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A NEW APPROACH TO EMPOWERMENT IN MINING

ANTHEA JEFFERY

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2 Clamart Road, Richmond
Johannesburg, 2092 South Africa
P O Box 291722, Melville, Johannesburg, 2109 South Africa
Telephone: (011) 482–7221
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TABLE OF CONTENTS

SYNOPSIS 5

A mining charter likely to cause 'irreparable' harm 5

Changing and costly requirements 5

An increased threat to mining titles 6

More scope for officials to abuse their powers 7

Creeping mine nationalisation under the charter 8

An urgent need for an 'EED' empowerment strategy 8

Tax-funded vouchers for meaningful empowerment 9

Key differences between EED and BEE 10

An EED charter for mining 10

Time to shift from BEE to EED 10

A NEW APPROACH TO EMPOWERMENT IN MINING 12

A new mining charter impervious to economic malaise 12

A legal challenge from the chamber 13

Key provisions of the new charter 14

Shifting black ownership and other requirements 14

New rules for existing holders of mining rights 15

Requirements for the holders of new rights 16

Financing challenges and other key constraints 16

Greater insecurity of mining titles 18

More scope for bias and abuse 18

Abuses in the granting of mining rights 18

Unwarranted threats to cancel mining rights 19

Extraordinary abuses in the Tegeta/Optimum story 20

Benefits for the political elite and the state mining company 21

Many gains for the politically powerful 21

Major benefits for the state mining company 22

The wrong empowerment path 24

The EED idea in outline 25

The voucher element in EED 26

An EED scorecard for mining 27

Further empowerment via the voucher system 29

Unshackling a vital industry 31

References 33

APPENDIX: CONTENTS AND RAMIFICATIONS OF THE REVIEWED MINING CHARTER 35
Beneficiaries of the new charter 35
Ownership 35
New rights holders 35
Existing rights holders 37
All rights holders 37
Procurement, supplier, and enterprise development 38
Mining goods 38
Services 38
Contributions by foreign suppliers 38
Employment equity 39
Human resources development 39
Mine community development 40
Sustainable development 40
Housing and living conditions 41
Monitoring and enforcement 41
Assessment: economically damaging and often unlawful 42
References 43

THE TEGETA/OPTIMUM STORY 45

SYNOPSIS

A mining charter likely to cause 'irreparable' harm

The new mining charter, gazetted on 15th June 2017 by mining minister Mosebenzi Zwane, overlooks South Africa's worsening economic malaise. The growth rate is negative in per capita terms, while the unemployment rate has risen to close on 28% in general and to 56% among young people aged 15 to 24.

The mining sector is vital to any recovery in economic growth. It is also a key source of jobs for relatively unskilled labour. Yet the new charter, according to the Chamber of Mines, has made the sector largely 'uninvestable' and will cause it 'irreparable' harm.

The chamber was quick to reject the charter, saying it had 'spooked the markets' and would 'significantly impact on the viability of many mines'. It denied that the industry was 'anti-transformation', noting that mining companies had done BEE deals valued at more than R205bn (in 2014 rands) and transferred R159bn in economic value to the historically disadvantaged. However, 'it would be irresponsible for the industry to accede to unworkable targets' and put its sustainability at risk.

Soon the chamber embarked on legal action. It applied to the North Gauteng High Court for an urgent interdict to suspend the charter, saying it would thereafter seek to have the document set aside on judicial review. The chamber's interdict application is to be heard in mid-September 2017, and its application for judicial review thereafter. What the courts will decide remains to be seen, but the chamber's legal objections are generally well-founded. Many of the changes in the charter are at odds with its founding statute, the Mineral and Petroleum Resources Development Act (MPRDA) of 2002, which can be amended only by Parliament – and not by the minister.

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Changing and costly requirements

Because mining generally requires enormous upfront capital investments which may take ten years or more to start yielding returns, regulatory certainty and predictability are particularly vital to the industry. Since 2004, however, when the MPRDA took effect, repeated revisions to the Act, the original mining charter, and other relevant rules have steadily eroded that predictability. The new mining charter is particularly damaging because its demands are so unrealistic and costly to meet. It also signals that ownership and other targets are likely to keep shifting in the future, making it ever more difficult for investors to know what is expected of them if they are to keep their mining rights.

Under the original charter, mining companies were expected to transfer 26% of their equity or assets to historically disadvantaged South Africans (HDSAs) by the end of 2014. The charter also said deals were to be done at 'fair market value on a willing seller/willing buyer basis' – and that 'the continuing consequences' of all previous transactions should be taken into account in measuring HDSA ownership.

Under the 2017 charter, by contrast, all existing holders of mining rights must increase their BEE ownership to 30% within a year. The extent of the top-up required depends on what level of 'black person' (no longer 'HDSA') ownership companies are recognised as having already achieved.

Since the Department of Mineral Resources (DMR) refuses to recognise the 'continuing consequences' principle, it takes the view that only 20% of mining companies met the 26% target by the end of 2014. This

20% will have to top up black ownership by 4% within a year, but the other 80% will have to top up by much more. AngloGold Ashanti, for instance, which the DMR sees as having only 6% black ownership – rather than the 27% it has achieved on the 'continuing consequences' principle – would have to top up by 24% within 12 months.

Once the charter is in operation, applicants for new prospecting right will need to have 'a minimum of 50% + 1 black person shareholding' (shortened here to 51% black ownership). Those seeking new mining rights will have to show 'a minimum of 30% black person shareholding'. This must be structured in an 8:8:14 ratio, with 8% going to employees, 8% to communities, and 14% to BEE 'entrepreneurs.

The many additional BEE deals now required will often have to be financed by vendor companies themselves. However, these companies will find it difficult to afford such financing when the new charter also obliges them to:

- distribute 1% of annual turnover to BEE shareholders every year, in preference to other shareholders and over and above whatever dividends they may declare;
- spend 5% of payroll (on top of the 1% of payroll required by the state's skills development levy) for human resources development;
- make annual contributions to mine community development which are 'proportionate' to the size of their investments;
- put significant resources into creating and sustaining the 51% black-owned companies from which 26% of all mining goods and 80% of all relevant services will have to be bought each year;
- write off any loans that still remain unpaid by BEE shareholders after ten years if the dividends paid to them have not sufficed to discharge these debts; and
- in many instances, pay an extra 1% on the cost of any mining goods or services purchased from foreign suppliers, so as to compensate the latter for the 1% levy the new charter will require them to pay.

> *The new charter identifies its ownership, skills development, and community upliftment elements as 'ring-fenced' elements with which mining companies must demonstrate '100% compliance at all times'. These targets apply 'throughout the duration of a mining right', which is generally 30 years.*

The more funding companies must allocate to ownership deals and the charter's many other requirements, the less capital they will have for mine investment. Yet, as Henk de Hoop and Sandile Mbulawa of Rand Merchant Bank have noted, 'the mining sector requires constant investment for the value sitting below the surface to be realised sustainably for generations to come'. If mining companies lack the capital for such investment, then mineral resources may increasingly be left below the ground. Companies will also have incentives to strip out the most valuable ores as rapidly as possible, so reducing the potential life of their mines.

An increased threat to mining titles

The new charter identifies its ownership, skills development, and community upliftment elements as 'ring-fenced' elements with which mining companies must demonstrate '100% compliance at all times'. Targets in these three spheres are expressly made 'applicable throughout the duration of a mining right', which is generally 30 years (but could be longer if a mining right is renewed).

Any mining company which fails to maintain a 100% score on these three elements and to score at least 60% on other charter elements, will 'be regarded as non-compliant with the provisions of the mining charter and in breach of the MPRDA'. It will then be liable to have its mining rights suspended or cancelled.

However, at current rand prices for minerals, many mining companies are already battling to break even. Hence, they cannot easily afford their increased obligations on the three ring-fenced elements, where 100%

scores will now have to be maintained for 30 years or more. Most will also battle to afford their further costly obligations under the new charter. A host of non-compliant companies could thus have their mining rights cancelled or suspended.

The security of mining titles in South Africa has thus been severely undermined. This is a further major deterrent to investment – and helps explain why a number of pending mining deals have been cancelled since the new charter was gazetted.

More scope for officials to abuse their powers

Many of the rules in the MPRDA and its accompanying mining charter are already vaguely phrased and open to different interpretations. This discretionary element has not only made the regulatory environment less predictable, but also opened the door to corruption and abuses of power.

Abuses have long been evident in the granting of mining rights, for DMR officials have frequently insisted on choosing the 'right' BEE investors for mining companies to partner with. They have often also been able to help favoured BEE applicants gain confidential information, or obtain prospecting rights in breach of the relevant rules. Unwarranted and abusive threats to cancel mining rights have also been made at various times.

Even more extraordinary abuses have recently emerged in the story of how Glencore plc was pressurised into selling three key coal assets – the Optimum and Koornfontein coal mines and the Optimum Coal Terminal at Richards Bay – to Tegeta Exploration and Resources (Tegeta). Tegeta is effectively owned and controlled by the Guptas, an immigrant family from India with close ties to President Jacob Zuma. One of Mr Zuma's sons, Duduzane Zuma, has a significant stake in Tegeta (currently worth some R775m), giving the president a personal interest in the company's success or failure.

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According to former public protector Thuli Madonsela's *State of Capture* report, supplemented by the leaked Gupta e-mails and other sources, key people at Eskom and the DMR put great pressure on Glencore to compel it to sell these assets. These individuals – all of whom have apparent links to the Guptas – refused to renegotiate a 40-year-old coal supply contract on which Optimum was losing R100m a month. They also then fined Optimum R2.2bn for the delivery of allegedly 'sub-standard' coal. These financial pressures forced Optimum into business rescue.

Thereafter, these Gupta allies refused to entertain an offer to buy from another company, leaving Tegeta as the only purchaser still in the running. They also insisted that Glencore's profitable Koornfontein mine and Richard's Bay coal terminal had to be included in any deal. They further increased the pressure on Glencore by suspending Optimum's mining right for a period, and seemingly tried to cancel all of Glencore's 14 mining rights as well.

Once the sale to Tegeta had been agreed, these Gupta allies used prima facie unlawful and sometimes fraudulent means to help Tegeta raise the R2.1bn purchase price. After the sale had gone through, moreover, the R2.2bn fine which had helped force Optimum into business rescue was reduced by almost 90%, despite Eskom's prior insistence that the penalty was non-negotiable and had to be paid in full.

A key risk from the new mining charter is that its onerous requirements and often vague terms will pave the way for further abuses of this kind. Gupta-linked companies are thus likely to benefit substantially from the new rules. So too will South Africa's state mining company, African Exploration Mining and Finance Corporation (African Mining).

Creeping mine nationalisation under the charter

African Mining is currently a subsidiary of the Central Energy Fund, but in 2016 the DMR put forward a draft bill seeking to establish it as a separate company reporting to the mining minister. According to the bill, it will also be able to acquire mining rights from the DMR, undertake its own mining operations, and 'acquire shares or other interests' in companies already engaged in mining.

The new charter will help African Mining fulfil these aims. The rule requiring 51% black ownership for the granting of prospecting rights will help ensure that these rights go to it, rather than to the established mining majors. A further requirement that all mining assets must first be offered to 51% black-owned companies will help it to acquire the shares and other assets of existing companies, as it plans to do.

The costly obligations to be imposed on mining majors under the new charter could also encourage them to sell off their mining assets, which African Mining would then have a preferential right to buy. In addition, if the mining rights of existing companies are cancelled for non-compliance with the new charter – and full compliance will be virtually impossible to maintain – then African Mining will be waiting in the wings for the DMR to grant it these newly available rights.

The state mining company's acquisition of prospecting rights, mining rights, and mining assets is thus likely to proceed apace once the new charter is in force. This will help bring about the incremental and uncompensated mine nationalisation for which the ANC Youth League and other ANC allies have long been calling.

The ANC and its allies like to pretend that state ownership and control of the mining industry will increase and spread the benefits of South Africa's great mineral wealth. But international experience shows that state mining companies generally fail, managing to produce only a fraction of what the private sector is able to achieve.

> *The ANC likes to pretend that state ownership of the mining industry will increase and spread the benefits of South Africa's great mineral wealth. But international experience shows that state mining companies are generally plagued by poor management, rising inefficiency, diminishing competitiveness, corruption, and 'capture' by a political elite.*

The reasons for this are plain, and should resonate among all South Africans. State mining companies are generally plagued by poor management, rising inefficiency, and diminishing competitiveness. They also battle to raise the funds for new or expanded mining operations – and especially so when public debt is high, tax revenues are static or shrinking, and governments face many other demands on the public purse.

However, the most important obstacle to success is usually poor governance. State mining companies (in the careful words of the *Extractive Industries Source Book*) are often captured by small and privileged elites, which use them for their own gains rather than in the national interest.

In practice, the mining revenues generated by state companies are often concealed and then siphoned off to individual bank accounts abroad. This risk is particularly telling in South Africa, where the rapid enrichment of the Gupta family – and a small elite within the ANC – has shown how easily public resources can be commandeered and spirited out of the country with the help of the politically powerful.

The new mining charter will encourage self-enrichment of this kind. It will further empower the state, while bringing great wealth to a few politicians and their favoured 'crony capitalists'. At the same time, it is likely to have devastating consequences for the mining industry and the wider South African economy.

An urgent need for an 'EED' empowerment strategy

The charter is thus a particularly damaging BEE instrument. However, it is also very much in line with other BEE policies, which have invariably helped only a small minority while greatly harming the remainder. If South Africa is to succeed in positive transformation, it needs to shift away from BEE to a far more effective

empowerment policy. This alternative policy is being developed by the IRR and is called 'economic empowerment for the disadvantaged' or 'EED.'

EED would actively promote investment, growth, and employment, always the key foundations for prosperity. It would also make growth more inclusive by helping to break down barriers to upward mobility.

Millions of South Africans are currently held back by bad schooling, poor housing, and failing health care. Yet state expenditure in these three spheres totals some R570bn in this financial year alone, and far exceeds what most other developing countries can spend.

Despite this high spending, outcomes are generally dismal. Some 80% of public schools are dysfunctional, while at least 84% of public hospitals and clinics cannot maintain proper standards of hygiene or ensure the availability of medicines. In addition, the 'RDP' houses provided by the state – despite a massive increase in the housing subsidy from R12 500 at the start to R160 500 today – remain small, badly located, and often poorly built.

The state's repeated promises to do better have brought little change. Hence, the most effective way to kick-start improvements is to empower ordinary South Africans to start meeting their own needs in these three key spheres.

This can be done by redirecting much of the R570bn now budgeted for a top-down system of state provision into tax-funded vouchers for schooling, housing, and health care. These vouchers would go directly to millions of disadvantaged South Africans.

Tax-funded vouchers for meaningful empowerment

Re-directing the education budget would generate vouchers worth some R20 000 per pupil per year. Once parents had been provided with these vouchers – which could be redeemed solely for education – schools would have to start competing for their custom. Failing state schools would be forced to improve. Many more independent schools would be established, by both companies and non-profits, to help meet burgeoning demand. The resulting competition would hold down costs and push up quality – as experience with school vouchers in other countries has shown.

> *Millions of South Africans are currently held back by bad schooling, poor housing, and failing health care. The state's repeated promises to do better have also brought little change. Hence, the most effective way to kick-start improvements is to empower ordinary South Africans to start meeting their own needs through tax-funded vouchers.*

Take housing next. The current housing and community development budget could be re-directed to provide housing vouchers to roughly 10 million South Africans between the ages of 25 and 35. These would be worth some R110 000 over ten years, so a couple could pool their money and receive R220 000 over a decade. A couple earning R6 000 a month could devote R1 500 (25%) of that to housing, which would boost their housing budget to some R400 000 over ten years.

