



## CLIENT BRIEF

# Mining Charter III: certainty, but at a cost

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South Africa

## 1. Introduction

*The Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 (Mining Charter III or the Charter)*<sup>1</sup> came into force on Friday, 1 March 2019 - almost three years after the publication of the first draft.<sup>2</sup> This brought to a close nearly three years of uncertainty and speculation regarding the nature and content of the final version of South Africa's third official Mining Charter.<sup>3</sup>

However, in spite of the extensive public participation and negotiation process which preceded the publication of the Charter (on 27 September 2018),<sup>4</sup> it still contains a number of provisions that are a cause for concern. These include:

- onerous re-empowerment obligations for the renewal and transfer of existing mining rights;
- the BEE Shareholding top-up requirements for pending applications;
- the absence of provisions for the amendment of existing mining rights; and

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1 Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry published in Government Gazette No. 41934 on 27 September 2018. Like its predecessors, Mining Charter III was purportedly published under section 100(2)(a) of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA).

2 Mining Charter III was preceded by three earlier versions: Publication of and invitation to comment on the draft Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 published in Government Gazette No 39933 on 15 April 2016; Reviewed Broad-Based Black Economic Empowerment Charter for the South African Mining Industry, 2017 published in Government Gazette No. 40923 on 15 June 2017; and Publication of the Draft Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 (for public comment) published in Government Gazette No. 41714 on 15 June 2018.

3 The original Mining Charter was negotiated in 2002 and published in Government Gazette No. 26661 on 13 August 2004 (the 2004 Charter) and an "amended" Mining Charter was published in Government Gazette No. 33573 on 20 September 2010 (the 2010 Charter).

4 See footnote 1.

- the Minister’s seemingly unlimited ability to review and revise the obligations imposed under the Charter from time to time.

To understand the extent of the black economic empowerment (**BEE**) obligations for South Africa’s mining industry,<sup>5</sup> regard must also be had to the *Implementation Guidelines for the Broad Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 (Guidelines)*,<sup>6</sup> which the Minister of Mineral Resources (**Minister**) published on 19 December 2018.

The Guidelines outline processes, procedures, forms and templates to facilitate reporting and compliance with the requirements of the Charter.<sup>7</sup> To do so they further explain what the different empowerment elements comprise, expound on the factors which the Department of Mineral Resources (**DMR**) and the Minister will consider when establishing whether or not a mining right holder complies with the requirements of the Charter and provide useful examples illustrating how the various thresholds will be calculated.

On 19 December 2018, the Minister also published an Amendment to the Mining Charter, 2018 (**Amendment**).<sup>8</sup> Among other things, it provides that existing mining right holders and existing licence and permit holders must implement the Charter from 1 March 2019 (as indicated above). It also stipulates that the first annual reporting on the Charter must be submitted on or before 31 March 2020.<sup>9</sup>

Mining Charter III has been a significant source of uncertainty and cause of controversy over the last three years. Since a first draft was published for public comment in April 2016,<sup>10</sup> it has led to various High Court applications, occasioned calls for a change in political leadership at the DMR, unsettled investors and prompted adverse pronouncements by sovereign credit ratings agencies.<sup>11</sup>

Regrettably, it appears that the additional obligations imposed under the Amendment and Guidelines have seemingly added to the uncertainty. In fact, some of the concerns with the Charter have been exacerbated by the Guidelines which in certain cases go beyond those envisaged under the Charter (e.g. the obligations in relation to pending applications). With the exception of procedures relating to the beneficiation equity equivalent, the Guidelines likewise do not address any of the ambiguities created by the Charter (and considered in this Brief). The publication of the Guidelines and Amendment appears another missed opportunity for the Minister to have addressed the remaining uncertainties around the Charter.

The significant effect which the earlier drafts and published version of Mining Charter III had on South Africa’s mining sector becomes even more pronounced if regard is had to the country’s rankings on the Fraser Institute’s *Annual Survey of Mining Companies’s (Survey)* “Policy Perception Index”.<sup>12</sup> Prior to the publication of the first draft of Mining Charter III, South Africa scored 51.91 and ranked 78<sup>th</sup> out of the 109 jurisdictions surveyed. After the ruinous June 2017 version of the Charter<sup>13</sup> was published, the country’s score decreased to 42.66 and it ranked 81<sup>st</sup> out of the 91 jurisdictions surveyed. In the most recent Survey, published on 1 March 2019<sup>14</sup> (i.e. after the publication of the Charter and the Guidelines), South Africa’s score increased to 64.57 and the country now ranks 56<sup>th</sup> out of the 83 mining jurisdictions surveyed.

5 See clause 12.2 of Mining Charter III.

6 Published in Government Gazette No 1399 on 19 December 2018.

7 See the Guidelines at 2.

8 The amendment was republished in Government Gazette 42130 dated 20 December 2018.

9 Clause 8.1 of Mining Charter III and clause 3 of the Amendment appear to create conflicting positions. While clause 3 of the Amendment provides that the duties imposed under the Charter are suspended until 1 March 2019, clause 8.1 indicates that mining right holders are obliged to submit a five year plan indicating progressive implementation of the Charter’s inclusive procurement targets within six months from the date of publication of the Charter.

10 See note 2 above.

11 See, by way of example, Rand jumps as Moody’s warns SA about Mining Charter published by fin24 on 21 June 2017 available online at <https://www.fin24.com/Economy/rand-jumps-as-moodys-warns-sa-about-mining-charter-20170621>.

12 Available online at <https://www.fraserinstitute.org/sites/default/files/survey-of-mining-companies-2017.pdf>

13 Reviewed Broad Based Black Economic Empowerment Charter for the South African Mining Industry, Government Gazette 40923, 15 June 2017 (the 2017 Version).

14 Fraser Institute’s Annual Survey of Mining Companies 2018 online available at <https://www.fraserinstitute.org/sites/default/files/annual-survey-of-mining-companies-2018.pdf> accessed on 4 March 2019.

While South Africa's performance in the Survey is still below average, its score is significantly better than the previous three years which serves to confirm the importance of regulatory certainty. Likewise, if the country wishes to further improve its rankings, the Government should address the provisions of the Charter which are still a cause for concern. These (as well as the obligations imposed under the Charter) are discussed in greater detail below.

If the mining sector is to truly become the "sunrise industry" that the Government wishes it to be, it will have to become more proficient in how it regulates the industry.

