2013 ("**BEE Codes**");

2.2.2.2.2 this provision also seemingly excludes the use of any other corporate entities which may provide more commercial flexibility which may have been selected to satisfy the requirements of a particular transaction;

¹⁰ "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.

¹¹ Section 1 of the MPRDA defines the term "Holder" as follows, "*in relation to a prospecting right, mining right, mining permit, retention permit, exploration right, production right, reconnaissance permit or technical co-operation permit, means the person to whom such right or permit has been granted or such person's successor in title*".

¹² ESOP 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 III requirement;

- 2.2.2.2.3 further, the Community Trust itself must be created and managed by the yet to be constituted Mining Transformation and Development Agency ("**MTDA**"). In this regard, it is arguable that the Minister is empowered to establish the MTDA through the powers conferred upon him by the Constitution. The Minister has a range of powers to perform his function of developing and implementing policy (listed in section 85(2)(b) of the Constitution).¹³ Although the Constitution does not list lower-level powers, there is a good argument that the function of developing and implementing policy includes the lower-level power to establish a juristic person to do the same, as this is an action enabling the implementation of policy. At a minimum, in our view the MTDA should be a non-profit company which is established as a National Government Business Enterprise ("**GBE**") under the Public Finance Management Act, 1999 ("**PFMA**"). A GBE is defined as:
- 2.2.2.2.3.1 a juristic person under the ownership control of the national executive;
 - 2.2.2.2.3.2 has been assigned financial and operational authority to carry on a business activity;
 - 2.2.2.2.3.3 as its principal business provides goods or services in accordance with ordinary business principles; and
 - 2.2.2.2.3.4 is financed fully or substantially from sources other than (i) the National Revenue Fund; or (ii) by way of a tax, levy or other statutory money;
- 2.2.2.2.4 it is unclear if there would be any fees which may be derived from the MTDA as a *quid pro quo* for the establishment and administration of these Community Trusts;
- 2.2.2.2.5 depending on the rights accruing to the shares held by the Community Trusts, the assigning of control of a plethora of

¹³ The Constitution distinguishes functions (tasks or responsibilities of the institution) and powers (legal authority to act and includes lower-level powers required to perform functions).

Community Trusts to the MTDA may result in a violation of the Competition Act, 1998; and

2.2.2.2.6 in our view, the MTDA patronisingly deprives communities of ability to manage their asset for their own benefit and, in fact, contradicts Mining Charter III's objective of, "*redressing historical, socio-economic inequalities and ensuring broad based and meaningful participation of Black Persons in the mining and minerals industry*".

2.2.2.3 "*BEE Entrepreneurs*",¹⁴ must hold 14 per cent of the issued shares in the Holder of a new mining right. The term "*BEE Entrepreneur*" is defined as a *Black Owned Company* or a *Black Person* who acquires an equity interest in a Holder through a BEE Transaction. "*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*". While this is a seemingly good development, in our experience, the DMR does not view all 'established' Black Owned Companies as BEE Entrepreneurs. Further, while this provision may have provided an efficient segue to the DTI's Black Industrialist Scheme¹⁵, it is unclear if the DMR and DTI have considered the possibility of jointly broaching this issue, leading to yet another instance of non-cohesive policy development.

2.2.3 Black Persons are only permitted to transfer their shares in a Holder to a third party which falls with the same category as the original holders of the shares. Thus, for example, a BEE Entrepreneur would only be permitted to transfer its shares in a Holder to another BEE Entrepreneur, a community would only be able to transfer its shares in a Holder to another community and ESOP would only be able to transfer its shares in a Holder to another ESOP. Mining Charter III does, however, provide that a Black Person shareholder may dispose of a maximum of 49 per cent of its shares in the Holder provided that the funds realised through such divestment are applied to the development of

¹⁴ The term, "*BEE Entrepreneurs*" is defined as a *Black Owned Company* or a *Black Person* who acquires an equity interest in a Holder through a BEE Transaction. "*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*".

¹⁵ The Black Industrialists Scheme (BIS), a grant programme of the Black Industrialists Policy that aims to unlock the potential within black industrialists that operate in the South African economy through deliberate, targeted and well-defined financial and non-financial interventions.

"another asset", potentially outside of the mining industry. It is unclear if these principles are mutually applicable in the sense that the sale of 49 per cent of a BEE Entrepreneurs shares in a Holder must be to another BEE Entrepreneur.

