



# MINING AND MINERALS ALERT

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### INVESTOR SENTIMENT OF THE REVISED MINING CHARTER 2017 AT BREAKING-POINT

The South African government faces a real risk of being challenged in court and in the extreme case in international investment tribunals for potential breaches of the guarantees under applicable bilateral investment treaties (BITs) and/or multilateral investment treaties based on certain of the provisions of the Reviewed Broad Based Socio Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 (Revised Mining Charter 2017).

### MINING CHARTER – WHERE TO FROM HERE WITH YOUR CORPORATE STRUCTURE

The Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 (Charter) was published and became effective on 15 June 2017. Whilst mining companies will surely wait with bated breath for the outcome of the anticipated legal challenges to the Charter by the Chamber of Mines, they will also need to start considering what it means for their legal and corporate structures if the challenges are unsuccessful. This is particularly so given the short twelve month transitional period within which rights holders must comply with the new requirements.

# INVESTOR SENTIMENT OF THE REVISED MINING CHARTER 2017 AT BREAKING-POINT

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**The South African government faces a real risk of being challenged in court and in the extreme case in international investment tribunals for potential breaches of the guarantees under applicable bilateral investment treaties (BITs) and/or multilateral investment treaties based on certain of the provisions of the Reviewed Broad Based Socio Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 (Revised Mining Charter 2017).**

The Revised Mining Charter 2017 could, in respect of certain provisions thereto, result in BIT guarantees for qualifying foreign investors being infringed. The retroactive application of the Revised Mining Charter 2017 to existing mining right holders, in particular the increase of the black economic empowerment (BEE) threshold from 26% to 30% for existing rights holders could *prima facie* be a BIT violation. The requirement to maintain a 30% BEE ownership regardless of the disposal of shares by BEE shareholders during the tenure of the existing mining right (so-called "once empowered always empowered" concept) – may also constitute a BIT violation. The retroactive application of the Revised Mining Charter raises serious legal concerns, as it appears to violate the presumption against the retroactive application of the law, particularly as rights have vested.

The Revised Mining Charter 2017 contains an express provision that existing rights holders must ensure compliance therewith, as opposed to only making such requirement applicable to future rights holders. In order to give legal effect to the obligations being imposed by the Revised Mining Charter 2017 the Minister of Mineral Resources will need to ensure that the Mineral and Petroleum Resources

Development Amendment Bill is passed as law to elevate the Revised Mining Charter 2017 to a legal obligation for existing right holders. In doing so, any non-compliance with the Revised Mining Charter 2017 by existing rights holders would be deemed a breach of the Mineral and Petroleum Resources Development Act, No 28 of 2002, as amended (MPRDA), sanctionable by a suspension or termination of such right in accordance with s47 of the MPRDA.

The Chamber of Mines' rejection of a meeting request by the Department of Mineral Resources to attend the Mining Industry Growth, Development and Employment Task Team on 15 June 2017 shortly before the release of the Revised Mining Charter 2017 is a clear indication that the Chamber of Mines and certain of its members are planning to challenge the Revised Mining Charter 2017 on a number of fronts. The move appears to be strategic, as any meeting with the Department of Mineral Resources during the release of a controversial Revised Mining Charter could be viewed as a "tacit endorsement" by the industry in respect of certain of the provisions thereto.

# INVESTOR SENTIMENT OF THE REVISED MINING CHARTER 2017 AT BREAKING-POINT

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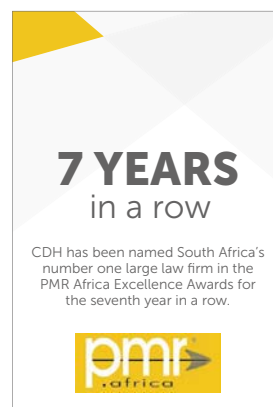
*There is a critical imperative in South African to ensure real, sustainable and inclusive broad based black economic empowerment and transformation in South Africa.*



There is a critical imperative in South African to ensure real, sustainable and inclusive broad based black economic empowerment and transformation. To achieve that it is similarly imperative to adopt policies and legislation which are not inconsistent with the rule of law, particularly the presumption against retrospective application of laws. In that regard the South African government must guard against policies and legislative changes which expose South Africa to legal challenge and will result in further divestment from a sector of the economy that is important to ensure inclusive and sustainable economic growth, in a time when real economic growth is required. There is a real risk that mining companies aggrieved by the Revised Mining Charter 2017 will not only challenge the South African government through domestic courts, but international investment tribunals for breach of guarantees in terms of existing BITs or multilateral investment

agreements. In these types of investment disputes the biggest loser will be the South African people as a) millions of Rands will be incurred to defend policy decisions, b) any adverse award to a qualifying investor exposes the national revenue fund to billions of dollars in future economic losses payable to the investor, and c) no direct or indirect financial benefit accrues to the South African people in the form of jobs, economic development activities and no revenue collection from the investor for government's socio-economic initiatives from mineral resources which could have been mined.

*Jackwell Feris and Allan Reid*



# MINING CHARTER – WHERE TO FROM HERE WITH YOUR CORPORATE STRUCTURE

*The Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 (Charter) was published and became effective on 15 June 2017.*

*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.*

The Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016 (Charter) was published and became effective on 15 June 2017. Whilst mining companies will surely wait with bated breath for the outcome of the anticipated legal challenges to the Charter by the Chamber of Mines, they will also need to start considering what it means for their legal and corporate structures if the challenges are unsuccessful. This is particularly so given the short twelve 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 thereto. 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. 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 thereto.

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:

- (i) a minimum of 8% to black employee share ownership plans;
- (ii) a minimum of 8% to mine communities, through a community trust; and

- (iii) 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.

# MINING CHARTER – WHERE TO FROM HERE WITH YOUR CORPORATE STRUCTURE

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*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 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.

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 twelve 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.

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*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.*



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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