



**THE SEPTEMBER 2018 MINING CHARTER:
AN IMPROVEMENT, BUT TRANSFORMATION
STILL TRUMPS SUSTAINABILITY**

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THE SEPTEMBER 2018 MINING CHARTER: AN IMPROVEMENT, BUT TRANSFORMATION STILL TRUMPS SUSTAINABILITY

Introduction¹

The latest draft Mining Charter gazetted on 27 September 2018 by mining minister Gwede Mantashe² has significantly improved previous versions, including the last one of June 2018. Mantashe introduced the latest iteration of Mining Charter III while also announcing that the government was withdrawing the controversial 2013³ Mineral and Petroleum Resources Development Act (MPRDA) Amendment Bill,¹ which he said would eventually be replaced by separate legal frameworks for mining and for petroleum resources.

Various stakeholders, including the Minerals Council South Africa (MCSA) – formerly the SA Chamber of Mines – representing some 90% of mining companies, have welcomed the new Charter. That's mainly because it allows mining companies to maintain the level of 'black' ownership at 26% – as per the Black Economic Empowerment (BEE) requirements – for the duration of their existing mining rights, without 'topping-up' to 30%, as had been demanded by the June 2018 draft Charter. It thus recognized the 'once empowered, always empowered' principle, for existing mining rights. On this principle, the government will recognize the empowerment credentials of a mining company even if its BEE partner subsequently sells its stake.

The MCSA expressed several reservations about the Charter, mainly concerning the limited applicability of continuing consequences of past transactions on disposal of BEE shareholding, the treatment of renewals of mining rights as new rights and the practicality of the Inclusive Procurement.

The MCSA said it 'broadly supports...[the] intentions and content' of the new Charter which was 'the product of substantial engagement between key stakeholders and is a compromise that reflects different difficult choices that have been made. This Charter provides a better balance between the mutually reinforcing concepts of promoting competitiveness and transformation.'⁵

The Council nonetheless expressed several reservations about the Charter, mainly concerning the limited applicability of continuing consequences of past transactions on disposal of BEE shareholding, the treatment of renewals of mining rights as new rights, the practicality of the Inclusive Procurement provisions relating to local content targets for mining goods, the targets for services, and the turnover threshold for junior miners. The latter criticism indicated that the Council believed that mining companies should be turning over significantly more than R150 million a year before they lost the status of 'juniors' and thus became liable for providing full empowerment benefits.

Despite the marked improvement on its predecessors, the September 2018 Mining Charter still raises the future BEE requirement for mining companies to a hefty 30% and imposes several other obligations on them beyond their core business of digging valuable minerals out of the ground.

Ultimately the September 2018 Mining Charter has to be judged, not against previous versions, but against the context of a real-world economy in which population growth has outstripped faltering economic growth for some five years, leaving unemployment at an unsustainable level of 27% or more.

Although the relative importance of the mining industry has declined over the past few decades, it remains vital to the economy, as Marius Roodt has noted in a recent Institute of Race Relations (IRR) report⁶. Mining's contribution to overall GDP has decreased from more than 20% in the early 1980s to about 7% in 2015. But if one adds related and dependent industries, its contribution still amounts to 17% of the economy. And mining contributes more than 10% to the economies of four of the country's nine provinces – Northern Cape, Mpumalanga, Limpopo and North West. In North West, mining represents almost 30% of GDP.

Mining remains critical to tackling South Africa's three key economic enemies: poverty, unemployment and inequality.

Its importance as an employer is even greater. Nationally, over half a million people are working in mining. Adding indirect employment generated by the industry, the number rises to about 1.3 million.

Mining also accounts for a large share of South Africa's exports – about 25%, rising to 40% when beneficiated minerals are included.

So mining remains critical to tackling South Africa's three key economic enemies, as identified by the ANC; poverty, unemployment and inequality. To play a meaningful role in that fight, mining needs a huge injection of investment, local and foreign.

The government believes the amended Charter will serve that end. At Davos on 23 January 2019, President Cyril Ramaphosa said: 'Over the last year we have undertaken measures to ensure greater policy certainty and consistency, including economic reforms in sectors that have great potential for growth. For example, in the mining industry, we finalised a new Mining Charter that balances the need for transformation with the imperative for new investment in an industry that, despite its difficulties, could be growing and creating jobs.'⁷

Ramaphosa had undoubtedly given his new minister of mineral resources, Gwede Mantashe, strict marching orders in early 2018 to address the policy uncertainty around the Mining Charter and the 2013 MPRDA Amendment Bill, which were troubling the mining industry and stifling new investment. That was in turn jeopardising Ramaphosa's ambitious drive to boost investment in South Africa to at least US\$100 billion over five years.

But although it will surely help to attract some new investment, it is nonetheless doubtful that the new Mining Charter will provide that huge capital injection which mining and the wider economy so badly need. That's because it still imposes a substantial BEE burden which will very probably discourage many foreign investors particularly. And also because it does not seem to have gone far enough in erasing the prevailing uncertainty and unpredictability generated by repeated revisions to the original Mining Charter – which came into effect in 2004 through the Mineral and Petroleum Resources Development Act of 2002⁸ – and other rules.

Jonathan Veeran, partner and mining sector head at the Johannesburg law firm Webber Wentzel, pertinently noted in his reaction to the new Charter that if the country's economy were to grow, government and industry would in future have to focus on economic assessment instead of policy development. Policy could not be formulated without a thorough economic, industry and government assessment, which was missing in the case of the Charter as there had been limited input from the departments of Energy and of Trade and Industry.⁹

Patrick Leyden, a director and mining law specialist at the law firm Herbert Smith Freehills, welcomed the September 2018 Charter for removing some of the uncertainty that had been upsetting the mining industry, especially by establishing the principle of 'once empowered, always empowered' – as far as existing mining rights were concerned.

But he said that certain key problems remained, such as the non-recognition of past BEE credentials on renewal of mining rights and also uncertainty about whether some of the targets and thresholds in the Charter were practically achievable within the given timeframes.¹⁰

And Leyden noted, as others have, that the Charter retained one of the major concerns for mining companies; the right of the minister of mineral resources to review the Charter at any time in the future. So mining companies have no assurance that BEE ownership and other obligations will not rise again in the future and perhaps keep rising. The Charter in that sense maintains a major part of the policy uncertainty it was supposed to address.

The Charter retained one of the major concerns for mining companies; the right of the minister of mineral resources to review the Charter at any time in the future.

And so 'whether or not it will drive the much-needed investment into the mining sector that we have desperately needed over the last couple of years remains to be seen,' Leyden concluded.

Ultimately, it seems that despite much better intentions under Ramaphosa than Zuma, the state-centric ANC government has still been unable to loosen its grip on mining enough to unleash the indispensable power of the private sector to revive the industry.

Ownership requirements for existing mining rights holders

Under the first Mining Charter of 2004, mining companies were required to transfer 26% of their equity or assets to historically disadvantaged South Africans (HDSAs) by the end of 2014. The Charter also said that ownership deals were to be done at 'fair market value on a willing seller/willing buyer basis'. And it stated that 'the continuing consequences' of all previous transactions must be taken into account in measuring HDSA ownership, even if HDSA beneficiaries had since sold out or otherwise exited from these deals.¹¹

From 2010 to 2017 those key principles were steadily eroded, while empowerment obligations were sharply ratcheted up.