## 2. Executive Summary

- **Existing rights:** existing mining right holders that achieved a minimum of 26 per cent BEE shareholding will be recognised as compliant for the duration of the mining right. This is so irrespective of their current BEE shareholding. To remain compliant the Guidelines provide that such holders must submit annual reports on their current BEE shareholding, meaningful economic participation and their shareholders' rights.
- **Renewals and transfers of existing rights:** existing mining right holders' historical BEE transactions will *not* be recognised for the purposes of the renewal and transfer of existing mining rights and the applicant for renewal or the transferee, as the case may be, will likely be required to comply with the BEE ownership requirements applicable to new mining rights.
- **New rights:** applicants for new mining rights must have a minimum of 30 per cent BEE shareholding comprising: a minimum of 5 per cent non-transferable *carried* interest to each of *Qualifying Employees* and *Host Communities*<sup>15</sup>, and a 20 per cent effective ownership to BEE entrepreneurs (5 per cent of which must preferably be owned by women). The "*carried interest*" is essentially a *free carried interest* but arguably permits notional vendor financing without any form of security.
- **Pending applications:** will be processed under the 2010 Charter. Applicants must accordingly have a minimum of 26 per cent BEE shareholding. However, after the mining right is granted, the holder of that right must increase its BEE shareholding to 30 per cent within five years and possibly also meet the BEE shareholding requirements applicable to new mining rights.
- **Procurement of goods:** a minimum of 70 per cent (by value) of mining goods must be manufactured or assembled in South Africa. Of the indicated percentage of goods 21 per cent must be sourced from companies owned and controlled by Historically Disadvantaged Persons, five per cent from women and youth controlled companies, and 44 per cent from BEE compliant companies. Mining right holders could, however, off set 30 per cent of the procurement budget against supplier and enterprise development (subject to meeting the additional requirements imposed under the Charter). In terms of the transitional provisions<sup>16</sup> mining right holders are afforded five years to become compliant, with the threshold incrementally increasing from 10 per cent in the first year to 70 per cent in the final year.
- **Procurement of services:** a minimum of 80 per cent (by value) of procured services, whether professional or technical, must be provided by local service providers. Of this, 50 per cent of the procurement spend must be sourced from companies owned and controlled by Historically Disadvantaged Persons, 15 per cent from companies owned and controlled by women, five per cent from youth owned companies, and ten per cent from BEE compliant companies. During the first year, 70 per cent of the procurement spend must be allocated to local service providers and the 80 per cent threshold requirement will apply from the second year onwards.
- **Employment Equity:** the targets have remained largely the same as those imposed under the 2017 version. The exception to this concerns white female representation, which now seemingly must also be considered (as was the position under the 2010 Charter). In addition to meeting these thresholds, mining

15 Mining Charter III defines "host community" as "a community within a local or metropolitan municipality adjacent to the mining areas, as defined in the MPRDA".

16 See clause 8 of the Charter.

right holders are obliged to prepare and submit an approved five year employment equity plan as well as a career progression plan (which should include individual development plans for employees).

- **Exploration and Junior Miners:** junior miners with an annual turnover of less than ZAR10 million will be exempt from complying with the employment equity requirements when there are fewer than ten employees, and are exempt from complying with the “inclusive procurement, enterprise and supplier development” requirements. Junior miners with an annual turnover of between ZAR10 million and ZAR150 million must comply with the employment equity requirements at group level and the inclusive procurement requirements. Junior miners with an annual turnover of less than ZAR150 million, are required to have 30 per cent BEE shareholding, but are not obliged to meet the percentages prescribed under the Charter. The holders of prospecting rights will not be subject to the provisions of the Charter.
- **Annual reports:** clause 6.1 of the Mining Charter III and the Guidelines<sup>17</sup> provide that mining right holders are obliged to submit annual reports indicating the extent of their compliance with the obligations imposed under the Charter. To assist them in preparing these reports, the Guidelines provide tables for each specific element of the Charter. These tables stipulate the information that must be provided as well as the format which the report should take. All mining right holders are expected to submit their first annual reports on or before 31 March 2020.<sup>18</sup>
- **Non-compliance:** a mining right holder who fails to comply with the ownership and mine community development requirements *and* falls within levels 6 and 8 of the Scorecard is in breach of the terms of Mining Charter III and the obligations imposed under the Mineral and Petroleum Resources Development Act, 2002 (**MPRDA**). Moreover, a licence or permit holder which has not complied with the requirements of Mining Charter III shall be in breach of the Diamonds Act, 1986 and the Precious Metals Act, 2005 and subject to the relevant provisions of the these Acts.<sup>19</sup>
- **Policy vs Regulation:** in April 2017 the Gauteng Division of the High Court ruled that compliance with the requirements imposed under the 2010 Charter is voluntary and not enforceable and declined to hand down an order declaring that that Charter was validly promulgated in terms of the provisions of section 100(2) of the MPRDA or that it is “the Charter contemplated in section 100” (as referred to in section 23(1)(h) of the MPRDA).<sup>20</sup> The Court’s decision may hold significant consequences for Mining Charter III. First, it may be possible to argue that owing to the reasoning applied by the High Court, Mining Charter III (like its predecessor) does not create legally binding and enforceable obligations on mining right holders. Second, it could also be questioned whether the Minister is lawfully empowered to review and revise the terms of the Charter (which clause 10 of the Charter empowers him to do) when the empowering provision under the MPRDA does not permit this.

### 3. Material Changes

The material changes introduced under Mining Charter III and the Guidelines are considered below under the headings *Ownership, Procurement, Employment Equity, Social Contributions and Other Obligations*.

The Brief also considers the revised obligations for *Downstream Diamonds and Precious Metals Industries*, the *Compliance Framework* created under the Charter and the Guidelines and whether their terms are binding.

Finally, in an annex to this Brief, we also compare and contrast the obligations imposed under the 2010 Charter with those imposed under Mining Charter III.

<sup>17</sup> Pursuant to section 28(2)(c) of MPRDA.

<sup>18</sup> See clause 2 of the Amendment.

<sup>19</sup> As discussed under section 4 of the Brief, we question the legality and enforceability of clause 9 of the Charter.

<sup>20</sup> See *Chamber of Mines v Minister of Mineral Resources and Another* Case Number 47661/2015 at para 107 available online at <http://www.saflii.org/za/cases/ZAGPPHC/2018/8.pdf>.

### 3.1 Ownership

#### Existing mining rights

An existing mining right holder who achieved a minimum of 26 percent BEE shareholding prior to the commencement of the Charter, is recognised as compliant for the duration of the right. These mining right holders will be compliant irrespective of whether or not their BEE partner(s) exited before 27 September 2018.

The *'once empowered, always empowered principle'* therefore applies for the duration of the mining right, but does *not* extend to the renewal of these rights (which is discussed below).

In terms of the Guidelines, mining right holders must submit annual reports which indicate the extent of their current and previous BEE shareholding. These reports must provide the information indicated in Table A of the Guidelines (including, information relating to the method through which the BEE shareholding was financed such as loans and loan agreements, the dividends which are declared and paid, and the voting rights attached to these shares) and adopt the same format.<sup>21</sup>

#### New rights

The holder of a mining right granted *after* 27 September 2018 must have a minimum of 30 per cent BEE shareholding.<sup>22</sup> These shares must include *"economic interest"*<sup>23</sup> and the proportional voting rights per mining right or in the mining company which holds the mining right.

A minimum of 50 per cent of the BEE shareholding must vest within two-thirds of the duration of the mining right.<sup>24</sup>

The 30 per cent BEE shareholding must be distributed as follows:

- a minimum of five per cent non-transferable carried interest to *qualifying employees* from the effective date of the mining right;
- a minimum of five per cent *non-transferable carried interest* or a minimum of five per cent equity equivalent benefit to *host communities* from the effective date of a mining right; and
- a minimum of 20 per cent effective ownership in the form of shares to *BEE entrepreneurs*, five per cent of whom must preferably be women.

"Carried interest" is defined as:

*shares issued to qualifying employees and host communities at no cost to them and free of any encumbrances. The cost for the carried interest shall be recovered by a right holder from the development of the asset.*<sup>25</sup>

It is not clear how this is different from a "free carried interest" (referred to in earlier drafts of Mining Charter III) and the definition accordingly may be misleading. The "carried interest" essentially remains a *free carried interest* but arguably permits notional vendor financing without any form of security. This is one of the key aspects that will require careful consideration as much as interpretation.