2.2.4 Similarly, the issuing of new shares in a Holder is not permitted to result in the dilution of the interests held by Black Persons and as such some of the shares would potentially need to be issued to Black Persons at a nominal value. This may be contrary to section 40 of the Companies Act requires that the board of a Company only issue shares for '*adequate consideration*'

2.2.5 Where the shareholding of Black Persons is debt funded, that portion of the 30 per cent Black Person shareholding, which has not yet vested in such shareholder, must "*vest*" within 10 years (presumably meaning the debt must be settled), at a rate of 3 per cent per of the "*total issued share capital of the [H]older*" per annum. The shares so funded must be paid for from the dividend flow emanating from the Holder. If such dividend flow is insufficient to fund the 3 per cent of shares which must vest annually, the "*balance owing*" must be written off, presumably on an annual basis, by the Holder or the vendor, as may be applicable. In addition to this Holders are required to pay 1 per cent of its annual turnover to Black Person shareholders. Effectively restricting funding to vendors and/or Holders and making such funding almost impossible from financial institutions. This provision will result in obtaining debt or quasi debt funding for BEE transaction becoming very difficult

2.2.6 The Holder is also required to *gratuitously*¹⁶ pay to the Black Person shareholders, 1 per cent of its annual turnover. Such a payment would:

2.2.6.1 constitute a "*distribution*" under the Companies Act, 2008 ("**Companies Act**") which provides a very wide definition of "distribution", and goes much further than just cash dividends. This definition can be broken up into three categories, namely, the direct or indirect: (i) transfer by the company of money or other property (other than its own shares) to or for the benefit of one or more of its shareholders; (ii) incurrence of a debt or other obligation by the company for the benefit of one or more of its shareholders; and (iii) forgiveness or

¹⁶ Such payment is compulsory and thus not akin to a dividend. The shareholders of a company only have an expectation (and not a right) to share in that company's profits during its existence. There is therefore no obligation on a company to declare distributions to its shareholders.

waiver by the company of a debt or other obligation owed to the company by one or more of its shareholders;

2.2.6.2 implicitly create a different class of shares in the Holder which would require the amendment of a Holder's Memorandum of Incorporation("Mol"). In this regard section 37 of the Companies Act states that *"all of the shares of a 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 is an unalterable provision of the Companies Act and further entrenches the principle in our common law that shareholders holding the same class of shares are to be treated equally. Based on this provision, the implementation of this provision would result in a contravention of the Companies Act.

2.2.6.3 potentially triggers the appraisal rights of minority shareholder under section 164 of the Companies Act. Section 164 of the Companies Act allows shareholders, who have been adversely affected by a decision made by the company that affects the shares held by said shareholders, to demand that the company pays the shareholder the fair value for the shares in the company held by them.

2.2.7 In relation to the imposition of the 1 per cent gratuitous payment, it is also important to note that:

2.2.7.1 it may inadvertently result in the imposition of a donations tax in that section 54 of the Income Tax Act, 1962, which provides that there shall be paid for the benefit of the National Revenue Fund, a tax (donations tax) on the value of any property disposed of (whether directly or indirectly and whether in trust or not) under any donation by any resident (the donor). The term property means any right in or to property movable or immovable, corporeal or incorporeal, wheresoever situated. The definition of property is sufficiently wide to include the *gratuitous* payment to the Black Person shareholders. Section 46 of the Companies Act sets out the requirements that a company must meet before making a distribution. A company must not make any proposed distribution to its shareholders unless the distribution: (i) has been authorised by the board of directors by way of adopting a resolution (unless such distribution is pursuant to an existing obligation of the company or a court order); (ii) it reasonably appears that the company

will satisfy the solvency and liquidity test immediately after completing the proposed distribution; and (iii) the board of the company acknowledges, by way of a resolution, that it has applied the solvency and liquidity test and reasonably concluded that the company will satisfy same immediately after completing the proposed distribution;

2.2.7.2

its imposition would not, strictly speaking, amount to a tax, levy or duty as contemplated in section 77 of the Constitution, as some commentators have suggested, because payment would be made to the Black Person shareholder and not the fiscus. A bill will only constitute a "Money Bill" as contemplated under section 77 of the Constitution if its primary purpose is to "*raise revenue for the state*".¹⁷ Accordingly, a bill which legislates financial charges for any purpose other than the raising of revenue for the State will not fall under section 77 of the Constitution and will not be subject to the requirements of that section.

2.2.8

Mining Charter III also stipulates that the "*Black Person Shareholding*" must be held in an entity which is "*separate*" from the Holder. This suggests the creation of multiple special purpose vehicles to house the cumulative shareholdings of Black Person shareholders. It should be noted that:

2.2.8.1

the 30 per cent Black Person shareholding must, "include economic interest plus a corresponding percentage of *voting rights*, per right or in the mining company which holds the right." It is not clear if the phrase "per right" refers to a new mining right, implying that each new mining right would need to be empowered or if it refers to "*economic interest plus a corresponding percentage of voting rights*" which would suggest some means of gaining an economic interest or voting rights, in regard to individual rights which is simply not possible;

2.2.8.2

Black Person shareholders are required to their manage equity interest in the empowering company, again suggesting that the shares held by Black Person shareholders be ring-fenced in a special purpose vehicle.

