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## The Mining Charter III

It was inevitable, following democracy in 1994, that the South African Government would endeavour to redistribute the wealth and ownership of the Mining Sector. In an effort to pave the way for economic transformation, the Mineral and Petroleum Resources Development Act 2002 (MPRDA) was promulgated on 10th October 2002. However, it only became effective on 1st May 2004, with much resistance from both local and international investors. In September 2010, the MPRDA was amended by the then Minister of Mineral Resources, who published a document entitled the Amendment to the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Mineral Industry. These documents, read together, are referred to as 'The Mining Charter.' The first version of The Mining Charter (The Charter) followed on 13th August 2004 as set out in section 100(2)(a) of the MPRDA.

Renewed world economic growth following the global economic crisis just over a decade ago has resulted in higher demand for commodities, indicating that, over the long-term, the Mining Sector will recover. In the latter part of 2017, uncertain policies resulted in a loss of investor confidence in the sector, causing costs to rise dramatically, and a loss of global competitiveness. In September 2018, the Minerals Council of South Africa estimated that the mining sector's share in the South African economy stood at 6.8%, marginally down from the 7% of overall gross domestic product (GDP) recorded in 2016. Growth resumed from the dismal decline of -4.3% in 2016 to an expansion of about 4.6% in 2017, contributing R335 billion to GDP.

Due to higher mining production, it is estimated that employment increased by 1.6% to 464,667 during 2017. This increase finally arrested the rate of job losses, which stood at 30,000 jobs between 2014 and 2017. Mine employment represents 6.1% of private non-agricultural employment and 4.8% of total non-agricultural employment. The sector contributed R80.9 billion to fixed investment in 2017, which constituted DRDGOLD – Gold pour 18.2% of private-sector fixed investment and 10.8% of the country's total fixed investment for the year. In the decade between 2007 and 2017, the sector's fixed investment had a downward trajectory.

The recovery in fixed investment is a sign of better prospects for the sector, but it still hung in the balance at the end of 2017. The sector exported R307 billion worth of produce, which is 27% of the country's R1.1 trillion export book. The 10% strengthening of the Rand against the US Dollar in 2017 adversely affected the Rand receipts for exports. On a US Dollar equivalent basis, exports increased by 16.1%, but only by 7% in Rand terms. In the 2016/17 fiscal year, the sector paid R5.8 billion in royalties, representing a 56% increase on the previous year. The sector paid R16 billion in taxes over the same period[1].

President Ramaphosa's cabinet reshuffle in early 2018 saw Gwede Mantashe appointed as Mineral Resources Minister, which was seen as a 'first' as he is the only minister since 1994 who worked in a mine. This new appointment followed delays in finalising The Mining Charter III (The Charter III) and the MPRDA during Mosebenzi Zwane's tenure as Minister, which resulted in a breakdown in communication and legal intervention with the sector councils. Therefore, the mandate of Minister Mantashe to finalise The Charter III, as well as restore confidence and create certainty in the sector, was no mean feat.

The Charter III was gazetted on 27th September 2018. At a media briefing, prior to the Gazette, Minister Mantashe revealed that The Charter III would not please all stakeholders, but in its current form would be a foundation for transformation and growth, taking into account that the sector is a national economic imperative. The quick turnaround between the appointment of Minister Mantashe and the Gazette is evidence that part of the Minister's mandate was to get The Charter III in motion in an effort to get the mining sector on track, create regulatory certainty and get investments flowing into the sector.

The long-awaited Charter III Implementation Guidelines were gazetted on 19th December 2018, when most companies had closed down for the festive season holidays. The September 2018 Broad-Based Socio-Economic Empowerment Charter stipulates it must be read together with Implementation Guidelines.

The highly anticipated Implementation Guidelines were finalised and published under Government Notice 1399 as Gazette #42122 - Implementation Guidelines. The 54-page document outlines the formulas and tables, as well as the requirements for mineral rights holders. The Charter III compels the mining sector to implement the following elements:

- Ownership;
- Mineral beneficiation;
- Procurement;
- Supplier and enterprise development;
- Human resources development;
- Mine community development;
- Employment equity; and
- Principles for housing and living conditions standards.

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## Mine Communities

The Charter III was welcomed as a 'consensual' step forward in creating certainty in the sector. However, it has left gaps in the interpretation of the inner workings of mine communities. At a time when community protests around mining operations are regular and subsequently impact mining activities, the issue of mine communities needs to be clarified. The Bench Marks Foundation lead researcher, David van Wyk, stated that out of 14,740 crowd-related incidents taking place annually in South Africa, approximately 35 of these protests take place in mine communities monthly. This outcome means that 2.8% of all service delivery protests are mining-related. Furthermore, data compiled by Anglo American Platinum and reviewed by Reuters reveals that from the beginning of 2016 until April 2018, the eastern limb of the platinum belt in the South African mining sector was hit by more than 400 incidents of social unrest.