Such sums would help people gain mortgage finance or enable them to start building their own homes. Families would no longer have to wait endlessly on the state to provide them with a small (and probably defective) RDP home. Building activities would accelerate, while dependency would diminish and self-reliance increase.

Re-directing the health care budget would provide health care vouchers, worth some R10 000 a year, to roughly 10 million households. People could then join the low-cost medical schemes that have been proposed (at premiums of some R200 per person per month), or take out 'combination' health insurance policies offering both hospital and primary care. Again, this would expand competition, increase efficiency, and help contain costs.

Since all households would want maximum value from their vouchers, tax revenues would be far better spent. The voucher system would also widen individual choice, build self-reliance, inject a new dynamism into the economy, and bring real benefits to millions of people now marginalised and destitute.

Key differences between EED and BEE

Tax-funded vouchers for education, housing, and health care are thus integral to EED and are a key factor distinguishing this strategy from BEE. Other differences between the two approaches are also important. BEE focuses on redistribution and promotes rent-seeking and entitlement, whereas EED would stimulate investment, quicken growth, expand employment, and encourage entrepreneurship instead of crony capitalism.

An EED strategy would rest on three prongs: the voucher system; an emphasis on economic growth as the overarching priority; and an EED scorecard that rewards the private sector for contributing to growth and effectively empowering the truly disadvantaged.

The benefits of shifting from BEE to EED would swiftly be felt across the country. However, the gains to be made are now particularly evident in the mining sector – where the contrast is stark between the harm the new charter will do and the help that EED would bring.

An EED charter for mining

Under an EED mining charter, companies would earn voluntary EED points for their contributions in four categories: economic, labour, environmental, and community. Given the overarching importance of growth, their economic contributions would count the most.

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In the ***economic*** sphere, mining companies would gain EED points for capital invested, minerals produced, profits earned, dividends declared, and contributions made to tax revenues, export earnings, and R&D spending.

In the ***labour*** sphere, companies would earn EED points for jobs provided and salaries paid, as well as for initiatives to improve skills, health, and mine safety, among other things.

As regards the ***environment***, companies would obtain EED points for reducing electricity and water consumption, minimising rock and other waste, treating polluted water, rehabilitating land, and so on.

As for their ***community*** contributions, companies would earn EED points for topping up the education, housing, and health care vouchers of poor households in mining communities, or for helping to improve provision in these three spheres. (Companies could earn EED points, for instance, for helping to develop innovative ways to treat polluted water for the benefit of mine communities.)

Time to shift from BEE to EED

The differences between EED and BEE underscore the intrinsic weaknesses of the latter. The costs of BEE implementation have also been very high. Apart from major compliance expenses, BEE has undermined black entrepreneurship, contributed to inflated pricing in procurement, and given impetus to corruption.

In the past five years, BEE requirements have also been greatly tightened up, making them ever more costly and difficult to implement. The BEE ownership requirement, which began at 25% in general (and at 26% in mining) is now also being nudged up to 51%, as the new mining charter once again shows. This demand is putting property rights as well as business autonomy increasingly at risk.

What then is to be done? The ANC's allies have long been using the predictable failures of BEE to push for ever more state ownership and control. The South African Communist Party (SACP), the Congress of South African Trade Unions (Cosatu), and the ANC Youth League have all said that BEE's failure to generate 'more egalitarian outcomes' means that the government must now start nationalising land and 'strategic' sectors, including the mining industry.

More recently, Mr Zuma's preferred presidential candidate, Nkosazana Dlamini-Zuma, has also called for the nationalisation of key industries, while the president himself has repeatedly demanded a strong emphasis on 'radical economic transformation'. As Mr Zuma told Parliament in his State of the Nation Address (SONA) in February 2017, such transformation requires 'fundamental change' in 'the structure...of the economy', as well as in its 'ownership, management and control'.

Given the president's repeated emphasis on inter-racial inequality, most commentators assume that what the ANC wants is a shift from supposedly 'white' ownership – though most listed companies are in fact mainly owned by pension funds and similar institutions – to 'black' ownership. However, the ANC's real objective, in line with its long-standing commitment to the national democratic revolution (NDR) it first endorsed in 1969, is to take South Africa from its predominantly free market economy to a socialist and then communist future. This requires a shift in ownership and control, not so much from whites to blacks, as from the private sector to the state.

> *A shift to EED in mining (and elsewhere) would free the country from the leg-iron of ever more damaging BEE requirements. It would also empower the majority in a way that BEE interventions – and the new mining charter in particular – will never be able to achieve.*

To achieve its objective of public ownership and control, says Mr Zuma, the government must now 'utilise to the maximum the strategic levers that are available to the state'. These include 'legislation, licensing, and...procurement [rules], as well as BEE charters'. The ruling party also requires 'more direct state involvement in mining', to be achieved through the state mining company. The new charter, as earlier outlined, will greatly help the ruling party to realise this last goal. This is why Mr Zwane sees the document as 'a revolutionary tool' and 'a key instrument for radical change'.

The policy choices are becoming stark. The country can keep on with BEE policies in mining and elsewhere, and reap the bitter harvest that will surely follow as the economy falters even further and a corrupt and inept political elite expands its power.

By contrast, a shift to EED in mining (and elsewhere) would free the country from the leg-iron of ever more damaging BEE requirements. It would also empower the majority in a way that BEE interventions – and the new mining charter in particular – will never be able to achieve. With the mining industry in the doldrums and the new charter's fundamental flaws readily apparent, it is time to revive investor confidence, kick-start growth in a vital sector, and re-ignite prospects of upward mobility for millions of South Africans by shifting from BEE to EED instead.

A NEW APPROACH TO EMPOWERMENT IN MINING

The 2017 mining charter, like its 2016 predecessor, threatens mining companies with the cancellation of their mining rights if they fail to maintain 100% scores on ownership, skills development, and community upliftment for the 30-year life of a mining right. It will halt investment and bring 'irreparable damage' to the mining industry, according to the Chamber of Mines, which is trying to have it set aside by the courts. The charter is likely to cost at least another 100 000 mining jobs, on top of the 70 000 that have been lost in the past five years and the 21 000 retrenchments recently announced. It also overlooks the practical reality that transformation cannot be achieved without strong economic growth.

The chamber thus wants to renegotiate its terms. However, little is likely to be achieved simply by re-jigging some of its most damaging provisions. Rather, the country needs a bold new approach, which puts the emphasis both on growth and on expanding opportunities for the truly disadvantaged. Empowerment policy for the mining industry should thus shift from BEE to a new system of 'economic empowerment for the disadvantaged' or 'EED'. This shift should be accompanied by the introduction of a new EED scorecard. This would reward mining companies for their economic, labour, environmental, and community contributions. EED would also usher in a new system of tax-funded vouchers for education, housing, and health care. These would liberate the poor from failing state provision, giving them the same choices as the middle class enjoy and promoting competition and efficiency.

> *Mining is thus to any recovery in economic growth. It is also a key source of jobs for relatively unskilled labour. But the gazetting of the new charter in June 2017 wiped R51bn in a single day from the value of mining stocks and is likely to cause 'irreparable damage' to the industry.*

A new mining charter impervious to economic malaise

The new mining charter, gazetted on 15th June 2017 by mining minister Mosebenzi Zwane, overlooks South Africa's worsening economic malaise. The growth rate is negative in per capita terms, while the country's dollar-denominated sovereign debt has been downgraded to sub-investment ('junk') status by two international ratings agencies and further downgrades loom. The budget deficit could rise to 15% of gross domestic product (GDP) within five years, while public debt – which has almost tripled since 2009 – could reach 70% of GDP by 2022, as the International Monetary Fund (IMF) has recently warned. Business and consumer confidence have fallen sharply in recent years, as has fixed investment. The unemployment rate has risen to close on 28% in general, and to 56% among young people aged 15 to 24.[1]

Mining and agriculture are the only sectors that have grown significantly in recent quarters – mining on the back of better commodity prices and agriculture in response to good rains signalling an end to a crippling three-year drought. Mining is thus vital to any recovery in economic growth. It is also a key source of jobs for relatively unskilled labour. But Mr Zwane seems impervious to the importance of mining to South Africa's economy. The gazetting of the charter in mid-June wiped R51bn in a single day from the value of mining stocks listed on the JSE. According to the Chamber of Mines, which represents some 90% of the mining industry by value, the charter has made the sector largely 'uninvestable' and is likely to cause it enormous harm.[2]

A legal challenge from the chamber

The chamber was quick to reject the charter, saying it had been developed without adequate consultation by 'a department which lacks integrity, capacity, and credibility'. It had 'spooked the markets' and would 'significantly impact on the viability of many mines'. According to journalist Allan Seccombe, writing in *Business Day*, the gazetting of the charter has 'created anger, confusion, and uncertainty, with foreign investors warning of repercussions and a potential exodus of companies from one of the world's mineral treasure troves'.[3]

The chief executive of the chamber, Roger Baxter, added that the industry was not 'anti-transformational', as Mr Zwane alleged. On the contrary, the value of BEE mining deals concluded since 2000 exceeded R205bn (in 2014 rands), while the economic value transferred to the historically disadvantaged amounted to R159bn. In addition, previously disadvantaged South Africans now held more than 50% of management posts. However, 'the chamber could not promote transformation at the expense of the sustainability of the mining industry'. On the contrary, 'it would be irresponsible for the industry to accede to unworkable targets and unnecessary institutions that are not founded in reality and do not have the interests of the industry at heart'.[4]

Soon the chamber embarked on legal action. It applied to the North Gauteng High Court for an urgent interdict to suspend the implementation of the charter, saying it would thereafter seek to have the document set aside on judicial review. In a 274-page founding affidavit, the chamber argued that Mr Zwane, in gazetting the new charter, had acted beyond the powers granted to him by the Mineral and Petroleum Resources Development Act (MPRDA) of 2002. Many aspects of the document were unconstitutional, it said, while the charter as a whole would cause 'irreparable damage' to the industry if it remained in place.[5]

The chamber also stressed its willingness to re-negotiate the terms of the charter with the Department of Mineral Resources (DMR), but Mr Zwane rejected this offer, saying: 'The button has already been pressed and there is no turning back.' However, having found it difficult to prepare his answering affidavit in time for the interdict hearing scheduled for mid-July, he agreed to suspend the operation of the charter until September, when the chamber's interdict application is now to be heard.[6]

> *The value of BEE mining deals concluded since 2000 exceeds R205bn (in 2014 rands), while the economic value transferred to the historically disadvantaged amounts to R159bn. Previously disadvantaged South Africans now hold more than 50% of management posts.*

In his answering affidavit (filed in August 2017), Mr Zwane stated that every objection raised by the chamber was simply 'an attempt to block the effective and meaningful participation of black persons in the mining...industry'. Instead of 'engaging constructively' on how this important objective could be met, the chamber had 'put up one technical objection after another'. The chamber's legal arguments were also 'obviously incorrect and demonstrably implausible'. In addition, the interdict application could not succeed because the chamber had 'overstated' the charter's potential economic harm. Moreover, though the chamber complained of a lack of proper consultation, the DMR had given it more 'time, energy, and resources' than any other stakeholder.[7]

In a subsequent speech to the Black Business Council, Mr Zwane added that the charter would give 'practical expression to the meaning of radical economic transformation'. Its 'targets and timelines were not only clear' but also 'realistic and achievable'. The charter was 'a decisive and deliberate action by the government to reverse the sustained negative impact of apartheid policies on the people and economy of South Africa'. The real question was whether the new charter went far enough, for many stakeholders felt that 'the ownership level should have been set at 50% or more to truly change the industry'.[8]

In a replying affidavit, the chamber responded that Mr Zwane had 'mostly attacked the chamber instead of dealing with its legal arguments'. The minister had ignored relevant provisions of the MPRDA, while

simply asserting that 'the 2017 charter was law' and that 'he could easily and expeditiously change the law' as he saw fit. However, this argument ignored the separation of powers doctrine and had no sound foundation. The minister was also using 'an unbridled attack' on the chamber to 'divert attention away from the absence of any cogent response to its legal arguments'. The chamber remained committed to positive change, but it had to be realistic about the challenges confronting the mining industry. 'Unilateral development and implementation of the charter' would not help the country, but would instead 'destroy investment, lead to further job losses, and cause irreparable damage to the mining industry', it reiterated.[9]

The chamber's interdict application is to be heard in mid-September 2017, while its application to have the charter set aside on judicial review will be heard by the Pretoria High Court as soon as possible thereafter.[10]

Key provisions of the new charter

The new charter makes many changes, most of which are supposedly intended to 'harmonise' its provisions with the current black economic empowerment (BEE) generic codes of good practice. This emphasis on harmonisation has its origins in a 'trumping' clause, found in the Broad-Based Black Economic Empowerment Amendment Act of 2013, which gives the generic codes precedence over all conflicting BEE requirements. This clause further demands that all sector codes, including the mining charter, be aligned with what the generic codes provide.[11]

> *The 2017 mining charter thus claims that its 'principles' have indeed been harmonised with the BEE generic codes. However, there are many provisions in the new charter – including a demand for 100% compliance with three key elements – that go far beyond what these codes require.*

The 2017 mining charter claims that its 'principles' have indeed been harmonised with the BEE generic codes and other empowerment laws. However, there are many provisions in the new charter – including a demand for 100% compliance with three key elements – that go far beyond what the generic codes require. On ownership, for example, the BEE codes would give mining companies credit for partial performance, sanction them comparatively lightly (by reducing their level of BEE contribution by one level) if they fail to reach a 40% minimum score, and take account of indirect black ownership via pension funds and unit trusts. By contrast, the new charter recognises only direct ownership, gives no credit to BEE ownership at any level below 30%, and threatens companies with a devastating penalty – the loss of their mining rights – if they fail to score 100% on this target for 30 years or more.[12]

This conflict suggests that the DMR is not really trying to align the mining charter with the general BEE requirements. Instead, it is seeking to give itself the capacity to cancel mining rights in wide-ranging circumstances. In doing so, the DMR is adding to the uncertainty of mining titles and exacerbating a regulatory burden which is already far too heavy.

The provisions of the new charter are more fully described in the *Appendix*. However, there are five main challenges arising from the charter, and these are set out below.

Shifting black ownership and other requirements

Because mining generally requires enormous upfront capital investments which may take ten years or more to start yielding returns, regulatory certainty and predictability are particularly vital to the industry. Since 2004, however, when the MPRDA took effect, repeated revisions to the Act, the original mining charter, and other relevant rules have steadily eroded that predictability. This third version of the mining charter is particularly damaging because its demands are so unrealistic and costly to meet. It also signals that ownership and other targets are likely to keep shifting in the future, making it ever more difficult for investors to know what is expected of them if they are to keep their mining rights.[13]

New rules for existing holders of mining rights

Under the original charter, mining companies were expected to transfer 26% of their equity or assets to historically disadvantaged South Africans (HDSAs) by the end of 2014. The charter also said that all ownership deals were to be done at 'fair market value on a willing seller/willing buyer basis' – and that 'the continuing consequences' of all previous deals must be taken into account in measuring HDSA ownership.[14]

Under the 2017 charter, by contrast, all existing holders of mining rights must increase their BEE ownership to 30% within a year. The extent of the top-up required depends on what level of 'black person' (no longer 'HDSA') ownership companies are recognised as having already achieved.