2.2.9

Black Person shareholders must also actively control their share of equity interest in the empowering company which shall include the (i) transportation, (ii) trading and (iii) marketing proportionate share of the production. It would

¹⁷ *South African Reserve Bank and another v Shuttleworth and another* 2015 (5) SA 146 (CC) [40] - [57]. In that case it was found that even a bill that raises revenue for the state incidentally, by way of regulatory charges, does not constitute a Money Bill. The primary purpose of the bill must be to raise revenue for the state

seem that this provision is aimed at combatting transfer pricing¹⁸ practices, by ensuring that the Black Person shareholder has some input into the marketing, trading and production of the Holder. However, it ignores that the fact that such production (i.e. minerals and mineral products) vest in the Holder itself and not its shareholders. It is thus unclear how this provision would be applied in practice.

2.2.10 Holders of new mining rights are entitled to a beneficiation offset to a maximum of 11 per cent against the 30 per cent Black Person shareholding target.

2.3 **New prospecting rights**

50 per cent plus one share in any company which holds a new prospecting right must be held by Black Person shareholders. While the *mandated structures regime* does not seem to apply to new prospecting rights, all other requirements enunciated under the ownership element which applies to new mining rights, would, in our view, apply to new prospecting rights. This onerous ownership requirement would, in fact, have the effect of imposing an onerous Black Person ownership requirement in respect of prospecting which is an inherently risky business. This is likely to have an inhibiting effect on prospecting which will not promote mineral resource development in South Africa.

2.4 **Existing prospecting and mining rights**

2.4.1 While not specifically defined, an "*existing*" right is, by implication, a mining or prospecting right that was granted on or before 14 June 2017.

2.4.2 Mining Charter III, in relation to existing prospecting and mining rights, introduces the new concept of "*Historical BEE Transactions*". This term is defined as those "*BEE Transactions concluded prior to [15 June 2017] that achieved a minimum 26% Black shareholding or more*". Historical BEE Transactions:

2.4.2.1 may be at company level, asset level or cover all operations;

¹⁸ Transfer pricing refers to the rules and methods for pricing transactions between enterprises under common ownership or control. Owing to potential for cross-border controlled transactions to distort taxable income, tax authorities in many countries can adjust intragroup transfer prices that differ from what would have been charged by unrelated enterprises dealing at arm's length.

2.4.2.2 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;

2.4.2.3 shall not apply to transactions which did not achieve a minimum of 26 per cent empowerment as at 15 June 2017; and

2.4.2.4 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, after 15 June 2017.

2.4.3 Mining Charter III then goes on to classify existing prospecting and mining rights into four distinct categories, which centre around the concept of *Historical BEE Transactions*:

2.4.3.1 **Category 1:**

where a Holder achieved the 26 per cent Black Person shareholding and such Black Person shareholders no longer hold shares in the Holder and it nonetheless seeks recognition of such shareholding. Each right Holder is required to top up its Black Person shareholding from its existing actual level (as at 15 June 2017) to 30 per cent in order to comply with Mining Charter III prior to 14 June 2018. Such a right holder need not comply with the mandated structures regime until seized with an application under section 11 of the MPRDA, potentially upon renewal of the prospecting or mining right and/or upon submission of an application for a new mining right. Further, the non-Black Person shareholders will need to dilute their shareholding proportionally in order to provide the Black Person Shareholder(s) with the additional shares to enable the holder to comply with the 30 per cent Black Person shareholding requirement. The Black Person shareholder(s) will share such shares proportionately.

2.4.3.2 **Category 2:**

Holders who are currently 26 per cent owned by Black Person shareholders are required to top up their shareholding to 30 per cent within the 12 months, being prior to 14 June 2018. Such a right holder

need not comply with the mandated structures regime until seized with an application under section 11 of the MPRDA, potentially upon renewal of the prospecting or mining right and/or upon submission of an application for a new mining right. The non-Black Person shareholder(s) will need to dilute their shareholding proportionally in order to provide the Black Person Shareholder(s) with the additional shares to enable the holder to comply with the 30 per cent Black Person shareholding requirement. The Black Person shareholders will share such shares proportionately.

2.4.3.3

Category 3:

Holders who are more than (but not equal to) 30 per cent owned by Black Person shareholders need not do anything. When such a Holder requires renewal of its prospecting or mining right or upon the sale of the shares held by Black Person shareholder(s), it will need to comply with the mandated structure regime. Apart from issuing of new shares at a nominal value, it is unclear how such a Holder would comply with the mandated structures regime should only a portion of the Black Person shareholder(s) sell their shares.

2.4.3.4

Category 4:

Holders who did not achieve a minimum of 26 per cent empowerment as at 15 June 2017 would seemingly need to comply with the mandated structures regime. Non-Black Person shareholder(s) will need to dilute their shareholding proportionally in order to provide the Black Person Shareholder(s) with the additional shares to enable the holder to comply with the 30 per cent Black Person shareholding requirement and/or if the Black Person shareholder(s) will share such shares proportionately.