"Equity equivalent", in turn, is defined as:

*a percentage equivalent to the issued share capital of the mining right holder, at no cost to a trust or similar vehicle set up for the benefit of the host communities.*<sup>26</sup>

An "equity equivalent" seemingly entails a donation (sounding in money) equal to the value of five percent of the shares of the mining right holder. The money must be donated to a trust or similar vehicle which, in turn, must use the funds to implement a development programme that will benefit the host community. The

<sup>21</sup> See clause 4.1 of the Guidelines.

<sup>22</sup> "BEE shareholding" refers to shares held by BEE entrepreneurs, host communities and qualifying employees.

<sup>23</sup> An entitlement to dividends, capital gains and other shareholder rights.

<sup>24</sup> See clause 2.1.5 of Mining Charter III.

<sup>25</sup> See the Definitions in Mining Charter III at 8.

<sup>26</sup> See the Definitions in Mining Charter III at 9.



development programme is to be approved under the ownership element and does not replace the social and labour plan commitments of the mining right holder.<sup>27</sup> Mining right holders which adopt this approach must submit independent valuation reports to evidence their compliance annually.<sup>28</sup>

While this alternative appears to be sensible, it is unclear whether mining right holders are required to make further donations if the value of its shares increase after the mining right has been granted and, if so, how often they are required to do so.

The Guidelines furthermore indicate that the qualifying employees' shares will be administered through an employee share ownership plan (**ESOP**) and confirm that the host communities' shares should be held by a trust or other "appropriate vehicle".<sup>29</sup> In addition, they also provide that the employees and communities must be consulted, the outcome of these consultations reported on annually and the qualifying employees, communities and organised labour must co-sign the annual report on the "Ownership" element prior to the report being submitted to the DMR.<sup>30</sup>

The report, in turn, must provide the information and adopt the formats prescribed under Tables B, C and D of the Guidelines and include information relating to the cost recovery mechanisms, the dividends which are declared and paid, the beneficiaries and the relevant annual budgets.<sup>31</sup>

### Renewals and transfers of existing rights

In contrast to existing mining rights, the continuing consequences of historical empowerment transactions will *not* apply when these rights are renewed by the existing mining holders or transferred to third parties.<sup>32</sup>

#### Renewal of existing mining rights

A renewal of an existing mining right will be subject to the requirements imposed under Mining Charter III at the time when the renewal application is submitted.<sup>33</sup> In terms of the current wording of the Charter, existing mining right holders will be required to meet the obligations imposed for new mining rights.

The onerous empowerment requirements for renewal applications appear to go further than those imposed under section 24 of the MPRDA (which regulates renewal applications).<sup>34</sup> By doing so, the Charter seeks to afford the Minister greater power when he decides whether or not to grant the renewal of an existing mining right. If the Minister exercises this power, his actions would be beyond his powers and accordingly unlawful.

Mining Charter III's failure to recognise historical BEE transactions for the purposes of renewal applications may also conflict with the April 2018 judgment of the Gauteng Division of the High Court in *Chamber of Mines v Minister of Mineral Resources & Others*.<sup>35</sup>

According to the judgment the MPRDA empowers the Minister to consider a mining right holder's empowerment credentials once: before the right is granted (or refused).<sup>36</sup> After the right is granted, the Minister may only re-evaluate a mining right holder's empowerment credentials if the mining right itself expressly obliges the mining right holder to continuously meet specific BEE threshold requirements (such as the 30 per cent BEE ownership requirement imposed under Mining Charter III).<sup>37</sup>

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27 See clause 2.1.4 of Mining Charter III.

28 See clause 4.3.3 of the Guidelines.

29 See clause 4.3 of the Guidelines.

30 Ibid.

31 Ibid.

32 See clause 2.1.1.4 of Mining Charter III.

33 See clause 2.1.1.6 of Mining Charter III.

34 Section 24 of the MPRDA does not empower the Minister to consider sections 2(d) and (f) of the MPRDA (the empowerment provisions) before granting a renewal application.

35 See *Chamber of Mines v Minister of Mineral Resources & Others* [2018] 2 All SA 391 (GNP).

36 See section 23(1)(h) of the MPRDA.

37 See *Chamber of Mines v Minister of Mineral Resources & Others* above at paragraph 102(2).

Conversely, the judgment provides that a mining right holder is only required to maintain a specific level of BEE ownership if this is a condition imposed under the mining right.

While the judgment considered the legal consequences of the 2010 Charter, the reasoning employed by the Court arguably finds application in the context of Mining Charter III as well. If so, the Minister (or his delegates) is seemingly not empowered to consider the BEE ownership credentials of an applicant for renewal when deciding whether or not to grant the application. If they do so, their decision to refuse an application might be unlawful and could be challenged in judicial review proceedings.

### Transfer of existing rights

The BEE ownership credentials of the transferor (seller) do *not* follow the mining right and are not imputed to the transferee (purchaser). Instead, the transferee must ensure that it complies with the relevant BEE ownership provisions of Mining Charter III.

It is not immediately clear whether the transferee would be entitled to rely on its existing BEE ownership credentials (if any) but it could be interpreted such that the transferee, regardless of its existing BEE ownership credentials, would be obliged to comply with the ownership requirements applicable to new mining rights (which are obviously more onerous). If the latter interpretation were to prevail, mining companies may well reconsider acquiring existing rights. This could ultimately result in reduced mergers and acquisitions activity in the mining sector.

Notably, clause 2.1.1.4 of the Charter is specific to the “transfer of a mining right” and is silent on the obligations regarding the sale of shares in the mining right holders.

### Pending applications

Where an application for a mining right was lodged and accepted prior to 27 September 2018, the Charter provides that the application must be processed in terms of the 2010 Charter. Such applicants must accordingly have a minimum 26 per cent BEE shareholding.

However, after the mining right is granted, the holder of the right must increase its BEE shareholding to a minimum of 30 per cent. The holder is required to do so once-off or progressively in accordance with the terms and conditions of the mining right within five years from the effective date of the right.

To remain compliant, the Guidelines indicate that such holders must also meet the carried interest allocations for employees and host communities.<sup>38</sup> This arises as the Guidelines stipulate that after the five year period, the holders in question are required to submit reports which provide the information required in Tables B, C, D, and E (i.e. the tables which new mining right holders must use). In doing so, the Guidelines impose requirements which go beyond those stipulated by the Charter. As the Guidelines are no more than that, they cannot interfere with statutory rights and duties and to the extent that they do so, they are unlawful.<sup>39</sup>

### Ownership structure

The minimum level of BEE shareholding may be met at holding company level, mining right level, on units of production, shares or assets. Where the BEE shareholding is met at any level other than mining right level, the flow-through principle will apply.

The Charter, however, does not make reference to the *modified flow through principle*, a concept recognised and implemented under the Broad-Based Black Economic Empowerment Act, 2003 and the Codes of Good Practice for the Mining Industry, 2007.

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38 This could be the case if regard is had to the Guidelines which provides that “qualifying employees through organised labour and host communities must co-sign the annual report...”; see clause 4.2 of the Guidelines. Notably, the 2010 Charter does not speak of “qualifying employees”. The Guidelines also do not impose similar obligations for existing mining right holders. Finally, it is not clear from the section whether the qualifying employees are required to sign the transitional reports, but this is seemingly not the case as the 2010 Charter does not provide for “qualifying employees”.

39 See C Hoexter 2012 Administrative Law (2ed) at 33.

## Disposal of BEE shareholding

A mining right holder's empowerment credentials are recognised for the duration of the mining right, where a BEE shareholding or part of it is disposed of below the prescribed minimum shareholding (30 per cent) provided that:

- the mining right holder complies with the requirements of Mining Charter III at the time of disposal;
- the BEE shareholder held the shares for a minimum period equal to a third of the duration of the mining right and an unencumbered net value must have been realised; and
- an agreement detailing exit mechanisms and the BEE shareholders' remaining financial obligations constituting a contract between the mining right holder and the BEE shareholders is submitted to the DMR.