In 2010, the Department of Mineral Resources revised the Charter and tried to limit the principle of 'continuing consequences' to ownership deals concluded before 2004. In 2016 the MCSA – then still the Chamber of Mines – took the government to court, arguing that the principle could not be retrospectively changed.¹²

Meanwhile, though, in June 2017, mining minister Mosebenzi Zwane added a substantially larger BEE burden to mining companies. He published a new draft Mining Charter which would not only have rejected the continuing consequences principle. It would also have obliged holders of mining rights to

top up their black ownership from the existing level to a minimum of 30% within a year.¹³ As Anthea Jeffery, mining expert at the IRR, then pointed out, this meant that a company such as AngloGold Ashanti – which had achieved 27% black ownership before many of its BEE investors sold out, thereby reducing its black ownership to 6% – would have had to top up black ownership by a huge 24 percentage points within 12 months to reach the new minimum of 30% in order to remain compliant.¹⁴

Mining companies were relieved in February 2018 when newly-elected ANC President Ramaphosa, ousted Jacob Zuma from the national presidency some 15 months before his term was due to expire and fired Zwane, widely regarded as having been among the chief enablers of Zuma's business cronies, the Gupta brothers.

In April 2018, the Pretoria (or North Gauteng) High Court delivered its judgment on the MCSA's 2016 application, upholding its contention that the principle of 'once empowered, always empowered', could not be retrospectively changed.¹⁵

The June 2018 draft Charter published by Zwane's successor Gwede Mantashe in part acknowledged this principle and was thus substantially better than its 2017 predecessor. It said a company which had 'at any stage' achieved a 26% BEE shareholding, and the BEE investors of which had since exited, would still be 'recognised as compliant'. Yet it also decreed that even these mining companies would nonetheless have to top up their BEE shareholdings to 30% over five years.¹⁶

The new Charter still limits the 'once empowered, always empowered' principle by stipulating that mining companies will have to top up their BEE credentials to 30% when they renew or transfer their mining rights.

The MCSA rejected this top-up requirement because it would retrospectively diminish the rights that mining companies had secured on the basis of the 2004 and 2010 Charters.¹⁷ That would violate the April 2018 Pretoria High Court ruling which had stipulated that increasing the empowerment obligation on an existing mining right would only be valid if the mining right had expressly been made subject to it at the time of its granting.¹⁸ The September 2018 Mining Charter addresses this major concern of the mining industry by removing the requirement for mining companies to top up their BEE shareholding to 30% on existing mining rights.

However the new Charter still limits the once empowered, always empowered principle by stipulating that mining companies will have to top up their BEE credentials to 30% when they renew or transfer their mining rights.¹⁹ The former provision will be particularly onerous for companies whose mining rights are about to expire. The latter provision is likely to reduce the market value of such rights, as the transferee will acquire the responsibility of increasing BEE ownership to 30%.

The September 2018 Charter is unclear about what mining companies that have not attained the minimum 26% ownership must do to become compliant. Will they now have to top up to 26%? Or will they have to increase BEE ownership to the new bar of 30%?

However, the September 2018 Charter does also improve the June 2018 version in another small way, by redefining the beneficiaries of empowerment from 'Black Persons' to 'Historically Disadvantaged Persons' (otherwise called Historically Disadvantaged South Africans-HDSAs).²⁰ The main practical effect of the change seems to have been to include white women among potential beneficiaries, though it remains to be seen how much they will in fact benefit.

Ownership requirements for new mining rights holders

Under the June 2018 draft Charter, applicants for new mining rights would have needed to increase

black ownership to at least 30%, of which 8% would have gone to mine employees, 8% to mine communities, and 14% to BEE ‘entrepreneur(s)’, defined as companies with at least 51% ‘black’ ownership.²¹

Mine employees and host mining communities would each have been entitled to a 5% ‘free carry’ (or ‘free carried interest’) and would thus have had to pay for only 3% of their 8% stakes. Companies seeking new mining rights would have therefore had to simply give away 10% of their equity.

The September 2018 Charter changes the distribution of BEE ownership requirements. Now the ratio of ownership becomes 5% to mine employees, 5% to host communities and 20% to BEE entrepreneurs.²² Significantly, the latter are now defined as companies with at least 51% ownership by ‘Historically Disadvantaged Persons’ (rather than ‘blacks’).²³

The nature of the ownership has also changed. Instead of employees and communities each being entitled to a 5% ‘free carry’, the word ‘free’ has been dropped. So mining rights holders need only give the 5% due to employees and communities in the form of non-transferable ‘carried interest’.

Furthermore, in meeting its empowerment obligations to a host mining community, the mining rights holder may substitute 5% ‘equity equivalence’ for the carried interest it would otherwise have to transfer to such a community.²⁴ This would allow a mining company to invest the equivalent of 5% of its equity in the social and economic development of the host community.

The MCSA has welcomed this substitution of ‘carried interest’ for ‘free carried interest’, saying that it provides for ‘the development of mechanisms towards cost recovery so as to not raise investment hurdle rates’.

It has also welcomed the ‘equity equivalence’ option.²⁵

The precise implications of a ‘carried interest’, the cost of which may be recovered from the development of the asset, do not seem to be universally clear, however.

The precise implications of a ‘carried interest’, the cost of which may be recovered from the development of the asset, do not seem to be universally clear, however. It has been suggested that this simply means that the mining company may withhold the payment of dividends to BEE shareholders until they have repaid any loans which the company might have originally given them to buy the shares.

However, Leyden notes that this explanation seems to be contradicted by the Charter’s requirement that the shares issued to employees and communities should come ‘at no cost to them and free of any encumbrance.’

This uncertainty about the recoverability of the 10% of shares which companies would be transferring was causing some concern to them, he said. ‘You can’t just take 10% off the market cap of a company like Anglo American. If they can’t recover it, that is a big problem,’ said Leyden.²⁶

The MCSA has also welcomed²⁷ the September Charter’s scrapping of the June 2018 Charter’s requirement for holders of new mining rights to pay an annual ‘EBITDA trickle dividend’ (of 1% of earnings before interest, taxes, depreciation and amortisation [EBITDA]) to employees and communities, if the companies failed to pay ordinary dividends for five years.²⁸

This was evidently dropped because it would have required mining houses to pay this trickle dividend even if they did not declare dividends otherwise, in other words, even if they made a loss.

The June 2018 Charter definitions explicitly included two classes of trickle dividends; the EBITDA one referred to above as well as a second class, which it defined as – ‘a dividend with a cash flow to BEE

entrepreneurs throughout the term of the investment where a percentage of such cash flow should be used to service the funding of the structure while the remaining amount is paid to BEE entrepreneurs.’²⁹

The latter trickle dividend had been introduced in the 2010 Mining Charter after it became apparent that many BEE shareholders were not deriving any economic benefit from dividends declared by mining companies as all the dividends were being allocated to the repayment of the loans granted to the BEE shareholders to acquire the shares in the mining companies.

The trickle dividend was introduced on the basis that, even if the loans were outstanding, some economic benefit had to flow to the BEE shareholders. So, for example, 10% of any dividend declared would be paid to the BEE shareholder while the remaining 90% went to the repayment of the loan.

Trickle dividends are no longer specifically defined in the September 2018 Charter, which has created some uncertainty over whether the trickle dividend to BEE shareholders is still required. It seems that it is, however, as it is referred to in passing under the definition of ‘meaningful economic participation’ which defines this participation to include, inter alia: ‘A percentage of dividends declared, or other monetary distributions or trickle dividends paid to BEE shareholders, subject to the provisions of relevant legislation.’³⁰

On 27 March 2019, the MCSA announced that it had filed an application for the judicial review and setting aside of certain clauses of the 27 September 2018 Mining Charter. These provisions would be ‘detrimental to its sustainability.’