2.5

Beneficiation in relation to existing mining rights

2.5.1

Holders of existing mining rights are entitled to a beneficiation offset to a maximum of 11 per cent against the 30 per cent Black Person shareholding target. However, such beneficiation must be "*over and above*" the provisions of section 26 of the MPRDA.¹⁹ Further, a Holder must:

¹⁹ The Current section 26 does not specifically provided any parameters in regard to beneficiation.

- 2.5.1.1 have invested in beneficiation post 2004;
- 2.5.1.2 ensure that its beneficiation activities are in line with the (yet to be prescribed) levels prescribed in the MPRDA and obtain the DMR's confirmation that its beneficiation activities are in line with the (yet to be prescribed) levels prescribed in the MPRDA; and
- 2.5.1.3 ensure that its beneficiation activities are continuing.

2.6 **Sale of mining assets**

- 2.6.1 A Holder is required to grant Black Person Shareholders a pre-emptive right to purchase its "*mining assets*" should it contemplate their sale. The parameters of this pre-emptive right are not clear and may presumably be negotiated between the Holder and the Black Person Shareholders. Further, the creation of such a pre-emptive right may conflict with contractual arrangement already in place, ie in the existing MOI and shareholders agreement this constitutes an expropriation of rights which all shareholders would have been entitled to.
- 2.6.2 The term "*mining assets*" is undefined but may conceivably refer to one or more of the following: (i) a physical portion or a part of a right, (ii) a specific area covered by a right (eg a seam or particular ore body) or (iii) a specific mineral covered by the right; (iv) mining and/or prospecting rights which are held by persons in undivided shares and (v) plant and equipment of the Holder.²⁰ This arguable pre-requisite will only be triggered when selling assets and not shares.

3. **Procurement**

- 3.1 Mining Charter III sets out three primary obligations in regard to procurement²¹ with which a Holder must comply:
 - 3.1.1 first, a Holder must, by June 2020, expend a minimum of 70 per cent its entire procurement spend in relation to "*Mining Goods*"²² on "*South African Manufactured Goods*", apportioned as follows:

²⁰ It would not include shares in a company which holds a prospecting or mining right *shareholders only own shares and do not participate in the day to day management of the company. The shares are their property and they have voting rights attached to the shares they hold.*

²¹ See clause 2.2 of Mining Charter III.

²² "*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

- 3.1.1.1 a minimum of 21 per cent of the total amount spent on *Mining Goods* must be allocated Black Owned Companies²³ who manufacture South African Manufactured Goods²⁴;
- 3.1.1.2 a minimum of 5 per cent of the total amount spent on Mining Goods must be allocated to Black Owned Companies with either "*a minimum of 50 % +1 vote female Black Person owned and controlled*" and/or "*50% +1 vote Youth owned and controlled*" who manufacture South African Manufactured Goods; and
- 3.1.1.3 a minimum of 44 per cent of total amount spent on Mining Goods must be sourced from "*BEE Compliant Manufacturing Companies*"²⁵ who manufacture South African Manufactured Goods. A BEE Compliant Manufacturing Company is a company that manufactures goods and has minimum BEE level 4 of the Codes of Good Practice on Black Economic Empowerment, 2013 ("**DTI Codes**") and a minimum of 26 per cent black ownership;
- 3.1.2 second, a Holder must, by June 2020, expend a minimum of 80 per cent of the total amount spent on "*Services*" on "*South African Based Companies*".²⁶ A South African Based Company refers to a company incorporated in South Africa under the Companies Act and which has offices in the South Africa apportioned as follows:
- 3.1.2.1 a minimum of 65 per cent of the total amount spent on *services* must be sourced from Black Owned Companies;
- 3.1.2.2 a minimum of 10 per cent of the total amount spent on *services* must be sourced from Black Owned Companies with a minimum of 50 % +1 vote female Black Person owned and controlled companies; and

earthmoving. This also includes aftermarket components and products that are used and/or consumed in daily operations.

²³ "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

²⁴ "*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

²⁵ "BEE Compliant Manufacturing Company" in relation to the procurement element contemplated herein, means a company that manufactures goods and has minimum BEE level 4 of the DTI Codes and minimum 26% black ownership.

²⁶ "*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.