In 2018, Statistics South Africa (Stats SA) reported that the second quarter employment figures in the sector declined by 69,000 jobs, a staggering 35,000 more than for the same period in the previous year. The sector continued to shed jobs over four consecutive quarters with 2,000 jobs lost. These protests are, more often than not, linked to community protests against mining companies for not improving the quality of life of communities where they operate.

## Investment in Mining

In the latter part of 2018, President Ramaphosa was working tirelessly to stimulate economic growth. He announced a stimulus package, chaired a Presidential Jobs Summit where 275,000 jobs were pledged, and hosted an Investment Conference which yielded R290 billion in investment commitments. These collectively bring South Africa one step closer to achieving its target of securing $100 billion in investment over the next five years.

These efforts resulted in investment announcements from companies representing sectors such as forestry, manufacturing, telecommunications, transport, energy, agro-processing, consumer goods, pharmaceuticals, infrastructure, financial services, energy, ICT and water. Mining companies Anglo American, Bushveld Minerals, Vedanta Resources and Ivan Plats, further committed billions of Rands for investment in the local mining sector.

Therefore, the gazetting of The Charter III couldn't have come at a more appropriate time to create certainty in the sector. Besides, the MPRDA Bill, which has been subject to legislative processes since 2013, has been withdrawn – much to the delight of the mining sector.

## Mine Community Development

Despite Social Labour Plans and Corporate Social Investment (Community Development Plans), many in the sector merely tick-the-box and do not follow through on the overall impact of their community involvement. A requirement in The Charter III is that a minimum of 5% non-transferable carried interest or a minimum 5% equity equivalent benefit must be made available to host communities from the effective date of a mining right.

Mantashe stated that the non-transferable carried interest, referred to as a free carried interest in the previous draft of The Charter, was not free, but carried by the empowering partners who would be financed by the development of assets over time.

This interpretation is probably a relief for the sector, as the free carry concept was heavily criticised by the sector at large, as it would have translated into free-carried shares that would consequently make new projects much tougher to finance.

However, the meaning of non-transferable carried interest needs to be clarified. While the minister endeavoured to clarify the non-transferable carried interest for communities, it remains unclear how this will complement or be an additional obligation to mining companies. One must bear in mind that such investment was already made to Community Development by adherence to the Social Labour Plans for communities, which is an obligation under the MPRDA.

Mining companies should note that The Charter III stipulates that a mining right holder shall ensure that any reduction in the shareholding of existing shareholders through the issue of new shares shall not reduce qualifying employees or host communities' carried interest or equity equivalent benefit.

Another interesting aspect in this area is how the 5% non-transferable carried interest must be managed on behalf of communities. The Charter III states:

> The equity equivalent benefit of 5% shall be housed in a Trust or similar vehicle for the benefit of the host community at no cost. It must be administered in line with applicable legislation for the duration of the mining right.
> The Trust or similar vehicle shall consist of representation from host communities in the form of community-based organisations and traditional authorities, to name but a few, as well as mining companies;

However, care must be taken that Trusts are created in line with the obligations and responsibilities outlined in The Charter III:

> Municipalities, host communities, traditional authorities and affected stakeholders, identify host community development needs and fund distribution and governance of the equivalent equity benefit;
> A host Community Development Programme approved under this element shall not replace Social and Labour Plan commitments as contemplated in the MPRDA or the quality of life of communities where they operate.

The consequence of a Trust created outside proper corporate governance requirements may result in community mistrust, which may give rise to protest action. With The Charter III introducing equity equivalent for community participation, such protests would be directed at mining companies and government alike.

Another unhappy stakeholder may be community organisations, in that they were not sufficiently consulted during the revision process of The Charter III. It remains to be seen how mining companies will respond to the amendments. Only time will tell the actual role played by tribal authorities and municipalities, especially the smaller ones.

The implementation of and adherence to The Charter III is not only the responsibility of the sector, but the Department of Minerals Resources officials who must be fully versed on the new requirements. All being well, this could lead to addressing the corruption challenges surrounding the sector.

## Localisation and Procurement

Local content can trigger and bolster home-grown Enterprise and Supplier Development. The issue at hand is whether we have reached a stage in South Africa where we are comfortable with our local home-grown suppliers. Are we able to replace or reduce foreign suppliers to create local jobs and business opportunities?

The government, through The Charter III, outlines the reason for the procurement of South African manufactured products and services, highlighting that it provides opportunities for expanding economic growth, job creation and an opportunity to increase market access for home-grown products or services.

According to The Charter III, a minimum of 70% of the total mining goods procurement spend - excluding non-discretionary expenditure - must be allocated to South African manufactured goods.

> 21% spend on South African manufactured goods produced by 'Black'-owned and/or controlled suppliers;
> 5% spend on South African manufactured goods produced by 'Black' Women or Youth owned and/or controlled suppliers; and
> 44% spend on South African manufactured goods produced by B-BBEE compliant suppliers.

Compliance with procurement targets must be achieved progressively over a five-year period, as outlined in the transitional arrangements.

