

MINING CHARTER III: BETTER BUT STILL BAD

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Legal Briefings - By **Peter Leon, Partner and Co-chairman, Africa Group**

More than R50 billion of the market value of mining company shares listed on the Johannesburg Stock Exchange was wiped out in the days immediately following the publication of erstwhile Minister Zwane's draft Mining Charter in June 2017. While Gwede Mantashe's new draft Mining Charter, released on Friday exactly a year later, is an improvement on his predecessor's, many of its provisions remain problematic and it is unlikely to result in much needed investment in the already embattled South African mining sector.

On the positive side, the draft Charter appears to make a significant change in relation to the ownership element of existing rights. Although the thirty per cent Black ownership target of the 2017 Charter is retained, up from twenty six per cent (a fifteen per cent increase) existing right holders are afforded a period of five years, rather than one, in which to meet this target. Importantly, the continuing consequences of historical black economic empowerment transactions will be recognised and, although it is open to interpretation, it appears that existing right holders will be protected in circumstances where they met but subsequently fell below the twenty six per cent ownership requirement on the exit of their Black shareholders.

The holders of new mining rights will not be so fortunate. The composition of the thirty percent Black shareholding remains unchanged from the 2017 Charter: eight per cent to qualifying employees, eight per cent to host communities and fourteen per cent to BEE entrepreneurs. However a new requirement is introduced that at least sixty per cent of the shares owned by host communities and qualifying employees must be on a non-transferable free carried basis.

This is likely to render marginal mining projects uneconomic and is a significant cost to shareholders. Although the requirement to pay one per cent of turnover to Black shareholders is removed from the current draft, mining companies will now, regardless of any economic considerations, be required to pay a trickle dividend of 1% of earnings before interest, taxes, depreciation and amortization in circumstances where a dividend is not declared in any twelve month period.

The draft Charter has finally elaborated on the permitted beneficiation off-set of up to eleven per cent against Black ownership, a concept which was carried through all previous versions of the Mining Charter but never implemented by the Department of Mineral Resources as it lacked a mechanism for its application. The new provision permits a mining company to claim the equity equivalent of a maximum of eleven per cent against a portion of its Black entrepreneur shareholding based on certain listed beneficiation activities. That said, it remains to be seen how the actual off-set entitlement will be calculated.

The significant increases in the local procurement of mining goods and services targets contained in the 2017 Charter have remained largely unchanged and do not appear to comply with South Africa's international trade law obligations as they continue to discriminate against foreign suppliers of goods and services. Similarly, there has been little reprieve for mining companies under the employment equity targets at board and executive management level with both still requiring fifty per cent Black participation. The targets for senior, middle and junior management have been lowered marginally.

In what appears to have been more of an afterthought, junior mining companies will be afforded the ability to make representations to the Minister for a much needed reprieve from some of the provisions of the Charter. However, as the provision is vague, any reprieve will ultimately be subject to the Minister's discretion.

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KEY CONTACTS

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