- 3.1.2.3 a minimum of 5 per cent of the total amount spend on *services* must be sourced from Black Owned Companies with a minimum of 50 % +1 vote Youth owned and controlled companies.
- 3.1.3 third, a Holder must identify non-mining goods and services which may be supplied by the near mine communities and where feasible, give preference to suppliers within that community. Presumably here the term "*community*" refers, by implication, to the near mine communities. The parameters of granting a preference to the near mine communities are undefined and, hence, compliance may be subject to abuse.
- 3.2 It is interesting to note that the goal posts seem to have been shifted substantially in regard to procurement in that under Mining Charter II service providers and suppliers of goods into the mining industry were required to comply with the definition of "*BEE Entities*" which is defined as, "*an entity of which a minimum of 25% + 1 vote of shares capital is directly owned by HDSA as measured in accordance with the flow through principle.*" It surely stands to reason that commercial pressure will be exerted on service providers and suppliers of goods into the mining industry to ensure that they are at the very least 50 per cent plus 1 share black owned.
- 3.3 The imposition of local procurement requirements and in particular the local manufacturing requirements may amount to a breach of South Africa's obligations under the General Agreement on Tariffs and Trade ("**GATT**"), the General Agreement on Trade-Related Investment Measures ("**TRIMS**") and the General Agreement on Trade in Services ("**GATS**"). Imposition of restrictions on investment designed to protect and foster domestic industries, and to prevent the outflow of foreign exchange reserves are not permitted under Article II of TRIMS, Articles III and XI of GATT and GATS. Examples of these restrictions include local content requirements (which require that locally produced goods be purchased or used), manufacturing requirements (which require the domestic manufacturing of certain components), trade balancing requirements, domestic sales requirements, export performance requirements (which require the export of a specified percentage of production volume), local equity restrictions, foreign exchange restrictions, remittance restrictions, licensing requirements, and employment restrictions. These measures can also be used in connection with fiscal incentives. Some of these investment measures distort trade in contravention of GATT Articles III and XI, and are, therefore, prohibited. The exemption under Art. III:8(a) to Articles III and XI of the GATT relates to goods procured by governmental agencies for governmental

purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale

4. **Employment Equity and Human Resources Development**

- 4.1 Mining Charter III imposes materially higher employment equity targets than in the Mining Charter II in seeking to *"create a conducive environment to ensure diversity as well as participation of black people at all decision making and core occupational categories in the Mining Industry."*
- 4.2 Every mining company is required to achieve the prescribed minimum levels of representation at the levels of executive/top management, senior management, middle management and junior management. The targets at these levels progress from 50 for top management to 88 per cent at junior management level. The targets for female black persons at each of these levels also escalate from 25 per cent of the minimum for top management to 44 per cent of the minimum at junior management level.
- 4.3 In addition Mining Charter III also provides for the appointment of a minimum of 3 per cent employees with disabilities as a percentage of all employees and reflective of the national and/or provincial demographics.
- 4.4 It also requires the mining company to ensure that a minimum of 60 per cent black persons are represented in the core and critical skills and must be reflective of the national demographics.
- 4.5 The term "employee" is not defined in Mining Charter III and it appears that the intention is to use the definition provided in the Employment Equity Act, 1998, and the Regulations published thereunder ("**EEA**"). This means that every mining right holder must directly employ the requisite number of persons to meet the prescribed thresholds and that the engagement of contractor personnel (defined as "*employees*" in the Mine Health and Safety Act) is not sufficient.
- 4.6 The requirement of 3 per cent employees with disabilities as a percentage of all employees, but that it must be reflective of national and/or provincial demographics, is vague and conflicts given that the targets for the other categories are required to be reflective of the national demographics. The EEA defines "*people with disabilities as people who have a long term or recurring physical or mental impairment which substantial limits their prospects of entering into or advancement in employment*". This will require practical adjustment of various occupational health and safety considerations including a formal determination of the job categories that

can safely be filled by employees with disabilities, incorporation of this consideration into the assessments by Occupational Medical Practitioners and revisions of applicable risk assessment and codes of practice.

- 4.7 Similarly, when a mining right holder is required to identify and fast track black persons to hold positions in respect of the company's "*core and critical skills*", an assessment of the minimum criteria for competency against such fast tracking will need to be established.
- 4.8 The Companies Act does not require the appointment of executive directors to the Board of a Company. However, the King IV Report requires listed companies to have consideration for the appointment to executive director roles such as the Chief Executive Officer, Financial Director as well as Company Secretary. Mining Charter III now places an obligation on a mining rights holder to employ a minimum of 50 per cent black persons at the executive director level of which 25 per cent must be female black persons. As such, should a mining right holder appoint a white person as a Chief Executive Officer at executive director level, then an additional executive director needs to be appointed who must be black and female. Non-executive Board members are not employees of the company and do not fall within the scope of the EEA.
- 4.9 In order to determine national and provincial demographics, the latest figures of the Economically Active Population ("**EAP**") as published by Statistics South Africa during the third quarter of 2016 are set out below. The EAP is provided by population, group and gender for the national and provincial population and is used as a benchmark for the setting of numerical goals and targets towards achieving an equitable and representative workforce in the Republic in terms of the provisions of the EEA:

Table 1: National EAP by population, group and gender

Population Group	Male	Female	Total
African	42.8%	35.1%	78.0%
Coloured	5.3%	4.5%	9.8%
Indian	1.8%	1.0%	2.8%
White	5.3%	4.2%	9.5%
Total	55.2%	44.8%	100.0%