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The disposal of shares and the exit of BEE shareholders should be reported on annually in accordance with the format prescribed by Table E of the Guidelines.<sup>41</sup>

The recognition of empowerment credentials only applies to the measured effective ownership which vested in the BEE shareholder. Moreover, the recognition of consequences of previous transactions cannot be claimed against future mining rights or mining right renewal applications, in these circumstances.<sup>42</sup>

## Beneficiation Offset

The beneficiation offset afforded to mining companies that undertake beneficiation activities is retained in Mining Charter III. It is, however, not available to licences or permits issued under the Diamonds Act, 1986 and the Precious Metals Act, 2005.<sup>43</sup> In addition, the eleven per cent permitted offset (provided for under the 2010 Charter) is reduced to five per cent and may only be claimed against a maximum of five per cent of the BEE Entrepreneur shareholding.

To qualify for the offset, the mining right holder must submit a beneficiation equity equivalent plan with the Minister<sup>44</sup> as well as meet the criteria set out in the Guidelines.<sup>45</sup> The Minister, in turn, must consider and approve the plan within sixty days from the date of the submission.<sup>46</sup>

To calculate the percentage set off to which the holder is entitled, the value of the beneficiation activities which were conducted *before* and *after* the commencement of Mining Charter III must be considered. This value, in turn, must be converted into a percentage of the mining right holder's ownership equity (defined as the holder's company or assets)<sup>47</sup> which is then used to calculate the beneficiation offset.

The Charter also provides that existing holders which "claimed" the 11 per cent offset prior to its commencement, retains the offset for the duration of the right. It is unclear how such holders will be able to do so as the 2010 Charter did not provide a mechanism for calculating the percentage offset. Moreover, even if such a "claim" was recognised it is unlikely that this off set would extend to the renewal of a mining right.

To qualify for the beneficiation offset, mining right holders must annually submit reports which provide the information stipulated under Table F of the Guidelines. The report should also follow the format prescribed by Table F.

## 3.2 Procurement

Mining Charter III retains the distinction between mining goods and mining services.

40 See clause 2.1.6 of Mining Charter III.

41 See clause 4.3.4 of the Guidelines.

42 See clause 2.1.6.2 of Mining Charter III.

43 See clause 10.1.4 of the Guidelines.

44 See clause 2.1.7.1.4 of the Mining Charter.

45 See clause 4.4.3 of the Guidelines.

46 See clause 4.4 of the Guidelines.

47 See clause 4.4.4 of the Guidelines.



To achieve inclusive procurement, supplier and enterprise development mining right holders are obliged to identify all goods and services they require to conduct their operations and ensure that the procurement policies adhere to the thresholds prescribed under the Charter. They are also required to report on their consumption annually. To assist mining right holders, the Guidelines prescribe the formulas which they must use to calculate the percentage local content of specific goods and services, their scores in respect of each budget category, their scorecard scores as well as the templates which they must use to report on their performance annually.<sup>48</sup> These are contained in Tables H and I of the Guidelines.

### Mining Goods

A minimum of 70 per cent of total mining goods procurement spend (including non-discretionary expenditure, but excluding profit mark-up, intangible value and overheads<sup>49</sup>)<sup>50</sup> must be on “South African manufactured goods”, which are defined as:<sup>51</sup>

*goods with a minimum of 60 per cent local content during the assembly or manufacturing of the product in South Africa.*<sup>52</sup>

The 70 per cent of total mining goods procurement spend must be apportioned as follows:<sup>53</sup>

- 21 per cent to be spent on South African manufactured goods produced by Historically Disadvantaged Persons (**HDP**) owned and controlled companies;
- Five per cent to be spent on South African manufactured goods produced by women or youth owned and controlled companies; and
- 44 per cent to be spent on South African manufactured goods produced by BEE compliant companies.<sup>54</sup>

Up to 30 per cent of the procurement budget on mining goods may be set off against supplier development. To qualify for this offset, the enterprise or supplier development activities must be quantifiable in a monetary value<sup>55</sup> and conducted pursuant to a formal written agreement between the right holder and the recipient of the benefit.<sup>56</sup>

In terms of the Guidelines, supplier development undertaken by original equipment manufacturers (**OEMs**) will only be recognised if the OEMs are owned and controlled by HDPs, women, the youth or are BEE compliant companies.

### Mining Services

A minimum of 80 per cent of the total spend on services (including non-discretionary expenditure) must be sourced from South African companies.

The 80 per cent must be allocated as follows:

- 50 per cent must be spent on services supplied by HDP owned and controlled companies;
- 15 per cent must be spent on services supplied by women owned and controlled companies;

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48 See clause 5 [Procurement] of the Guidelines.

49 Overhead costs that are major cost drivers for producing mining goods (such as electricity) may, however, be included in the calculation of the sale price as they are direct overhead costs. These costs must be apportioned through the products produced. See clause 5.2.3 of the Guidelines.

50 See clause 5.2.2 of the Guidelines.

51 See the Definitions in Mining Charter III at 11.

52 The Guidelines, in this regard, provide a formula which holders must use to calculate the percentage local content of specific mining goods.

53 See clause 2.2.1 of Mining Charter III and clause 5.5 of the Guidelines.

54 “BEE Compliant Company” means a company with a minimum B-BBEE level 4 status in terms of the Department of Trade and Industry’s Broad-Based-Black Economic Empowerment Codes of Good Practice, and minimum 25% + 1 vote ownership by Historically Disadvantaged Persons. See the Definitions in Mining Charter III at 8.

55 See clause 5.8.4 of the Guidelines.

56 See clause 5.8.5 of the Guidelines.

- 5 per cent must be spent on services supplied by youth owned and controlled companies; and
- 10 per cent must be spent on services supplied by BEE compliant companies.

Up to 10 per cent of the procurement budget on services may be offset against supplier development. The requirements for mining goods indicated above also apply to supplier and enterprise development for services.

**Contractors and inclusive procurement<sup>57</sup>**

The mining goods and services used by contractors are deemed to be used by the mining right holder, where the holder in question uses a contractor to undertake extraction and or processing of minerals on its behalf. To remain compliant, these holders must include data from the procurement spend of their contractors when they report on the procurement element.

**Transitional arrangements**

The procurement targets must be complied with progressively within a period of five years (of the Charter commencing)<sup>58</sup> and a mining right holder must within six months from 27 September 2018 submit a five year plan indicating how it intends to achieve these targets.

The targets applicable to the transitional period are as follows:

	MINING GOODS (PER CENT OF PROCUREMENT BUDGET)	MINING SERVICES (PER CENT OF PROCUREMENT BUDGET)
YEAR 1	10	70
YEAR 2	20	80
YEAR 3	35	80
YEAR 4	50	80
YEAR 5	70	80

**Additional obligations**

A mining right holder must:

- spend at least 70 per cent of its total research and development budget on South African based research and development entities, either in the public or private sector. This should be reported on annually in accordance with the requirements imposed under Table L of the Guidelines;<sup>59</sup> and
- use South African based companies for 100 per cent of mineral sample analysis across the mining value chain (unless the Minister provides prior written consent to use foreign companies). This should be reported on annually in accordance with the requirements imposed under Table M of the Guidelines.<sup>60</sup>

It is unclear whether the latter two categories of expenditure are meant to be included in or additional to the right holder’s total “discretionary” expenditure on services.

