

MINING & MINERALS ALERT

IN THIS ISSUE

ONCE EMPOWERED, ALWAYS EMPOWERED. THE VEXED QUESTION FINALLY ANSWERED.

In a split-decision, the High Court, Pretoria yesterday gave judgment in favour of the Chamber of Mines against the Minister of Mineral Resources and the Director-General, Department of Mineral Resources in the highly contentious Once Empowered, Always Empowered application. The Once Empowered, Always Empowered principle relates to mining companies being able to claim recognition for previous Black Economic Empowerment transactions, notwithstanding that the BEE entities involved have since sold their interests or shares, thereby bringing such mining companies below the 26% BEE ownership threshold.

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The Department of Mineral Resources has consistently maintained that BEE ownership has to be maintained at 26% throughout the duration of the mining right.

Once the Minister or his delegate has granted the mining right applied for, the holder thereof is not thereafter legally obliged to restore the percentage ownership.



In a split-decision, the High Court, Pretoria yesterday gave judgment in favour of the Chamber of Mines against the Minister of Mineral Resources and the Director-General, Department of Mineral Resources in the highly contentious Once Empowered, Always Empowered application. The Once Empowered, Always Empowered principle relates to mining companies being able to claim recognition for previous Black Economic Empowerment transactions, notwithstanding that the BEE entities involved have since sold their interests or shares, thereby bringing such mining companies below the 26% BEE ownership threshold.

The Department of Mineral Resources (DMR) has consistently maintained that BEE ownership has to be maintained at 26% throughout the duration of the mining right and that if the BEE entity exited its investment, the mining right holder was required to conclude a further BEE transaction in order to achieve a 26% BEE ownership once more.

In its majority judgement, the court declared that:

- Once the Minister or his delegate is satisfied in terms of section 23(1)(h) of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) that that the grant of a mining right applied for in terms of section 22 of the MPRDA will further the objects referred to in section 2(d) and (f) of the MPRDA in accordance with "the Charter referred to in section 100", and has granted the mining right applied for, the holder thereof is not thereafter legally obliged to restore
- the percentage ownership (howsoever measured, inter alia wholly or partially by attributable units of South African production) controlled by Historically Disadvantaged Persons or Historically Disadvantaged South Africans (HDSAs) to the 26% target referred in the Original Charter¹ and the 2010 Charter², where such percentage falls below 26%, unless such obligation is specified as an obligation in the terms and conditions stated in the right, as referred to in s23(6) of the MPRDA.
- The same principles will apply to old order rights converted in terms of Schedule II of the MPRDA.
- A failure by a holder of a mining right or converted mining right to meet the requirements of the Original Charter or of the 2010 Charter does not constitute a breach of a material term or condition of the mining right for the purposes of s47(1)(a) of the MPRDA, and further does not constitute an

¹Scorecard for the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (including the Charter) that was published in Government Gazette 26661 by Government Notice R1639 of 13 August 2004.

²Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry that was published in Government Gazette 33573 by Government Notice 838 of 20 September 2010.

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offence for the purposes of s98(a)(viii), read with s99, unless an obligation to meet such a requirement is specified as an obligation in the terms and conditions stated in the mining right, as referred to in s23(6) of the MPRDA.

- Neither the Original Charter nor the 2010 Charter requires the holder of a mining right or converted mining right to continue to enter into further HDP or HDSA empowerment transactions to address losses in HDP or HDSA participation or ownership once the 26% participation or ownership level as referred to in clauses 4.7 and 4.8 of the Original Charter has been achieved, unless such obligation is specified in the terms and conditions stated in the mining right, as referred to in s23(6) of the MPRDA.
- The 2010 Charter does not retrospectively deprive holders of mining rights of benefits of credits/offsets, or the continuing consequences of empowerment

transactions concluded after the MPRDA came into effect, or the right, where a holder has achieved HDSA participation in excess of any set target in a particular operation, to utilise such excess to offset any shortfall in its other operations, as referred to in clause 4.7 of the Original Charter.

The court was not requested to pronounce on the validity of the 2010 Charter. However, the judgment does call into question the validity of the 2010 Charter and the court cautioned that the absence of the pronouncement on the issue should not be inferred as a confirmation that the 2010 Charter was validly issued in terms of s100(2) of the MPRDA or that 'it is the charter contemplated in sec 100' of the MPRDA.

On the basis of this judgment, one has to wonder as to the validity of Mining Charter III, if and when this next iteration of the Mining Charter is promulgated.

Allan Reid



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