Table 2: Provincial EAP by population, group and gender

Provinces	Gender	Population Group
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		African	Coloured	Indian	White	Total
Eastern Cape	Male	43.2%	5.9%	0.1%	3.0%	52.3%
	Female	39.8%	5.5%	0.1%	2.4%	47.7%
	Total	83.0%	11.5%	0.2%	5.4%	100.0%
Free State	Male	49.6%	0.7%	0.4%	3.7%	54.3%
	Female	41.5%	1.3%	0.1%	2.7%	45.7%
	Total	91.1%	2.0%	0.5%	6.4%	100.0%
Gauteng	Male	44.8%	1.7%	1.8%	7.9%	56.1%
	Female	35.2%	1.3%	1.1%	6.3%	43.9%
	Total	80.0%	3.0%	2.9%	14.2%	100.0%
KwaZulu-Natal	Male	43.2%	0.6%	6.8%	2.3%	52.9%
	Female	41.1%	0.4%	3.8%	1.8%	47.1%
	Total	84.3%	1.1%	10.6%	4.0%	100.0%
Limpopo	Male	53.1%	0.2%	0.4%	2.1%	55.7%
	Female	43.0%	0.1%	0.1%	1.0%	44.3%
	Total	96.0%	0.3%	0.5%	3.1%	100.0%
Mpumalanga	Male	51.0%	0.2%	0.6%	3.5%	55.3%
	Female	42.1%	0.1%	0.1%	2.5%	44.7%
	Total	93.1%	0.3%	0.7%	6.0%	100.0%
North West	Male	56.4%	0.5%	0.1%	3.6%	60.6%
	Female	35.9%	0.3%	0.2%	2.9%	39.4%
	Total	92.3%	0.8%	0.3%	6.5%	100.0%
Northern Cape	Male	29.8%	21.3%	0.2%	6.2%	57.6%
	Female	20.6%	17.3%	0.2%	4.4%	42.4%
	Total	50.4%	38.6%	0.4%	10.6%	100.0%
Western Cape	Male	19.9%	26.2%	0.4%	8.2%	54.7%
	Female	16.1%	22.5%	0.1%	6.6%	45.3%
	Total	36.0%	48.7%	0.5%	14.9%	100.0%

- 4.9.1 In terms of the Code of Good Practice, preparation, implementation and monitoring of Employment Equity Plans, promulgated in terms of the EEA, employers are entitled to have regard to both the provincial and national EAP to set their relevant numerical goals.²⁷ They may also in terms of developing such numerical goals have regard to a number of factors including:

²⁷ The reference to both the national and provincial (or regional) EAP in the consideration of employment equity plans has been confirmed in *Solidarity v Minister of Safety & Security & others (Police & Prisons Civil Rights Union as Amicus Curiae)* (2016) 37 ILJ 1012 (LC) and *Solidarity on behalf of Pretorius v City of Tshwane Metropolitan Municipality & another* (2016) 37 ILJ 2144 (LC). This reference has also remained in the revised draft Code of Good Practice on the preparation and implementation of employment equity plans.

- 4.9.1.1 the degree of under representation of employees from designated groups in each occupational category and level in the workforce;
- 4.9.1.2 present and anticipated economic and financial factors relevant to the industry in which the employer operates;
- 4.9.1.3 the economic and financial circumstances of the employer, as well as the labour turn over trends and specifically for employees from designated groups.

These factors are not referred to in the Mining Charter III provisions. Employers normally set the targets in their Social and Labour Plans and Employment Equity Plans in accordance with the provisions of the EEA and Regulations. Mining Charter III will require a substantial amendment of such plans and is in conflict with the EEA Code of Good Practice by referring only to national demographics when referring to the minimum thresholds. The Mining Charter III does not set a time table when these minimum thresholds need to be achieved.

- 4.10 Mining Charter III require a mining right holder to invest 5 per cent of the leviable amount (1% of the company's wage bill in terms of the Skills Development Levies Act) on essential skills development. The aforesaid 5 per cent of the leviable amount needs to be invested in the following manner:
 - 4.10.1 2 per cent on essential skills development activities, skilling to be representative of national and/or provincial demographics and bias towards low level employees;
 - 4.10.2 1 per cent to the South African Historically Black Academic Institutions for research and development;
 - 4.10.3 2 per cent towards the MTDA.
- 4.11 The imposition of the aforesaid levy may amount to a tax and would need to be introduced by the National Treasury. The DMR is potentially acting *ultra vires* by imposing this new levy. Although the additional levy is portrayed as a levy to develop skills the impact is effectively that of a tax in that it entitles the State to a percentage of the nett profits of an enterprise. It follows that the State is imposing a new financial burden which, no matter how characterised or termed, is in substance a new tax surcharge or levy within the meaning of Section 77 of the Constitution. The DMR is potentially acting *ultra vires*. It could be argued that this provision is

tantamount to a tax being imposed on mining companies. Although the additional levy is portrayed as a levy to develop skills, the impact is effectively that of a tax, in that it entitles the State to a percentage of the net profits of an enterprise.