Importantly, when it comes to ownership, the MCSA and many others have lamented the requirement in the latest Charter that if existing mining rights are renewed or transferred, the same BEE requirements will apply as to new mining rights, i.e. 30% BEE ownership and other obligations.³¹

The government’s refusal to recognize ‘continuing consequences’ – empowerment credentials – when mining rights are renewed or transferred is one of the big issues to emerge from the September 2018 Charter. MCSA CEO Roger Baxter said in December that this was ‘a material issue for the industry’ and that the council was still seeking clarity, certainty and finality on it.³²

On 27 March 2019 the MCSA announced that it had filed an application for the judicial review and setting aside of certain clauses of the 27 September 2018 Mining Charter. These provisions would be ‘detrimental to its sustainability.’

Baxter specifically complained that the Charter did not recognize ‘the continuing consequences of previous empowerment transactions, particularly in respect of mining right renewals and transfers of those rights.’

So the MCSA is clearly objecting to the requirement that when a mining company renews or transfers its mining right, its existing BEE shareholding will have to be topped up, from, say, 26% to 30%. And if it has had BEE partners but they have already exited, it will get no recognition for past BEE credentials upon renewal or transfer, and so will have to rise from zero BEE ownership to 30% upon renewal or transfer.

Baxter said this would ‘have a severely dampening effect on the attractiveness of mining in the eyes of investors.’ The MCSA also believed it was in breach of the April 2018 North Gauteng High Court decision (referred to above).

Baxter added that the MCSA was still in negotiation with Mantashe where these issues might be

resolved but that it was taking the matter to court to meet a deadline to do so, within 180 days of the publication of the Charter.³³

Leyden said for mining companies which had recently acquired their mining rights, this was not such an issue as they would remain empowered and compliant at 26% BEE ownership for many years to come. But for companies whose mining rights were about to expire, the new provisions would be a major burden as they would have to top up to 30% soon.

It was also unclear exactly how they would do so, he said. Could they simply increase BEE ownership to 30% in any proportions, or would they have to do so in the 20:5:5 ratio set out in the new Charter; i.e. 20% for BEE entrepreneurs and 5% each for qualified employees and communities? If the latter, would this mean diluting the 26% share of their BEE partners to 20%, so they could then give 5% to the employees and communities, to reach the new target of 30%? Or would they have to add the 5% for communities and 5% for employees to the existing 26% BEE ownership and thereby have to attain 36%?

Having to top up to 30% ownership under the new terms if a mining right were transferred would also be a potential problem, he said. Other companies might be reluctant to buy those mining rights if they could not also inherit the BEE empowerment credentials and would thus have to increase ownership to 30% in the 20:5:5 ratio on purchase.

‘There might potentially be less merger and acquisition activity which would be bad. You want investment especially from foreign companies and thus necessary merger and acquisition in the mining sector might be stymied,’ said Leyden.

It was also not clear if amending the terms of a mining company’s mining rights – say by adding a new mineral to those it was already mining in its seam – would also trigger the imposition of the new 30% BEE ownership requirements.

He added that it was also not clear if amending the terms of a mining company’s mining rights – say by adding a new mineral to those it was already mining in its seam – would also trigger the imposition of the new 30% BEE ownership requirements.³⁴

And law firm Webber Wentzel has said that if an existing rights holder applies for an additional mining right (say, on an adjoining property which has not been mined before), this new right will also be subject to all the new rules.³⁵

As previously shown, the MCSA has also criticised ‘the limited applicability of continuing consequences of past transactions on disposal of BEE shareholding’ in the new Charter.³⁶ This is part of the council’s wider concern about security of tenure of existing rights.

Analysts say the council is referring in this case to Clause 2.1.6 of the Charter. As we have seen, Clause 2.1.1 recognises the continuing consequences of previous BEE transactions in relation to existing rights, i.e. if a mining company has met the 26% requirement and its BEE shareholder subsequently sells out, it will still be recognised as compliant.

However, clause 2.1.6 states that if the BEE partner of an existing mining right holder exits the company after the September 2018 Charter comes into effect, then the holder’s BEE credentials will only be recognised for the duration of the right, *under certain circumstances*. These apparently pertain to ‘vested interests’, a concept that is not entirely clear from the Charter. The Charter says if a BEE partner

disposes of his share before ‘a third of the duration of the mining right has elapsed’ – in other words, generally speaking before ten years have passed – then the mining company will receive no credit for that empowerment.. The same will evidently apply if the BEE entrepreneur sells out after ten years, but before any remaining debt on its shares has been written off, giving it the ‘unencumbered net value’ of its stake.³⁷

‘The recognition of empowerment credentials shall only be applicable to measured effective ownership which has vested to BEE shareholding,’ the Charter says.³⁸

Recognizing empowerment credentials only for ownership which has ‘vested’ in BEE partners seems to mean that the BEE partner’s shares must, firstly, be unencumbered, i.e. they must not have been pledged as security for an underlying loan and, secondly, that any loan in relation to the acquisition of such shares must have been settled in full.

So although the BEE entrepreneur may be the registered owner of the shares, there will be restrictions on its shares until such time as the shares have vested. These restrictions could prevent transfer of the shares, for example. They could also prevent the BEE shareholder from using its shares to ‘leverage equity in proportion to such vested interest over the life of the transaction to reinvest in other mining projects,’ as spelt out in the Charter’s definition of ‘economic interests’.³⁹

The apparent requirement for a mining company to write off any outstanding debt owed by a BEE partner which disposes of its shares, in order to retain its empowerment credentials, is an onerous one for the mining company.

The apparent requirement for a mining company to write off any outstanding debt owed by a BEE partner which disposes of its shares, in order to retain its empowerment credentials, is an onerous one for the mining company. It also seems to be a burden on the BEE entrepreneur who may be locked in by the company and unable to realise value for his or her shares until the shares have been paid off. If the BEE shareholder is effectively locked in, the sale cannot take place until all debt has been paid off, but that erodes the supposed purpose of BEE, which is to allow black people to acquire more capital to use as they see fit.

Penalties for non-compliance with the ownership requirement

The June 2018 draft Charter would have required a mining rights holder to maintain a 100% score on the ownership target for the duration of its mining rights, which is usually 30 years. It would also have required it to maintain at least a 50% pass mark on its overall BEE scoreboard. Failing on any of these requirements would put it in breach of the Charter and of the MPRDA. It could then have had its mining rights suspended or cancelled, and might also have faced hefty fines and other penalties.⁴⁰

The September Charter is actually a bit more demanding on that score. As confirmed by an amendment to the Charter gazetted on 19 December 2018,⁴¹ a mining company holder must fully meet not only the ownership requirement but also the community development requirement (plus score more than 50% on the overall scorecard), in order to remain compliant.

The penalty of losing its mining right if it does not do so, however, evidently conflicts with the Pretoria High Court’s April 2018 ruling, which said that a failure to comply with Charter obligations did not constitute a breach of the MPRDA for which the penalties in the Act might be imposed.⁴²

And penalties under the Mining Charter are harsher than those in the general BEE codes of practice. The Broad-Based Black Economic Empowerment Act of 2003, as amended in 2013, which is supposed

to trump all other empowerment rules, gives companies some credit for partial performance on its ownership targets. It punishes them comparatively lightly – by reducing their level of BEE compliance by one level – if they fail to reach a 40% minimum score on the ownership element.⁴³

Equity equivalents

Under the September 2018 Charter, all mining right holders will be able to earn beneficiation ‘equity equivalents’ of up to 5% of their BEE entrepreneur shareholding requirements if they supply mineral ore or mineral products to ‘independent South African-based beneficiation entities at a discount to the mine gate (production) price’ or otherwise increase local value addition.⁴⁴ The 5% represents quite a drastic reduction from the 11% beneficiation equity equivalent in the June 2018 draft Charter.