**Verification of local content**

To ensure that the mining goods in question meet the prescribed thresholds Mining Charter III<sup>61</sup> and the Guidelines indicate that the South African Bureau of Standards (**SABS**) should verify the local content

57 See clause 5.7 of the Guidelines.

58 See clause 8 of Mining Charter III.

59 See clause 2.2.5 of Mining Charter III and clause 5.10 of the Guidelines.

60 See clause 2.2.6 of Mining Charter III and clause 5.11 of the Guidelines.

61 See clause 2.2.3 of Mining Charter III.

percentage.<sup>62</sup> The costs resulting from this process must be borne by the relevant mining right holders or suppliers.<sup>63</sup>

Verification certificates from SABS will, however, not be required during the first two years of the transitional period.<sup>64</sup>

It is not clear what, if any, discussions the DMR has had with the SABS in this regard. SABS, however, does not appear to be under any legal obligation to provide mining companies (or suppliers) with this certification.

It is relevant, in this regard, that in July 2018 the Minister of Trade and Industry dissolved the SABS board and placed it under administration in terms of section 49(2) of the Public Finance Management Act, 1999.<sup>65</sup> This action by the Minister of Trade and Industry suggests that the SABS is not in a position to carry out its existing mandates let alone the additional responsibilities set out in the Charter.

### South Africa's international trade law obligations

As we previously cautioned,<sup>66</sup> the local content requirements imposed by Mining Charter III may violate South Africa's international obligations under the General Agreement on Tariffs and Trade (**GATT**) and the General Agreement on Trade in Services (**GATS**).<sup>67</sup>

- Under the GATT, South Africa is obliged to afford imported products “treatment no less favourable than that accorded to like products of national origin”, and thus not to apply any regulatory measures that afford preference or protection to domestic products over imported products.<sup>68</sup> Under Mining Charter III, however, right holders will be unable to procure any more than 30 per cent of their mining goods from foreign suppliers. This clearly affords domestic producers a significant advantage over foreign competitors.
- Similarly, under the GATS, South Africa is obliged to afford foreign service providers “treatment no less favourable than domestic suppliers”.<sup>69</sup> Under Mining Charter III, however, right holders will be precluded from contracting any more than 20 per cent of their services from foreign suppliers. The imposition of quotas of procurement from domestic suppliers with specific empowerment profiles potentially also violates the GATS's specific prohibitions on measures that limit foreign capital participation in service sectors,<sup>70</sup> and measures that restrict or require specific types of legal entities or joint ventures through which a supplier may supply a service.<sup>71</sup>

While a breach of either the GATT or GATS will not directly impact right holders, it could make South Africa vulnerable to challenges by other member states of the World Trade Organisation (**WTO**). If the implementation of Mining Charter III places South Africa in breach of its obligations under the GATT and GATS, it will either have to negotiate a modification of those obligations or face the risk of a referral to the WTO's Dispute Settlement Body (**DSB**).

In the case of the former, South Africa will have to tender necessary “*compensatory adjustments*” for its failure to extend the necessary protection to investors from other member states, which could result in other sectors of the economy being deprived of protections afforded by the GATT and GATS.<sup>72</sup> If the matter is referred to

62 Verification certificates will not be required for the first two years of the transitional period. See clause 5.4 of the Guidelines.

63 Ibid.

64 See clause 5.4.4 of the Guidelines.

65 The board was dissolved owing to a lack of service delivery and a failure to perform its mandate. See SA: South African Bureau of Standards placed under administration issued by the Department of Trade and Industry on 6 July 2018 which is available online at <http://www.polity.org.za/article/sa-south-african-bureau-of-standards-placed-under-administration-2018-07-06>.

66 A copy of our 4 July 2018 Brief entitled “South Africa: Mining Charter III” is available online at <https://www.herbertsmithfreehills.com/south-africa-mining-charter-iii>.

67 On 1 January 1995 South Africa became a signatory of the Marrakesh Agreement Establishing the World Trade Organisation and by doing so also became a party to the GATT and GATS.

68 Article III(1) and (4) of the GATT.

69 Article XVI(1) of the GATS.

70 Article XVI of the GATS.

71 Article XVI(2) of the GATS.

72 Article XXI of the GATS and Article XVIII Section A of the GATT.

the DSB, some or all of South Africa's rights under the GATT and GATS could be suspended until the dispute is resolved.<sup>73</sup> Predictably, such a suspension could have a severe impact on the entire economy and not simply the mining industry.

### 3.3 Employment Equity

A right holder must meet the following minimum thresholds of Historically Disadvantaged Persons (**HDPs**), reflective of the provincial or national demographics, at different levels of employment:

- **board:** 50 per cent HDPs with proportional exercisable voting rights, 20 per cent of whom must be women;
- **executive management:** 50 per cent HDPs, 20 per cent of whom must be women;
- **senior management:** 60 per cent HDPs, 25 per cent of whom must be women;
- **middle management:** 60 per cent HDPs, 25 per cent of whom must be women;
- **junior management:** 70 per cent HDPs, 30 per cent of whom must be women;
- **core and critical skills** (i.e. science, technology, engineering and mathematical skills, across all organisational levels): 60 per cent HDPs; and
- **employees with disabilities** must make up at least 1.5 per cent of all employees.

To ensure that mining right holders progressively realise these requirements the Guidelines provide that they must submit a five year employment equity plan, which must be approved by the "Regulator" (which is neither defined nor identified).<sup>74</sup> Mining Charter III, furthermore, provides that they must also develop and implement a career progression plan which among other things must include individual development plans for employees.<sup>75</sup>

The annual reporting requirements in this regard are extensive. According to the Guidelines the information provided must be broken down "into the finest detail" and include all information relating to their employees' race, gender, remuneration and career development at each occupation level.<sup>76</sup> The information should be presented in accordance with the formats prescribed under Tables T, U and V.

The Guidelines also prescribe a method to calculate the employment equity scoring for junior miners, precious metals jewellers, precious metals beneficiators, diamond beneficiators, diamond dealers and precious metals refiners that do not have all the management levels identified in Mining Charter III. These require weighting of only the employment categories relevant to the junior miners, precious metals jewellers, precious metals beneficiators, diamond beneficiators, diamond dealers and precious metals refiners.<sup>77</sup>

### 3.4 Other Obligations

#### Human Resource Development

A mining right holder must invest a minimum five per cent of the "*leviable amount*"<sup>78</sup> (excluding the mandatory statutory skills levy) on essential skills development activities. These activities include science, technology, engineering, mathematics skills, graduate training programmes and research and development solutions. Mining right holders must annually report on their compliance with this element in accordance with the requirements stipulated in Tables Q and R of the Guidelines.

#### Mine Community Development

A right holder must consult with relevant municipalities, mine communities, traditional authorities and other affected stakeholders to identify developmental priorities for the mine-affected communities.

<sup>73</sup> Article XXIII of the GATS.

<sup>74</sup> See clause 8 of the Guidelines which stipulate the information which must be provided as well as the format of the document.

<sup>75</sup> See clause 2.4.8 of Mining Charter III.

<sup>76</sup> See clause 8 of the Guidelines, specifically tables 8.1, 8.2 and 8.3.

<sup>77</sup> See clause 8.5 of the Guidelines.

<sup>78</sup> As defined in the Skills Development Levy Act, 1999.