Mining companies have six months from the date The Charter III was published to submit this five-year plan, indicating the progressive implementation of the procurement targets. Although meeting these targets will benefit home-grown suppliers, it begs the question as to whether this a realistic timeframe and whether the Department of Mineral Resources can monitor the process.

The procurement challenges in the mining sector are that it is a highly regulated sector. Due diligence on new suppliers comes at an enormous capital cost, for example, environmental assessments, exploration, heavy mining equipment and mining infrastructure development.

Will the home-grown supplier have the capacity, infrastructure or capital to become a preferred supplier to a mining company?

The Government and the mining companies will have to collaborate and determine how the procurement targets can be practically implemented and the challenges ironed out. However, two solutions were put forward.

1. What the Department of Mineral Resources has come up with is for mining companies to promote economic growth through the development or nurturing of small, medium and micro-enterprise suppliers of mining goods and services. In instances where a mining right holder procures products and services from a contractor to undertake extraction or processing - crushing and concentration - of minerals on their behalf, such goods and services will be deemed to have been procured by the mining right holder. Although this will help in achieving procurement targets, reviewing all existing contracts will be time-consuming and require extra resources to execute the process adequately.

   Although The Charter III is not applicable to suppliers outside the mining sector, it will have an impact on purchasing decisions throughout the supply chain of mining companies.

   Essentially, all existing supplier contracts would need to be re-evaluated. However, it must be taken into account that some suppliers have long-term contracts which do not meet the requirements of The Charter III. These requirements could lead to contractual disputes with penalties applicable due to early cancellation, possible litigation and the probability of disruptions in productivity.

2. Mining companies could develop home-grown suppliers through Original Equipment Manufacturers (OEMs) as prescribed in the Implementation Guidelines. Currently the government, through the Department of Trade and Industry, introduced the ‘Black’ Industrialist Incentive Programme aimed at unlocking the potential of ‘Black’ Industrialists operating in strategic and productive sectors of the economy through deliberate, targeted, well-defined financial and non-financial interventions.

   The ‘Black’ Industrialist Incentive Programme thus far has had an investment of R11.1 billion in 128 projects. Hopefully, with The Charter III procurement targets, this will encourage the development of more home-grown suppliers that meet the sector’s needs. The South African Capital Export Council (SACEC) and South African Minerals Processing Equipment Cluster (SAMPEC) are other platforms that could assist in promoting and boosting local manufacturing interests.

## Global Trading Regulations

The Charter III contains local content requirements for Enterprise Development, Supplier Development and Preferential Procurement. However, in obtaining them, one cannot overlook the possibility that South Africa may be contravening the World Trade Organisation (WTO) rules.

In the multilateral trading system under the WTO, the most relevant agreements on the compliance with Local Content Requirements (LCR) are the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade-Related Investment Measures (TRIMs). The TRIMs agreement prohibits the use of LCRs that require a specific percentage or quantitative target of local goods purchased by organisations. It has trade-balancing requirements that restrict the volume or value that an organisation can import to an amount related to the level of products it exports.

According to the WTO, by their nature, local content requirements emphasize preferential treatments for local suppliers vis-à-vis foreign goods and services providers. Therefore, this may be viewed by many countries as protectionist measures.

Members of the WTO, which include South Africa, are therefore required to adhere to the rules under GATT and TRIMs. Not doing so may well subject them to a challenge - through domestic court processes or international dispute resolution systems - for failing to comply with international investment and trade law obligations. If these local production targets are contested under the international dispute resolution systems, South Africa will not be the first to be brought under such scrutiny.

Many developing countries, including Tanzania, India, Nigeria, Indonesia and Brazil have implemented legislation and guidelines that provide preference to local suppliers. The Tanzanian government recently enacted the Local Content Regulations GN 3 of 2018 to address its challenges in their mining sector. Not only does it force licensees and contractors to use indigenous Tanzanian companies for the procurement of goods and services, but it requires a physical presence in Tanzania.

In 2016, a WTO panel ruled on a US dispute against India concerning the use of local content requirements in the context of the Jawaharlal Nehru National Solar Mission (JNNSM) energy scheme. In the initial phases, solar power developers were required to use certain types of solar cells and modules manufactured in India for power generation projects to ultimately sell that electricity to government agencies under a long-term agreement at a guaranteed rate. The US complained that these domestic (local) content requirements violated India’s national treatment obligations under GATT and the TRIMs Agreement. The WTO panel found that India’s local content requirements are trade-related investment measures that violate the national treatment obligations under the TRIMs Agreement and the GATT.

Promoting the use of more efficient, best price available intermediate goods in global markets for a country’s manufacturing needs, is the economic assumption underlying this WTO obligation.

In conclusion, following President Ramaphosa’s drive to attract investments, we as a nation need to be circumspect about how these investments will flow into the economy to bring us out of recession. However, Government will have to concurrently ensure that all mining companies comply with South Africa’s regulations that govern how they operate in this country.

Source of Reference
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