The aim of this equity equivalent is to promote the government’s National Industrialisation Programme.

However forcing mining companies to sell their ore at below production prices to qualify for equity equivalents is a considerable interference in their business autonomy and, potentially, also in their profitability. It is also by no means clear that beneficiation is a viable industrial strategy for South Africa.

Dropping the beneficiation equity equivalent from 11% to 5% may indicate some second thoughts by the government on the practicability of beneficiation. And minister Mantashe’s announcement of the withdrawal of the controversial MPRDA Amendment Bill at the same time as he unveiled the September 2018 version of the Mining Charter could be seen as another clue that the Ramaphosa administration has reservations about the wisdom of interfering in the business decisions of mining companies by restricting their exports of raw minerals.

Dropping the beneficiation equity equivalent from 11% to 5% may indicate some second thoughts by the government on the practicability of beneficiation.

Law firm Strata Legal MD Brandon Irsigler welcomed the promised withdrawal of the MPRDA amendment bill as ‘an excellent move’, particularly because this meant abandoning its provision that certain minerals could be designated of strategic value to the state, allowing their export to be throttled by ministerial proclamation. This, he said, would come as a relief for producers and investors in the coal industry, in particular.⁴⁵

More cynically, perhaps, decreasing the beneficiation equity equivalent from 11% to 5% might simply indicate that the government has come under pressure from BEE entrepreneurs for more ownership.

Preferential procurement

The September 2018 Charter slightly eases the empowerment obligations of mining companies in procuring goods and services. It says they must buy 70% of their capital and other mining goods from South African manufacturers. This was the same in the June 2018 Charter. Of this 70%, though, 21% must come from companies owned and controlled by Historically Disadvantaged Persons. The June 2018 Charter would have obliged them to buy 26% of goods from 51% ‘black’-owned firms.

The September Charter prescribes that 5% of the supplying firms must be owned by women or youth. The remaining 44% must come from BEE-compliant firms, i.e. with 26% BEE ownership and level 4 BEE ratings.⁴⁶

The September 2018 Charter further stipulates that all mining rights holders must buy 80% of the ser-

services they need from South African companies, as was the case in the last Charter. Of this 80%, though, only 50% must come from companies 51%-owned by historically disadvantaged persons versus the 60% of services to be bought from 51% black-owned firms. The September Charter says a further 15% must be spent on services supplied by women-owned and -controlled companies; 5% must be spent on services supplied by youth (versus 10% to be spent on women or youth companies in the June Charter); and 10% of services must be supplied by BEE-compliant companies (this remains unchanged).⁴⁷

As with ownership requirements, the September Charter significantly changes the definition of procurement beneficiaries from ‘black persons’ to ‘Historically Disadvantaged Persons’.⁴⁸ This effectively extends the preferences to include white women and youth, and so the trade union Solidarity – which is quite vigilant in defending the rights of white people – has welcomed the changes.⁴⁹

The MCSA has nonetheless expressed reservations about ‘the practicality of the Inclusive Procurement provisions relating to local content targets for mining goods, [and] the targets for services.’ It says it will take this up with the minister.⁵⁰

The offset concessions mean that mining companies would probably have to nurture infant local firms to get the goods and services they need to remain compliant. This will be both expensive and time-consuming. It would also require the mining companies to venture into all sorts of enterprises they know little about.

The MCSA’s reservations are understandable. Few South African companies – and even fewer that are 51% owned by historically disadvantaged persons – have the capacity to manufacture the highly sophisticated equipment needed for mining. It’s also likely that mining houses will struggle to find enough 51% HDP (HDSA)-owned services firms to meet their empowerment quotas.

‘Take the “transportation” requirement, for instance,’ says Jeffery. ‘If Transnet cannot be relied upon – given its general inefficiency and a recent sharp increase in train derailments – then mining companies needing to get their mineral products to port will have to find local 51% HDP-owned firms that are able to do the job instead. Yet how many firms of this kind have the massive fleets of heavy trucks required?’⁵¹

The Department of Mineral Resources may have implicitly acknowledged these concerns. The June 2018 Charter allowed mining companies to offset up to 5% of their total procurement budget for mining goods by investing that percentage in enterprise and supplier development instead.⁵² The September 2018 Charter substantially increases this offset allowance to 30%.⁵³ However it retains the June 2018 draft Charter’s allowance of only 10% of the total procurements budget on services which may be offset against supplier and enterprise development.

But the offset concessions mean that mining companies would probably have to nurture infant local firms to get the goods and services they need to remain compliant. This will be both expensive and time-consuming. It would also require the mining companies to venture into all sorts of enterprises they know little about.

However, viewed more optimistically, these procurement requirements might instead encourage existing white-owned mining goods and services supply companies to become more BEE-compliant themselves in order to win contracts from mining companies.

Either way, the mining houses will be under some pressure to comply, since procurement obligations (goods and services) count for 40% of the points on the September 2018 Charter scoreboard.⁵⁴ (This, though, is down from 60% in the June 2018 Charter.)⁵⁵

Another likely problem is that these local procurement preferences will effectively restrict foreign

suppliers to providing no more than 30% of mining goods and 20% of services. These restrictions would seem to violate South Africa's binding obligations under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) of the World Trade Organisation to give foreign suppliers at least the same treatment as local ones.

One small consolation is that the September 2018 Charter completely drops the requirement of the June 2018 draft Charter that foreign companies which supply either mining goods or services will have to contribute 0.5% (down from 1% in the 2017 Charter) of the annual turnover they generate from South African mining operations to the Mandela Mining Precinct for Research.

Employment equity

The most significant change which the September 2018 Charter makes to the employment equity requirements in the June 2018 Charter is that it applies these requirements to 'Historically Disadvantaged Persons' and not to 'black persons', as the June 2018 Charter had. As with the similar changes to the ownership and procurement requirements, the beneficiaries of this change are effectively white women, who are included in the wider definition of Historically Disadvantaged Persons.⁵⁶

The September 2018 Charter sets a minimum percentage of Historically Disadvantaged Persons to be employed at each level of mining companies. This quota is to be apportioned according to national or provincial demographics. It also sets a minimum percentage of women to be employed at each level. These percentages are mostly higher than those set down in the June 2018 Charter.

Though employment equity requirements are in principle undoubtedly meritorious, it seems unlikely that even these revised targets are capable of being met, given the general dearth of those skills in the country, let alone in the HDP/HDSA community.

So, at mining company board level, at least 50% of directors must be Historically Disadvantaged Persons, with exercisable voting rights, 20% of whom must be women.

Of executive managers, 50% must be Historically Disadvantaged Persons, 20% of whom must be women, an increase from the 15% requirement for women in the June Charter.