According to the chamber, the 'continuing consequences' (or 'once-empowered, always-empowered') principle allows companies to count ownership deals from which BEE investors have since sold out. This, it says, is plainly what the MPRDA and the original charter require – and the minister has no legal capacity to change the relevant rules. The new charter nevertheless states that historical BEE deals may not be taken into account if they 'did not achieve a minimum of 26% empowerment' by the time of the document's gazetting. In addition, the DMR has long taken the view that the 2010 revised mining charter put an end to the 'continuing consequences' principle for all ownership deals other than those concluded before 2004 (when the original charter took effect).[15]

This difference in perspective explains why the chamber, in a 2015 report on the industry's compliance with BEE requirements, put average HDSA ownership at 38%, well above the 26% target. The DMR, by contrast, refused to take account of deals from which BEE investors had sold out. In its own compliance report, also published in 2015, the DMR thus concluded that only 20% of mining companies had succeeded in meeting the 26% target by the end of 2014.[16]

The DMR's view has enormous ramifications for the industry, for it suggests that only 20% of mining companies will have their BEE ownership recognised as standing at 26%. The remaining 80% will have to top up black ownership to a much greater extent – from whatever 'existing level' the DMR recognises them as having achieved.[17] What 'existing levels' might then be in issue?

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Some of the answer may be found in a confidential letter from the chamber (which Mr Zwane has made public as part of his answering affidavit). In this letter, written in March 2015, the chamber said that almost all major mining companies – including Kumba Iron Ore, Impala Platinum, AngloGold Ashanti, Sibanye Gold, and Aquarius Platinum – had already achieved 30% black ownership, based on the 'continuing consequences' principle. However, if deals from which black investors had exited were left out of account, then the situation was very different. AngloGold would see its HDSA ownership level drop from 27% to 6%, while Gold Fields would see a decline from 35% to 20%. Harmony's level would fall from 37% to 25% and Sibanye's would decrease from 26% to 11%. Anglo American Coal would see a drop from 52% to 27%.[18]

On this basis, AngloGold (to take but one example) would have to increase its black ownership level from 6% to 30%. In addition, all the deals required for this purpose, amounting to 24% of the value of its local assets, would have to be concluded in a single year. The other mining majors would also have to top up by far more than 4%.[19]

The costs of all the BEE deals required by the new charter are thus likely to be enormous. Raising the capital required to fund them will also be inordinately difficult under the new rules (as further outlined below). Simply in terms of logistics, it will be impossible to finalise all these deals within the specified period, as BEE ownership transactions generally take some 18 months to conclude.[20]

Requirements for the holders of new rights

Once the charter is in operation, applicants for new prospecting rights will need to have 'a minimum of 50% + 1 black person shareholding' (shortened here to 51% black ownership). Those seeking new mining rights will have to show 'a minimum of 30% black person shareholding'. This must be structured in the 8:8:14 ratio required by the charter, with 8% going to employees, 8% to communities, and 14% to BEE 'entrepreneurs.[21]

The 51% black ownership target for prospecting rights suggests that the ANC has long been intent on returning to this requirement, despite its disclaimers to the contrary. In January 2002 a leaked version of the original mining charter said that all new mines would be required to have 51% black ownership after ten years. In the stock market panic that followed, the value of mining shares fell by some R99bn in two days. In response, the then mining minister, Phumzile Mlambo-Ngcuka, repudiated the leaked document, stressed that the black ownership requirement had been pegged at 26%, and pledged that this target would not be increased in the future.[22]

Since two thirds of the country's mineral resources were privately owned at this time – and since no compensation was to be paid for the transfer of these resources into the custodianship of the state under the MPRDA – this reassurance was seen by many companies as a necessary quid pro quo for their loss of the ownership rights they had previously enjoyed.[23] Hence, that the ANC has now returned to the 51% target is a fundamental betrayal. It also shows that the organisation's reassurances mean little in practice. This has further eroded trust in the government, while underscoring the unpredictability of South Africa's mining regulations.

Financing challenges and other key constraints

Though a host of new ownership deals will be needed to fulfil the requirements of the new charter, the wording of the document will make it difficult to finance these transactions. Most BEE beneficiaries will lack the capital needed to buy mining equity or assets and will have to borrow to acquire their stakes. However, they may battle to obtain loans from commercial banks as most will have little collateral to offer.

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To make it easier for mining companies to keep their BEE ownership at 30% and retain the necessary 8:8:14 ratio at all times, the new charter states that BEE shareholdings may be sold only to black people falling in the same categories (employees, community members, or BEE entrepreneurs) as their prospective sellers. However, this restriction will limit the liquidity of BEE stakes and reduce their market value. This in turn will decrease the collateral that BEE borrowers can provide, making banks more reluctant to finance BEE deals.[24]

Most BEE deals will thus have to be financed by vendor companies themselves. However, mining companies will find it very difficult to afford such financing when the new charter also obliges them to:

- distribute 1% of annual turnover to BEE shareholders every year, in preference to other shareholders and over and above whatever dividends they may declare;[25]
- spend 5% of payroll (on top of the 1% of payroll required by the state's skills development levy) for human resources development;[26]
- make annual contributions to mining community development which are 'proportionate' to the size of their investments;[27]

- provide 'decent standards of housing' in 'integrated human settlements' for mine workers, along with an 'affordable, equitable, and sustainable health system' for their benefit;[28]
- put significant amounts of financial and human capital into creating and sustaining the 51% black-owned companies from which 26% of all mining goods and 80% of all relevant services will have to be bought each year;[29]
- write off any loans that still remain unpaid by BEE shareholders after ten years if the dividends paid to them have not sufficed to discharge these debts;[30] and
- in many instances, pay an extra 1% on the cost of any mining goods or services purchased from foreign suppliers, so as to compensate the latter for the 1% levy the new charter will oblige them to pay (as set out in the *Appendix*).[31]

The more funding companies must allocate to ownership deals (and the charter's many other requirements), the less capital they will have to invest in maintaining their shafts and underground tunnels, keeping plant and other equipment in good repair, replacing what can no longer be maintained, extending their operations, or acquiring additional mining assets. Yet, as Henk de Hoop and Sandile Mbulawa of Rand Merchant Bank have noted, 'the mining sector requires constant investment for the value sitting below the surface to be realised sustainably for generations to come'. If mining companies lack the capital for such investment, then mineral resources may increasingly be left below the ground. Companies will also have incentives to strip out the most valuable ores as rapidly as possible, so reducing the potential life of their mines.[32]

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Under the charter, fresh investments into greenfields mining operations will be particularly difficult to fund. A potential overseas investor planning to make a $1bn investment in a new manganese mine, for example, will have to cede 30% to BEE investors at the start. He will probably also have to provide most of the financing for these ownership deals. Each year, moreover, he will also have to pay his BEE shareholders 1% of what he is spending on developing the mine. If it takes ten years for the mine to start generating profits and paying dividends, the investor will also have to write off the whole of his initial loan to his BEE investors. In addition, in each one of these initial ten years, the investor will have to contribute significant amounts to skills development, community upliftment, and the like. He will also have to establish and incubate many of the 51% black-owned companies from which he will be expected to buy 26% of his mining goods and 80% of the relevant services that he needs every year.

Raising additional capital through rights issues will also become more difficult, for the new charter says that BEE shareholdings must remain undiluted, even if BEE investors decline to follow their rights. Mining companies will thus have to persuade their other shareholders to put in extra funding on rights issues, even though these investors will know (to cite Mr de Hoop and Mr Mbulawa once again) that 'for every rand injected into the company they can expect their returns to be capped at 70c'.[33]

Banks could also become more cautious about extending loans to mining companies, partly because of this constraint on rights issues and partly because charter obligations will often be so costly to fulfil. This could limit the finance available to mining houses, and will certainly increase their borrowing costs. (South Africa's largest gold mine, Sibanye Gold, which has recently bought a platinum mine in the US, has already experienced this. When the charter was gazetted, Sibanye found it had to offer a higher rate on the $1bn bond it was issuing in the US to help pay for this acquisition because investors were concerned about the rising regulatory burden in South Africa.)[34]

The charter also introduces two major constraints on mining companies. First, the 51% black ownership requirement for new prospecting rights will effectively bar many mining majors from obtaining such rights. Yet existing mines often need new prospecting rights to keep up with exploration and plan for the future. This clause, however, will 'cut them off from the lifeblood of fresh mineral deposits' (in the words of mining law expert Warren Beech) unless they raise their BEE ownership to 51% and concede majority control to others.[35]

Second, mining companies wanting to sell some of their 'mining assets' will be obliged to give 51% black-owned companies 'a preferential...option to purchase' these.[36] The charter does not explain how such assets are to be defined. Nor does it say how for long such preferential options must be kept open, or how purchase prices are to be decided.

This restriction could apply to many prospective sales now in the offing. Anglo American plc, for instance, may yet want to sell several of its South African subsidiaries, including Kumba Iron Ore. Under the new charter, however, it could find itself obliged to sell to a 51% black-owned company. Cash-strapped Lonmin has spoken of selling spare capacity at some of its processing plants, including its smelter, to help maintain its mining operations. If this spare capacity counts as a 'mining asset', then any such sale could be similarly constrained.[37]

Greater insecurity of mining titles

The new charter identifies its ownership, skills development, and community upliftment elements as 'ring-fenced' elements with which mining companies must demonstrate '100% compliance at all times'. Targets in these three spheres are expressly made 'applicable throughout the duration of a mining right', which is generally 30 years (but could be longer if a mining right is renewed).[38]

> *The 51% black ownership requirement for new prospecting rights will effectively bar many mining majors from obtaining such rights. Yet existing mines often need new prospecting rights to keep up with exploration and plan for the future.*

Any mining company which fails to maintain a 100% score on these three elements and to score at least 60% on other charter elements, will 'be regarded as non-compliant with the provisions of the mining charter and in breach of the MPRDA'.[39] It will then be liable to have its mining rights suspended or cancelled.

However, at current rand prices for minerals, many mining companies are already battling to break even. Hence, they cannot easily afford their increased obligations on the three ring-fenced elements, where 100% scores will now have to be maintained for 30 years or more. Most will also battle to afford their other costly obligations under the new charter. A host of non-compliant companies could thus have their mining rights cancelled or suspended.

The security of mining titles in South Africa has thus been severely undermined. This is a further major deterrent to investment – and helps explain why a number of pending mining deals have been cancelled since the new charter was gazetted.[40]

More scope for bias and abuse

Many of the rules in the MPRDA and its accompanying mining charter are vaguely phrased and open to different interpretations. This discretionary element has not only made the regulatory environment less predictable, but has also opened the door to corruption and abuses of power.

Abuses in the granting of mining rights

From the time the MPRDA came into operation, DMR officials have frequently insisted on choosing the 'right' BEE investors for mining companies to partner with. They have often also been able to help favoured BEE applicants gain confidential information, or get ahead in the queue for mining and prospecting rights.

They have also encouraged rent-seeking behaviour by allocating prospecting rights to shelf companies, which can then make considerable profits by selling these licences to the established mining companies that urgently require them.[41]

Some notable examples of abuses by DMR officials have come to light over the years. In 2008, for instance, valuable manganese mining rights were granted, in clear breach of the first-in, first-assessed rule, to Chancellor House, a BEE company known to be a funding vehicle for the ANC,[42] and other firms.

In 2009 an application by Kumba Iron Ore for a mining right over a portion of its Sishen mine was the first to be submitted and should plainly have been granted. Instead, DMR officials allowed a BEE shelf company called Imperial Crown Trading (ICT) – which had links to President Jacob Zuma's son Duduzane and the notorious Gupta family – to complete its own competing application by photocopying some of the confidential documents that Kumba had already lodged with the DMR. Worse still, the DMR then proceeded to grant ICT a prospecting right over the whole of Kumba's long-established mine. Though this flawed award was ultimately set aside by the Constitutional Court, such abuses of power should never have occurred.[43]

A similar saga came to light in the same year, when the DMR granted a BEE company called Keysha Investments a prospecting right to the nickel, copper and chrome (the 'associated minerals') found in the platinum-bearing ore which Lonmin had long been mining at its Marikana mine near Rustenburg (North West). When Lonmin objected, DMR officials instructed it to stop selling these associated minerals: a restriction which wiped 5% off the company's share price in a single day. The DMR relented in time, granting Lonmin mining rights to these associated minerals. But it still refused to withdraw the prospecting right it had granted to Keysha, saying this would 'compromise the important principle of security of tenure'. This left Lonmin with a choice between embarking on a costly process of judicial review, or buying Keysha out. It took the latter path, agreeing to pay Keysha some US$4m for the 'surrender' of a prospecting right that, once again, should never have been granted.[44]

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Other abuses of power have also been reported. In 2010, for instance, Gold Fields was allegedly pressurised into allocating ANC chairwoman Baleka Mbete a BEE stake worth R28.5 million (rather than the R2.2m earlier proposed) in order to secure a mining right for its South Deep mine. In 2015 the DMR denied Aquila (a subsidiary of an Australian resources company) a mining right over a manganese reserve it had spent some R150m in prospecting. Instead, it registered a prospecting right over much the same area to the Pan-African Mineral Development Company (Pamdc), which is jointly owned by the governments of Zimbabwe, Zambia and South Africa. This entity had no valid claim to this right and seemed (as the Pretoria High Court was later to state) to be intent on pushing Aquila into 'paying it a sum of money to stop obstructing the process'. It was only through the court's intervention that Aquila was finally granted the mining right to which it was plainly entitled.[45]

Unwarranted threats to cancel mining rights

Abusive threats to cancel mining rights have also been evident. In 2011, for instance, the then mining minister, Susan Shabangu, announced the immediate cancellation of a mining right earlier granted to gold mining company Central Rand Gold (CRG), claiming CRG had failed to fulfil its social and labour plan. But this cancellation was unwarranted by the facts and ignored the procedures for cancellation set out in the MPRDA. The minister was thus compelled to recant, but the incident nevertheless raised investor concerns about the security of mining titles in South Africa.[46]

A similarly abusive threat was made in 2013, when Anglo American Platinum (Amplats) announced that it would soon have to retrench some 14 000 workers. This was necessary, the company said, to help re-

store its profitability after it had suffered a loss of R1.5bn in 2012 and an increase in net debt from R6.8bn to R10.5bn. In response, Ms Shabangu described Amplats as 'a child' that needed to be brought back into line, and threatened to withdraw its mining rights. She also warned that the mining rights of other companies that threatened to retrench mineworkers could be reviewed.[47]

In 2015 the DMR's report on the industry's compliance with the mining charter found (as earlier noted) that only 20% of mining companies had met the 26% BEE ownership requirement. Though the chamber's report showed average ownership levels at 38%, the then mining minister, Ngaoko Ramatlhodi, warned that the great majority of companies had failed to meet their overall charter obligations. The DMR, he added, would thus 'have to take steps to cancel mining licences under Section 47 of the MPRDA'. However, since the MPRDA does not allow the termination of mining rights for non-compliance with the charter, this was a further abuse of power – and one which threatened the very existence of many companies.[48]

Extraordinary abuses in the Tegeta/Optimum story

Still more disturbing is the way in which the current minister, Mr Zwane, aided by various senior managers at Eskom, allegedly helped to bring about the sale of the Optimum coal assets of Glencore plc to Tegeta Exploration and Resources (Tegeta). Tegeta is effectively owned and controlled by the Guptas, an immigrant family from India with close ties to Mr Zuma. One of Mr Zuma's sons, Duduzane Zuma, has a significant stake in Tegeta (currently worth some R775m), which has arguably given the president a personal interest in the company's success or failure.[49]

> *Eskom chief executive Brian Molefe (whose cell phone records show his repeated contacts with the Guptas at the relevant time) pushed Optimum Coal into business rescue by refusing to approve a justified price increase for the coal it was supplying Eskom, and then imposing a R2.2bn fine on Optimum for the supposedly 'sub-standard' quality of its coal.*

The full story of how the mining minister and key figures in Eskom helped the Guptas acquire three key Glencore assets – the Optimum coal mine, the Koornfontein one, and Optimum's share of the Richards Bay Coal Terminal – is set out in the Box on page 45. In essence (as described by former public protector Thuli Madonsela in her *State of Capture* report in November 2016 and further shown by the leaked Gupta e-mails and other sources):

- Eskom chief executive Brian Molefe (whose cell phone records show his repeated contacts with the Guptas at the relevant time) pushed Optimum Coal into business rescue by refusing to approve a justified price increase for the coal it was supplying Eskom, and then imposing a R2.2bn fine on Optimum for the supposedly 'sub-standard' quality of its coal;
- Eskom refused to approve another prospective purchaser and insisted that the Optimum sale must also extend to Glencore's Koornfontein coal mine and the Optimum Coal Terminal, neither of which was in financial difficulty;
- Mr Zwane was unexpectedly appointed mining minister at a key time and then reportedly helped to broker Tegeta's purchase of these three assets;
- Mr Zwane may also have authorised the transfer of some R1.6bn from the two mines' rehabilitation funds to Tegeta accounts with the Bank of Baroda, from which much of this money seems to have disappeared (though the minister denies this);
- Eskom made various payments to Tegeta, which helped it raise the purchase price of R2.1bn. These included an amount of R660m, which Eskom fraudulently disguised as a 'pre-payment' for coal supplies; while
- Eskom, having earlier insisted that its R2.2bn fine had to be paid in full, reduced the penalty by close on 90% after the sale to Tegeta had gone through.