These must then be included in the holder's Social and Labour Plan, which, once approved, must be published in English and one or two other languages commonly used within the mine community. The approved Social and Labour Plan must, in turn, be reviewed every five years for the duration of the mining right. The mining right holder must do so in consultation with affected mine communities, adjacent communities, labour sending areas, local or district municipality and tribal authorities.<sup>79</sup>

To remain compliant, holders are obliged to implement 100 per cent of the commitments stipulated in their Social and Labour Plans in any given financial year.<sup>80</sup>

Mining right holders must annually report on their compliance with this element in accordance with the requirements stipulated in Table S of the Guidelines.

### Housing and Living Conditions

Mining companies must improve the standards of housing and living conditions for mineworkers as indicated in the Housing and Living Conditions Standard for the Mining and Mineral Industry.

A right holder must submit a Housing and Living Conditions Plan, which must be approved by the DMR after consultation with organised labour and the Department of Human Settlements.

Mining right holders must annually report on their compliance with this element in accordance with the requirements stipulated under Table W of the Guidelines.

## 3.5 Downstream Diamonds and Precious Metals Industries

A minimum of 26 per cent of the downstream diamonds and precious metals jewellers' and diamond beneficiators' shares must be held by HDPs, which must be distributed as follows:<sup>81</sup>

- a minimum of ten per cent must be held by qualifying employees from the effective date of the licence or permit, of which five per cent must be a non-transferable carried interest; and
- a minimum of 16 per cent shares must be held by BEE entrepreneurs.

In turn, 30 per cent of diamond dealers' and precious metals refiners' shares must be held by BEE shareholders as follows:<sup>82</sup>

- a minimum of ten per cent by qualifying employees (from the effective date of the licence or permit) of which five per cent must be a non-transferable carried interest; and
- a minimum of 20 per cent shares by BEE entrepreneurs.

The flow through principle will apply where a refiner is also a mining right holder and claims the same BEE shareholders as those claimed under the mining right.<sup>83</sup>

Mining Charter III provides for the specific application of certain of the *elements* of the Charter with variations and exemptions subject to the turnover of the licence holder. Enterprises with a turnover of more than ZAR 50 million must comply with the Charter in its entirety.<sup>84</sup>

Similar to mining right holders, the holders of permits or licences granted in terms of the Diamonds Act, 1986 and the Precious Metals Act, 2005 must submit reports annually which indicate the extent to which they have met the requirements of Mining Charter III.<sup>85</sup> Existing permit or license holders and holders of licences issued pursuant to a pending application are required to report annually on compliance with the 2010 Charter.<sup>86</sup>

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79 See clause 7.3 of the Guidelines.

80 See clause 2.5 of Mining Charter III.

81 See clause 4.5.1.2 of Mining Charter III.

82 See clause 4.5.1.3 of Mining Charter III.

83 See clause 4.5.1.4 of Mining Charter III.

84 See clause 4 of Mining Charter III.

85 Existing permit or license holders and holders of licenses issued pursuant to a pending application are required to report annually on compliance with the 2010 Charter. See clause 10.1 of the Guidelines.

86 See clause 10.1 of the Guidelines.

Existing permits or licences which are due for renewal within a period of six months from the date of publication of Mining Charter III must comply with Mining Charter III within a period of twelve months from the date of renewal of the licence or permit.<sup>87</sup>

A holder of a Diamond Dealers licence or a Refining Licence must increase its BEE shareholding from the minimum 26 per cent to 30 per cent once off or progressively within the twelve months transitional period after which they must comply with the requirements of Mining Charter III.<sup>88</sup>

In addition, licence or permit holders must submit five year plans for industry related enterprise development and a five year Employment Equity Plans, which must be approved by the South African Diamonds and Precious Metals Regulator.

Finally, all licence and permit holders are obliged to annually report on their compliance with the terms imposed under the Mining Charter. The reports must include the same information and adopt the formats as provided under the Guidelines and prescribed for mining right holders.

### 3.6 Junior Miners

Mining Charter III creates a specific regime for junior miners, which will apply to mining rights granted after 27 September 2018.

Junior miners with an annual turnover of less than ZAR10 million are *exempt* from complying with the employment equity requirements when there are fewer than ten employees, and are exempt from complying with the “inclusive procurement, enterprise and supplier development” requirements.

Junior miners with an annual turnover of between ZAR10 million and ZAR150 million must comply with the employment equity requirements at group level as well as the inclusive procurement, Human Resource Development and Mine Community Development requirements.

The ownership requirement for all junior miners with an annual turnover of less than ZAR150 million, is described as “undefined” in the Charter. The Guidelines indicate that “undefined ownership” refers to “the attainment of the minimum 30 per cent BEE shareholding distributed to all BEE shareholders without following the percentages prescribed in Mining Charter III”.<sup>89</sup> Seemingly, junior miners are obliged to have a 30 per cent BEE shareholding, but they are not compelled to allocate specific proportions of this to BEE entrepreneurs, host communities or qualifying employees.

### 3.7 Compliance Framework

#### Non-compliance

In terms of clause 9 of the Charter, a mining right holder will be regarded as in breach of the obligations imposed under the MPRDA if s/he fails to comply with the ownership and mine community development elements *and* falls between levels 6 and 8 of the Scorecard. If so, the holder in question will be subject to the provisions of section 93 [Orders, suspensions instructions], read with sections 47 [Minister’s power to suspend or cancel rights, permits or permissions], 98 [Offences] and 99 [Penalties] of the MPRDA.

A licence or permit holder who has not complied with the ownership and enterprise development elements shall, likewise, be in breach of the Diamonds Act, 1986 or the Precious Metals Act, 2005 and subject to the relevant provisions of the Diamonds Act, 1986 or the Precious Metals Act, 2005.<sup>90</sup>

It is questionable whether this clause is lawful and remains to be seen whether the Minister and DMR will be able to rely on its terms.

Section 47 grants the Minister the power to cancel or suspend a mining right if the holder (among other) conducts its mining operations in a manner which contravenes the provisions of the MPRDA or breaches any material term or condition of the right or concomitant environmental authorisation. Section 93, likewise,

87 Clause 8.8 of the amendment to Mining Charter III.

88 See clause 10.1.2 of the Guidelines.

89 See clause 11 of the Guidelines.

90 See clause 4 of the amendment to Mining Charter III.



concerns instances where a mining right holder contravenes or is suspected of contravening the obligations imposed under the MPRDA,<sup>91</sup> any term or condition of any right, permit or permission granted in terms of the MPRDA,<sup>92</sup> or an environmental authorisation.<sup>93</sup>

As the provisions of the MPRDA do not expressly compel a mining right holder to comply with the obligations imposed under the Charter, a mining right holder does not automatically commit an offence under the MPRDA or breach the terms of the mining right if s/he fails to comply with terms of the Charter. The obligations will only be binding if a term of the mining right requires the holder to do so. If not, neither the Minister nor any of his delegates are empowered to suspend or cancel a mining right where a mining holder fails to comply with the terms of the Charter.<sup>94</sup>

## 4. Legality of Mining Charter III

Subsequent to the publication of the 2010 Charter, the Minerals Council of South Africa (formerly the South African Chamber of Mines) (**Minerals Council**), approached the High Court and requested it to issue a declaratory order in respect of the empowerment obligations of mining rights holders.<sup>95</sup> Specifically, the Minerals Council requested the Court to confirm:

*Whether a mining company has a perpetual and recurring obligation to meet a 26 per cent ownership target after the grant of a mining right or the conversion of an old order mining right?*<sup>96</sup>

In response, the Court ruled that:

- section 100(2) of the MPRDA affords the Minister a single opportunity to develop a broad-based socio-economic empowerment Charter (within six months from the date on which the Act takes effect).
- the charter referred to under section 100(2) was published on 13 August 2004 in the form of the Original Charter.
- the provisions of the MPRDA do not provide that the charter referred to under section 100(2) will have any binding effect. The Original Charter accordingly finds application and legal significance in an indirect manner only through application of the sections of the MPRDA that refer to it.<sup>97</sup> Section 23 is an important provision in this regard, as it empowers the Minister to consider whether the granting of the mining right will "further the objects referred to in sections 2(d) and (f) [of the MPRDA] and is in accordance with the charter contemplated in section 100". Section 23(6) of the MPRDA is also significant as it provides that a mining right is subject to "the terms and conditions stated in the right".
- mining right holders are required to comply with the terms of the Original Charter when they apply for a mining right<sup>98</sup> and if the terms of the mining right compel them to do so.<sup>99</sup>
- a mining right holder is only obliged to maintain a certain level of BEE shareholding if a term of the mining right requires it to do so.