Of senior managers, at least 60% must be Historically Disadvantaged Persons, 25% of whom must be women. The 2018 Charter had required 50% of senior managers to be 'black persons' of whom only 15% had to be women. At least 60% of middle managers must now be Historically Disadvantaged Persons, of whom 25% must be women, up from 20% women in the June 2018 Charter. And at least 70% of junior management in mining companies must be Historically Disadvantaged Persons, 30% of whom must be women, an increase from 25% women in the June 2018 Charter. At least 1.5% of the total workforce must be employees with disabilities, also reflecting national or provincial demographics.⁵⁷

Though such employment equity requirements are in principle undoubtedly meritorious, it seems unlikely that even these revised targets are capable of being met, given the general dearth of those skills in the country, let alone in the HDP/HDSA community.

Skills development and research

The September 2018 Charter also requires mining companies to ensure that Historically Disadvantaged Persons comprise 60% of the company's 'core and critical skills' which must include science, technology, engineering and mathematical skills.⁵⁸

Again, the general shortage of those skills raises some doubts that that target is practically attainable.

And the September 2018 Charter retains the requirement that all mining rights holders must con-

tribute 5% of their annual payroll to skills development. This is in addition to the 1% levy they must already pay, like all companies, under general skills development legislation.⁵⁹ The 5% levy must be apportioned according to national or provincial demographics. But the September Charter at least drops the additional requirement that, of the 5% total, 1.5% must go to public universities and other research institutions.

However, the latest Charter still obliges mining companies to spend at least 70% of their total research and development budgets on South African research and development entities, either public or private.⁶⁰

Mine community development

All mining companies must ‘meaningfully’ contribute to mine community development, the September Charter decrees. ‘Mine community’ refers to communities where mining takes place, major labour-sending areas, adjacent communities within a local municipality, and metropolitan or district municipalities.⁶¹ Mining companies must identify the developmental priorities of these communities in consultation with the communities themselves, municipalities and other stakeholders and incorporate these priorities in government-approved Social and Labour Plans (SLPs).⁶² And they must implement 100% of these SLP commitments in every financial year.⁶³

The September Charter thus gives greater importance to mining community development than the June 2018 Charter had, by insisting that these obligations – along with ownership requirements – must be met fully in order for mining companies to be deemed compliant with their overall empowerment commitments.

The September Charter does provide some relief to mining companies on this score by introducing an alternative to mining companies having to transfer 5% ownership to mining communities. Instead, they may grant them a 5% ‘equity equivalent benefit’ as mentioned above.

The September Charter does, however, provide some relief to mining companies on this score by introducing an alternative to mining companies having to transfer 5% ownership to mining communities. Instead, they may grant them a 5% ‘equity equivalent benefit’ as mentioned above.⁶⁴ This would take the form of a trust or similar vehicle, which must operate for the duration of the mining right to help develop the community.

The MCSA has welcomed this option of equity equivalence as an offset to transferring ownership, saying it offers greater flexibility.⁶⁵

Housing and living conditions

As with the draft June 2018 Charter, the September 2018 Charter demands that all mining rights holders must provide mine employees with ‘decent and affordable’ housing and living conditions, including proper, affordable, equitable and sustainable healthcare and balanced nutrition. The housing must meet standards laid down by the mining minister in the relevant housing code. Mining companies must provide ‘clear targets and timelines’ for meeting the standards.⁶⁶ It is hard to quantify the costs of meeting these standards but they seem likely to be substantial.

Junior miners

The June 2018 Charter had been criticised for making the BEE obligations of junior miners too vague to be legally enforceable. It simply stated that mining companies were bound by the draft Charter, but could apply to the mining minister for exemption from some of its provisions.⁶⁷ No objective criteria were included, which created uncertainty.

The September 2018 Charter has provided the missing objective criteria in a comprehensive ‘Regime for Junior Miners’, which will apply to new mining rights. It creates two classes of junior miner; one with annual turnover of less than R10 million and another with turnover from R10 million to R150 million. Neither will be required to provide any BEE ownership. Those turning over less than R10 million a year will also be exempt from the inclusive procurement, enterprise and supplier development requirements of the Charter – as well as the employment equity requirements if they have fewer than ten employees. Those with turnovers between R10 million and R150 million a year will have to meet those empowerment obligations.⁶⁸

The MCSA, though, remains concerned about the empowerment burden on smaller mining companies and wants the turnover threshold of R150 million to be raised.⁶⁹ This is a reasonable demand, given that smaller companies face even greater obstacles than senior miners do in navigating and surviving in what is already a difficult and often hazardous business environment. The Charter should therefore respond to the council’s concerns by providing greater latitude for smaller companies to get off the ground before burdening them with empowerment obligations.

Monitoring and enforcement

In the September Charter, both the ownership and the mining community development requirements are ‘ring fenced’ and thus ‘require 100% compliance at all times.’⁷⁰

As noted before, the 2017 Charter required 100% compliance in three elements; ownership, mine community development and skills development. The June 2018 draft Charter dropped both the community development and skills development requirements, but the September Charter has re-introduced the 100% mine community development requirement.

Mining rights holders who fail to score 100% at all times on the ownership and mine community development requirements and also fail to score at least 50% on the other elements in the Charter scorecard will be regarded as non-compliant with the Charter.

So, under the September Charter, a mining rights holder who fails to score 100% at all times on the ownership and mine community development requirements and also fails to score at least 50% on the other elements in the draft Charter scorecard will be regarded as non-compliant with the Charter and hence in breach of the MPRDA. For this breach, the penalties are harsh, including the suspension or cancellation of mining rights, as well as possible fines and prison terms for directors.⁷¹

As earlier noted, these penalties were ruled ultra vires by the Pretoria High Court in its April 2018 judgment, which held that failure to comply with the Charter did not constitute a punishable breach of the MPRDA as the Charter was not part of the act.⁷²

The MPRDA Amendment Bill of 2013, which is technically still before Parliament, aims to make the Mining Charter a part of the MPRDA. But, as noted above, minister Mantashe has announced the withdrawal of the amendment.

Prospecting rights

The 2017 Charter required all applicants for new prospecting rights to have a minimum of 51% black ownership. This explicit requirement was dropped from the June 2018 Charter, which was largely silent on prospecting rights. However it did say the draft Charter would ‘apply to prospecting rights as contemplated in Section 17(4) of the MPRDA.’⁷³ Under this section, the minister might ‘request’ an applicant for a prospecting right to ‘give effect’ to the MPRDA’s aim of increasing black participation in the mining industry.

The MCSA expressed concern then that a 30% black ownership target would also be applied to ‘new greenfields prospecting rights’ which would continue to discourage exploration, despite this being ‘the lifeblood of new projects for the industry’.⁷⁴

The September 2018 Charter has removed the reference to Section 17 (4) and therefore also allayed such concerns. The MCSA welcomed this as a move which could ‘encourage a greenfields exploration boom’.⁷⁵ Leyden remarked that the empowerment obligation for prospecting would not have been income-generating for BEE beneficiaries anyway as prospecting is so highly capital-intensive. So there would have been no benefit to BEE partners, while at the same time the obligations would have inhibited exploration.⁷⁶

Application of the Mining Charter to the downstream diamond and precious metals industries

The draft June 2018 Charter extended some provisions of the Mining Charter also to the downstream diamonds and precious metals industries.

It said that ‘at least 18% of each licence holder in those industries had to go to ‘Black persons’ – comprising BEE entrepreneurs and workers. Subject to exemptions for smaller companies, these downstream businesses would also have to comply with the other relevant elements and targets in the Charter which applied to mining companies.’⁷⁷

The September 2018 Charter raises the bar and goes into more detail, while changing the definition of the beneficiaries from ‘black persons’ to ‘Historically Disadvantaged Persons’, as elsewhere in the Charter.

