

Mining Charter: What does it all mean?

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While mining companies will surely wait with bated breath for the outcome of the anticipated legal challenges to the Mining Charter by the Chamber of Mines, they will also need to start getting their ducks in a row, in terms of legal and corporate structures if the challenges are unsuccessful.



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Particularly as there is only a short 12-month transitional period within which rights holders must comply with the new requirements. Meaningful transformation remains an important imperative to address the inequalities of the past and the industry remains committed to this principle. However, the unclear and ambiguous manner in which the charter has been drafted will pose significant challenges to those seeking to comply.

Most mining companies have specific corporate structures in place to cater for the previous 2010 charter's black economic empowerment (BEE) requirements. The reviewed charter published for comment during April 2016 contained stringent BEE structure requirements, including that every mining right needed to be housed in a separate special purpose vehicle, with each such structure being empowered.

Right holders

The new charter is a slight improvement, as it seeks to acknowledge existing right holders' present corporate structures. However, a proper analysis of the provisions regarding the ownership element leave the mind somewhat reeling if one considers the various scenarios that could be relevant and the different requirements that would be applicable.

It is clear that applicants for new rights must comply with the new requirements. A new mining right holder must have a minimum of 30% black person shareholding, allocated as follows:

- a minimum of 8% to black employee share ownership plans;
- a minimum of 8% to mine communities, through a community trust; and
- a minimum of 14% to BEE entrepreneurs (BEE allocation thresholds).

A new prospecting right holder must have a minimum of 50% plus 1 black person shareholding.

Controversially, the charter provides that a new mining right holder must, subject only to the Companies Act's solvency and liquidity requirements, pay a minimum 1% of its annual turnover in any given year to its black person shareholders, prior to and over and above any shareholder distributions. This creates a guaranteed dividend structure that previously was not a hard requirement.

In an ambiguous and unclear provision, the charter also seems to seek to regulate how payment for the black person shareholding will take place, with ultimately the holder or vendor writing off any unpaid balances at certain milestones. Given the constraints of the current economic climate, these two requirements will further restrict the cash resources of mining companies seeking to remain viable and limit the extensive job losses historically suffered by the industry.

Eliminates once empowered, always empowered

The 30% stake must be held in a special purpose vehicle separate from the right holder. Should any black person hold shares within one of the BEE allocation thresholds' categories, such black person must ensure when transferring any shares that the transferee falls within the same category. Subject to such requirement, the charter also restricts the extent that BEE entrepreneurs can dilute their shareholding.

If adhered to, this provision will at least eliminate the "once empowered, always empowered" debate regarding new rights. However, it will render the shares held by such special purpose vehicles almost worthless, achieving negligible empowerment at enormous costs to the holder and its remaining shareholders.

Additionally, the provision giving the 30% black person shareholders the right to transport, trade and market their proportionate share of production will cause numerous mining companies to breach existing sales and offtake arrangements.

Historical BEE transactions

The charter aims to recognise historical BEE transactions of existing mining and prospecting rights holders as follows:

- Existing holders, whether currently at or below 26% black person shareholding, must top up their black person shareholding to 30% within 12 months. They do not need to adhere to the BEE allocation thresholds and the top-up shares must be given proportionally to the existing BEE partners, unless the BEE partners have already exited the structure, in which case the top-up shares should be held by a BEE entrepreneur. This requirement limits allowing new BEE entrants into the structure and does not therefore necessarily cater for what the charter seeks to achieve, being more broad based BEE structures.
- Existing holders who have maintained more than 30% black person shareholding may maintain their existing structures until the BEE partners exit the structure or upon the right's renewal.

The charter states that the recognition of historical BEE transactions shall not apply to applications for new rights, the renewal thereof or to "applications in terms of section 11 of the MPRDA affected by such recognition". It therefore appears that upon renewal of any existing rights, recognition of historical BEE transactions would no longer apply. Although unclear,

this also appears to be so where approval for a transaction involving a right transfer or the change of control of the holder is required. If historical BEE transactions are not to be recognised in such circumstances, then presumably the new applications requirements would be relevant, however, this is not stated specifically.

This could result in a scenario where an existing right holder complies with the specific transitional requirements by 14 June 2018 and would then again need to comply when the right is renewed or if s11 approval is required - but with entirely different requirements. This is onerous and impractical and is just one example of where proper consultation on the charter may have found a more sustainable and practical solution.

Therefore, although the intention may have been to recognise historical BEE transactions and existing corporate structures to some extent, the various requirements applicable in different circumstances will likely result in mining companies having to cater for various alternative scenarios, through implementing separate and complex structures. In an industry that requires true transformation, one wonders how productive this will be and whether the costs associated with such restructures will reap the benefits intended to flow to a larger group of BEE beneficiaries.

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