The Optimum/Tegeta story takes earlier DMR abuses in the implementation of the charter and the MPRDA to unprecedented heights. The saga shows that even a major international mining company can be pressurised by underhand means into selling mining assets it would have preferred to retain. It also shows that a BEE company with close connections to the president can be provided with the purchase price for those assets out of public funds – in even more underhand ways. The story further suggests that a compliant mining minister can do much to help the process by threatening the mining major with the loss of its mining rights, and by turning a blind eye to improper transfers of mine rehabilitation funds. Against this background, the most important (though, of course, unspoken) purpose of the new mining charter may be to widen the scope for abuses of this kind.

Benefits for the political elite and the state mining company

Many gains for the politically powerful

Gupta-owned mining companies such as Tegeta are likely to derive major benefits from the new charter. To begin with, the description in the 2017 charter of who is entitled to empowerment benefits is now wide enough to include immigrants such as the Guptas, who arrived from India in 1993 and were never harmed by apartheid's racial laws. The Guptas would have battled to show that they were 'previously disadvantaged South Africans' who qualified for empowerment benefits under the MPRDA and the original mining charter.

Under the new charter, however, those entitled to BEE benefits now include Indian immigrants who gained South African citizenship by naturalisation either before or after 1994, provided they would have qualified for naturalisation prior to the political transition. This wording (like the revised definition of black people in the Broad-Based Black Economic Empowerment Amendment Act of 2013) seems tailor-made for the Guptas. Its inclusion in the new charter thus raises questions, says Roger Baxter, CEO of the chamber, as to 'whether the charter has been written in the national interest to promote transformation, or to benefit a small group of vested interests operating in South Africa's mining space'.[50]

> *The Optimum/Tegeta story takes earlier DMR abuses in the implementation of the charter and the MPRDA to unprecedented heights. Against this background, the most important (though, of course, unspoken) purpose of the new mining charter may be to widen the scope for abuses of this kind.*

Gupta-owned mining companies could also gain handsomely from other provisions in the new charter. Such companies will be recognised as 51% black-owned, which means that they will qualify for the new prospecting rights from which the mining majors will be barred. Given their 51% 'black person' ownership, Gupta mining companies will also have a preferential option to buy all the mining assets which mining majors labouring under the heavy costs of the new charter might in time decide to sell.

The Guptas will no doubt also find it relatively easy to set up many of the new 51% black-owned firms from which all mining companies will need to purchase 26% of their mining goods and 80% of their relevant services each year. Since the mining industry spends some R250bn a year on procurement, these benefits to the Guptas could in themselves be considerable.

At the same time, Gupta-owned companies will probably be spared the new charter's demand that 1% of annual turnover be paid to BEE shareholders each year, as this obligation seems to apply solely to mining companies which are 30% black-owned (and not to those which are 51% black-owned).[51] Like other holders of mining rights, Gupta-owned companies will have to score 100% on skills development and community upliftment if they wish to retain their mining rights. However, this burden will be relatively minor compared to what their competitors will face. In addition, unlike the mining majors, Gupta-owned companies will not have to fear that their mining rights will be cancelled if they fail to maintain a 30% black ownership target for 30 years or more.

The Guptas themselves may have been so constrained by the *State of Capture* report, the damaging disclosures in the leaked e-mails, and the closure of their bank accounts that they decide to leave South

Africa. At the time of writing, the Bank of Baroda was due to close their bank accounts (the last available to them) at the end of August 2017 – and the Guptas were hurriedly selling off some of their assets to buyers who still had access to banking services. Tegeta was among the assets sold.[52]

(In the last week of August, the Guptas announced the sale of Tegeta to a Swiss-based company, Charles King SA, for R2.97bn. However, not many years earlier, Charles King's market capitalisation had stood at some R1.4m, raising questions as to how it could now afford to pay close on R3bn for Tegeta. In addition, the company had been created in 2011 to manufacture and distribute the fashion brand Charles King Paris. This raised further questions as to why the firm should want to try its hand at mining in South Africa – and whether it would have the necessary financial and technical competence to do so. The company's owner, Amin Al Zarooni, a businessman from Dubai, said that 'opportunities in mining in South Africa were extremely attractive and the company had been looking for some time to invest in the country' and the wider African continent. But the Gupta e-mails show links between the Guptas and Mr Zarooni, and suggest that he may have helped to obscure the Gupta family's ownership of assets in the past.)[53]

However, even if the Guptas themselves cannot take advantage of the new charter, the Optimum/Tegeta story has nevertheless shown what shenanigans are possible with the help of powerful politicians and influential executives at Eskom and other SOEs. With the rules of the game so stacked in their favour – and with public revenues and SOE funds perhaps also clandestinely made available to them – many other BEE entrepreneurs may want to set up 51% black-owned mining companies that will be able to benefit from the new charter in the same ways that the Guptas might do. However, whether such new companies will also have the knowledge, experience, and staying power required for success in mining in South Africa – where gold and platinum ores are sometimes located up to four kilometres below the surface – remains to be seen.

In 2016 the DMR put forward a draft bill aimed at establishing African Mining as a separate company reporting to the mining minister. It will also have new powers – and will be able to acquire mining rights from the DMR, undertake its own mining operations, and 'acquire shares or other interests' in companies already engaged in mining.

Major benefits for the state mining company

The other major beneficiary of the new charter will be the state mining company. South Africa already has a state mining company in the form of the African Exploration Mining and Finance Corporation (African Mining), which was established in 1944, lay dormant until 2007, and was then resuscitated by its parent company, the Central Energy Fund.

Since African Mining began its various coal mining operations in 2011, private sector objections to it have been surprisingly muted – though the chamber has stressed the need for the government to ensure 'a level playing field'. However, as mining law expert Peter Leon points out, fairness is difficult to achieve when African Mining can rely on taxpayer revenue for funding and a fellow state entity (the DMR) to grant it a host of mining and prospecting rights.[54]

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The new charter will help African Mining fulfil these aims. The rule requiring 51% black ownership for the granting of prospecting rights will help ensure that these rights go to it, rather than to the established mining majors. The further requirement that all mining assets must first be offered to 51% black-owned companies will help it to acquire the shares and other assets of existing companies, as it plans to do.

The costly obligations to be imposed on mining majors under the new charter could also encourage them to sell off their mining assets, which African Mining would then have a preferential right to buy. In addition, if the mining rights of existing companies are cancelled for non-compliance with the new charter – and full compliance will be virtually impossible to maintain – then African Mining will be waiting in the wings for the DMR to grant it these newly available rights.

The state mining company's acquisition of prospecting rights, mining rights, and mining assets is thus likely to proceed apace once the new charter is in force. This will help bring about the incremental and uncompensated mine nationalisation for which the ANC Youth League and other ANC allies have long been calling.

As far back as 2009, when Mr Zuma first came to power, the youth league insisted that mine nationalisation was needed to give black South Africans 'economic freedom' from white domination. To this end, it called for the establishment of a state mining company which would own at least 60% of all new mining investments and would incrementally expand its ownership of all existing mines.[56]

In September 2016 the Youth League revived this call, saying there had long been a 'strategic need for the nationalisation of mines'. It demanded to know when the bill establishing the state mining company would be adopted by Parliament, adding: 'As soon as it is operational, it must take up ownership and control of the greater mines in the country.' According to the league, 'the state mining company should own 51% [of all new mining rights] as custodian for the people of South Africa', while 'select strategic mineral properties must be reserved for it as well'.[57] Again, the new charter will help fulfil these objectives.

> *The charter is clearly, as Mr Zwane says, an important new 'revolutionary tool'. Through it, the state mining company will be able to obtain ever more mining rights and other mining assets. In this way, an indirect and incremental process of mine nationalisation will be achieved, without compensation having to be paid.*

At its policy conference in 2012, the ANC decided against any outright seizure of mining companies as the compensation payable could exceed R1 trillion. The ruling party instead urged a bigger role for the state mining company, suggested that the BEE ownership requirement should be raised from 26% to 30%, and said that the state should be given its own 30% stake in mines. The new charter will help achieve the first two of these objectives, and may provide a foundation for the third. Even without this further intervention, however, the charter is clearly, as Mr Zwane says, an important new 'revolutionary tool'. Through it, the state mining company will be able to obtain ever more mining rights and other mining assets. In this way, an indirect and incremental process of mine nationalisation will be achieved, without compensation having to be paid.[58]

The ANC and its allies in the Youth League and elsewhere like to pretend that ever more state ownership and control of the mining industry will help increase and spread the benefits of South Africa's great mineral wealth. But international experience shows that state mining companies generally fail, managing to produce only a fraction of what the private sector is able to achieve.

The reasons for this are plain, and should resonate among all South Africans. State mining companies are generally plagued by poor management, rising inefficiency, and diminishing competitiveness. They also battle to raise the funds for new or expanded mining operations – and especially so when public debt is high, tax revenues are static or shrinking, and governments face many other demands on the public purse.[59]

However, the most important obstacle to success is usually poor governance. State mining companies (in the careful words of the *Extractive Industries Source Book*) are often captured by small and privileged elites, which use them for their own gains rather than in the national interest.[60]

In practice, the mining revenues generated by state companies are often concealed and then siphoned off to individual bank accounts abroad. This risk is particularly telling in South Africa, where the rapid enrichment of the Gupta family – and a small elite within the ANC – has shown how easily public resources can be commandeered and spirited out of the country with the help of the politically powerful.

The new mining charter will encourage self-enrichment of this kind. It will further empower the state, while bringing great wealth to a few politicians and their favoured 'crony capitalists'. At the same time, it is likely to have devastating consequences for the mining industry and the wider South African economy. Moreover, though the charter is a particularly damaging BEE instrument, it is very much in keeping with other empowerment policies that will likewise never help the truly disadvantaged to climb the economic ladder. If South Africa is to succeed in this important objective, it needs to shift away from BEE to a new empowerment policy. This alternative policy is being developed by the IRR and is called 'economic empowerment for the disadvantaged' or 'EED'.

The wrong empowerment path

South Africa has been chasing down the wrong path on 'transformation' for the past 23 years. As finance minister Pravin Gordhan said in 2010, 'South Africa's BEE policies...have not worked... BEE policies have not made South Africa a fairer and more prosperous country. They have led to a small elite group benefiting and that is not good enough in terms of benefiting [the remainder].'[61]

> *Many companies have put huge sums and enormous efforts into implementing BEE. Yet BEE has undermined black entrepreneurship, contributed to inflated prices and wastefulness in state procurement, and given impetus to crony capitalism and corruption. In the past five years, BEE requirements have also been greatly tightened up, making them ever more onerous and costly to implement.*

The ANC made a compelling case for BEE back in 1994, when it said that the policy would 'unleash the full potential of all South Africans to contribute to wealth creation' and contribute to economic growth. Since then, many companies have put huge sums and enormous efforts into implementing BEE. However, far from fulfilling the ANC's promise, BEE has undermined black entrepreneurship, contributed to inflated prices and wastefulness in state procurement, and given impetus to crony capitalism and corruption. In the past five years, BEE requirements have also been greatly tightened up, making them ever more onerous and costly to implement. The BEE ownership requirement, which began at 25% in general (and at 26% in mining) is now also being nudged up to 51%, as the new mining charter once again shows. This demand is putting property rights as well as business autonomy increasingly at risk.

BEE has thus become a major factor deterring direct investment and encouraging capital flight. It is a key part of the reason why economic growth has been negative in per capita terms for the past three years. The new mining charter will exacerbate the damage that has already been done, for at the very least it will make the industry largely 'uninvestable'.[62] It will also allow the state mining company – together with a narrow group of politicians and crony capitalists – to assume increasing control of mining, with consequences likely to be devastating for both the industry and the wider society.

Though the charter is likely to be particularly damaging, its weaknesses are typical of BEE policies in general. The gains it provides will be confined to a relatively small group, while the harm it causes will afflict the country as a whole. These outcomes mirror those of other BEE policies, which have brought prosperity – and sometimes enormous wealth – to a small and politically powerful elite. However, these policies have not helped the great majority of South Africans, some 87% of whom (according to comprehensive opinion polls conducted for the IRR in 2015 and 2016) have gained no benefits from BEE. Worse still, BEE has harmed the truly disadvantaged by eroding public service efficiency, contributing to corruption, and helping to choke off investment, growth, and jobs.

What then is to be done? The ANC's allies have long been using the predictable failures of BEE to push for ever more state ownership and control. The South African Communist Party (SACP), the Congress of South African Trade Unions (Cosatu), and the ANC Youth League have all said that BEE's failure to generate 'more egalitarian outcomes' means that the government must now start nationalising land and 'strategic' sectors, including the mining industry. More recently, Mr Zuma and other ANC leaders have started to demand a new emphasis on 'radical economic transformation'. As Mr Zuma told Parliament in his State of the Nation Address (SONA) in February 2017, such transformation requires 'fundamental change' in 'the structure...of the economy', as well as in its 'ownership, management and control'.[63]

Given the president's repeated emphasis on inter-racial inequality, most commentators assume that what the ANC wants is a shift from supposedly 'white' ownership – though most listed companies are in fact mainly owned by pension funds and similar institutions – to 'black' ownership. However, the ANC's real objective, in line with its long-standing commitment to the national democratic revolution (NDR) it first endorsed in 1969, is to take South Africa from its predominantly free market economy to a socialist and then communist future. This requires a shift in ownership and control, not so much from whites to blacks, as from the private sector to the state.