The mining minister is empowered to ‘review’ the Mining Charter by notice in the Gazette. This raises the suspicion that the BEE obligations could in future be increased at will by the government, without consulting the mining industry.

It decrees that downstream diamond and precious metals jewellers and diamond beneficiaries must transfer 26% of their equity to Historically Disadvantaged Persons.⁷⁸ Of this 26%, at least 10% must go to qualifying employees. And of this 10%, 5% must be in the form of a non-transferable carried interest. Of the 26%, 16% of shares must go to a BEE entrepreneur.⁷⁹

Diamond dealers, and precious metals refiners incur steeper obligations, being required to transfer 30% ownership to BEE benefactors. At least 10% of that must go to qualifying employees of which half must be a non-transferable carried interest. At least 20% of the company’s shares must go to a BEE entrepreneur.⁸⁰

In general, all these companies must also contribute 1% of net profit after tax to socio-economic development.⁸¹ They will also be subject to employment equity and procurement requirements similar to those applying to mining companies. These requirements will be reduced for smaller companies and eliminated for the smallest, according to a table provided in the Charter.⁸²

Amendments to the charter

The mining minister is empowered to ‘review’ the Mining Charter by notice in the Gazette. As Leyden and others have said, this raises the suspicion that the BEE obligations could in future be increased at will by the government, without necessarily consulting the mining industry.⁸³

Transitional provisions

Under the September 2018 Charter, mining companies are generally given five years to comply with the new procurement and employment equity obligations.⁸⁴

Repeal of earlier Charters

According to the September 2018 draft, the original 2004 Charter and the revised 2010 Charter will be repealed and replaced by the new Mining Charter when this is gazetted in its final form.⁸⁵ The repeal of the 2004 Charter will thereby put an end to a clause in it which said that the equity or assets transferred for empowerment purposes must be valued ‘at fair market value on a willing seller/willing buyer basis.’⁸⁶ What the implications might be of the removal of this principle remain to be seen, though removing it does not seem reassuring to the mining industry.

Validity of the 2018 draft

Jeffery contended, with reference to the June 2018 draft Charter, that while the MPRDA empowers the mining minister to ‘develop a broad-based socio-economic empowerment Charter’, it does not give him the power to alter, repeal, or replace such a Charter. So the original 2004 Charter ought to remain in force and the June 2018 draft ‘is thus ultra vires the minister’s powers under the statute’.⁸⁷ This assessment must also remain true of the September 2018 Charter. As referred to above, this anomaly presumably waits to be addressed in a revised MPRDA Amendment Bill.

Ramifications of the September 2018 Charter

The September 2018 Charter is better than its predecessor, the June 2018 draft Charter, in material ways. Most notably, as we have seen, it scraps the obligation of compliant mining companies which have attained the 26% BEE ownership target, at any time, to top this up to 30% BEE ownership. That gives more recognition to the critical ‘continuing consequences’ or ‘once empowered, always empowered’ principle which is so important to the mining industry.

Another noteworthy improvement is that the September 2018 Charter – apparently – relieves mining companies of the requirement to simply give away for nothing 5% of their companies to employees and 5% to mining communities as ‘free carry’ interests.

‘This is an important indicator to the industry, to investors and to rating agencies, that government will observe and respect the sanctity of transactions that have been undertaken in good faith,’ the MCSA said in its response.⁸⁸

Another noteworthy improvement is that the September 2018 Charter – apparently – relieves mining companies of the requirement to simply give away for nothing 5% of their companies to employees and 5% to mining communities as ‘free carry’ interests.

It replaces this with the requirement instead to grant both employees and communities each with a minimum of 5% of non-transferable ‘carried interest’, which the mining companies can recover from the development of their assets.⁸⁹ Yet it remains unclear exactly how that will happen, and some miners seem concerned that they will still effectively have to give away 10% of their firms.

The new Charter, though, does give mining companies the option of helping to develop mining communities through an ‘equity equivalent’ of 5%, rather than giving them 5% equity.⁹⁰ As mentioned above, the MCSA has welcomed both the introduction of ‘carried interest’ and the 5% equity equivalence for mining communities. To summarise, it has also welcomed:⁹¹

- The removal of the 1% of EBITDA stream, which would have created a separate class of shares, and placed a further unaffordable burden on project viability.
- The removal of Charter ownership requirements on prospecting rights, to encourage a greenfields exploration boom; and

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- The removal of the proposal that 1.5 percentage points of the 5% skills development contribution must be designated for R&D.

In one important way, though, the September 2018 Charter is tougher on mining companies than was the June 2018 version, as we have seen. It reintroduces the compulsion for mining companies to comply fully with their mining community ownership or development obligations, to avoid incurring severe penalties including the possible loss of their mining rights.

It should also be noted, importantly, that by raising the BEE entrepreneur ownership requirement from 14% to 20% – while reducing the worker and community ownership requirements from 8% to 5% each – compared to the June 2018 draft Charter, the September 2018 Charter narrows rather than broadens ownership of the mining industry. It is thereby manifestly inconsistent with its own objectives – the full title of the Charter is after all the ‘Broad-based Socio-Economic Empowerment Charter for the Mining and Minerals Industry’ – and with those of the wider government policy of ‘Broad-Based Black Economic Empowerment’.

This suggests on its face, that, despite the departure of the dubious mining minister Zwane, the government is still unhealthily focused on enriching elite entrepreneurs rather than uplifting poorer mining workers and communities.

When the government first introduced the 30% overall BEE ownership target in the June 2017 draft Mining Charter – to be divided in the 8:8:14 ratio – Roodt noted that ‘the large proportion to be held by BEE entrepreneurs is not in the spirit of broad-based transformation, and will likely only lead to more crony capitalism, rather than seeing a spread of benefits’.⁹²

The government is still unhealthily focused on enriching elite entrepreneurs rather than uplifting poorer mining workers and communities.

How much truer must this criticism be when the ratio is now 5:5:20?

Can one be blamed for suspecting, therefore, that BEE in mining (and elsewhere) is really about creating a black middle class rather than tackling the government’s identified triple economic enemies of poverty, unemployment and inequality?

The preamble to the current Mining Charter says that in 2014, a decade after the first Mining Charter had come into effect to address the inequalities in mining, an assessment by the government had found that despite a ‘noticeable improvement in the levels of compliance’ since the first assessment in 2009, ‘overall transformation of the mining industry remains unacceptably low’.

The majority of mining communities ‘continue to live in abject poverty’ and ‘meaningful participation by Historically Disadvantaged Persons remains limited...’⁹³

Roodt disagrees, insisting that ‘mining has done well in transferring value to previously disadvantaged South Africans. Between 2000 and 2014, the value of BEE transactions in mining was estimated at about R205 billion and BEE deals had transferred at least R159 billion to entrepreneurs, employees, and community trusts.

‘According to a BEE audit conducted by the DMR itself, some 90% of mines had increased average black ownership to over 30%, exceeding the DMR’s own requirement,’ Roodt said. But the DMR nonetheless put overall black ownership of mining lower, at only 20%, apparently because mining companies did not at first empower workers and communities – which they were not then obliged to do.⁹⁴

But whether or not one agrees that the various Mining Charters have spread sufficient wealth to the historically disadvantaged as a whole, few would contend that they have done very much to reduce inequality or even poverty. They have certainly created a few millionaires but without spreading much wealth beyond that, although the more concerted effort in the 2018 Charter to extend ownership to employees and host communities might partly begin to redress that.