- 4.12 In addition the role of the MTDA in its utilisation of a portion of the aforesaid levy is also questionable. The MTDA is a body established by the DMR and run by the DMR. The DMR should not be taking up the role of skills development. This is a task divided in terms of the Skills Development Act between the Department of Higher Education and the Department of Labour. The aforesaid overlap and conflict in roles and responsibilities are clearly aspects that required the Minister to have consulted with other responsible Ministers. Furthermore, the Skills Development Act the National Skills Authority ("**NSA**") and the National Skills Fund all have roles to play in terms of skills development in the Mining Industry. Again the aforesaid overlap in scope and responsibility may lead to confusion and duplication.

5. Housing and Living Conditions and Mine Community Development

- 5.1 Under section 100(1)(a) of the MPRDA, the Minister was required, within five years of its the effective date, and after consulting with the then Minister of Housing (now Minister of Human Settlements) ("**Minister of Human Settlements**"), to develop a housing and living conditions standard for the South African mining industry. In order to comply with the tenets of section 100(1)(a) of the MPRDA, the then Minister published the Housing and Living Standard on 29 April 2009,²⁸ one day before the deadline set under section 100(1)(a) of the MPRDA. In addition to the Housing and Living Standards, section 100 of the MPRDA required the Minister to develop (i) a code of good practice for the South African minerals industry²⁹ as well as (ii) a socio economic empowerment charter which stipulates the framework, targets and time-table for effecting the entry of historically disadvantaged South Africans into the mining industry.³⁰ In order to comply with the tenets of section 100(1)(b) of the MPRDA, the then Minister published the Codes of Good Practice for the South African Mining Industry on 29 April 2009 ("**Mining Codes**"),³¹ one day before the deadline set under section 100(1)(b) of the MPRDA.

²⁸ Published in the Government Gazette under GN 446/2009 on 29 April 2009

²⁹ See section 100(1)(b) of the MPRDA

³⁰ See section 100(2)(a) of the MPRDA. The charter referred to in section 100(2)(a) must, under section 100(2)(b) give effect to objects of the MPRDA highlighted in section 2(c) to (f) and (i)

³¹ Published in the Government Gazette under GN 446/2009 on 29 April 2009

- 5.2 The Mining Codes purport to "*set out administrative principles*" to enhance the implementation of mining legislation and the original Mining Charter. The Mining Codes, among other things, sets out eight elements, including one which is entitled "Housing and Living Conditions", with which mining companies are to comply.³² To add a further level of complexity, housing and living conditions are also referred to in the Stakeholders' Declaration on Strategy for the Sustainable Growth ("**Declaration**").
- 5.3 The instruments which create compliance and reporting obligations with regard to housing and living conditions are the revised Mining Charter and the Housing and Living Standard, Meaningful Transformation of South Africa's Mining Industry ("**Stakeholders' Declaration**") as well as the Revised Social and Labour Plan Guidelines ("**SLP Guidelines**"), which were published by the DMR in October 2010. Both the Stakeholders' Declaration and the SLP Guidelines purport to neither have the force of legislation / regulation nor impose penalties for non-compliance. In our view, the SLP Guidelines and the Stakeholders' Declaration provide guidance as to the manner in which a mining company should comply with the Housing and Living Standard when preparing and submitting its Social and Labour Plan ("**SLP**") envisaged under the MPRDA and regulation 46 of the regulations. The Mining Codes have, however, not found practical application, and have now been repealed by virtue of Mining Charter III.
- 5.4 In short, the regulatory uncertainty is to some extent cured by imposition of the Housing and Living Standards as the central document which regulates Housing and Living Conditions. The flaw is, however, that a Holder is required to submit a housing and living condition plan for approval by the DMR after having consulted with Human Settlements and organised labour. There is no prescribed process to do so.
- 5.5 Mine Community Development has seemingly been extended to cover both near mine communities as well as other labour sending areas. Holders are required to put in place development projects which include infrastructure projects, income generating projects and enterprise development. Further, Holders are required to cooperate with municipalities in developing their Integrated Development Plans

³² The Mining Codes attempt to import a variety of terms and concepts from the generic Broad-Based Black Economic Empowerment Codes of Good Practice, 2007 ("**Generic Codes**") published under the Broad-Based Black Economic Empowerments Act, 2003 ("**B-BBEE Act**") in regard to the measurement of HDSA ownership of mining companies, without adapting these terms and concepts to the mining industry or taking into consideration the structures of black economic empowerment ("**BEE**") transactions which preceded the promulgation of the Generic Codes.

("IDPs") and identify priority projects which presumably it will need to undertake or fund.

