

Draft Mining Charter would restructure BBBEE transactions in the South African mining industry

May 2016

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On 15 April 2016, the Department of Mineral Resources (“**DMR**”) published the draft Reviewed Broad Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 (“**Draft Mining Charter**”) for comment. The Draft Mining Charter seeks to align its predecessor to the provisions of the recent amendments, effective from 1 May 2015, to the codes of good practice (“**BBBEE Codes**”) issued by the Department of Trade and Industry under the Broad-Based Black Economic Empowerment Act, 2003 (“**BBBEE Act**”). However, the revised requirements of the Draft Mining Charter, while providing clarity in certain respects, also introduce certain possibly unforeseen implications for broad-based black economic empowerment (“**BBBEE**”) in the South African mining industry.

Background

The mining industry was at the fore of legislation when the post-1994 South African government introduced BBBEE policies aimed at addressing social and economic injustice created by past South African policies, particularly apartheid. The Broad Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (“**Mining Charter**”) was first issued in 2004 under the Mineral and Petroleum Resources Development Act, 2002 in order to advance the participation of historically disadvantaged South Africans in the mining industry.

The current BBBEE Codes, issued in 2007, set out detailed BBBEE targets to be met by enterprises operating businesses in South Africa, including the target of 26% ownership by black people (as defined in the BBBEE Act) in the enterprise.

Given that the Mining Charter predates the BBBEE Codes and notwithstanding previous amendments in 2010, it is not as comprehensive or as clear as the BBBEE Codes and, more importantly, it is silent on whether the ownership target is required to be maintained permanently in cases where, *inter alia*, existing black participants in an entity holding mining rights have disposed of their interest in such entity.

Under the latest amendment to the BBBEE Act, effective from 24 October 2015, the BBBEE Act and BBBEE Codes prevail over any prior law in force in relation to a matter dealt with in the BBBEE Act. Accordingly, amendments to the Mining Charter after this date should seek to align the Mining Charter to the terms of the BBBEE Codes. Alternatively, the BBBEE Act grants the Minister of Trade and Industry the power to exempt an organ or state, or allow it to deviate from, the BBBEE Codes.

Proposed changes

The Draft Mining Charter retains the minimum target of 26% participation by workers, entrepreneurs and the community and incorporates other principles contained in the BBBEE Codes, including: (i) the recognition of a non-equity contribution (limited to ‘beneficiation’ of minerals in South Africa) which could be off-set against up to 11% of the total 26% ownership target; (ii) the use of terminology from the BBBEE Act, for instance, referring to ‘black people’ instead of ‘historically disadvantaged South Africans’ and (iii) the shift away from emphasis on compliance with the ownership element only. However, the Draft Mining Charter also proposes amendments related to the requirement of black ownership that arguably extend beyond the BBBEE Codes.

Ownership element

Firstly the Draft Mining Charter prescribes a particular participation structure. All black participants (entrepreneurs, workers and black communities) are required to participate collectively in a single special purpose vehicle (“**SPV**”). Each mining right granted by the DMR will require a separate BBBEE transaction to be concluded between an SPV (created specifically for that BBBEE transaction) and the entity holding the mining right (“**Mining Company**”). In other words, the model incorporating the SPV would apply for every mining right granted by the DMR (“**Participation Structure**”) and the Draft Mining Charter requires all existing BBBEE transactions to be restructured accordingly.

Secondly, the target of the ownership requirement (among others) under the Draft Mining Charter will need to be met throughout the life of the mine. This appears to be aimed at clarifying the issue currently before the High Court on whether the current Mining Charter is subject to the principle of ‘once empowered, always empowered’, which refers to the idea that, on the exit of a black participant from a BBBEE transaction with a Mining Company (i.e.: in instances where the black participant has disposed of its interest in a Mining Company), the Mining Company should be entitled to retain its mining right despite losing its black ownership compliance status as a result of such exit. According to recent media reports, the question was brought before the High Court by the mining industry’s employers’ organisation, the Chamber of Mines of South Africa. The National Empowerment Fund (“**NEF**”), a trust established by the National Empowerment Fund Act, 1998, has applied to join the court case. The NEF, which funds participation by black people in BBBEE transactions, reportedly seeks to advocate the requirements of the BBBEE Act in the matter and seem to be supportive of the principles of the Draft Mining Charter.

Thirdly, in terms of the Draft Mining Charter, the Mining Company will have a grace period of 3 years from the date of publication of the Draft Mining Charter (“**Transitional Period**”) to conclude another BBBEE transaction to ensure that it meets the requirement of black ownership. What is unclear is whether the 3 year grace period may be relied on in future in instances where black ownership drops below the required percentage (which seems to be unlikely).

Finally, the use of the ‘black people’ definition has resolved a controversy caused by the introduction, in the previous amendment, of the notion of demographic representation in the definition of ‘historically disadvantaged South Africans’, which was considered to be more complex to apply and also not in line with the BBBEE Act.

Overall scorecard compliance

In line with the BBBEE scorecard, the Draft Mining Charter incorporates the concept of overall scorecard compliance, subject to the qualification that the targets set for the scorecard elements of ownership, housing and living conditions and human resource development (“**Mining Priority Targets**”) must be met.

Implications of proposed changes

The Participation Structure would require investors in the mining industry to conclude BBBEE transactions for each separate area in which a Mining Company operates a mine and would not be able to rely solely on black ownership credentials at holding company level (which is recognized in terms of the BBBEE Codes).

Traditionally, BBBEE transactions are funded in the form of preference share or other vendor finance structures and, typically, each black participant could create a separate SPV to facilitate funding, taking into account such black participant’s credit profile. For example, community participants generally obtain funding through development finance institutions and are often not able to raise their own equity contributions, while black entrepreneurs tend to raise funding through commercial banks and therefore use a separate SPV structure to other black participants. Therefore, most existing BBBEE transactions are unlikely to comply with the Participation Structure.

The Draft Mining Charter could require mining companies to tighten the lock-in provisions for black participants in line with the current requirements of the Draft Mining Charter. However, the proposed retrospective effect, *inter alia*, of the Participation Structure to existing BBBEE transactions has been met with criticism in the media since such move could prejudice the rights of the black participants and the funders of existing BBBEE transactions.

The BBBEE Codes permit black participants to encumber their shares. However, restrictions on the transferability of shares to limited classes of investors could make security less attractive to funders. This could accordingly limit BBBEE transactions to black investors with liquidity at the expense of the broader principles envisaged under the BBBEE Act. In addition to possibly creating funding hurdles for black participants in the mining industry in future, it could also increase cost to shareholders by requiring Mining Companies to negotiate new BBBEE transactions each time black ownership is diluted or the structure does not meet the Participation Structure, if the 'once empowered always empowered' principle is not extended beyond the Transitional Period, as is the case in other sectors.

The required strict compliance with the Mining Priority Targets implies that Mining Companies may need to commit more than is required by the BBBEE Codes to satisfy the terms of Draft Mining Charter. Unlike under the BBBEE Codes where the failure to meet certain priority targets results in a reduction of the overall points scored towards compliance with the BBBEE Codes, failure to reach the Mining Priority Targets appears to result in automatic non-compliance with the Draft Mining Charter.

If the Draft Mining Charter comes into effect, it would render the judgment sought in the High Court on the issue of 'once empowered always empowered' moot. Therefore, it would be advisable for interested and affected parties to consider lodging comments on the Draft Mining Charter by no later than 31 May 2016, directly to the DMR or through representative bodies (such as Chamber of Mines) and to seek expert advice to assist them to quantify the costs of restructuring existing investments in mining to meet the proposed changes to the Mining Charter.

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