And if the Charter policy over the last 15 years has indeed discouraged investment in mining by creating policy uncertainty and unattractiveness, as many believe, it would also thereby have squandered the huge potential that lies under South Africa's soil to create many more jobs and so to narrow the wealth gap.

Overall, however, the industry, rather embattled perhaps, has largely accepted the September 2018 Charter, though with reservations, as we have seen. MCSA President Mxolisi Mgojo did sound rather resigned in his overall assessment, however, that minister Mantashe had 'struck a reasonable balance, where all stakeholders are not totally happy'.⁹⁵

Leyden of Herbert, Smith, Freehills, said the September 2018 Charter had addressed one of the main issues that was hurting the mining industry, the non-recognition of existing and past BEE ownership credentials. This and other uncertainties and concerns about policy – including those around the 2013 MPRDA Amendment Bill – had caused South Africa to drop significantly down the Canadian Fraser Institute's Investment Attractiveness Index for mining jurisdictions over the last several years. This is particularly true as far as perceptions of policy are concerned – while South Africa's reputation as still the largest reservoir of minerals in the world helps to offset this to a degree, but not entirely.

The non-recognition of existing and past BEE ownership credentials and other uncertainties and concerns about policy has caused South Africa to drop significantly down the Canadian Fraser Institute's Investment Attractiveness Index for mining jurisdictions over the last several years.

'And it's been this uncertainty which has been one of the key elements for deterring investment in the SA mining sector,' Leyden said, The September 2018 Charter and Mantashe's announcement that the MPRDA Amendment Bill would be revoked entirely had helped to allay that uncertainty.

'If investors know what's on the table, that's great. You will also see that the Chamber of Mines (Minerals Council) came out fairly positively where they had attacked all the previous versions of the Charter,' Leyden said.

Nonetheless the Council had mentioned some key issues which needed further consultation, especially around renewals of mining interests, he noted.

Leaving aside comparisons with the June 2018 draft Charter, Leyden expressed concerns about whether some of the targets and thresholds in the September Charter were practically achievable within the given time-frames.⁹⁶

Indeed, if one steps back from a detailed examination of the improvements that the September Charter has made over the June 2018 Charter, it is still striking to reflect that the government has now established the new BEE ownership benchmark for miners at a hefty 30%, even if it has somewhat eased the path to that goal. This contradicts assurances given by the DMR in the past that the 26% empowerment obligation was permanent, and leaves open the possibility of further increases in the future.

As Leyden underlined, the September Charter's retention of the mining minister's authority to review the Charter as and when necessary in the future raises the possibility of endless increments to BEE

requirements. It ultimately places a question mark over the increased certainty that the Charter had otherwise provided.

‘So that could be a concern for investors going forward, that on the face of it you have achieved certainty but how long will that certainty last and when will mining companies be required to reassess their BEE targets, and procurement targets and ownership targets? So there are positives but there are also questions,’ Leyden said.

‘And so, whether or not it will drive the much-needed investment into the mining sector that we have desperately needed over the last couple of years remains to be seen.’⁹⁷

As mentioned above, the September 2018 Charter must ultimately be benchmarked, not against previous draft Charters, but against a struggling industry where some 50% of gold mining companies and 60% of platinum miners are already battling to survive at current mineral prices.

The new BEE demands will inevitably push some over the edge and force others to close shafts and lay off workers. Gold miners seem particularly vulnerable as their remaining seams mostly lie very deep, requiring full-scale mechanisation and round-the-clock operation to extract. This will require large investment and the best skills and equipment, at the very time when the Mining Charter will be diverting profits into BEE deals and forcing hard-pressed mining executives to buy machinery and services from HDP-compliant companies rather than on the open market.

The new BEE demands will inevitably push some mines over the edge and force others to close shafts and lay off workers.

Other factors obviously have affected the steady decline in the mining industry over the last few decades, including depleting reserves of gold. But mining in this country still has huge potential. In 2010, Citi estimated South Africa to have the largest metal and ore reserves in the world, valuing them at \$2 494 billion.

It is impossible to quantify how greater policy certainty and rationality might have boosted investment and therefore mining production. But it is largely accepted that South Africa missed much of the global commodities super-cycle which prevailed for most of the first decade of the 21st century because of the uncertainty and unattractiveness of its mining policy. This is reflected in the country’s overall decline on the Fraser Institute’s ranking of the attractiveness of mining jurisdictions, from 28th out of 47 in 2003 to 84 out of 104 in 2016.⁹⁸

An upward tick in 2017 – to 48th out of 91 – has largely been attributed to South Africa scoring high on the index for the attractiveness of its mineral reserves, 21 out of 91 jurisdictions in 2017. Conversely, South Africa ranks much lower on the Fraser Institute’s policy perception index. In 2017, it ranked 81st out of 91, above only Zimbabwe and the Democratic Republic of Congo in Africa.⁹⁹

The MCSA, however, has attributed a further significant improvement in 2018 to the shift in political leadership of the country and of the industry, to Ramaphosa and Mantashe respectively. It has noted in particular that South Africa rose 25 places in the policy perception index, from 81st to 56th.

In the overall investment attractiveness index which combines policy attractiveness with geological attractiveness, South Africa rose from 48th in 2017 to 43rd in 2018.

Nonetheless the MCSA felt it was important for South Africa to rise further to reach the top quartile of mining jurisdictions in order to realize its full mining potential. It said South Africa’s ranking was

still being held back by regulatory uncertainty which had still not been fully remedied by the efforts of the last year as well as the continuing uncertainty created by the ruling ANC's intention to amend the constitution to allow expropriation of land without compensation.¹⁰⁰

The first iteration of the third Mining Charter, published by former minister Zwane in June 2017, was characterised by many analysts as essentially a state capture-enabling instrument. One of its most suspicious clauses was that it redefined the beneficiaries of mining empowerment from 'Historically Disadvantaged Persons' to 'black persons' and then included under the definition of Black Persons, 'Africans, Coloureds and Indians (b) Who became citizens of the Republic of South Africa by naturalisation... (ii) on or after 27 April 1994.'¹⁰¹

This was widely seen as throwing open the door for President Jacob Zuma and minister Zwane's India-born Gupta cronies, already deeply involved in mining, to grab more mining opportunities.

Under President Ramaphosa and minister Mantashe, as we have seen, the Charter has at least been freed from those crooked clutches. But as we have also discussed, it still raises many questions about the government's true commitment to uplifting the entire black community rather than only those who are already well off.

The BEE policy as a whole is not working

Mining companies face a heavier empowerment burden than other South African industries. This is probably because of the special place mining occupies in the ANC's economic history and ideology. The Freedom Charter of 1955, the ANC's 'Bible', had decreed, under the heading, 'The People Shall Share In the Country's Wealth!', that 'the mineral wealth beneath the soil, the banks and monopoly industry shall be transferred to the ownership of the people as a whole.' However, nationalisation had become politically unfeasible by the time the ANC came to power in 1994. The next best thing was clearly to transfer as much as possible of the country's mining wealth to black ownership.

Mining companies face a heavier empowerment burden than other South African industries.

But the Mining Charter is also part of a wider Black Economic Empowerment policy. That policy as a whole, while transferring substantial assets to black South Africans over the past two decades, has not really succeeded in seriously denting the ANC's triple economic enemies; poverty, unemployment and inequality.