91 See section 93(1)(a) of the MPRDA.

92 See section 93(1)(b) of the MPRDA.

93 Ibid.

94 This view is supported by the High Court's decision in *Chamber of Mines v Minister of Mineral Resources & Others* see above at paragraphs 91 to 102 as well as 109(2). While the Court in *Chamber of Mines v Minister of Mineral Resources & Others* was requested to make a finding in respect of the Original and 2010 Charters it is very likely that another court would make a similar finding if it was requested to hand down judgement in respect of the legal consequence arising from the failure to comply with the obligations imposed under Mining Charter III.

95 See *Chamber of Mines v Minister of Mineral Resources and Another* above at paragraph 12.

96 See *Chamber of Mines v Minister of Mineral Resources and Another* above at paragraph 13.

97 See *Chamber of Mines v Minister of Mineral Resources and Another* above at paragraph 81.

98 See section 23 of the MPRDA as well as *Chamber of Mines v Minister of Mineral Resources and Another* above at paragraph 86.

99 See section 23(6) of the MPRDA as well as *Chamber of Mines v Minister of Mineral Resources and Another* above at paragraph 88.

- the same position applies to the obligations imposed under the 2010 Charter.<sup>100</sup>

While the Court's decision concerned the Original and 2010 Charters, it may hold significant consequences for Mining Charter III.

First, it may be possible to argue that the Charter (like its predecessor) does not create legally binding and enforceable obligations unless the terms of the mining right obliges the holder to do so.

Second, it should be questioned whether the Minister is lawfully empowered to review and revise the terms of the Charter, which clause 10 of the Charter empowers him to do.<sup>101</sup> In the Court's view, section 100(2) – the provision in the MPRDA which empowered the former Minister to publish the Original Charter – does not empower the Minister to review or revise the terms of Mining Charter III.

Independent of the legal questions, the Minister's seemingly unrestricted ability to revise the obligations imposed under the Charter at will,<sup>102</sup> will likely also have significant consequences for security of tenure as it promotes regulatory uncertainty.

Stability, certainty and predictability of a regulatory framework (including security of tenure) are indispensable requirements for investment in mining, which is a high risk, capital intensive industry with long lead times from prospecting to production.

To address some of the concerns surrounding security of tenure, a number of African mining jurisdictions (particularly Francophone jurisdictions such as Mali, Guinea and Congo-Brazzaville) have introduced clauses into agreements with investors, which stabilise the regulatory environment and protect the latter against sudden regulatory changes over the life of a project. Examples of such clauses include constraints on unilateral changes, balancing clauses (also known as economic stabilisation clauses) and allocation of burden clauses (which seek to allocate the fiscal and related burdens created by a unilateral change in the law).

In addition, the Organisation for Economic Co-operation and Development (OECD)<sup>103</sup> recommends that Governments and investors conclude agreements which include defined renegotiation provisions, clauses that prohibit arbitrary and discriminatory treatment of investors, and clauses which move from stabilization to predictability (such as agreeing to predetermined yet variable levels of local content).

To attract further and better foreign direct investment South Africa should follow suit.

Finally, the DMR should have regard to the principles provided under the Tenth Schedule of the Income Tax Act, 1962 which promotes fiscal stability for companies embarking on oil and gas activities in South Africa.

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100 See *Chamber of Mines v Minister of Mineral Resources and Another* above at paragraph 94 to 105. The Court also questioned whether section 100(2) of the MPRDA empowers the Minister to amend and publish revised versions of the “broad-based socio-economic empowerment Charter that will set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry”. In the Court's view (see paragraph 86) the Minister complied with the duty imposed upon her/him when the Original Charter was published. The Original Charter accordingly is “the charter contemplated in section 100” and not the 2010 Charter.

101 It is an accepted principle of constitutional law that the Minister does not have the ability to create his own powers. The powers afforded to the Minister under clause 10 might therefore be unlawful and unconstitutional to the extent that it affords the Minister greater powers than provided for under section 100 of the MPRDA.

102 Clause 10 of the Charter provides that the Minister may by publication in the Government Gazette revise the terms of the Charter.

103 OECD “IGF/OECD Program on Tax Base Erosion and Profit Shifting in the Mining Sector” Intergovernmental Forum on Mining, Minerals, Metals and Sustainable development (Paris, 25 June 2018).

## 5. Annex: Comparison of the obligations imposed under the 2010 Charter and Mining Charter III

ELEMENTS	MINING CHARTER (2010)	MINING CHARTER III (2018)
OWNERSHIP		
BY WHOM?	<i>HDSA</i> : any SA citizens disadvantaged by unfair discrimination before 1994.	<i>BEE shareholding</i> : refers to shares held by BEE Entrepreneurs, host communities and qualifying employees.  <i>BEE Entrepreneurs</i> : Historically Disadvantaged Persons (HDP) (as defined under the MPRDA) or enterprises which are owned by at least 51 per cent HDPs who hold 51 per cent voting right and 51 per cent interest in the entity.  <i>Host Communities</i> : communities adjacent to the mining area (as defined under the MPRDA).  <i>Qualifying Employees</i> : persons employed by a mining company (excluding those persons who already hold shares in the mining company as a condition of their employment).
HOW MUCH?	At least 26 per cent HDSA ownership in mining companies to enable meaningful economic participation of HDSAs by 2014.	<u>New mining rights</u> New mining rights must be held by entities with a minimum 30 per cent BEE shareholding.  At a minimum, 5 per cent of the shares must be owned by Host Communities and 5 per cent by Qualifying Employees (or a minimum of 5 per cent Equity Equivalent benefit must be granted to host communities from the effective date of a mining right). The shares owned by the Host Communities and Qualifying Employees must be in the form of a "non-transferable carried interest".  The remaining 20 per cent of shares must be owned by BEE Entrepreneurs.  <u>Existing rights</u> Holders of existing mining rights which complied with the ownership obligations of the 2010 Charter are recognised as fully compliant for the duration of the right. This includes instances where the 26 per cent BEE shareholding threshold was met prior to the publication of