- 5.6 The Holder contributions to Mine Community Development must be proportionate to the size of the investment. However, no criterion is provided in order to assess whether or not the contribution is proportionate to the investment. There is, however, a vague reference in the Mining Charter III Scorecard to, "*revenue projection for two and a half years, applicable to a SLP's for five (5) years cycle.*" Not only does this give rise to regulatory uncertainty, but it allows administrators an overly broad discretion, which compounds this issue. The rule of law principle is a foundational value enshrined in section 1(c) of the Constitution as the Constitutional Court has repeatedly recognised. The rule of law requires law to be certain, and thus that the exercise of powers and discretions under the law not be undertaken in an unrestricted manner. Those who are affected by the exercise of broad discretionary powers by administrative officials must know, among other things, what is relevant to the exercise of those powers.³³ This means that the relevant provision must indicate with reasonable certainty to those administrative officials who are bound by it what is required of them, so that they may regulate their conduct accordingly.³⁴ As the Constitutional Court has held, the legislature must ensure that when legislation is drafted, it must limit the risk of an unconstitutional exercise of the discretionary power it confers on administrative officials. The Constitutional Court has also held that it would be inappropriate for a minister to exercise an unfettered and unguided discretion in situations with potentially irreversible and prejudicial consequences to business entities and others who may be affected.³⁵

³³ See, for instance, *Dawood and another v Minister of Home Affairs; Shalabi and another v Minister of Home Affairs and others; Thomas and another v Minister of Home Affairs and others* 2000 (8) BCLR 837 (CC), at 22, where the Constitutional Court stated that:

"[i]t is an important principle of the rule of law that rules be stated in a clear and accessible manner...if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision".

³⁴ Similarly, Justice Ngcobo in *Affordable Medicines Trust v the Minister of Health* 2006 (3) SA 247 (CC) at para 108, held that in order for a rule to comply with the requirement that it be "*stated in a clear and accessible manner*" its meaning must "*indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly*". In the Constitutional Court judgment of *Kruger v President of the Republic of South Africa* 2009 (1) SA 417 (CC) at para 65, Justice Skweyiya further added that rules:

"should be communicated in clear language so those affected can know what it is they should do in order to comply with the law... [t]he public should not have to rely on lawyers to interpret the meaning and import of words in proclamations".

³⁵ *Janse van Rensburg, NO v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC), at para 31.

6. Sustainable development and growth of the Mining and Mineral Industry

6.1 Mining Charter III obliges Holders to implement the Declaration.³⁶ This is bound to create more regulatory uncertainty as, again, it allows administrators an overly broad discretion, which compounds this issue. In any event, the Declaration creates a broad set of obligations without setting any compliance criteria. It is also not clear if all the elements of the Declaration must be complied with in order to ensure compliance with this provision or, in the alternative, it is only the sustainable Development commitment which should be complied with.

6.2 The goals are, however, laudable in that it requires Holders to:

6.2.1 comply with and implement environment management systems which focus on continuous improvement in order to mitigate adverse environmental impact;

6.2.2 maintain a zero harm policy in respect of mine Health and Safety. It goes on to propose the elimination of certain diseases but does not provide any detail as to how this is to be done and time lines for completion;

6.2.3 spend 70 per cent of the research and development budget on research and development in South Africa and to spend 35 per cent of the research and development budget on South African historically disadvantaged Institutions.³⁷

³⁶ as defined in 5.2 above.

³⁷ Historically Black Academic Institutions means, " "South African Historically Black Academic Institutions" means institutions of higher learning which were historically solely for Black Persons" which would include

- University of Fort Hare;
- University of Zululand;
- University of Venda;
- University of Limpopo;
- University of Western Cape;
- University of Walter Sisulu; and
- University of North West

Mining Charter III Scorecard

7. We have replicated the Mining Charter III Scorecard as Annex A. It is important to note that 3 of the 6 element are weighted while the other 3 are not. The Ownership, Human Resources Development and Mine Community Development have a strict yes/no compliance requirement while the Procurement, Employment Equity and Sustainable Development elements are weighted elements. In order to ensure compliance, a Holder would need to score a minimum of 60 per cent in relation to the weighted elements and full compliance in regard to the unweighted elements

Annexe A

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%

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		

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%	
	Percentage of the total annual Leviable amount contributed to South African Historically Black Academic Institutions	1%	

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)

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 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 South African based services companies.	65%	5%
	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	5%	2%

Element Description	Measure	Compliance Target %	Weighting %
	companies.		
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%

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 Board representatives			25%	3%
Senior Management:				
Africans	Coloureds	Indians	60%	4%
Black Females as a percentage of all Board representatives			30%	3%
Middle Management:				
Africans	Coloureds	Indians	75%	3%
Black Females as a percentage of all Board representatives			38%	3%
Junior Management:				
Africans	Coloureds	Indians	88%	1%

Element Description			Compliance Target %	Weighting %
Black Females as a percentage of all Board representatives			44%	3%
Employees with disabilities:				
Africans	Coloureds	Indians	3%	2%
Core and Critical Skills:				
Africans	Coloureds	Indians	60%	3%
Total				35%

SUSTAINABLE DEVELOPMENT

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

MINE, HEALTH AND SAFETY

Element Description	Measure	Compliance Target %	Weighting %
Elimination of Occupational Diseases	(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	95%	1%

Element Description	Measure	Compliance Target %	Weighting %
	the milestone level		
	(d) Tuberculosis incidence rate by 2024	Below National TB incident rate	2%
	(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%