To achieve its objective of public ownership and control, says Mr Zuma, the government must now 'utilise to the maximum the strategic levers that are available to the state'. These include 'legislation, licensing, and...procurement [rules], as well as BEE charters'. The ruling party also requires 'more direct state involvement in mining', to be achieved through the state mining company. The new charter, as earlier outlined, will greatly help the ruling party to realise this last goal. This is why Mr Zwane sees the document as 'a revolutionary tool' and 'a key instrument for radical change'.[64]

> *The SACP, Cosatu, and the ANC Youth League have all said that BEE's failure to generate 'more egalitarian outcomes' means that the government must now start nationalising land and 'strategic' sectors, including the mining industry.*

The policy choices are becoming stark. The country can keep on with current transformation policies on BEE in mining and elsewhere and reap the bitter harvest that will surely follow as the economy falters even further. Or South Africans can grasp the policy nettle by recognising the failures of BEE and shifting to the IRR's new transformation policy, called 'economic empowerment for the disadvantaged' or 'EED'.

The EED idea in outline

EED differs from BEE in two key ways. First, it no longer uses race as a proxy for disadvantage. Instead, it cuts to the heart of the matter by focusing directly on disadvantage and using income and other indicators of socio-economic status to identify those most in need of help. This allows racial classification and racial preferences to fall away, instead of becoming permanent features of policy. This in turn will reduce racial awareness and potential racial polarisation, helping South Africa to attain and uphold the principle of 'non-racialism' embedded in the Constitution.

Second, EED focuses not on outputs in the form of numerical quotas, but rather on providing the inputs necessary to empower poor people. Far from overlooking the key barriers to upward mobility, it seeks to overcome these by focusing on all the right '**E**s'. In essence, it aims at rapid **e**conomic growth, excellent **e**ducation, very much more **e**mployment, and the promotion of vibrant and successful **e**ntrepreneurship.

EED policies aimed at achieving these crucial objectives need to be accompanied by a new EED scorecard, to replace the current BEE one. Under this revised scorecard, businesses would earn (voluntary) EED points for the investments they make, the profits they generate, the jobs they sustain or create, the goods and services they buy from other suppliers, the innovations they help to foster, and the contributions they make to tax revenues, export earnings, and foreign currency inflows.

These are by far the most important contributions to the upward mobility of the disadvantaged that the private sector can make. Jobs and earnings are vital to the dignity and self-reliance of individuals. They also offer people the surest and most sustainable path out of poverty. The tax revenues that businesses contribute are also vital in meeting infrastructure, education, and other needs. Hence, it is only when businesses of every kind and every size – from the street vendor to the major corporation – are able to thrive and expand that real opportunity can be generated and full employment achieved.

Unlike BEE, the EED approach would be effective in growing the economy and generating millions more jobs. Instead of frightening investors away and allowing precious tax revenues and SOE funds to be frittered away through corruption, fraud and inflated prices, EED would stimulate investment, growth, and jobs. Rather than enriching the politically connected few, EED would also focus on expanding the opportunities available to the many. EED thus seeks to make economic growth more 'inclusive' (as finance minister Malusi Gigaba might put it) by equipping the disadvantaged to participate more fully in the economy.

The voucher element in EED

Most black South Africans (around 76% of them, according to the IRR's 2015 and 2016 opinion polls)[65] identify 'more jobs and better education' as the best way to get ahead. However, the millions of jobs required cannot be generated without an upsurge in business confidence and much faster rates of economic growth. In addition, people need good schooling to equip them with the skills for which there is demand. The disadvantaged also need much better housing and health care to help them climb the economic ladder and join the middle class.

The government already spends enormous sums – close to R570bn in the present financial year – on schooling, health care, and housing (along with community development). However, outcomes are dismal. Some 80% of public schools are dysfunctional; at least 84% of public hospitals and clinics do not comply with basic standards; and the state's 'RDP' houses – despite a massive increase in the housing subsidy from R12 500 at the start to R160 500 today – remain small, badly located, and often poorly built.[66]

> *People have long been urging the government to transfer its housing subsidies directly to households, saying they could build better homes for themselves with the money. This demand could be met by giving people tax-funded housing vouchers. But why stop at housing when the state's provision of schooling and health care is also so flawed?*

People have long been urging the government to transfer its housing subsidies directly to households, saying they could build better homes for themselves with the money. This demand could be met by giving people tax-funded housing vouchers, which would be redeemable solely for housing-related expenditure. But why stop at housing when the state's provision of schooling and health care is also so flawed? And when education vouchers, in particular, are already being used in many countries to give parents a real choice, promote competition, and drive up the quality of schooling?[67]

The IRR's 2016 opinion poll thus also asked respondents if they would like to have tax-funded education, health care and housing vouchers to help them meet these key needs. Some 85% of black people supported the idea of education vouchers. Support for housing and health care vouchers was similar at 83% on each. In addition, 74% of blacks said these vouchers would be more effective in helping them to get ahead than current BEE policies.[68]

Education vouchers could be funded out of the current budget (by redirecting, rather than increasing it) and would be worth some R20 000 per annum per child. Schools would then have to compete for the custom of voucher-bearing parents. This would force all of them, including failing state schools, to up their game. Many more independent schools would also be established by companies, non-profits, and religious organisations to help meet burgeoning demand.[69]

At present, only middle-class parents can choose what schools their children will attend, while most families have no option but to send their children to dysfunctional state schools. The government has repeatedly promised to implement major reforms, but little has been achieved. However, South Africa does not have to stick to its current centralised, top-down model of state provision. Instead, it could shift to the voucher system, which would generate competition, hold down costs, and push up quality. Few other reforms could have so immediate or comprehensive an impact.[70]

Housing vouchers could also be funded out of the current budget. These vouchers would go to some 10 million South Africans between the ages of 25 and 35, who fall below a specific earnings ceiling of, say, R15 000 a month. Each beneficiary would receive some R110 000 over ten years. A couple could pool their money and so receive R220 000 over a decade. This amount could be topped up by their own earnings, which means a couple earning R6 000 a month could devote R1 500 (25%) of that to housing. Over ten years, this additional amount would boost their housing budget to close on R400 000. Such sums would help substantially in empowering people to build or improve their own homes, or obtain and pay down mortgage bonds.[71]

With this voucher system in place, households would be able to start meeting their own housing needs, instead of having to wait endlessly on the state to provide them with a small and probably defective RDP home. Construction would accelerate, while dependency would diminish and self-reliance increase.[72]

Health care vouchers could also be funded out of the current budget, and should be introduced as part of a package of essential reforms. Inefficiencies in the management of public health care facilities should be overcome through public-private partnerships (PPPs). The supply of health professionals and health services must be increased in innovative ways. Instead of prohibiting these options, the government should allow low-cost medical schemes and health insurance policies with risk-rated premiums. This change in itself would extend private primary health cover to millions more households. Tax-funded health vouchers worth some R10 000 a year should also be made available to some 10 million households, so empowering them to take out low-cost medical aid membership and health insurance too.[73]

> *Tax-funded vouchers in these three key spheres would greatly help to liberate the poor, while giving taxpayers far more bang for their buck. They would also bring a new dynamism into the economy, helping it to grow at the rapid rates required to counter the unemployment crisis.*

Tax-funded vouchers in these three key spheres would greatly help to liberate the poor, while giving taxpayers far more bang for their buck. They would also bring a new dynamism into the economy, helping it to grow at the rapid rates required to counter the unemployment crisis. These vouchers are thus a crucial element in the EED proposal.

Under an EED system, individuals armed with tax-funded vouchers would be able to pay for the schooling, housing, and health care of their choice. Businesses would earn additional voluntary EED points for:

- topping up those vouchers, particularly for the poor and marginalised;
- participating in public-private partnerships aimed at expanding essential infrastructure and improving operational efficiency in these three key spheres; and
- developing innovative ways of reducing the costs and improving the quality of provision.

A shift from BEE to EED would thus bring real opportunities to the poor. It would also help firms in all sectors to prosper and grow, thus generating millions more jobs. These benefits would stretch right across the economy. However, the potential gains are particularly evident in the mining industry – where the contrast is stark between the harm the new charter will do and the benefits that EED could bring.

An EED scorecard for mining

Under an EED scorecard, mining companies would earn voluntary EED points for their contributions in four categories: economic, labour, environmental, and community. The economic contributions of mining com-

panies are the most important, because they help to attract investment, increase the growth rate, generate jobs, and provide procurement opportunities for a host of businesses supplying goods and services to the mines. An EED scorecard would thus weigh these economic contributions the most highly, while recognising the importance of the industry's activities in the other three spheres.

As regards their ***economic contribution***, mining companies would earn EED points for maintaining and expanding production; adding value to the minerals they extract through milling, refining, smelting or otherwise processing them; sustaining or increasing their net operating profits; realising sufficient gains to allow the declaration of dividends; making fixed capital investments; attracting direct investment from abroad; adding to export earnings; contributing to tax revenues; maintaining or increasing their procurement, especially from local firms; and putting resources into research and development (R&D). They should also earn bonus points for managing to sustain their operations in adverse circumstances (falling commodity prices, electricity constraints, prolonged strikes, and the like). Additional bonus points should be available for important innovations introduced: for example, increasing ore yields via new processing techniques, or extending the lives of mines through new drilling methods.

As for their ***labour contribution***, mining companies should earn EED points for maintaining and expanding jobs; sustaining and increasing salaries and employee benefits; contributing to tax revenues through the PAYE levied on employee earnings; maintaining and improving mine safety; meeting the health needs of mineworkers (for example, through regular health evaluations and the provision of anti-retrovirals (ARVs); improving underground working conditions; providing training and skills development for staff; encouraging mineworkers to participate in employee share ownership programmes (ESOPs); and helping to provide housing to migrant workers and other employees. Bonus points should also be available for aiding employees in other ways: for example, by providing advice on debt management. Additional bonus points should be earned for successfully sustaining jobs despite adverse economic conditions, or for helping migrant workers spend more time at home.

As regards their economic contribution, mining companies would earn voluntary EED points for maintaining and expanding production; adding value to the minerals they extract through milling, refining, smelting or otherwise processing them; sustaining or increasing their net operating profits; making fixed capital investments; adding to export earnings; contributing to tax revenues; and putting resources into research and development.

As regards their ***environmental contributions***, mining companies should earn EED points for contributing to environmental rehabilitation funds; reducing electricity consumption through efficiency gains or own generation; limiting water consumption via recycling; guarding against water pollution and treating contaminated water; maintaining dust mitigation initiatives; rehabilitating land disturbed by mining; minimising waste, including waste rock; helping to reprocess residue dumps; and taking steps to reduce environmental incidents. Bonus points should also be available for other contributions to sound environmental management: for example, by helping to find or implement new ways of reducing or mitigating environmental damage. Additional bonus points should be earned for sustaining contributions to present and future environmental obligations despite adverse economic conditions.

As regards ***community contributions***, mining companies should earn EED points for topping up schooling, housing and health care vouchers for poor people in mining communities; helping to improve the quality of schooling in mining areas; providing bursaries for relevant tertiary training; helping to develop artisan skills; helping to implement innovative housing solutions in mining communities; and helping to find new ways to meet the health care needs of mineworkers and community residents. Bonus points should also be available for other contributions, such as seconding retired staff to municipalities in mining areas to help solve operational problems, including the effective management of waste water treatment plants.

Additional bonus points should be earned for managing to sustain contributions to communities even in adverse economic conditions.

Most of the economic and other contributions that would be measured under this new scorecard are straightforward and easy to understand. How mining companies could further contribute to individual empowerment under the EED voucher system needs a little more explanation.

Further empowerment via the voucher system

With *education vouchers* in place as part of EED, mining companies could earn additional EED points for topping up the vouchers of poor people in mining communities, so as to expand their schooling choices or to cover additional expenses (such as transport costs or boarding fees).

Mining companies could also earn EED points for helping to improve pupil performance in mining communities in various ways. Firms might, for instance, fund supervised homework sessions for disadvantaged pupils, especially those whose parents are functionally illiterate and innumerate and cannot easily help their children in this way. Retired teachers or others with appropriate skills could be available to assist with homework on most afternoons, while EED points could be earned for providing this assistance. EED points would also be available to mining companies that help run Saturday morning schools or holiday catch-up sessions for pupils in need of these additional interventions.

> *Firms might, for instance, fund supervised homework sessions for disadvantaged pupils, especially those whose parents are functionally illiterate and innumerate and cannot easily help their children in this way. Retired teachers with appropriate skills could be made available to assist with homework on most afternoons.*

Mining companies could also gain EED points for entering into public/private partnerships to refurbish state schools in mining communities, or for helping to supply them with functioning libraries and/or computer laboratories. All contracts awarded for these purposes must, however, be awarded via open and competitive tender processes, so as to put an end to corruption and artificially inflated prices.

Mining companies could also earn EED points for finding innovative ways to overcome other challenges. For example, firms could also earn EED points for helping to supply various electronic aids to teaching. DVDs featuring the best teachers presenting model lessons could be developed in all key subjects, from the foundation phase to Grade 12. These DVDs could be made available both in English and in other home languages, so as to help improve pupil understanding. DVDs showing pupils how to solve maths problems or carry out scientific experiments could also be made available. Smart phone applications which score pupils on their capacity to solve maths problems and gives them pointers as to where they have gone wrong might be particularly useful.

Mining companies should earn EED points either for helping to develop innovations themselves, or for funding organisations that are already engaged in endeavours of this kind. In a policy environment that fosters and rewards innovation in this way, a host of further creative ideas would doubtless soon emerge.

With a *housing voucher* system in place, mining companies could earn additional EED points for topping up the housing vouchers of the poor in mining communities, so as to increase the housing options available to them. They could also earn EED points for helping to find ways of reducing building costs. This could be done, for instance, through the use of pre-fabricated and other low-cost housing options, some of which have already been approved by the National Home Builders Registration Council and the South African Bureau of Standards.

EED points should also be available for helping to supply sound temporary structures to help those living in shack settlements. These might include properly insulated shipping containers (which can be bolted together to make homes bigger than many RDP houses), as well as the 'sand-bag' houses now becoming

more common. The latter are cheap to build, provide excellent insulation against heat and cold, and are water-proof, sound-proof, and fire-resistant.

Mining companies could earn EED points for helping to supply these low-cost structures to people living in informal settlements in mining communities. They could also gain EED points by using them to provide suitable shelter for migrant mineworkers with little interest in obtaining permanent homes in the mining towns where they work. (Mining companies in the platinum belt near Rustenburg, for example, have tended in recent years to provide living-out allowances to migrant workers in this situation. Many of these migrants have then chosen to rent the most rudimentary shacks, so that they can live as cheaply as possible and send the bulk of their living out-allowances to their families back home. The upshot, however, is that many of these migrant mineworkers live in appalling conditions. However, under an EED system, mining companies could earn EED points for providing migrant workers with sound but cost-effective 'sand-bag' or other temporary structures. Their housing needs would then be met, but on a low-cost basis that would leave them still with money from their living-out allowances to send to their families back home.)

EED points should be made available to all mining companies which either help develop innovative housing solutions or play a part in rolling them out. The same should apply to firms which find effective new ways to meet sanitation, energy, and water requirements in the housing sphere. Community water needs, for example, might in future be met via a specialised freezing process which is currently being developed to extract clean water from the brine arising from the desalination of polluted mining water.