		<p>Mining Charter III but the BEE shareholders have since exited.</p> <p>Historic empowerment transactions will not be recognised when existing mining rights are transferred or renewed.</p>
<b>PERMITTED OFFSETS</b>	<p>Mining companies may offset the value of beneficiation against a portion of its HDSA ownership requirements not exceeding 11 per cent.</p>	<p>A mining right holder may claim the equity equivalent against a maximum of 5 percentage points of a BEE Entrepreneur shareholding.</p> <p>Where a mining right holder claimed the 11 per cent beneficiation offset before Mining Charter III was published, that holder retains the offset for the duration of the mining right.</p>
<b>ONCE EMPOWERED ALWAYS EMPOWERED</b>	<p>Continuing consequences of all previous transactions concluded prior to the MPRDA included in calculating credits/off sets in terms of market share measured as attributable units of production.</p> <p>No specific requirement to re-empower after the exit of HDSA shareholders.</p>	<p>The continuing consequences of historical empowerment transactions are recognised to establish if an existing mining right holder meets Mining Charter III's ownership requirements.</p> <p>Continuing consequences shall include all historical transactions concluded at holding company level, mining right level, units of production, shares or assets including all historical BEE transactions which formed basis upon which new order mining rights were granted.</p> <p>The continuing consequences of historic empowerment transactions will not be recognised when existing mining rights are transferred or renewed or when a mining right holder applies for a new mining right.</p>
<b>PROCUREMENT FROM WHOM?</b>	<p><i>BEE entities:</i> entities having 25 per cent plus 1 vote of share capital directly owned by HDSA.</p> <p>Multinational suppliers contributing at least 0.5 per cent of annual income from local mining companies to a social development fund.</p>	<p><i>HDP owned and controlled companies, BEE compliant companies, and women and youth owned and controlled companies.</i></p> <p><i>BEE compliant company:</i> a company with a minimum B-BBEE level 4 status in terms of the DTI's B-BBEE Codes of Good Practice, and a minimum of 25 per cent plus 1 vote ownership by HDPs.</p> <p><i>Women owned and controlled company:</i> entity in which South African women hold at least 51 per cent of the exercisable voting rights and economic interest.</p>

<p>HOW MUCH?</p>	<p><i>Capital goods:</i> At least 40 per cent from BEE entities.</p> <p><i>Consumer goods:</i> At least 50 per cent from BEE entities.</p> <p><i>Services:</i> At least 70 per cent from BEE entities.</p> <p><i>Sample Analysis:</i> No obligation.</p>	<p><i>Youth:</i> young South African citizens between the ages of 18 to 35 years based on national or provincial demographics or juristic persons managed and controlled by such persons.</p> <p><i>Mining goods:</i> 70 per cent of total mining goods procurement spend must be on South African manufactured goods of which (a) 21 per cent must be allocated to HDP owned and controlled companies; (b) 5 per cent on women owned or youth owned and controlled company; and (c) 44 per cent on BEE compliant companies.</p> <p><i>Services:</i> 80 per cent of total spend on services must be sourced from South African based companies of which (a) 50 per cent must be spent on HDP owned and controlled company, (b) 15 per cent on women owned and controlled companies, (c) 5 per cent on youth owned and controlled companies, and (d) 10 per cent on BEE compliant companies.</p> <p>A mining right holder may invest in enterprise and supplier development which may be offset against the local content obligations: (a) up to 30 per cent of the total procurement budget on mining goods, and (b) up to 10 per cent of the total procurement budget on services.</p> <p><i>Sample analysis:</i> 100 per cent of all mineral samples across the mining value chain must be analysed by South African based facilities. Foreign-based facilities may only be used if the Minister provides his consent in writing.</p>
<p><b>EMPLOYMENT EQUITY</b></p> <p>FOR WHOM?</p> <p>HOW MUCH?</p>	<p>HDSA</p> <ul style="list-style-type: none"> <li>• Board: n/a</li> <li>• Executive management: 40 per cent</li> <li>• Senior management: 40 per cent</li> <li>• Middle management: 40 per cent</li> <li>• Junior management: 40 per cent</li> </ul>	<p>HDP (meaning that white women and disabled persons are recognised).</p> <ul style="list-style-type: none"> <li>• Board: 50 per cent HDP, of which 20 per cent must be women</li> <li>• Executive management: 50 per cent HDP, of which 20 per cent must be women</li> </ul>

	<ul style="list-style-type: none"> <li>• Core &amp; critical skills: 40 per cent</li> </ul>	<ul style="list-style-type: none"> <li>• Senior management: 60 per cent HDP, of which 25 per cent must be women</li> <li>• Middle management: 60 per cent HDP, of which 25 per cent must be women</li> <li>• Junior management: 70 per cent HDP, of which 30 per cent must be women</li> <li>• Core &amp; critical skills: 60 per cent HDP</li> <li>• Employees with disabilities must make up at least 1.5 per cent of all employees.</li> </ul>
<p><b>SOCIAL CONTRIBUTIONS</b></p> <p>HUMAN RESOURCES</p> <p>COMMUNITY DEVELOPMENT</p> <p>HOUSING AND LIVING CONDITIONS:</p>	<p>Invest 5 per cent of annual payroll in essential skills development.</p> <p>Contribute to community development "proportionate to the size of the investment".</p> <p>Facilitate home ownership options.</p>	<p>Invest 5 per cent of leviable amount (excluding the statutory skills development levy) on essential skills development such as science, technology, engineering, mathematics skills, graduate training programmes and research and development solutions.</p> <p>A right holder must consult with relevant municipalities, mine communities, traditional authorities and other affected stakeholders to identify developmental priorities for the mine-affected communities.</p> <p>These must then be contained in the holder's Social and Labour Plan, which, once approved, must be published in English and one or two other languages commonly used within the mine community.</p> <p>This element of Mining Charter III requires one hundred per cent compliance.</p> <p>Mining companies must improve the standards of housing and living conditions for mine workers as stipulated in the Housing and Living Conditions Standard for the Mining and Mineral Industry.</p> <p>A mining right holder must submit a Housing and Living Conditions Plan, which must be approved by the DMR after consultation with organised labour</p>



		and the Department of Human Settlements.
<b>PRECIOUS METALS AND DIAMOND SECTOR</b>	No specific requirements in the 2010 Charter although the Diamonds Act, 1986, and Precious Metals Act, 2005, requires the Regulator to have regard to the requirements in the 2010 Charter before issuing a licence.	<p>HDPs must own 26 per cent of downstream diamonds and precious metals jewellers' and diamond beneficiaries' shares, of which (a) 10 per cent of the shares must be owned by qualifying employees (half of which must be non-transferable carried interest), and (b) 16 per cent must be owned by BEE entrepreneurs.</p> <p>In turn, 30 per cent of diamond dealers' and precious metals refiners' shares must be owned by BEE shareholders, of which (a) 10 per cent must be owned by qualifying employees (half of which must be a non-transferable carried interest), and (b) 20 per cent of shares must be owned by BEE entrepreneurs.</p> <p>The flow through principle will apply where a refiner is also a mining right holder and claims the BEE shareholding claimed under the mining right.</p>
<b>SANCTIONS FOR NON-COMPLIANCE</b>	Non-compliance with the provisions of the Charter and the MPRDA shall render the mining company in breach of the MPRDA and subject to the provisions of section 47 read with sections 98 and 88 of the MPRDA.	<p>If a mining right holder fails to comply with the ownership and mine community development elements and falls between levels 6 and 8 of the Scorecard, he, she or it will be regarded as in breach of the obligations imposed under the MPRDA, and subject to the provisions of section 93, read in conjunction with sections 47, 98 and 99 of the MPRDA.</p> <p>A licence or permit holder who has not complied with the ownership and enterprise development elements shall be in breach of the Diamonds Act, 1986 or the Precious Metals Act, 2005 and subject to the relevant provisions of the Diamonds Act, 1986 or the Precious Metals Act, 2005.</p>

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