Overall inequality has actually increased over that time as has inequality within the black (African) community. The Gini index among blacks has risen from 0.53 in 1996 to 0.58 in 2016, a jump in inequality of nearly 10%. (In the Gini index a score of 0 represents perfect equality and a score of 1 perfect inequality.) Inequality has also increased slightly in the Coloured community, from 0.51 in 1996 to 0.55 in 2016. By contrast, inequality has slightly declined in the Indian community over that time, from 0.51 to 0.49 and in the white community even more, from 0.48 to 0.44.

'As long as ago as 2010, intra-African inequality was flagged by the Human Sciences Research Council as the major contributor to inequality in South Africa. Intra-African inequality contributed 33% to overall inequality, as against 21% for intra-white inequality,' Roodt writes.¹⁰²

And he attributes the large contribution of intra-African inequality to overall inequality in large part to empowerment policies having helped mainly the politically and socially well-connected and those who already have money and skills, rather than the genuinely poor and needy.

It's mainly for this reason that BEE has been widely criticised. Moeletsi Mbeki, a political analyst, businessman and brother of former president Thabo Mbeki, had said in 2009 that BEE was simply entrenching the divide between rich and poor and a culture of cronyism and entitlement.¹⁰³ Even within the Tripartite Alliance, the South African Communist Party (SACP), one of the ANC's alliance partners, wrote in its magazine, *African Communist*, in 2017 that 'the assumption that enriching a select BEE few via share-deals, or measuring empowerment progress in terms of direct individual black percentage ownership of the JSE, or (worse still) looting public property in the hands of state owned corporations in the name of broad-based black empowerment is resulting in the very opposite – increasing poverty for the majority, increasing racial inequality, and persisting mass unemployment.'¹⁰⁴

Ironically in 2012, Gwede Mantashe, the author of the current Mining Charter with all its preferential procurement requirements for mining houses, said (when he was still the ANC's secretary-general) that preferential procurement was costly and that paying more for goods just because they were supplied by a black business had to come to an end.¹⁰⁵

'A new way of empowering people is clearly needed, and one that should move away from race,' Roodt says.¹⁰⁶

Economic Empowerment for the Disadvantaged (EED) – a new framework through which to uplift the poor.

The IRR's proposal for such a new empowerment policy is Economic Empowerment for the Disadvantaged (EED)¹⁰⁷ – which aims to empower the poor rather than black people per se. It has specific elements on mining.

The IRR's proposal for such a new empowerment policy is Economic Empowerment for the Disadvantaged (EED) – which aims to empower the poor rather than black people per se. It has specific elements on mining.

'EED differs from BEE in two key ways,' as Jeffery writes. '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 "Es". In essence, it aims at rapid economic growth, excellent education, very much more employment, and the promotion of vibrant and successful entrepreneurship.'

The IRR proposes that the current BEE scorecard should be replaced by an EED scorecard. Businesses – including mining houses – would earn points for contributions such as making investments, generating profits, sustaining or creating jobs, buying goods and services from other suppliers, fostering innovation and contributing to tax revenues, export earnings, and foreign currency inflows.

The EED approach would be to encourage investment rather than discouraging it, as the BEE does. It would also boost employment and stimulate growth. It would thus create opportunities for all South Africans, rather than a politically connected few.

Means-tested South Africans, earning below a certain amount, would be entitled to government-funded vouchers, which they could use to access education, healthcare, and housing.

EED would also be tailored to mining, using a scorecard by which companies would earn EED points for contributions in four areas – economy, labour, environment, and the community. The economic component would rank highest, as this would be what would attract investment, increase the growth rate, generate jobs, and provide procurement opportunities for a host of businesses supplying goods and services to the mines.

Mining companies would earn points for maintaining and expanding production; beneficiation of minerals; sustaining or increasing net operating profits; declaring dividends; making fixed capital investments; ensuring and increasing procurement from South African companies; and investing in research and development (R&D). Bonus points would also be awarded for technical innovations and for maintaining outputs when economic conditions are poor.

Mining companies would also earn points for maintaining and increasing their workforces; raising salaries and providing additional employee benefits; improving mine safety and underground conditions; and offering employees skills training and education.

Points would be awarded for protecting the environment as well; for example, by rehabilitating land damaged by mining and reducing electricity and water consumption.

Mining companies could also earn points for helping develop mining communities through the voucher policy already described. So, for example, they could get points for topping up the vouchers of community members, especially for housing, education and healthcare. They could earn extra points for improving housing and sanitation for their workers and communities.

Acknowledging past injustices does not automatically suggest solutions. South Africa cannot undo its past. It can only try to change the present. It is not helpful to do so in ways which harm the economy and lead to poorer South Africans losing work and income.

Conclusion

The reputation of South African business has been marred by a long history of exclusion and dispossession and the mining industry is often held to have made a particularly egregious contribution to this record. The migrant labour system was one of the worst aspects of this, and its dismal legacy remains with us today.

That those historic wrongs must be remedied in some way is not in question. However, acknowledging past injustices does not automatically suggest solutions. South Africa cannot undo its past. It can only try to change the present. It is not helpful to do so in ways which harm the economy and lead to poorer South Africans losing work and income.

In her book *The Case for Business in Developing Economies*, Ann Bernstein notes that the prevailing view globally (and this is certainly even more true of South Africa) is that companies are ‘social outlaws who need fundamentally to change their ways.’¹⁰⁸ Companies often undertake corporate social responsibility (CSR) projects to try to compensate for this bad reputation. Because of this reputation, which is largely undeserved, she says, CSR advocates wrongly focus the debate on what else companies can do other than their core business. Whereas, she says, quoting the World Business Council for Sustainable Development, ‘most companies benefit society simply by doing business.’ They create jobs, pay wages

and salaries, provide pensions and health plans, innovate to create products that contribute to human progress, pay taxes that contribute to public services and infrastructure, create work for millions of suppliers, and so on and so forth.¹⁰⁹

The fundamental question then is whether mining companies would better serve the whole country by essentially doing more of what they are good at, i.e. mining, rather than by being obliged to try to help engineer a larger black middle class.

It is now widely acknowledged that BEE – a particular species of corporate social responsibility – has not worked. It has largely made a small rich elite richer while mainly leaving the majority of the black population still in poverty. Though there are fewer poor black people today than in 1994, this is largely because of economic growth and social grants, not BEE.

The September 2018 Mining Charter is substantially better than its two immediate predecessors, largely because it eases the BEE burden. It recognizes past empowerment efforts by upholding the ‘once empowered, always empowered’ principle – but only, as far as existing mining rights are concerned. It does not extend this recognition of empowerment credentials to renewed or transferred mining rights. The current MCSA legal challenge to those omissions shows that despite the more enlightened Ramaphosa/Mantashe administration, significant policy uncertainty and therefore likely investment deterrents, remain. The new Charter does, to its credit, increase the focus on empowering and uplifting mineworkers and mining communities in some ways. Yet, by contrast, it also increases the BEE entrepreneur component of ownership from 14% in the June 2018 draft Charter to 20%. This inevitably raises questions about the real intentions of its authors.

By moving the focus of empowerment away from race and towards eradicating poverty a policy of EED should correct the distortions both of the past and of the mining Charters by stimulating more investment in mining and also by spreading much more of the wealth derived from our huge mineral reserves to the neediest members of our society.

By moving the focus of empowerment away from race entirely and towards eradicating poverty – where it surely should be – a policy of EED should correct the distortions both of the past and of the mining Charters by stimulating more investment in mining and also by spreading much more of the wealth derived from our huge mineral reserves to the neediest members of our society.

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