EED points should be made available to all mining companies which either help develop innovative housing solutions or play a part in rolling them out. The same should apply to firms which find effective new ways to meet sanitation, energy, and water requirements in the housing sphere. Community water needs, for example, might in future be met via a specialised freezing process which is now being developed to extract potable water from brine.

As the *Sunday Times* has recently reported, some 95% of polluted coal mining water can already be converted to potable water through desalination, but the remaining 5% constitutes a brine which has to be pumped into large pools and left to evaporate over time. In future, however, a new system called eutectic freeze crystallisation could also convert this brine into potable water. (The new system is being developed at Glencore's Tweefontein coal mine in eMalahleni in Mpumalanga and is expected to generate some 500 000 litres of potable water a day for the residents of this mining community.)[74]

With *health vouchers* available, mining companies could also earn EED points for various contributions in this sphere. In addition to topping up the health vouchers of the poor in mining communities, companies could second retired managers to municipalities to help improve the running of public clinics. Such assistance from experienced managers could be invaluable in helping these institutions comply with basic norms and standards and improve the quality of the health care they provide.

Mining companies could also earn EED points in other ways: for example, by contributing to the training of doctors, nurses, and other health professionals; by helping to build clinics in mining communities; and by assisting in the roll-out of essential medicines.

Some BEE proponents might say that there is little difference between the contributions that mining companies could make under an EED voucher system and what many firms are already doing under the mining charter's community development element. There is, however, a world of difference between what current initiatives can achieve and what EED vouchers would help to bring about.

At present, community development contributions can do little to address the massive inefficiencies in the state's provision of schooling, housing, and public health care. The voucher system, by contrast, would cut to the root of present ills in all three spheres. It would maximise the efficient use of tax revenues, encourage competition, and promote individual self-reliance. Its emphasis on innovation would also to help

unleash a wave of creative ideas as to how current challenges can best be overcome. With the voucher system in place, EED contributions would thus soon have a substantial impact in helping the disadvantaged to get ahead.

Unshackling a vital industry

The mining industry is the bedrock on which modern South Africa has been built, and remains crucial to the country's success. Though its relative contribution to GDP has declined as the economy has modernised, mining still plays a vital part in attracting investment, providing direct and indirect jobs to some 1.5m people, sustaining the country's coal-based electricity supply, underpinning the manufacturing sector, adding to tax revenues and export earnings, and helping to boost the value of the rand. Four provinces, six major cities (not including Johannesburg, which long ago diversified away from mining), and two ports are also heavily dependent on the mining industry. People in these areas currently do better than many others, and would suffer greatly if the current malaise in mining were to worsen.

South Africa has virtually unparalleled mineral riches, a Citibank survey in 2010 estimating the value of its mineral resources at $2.5 trillion. This puts the country far ahead of both Australia and Russia, whose resources are estimated at $1.6 trillion each. Yet, despite South Africa's extraordinary mineral wealth, its mining industry has performed far below its potential for the past 15 years. Even during the global commodities boom from 2001 to 2008, the country's mining industry shrank by 1% a year, whereas the mining sectors in other states expanded by 5% a year on average over this period.

> *Even during the global commodities boom from 2001 to 2008, the country's mining industry shrank by 1% a year, whereas the mining sectors in other states expanded by 5% a year on average over this period. The National Development Plan (NDP) identifies this poor performance as 'an opportunity lost', and blames it largely on the impredictable terms of the MPRDA.*

The National Development Plan (NDP) identifies this poor performance as 'an opportunity lost'. It also acknowledges that much of the fault lies with the vague and uncertain terms of the MPRDA. It thus urges that the MPRDA and its accompanying mining charter be amended to 'ensure a predictable, competitive and stable regulatory framework'.

Far from complying with the NDP's recommendation, the new charter makes the regulatory framework even more unpredictable, arbitrary, and unstable. It changes the goalposts on BEE ownership in fundamental (and unlawful) ways, imposes a host of costly requirements which cannot realistically be met, and threatens mining companies with the loss of their mining rights if they fail to maintain 100% compliance on ownership and other targets for 30 years or more.

The charter's demands would be difficult to fulfil even if the mining industry was thriving and South Africa was highly rated as an investment destination. In fact, of course, the industry is already struggling and cannot easily withstand the further damage the charter will unleash. As the chamber has pointed out:[76]

- the sector was smaller in real GDP terms in 2016 than it was in 1994;
- in the past five years, mining GDP has shrunk by 0.2% a year, even as the rest of the economy has grown by 1.6% per annum;
- investment has declined materially in the past two years and no longer suffices even to cover depreciation, which means that production must in future fall;
- in 2015 the sector recorded an overall R31bn loss, while at current prices 60% of the platinum sector is loss-making;
- over 70 000 jobs have been lost in the past five years, while another 1 500 jobs are already being lost every month;

- since 2011 the industry has had to cope with rapid fluctuations and a general downturn in commodity prices, though these have started to recover in the past year;
- the sector has also confronted enormous volatility in the rand-dollar exchange rate, while the recent strengthening of the rand has largely neutralised the benefits of better commodity prices; while
- input costs have risen sharply over the past ten years, with double digit increases evident in many spheres.

Challenges from falling commodity prices and rapidly rising input costs have been compounded by an already onerous and unstable minerals regime. Despite its enormous mineral wealth, South Africa's appeal to international investors, as measured by the Fraser Institute's annual mining index, has thus declined sharply since the MPRDA was introduced.

In 2016 the country fared poorly once again, ranking 74th out of 104 mining jurisdictions on its overall attractiveness as an investment destination. (In 2015 it came 66th out of 109 countries, so this was a significant fall.) On many specific indicators, South Africa did even worse. On workplace disruptions, it ranked 101st out of 104 (the third worst in the world), while on regulatory issues its performance was particularly poor. On 'regulatory duplication and inconsistency' it ranked 94th, while on 'uncertainty regarding the interpretation of existing regulations' it ranked 90th. Its performance in other spheres also pulled it down, for on security issues it ranked 93rd, while on 'uncertainty regarding land claims' it ranked 94th.[77]

> *The state mining company, African Mining, is unlikely to be any more efficient than other failing SOEs. Mining production will thus decline, as will GDP, employment, export earnings, and tax revenues. The state mining company may also be captured by a small group of politically powerful people, who will use it for their own enrichment.*

Investor confidence has been undermined not only by the vague terms of the MPRDA, but also by the DMR's frequent abuses of power, as earlier outlined. Frustration at the inefficiency of officials has accelerated too, for mining companies commonly experience long delays in the granting of new mining and prospecting rights. Many also have to wait inordinately long to have their social and labour plans approved, or to obtain departmental consent for the transfer of mining interests under Section 11 of the MPRDA. Already, thus, as the chamber notes, 'much of the industry's new project investment has been placed on hold'.[78]

With the economic and regulatory environment already so adverse, the damage from the new charter is likely to be particularly acute. The charter will clearly deter further investment in both new and existing mines, even as it sharply raises operating costs and undermines the certainty of mining titles. These factors are likely to result in the closure of many marginal mines. In time, they will also put great pressure on the major mining companies to disinvest. This in turn is likely to bring about an incremental process of mine nationalisation as companies sell out, often at bargain basement prices, to the state mining company, African Mining.

However, African Mining is unlikely to be any more efficient than other failing SOEs, among them Petro SA, Eskom, Transnet, Prasa, Denel, and SAA. Mining production will thus decline, as will GDP, employment, export earnings, and tax revenues. Like other SOEs, the state mining company may also be captured by a small group of politically powerful people, who will use it for their own enrichment, rather than in the national interest. Much of the limited revenue generated by African Mining could thus be concealed and siphoned off to individual bank accounts abroad, as the Optimum/Tegeta story shows.

The new charter may well 'transform' the mining sector by turning it into another corrupt and inept state monopoly, but it will do little to advance the poor. Fortunately, however, the document is so obviously unlawful that the courts should have little hesitation in striking it down. The key question is what should follow next.

Making small changes to the 2010 charter will not suffice. Nor will a return to the original charter succeed in restoring confidence and positioning the mining industry for rapid growth. Instead of trying to re-jig BEE requirements that harm rather than help the great majority, the country should embrace a different transformation strategy in the form of EED.

EED would recognise the limits of redistribution and the vital need for rapid economic growth in mining (and elsewhere). It would give mining companies due credit for their key contributions to investment, employment, export earnings, and tax revenues. It would further reward them for their labour, environmental, and community contributions, as earlier outlined. It would also usher in a state-funded voucher system that would liberate the poor from having to rely on a failing state for the delivery of schooling, housing, and health care.

> *Making small changes to the 2010 charter will not suffice. Instead of trying to re-jig BEE requirements that harm rather than help the great majority, the country should embrace a different transformation strategy in the form of 'economic empowerment for the disadvantaged' or 'EED'.*

This voucher system would widen individual choice, stimulate competition among providers, and help to promote efficiency and hold down costs. It would ensure a much greater bang for the taxpayer's already extensive buck (R570bn in the current financial year) in these key spheres. It would also inject a new dynamism into the economy and open it up to those who are currently left out. This would help break down the present insider/outsider dichotomy and bring fresh hope to the 9 million South Africans now unemployed and largely destitute.

A shift to EED in mining (and elsewhere) would free the country from the leg-iron of ever more damaging BEE requirements. It would also empower the majority in a way that BEE interventions – and the new mining charter in particular – will never be able to achieve. With the mining industry in the doldrums and the new charter's fundamental flaws readily apparent, it is time to revive investor confidence, kick-start growth in a vital sector, and re-ignite prospects of upward mobility for millions of South Africans by shifting from BEE to EED instead.

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APPRENDIX: CONTENTS AND RAMIFICATIONS OF THE REVIEWED MINING CHARTER

This *Appendix* sets out the key provisions of the reviewed mining charter of 2017 (the new charter) and briefly outlines their ramifications. The contents of the charter are summarised in **bold** text, while comments on their ramifications are set out in *italics*.

Beneficiaries of the new charter

According to the new charter, its objectives are to 'expand opportunities for Black Persons to enter the mining...industry' and benefit from the exploitation of 'the State's mineral resources'.[1]

The charter defines 'Black Person' as 'a generic term which means Africans, Coloureds, or Indians (a) who are citizens of...South Africa by birth or descent or (b) became citizens...before...or... after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date'.[2]

The Mineral and Petroleum Resources Development Act (MPRDA) of 2002 identifies the beneficiaries of empowerment as 'historically disadvantaged South Africans'. These HDSAs are to be given increased opportunities to participate in the mining industry and benefit from the country's mineral resources.[3] *In the new charter, however, mining minister Mosebenzi Zwane seeks to replace this wording with his own definition of 'black persons'.*

The Chamber of Mines says this is unlawful. In its founding affidavit (lodged in support of its application for judicial review), it says: 'The definition of "black person" impermissibly widens the scope of those who may benefit from the provisions of the charter... For reasons best known to himself, the minister...seeks to benefit a category of persons who were never disadvantaged by unfair discrimination before the Constitution took effect... This is clearly contrary to the MPRDA. Moreover, if such a change to the MPRDA is to be introduced, it must be done by Parliament through the normal legislative process.'[4]

> *The definition of "black person" impermissibly widens the scope of those who may benefit from the provisions of the charter...This is clearly contrary to the MPRDA. If such a change to the MPRDA is to be introduced, it must be done by Parliament.*

In his answering affidavit, the minister notes that the definition of 'black person' in the charter is the same as that found in the Broad-Based Black Economic Empowerment Act of 2003, as amended in 2013. However, notes the chamber in its response: 'The MPRDA is the empowering legislation' and 'the minister is not authorised to adopt another definition of his liking...which is not in accordance with the empowering legislation, whether it coincides with a definition in another Act or not'.[5]

Ownership

In laying down its new ownership requirements, the charter generally distinguishes between new and existing rights holders. However, some of its clauses apply to all rights holders.

New rights holders

Applicants for new prospecting rights must have 'a minimum of 50% + 1 black person shareholding', or 51% black ownership for short.[6]

This will prevent many mining majors from obtaining prospecting rights, which will hamper both new mining ventures and the expansion of existing mines. Exploration and mining companies will be reluctant to invest in prospecting when they lack majority control, but must nevertheless provide the bulk of the capital

required. Most new prospecting rights may go to the state mining company, though Gupta-owned mining companies could benefit too. As the chamber notes, this provision is also contrary to the MPRDA and is thus unlawful.[7]

Applicants for new mining rights must have 30% black ownership, which must be structured in an 8:8:14 ratio (with 8% for employees, 8% for mine communities, and 14% for 'BEE entrepreneurs). The 8% to be set aside for mine communities must be held in a community trust.[8]

The chamber stresses that there is nothing in the MPRDA which authorises these specific requirements.[9] *The 8:8:14 ratio differs from that set out in the 2010 revised charter (5:5:16) and seems arbitrarily chosen. It is also too rigid and prescriptive in its one-size-fits-all approach. Mine communities have further questioned why their shareholdings should be vested in trusts managed by the Mining Transformation and Development Agency (the Agency). This Agency is to be established by the minister and will be accountable to him alone, leaving communities with little opportunity to influence its actions.*[11]

The new 30% requirement contradicts the ANC's long-standing pledge that the 26% ownership target in the original charter would not be increased. It also creates uncertainty as to how much higher the target may be raised, so undermining the predictability that investors need. Further changes to the current target seem likely, moreover, as Mr Zwane has already spoken of pressure from the Black Business Council and others to raise the ownership target to 51%.[10]

Black shareholders cannot have their shareholdings diluted through rights issues, even if they decline to follow their rights by putting in additional funds.[12]

This limitation will make it harder for mining companies to raise capital in times of need. By treating shareholders differently, it also contradicts the Companies Act of 2008. In addition, it is inconsistent with the property clause in the Constitution, as it will result in non-black shareholders suffering arbitrary deprivations which could also amount to uncompensated expropriations.[13]

> *The new 30% requirement contradicts the ANC's long-standing pledge that the 26% ownership target in the original charter would not be increased. It also creates uncertainty as to how much higher the target may be raised, so undermining the predictability that investors need.*

'Subject only to solvency and liquidity requirements', black shareholders must receive 1% of annual turnover every year, 'prior to and over and above' any distributions to other shareholders.[14]

This could generate severe cash-flow problems for mining companies and limit their capacity to maintain or expand their operations. It is also contrary to the Companies Act of 2008, which requires that shareholders be treated in the same way. In addition, it will make it difficult for companies to attract or retain non-black shareholders, who will know that their dividends – assuming these are still affordable at all following these distributions – will be significantly limited.[15]

If dividends to black shareholders do not suffice to pay off all the debt on their BEE deals within ten years, the mining company must then write off the outstanding balance.[16]

This clause may give BEE investors a 30% 'free carry', as they may never have to pay for their shareholdings. Mining companies which are compelled to write off these debts will suffer arbitrary deprivations of property, which could again amount to uncompensated expropriations.[17]

Black shareholders must be given 'direct' and 'active' control over 'the transportation, trading and marketing of their proportionate share' of a mining company's production.[18]

This provision is contrary to the Companies Act of 2008. In practice, it will be impossible to implement as any minerals produced belong to the company and not its shareholders.[19]

Black shareholders may sell their stakes only to black people who fall within the same categories (employees, communities, or BEE entrepreneurs) as themselves.[20]

This restriction will make their stakes less liquid. This in turn will reduce the market value of their shares and make it harder for BEE investors to obtain bank loans to help fund their ownership deals. Mining companies will thus generally have to provide vendor financing for all the additional ownership deals the new charter will compel them to do.[21]

