

MINING CHARTER III: CERTAINTY, BUT AT A COST

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Legal Briefings - By **Peter Leon, Patrick Leyden, Ernst Müller and Michelle Mudzviti**

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

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

onerous re-empowerment obligations for the renewal and transfer of existing mining rights;

the BEE Shareholding top-up requirements for pending applications;

the absence of provisions for the amendment of existing mining rights; and

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

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

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

On 19 December 2018, the Minister also published an Amendment to the Mining Charter, 2018 (**Amendment**)⁸. Among other things, it provides that existing mining right holders and existing licence and permit holders must implement the Charter from 1 March 2019 (as indicated above). It also stipulates, that the first annual reporting on the Charter must be submitted on or before 31 March 2020.⁹

Mining Charter III has been a significant source of uncertainty and cause of controversy over the last three years. Since a first draft was published for public comment in April 2016¹⁰ it has led to various High Court applications, occasioned calls for a change in political leadership at the DMR, unsettled investors and prompted adverse pronouncements by sovereign credit ratings agencies.¹¹

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

The significant effect which the earlier drafts and published version of Mining Charter III had on South Africa's mining sector becomes even more pronounced if regard is had to the country's rankings on the Fraser Institute's *Annual Survey of Mining Companies's (Survey) "Policy Perception Index"*.¹² Prior to the publication of the first draft of Mining Charter III, South Africa scored 51.91 and ranked 78th out of the 109 jurisdictions surveyed. After the ruinous June 2017 version of the Charter¹³ was published, the country's score decreased to 42.66 and it ranked 81st out of the 91 jurisdictions surveyed. In the most recent Survey, published on 1 March 2019¹⁴, (i.e. after the publication of the Charter and the Guidelines), South Africa's score increased to 64.57 and the country now ranks 56th out of the 83 mining jurisdictions surveyed.

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

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

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KEY CONTACTS

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