Existing rights holders

Companies that already hold mining rights must top up their black ownership 'from the existing level to a minimum of 30%' within a year.[22]

The Department of Mineral Resources (DMR), in its 2015 report on the industry's compliance with the mining charter, sees 20% of mining companies as having reached 'a minimum of 26% empowerment'. These companies will thus have to top up their black ownership by 4% within 12 months. However, the remaining 80% of companies (regarded by the DMR as non-compliant, largely because BEE beneficiaries have sold out) will have to top up from whatever 'existing level' of black ownership the department recognises them as having reached. Many companies may thus have to top up by 10% or more. AngloGold Ashanti, for instance, would have to top up by 24% within a 12-month period.[23]

Existing black shareholdings may not be diluted in the course of these top-ups.[24]

Under this clause, existing non-black shareholders will suffer 'arbitrary' deprivations inconsistent with the property clause in the Constitution. Non-black investors will also become more difficult to attract or retain, especially as the preferential (1% of annual turnover) distributions to be made to black shareholders each year may leave few profits available for the declaration of dividends.[25]

'Historical BEE transactions' do not qualify for recognition unless they 'achieved a minimum 26% black shareholding or more'. Moreover, even where historical BEE transactions satisfy this criterion, they may not be taken into account in applications for new mining or prospecting rights, the renewal of existing rights, or Section 11 approvals for the transfer of mining interests.[26]

These provisions put an end to the 'continuing consequences' (or 'once-empowered, always-empowered') principle in the 2004 mining charter. According to the chamber, however, the minister has no right 'retrospectively to extinguish' the continuing consequences principle. Mining companies have relied on this principle in entering into BEE deals and in making investment decisions, and 'they would be severely prejudiced' if the principle 'could be retrospectively withdrawn'.[27]

> *These provisions put an end to the 'continuing consequences' (or 'once-empowered, always-empowered') principle in the 2004 mining charter. According to the chamber, however, the minister has no right 'retrospectively to extinguish' the continuing consequences principle.*

All rights holders

All rights holders (of either prospecting or mining rights) who wish to sell their 'mining assets' must give 51% black-owned companies 'a preferential option to purchase'.[28]

This clause is impermissibly vague, as it fails to define what 'mining assets' it covers, to specify for how long such options are to remain in place, and to clarify what is to happen if no suitable black-owned firm offers an adequate market-related price. According to the chamber, the clause is also ultra vires the MPRDA. In addition, it is inconsistent with the property clause in the Constitution because it deprives mining companies of 'a component of ownership (the right of disposition)'.[29]

In practice, once the state mining company has been established as a separate entity (under a 2016 bill yet to be put before Parliament), this provision may increasingly be invoked to give it preferential access, at below market prices, to the land, plant, equipment, and other assets of mining companies unable to maintain their operations in the face of rising input costs and the draconian provisions of the new charter.

Procurement, supplier, and enterprise development

Mining goods

Under the new charter, 'a minimum of 70%' of total annual spending on mining goods must go to goods manufactured in South Africa. Of this 70%, 26% must come from 51% black-owned firms, with 5% of this 26% coming from firms which are 51% owned either by black women or by black youth. The remaining 44% of mining goods must be bought from local manufacturing companies which are 'BEE compliant'. According to the charter, this means that they must have at least 26% black ownership and score at least 80 points out of 105 under the generic codes of good practice, so making them 'level 4' contributors to BEE.[30]

The 70% obligation extends to capital goods, which range from drilling and hoisting equipment to crushing mills and furnaces. Yet few South African companies – and even fewer firms which are 51% black-owned – have the capacity either to manufacture such goods or to supply them on competitive terms. The new requirements could also compromise safety standards and contribute to mine accidents. In addition, they will exacerbate the already heavy financial burden on mining majors by putting pressure on them to establish and incubate the black-owned suppliers now required.[31]

At the same time, limiting foreign manufacturers to supplying 30% of mining goods will conflict with South Africa's binding obligations under the General Agreement on Tariffs and Trade (GATT) of the World Trade Organisation (WTO). This agreement requires all member states to accord foreign suppliers treatment which is 'no less favourable' than that given to domestic ones. Instead, the charter 'discriminates against the exports of other member countries', as the chamber notes.[32]

> *The 70% obligation extends to capital goods, which range from drilling and hoisting equipment to crushing mills and furnaces. Yet few South African companies – and even fewer firms which are 51% black-owned – have the capacity either to manufacture such goods or to supply them on competitive terms.*

Services

'A minimum of 80%' of what mining companies spend on relevant services must go to local firms which are 51% black owned. Of this 80%, 10% must go to firms which are 51% owned by black women, while 5% must go to firms which are 51% owned by black youths.[33]

The relevant services required by mining companies range from cleaning and security to geological surveying, the maintenance of complex plant and equipment, the treatment of polluted water, and the provision of medical, financial, and shipping services. The 51%-black owned companies from which 80% of such services must be procured do not exist and will have to be created. This will be costly and cumbersome in itself. In addition, new entrants might lack necessary technical knowledge and experience, which could again put mine safety at risk. At the same time, confining foreign suppliers to providing a mere 20% of the relevant services needed each year will conflict with the country's binding obligations under the WTO's General Agreement on Trade in Services (GATS).[34]

Contributions by foreign suppliers

Foreign companies which supply either mining goods or services must contribute at least 1% of the annual turnover they generate from South African mining operations to the Mining and Transformation Agency (the Agency), to be established by the minister.[35]

As the chamber points out, this levy is 'nothing other than a tax' and hence can be introduced only via a money bill adopted by Parliament. The proceeds of the levy are also to be paid to the Agency, whereas the Constitution provides that all tax monies, other than those 'reasonably excluded by an Act of Parliament', must be paid into the National Revenue Fund. The minister thus lacks the legal authority to introduce these

clauses. He is also impermissibly seeking to give the charter an extra-territorial application, even though foreign firms are not bound by South African law.[36]

In practice, moreover, foreign suppliers who end up paying the levy will want to pass its costs on to local mining companies. According to the chamber, this could cost the industry some R430m a year, based on import data from 2016. This will further increase the financial burden on the mining industry, while reducing its international competitiveness.[37]

Employment equity

Black representation is expected to rise to 50% at board and top management levels, 60% at the senior management level, 75% at the middle management level, and 88% at the junior management level. In each of these spheres, black women must make up half the black representation required.[38]

Unlike most other provisions in the new charter, these targets are closely modelled on those in the BEE generic codes. They are also based on the assumption that, because black South Africans make up 80% of the economically active population (EAP), they should also come close to (or exceed) the 80% level in all management posts. But the EAP (by definition) includes all people between the ages of 15 and 64 who work or wish to do so. Since more than half the African population is under the age of 25, the EAP includes many black youths who have never finished high school or worked at any job at all.

> *In 2016, only 33% of Africans fell within the 35-64 age cohort from which managers would normally be drawn. In addition, though degrees or diplomas are often necessary or advisable for management jobs, only 7% of Africans then held any kind of post-school qualification. The pool of African people from which mining managers can realistically be drawn is thus smaller than the new charter assumes.*

By contrast, those appointed to management posts must have appropriate training, experience, and skills. In 2016, however, only 33% of Africans fell within the 35-64 age cohort from which managers would normally be drawn. In addition, though degrees or diplomas are often necessary or advisable for management jobs, only 7% of Africans then held any kind of post-school qualification. The pool of African people from which mining managers can realistically be drawn is thus very much smaller than the new charter assumes.

How quickly black representation can be increased at senior levels also depends on natural attrition among incumbents and how fast the economy is growing. According to the chamber, at growth rates of between 2% and 8% of GDP, it would take five years for black representation among top management to reach 29% and another five years for it to reach 36%. Yet the charter demands that these targets be met within 12 months. If the growth rate is lower (which is more probable), it would take ten years for black representation among top managers to reach 24%, as resignations would then be fewer while the scope to expand companies would be more limited.[39]

In its founding affidavit, the chamber argues that 'these targets are incapable of immediate compliance', as the charter requires. Attempting to implement them would also result in 'massive disruption' to mining operations. Yet failing to achieve the new targets would expose mining companies to the loss of their mining rights.[40] *This is likely to put them in an impossible 'Catch-22' situation.*

Human resources development

The new charter requires mining companies to 'invest 5%' of their annual payrolls on 'essential skills development'. However, of this 5%, only 2% is to be spent on training and bursaries for employees. Of the remaining 3%, 2% is to go to the minister's new Agency, while 1% is to go to historically black universities to help 'develop solutions' to exploration, environmental, and other challenges.[41]

Like ownership, this is a 'ring-fenced' element on which 100% compliance throughout the life of a mining

right is required. Yet, for most companies in a still labour-intensive industry, 5% of annual payroll is a significant sum (especially as mining companies must also pay the statutory skills levy, currently set at 1% of annual payroll). Payments of this magnitude pose a substantial burden, especially during periods of limited profitability. Hence, they could fuel many job losses over and above the roughly 70 000 already recorded over the past five years and the 21 000 soon to take effect.[42]

That only 2% of each company's total contribution will be spent on employee training is a further concern. The requirement that 2% be allocated to the new Agency is also inconsistent with the Constitution, which requires that all taxes and levies be paid into the National Revenue Fund. In addition, the historically black universities to which the remaining 1% must go are weak on research and cannot easily attract high-calibre academics. Hence, more than half the money that companies must contribute each year may in practice do little to enhance mining skills or help find solutions to pressing technological challenges. At the same time, the overall 5% levy is again essentially a tax, which can be imposed only via a money bill adopted by Parliament.[43]

Mine community development

Mining companies must 'meaningfully contribute' to the development of mine communities via 'infrastructure projects, income-generating projects, and enterprise development'. Their contributions must be 'proportionate to the size of their investments' and in keeping with their approved social and labour plans (which must also be published in English and other languages used in mine communities).[44]

The charter provides no clarity as to what level of contribution may be accepted by the DMR as sufficient, for it fails to define words such as 'proportionate' and 'investment'. This uncertainty makes it impossible for mining companies to comply with this requirement. Yet this is also a ring-fenced element, on which 100% compliance is required at all times.[45]

The charter provides no clarity as to what level of contribution may be accepted by the DMR as sufficient, for it fails to define words such as 'proportionate' and 'investment'. This uncertainty makes it impossible for mining companies to comply with this requirement. Yet this is also a ring-fenced element, on which 100% compliance is required at all times.

The wording used also suggests that the required contributions are in addition to the already costly obligations generally contained in social and labour plans. This will compound the financial burden on companies at a time when many are battling to stay afloat.

Sustainable development

Under these clauses, mining companies must 'comply with and implement environmental management systems', as required by national legislation and regulations. Companies must also improve their 'health and safety performance' in line with 'milestones' towards 'zero harm' that were endorsed by stakeholders at a 2016 summit. In keeping with 'agreed timelines', they must thus 'eliminate occupational lung diseases'; 'prevent' as well as 'manage' TB and HIV/AIDS; and 'eliminate fatalities and injuries'. In addition, if they undertake research and development (R&D), they must spend 'at least 70%' of their R&D budgets in South Africa, while 50% of this 70% must go to historically black universities.[46]

Environmental obligations are already binding on the mining industry and there is no need to include them in the new charter. In addition, the charter scorecard obliges mining companies to show '100%' compliance with their approved environmental management plans,[47] *which may not always be attainable in practice. These provisions will thus increase the risk of mining rights being suspended or cancelled without adequate reason.*

The 'zero harm milestones' that were endorsed by stakeholders in 2014 were never intended to be binding on mining companies.[48] *Nor were they expected to result in the cancellation of their mining rights if they failed to achieve unrealistic objectives, such as 'preventing' the spread of HIV.*

Moreover, given the great depths at which mining companies may have to operate (sometimes four kilometres beneath the ground) and the frequency of seismic events, it is difficult in practice to 'eliminate' all injuries and deaths. There is also no need to include this requirement when comprehensive safety rules are already contained in the Mine Health and Safety Act of 1996. In addition, the wording used in this clause seems inconsistent with that in the scorecard, which requires a '20% annual reduction' in both fatalities and injuries. This contradiction adds to uncertainty.[49]

The new R&D obligations exceed what the MPRDA envisages and are ultra vires the Act. The requirement that 70% of R&D budgets be spent inside the country ignores the magnitude of the domestic skills shortage and may make it harder for the industry to benefit from technological developments elsewhere in the world. In addition, the charter's demand that 50% of this 70% go to historically black universities is unrealistic, as these universities generally have little research capacity and cannot easily acquire this.

Housing and living conditions

Mining companies must submit 'housing and living conditions plans', which must be approved by the DMR after consultation with trade unions and the Department of Human Settlements. These plans must 'address housing demand' and help establish 'integrated human settlements' catering for 'social, physical, and economic needs'. In addition, an 'affordable, equitable and sustainable health system' must be made available.[50]

> *According to the new charter, 'the ownership, mine community development, and human resources development elements are ring fenced and require 100% compliance at all times'. In addition, these targets are 'applicable throughout the duration of a mining right', which is generally 30 years (but could be longer) under the MPRDA.*

These clauses fail to recognise the financial and other difficulties that mining companies may face in seeking to 'address housing demand', or to provide a 'sustainable' health system. Many mining companies are now struggling to survive and may need to reduce or postpone housing construction. New housing developments also cannot proceed unless the necessary land and infrastructure has been made available by municipalities and other organs of state. (In the Rustenburg area, for example, the available water supply is too limited to meet the needs of an expanding platinum mining community, which limits new housing developments.) However, the charter ignores these practical constraints.

In addition, mining companies are already bound by the Housing and Living Conditions Standard developed by the minister. Hence, there seems to be no need to include additional housing obligations in the charter. The wording used is also confusing, as the scorecard makes no mention of this element. This suggests that compliance with the Housing and Living Conditions Standard need not in fact be measured under the charter.

Monitoring and enforcement

According to the new charter, 'the ownership, mine community development, and human resources development elements are ring fenced and require 100% compliance at all times'. In addition, these targets are 'applicable throughout the duration of a mining right', which is generally 30 years (but could be longer) under the MPRDA.[51]

According to the charter, a mining company which fails to score 100% on the three ring-fenced elements and scores less than 60% on three other listed elements (preferential procurement, employment equity, and sustainable development) may have its mining rights suspended or cancelled. It may also be punished via fines and prison terms.[52]

The charter goes well beyond the BEE generic codes in demanding 100% compliance on the ownership element as well as two other 'ring-fenced' elements: human resources development and mine community development. By contrast, the BEE generic codes do not expect 100% compliance on their three 'priority' elements, which are ownership, skills development, and preferential procurement. Instead, the generic codes give firms credit for partial performance in these spheres. In addition, the generic codes punish firms comparatively lightly – by reducing their level of BEE contribution by one level – if they fail to reach a 40% minimum score on each of these priority elements.

The new charter is very different, for it gives no credit for BEE ownership at any level below 30%, for any contribution to human resources development that is less than 5% of payroll, or for any expenditure on mine community development which is not 'proportionate' to the mining company's 'investment' (whatever these terms might mean). The new charter also threatens mining companies with a devastating penalty – the loss of their mining rights – if they fail to score 100% on these three targets for periods of 30 years or more.

The wording in the new charter is also impermissibly vague. It could be interpreted as meaning that a mining company may have its mining rights suspended or cancelled only if it scores less than 100% on all of the three ring-fenced elements, while simultaneously scoring less than 60% on the other three elements. However, it could also be interpreted as meaning that a mining company's failure to score 100% on any of the ring-fenced elements will suffice to warrant cancellation.

In addition, the minister is claiming a power to cancel mining or prospecting rights which he does not in fact have. As the chamber notes, the MPRDA does not give the minister the power to cancel or suspend mining rights for a failure to comply with the charter, which is simply 'a statement of policy' on how the MPRDA's objectives may be fulfilled. If the minister is now to be given such powers, this can be done only via an amendment to the statute, which must be adopted by Parliament in the usual way.

> *The MPRDA does not give the minister the power to cancel or suspend mining rights for a failure to comply with the charter. If the minister is now to be given such powers, this can be done only via an amendment adopted by Parliament.*

The minister's attempts to expand his powers under the MPRDA conflict with the doctrine of the separation of powers and are unconstitutional. As the chamber puts it: 'The minister cannot by decree elevate the charter's status to that of legislation, and cannot by decree provide in the charter that non-compliance therewith shall render the mining company in breach of the MPRDA... Only Parliament, by means of appropriate amendments to the MPRDA, can render a breach of the 2017 charter a breach of the MPRDA.'[53]

The chamber adds that the minister (in his answering affidavit) has tried to side-step this core issue through the 'unconvincing statement that he and his department have always implemented the charter in a benevolent and flexible manner and will continue to do so'. Says the chamber: 'This of course does not render the charter's provisions within his powers or make them lawful.' On the contrary, the minister's promise to be 'flexible' in implementing the charter 'merely emphasises the threat to the law of law' in his approach.[54]

Assessment: economically damaging and often unlawful

The new charter will cause enormous damage to the mining industry and the wider South African economy. Many of its provisions are unlawful, while some are also unconstitutional.

Provisions which are ultra vires the MPRDA cannot stand, for the minister has no capacity to give himself powers which this founding statute does not confer on him. Nor can the minister assume a law-making power which is contrary to the doctrine of the separation of powers. Clauses in the charter that make for arbitrary deprivations and uncompensated expropriations are also inconsistent with the Constitution. So

too are the clauses in which the minister seeks to impose new taxes on the industry and then to direct their proceeds to his proposed Agency, rather than to the National Revenue Fund.

The chamber thus has strong legal grounds for its court application seeking to have the charter struck down. However, even if the charter is indeed set aside, this will not be enough to restore investor confidence in the mining industry or position the sector for renewed growth. For that to occur, as the National Development Plan stressed back in 2012, South Africa needs 'a predictable, competitive and stable regulatory framework' in the mining sphere.

Striking down the new mining charter is simply the first step towards this goal. Thereafter, the country needs major reforms to the MPRDA to bring it into line with sound mining laws elsewhere in the world. It also needs a shift away from a failed system of BEE to a new focus on 'economic empowerment for the disadvantaged' or 'EED'. Whereas ever more onerous BEE requirements will increasingly hobble and destroy the mining industry, an EED strategy would stimulate investment, growth, and employment, while providing the poor with tangible and meaningful opportunities to get ahead.

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THE TEGETA/OPTIMUM STORY

Tegeta Exploration and Resources (Tegeta) is effectively owned and controlled by the Guptas, an immigrant family from India which has close ties to President Jacob Zuma. One of Mr Zuma's sons, Duduzane Zuma, has a significant stake in Tegeta: a shareholding recently valued at some R773m. Duduzane's participation in Tegeta is arguably enough to give the president a personal interest in the company's success or failure.[1]

In 2015 the Optimum coal mine, which was then owned by Glencore plc, was losing roughly R100m a month on a 40-year contract with Eskom, which obliged it to supply the Hendrina power station with coal at some R160/ton. Since input expenses had risen sharply over the years, this price was now less than the cost of producing the coal. Early in 2015, Optimum managed to negotiate a price increase with Eskom's procurement committee, but the Eskom board (which by then included a number of people with links to the Guptas) unexpectedly refused to endorse it.[2]

The board instead referred the matter to Brian Molefe, Eskom's newly appointed chief executive, who likewise refused to sanction any departure from the original contract. Mr Molefe also seemed to have close ties to the Guptas, as public protector Thuli Madonsela was later to recount in her *State of Capture* report, published in November 2016. As this document shows, in the period from August to November 2015, when the Optimum/Tegeta deal was being negotiated, Mr Molefe's cell phone records placed him in the vicinity of the Gupta's Saxonwold home on 19 occasions. They also showed that Mr Molefe had called Ajay Gupta no less than 44 times between August 2015 and April 2016, and that Ajay Gupta had phoned Mr Molefe 14 times in this period.[3]

> *Glencore was under significant pressure over Optimum when, in July 2015, it received an offer (made anonymously by the Guptas) to buy the coal mine for R2bn. Two weeks later, as the* Financial Mail *reports, Eskom CEO Brian Molefe added to that pressure by 'slapping a R2.2bn penalty on Optimum for the delivery of "sub-standard" coal'.*

Glencore was thus under significant pressure over Optimum when, in July 2015, it received an offer (made anonymously by the Guptas) to buy the coal mine for R2bn. Two weeks later, as the *Financial Mail* reports, Mr Molefe added to that pressure by 'slapping a R2.2bn penalty on Optimum for the delivery of "sub-standard" coal'. Glencore tried to negotiate further over both the contract price and the fine, but Mr Molefe refused to enter into any discussions, saying: 'We want our money and we will recover all of it.' Glencore was thus left with little choice but to place Optimum in business rescue, which it decided to do on 31st July 2015.[4]

On 3rd August the DMR suspended Optimum's mining licence, accusing the company of illegally retrenching employees. On 4th August Optimum's business rescue practitioners were appointed, while on 5th August Eskom served a legal summons on Optimum demanding payment of the R2.2bn fine. But no legal proceedings may be instituted against a company in business rescue, which blunted the force of this threat. In addition, on 7th August, the then mining minister, Ngoako Ramatlhodi, reinstated Glencore's mining licence for Optimum, which the DMR had suspended four days earlier.[5]

However, as amaBhungane's investigative journalists were later to write: 'Eskom still had a powerful bargaining chip, for in 2008 Optimum Coal Holdings, through which Glencore owned Optimum, had given Eskom a guarantee that, if Optimum went into liquidation before the end of the coal con-

tract in 2018, the holding company would step in and cover costs.' Fulfilling this guarantee could cost the holding company several billion rand.[6]

On 1st September Mr Molefe and Eskom chairman Ben Ngubane also allegedly sought to increase the pressure on Glencore by trying to persuade Mr Ramatlhodi to suspend all of the company's mining licences. As Mr Ramatlhodi later told amaBhungane: 'They insisted that I must suspend all the Glencore licences pending the payment of the R2bn.' The suspension of these licences would have brought Glencore's 14 coal operations to a standstill and jeopardised the jobs of its 35 000 employees. It would also have added to the likelihood of increased load shedding at a time when electricity stoppages were already causing the country great harm. According to Mr Ramatlhodi, the Eskom chairman was 'very insistent' that he must cancel the licences, but he nevertheless refused to 'shut the mines'.[7]

(An Eskom spokesman, Khulani Qoma, has strongly rejected Mr Ramatlhodi's allegations, but they nevertheless seem to have cost the mining minister his job. According to Mr Ramatlhodi, Mr Ngubane warned that he would have to report his refusal to withdraw the Glencore mining licences to Mr Zuma. Soon afterwards, the president reshuffled his cabinet, despatching Mr Ramatlhodi to the public service and administration portfolio, and appointing Mosebenzi Zwane as mining minister instead, as further outlined below.)[8]

> *Eskom continued to demand compliance with the existing contract and the full payment of the fine. This meant that Optimum would have to be sold. However, Eskom vetoed a possible sale to another company, which left Tegeta as the sole contender.*

According to Ms Madonsela, the business rescue practitioners made numerous attempts to negotiate a new coal supply agreement to save Optimum from being liquidated. But Eskom continued to demand compliance with the existing contract and the full payment of the fine. This meant that Optimum would have to be sold. However, Eskom vetoed a possible sale to another company (Pembani investment company, which had the purchase price available),[9] which left Tegeta as the sole contender.

On 22nd September, three weeks after Mr Ramatlhodi had reportedly refused to cancel all Glencore's mining rights, Mr Zwane, then MEC for agriculture in the Free State, was unexpectedly appointed as the country's new mining minister, despite his lack of mining experience. However, Mr Zwane already had significant links to the Guptas, having helped to establish a dairy project in the Free State which Gupta-linked companies had been entrusted to manage and supply. More than R80m of the tax revenues allocated to this farm – which was supposed to help a number of black farmers get ahead – had thus allegedly been siphoned off and diverted to a Gupta-controlled company in the United Arab Emirates (UAE). Of this total, R30m had come back to South Africa via Dubai to pay for a lavish Gupta wedding at Sun City in 2013. (As DA leader Mmusi Maimane puts it: 'This was the same wedding of Waterkloof Airforce Base ignominy, when the Guptas showed enough clout with government to land their private charter plane at a military airforce base'.)[10]

The dairy project was endorsed by the Free State provincial government in 2012, largely at Mr Zwane's urging. Soon afterwards, the Guptas (according to further information gleaned from the leaked Gupta e-mails) paid for Mr Zwane and his gospel choir to visit India. The Gupta brothers also reportedly funded several luxury trips for Mr Zwane to Dubai, where they themselves are frequent visitors and have bought costly mansions for themselves (and allegedly also for Mr Zuma). The leaked e-mails further suggest that Mr Zwane's CV was sent to the Guptas shortly before his appointment

as mining minster, and that they helped train him on how best to answer difficult media questions regarding his inexperience in mining and his ties to the family.[11]

With a Gupta ally in place as mining minister, Eskom in November 2015 began to insist that the Optimum mine could not be sold on its own. Rather, it had to be sold together with the rest of the shares in the Optimum Holding Company, as this would allow the failing Optimum mine to be subsidised by the Koornfontein mine and Optimum's share in the Richards Bay Coal Terminal. Both the Koornfontein mine and the coal export terminal were profitable and Glencore had no wish to part with them. But Eskom now demanded that the sale must be done at the level of Optimum Coal Holdings and must include all three of its assets. Eskom insisted on an answer within the next few days, while inspectors from the DMR, now under the control of Mr Zwane, allegedly began visiting Glencore's other mines looking for evidence of non-compliance with relevant rules.[12]

(Perversely, however, as Ms Madonsela reports, once Tegeta had acquired all three assets, it soon began to speak of selling the Optimum Coal Terminal, at a price later reported to be in the region of $250m or roughly R3.3bn. Whereas Eskom had previously insisted that Optimum, Koornfontein, and the Optimum Coal Terminal had to be kept together and could not be sold separately, now Eskom failed to object to the proposed sale – which in the end did not proceed.)[13]

With a Gupta ally in place as mining minister, Eskom in November 2015 began to insist that the Optimum mine could not be sold on its own. Rather, it had to be sold together with the rest of the shares in the Optimum Holding Company, as this would allow the failing Optimum mine to be subsidised by the Koornfontein mine and Optimum's share in the Richards Bay Coal Terminal.

It was at this juncture that Glencore global chief executive Ivan Glasenberg held a meeting in Switzerland with Tony Gupta and his business partner Salim Essa. This meeting was reportedly arranged and facilitated by Mr Zwane. The deal was finalised on 14th December 2015, when it was announced that Tegeta had entered into a R2.15bn transaction to buy the three Optimum assets which Eskom had insisted had to be sold together.[14]

Both Eskom and Mr Zwane then allegedly helped Tegeta to obtain the money needed to complete the purchase. In December 2015 Eskom, acting at the instance of Anoj Singh, the parastatal's chief financial officer and another Gupta ally, provided ABSA bank with a R1.6bn guarantee in favour of Tegeta, so as to help the company purchase the Optimum assets. In the end, however, this guarantee remained unused. Instead, as Ms Madonsela's *State of Capture* report reveals, between January 2016 and 14 April 2016 (when Tegeta had to pay the purchase price), Eskom paid Tegeta some R1.2bn for coal, some of it yet to be mined. Of this, at least R910m was 'diverted by Tegeta to fund 42% of the purchase price' of Optimum. In at least one instance, Eskom could have bought the same coal for less if it had refrained from using Tegeta as a middleman. As Ms Madonsela writes, this 'did not make commercial sense'.[15]

Much of the remaining 58% of the purchase price may have been secured by raiding the mine closure rehabilitation fund which Optimum had built up. On a basis that has yet to be explained, the Optimum fund was allowed to be counted as Tegeta's asset and to be transferred to the Indian state-owned Bank of Baroda. Thereafter, as Ms Madonsela reports, instead of keeping the funds carefully ring-fenced, Tegeta initiated a flurry of transactions that saw monies flow in and out of accounts held at various branches of the Baroda Bank. At the end of this process, one account was missing some R1.45bn. However, rehabilitation funds must by law be retained to help remedy environmental dam-

age on mine closures. Hence, as Ms Madonsela puts it, 'it is unclear as to why the DMR authorised the transfer of these funds to the Bank of Baroda'.[16]

Eskom also helped Tegeta yet again in April 2016, when it transpired – only two days before payment for Optimum had to be made – that the company was short of the roughly R600m it needed to finalise the purchase. According to Ms Madonsela's report, a late-night meeting was then held at Eskom (at 9pm on 11 April 2016), where the board agreed to make a R660m 'prepayment' to Tegeta for five months' worth of coal still to be supplied by Optimum. This advance payment was justified on the basis that Eskom needed to secure a reliable coal supply through the high-demand winter months. It was also agreed that Tegeta would be paid R19.69/gigajoule (GJ), which was almost double Eskom's average coal price of R11.05/GJ. The total bill came to R660m, including VAT.[17]

However, as Ms Madonsela notes, the Eskom pre-payment was 'not used to meet coal production requirements', but rather to help provide the cash that Tegeta needed to finalise the purchase. Reports the *Financial Mail*: 'The money came in the nick of time. Six hours earlier, the banks had told the Guptas they wouldn't be able to give them the R600m needed to meet the Optimum price tag of R2.15bn, due two days later. Without the prepayment, the deal would have fallen through.'[18]

> *As Ms Madonsela notes, the Eskom pre-payment was 'not used to meet coal production requirements', but rather to help provide the cash that Tegeta needed to finalise the purchase. Reports the* Financial Mail*: 'The money came in the nick of time. Without the prepayment, the deal would have fallen through.'*

Eskom also helped the Guptas still further by granting Tegeta various contracts to supply its power stations with coal from Optimum. The first contract was valued at R235m and was awarded at the end of 2015, shortly after the contract to buy Optimum had been concluded. This coal supply contract was then extended at Eskom's late-night April 2016 board meeting, resulting in the pre-payment that Tegeta so badly needed. Thereafter, Mr Molefe planned to award Tegeta a third extension of the coal contract, which would have been worth some R855m. This third extension was blocked by the National Treasury, which recommended that Eskom use a wider range of coal suppliers. Had the deal gone through, Tegeta would have notched up some R1.7bn in coal supply contracts without ever participating in an open tender.[19]

The issue of the R2.2bn fine which Eskom had imposed on Optimum for supposedly sub-standard coal still remained, however. Mr Molefe had earlier insisted that this fine was non-negotiable but, once the purchase had gone through, Eskom proved willing to enter into talks on the issue. In June 2017 it emerged that the parastatal, represented by Gupta associate Anoj Singh, had agreed to reduce the fine from R2.2bn to R255m. This was a decrease of some 88% on the amount that Molefe had earlier insisted had to be paid in full.[20]

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